STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2019-0051

CLIFFORD E. AVERY

PLAINTIFF - APPELLANT

-V-

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS

RESPONDENT - APPELLEE

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF STATEMENT OF THE CASE

The Plaintiff, Clifford E. Avery and Defendant Helen Hanks Commissioner of NHDOC are parties to a settlement agreement. On April 23, 2001 the settlement agreement was entered into by the Plaintiff and his then counsels Alan Linder and Elliot Barry of New Hampshire Legal Assistance (NHLA) and Daniel J. Mullen counsel for Defendant. Page 1 of the settlement agreement states in pertinent part: "Federal court jurisdiction of this matter shall terminate upon final approval by the court of a stipulation for dismissal to be filed by the parties...Upon approval of the stipulation for dismissal, the Consent Decree in the above-entitled matter shall expire, and the provisions of the Consent Decree approved by the court on May 22, 1990, as modified by this agreement shall constitute a settlement agreement enforceable by the courts of the State of New Hampshire." Paragraph 10 of the May 22,1990 federal court Consent Decree states: "It is agreed by the parties that this Consent Decree also constitutes a settlement agreement which survives the termination of this Court's jurisdiction over the Decree." SEE May 22, 1990 modified Consent Decree, Plaintiff's Exhibit A-2.

The genesis for the settlement agreement came from a class action lawsuit Plaintiff Avery filed in the federal district court in 1976. Plaintiff's lawsuit, Edgar Avery, et al v Raymond Helgemoe, Warden, et al was consolidated with Jaan Laaman, et al v Raymond Helgemoe, Warden, et al. As a result of Plaintiff's lawsuit NHSP officials were ordered to implement a plan to correct inadequate living conditions and programs at NHSP because as Justice Hugh H. Bownes found,

the cumulative effect of the intolerable prison conditions subjected the Plaintiff and all NHSP inmates to cruel and unusual punishment in violation of the Constitutions and Laws of New Hampshire and the United States. The settlement agreement was created to correct such inadequate, inhumane and intolerable conditions at NHSP. It required the Defendant to provide a variety of certain services and programs to Plaintiff and all other NHSP inmates. SEE Laaman, et al v Helgemoe, et al, 437 F.Supp. 269 (DNH 1977), see also the settlement agreement, Plaintiff's Exhibit A-4, and May 22,1990 modified Consent Decree, Plaintiff's Exhibit A-2.

In July 2018 Plaintiff filed in the superior court a petition for enforcement of the settlement agreement and alleged many violations of the settlement agreement. The superior court,(Ruoff,PJ), on January 10, 2019 dismiss the petition concluding sovereign immunity prevented the court from adjudicating the claims and Plaintiff lacked standing.

This appeal follows.

ISSUE 1 AND 2:

DID THE SUPERIOR COURT ABUSE IT'S DISCRETION BY NOT INVOKING JUDICIAL AND/OR EQUITABLE ESTOPPEL IN THIS PARTICULAR CASE AND DOES THE FAILURE TO DO SO VIOLATE THE PRINCIPLES IN NEW HAMPSHIRE V MAINE, 532 U.S. 742 AND KELLEHER V MARVIN LUMBER & CEDAR CO.,152 N.H. 813

Plaintiff asserts the superior court erred by not invoking judicial estoppel in this particular case as Plaintiff requested the court to do. The Defendant, Plaintiff asserts is prohibited from raising sovereign immunity as a defense because she is prohibited from doing so under the principles of judicial and/or equitable estoppel.

"Where a party asumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who have acquiesced in the position formerly taken by him." Davis v Wakelee, 156 U.S. 680,689 (1895). This rule, known as judicial estoppel,"generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Pegram v Hendrick, 530 U.S.221,227,n.8 (2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding");18 C.Wright,A.Miller & Cooper, Federal Practice and procedure,4477,p.782 (1981)("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by persuing an incompatible theory").

Courts have uniformly recognized that the purpose of the judicial estoppel doctrine is "to protect the integrity of the judicial process," Edwards v Aetna Life Ins.Co., 690 F.2d 595 (CA6 1982),by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," United States v McKaskey,9 F.3d 368,378 (CA5 1993). See In re Cassidy,892 F.2d 637,641 (CA7 1990)("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process");Scarano v Central R.Co.,203 F.2d 510 (CA1953)(judicial estoppel prevents parties from "playing fast and loose with the courts"). Because this rule is intended to prevent "improper use of judicial machinery," Konstantinidis v Chen, 200 U.S.App. D.C. 69,626 F.2d 933,938 (CA DC 1980),judicial estoppel "is an equitable doctrine invoked by a court at its discretion," Riosell v Rolfs, 893 F.2d 1033,1037 (CA1980).

Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." Nevertheless,several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regulary inquire whether the party has succeeded in persuading a court to accept that party's earlier position,so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Judicial estoppel forbids use of "intentional self-contradiction...

as a means of obtaining unfair advantage. See State of New Hampshire v Maine, 532 U.S. 742 (2001) and cases cited therein, see also 18 Wright,4477,p.782.

Four years after the United States Supreme Court invoked judicial estoppel against New Hampshire this Court adopted the doctrine of judicial estoppel in Kelleher v Marvin Lumber & Cedar Co., 152 N.H. 813 (2005).

In Plaintiff's case all the factors and more that courts uniformly consider when invoking judicial estoppel are clearly present. First, Defendant's present position is clearly inconsistent with her earlier position. In her earlier position on April 23,2001,Defendant, by and through her counsel Daniel J. Mullen entered into the settlement agreement. Now, in 2018, the Defendant's proclaimed position is that she has immunity. Defendant's current position is clearly inconsistent with her earlier position when entering into the settlement agreement on April 23, 2001. At that time Defendant did not say she had immunity and Plaintiff could not seek enforcement of any noncompliance issues should they arise. Moreover, the settlement agreement provides a two-step alternative dispute resolution process which Plaintiff exhausted prior to initiating litigation.

Second, Defendant succeeded in convincing the federal district court and State superior court of their intent to comply with all the terms and provisions of the settlement agreement. The federal district court and state superior court sanctioned the settlement agreement and this was a judicial function.

Third, if Defendant is permitted to now present a clearly inconsistent position than her earlier one and is not estopped by this

Court. Defendant will be allowed to effectively and completely take away from Plaintiff all of the equitable gains he acquired from his 1976 federal court lawsuit and the 2001 settlement agreement. This would in fact improperly render the settlement agreement nugatory and void. Without question by such an act the Defendant "would derive an unfair advantage (and) impose an unfair detriment" on the Plaintiff.

Plaintiff believes that it was an abuse of discretion for the superior court to not have invoked judicial estoppel in this particular case. Further, Plaintiff believes the failure to invoke judicial estoppel violates the principles and cases cited in New Hampshire v Maine, 532 U.S. 742 (2001) and Kelleher v Marvin Lumber & Cedar Co., 152 N.H. 813 (2005).

The Court should find in favor for the Plaintiff on this issue.

ISSUE 3:

DOES THE SUPERIOR COURT'S DECISION DENYING PLAINTIFF ANY RELIEF ON HIS PETITION FOR ENFORCEMENT VIOLATE THE PRINCIPLES IN POLAND V TWOMEY,156 N.H.412 (2007)?

Defendant ih her MOL at page 13 cited Lambert v Lambert, 96 N.H. 376 (1950) for which this Court held that "a promise to render personal services or supervision will not be specifically enforced by an affirmative decree." The Lambert case involved an agreement to provide "life support and maintenance" of a person. This Court held that in such a case specific performance "will not ordinarily be enforced by a decree of specific performance." Plaintiff's Petition for specific performance is completely inopposite of the relief sought in Lambert.

Moreover, in Poland v Twomey, 156 N.H. 412 (2007). This Court held that under both New Hampshire and Utah law, specific performance is an adequate remedy when one party is in breach of a settelment agreement. SEE Restatement (Second) of Contracts § 357 CMT. a. Ballentine's Law Dictionary defines specific performance as: "The actual accomplishment of a contract by the party bound to fulfill it. Guadulupe County Board of Education v O'Bannon, 26 NM 606, 195 P 801. The remedy by which a party to a contract is compelled to do precisely what he ought to have done without being coerced by a court. Edwards v Tobin, 132 Or. 38 284 P 562,68 ALR 152. The equitable remedy of compelling performance of a contract as distinguished from an action for damages at law for breach through non-performance."

