THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0067

101 Ocean Blvd., LLC

v.

The Hanover Insurance Company & a.

BRIEF OF APPELLEE 101 OCEAN BLVD., LLC

101 Ocean Blvd., LLC
By its attorneys,
CRONIN, BISSON & ZALINSKY, P.C.

Dated: August 5, 2019

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The Appellee requests fifteen minutes of oral argument before the full court, to be presented by Attorney John G. Cronin.

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STATEMENT OF CASE AND FACTS

Albert "Chuck" Bellemore is the principal of 101 Ocean Blvd., LLC ("Ocean"). Mr. Bellemore is a New Hampshire native, born in Bedford and educated locally. T. 48:13-22[1]. Mr. Bellemore started out in the family heating oil business, but he and a partner purchased their first piece of commercial investment property in Hampton in 1976. T. 47: 11-16; 50:8-17. What began with a two family home grew over time, and, in particular, after the sale of the oil business, into a modest portfolio of New Hampshire real estate with Mr. Bellemore investing in real estate at times alone and at other times with others. See generally T. 50-53.

In 2000, Mr. Bellemore and his family purchased an old Hampton hotel to convert to a contel. T.52:6-22. At the time, he had no particular relationship with one insurance agent and thus, he began with Meredith Foy of the Defendant, Foy Insurance Group, Inc. ("Foy"). T.53:16, 25. Before Foy, he "didn't have any close relationship with [insurance agents]. We just dealt with insurance and that was it." T.54:20-21. Thankfully, he had "very little claims, if any." T.54:24.

As the real estate market turned in the middle 2000's, Mr. Bellemore became aware of another available hotel property on Ocean Boulevard in Hampton built in the 1920s. T.55:23; T.77:25. With no prior experience operating a hotel, he closed on the property in the name of 101 Ocean Blvd., LLC in May 2006 and opened for business for the summer season.

[1] For purposes of this Brief, the following abbreviations shall be used to reference the record and pleadings: Transcript ("T"); Appellant's Brief of Foy Insurance ("F.B."); and Appellant's Appendix to Brief ("F.App. #").

T. 57:6, 18. Because of his prior experience with Foy, Mr. Bellemore went to Foy for his insurance needs. T.58:12. He "enjoyed working with them. . . .[T]hey were a full-service company, a family business. . . .[T]hey seemed to be very attentive to their clients." T.58:18-19.

Mr. Bellemore provided necessary information to Foy. T.58:23. Foy reviewed the application, "ask[ed] a lot of questions, [did] their research" and provided a replacement cost policy with initial coverage limits of $1,300,000.00. T.59:10, 19-20. He "figured [he] had full coverage so in case something happened to the property [he'd] get the 1.3 million to either fix it, [or] rebuild it." T.59:14-15.

At the time of the coverage discussions, Foy also offered terrorism coverage and flood coverage. T.60:4, 12-13. Mr. Bellemore reviewed both coverage options with Foy and made appropriate coverage decisions based on those discussions. T.60:7, 16. Mr. Bellemore "never heard of" law and ordinance coverage. T.60:20. Thus, he did not believe it was ever brought to his attention. T.60:19.

Following the purchase decision and payment of the insurance premium, Foy delivered the insurance policy – typically two months later. T.61:2. Upon receipt of the policy, Mr. Bellemore reviewed the coverage information but did not "read it from cover to cover." T.61:11. The policy renewed each year after that. T.61:14.

In 2007, after a number of years with Meredith Foy, Heidi Sansouci became Mr. Bellemore's primary contact at Foy. T.61:17-19. Ms. Sansouci started with Foy in 2005. T.167:13. She is an accredited advisor of insurance and a licensed property casualty agent. T.169:9, 18. Her objective at Foy was to suggest the best available coverage for her clients.

T.171:3. She became Mr. Bellemore's "all the time" contact. T.62:1. Most of their many conversations were by telephone. T.62:12. Mr. Bellemore was happy with the level of service and therefor, moved other business to Foy and referred Foy to others when he had the chance. T.62:19-24. Ms. Sansouci assisted with his real estate insurance, business insurance, automobile coverage and worker's compensation insurance. T.173:14-17.

After the relationship with Ms. Sansouci continued for a number of years, she expressed concerns with the limits of Mr. Bellemore's existing coverage. T.63:5. In 2013, Ms. Sansouci recommended a comprehensive review of coverage and recommended that he increase his coverage limit to $2 million. T.63:8, 25. Since property values in the area appeared to be increasing, Mr. Bellemore gave the matter considerable thought. T.63:16-22. During this period, as a result of Mr. Bellemore's efforts, the business had nearly doubled at the hotel. T.64:19. As a result, Mr. Bellemore renewed the policy with Foy at the recommended increased coverage limit of $2 million – a nearly 54% increase over the prior limits. T.64:2. Ms. Sansouci did not expect that her clients would read the actual terms of their insurance policies. T.185:18.

He generally deferred to Ms. Sansouci's recommendations. T.65:2. Conceding that he does not know much about insurance coverage, he said "when you have a relationship over a period of years like this . . . you really rely on . . . your agent." T.65:5-7. Because he had "a lot of policies" through Foy, he spoke with her on a "weekly basis." T.65:13-14. He explained "Heidi was my agent at the time and she still is today. And, you

know, I relied on her so much . . . . We have not let this – this lawsuit come between us." T.65:6-9.

Mr. Bellemore had similar respect for Foy. T.66:16-23. "They were very professional . . . . a full-service company" and "attentive to detail." T.66:17-18. Foy handled claims with ease and made efforts to mitigate. T.66:20-22. Mr. Bellemore "came to . . . rely on Heidi or . . . her recommendations." T.66:22-23.

Mr. Bellemore had approximately 50 policies through Foy. T.83:3. Once during the relationship, Mr. Bellemore needed builder's risk insurance for another property. T.82:16. The premium for the proposed Foy coverage was according to Ms. Sansouci "quite high." T.82:20-21. Although Mr. Bellemore looked elsewhere for coverage, he ended up where he started with Foy. T.82:24. Mr. Bellemore never bid any of his other policies because he was comfortable relying on Ms. Sansouci's recommendations. T.83:5-7. He paid Foy "hundreds of thousands" for insurance for his properties. T.148:2. Ms. Sansouci estimated his premium bill to be "just shy of fifty thousand dollars a year." T.173:24.