The Defendant in her MOL at p.14 stated "The terms of the agreement would be very difficult to enforce, would necessitate ongoing

oversight and supervision by the courts, and would require testing of the performance rendered." Defendant's assertion is an exagerated response and unfounded. If it were true then why did Defendant's counsel Daniel Mullen induce Plaintiff to enter into the settlement agreement on April 23, 2001. Further, the ruling principle is that specific performance will be ordered if it will "do more perfect and complete justice." Wilson v Northampton and Bamburg Junction Railway Co.,L.R. (ch.A.C.279,283 (1874);Fleischer v v James Drug Stores, N.J. 138,146,62 A.2d 383 (1948). Clerly in Plaintiff's case specific performance will "do more perfect and complete justice."

The Court should find in favor for the Plaintiff on this issue.

ISSUE 4:

DID THE SUPERIOR COURT ERR BY HOLDING THAT DEFENDANT HAS IMMUNITY IN THIS PARTICULAR CASE?

Plaintiff Avery on April 23, 2001 entered into a settlement agreement with the Defendant,see Exhibit A-4. "Settlement agreements are contractual in nature and, therefore, are generally goverened by the principles of contract law." Poland v Twomey, 156 N.H. 412. Under both New Hampshire and Utah law, specific performance is an adequate remedy when one party is in breach of a settlement agreement. Poland,supra (specific performance is appropriate relief for a violation of enforceable settlement agreement);Sachler v Savin, 897 P. 1217,1220 (Utah 1995)(settlement agreements are favored by the law and may be summarily enforced...(and) are governed by rules applied to general contract actions).

A "breach of contract occurs when there is a failure without legal excuse, to perform any promise which forms the whole or part of a contract." Poland, supra; Lassonde v Stanton, 157 N.H. 582. The Defendant in this case has egregiously and materially breached the settlement agreement and/or contract and has no legal excuse for having done so.

"Generally a decree of specific performance is intended to produce essentially the same effect as if the performance due under a contract were rendered. Poland, supra; see Restatement (Second) of Contracts § 357 CMT.a. In general it may be said that the specific performance will be granted when it is apparent from a review of the circumstances of the particular case, that it will

subserve the ends of justice, and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. The exercise of the courts' discretion is but a finding of fact as to whether or not granting the relief prayed for would be equitable in view of all the circumstances of the particular case. New Hampshire Donuts v Shipitasis,129 N.H. 774. A suit for specfic performance of a contract is an equitable proceeding and ordinarily means performance of a contract according to the precise terms agreed upon, or substantially in accordance therewith. Risin v Newberry (1894),90 Va.513,18 S.E.916; Dow v Northern Railroad,(1886),67 N.H. 1,36 A.510. The superior court denied Plaintiff any relief for his enforcement petition on grounds that Defendant had immunity.

Plaintiff asserts N.H.RSA 491:8 partially abrogates the State's sovereign immunity by conferring jurisdiction upon the superior court to decide claims against the State "founded upon any express or implied contract with the State." Morgenroth Associates,Inc.,v Town of Tilton, 121 N.H.511,514 (1981).

"The clear intent of RSA 491:8 is to grant a right to sue the state for breach of contract." The jurisdictional grant permits the superior court "to enter judgment against the State of New Hampshire founded upon any express or implied contract with the state." Chase Home for Children v New Hampshire Division for Children,Youth & Families, 126 N.H.720 (2011)(emphasis added).

Under New Hampshire law the settlement agreement entered into by Plaintiff and defendant is an express contract. Since settlement agreements are contractual in nature and, therefore, are generally governed by the principles of contract law. In sum,RSA 491:8

is an express and detailed waiver of sovereign immunity directly applicable here, as Plaintiff's enforcement petition is for a breach of contract. RSA 491:8 waives the State's immunity in this particular case. The statute is a specific legislative authorization for the judiciary to enter judgment against the State of New Hampshire in contract disputes. A statute can waive immunity either "expressly or by reasonable implication." State v Brosseau,121 N.H. 184 (1983). In this case there is a "reasonable implication that the statute waives immunity. In that this Court in State v Brosseau, held that State law granted "to civilly committed mentally ill patients and developmentally impaired clients of State mental health facilities a right to adequate and humane treatment." And that the State had waived any claim of immunity from the laws created by the New Hampshire Legislature. (emphasis added).

The settlement agreement Plaintiff entered into with Defendant was created to correct inadequate and inhumane conditions at New Hampshire State Prison which subjected Plaintiff and all NHSP inmates to cruel and unusual punishment. This includes those inmates who have mental health issues and those who are developmentally impaired.SEE Laaman,et al v Helgemoe,437 F.Supp.269 (DNH 1977).