Mr. Bellemore also relied on Ms. Sansouci to review the coverage he had in place from other agents which he described as "small coverages." T.83:10. He "trusted her" and "relied on her." T.83:19. She sometimes simply recommended that he "just stay there." T.83:17. On one such occasion, she explained that she could not obtain a competitive price, but she appreciated the opportunity for a "last look." T.192:16. She told him to make sure he was "fully covered." T.192:18. He never had anyone else review Foy policies. T.83:21. Ms. Sansouci took pride in her customer service, gathering information and suggesting coverage. T.202:1-3.

In August 2013, Ms. Sansouci contacted Mr. Bellemore at insurance renewal time. T.86:10. Along with her quote, she noted "there are several coverages that are not included in these policies that I feel should be addressed." T.86:18. She recommended flood coverage and liquor liability coverage. T.86:19, 23. Following review and discussion with Ms. Sansouci, Mr. Bellemore did not believe that the recommended coverages were necessary. T.87:8-14. Significantly, however, Ms. Sansouci made no other suggestions and never raised an issue about law and ordinance coverage. T.87:22. She conceded that she never discussed law and ordinance coverage with him and had no personal experience with the coverage. T.174:16, 22. In her view, she "just wouldn't think of the law and ordinance coverage as being a big issue." T.212:25.

Mark Boland, President of Merit Specialty, a division of Hanover Insurance, has significant experience with properties that "are difficult to insure." F.App. I 134:6. He was familiar with the property, the insurance coverage applications and the policy provided. Id. 14:20. According to Mr. Boland, his company would not have offered law and ordinance coverage "because of the age of the building. . . . because it's very hard for us to determine what exactly those expenses are going to be," Id. 144:13, 23-24, but also conceded that any coverage may be available in the market at the right price. Id. 161:11-20. His company has "no policies with law and ordinance coverage." Id. 145:11. Despite what must have been an obvious issue, no one from Mr. Boland's company ever spoke with anyone at Foy about the coverage or suggest it be passed on to the client. Id.161:4.

According to Mr. Bellemore, "Foy knows the insurance coverages available." T.89:19. Yet, they never gave him options regarding law and

ordinance coverage. T.89:23. With an approximately 90 year old building and his construction experience, he would have understood the concern of insurance coverage to provide for the costs of code compliance with a proper explanation of the law and ordinance coverage by Foy. T.90:1-10. He could have explored other options to minimize exposure. T.90:4. Because he was never notified, available choices were never explored. T.90:1-10.

On October 8, 2017, the Ocean Boulevard building caught fire. T.68:15. Someone had been smoking on the roof top deck and discarded a lit cigarette in a trash can. T.90:18-22. After providing for the safety and relocation of guests, Mr. Bellemore contacted Ms. Sansouci to report the "major fire." T.70:12. She assured him of coverage and that he "shouldn't have any issues." T.70:14. As the fire was brought under control, Mr. Bellemore got into the building with the fire chief. T.71:14. He saw first-hand the complete destruction of his building. T.72:1-16. Mr. Bellemore was "devastated." T.74:4.

Soon after the fire, John Johnson, a claims adjuster with Hanover Insurance, met Mr. Bellemore at the property for inspection. T.74:13, 16. Mr. Bellemore said that he "made [him] aware of what [he] had for coverage and, obviously, what [he] didn't have." T.74:20-21. Mr. Johnson explained that Mr. Bellemore had only $10,000 of "law and ordinance coverage" which he explained as "if you need to bring this building up to code, which you probably will" those additional requirements would be covered by the law and ordinance coverage. T.74-75: 25, 1. Since Mr. Bellemore was aware of Hampton's code requirements from other projects, he anticipated a new elevator and sprinkler system "which knocked the hell

out of $200,000." T.70:5. Thus, he discovered he had a serious coverage deficit. T.75:7.

Mr. Bellemore hired Jeff Luter from Fulcrum Engineering to estimate the cost of restoration and particularly the cost to comply with Hampton ordinances. T.75:22. Mr. Luter determined the additional cost of construction to comply with codes would be $905,070. T.368:20. Until the fire, the building was allowed to operate without extensive renovation even though local codes had changed. T.76:5-8. Mr. Bellemore explained that the building was "grandfathered" as an existing and operating business with a certificate of occupancy. T.76:6-8. In addition, in his annual reviews of coverage with Foy, no insurer ever raised any issue of sprinklers, elevators or code compliance. T.76:12. Mr. Bellemore intended to rebuild his business until he received a notice of nonrenewal of the insurance in late winter, 2018. T.76:21.

Mr. Bellemore needed liability coverage for the building and brought the issue to Ms. Sansouci. T.75:10-11. She tried to get the existing coverage extended, but could not. T.79:19. With a 1920s fire damaged structure, she tried to get basic liability coverage which worked for a few months. T.80:1-3. Because of the expense, it made little sense to continue that liability coverage. T.80:3. According to Mr. Bellemore, "at the end of the day that's what it was." T.75:10-11.

Meanwhile, the building had been taken down to essentially a shell with the original 1920s construction open for inspection. T.77:13. The Hampton Building Inspector, Kevin Schultz, inspected the building throughout the demolition. T.78:15-23. Mr. Schultz explained to Mr. Bellemore what would have to happen if he wanted to rebuild the building.

T.259:18. In addition to hiring a structural engineer to evaluate the building, because of the extent of the damage, any restoration would have to comply with the current state building code and the local Hampton code. T.260:1-3.Thus, Mr. Bellemore was left with two options – rebuild the building consistent with the current Hampton codes or tear it down. T.79:11-12.

Mr. Bellemore tore the building down and used it for parking. T.80:18-20. However, the income from parking failed to cover expenses. T.81:1-9. Hanover Insurance paid $910,000 for replacement of the building. T.140:13. However, the added cost to reconstruct the building according to code was not covered. T.143:1.

Mr. Johnson inspected the damaged property four times. F.App. I 183:15. The building had obviously sustained major damage. Id. 185:19. Under the existing Hanover Insurance policy, the building was insured for $2 million with only $10,000 coverage for the increased cost of construction required to comply with building codes. Id. 187:17; Id. 188:10. The replacement cost of the building was determined to be $1,058,304.00, which did not include the increased law and ordinance costs. Id. 188:22-189:6. According to Mr. Johnson, the costs to construct according to the law exceeded the amount of the available coverage. Id. 193:20.

Franklin Siegel is an expert on the duties and responsibilities of insurance agents and is familiar with the duties and standard of care for insurance agents in New Hampshire. T.321:24. He has been involved in numerous cases and has been qualified as an expert on the standard of care applicable to services provided by insurance agents. T.322:2. He was

asked to review whether a "special relationship" existed between Foy and Mr. Bellemore which would impose certain duties on Foy regarding the services provided to Mr. Bellemore and his companies. T.328:3.

Mr. Siegel summarized the relationship as one "of trust between the parties. . . . [T]he insured has a level of trust and of confidence in the information provided by the agent. . . ." T.328:25. An agent who holds herself out as an expert and provides unsolicited advice on which the insured relies creates a special relationship in the insurance industry. T.329.2-3. Mr. Siegel pointed to the long relationship of trust between Mr. Bellemore and Foy and the many instances of advice on which Mr. Bellemore relied to form his insurance purchase decisions. T.329:21 – 330:9. Even though some recommendations were rejected, Mr. Siegel concluded that a special relationship existed. T.329:12; T.354:1-2.

Once a special relationship is created, the agent "is required to provide advice, counsel, and guidance on insurance coverage . . . and to explain to the client what's covered and what's not covered by their insurance policy." T.331:19-21. The agent is not simply "an order taker." T.331:22. Mr. Siegel explained that Foy failed in its special relationship with Mr. Bellemore because no one explained the serious limitations with the coverage that he believed provided "full" coverage that he purchased from Foy. T.332:12. No one offered him or explained the apparent need for law and ordinance coverage which in Mr. Siegel's experience was available. T.332:13-14; T.333:11. He would have recommended and could have obtained "$900,000.00 as the law and ordinance limit." T.333:7.

Peter Milnes, an equally credentialed expert hired by Foy, noted the benefit of reviewing specific coverage and endorsements with policy

holders "sometimes" relying on a commercial lines checklist to frame the conversation. T.538:11, 13. Over a foundation objection from Foy, Mr. Milnes was allowed to review and consider a commercial lines checklist used by other companies in the industry. T.542:19. The checklist form included a reference to "ordinance of law," a box to check "yes" and the statement "higher limits available." T.544:9. Mr. Milnes concluded "I think it provides a mechanism for discussion if people want to have that." T.545:14-15.

Mr. Milnes also explained what a "special relationship" in the insurance business is consistently with Mr. Siegel. T.467:17. "[I]f you are providing in-depth services, if you've held yourself out as a particular expert in a subject, and the insured relies upon you for those types of things." T.472:6-9. He concluded that agents, like Ms. Sansouci, should have "superior knowledge [of] . . . limitations in commercial policies." T.520:19. In addition, "accredited insurance advisor[s]," like Ms. Sansouci, should possess "additional information at a higher level . . . ." T.521:7. Regarding law and ordinance coverage, agents "need to know about it." T.523:14. However, based upon his interpretation of the facts and circumstances of the relationship between Mr. Bellemore and Ms. Sansouci, he disagreed with Mr. Siegel's conclusions "vehemently." T.469:17.

At the close of evidence, Foy's motion seeking to take the decision away from the jury was denied as it had been when Ocean rested. T. 600:4-601:19; T. 394:18-395:25. After the parties debated some of the instructions, the parties presented their closing arguments. T. 674:14-704:9. With the exception of an objection to the presentation of a single letter not

at issue on this appeal, Foy did not raise a single objection to Ocean's closing arguments. T. 674:18- 704:9. The Trial Court then instructed the jury, including comparative fault instructions at Foy's request, and provided the jury with both written copies of its instructions and the Special Verdict Form. T. 705:25-728:7.

The jury deliberated and at one point advised the Trial Court it was deadlocked. T.735:16-736:7. However, after being instructed to keep deliberating, the jury returned a verdict in favor of Ocean in the amount of $812,519, but that Ocean was 25 percent at fault. F.B. 50-51.

ARGUMENT

I. General Standard of Review

Foy appeals from the denial of its motion for judgment notwithstanding the verdict ("JNOV") and its motion to set aside the verdict following a jury verdict in favor of Ocean. While both motions challenge a jury verdict, they present distinct standards and seek distinct forms of relief.

A motion for JNOV concedes that the "trial was adequate but that the…record is so clear that the court is justified as a matter of law in entering a different verdict without a new trial." Broderick v. Watts, 136 N.H. 153, 162 (1993). It presents a question of law as to whether "the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the non-moving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand." Halifax-American Energy Company v. Provider Power, LLC, 170 N.H. 569, 576 (2018). In considering a motion for JNOV, a court cannot weigh the evidence or inquire into the credibility of the witnesses, and if the

evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion is to be denied. Id. As a motion for JNOV presents a question of law, the Court reviews a decision relative to the same *de novo*. Id.

By contrast, a motion to set aside jury verdict "seek[s] a trial *de novo* at which facts related to some or all of the issues may be determined anew." Broderick, 136 N.H. at 162. The motion presents a question of fact and may only be granted if the verdict is conclusively against the weight of the evidence or the product of mistake, partiality or corruption. Id. A jury verdict is conclusively against the weight of the evidence only if no reasonable jury could return it (i.e. a party could not have met its burden of proof), Id., and this is an extremely narrow standard. Faust v. Gen. Motors Corp., 117 N.H. 679, 683 (1979). Mistake, partiality or corruption focus the conduct of the jury and must be independent of its consideration of the evidence. Broderick, 136 N.H. at 163; *see also*, Panas v. Harakis, 129 N.H. 591, 603-604 (1987) [Examples of jury mistake]. Given that the jury is the proper trier of fact and cases are rarely clear, the Court historically has said that the power to set aside jury verdicts should be "exercised very sparingly." Faust, 117 N.H. at 682, *citing*, Clark v. Society, 45 N.H. 331, 334 (1864). As the motion presents a question of fact, the Court "will uphold the trial court's decision unless it was made without evidence or constituted an unsustainable exercise of discretion." State v. Fedor, 168 N.H. 346, 352 (2015).

For the reasons set forth below, the Trial Court properly denied Foy's combined motion for JNOV and, alternatively, to set aside the jury verdict.