In Chase,162 N.H. 720 supra, this Court said: "Many states have statutes that waive sovereign immunity in contract disputes." The Court mentioned some of the other state's statutes and cases. Such as: Alaska Stat 09.50.250 Lexis 2010):Ky.Rev.Stat.Ann.45 A.245;Md. Code A,.State Gov't 12-20(2009. This Court said,"Those states have had little difficulty in holding that their respective statutes mean what they say—that the state can be held liable for breach of contract. See g. State v Haley,687 P.2d 305,318 (Alaska)(1984)

("By enacting section 250,the legislature has exercised it's authority, pursuant to Alaska Const.art.II,§21,to waive the State's immunity to suits asserting contract claims against it.");Commonwealth v Whitworth,74 S.W.3d 695,699(Ky.2007)KRS 45-A.245(1)(waives sovereign immunity for a lawfully written contract.);Beka v Board of Ed.,419 Md.194,18A.3d 890,891 (Md.2011)(holding that "the contract was duly executed and falls within the waiver of sovereign immunity provided by S.G.§ 12-20(1A)."

"Indeed, a few state courts have gone so far as to hold that every time a state enters into an authorized contract it implicitly waives sovereign immunity." See e.g. Ace Flying Service v Colorado Dept. of Agriculture,136 Colo.19,314 P.2d 278,280-81 (Colo.1957); Grant Construction Co. v Burns,92 Idaho 408,443 P.2d 1005,1009-10. As a justification for this rule,one court has said:"(T)he very antithesis of responsibility by government would be to say that it may contract with a citizen and assume obligations under the contract and then be permitted to disavow and say to the citizen that the state has breached the contract but you can't do anything about it because the government has not expressly consented to the maintenance of the suit." V.S.DiCarlo Construction Co.,Inc. v State,485 S.W. 2d 52,54 (Mo.1972). In reality this is what the Defendant is saying to Plaintiff: ..."the state has breached the contract but you can't do anything about it because the government has not consented to the maintenance of the suit."

In V.S.DiCarlo Const.Co.,Inc., v State, the court held: "When the state enters into a validly authorized contract,it lays aside whatever privilege of sovereign immunity it otherwise possesses and

binds itself to performance,just as any private citizen would do by contracting."

In Pam-Am Tobacco Corp. v Department of Corrections,471 So.2d 4 (Fla.1984). The Supreme Court of Florida unequivocally held that state sovereign immunity does not apply in breach of contract actions,stating,"where the legislature has,by general law,authorized entities of the state to enter into contracts or to undertake those activities which,as a matter of practicality,require entering into contract,the legislature has clearly intended that such contracts be valid and binding on both parties." Looking to legislative intent in the general law, the court reasoned that where the legislature has "authorized entities of the state to enter into...contract(s), the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless." The court explained that as a matter of "basic hornbook law," a contract which is not mutually enforceable is an illusory contract. Where no party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract,there is no valid contract and neither side may be bound."

The Court should find that Defendant does not have immunity in this particular case.

ISSUE 5:

DID THE SUPERIOR COURT ERR BY FINDING PLAINTIFF DID NOT HAVE STANDING TO ENFORCE THE SETTLEMENT AGREEMENT?

Generally,in evaluating whether a party has standing to sue a court focuses on whether the party suffered a legal injury against which the law was designed to protect. Plaintiff has suffered a legal injury. Legal injury is defined as an invasion of a legal right from which the law imports damage. Allen v Stowell, 145 Cal. 666, 79 P. 371. An injury for the redress whereof an action will lie.

Plaintiff has a legal and equitable right to have Defendant comply with the terms and provisions of the settlement agreement which are capable of judicial redress. See 24 Samuel Williston & Richard A. Lord,A Treatise on the Law of Contracts § 64:6 (4th ed. 2002) ("An unexcused failure to perform a contract is a legal wrong. An action will therefore lie for the breach.."). See Joseph M.Perillo, Corbin on Contracts §55.10(rev. ed. 2005("For every breach of a contract, a cause of action exists...").

Plaintiff Avery has a contractual relationship with Defendant. A contract expresses the legal relationship between parties manifested by their assent and which organized society recognizes as giving remedies to the holder of a right against the bearer of a legal obligation. See 1 Arthur L. Corbin,Corbin on Contracts §§ 2-1.3.

"(A)n obligation of good faith is imposed by statute in the performance and enforcement of every contract or duty subject to the Uniform Commercial Code."

In every agreement, there is an implied covenant and that the

parties will act in good-faith and fairly with one another. Richard v Good Luck Trailer Court, 157 N.H. 65,70 (2008). In New Hampshire, there is not merely one rule of good-faith duty, but a series of doctrines, each of which serve different functions. Great Lake Aircraft Co. v City of Claremont, 135 N.H. 270,293 (1992). The various implied good-faith obligations fall into three categories: (1) contract formation, and (3) limitation of discretion in contractual performance, Id. The Plaintiff's case deals with the third catagory. While the third catagory is comparatively narrow, its broader function is to prohibit behavior inconsistent with the parties agreed-upon common purpose and justified expectations, id., as well as "with common standards of decency, fairness and reasonableness." Richard, 157 N.H. at 70. Defendant has failed to honor rule catagory 3. In that she has failed to fulfill Plaintiff's justified expectation that she would fulfill her obligation and duty to him by honoring the terms of the settlement agreement.

The claims raised in Plaintiff's enforcement petition are "definite and concrete touching the legal relations of parties having adverse interests...Furthermore the controversy (is of) a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character." In Plaintiff's petition he has shown that the violations "interfere with or impairs" his legal rights or privileges. And he is not raising the rights of another. He is seeking enforcement of his legal and equitable rights to have Defendant keep her promises by complying with the terms of the settlement agreement which she has an obligation and duty to do.

ISSUE 5A:

PLAINTIFF HAS A RIGHT TO LITIGATE ANY ISSUES OF NON COMPLIANCE OF THE SETTLEMENT AGREEMENT ON HIS OWN AFTER EXHAUSTING THE TWO-STEP ALTERNATIVE DISPUTE RESOLUTION PROCESS THAT IS SET FORTH IN THE AGREEMENT

On the last page of the settlement agreement there is a process set forth which governs when litigation may be initiated to enforce the settlement agreement. The paragraph states verbatim:

> "The parties acknowledge that a spirit of reasonableness and cooperation should govern resolution of grievances arising under this settlement agreement. The named plaintiffs and their counsel agree to consult,where possible in the first instance, with the Commissioner of the Department of Corrections and,thereafter,with the office of the Attorney General if a problem of noncompliance comes to their attention,and to allow the institution a reasonable amount of time to either remedy the problem to the plaintiff's satisfaction or to indicate disagreement with the alleged problem,prior to initiating litigation."

The Defendant claims this provision permits only the "named plaintiffs and their counsel" to institute litigation to enforce the settlement agreement and only after they consult first with the NHDOC Commissioner and,thereafter with the office of the Attorney General regarding any "problem of noncompliance." That only after that informal dispute resolution process has occurred may litigation be instituted according to Defendant. See Defendant's Memorandum of Law (MOL) at p. 12.

Defendant in her MOL incorrectly stated that Plaintiff "has failed to plead that he has exhausted the two-step alternative dis-

pute resolution process" outlined in the final paragraph of the settlement agreement. Defendant further stated that "Mr. Avery cannot enforce the April 23, 2001 settlement agreement until (1) his prior counsel is also involved in this suit; and (2) he alleges that he has completed the two-step alternative resolution process that the settlement agreement requires before instituting litigation." Defendant's MOL at p. 13.

In Plaintiff's Objection to Defendant's Motion to Dismiss and Memorandum of Law ("Plaintiff's Objection"), at page 13. He stated that first of all, Plaintiff Avery's "prior counsel," NHLA many years ago stopped representing Plaintiff and all NHSP inmates in regards to the settlement agreement. NHLA said they could no longer do so due to a "lack of financial resources."

Secondly, Plaintiff asserted in his Objection that he in fact had exhausted "the two-step alternative dispute resolution process." As evidence in support of his assertion he directed the superior court to page 1 of Exhibit C. Exhibit C indicates that on September 20,2013 Plaintiff submitted to then NHDOC Commissioner William Wrenn a 16 page Inmate Request Slip (IRS). In his 16 page IRS he raised all of the noncompliance issues that were in his petition for enforcement. On September 24, 2013 Christopher Kench, office of the Commissioner responded to the 16 page IRS. Mr. Kench said that all matters of noncompliance had been sent to the respective directors. Not only were none of the noncompliance issues ever corrected by Defendant, Defendant never even "indicate(d) disagreement with the alleged problem(s)."