II. There Was Sufficient Evidence to Find that Ocean and Foy Maintained A Special Relationship.

Foy first complains that no rational factfinder could find that Ocean and Foy had a "special relationship" because there was no evidence of what constitutes a standard relationship and there was no evidence of any purported special relationship factors under Sintros v. Harmon, 148 N.H. 478 (2002). While it recognizes that two different standards of review may be applied, Foy does not specifically address whether it challenges the sufficiency or weight of the evidence with this first claim of error. Given its emphasis on the lack of (i.e. the sufficiency) rather than weight of the evidence in its Brief, Foy may only be fairly read to challenge sufficiency of the evidence as a matter of law on this appeal. In light of the same, Foy waived its first argument relative to the contours of a standard relationship. With respect to its second argument, Foy misconstrues the holding in Sintros and ignores evidence in the record.

In order to preserve a sufficiency of the evidence objection, a party must raise such an objection in the form of a motion for a directed verdict "when there may still be an opportunity to supply the deficiency" or the objection is waived. Carlisle v. Frisbie Mem'l Hosp., 152 N.H. 762, 767 (2005). Foy did move for a directed verdict after Ocean had rested, but did not assert that there was insufficient evidence as to the contours of a standard relationship. T. 394:18-25, 395:1-25. Relevant to this specific claim of error, Foy focused upon the alleged lack of evidence that any of the so-called Sintros factors had been established. Id. Accordingly, Foy's claim that there was insufficient evidence of the contours of a standard relationship was waived.

Assuming *arguendo* that the claim was not waived, there was sufficient evidence before the jury as to the contours of the standard relationship. Foy itself informed the jury that in the standard agent-insured relationship, the agent does what the insured asks and advises the insured whether it can meet the request. T. 470:4-7. Indeed, its own expert suggested testimony had previously been given in the case as to normal duties. T. 471:20-472:1-9; *see also,* T. 331:21-22 [Agreement by Mr. Siegel that absent special relationship, insurance agent is generally "order taker".]. In short, there was evidence that a standard agent-insured relationship consisted of the insured making requests and the agent advising the insured whether those requests could be met.

Turning to Foy's claim that there was insufficient evidence to establish a special relationship, Foy asserts that Sintros established an exhaustive list of factors for establishing a "special relationship" and Ocean failed to prove any of those factors. While other courts or legislatures have established a purported exclusive list of circumstances under which a special relationship may be established, *see, e.g.*, Voss v. Netherlands Ins. Co., 8 N.E.3d 823 (N.Y. 2014) [Identifying three "exceptional situations" that may give rise to a special relationship under New York law.]; Harts v. Farmers Ins. Exch., 597 N.W.2d 47, 51-52 (Mich. 1999) [Four factor test under Michigan law.]; Wuebker v. Hennan Agency Inc., 814 N.W.2d 622 (Iowa App. 2012) [Applying Iowa statute defining when an insurance producer's duties to insured expand.], the Sintros Court did not adopt an exhaustive list of circumstances under which a special relationship existed. It rather, under the plain language of the decision, called for a case-by-case determination as to whether there was more than a standard insurer-insured relationship

and cited examples of where other courts had found a special relationship. Sintros, 148 N.H. at 481. Such a reading is consistent with the Sintros Court's reliance upon Hardt v. Brink, 192 F.Supp. 879 (W.D. Wash. 1961). In Hardt, the federal court observed "[w]hether or not an additional duty is assumed will depend upon the particular relationship between the parties" and "[e]ach case must be decided on its own peculiar facts." Hardt, 192 F.Supp. at 881. The Sintros Court had good reason to adopt a fact-dependent standard as opposed to factor-based approach urged by Foy. As implicitly recognized in Sintros and expressly recognized elsewhere, "[i]t is more difficult to derive any absolute rule from the caselaw as to the requirements of a 'special relationship.'" Nelson v. Davidson, 456 N.W.2d 343 (Wisc. 1990) [Superseded by statute in 1995]; *accord*, Somnus Mattress Corp. v. Hilson, No. CV-15-900038, 2018 WL 671577 (Ala. Dec. 21, 2018). Indeed, courts using a factor-based test have had to recognize that such tests may not necessarily be exhaustive. *See, e.g.*, Connell v. Pastridge, 963 N.E.2d 776 (Mass. App. Ct. 2012). In short, Foy predicates its claim on a misconstruction of Sintros. Foy never argues that, based on the evidence before the jury in this case, that the jury could not find more than a standard relationship existed between Ocean and Foy.

Alternatively, even if Sintros is construed in accordance with Foy's interpretation, a rational factfinder could find that one or more of the "factors" were satisfied. As noted above, experts for both sides agreed that the standard insurer-insured relationship involved the insurer responding to requests made by the insured. Foy's own expert suggested advising an insured about the sufficiency and adequacy of coverage was beyond the

general duties of the insurer. T. 470:8-19. There was evidence before the jury that:

1) Ocean and Foy had a long relationship and Ocean or related entities had a significant number of policies with Foy. T.170:2-8.

2) Ocean's prior dealings with insurance companies were "transactional." T 54:3-9.

3) With Bellemore having approximately 50 policies with Foy and only "small coverages" elsewhere, there was significant communication between Ocean and Foy on insurance. T. 170:12-21.

4) Ocean was not knowledgeable about insurance and relied upon Foy's advice and recommendations. T. 65:1-8, 66:22-24.

5) Ocean had no experience in the hotel industry prior to buying the property that Foy agreed to insure. T. 57:16-19.

6) Foy's representative's "goal" was to make sure Ocean had appropriate levels of coverage and was not underinsured. T. 202:22-24.

7) While Ocean asked for advice at times, Foy frequently provided unsolicited advice as to the sufficiency and adequacy of Ocean's coverages, including when Ocean entered into new businesses. T. 63:2-5; 86:10-25, 87:1-19; 172:11-18; 562:15-25;

8) Foy's representative reviewed policies from other agents for Ocean. T. 83:12-21;

9) Foy's representative recommended that Ocean look for other quotes when Foy's prices were too high. T. 192:8-18.

10) While others might be paid for consultation (i.e. assessing client's needs in purchasing insurance), there are different ways of doing business and Foy provided counseling and consultation without requiring a fee. T.171:6-8; 563:4-21.

11) Foy was well compensated for its efforts receiving "just shy of fifty thousand dollars a year." T.173:24.

12) Over time, Foy's representative handling Ocean's account had obtained an "accredited advisor of insurance" designation. T. 169:7-15.