On April 2, 2015 Plaintiff sent a copy of his 16 page IRS to the office of the Attorney General, specifically, Senior Assistant Attorney General Michael Brown. See page 2 of Exhibit C. Mr. Brown never even responded to the matters of noncompliance of the settlement agreement, not even to "indicate disagreement with the alleged problem(s)." Plaintiff clearly did exhaust the two-step alternative dispute resolution process "prior to initiating litigation, all to no avail.

Plaintiff Avery was the original named Plaintiff in his federal class action lawsuit in 1976 which gave birth to the settlement agreement. Under the facts and circumstances of this particular case the Court should find that he has standing to raise the many claims of noncompliance of the settlement agreement.

ISSUE 6:

DID THE SUPERIOR COURT ERR BY NOT CONSIDERING AND RULING ON PLAINTIFF'S CLAIM THAT DEFENDANT AND HER PRIOR COUNSEL IN APRIL 2001 COMMITTED A PROMISSORY FRAUD?

Plaintiff contends the settlement agreement can be consider as a matter of law an express contract with Defendant. The Defendant by and through prior counsel Daniel J. Mullen negotiated the settlement agreement. Plaintiff prevailed in federal court in his class action lawsuit. The federal court determined Plaintiff's and all NHSP inmate's constitutional rights had been denied them by the inadequate and inhumane conditions of confinement at NHSP. As such the federal court ordered NHSP officials to come up with a plan to correct such conditions. The federal court 1978 Consent Decree was created for such purpose, SEE August 4,1978 Consent Decree, Plaintiff's Exhibit A-1. Subsequently in May 1990 a modified Consent Decree was approved by the federal district court. SEE May 22,1990 modified Consent Decree, Plaintiff's Exhibit A-2. This modified Consent Decree on April 23,2001 was converted into a "settlement agreement" to be enforced by the State Courts of New Hampshire. SEE settlement agreement, Plaintiff's Exhibit A-4.

The Defendant promised to honor and obey all the terms and provisions of the settlement agreement. The Defendant and her predecessor have miserably failed to honor and comply with the terms of the settlement agreement so egregiously that it constitutes a **material"** breach of the agreement and/or contract.

Plaintiff alleges that Defendant by and through her prior counsel have committed a promissory fraud by agreeing to honor the terms of

the settlement agreement, knowing Defendant would not keep the promise to rectify the constitutional violations found to exist in the Plaintiff's federal lawsuit, simply by raising the defense of sovereign immunity as her now current counsel has argued in her 2018 pleadings to the superior court.

There was no mention in April 2001 of sovereign immunity being raised as a defense when the settlement agreement was negotiated, indeed no one considered it as any problem and/or defense or an option to dismiss constitutional violations found by the federal district court in Plaintiff's lawsuit. In the event any noncompliance issues arose a two-step alternative dispute resolution process was set forth at the last page of the settlement agreement. This process is among other things that gives Plaintiff standing to enforce compliance with settlement agreement.

The Court should find for Plaintiff on this issue.

ISSUE 7:

DID THE SUPERIOR COURT ERR BY NOT CONSIDERING AND RULING ON PLAINTIFF'S CLAIM THAT DEFENDANT'S PRIOR COUNSEL'S ACTS OF ENTICING PLAINTIFF TO ENTER INTO THE SETTLEMENT AGREEMENT CONSTITUTED FRAUD UPON PLAINTIFF, FEDERAL COURT AND STATE SUPERIOR COURT?

Plaintiff contends that the acts and omissions referred to in ISSUE 6, enticing Plaintiff into the settlement agreement, not informing the federal district court before it relinquished federal jurisdiction over the Consent Decree, that the Defendant and her counsel would raise sovereign immunity as a defense to prevent the Plaintiff from ever enforcing the settlement agreement in the State Courts of New Hampshire, constitutes fraud upon the Federal District Court of New Hampshire, Plaintiff as well as his then counsel NHLA and the State Superior Court.

New Hampshire law recognizes that "(f)raud will vitiate a judgment, and a court of equity may declare it a nullity" Wingate v Haywood, 40 N.H. 437,441 (1860). In Conant v O'Meara, 167 N.H. 644, (2015), the Court , quoting Salway v Arkava, 215 Mont. 135,695 P.2d 1302,1306 (1995), said, "(t)he power of the court to set aside a judgment on the basis of fraud upon the court is inherent and independent of statute."