Based upon such evidence, a reasonable jury could have found "a long established relationship of entrustment in which the agent clearly appreciates the duty of giving advice," "an agent holding themselves out as a highly-skilled expert coupled with reliance by the insured," or "a course of dealing over time where an agency was on notice that its advice was being sought and relied upon" - three of what Foy refers to as the Sintros factors. F.B. 27-28. That there may have been conflicting evidence with respect to any of this evidence is irrelevant to the issue. As such, even under Foy's reading of Sintros, the jury had a sufficient basis to find that the relationship between Foy and Ocean consisted of much more than Ocean making requests to Foy and Foy advising whether it could satisfy those requests. Simply, Foy was more than an order taker.

III. Foy's Second Claim of Error Misconstrues The Injury And Has No Bearing On The Verdict.

Foy's second claim of error is that no rationale juror could find additional law and ordinance coverage was actually available and, therefore, its failure to advise Ocean of the inadequacy of its coverage could not legally or factually cause Ocean's injury. While once again, it fails to specify whether it is addressing the sufficiency or weight of the evidence, it does not matter as Foy's claim of error is contrary to the record and, more importantly, predicated on a false narrative.

The evidence before the jury on the availability of additional law and ordinance coverage was conflicting. Ocean's expert testified that he made a call and that such coverage would be available. T. 332:23- 333:18. While others testified that such additional coverage would not be available, T. 483:5- 484:12, witnesses, including those for Foy, conceded that the market allows for just about anything to be insured depending on risk and the price paid and decisions are made on a case-by-case basis. F.App. I 161-163. Indeed, Ms. Roux testified one never really knew about availability unless one went out into the market and conceded Foy never asked her to do that, because its representative did not think that law and ordinance coverage was a "big issue." T. 212: 18-25; 288:4-25. In short, Foy ignores conflicting testimony to paint a false narrative. It never asked about additional coverage at all.

In addition, Foy, through this claim of error, attempts to recast Ocean's injury. While Ocean was under the impression it had adequate coverage even after it first reported the fire, T. 70:9-14, Foy's representative conceded the coverage proved to be inadequate. T. 174:23-1752. The

building sat on a property subject to a mortgage that needed to be paid. T. 81:1-3. After the fire, the building, which had been used as a hotel, due to the significant damage, had to be gutted and temporarily shored up and could not be occupied. T. 71:24-25; 72:1-16, 76:21-25; 77:7-21. The damaged structure ultimately lost all insurance coverage. T. 76:13-18. After meeting with the building inspector, Ocean understood that its only two options were to rebuild the hotel and bring it up to code or to demolish it. T. 79:5-12. A rebuild would entail what Ocean understood to be expensive improvements, such as an elevator to make the common deck accessible and fire sprinklers, T. 74:22-75:6, the cost of which Ocean would principally have to bear given the lack of coverage. As Ocean's principal explained at trial, Foy's failure to advise Ocean that its coverage was inadequate denied Ocean the opportunity to mitigate its risk associated with what was an underinsured building. T. 89:16- 90:10. If it had known that its current coverage was inadequate, Ocean could have pursued additional law and ordinance coverage or other insurance either through Foy or some other broker to address the coverage issue. Id. If no additional coverage was available, it could have considered altering smoking policies at the hotel or installing sprinklers to mitigate the risk of a fire loss given the realities of its coverage options. Id. The point is that Foy's breach denied Ocean the opportunity to mitigate its risk arising from inadequate coverage before it was too late and Ocean was left holding a shell of a building that was going to cost it significant money to deal with one way or the other. In sum, as Foy's claim of error does not address the actual injury caused by its breach, it is not grounds to disturb the verdict below.

IV. The Jury Instructions and Verdict Form Were Not Confusing Or Prejudicial And Did Not Articulate the Wrong Legal Standard To The Jury.

Foy next complains that three jury instructions and a question on the special verdict form were misleading and warrant a new trial. Given the assertion a new trial is warranted, this claim of error is generally subject to the deferential standard of review for a motion to set aside a verdict.

In arguing the four claims, Foy fails to acknowledge the legal differences between jury instructions and special verdict forms. With respect to jury instructions, the purpose and its review of jury instructions has been described as follows:

> The purpose of jury instructions is to identify issues of material fact, and to explain to the jury, in clear and intelligible language, the proper standards of law by which it is to resolve them. The scope and wording of jury instructions, however, are within the sound discretion of the trial judge and are evaluated as a reasonable juror would have interpreted them. A trial court need not use the exact words of any party's jury instruction request. A jury charge is sufficient as a matter of law if it fairly presents the case to the jury such that no injustice is done to the legal rights of the parties. In a civil case, we review jury instructions in context. We will reverse if the charge, taken in its entirety, fails to explain adequately the law applicable to the case in such a way that the jury could have been misled.

Halifax-American, 170 N.H. at 577-578 (citations omitted). By contrast, a special verdict form serves to enable the trial court to determine which party is entitled to judgment and "must be reasonably capable of an interpretation that would allow the jury to address all factual issues essential to judgment." Madeja v. MPB Corp., 149 N.H. 371, 390 (2003).

In assessing whether the form fairly presented the issues to the jury, the Court considers the wording of the form, the jury instructions, and the evidence at trial. Id.

A. Special Relationship Charge

Foy first complains about the Trial Court's jury instruction in terms of what Ocean was required to prove in order to show a "special relationship." More specifically, it essentially reiterates its claim that Sintros requires proof of one or more specific factors to establish a special relationship and, based upon the same, asserts that the Trial Court's instruction should have set forth the specific factors which it alleges Ocean had to prove. For the reasons set forth above, Foy misconstrues Sintros. In addition, the Trial Court parroted the language of the Sintros case itself for its instruction to the jury. *Compare*, Sintros, 148 N.H. at 481 *with* T. 722:17- 723:15. Foy cites no authority for its apparent proposition that a party is prejudiced by the Court's own description of the law and the Court has rejected claims that accurate statements of law prejudice a party. Bellacome v. Bailey, 121 N.H. 23, 27 (1981). As such, the complaint is without merit.

B. Special Verdict Form

Foy next complains about Question 3 of the special verdict form. Question 3 read "[i]f you answered Yes to Questions 1 AND 2, do you find that Defendant Foy Insurance Group's breach of the applicable standard of reasonable care was a substantial factor in bringing about Plaintiff 101 Ocean Blvd's alleged damages?" Foy complains that the question was

inaccurate because it did not fully set forth the causation element. However, reading not only the language of the form, but considering the same in light of the jury instructions and the evidence adduced at trial, this claim must also fail.

The special verdict form included five questions, including comparative fault. Prior to providing the jury with the special verdict form, the Trial Court instructed the jury. With respect to causation, the Trial Court instructed the jury that "[i]n order to recover, the Plaintiff must prove the Defendant is legally at fault for the damages" and "[t]o do this, the Plaintiff must prove the Defendant was negligent and that such negligence was the legal cause of the damages." T. 720:9-12. The Trial Court then advised the jury that it would define "legal cause" and subsequently did so explaining there is legal cause "when the negligent conduct is a substantial factor in bringing about the damages, and if the damages would not have occurred without that conduct." T. 720:12-13; 721:7-10. The instruction mirrored the standard instructions for negligence. New Hampshire Civil Jury Instruction, §6.1. Foy had no objection to these instructions and admitted that the instructions accurately reflected the law. T. 722:7-10. Foy sought and received an instruction on comparative fault, including that Foy had to prove that Ocean was legally at fault and that Foy had to prove Ocean's "failure to exercise care and that such failure was a substantial factor in bringing about such damages." T. 724:22- 726:12. A copy of the instructions was provided to the jury. T. 647:4-5. The Special Verdict Form also included a question on comparative fault. F.B. 51. Given the competing claims of fault and consistent with the standard jury instructions, the "substantial factor" language clarified that fault was not an all or

nothing proposition (i.e. the sole cause of damages) and the jury could find either party negligent so long as their conduct was a substantial factor in bringing about Ocean's injury. New Hampshire Civil Jury Instructions, §6.1 ["In determining whether the defendant's conduct was a legal cause of the plaintiff's injury, you need not find that the defendant's conduct was the sole cause of the injury."]. Furthermore, the "bringing about" language on the verdict form together with the causation instruction made it clear that the jury had to find Foy, in fact, caused Ocean's injury. Madeja, 149 N.H. at 391 [Although not explicitly referenced in the verdict form, general questions on liability subsumed questions on defendant's affirmative defenses.]. Finally, Foy itself acknowledged at one point that the "substantial factor" language accurately reflected the law. T. 606:24-607:6. In sum, viewing the form as a whole, together with the jury instructions and the evidence in the case, the Special Verdict Form did not mislead the jury on causation.

C. Law and Ordinance Instruction.

Foy also complains that the so-called law and ordinance jury instruction first misstated the law and, alternatively, should not have been given. The jury instruction was more generous to Foy's position than either the law or the evidence required. Furthermore, Foy waived its argument that the instruction should have been given.

As it did below, Foy misstates the law from the outset of its argument. Municipalities do not incorporate the State Building Code into their building code, but rather the State Building Code applies throughout the State and municipalities may adopt additional regulations, provided that

they are more stringent than the State Building Code. RSA 155-A:2, I; RSA 155-A:3. Additionally, contrary to Foy's general substantive claim, RSA 155-A:2, I provides:

> All buildings, building components, and structures constructed in New Hampshire **shall comply** with the state building code and state fire code. The construction, design, structure, maintenance, and use of all buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, removal, or demolition of all buildings and structures previously erected shall be governed by the provisions of the state building code.

[Emphasis added]. The plain language of the statute requires that work not merely "should" but is required to comply with the provisions of the State Building Code. Appeal of Concord Natural Gas Corp., 121 N.H. 685, 691 (1984) ["Shall" acts as a command.]. It is the language of the State Building Code and not the interpretation of some administrative official that ultimately governs its meaning and application. Fischer v. N.H. State Building Code Review Board, 154 N.H. 585, 589 (2006) [Administrative official cannot act in contravention of statute.]. Similarly, the federal Americans with Disabilities Act broadly prohibits discrimination based upon disability in the provision of services, privileges, facilities, and the like in a place of public accommodation, PGA Tour, Inc. v. Martin, 532 U.S. 661, 676-677 (2001), and has been construed to require the removal of architectural and structural barriers or, if the removal is not readily achievable, the provision of equal access to facilities through alternative means. Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 128-129 (2004). In short, there is nothing in either statute that suggests that compliance is optional or advisory. As such, as a matter of law,

compliance with these State and federal codes is mandatory and the instruction given by the Trial Court with its "should" language actually benefitted, rather than prejudiced, Foy.

Additionally, Foy elicit evidence that code officials generally have some discretion in administering building codes, that Hampton officials had exercised discretion on another development, that Hampton officials had viewed Ocean's damaged building after the fire, and that Ocean had razed the building without inquiring into waivers. T. 265:6-16. However, such testimony does not establish that waivers were, in fact, likely or even feasible with respect to Ocean's damaged building. Hampton's building inspector testified that one of the examples of a rebuild cited by Foy was made code compliant, T. 267:22-24, and that substantial damage to an existing building, as was the case here, triggers the need to bring the structure into compliance with the codes. T. 268:11-20. Consistent with the latter testimony, Mr. Luter testified that he had worked with Hampton's building inspector previously and found him to be very knowledgeable, but inflexible in terms of code compliance. T. 375:7-13. Foy's own expert, Mr. Fraser, did not contemplate any waivers or modifications in reviewing the costs of the rebuild. T. 446:11-17. Furthermore, with respect to the ADA, even Foy presumed compliance with that law. *See, e.g.*, T. 422:7-15. In short, even though it bore the burden on comparative fault, Foy did not establish any factual basis for its waiver argument. As such, Foy wanted the Trial Court to instruct the jury to engage in speculation for Foy's benefit that Town officials would have granted certain unidentified waivers from unidentified local, State, or federal codes, which would have materially affected the cost of Ocean's rebuild to some unknown degree.

Such a call for rank speculation by the jury does support a legitimate claim of error. New Hampshire Civil Jury Instruction, §3.2 ["You must not guess or speculate."]. Nevertheless, the Trial Court gave a jury instruction which sought to afford Foy the opportunity to argue its position, T. 634:20-22, and the jury came back with a verdict that attributed some fault to Ocean. Once again, the jury instruction benefitted, rather than prejudiced, Foy.