Plaintiff believes the superior court should have allowed Plaintiff to argue this claim of fraud. Moreover, the superior court on its own motion should have held a hearing. As such, Plaintiff submits that this is grounds for the Court to vitiate the settlement agreement. Plaintiff further submits that where fraud has allegedly

been perpertrated upon the Federal District Court, Plaintiff,his counsel in 2001,NHLA, and the State Superior Court, this is grounds for the Federal District Court to retake jurisdiction over this entire matter.

The Court should find in favor for the Plaintiff on this issue.

ISSUES 8 & 9:

DID THE SUPERIOR COURT ERR BY NOT CONSIDERING AND RULING ON PLAINTIFF'S CLAIMS THAT IF NH RSA 99-D AND RSA 491:8 WERE APPLIED TO PLAINTIFF AND THE FACTS AND CIRCUMSTANCES OF THIS PARTICULAR CASE THEN THOSE STATUTES WOULD BE UNCONSTITUTIONAL IN THEIR APPLICATION TO HIM?

Plaintiff asserts that applying the State's immunity statutes against him in this particular case are unconstitutional.In that it denies him due process of law by depriving him of any remedy to enforce the terms and provisions of the settlement agreement. It violates his rights to equal protection of the laws and equal justice under the laws. It constitutes an arbitrary infringement of his fundamental right of access to the courts.

It would also be against public policy. The doctrine of sovereign immunity this Court has said serves two general public policy considerations: (T)he protection of the public against profligate encroachment on the public treasury, and the need for the orderly administration of government, which in the absence of immunity would be disrupted if the state could be sued at the instance of every citizen." In re Estate of Raduazo, 148 N.H. 687.

In Plaintiff's case he is not seeking any money from the State treasury, so there is no need to "protect the public against profligate encroachment on the public treasury." Moreover, there is no threat the orderly administration of government will be disrupted by Plaintiff seeking to have Defendant honor the terms and provisions of the settlement agreement which she has a legal obligation and duty to do. By complying with the terms and provisions of the settlement agreement, Defendant would be advancing "the orderly administration

of government." Not doing so would be the antithesis of the orderly administration of government. It would be tantamount to what the court in V.S. DiCarlo Construction Co. Inc.v State, 485 S.W.2d,52 said: "The very antithesis of responsibility by government would be to say that it may contract with a citizen and assume obligations under the contract and then be permitted to disavow and say to the citizen that the state has breached the contract but you can't do anything about it because the government has not expressly consented to the maintenance of the suit."

It would be against the public policy and public's interest, In that settlement agreements are entered into by parties to a case after negotiation has produced agreement on their precise terms. The parties waive their right to litigate some of the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally the agreement reached normally embodies a compromise, in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. Moreover, parties in the future would be less inclined to settle cases and more apt to insist upon time-consuming and costly litigation clearly contrary to public policy and the public's interest.

Accepting the Defendant's argument and interpreting RSA 498:1 to permit suits only for implied contracts seeking money would be a misinterpretation of RSA 498:1 and be unconstitutional in its application to the facts and circumstances of this particular case. In that it would only allow citizens of the State to seek enforcement of settlement agreements and/or contracts when asking for money and deny all others who do not seek money. This deprives Plaintiff of his rights

to due process of law,equal protection of the laws,equal justice under the laws and constitutes an arbitrary denial of his fundamental right of access to the courts guranteed to him by Articles 1,10,12 and 14 of the New Hampshire Constitution.

The Court should find in favor for Plaintiff on this issue.

ISSUE 10:

WHERE PLAINTIFF IN HIS PLEADINGS SPECIFICALLY REQUESTED THE SUPERIOR COURT TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO CLAIMS OF PROMISSORY FRAUD, FRAUD ON THE COURT,FEDERAL DISTRICT COURT AND PLAINTIFF, DID THE SUPERIOR COURT ERR AND VIOLATE RSA 491;15 BY NOT DOING SO?

WHEREFORE, based upon the foregoing, Plaintiff/Appellant respectfully request the Court to grant this appeal.

May 30, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I placed this Brief in the NHSP "mailbox" on May 30, 2019 to be mailed to the Clerk of Court Eileen Fox at One Charles Doe Drive, Concord,NH 03301, either by first class mail postage pre-paid or messenger servce. I further certify a copy of the Brief was put in the NHSP mailbox for delivery to Anthony J. Galdieri, Esq,33 Capitol Street,Concord,NH 03301-6397,either by first class mail, postage pre-paid or delivery by messenger service.

Clifford E. Avery