Foy further asserts that the law and ordinance instruction was improper because it suggested that, as a matter of fact, Ocean had to comply with the building codes. "Whether a particular jury instruction is necessary and the exact scope and wording of jury instructions are within the sound discretion of the trial court." State v. Exxon Mobil Corp., 168 N.H. 211, 225 (2016). Jury instructions serve, in part, to explain to the jury the proper standards of law to resolve issues of fact. Halifax-American, *supra.* Ocean asserted that it had to pay certain sums to rebuild the structure in compliance with local, State and federal codes as a result of Foy's failure to advise regarding the adequacy of coverage. T. 364:24-365:19; 368:13-20. As such, whether, legally, Ocean was required to comply with local, State and federal codes affected the amount of damages it claimed. While it, at one point, attempted to treat the matter as a breach of contract case rather than a tort claim, even Foy's expert, Mr. Fraser, considered compliance with local, State and federal codes in opining that the costs incurred by Ocean were unreasonable. T. 420:25- 423:15; T.424:9-20. Therefore, a factual dispute for the jury existed relative to the amount of damages, something Foy's own proposed damages instruction reflected. F.App. I 42. The law and ordinance instruction properly advised the jury of the law applicable to that factual dispute. Additionally and

alternatively, as discussed above, the testimony at trial did suggest that Ocean would have to comply with the codes and, therefore, the claim of error is contrary to the record in any event.

Finally, to the extent that there was any factual issue as to whether compliance with the codes was required, it was Foy that made it a question with its hypothetical waiver argument and, therefore, it is in no position to complain about any consequences of its actions. State v. Goodale, 144 N.H. 224, 227 (1999) [Invited error doctrine precludes appellate review of issues into which a party intentionally or unintentionally led the trial court.]. For these reasons, the Trial Court was well within its discretion to include the jury instruction on law and ordinance. Exxon-Mobil, *supra*. [Jury instruction reviewed under unsustainable exercise of discretion standard.].

D. Damages Instruction

Finally, Foy objects to the damages instruction asserting the Trial Court misstated the law by failing to provide a measure of damages for the jury to use. In support of its argument, Foy cites Elwood v. Bolte, 119 N.H. 508 (1979), for the proposition that the failure to articulate the proper measure of damages can warrant a new trial.

First, Elwood does not stand for the proposition for which it is cited. More specifically, the Elwood Court, while observing that the trial court had failed to specify the measure of damages used, remanded the matter as the trial court had employed the wrong measure of damages relative to lost fruit trees in light of prior case law. Elwood, 119 N.H. at 510-11. As such, Foy does not cite any case law actually supporting its position.

Second, Foy does not identify any standard jury instruction or case that establishes a specific measure for damages for a case such as this. F. App. I 42. Indeed, Foy admitted that it attempted to modify the standard jury instruction for personal injury damages with its requested jury instruction on the measure of damages. T. 642:9-16; 643:1-16. It offered no factual basis for its proposed instruction. Id. The Trial Court employed the standard instruction on general damages and the burden of proof, Id., and, therefore, adequately advised the jury as to the applicable law. As such, the Trial Court's refusal to use Foy's preferred damage instruction was well within its discretion both as a general matter, Broderick, 136 N.H. at 163-65 (1993) [Repeated denial of challenges based upon failure to adopt a party's proposed language for jury instructions.], and under the circumstances of this case.

V. The Statements Made During Closing Argument Do Not Warrant A New Trial.

In its Brief, Foy identifies nine excerpts from the closing statement by Ocean's counsel that it asserts were factually inaccurate and prejudicial and overall suggested that the jury should "send a message" to the insurance industry. It also objects to references to "team insurance" used during the same closing argument. The excerpted statements and the references to "team insurance" do not warrant a new trial.

While it apparently scoured the record after the fact for objectionable phrases and references, Foy did not object in the proceedings below. Outside of the presentation of one letter during the closing argument, Foy did not raise a single objection to Ocean's closing argument

and its objection to the letter was resolved after a bench conference. T. 691:10- 692:9. "To preserve an objection to closing arguments, 'an objection should be taken at the time the alleged improper statement is made, or within a reasonable time thereafter.'" Broderick, 136 N.H. at 167. Raising an objection in a post-verdict motion is not timely. Having failed to properly preserve an objection, Foy's claim of error may be only reviewed for plain error. State v. Drown, 170 N.H. 788, 792 (2018).

The plain error rule is to be used sparingly to prevent a miscarriage of justice. Id. at 793. To establish a plain error, the appealing party must show (1) there was an error; (2) the error was plain; (3) the error affected substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Id. Foy does not even acknowledge the limitations of the rule or its elements, let alone discuss how they are satisfied in this case. Additionally, except in the case of $1.3 million cost calculator, Foy offers no record support for any of its conclusory assertions that Ocean's counsel misstated facts and, in the case of the cost calculator, misrepresents the testimony, T. 180:17-24 [Ms. Sansouci testified that she did not do a cost calculator and did not see one in the file.], and ignores contrary evidence,. T. 58:21- 59:10, and references to the initial valuation by its own counsel. T. 655:15-16. As such, the Court should reject Foy's claim on the grounds that its argument is not fully developed alone. Halifax-American, 170 N.H. at 574 [Complaints without fully developed legal argument do not warrant review.].

Alternatively, even when an objection to closing argument is preserved, the Court has observed that the trial court is in the best position

to assess any prejudicial effect closing arguments may have had on the jury and that the assessment of any prejudice is made on a case-by-case basis considering the totality of the circumstance, "including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, and the strength of the case." Laramie v. Stone, 160 N.H. 419, 434 (2010). The totality of the circumstances does not demonstrate an error occurred, let alone a plain error.

Foy characterizes the opening remarks by Ocean's counsel as a "send a message" argument intended to encourage the jury to act on bias as opposed to the evidence. Unlike counsel in Laramie or in Murray v. Dev. Services of Sullivan County, 149 N.H. 264 (2003), Ocean's counsel, however, did not expressly implore the jury to "send a message." His opening remarks spoke to the import of the jury's role in the case. However, even if deemed an improper "send a message" argument, these statements, contrary to Foy's suggestions, were limited to his opening remarks. Ocean's counsel subsequently stated in his closing argument that the jury should follow the Trial Court's instructions. T. 676:8-18. The Trial Court later verbally advised the jury that it was to decide facts based upon the evidence, apply the law as the Trial Court, not as counsel, described it, and the purpose of any damages was not to punish a party. T. 707:23-708:16; 724:8-16. This subsequent statement by Ocean's counsel and the Trial Court's instruction also undercut Foy's reliance upon "misstatements of law," which were merely the disputed areas of law discussed elsewhere in this Brief. Furthermore, while Foy asserts Ocean's counsel misstated facts, as discussed above, it generally fails to cite any support for its

conclusory assertions, save its flawed argument under the $1.3 million cost calculator discussed above. As with the purported misstatement relative to the $1.3 million cost calculator, the other purported misstatements of fact had evidentiary support and, therefore, were not misstatements of facts, although Foy may have been disputed the same. . *See, e.g.* T. 333:1-8 [Siegel conversation on obtaining coverage]; 293:12- 294:8; 481:5-17 [Experts, including Mr. Milne, on terrorism form]. Finally, as for the "team insurance" or similar references, this was a case between an insured and insurer involving insurance coverage or the lack thereof. Just as Foy's counsel did emphasizing that Ocean's insurance expert was a professional witness for attorneys, T. 665:7-12, these references merely were intended to argue potential bias on the part of Foy's witnesses. Foy cites no authority for the proposition that suggesting a witness may have a bias based upon employment is improper and Ocean is not aware any such authority. Given the nature of the parties and the dispute, as discussed above, together with the fact that Foy itself identified witnesses as insurance industry persons in its closing, T. 663:23- 664:5, Foy's reliance upon cases such as Walton v. City of Manchester, 140 N.H. 403,407 (1995), with its warning about the "unnecessary mention of insurance," to support its general claim is misplaced. Finally, Foy conveniently ignores that the jury, even after the closing, found Ocean partially at fault per Foy's request. In short, even if it had been properly preserved, Foy's claim would not be grounds for a new trial, Laramie, *supra*.; Murray, *supra.* [Rejecting similar claims for new trial based upon "send a message" arguments on preserved objections.]. Accordingly, the arguments do not support even more restrictive plain error analysis.

VI. The Admission of Exhibit 27 Was Not Improper and Is Not Grounds for a New Trial.

Foy's final claim of error concerns the admission of an insurance checklist prepared for Ocean's counsel. F.App. IV 101-02. A trial court's evidentiary ruling on the admissibility of evidence is reviewed under the unsustainable exercise of discretion standard and, therefore, may only be reversed if the ruling is clearly untenable or unreasonable to the prejudice of a party's case. Zola v. Kelley, 149 N.H. 648, 652 (2003). While it may have raised other objections at trial, Foy focuses upon the relevancy and hearsay objections in its Brief thereby waiving any other objections. Halifax-American, 170 N.H. at 575 [Arguments not briefed are waived.]. Notwithstanding the rhetoric in the Brief, the admission of this checklist was proper and did not prejudice Foy's case.

First, Foy urges that the exhibit was irrelevant. However, during its examination of Ms. Sansouci, Ocean's counsel, without a word of opposition from Foy, inquired as to the use of checklists to track an insured's coverage. T. 195:12-196:5. The central issue in the case was whether Foy was negligent in failing to advise Ocean of its inadequate coverage and the checklist inquiry focused upon a means by which Foy could have advised Ocean of its inadequate coverage. Foy's lack of objection signaled that it implicitly agreed that the line of inquiry was relevant and indeed its own expert later acknowledged a checklist could be helpful to start a discussion on the adequacy of coverage. T.545:14-15. Exhibit 27 built upon this inquiry by providing a specific example of such a checklist. T. 538:6-16. Consistent with the same, the Trial Court recognized that the exhibit could bear on the issue of breach by Foy and

Ocean could draw such a checklist for the jury. T. 542:8-12. While Foy raises a number of complaints about the checklist, such as it was not issued to Ocean by Foy and did not involve a surplus lines policy, F.B. 44, those arguments go to the weight to be afforded the document, not its admissibility. Indeed, to that end, Foy and its witnesses attempted to raise those differences and minimize the efficacy of the checklist approach. T. 573:13-25; 574:1-25; 575:1-12. Despite its objections, Foy directed attention to the specific law and ordinance entry on the checklist. T. 575:13-25. While Foy's rhetoric would have the Court believe that this checklist was the lynchpin of the case, it was merely a demonstrative exhibit building upon a prior line of inquiry on advising clients of coverage to which Foy did not object. As the Trial Court stated, Ocean could have drawn a similar checklist on the blackboard to the same end. T. 540:21-541:3. In short, Exhibit 27 was a demonstrative exhibit bearing on the central issue of the case about which Ocean had already inquired without objection and, therefore, was relevant.

Foy next asserts that Exhibit 27 was hearsay as it was a third party statement offered for the truth of the matter asserted; namely, that additional law and ordinance coverage was available for Ocean's building. N.H. R. Ev. 801. Foy cites no record support for this assertion and, as suggested above, the record demonstrates that the party that principally focused upon the specific law and ordinance entry on Exhibit 27 was Foy itself. T. 575:13-25. The Trial Court, as noted above, understood it was a demonstrative exhibit with its suggestion that Ocean could have drawn a checklist on the chalkboard. In addition, Jeff Foy under questioning by Foy's counsel acknowledged that the exhibit was being offered as a

demonstrative exhibit and not being offered for its truth. T. 574:2-5. Foy's expert also understood its limited purpose given his discussion of the checklist. T. 538:6-16; 543:9-17; 545:9-17. In short, Exhibit 27 was not hearsay and Foy's contrary assertion is a blatant effort to manufacture an error. Accordingly, the Trial Court properly rejected Foy's objection and the admission of Exhibit 27 in no way, shape, or form warrants a new trial.

CONCLUSION

For the reasons set forth above, the verdict below and the Trial Court's ruling relative thereto should be affirmed.

REQUEST FOR ORAL ARGUMENT

Ocean hereby request oral argument and John G. Cronin, Esquire, shall present same on behalf of Ocean.

WORD LIMIT CERTIFICATION

This brief complies with the word limitation set forth in Supreme Court Rule 16(11) by containing 9,422 words.

Respectfully submitted,
101 Ocean Blvd., LLC
By its attorneys,
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Dated: August 5, 2019 By: */s/ John G. Cronin*_____
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CERTIFICATE OF SERVICE

A copy of this Brief was forwarded on August 5, 2019 to Russell Hilliard, Esquire, and Nathan Midolo, Esquire, counsel for Foy, through the New Hampshire Supreme Court's electronic filing system.

/s/John G. Cronin
John G. Cronin, Esquire