THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CHAD AND KELLY SHORT

v.

JOHN AND LORI LAPLANTE AS TRUSTEES OF THE LAPLANTE FAMILY REVOCABLE TRUST

Case No. 2020-0113

Rule 7 Mandatory Appeal from Merrimack County Superior Court

BRIEF OF APPELLEES JOHN AND LORI LAPLANTE AS TRUSTEES OF THE LAPLANTE FAMILY REVOCABLE TRUST

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STATEMENT OF THE CASE

This case arises from appellants' fervent desire to purchase appellees John and Lori LaPlante's home in Concord, New Hampshire and their obstinate refusal to accept that the parties either failed to achieve a meeting of the minds as to a material element of the contract – as determined by the trial court – or that the LaPlantes validly exercised the agreed upon contingency provision in order to cancel the contract. Although appellants have taken an expansive approach to the issues before this Court, in reality there only is one material issue ripe for review: did the trial court correctly determine that the parties had not reached a meeting of the minds with respect to a material provision of the parties' contract and thus, that there was no contract between the parties? Both the evidence in this case and the law unequivocally support the trial court's conclusion that no binding contract existed between these parties. Appellants, however, forge ahead, asking this Court not only to overturn this conclusion, but to act as a fact finder in the first instance on each of the subsequent questions necessary to give the appellants what they want – the LaPlantes' home.

In determining that there was no meeting of the minds, the trial court essentially gave appellants the benefit of the doubt and accepted that they objectively applied a materially different meaning to the otherwise clear and unambiguous language of the pertinent contingency provision that expressly allowed the termination of the parties' purchase and sale agreement ("PSA"). If this Court should find that determination incorrect, there are a host of other issues, including factual issues, which must then be decided but have not yet been resolved. This includes (1) whether the pertinent contingency provision is ambiguous, a foundational element of the appellants' entire argument; (2) if the provision is ambiguous, what is the appropriate interpretation given the factual evidence; (3) have appellees breached the agreement given that interpretation and

the pertinent facts; and (4) if there has been a breach, is the extreme remedy of specific performance equitable under the circumstances. Appellants overlook the lack of necessary underlying factual determinations and demand that this Court make these factual findings in the first instance. While appellees believe that no such analysis is warranted or appropriate, if this Court should undertake such an analysis, the evidence at trial demonstrates that the contingency language is not ambiguous, the LaPlantes did not breach any obligation under the agreement, and that specific performance forcibly taking the LaPlantes home from them is not supported here.

STATEMENT OF FACTS

Appellants are not incorrect in stating the LaPlantes hope to grow old in their home at 58 Hot Hole Pond Road in Concord, New Hampshire ("the Property"). Indeed, it is their dream home, a reward for hard earned and long fought for success in their respective industries. Tr. 262[1]. While the outdoor amenities were important to the LaPlantes, the home itself perfectly suited their particular needs, including extra bedrooms for office space, an open floor plan for entertaining, and perhaps most importantly, the existence of an in-law apartment with a separate connecting garage to satisfy the various equipment and space requirements needed for John's ongoing consulting work. Tr. 102; L. Appx. 45-46. As John explained at trial, he is a "one-man shop" for mechatronics engineering, performing "everything from designing, specifying the shape, size, mission of the vehicle . . . mechanical assembly, electrical assembly . . . and the software." Tr. 260-262 (describing extensive machinery and space requirements).

Despite the treasure this property afforded, there came a time when the LaPlantes made the difficult decision that it was necessary to leave. As the

[1] Citations to the trial transcript are noted as "Tr." followed by the pertinent page number.

evidence demonstrates, a long-time allergy sufferer, Lori's allergies worsened significantly over time while living at the property, to the point of being debilitating. Tr. 103-107. Lori testified that she would spend weeks with severe respiratory and eye symptoms, among others, to the point where she was forced to actually move out for a period of time and only return home to a "clean room" situation that required her to live in the basement. Tr. 103-104; 263; 204. Lori learned through medical testing that her allergies were particularly heightened while at home because of the vast birch trees on the property. *See* L. Appx. 81-84; Appx. 137[2]; Tr. 105. As John described it, it was life-altering and untenable. Tr. 263. Even though Lori began receiving weekly allergy shots (after the 2017 allergy season) in order to hopefully lessen her allergy symptoms, the outcome was not assured. Tr. 107. In the fall of 2017, the couple made the decision that living in this way was not sustainable, and a move was necessary.

The evidence reflects that, from the start, the LaPlantes were very concerned about the timing of any move, and in particular, working around the rigorous schedule that Lori kept as a professor tending to a live animal lab, teaching classes and labs, mentoring students, independent research, and working on various committees at the college, all of which required her presence on campus often on a daily basis – making it virtually impossible to devote any time to a move once the semester started. Tr. 100-102. As a result, the LaPlantes determined that they would put their home on the market in the spring, around the time the semester had substantially completed, and would need to be moved into a new house before work began for the next academic calendar year, in early to mid-August 2018. *Id*. at 108; 110.

[2] Citations to appellants' appendix are noted as "Appx. [page number]". Citation to the LaPlantes' appendix are L. Appx. [page number]"

As a researcher by nature and profession, Lori immediately went to work identifying areas where the LaPlantes may consider moving that were both accommodating to her allergies, as well as the commute any move would entail, and other factors important to them, specifically focusing on the seacoast. Tr. 118-19; Appx. 138, L. Appx. 47-65. Lori remained active even after retaining Mary Truell as their real estate agent in April 2018, including identifying properties, mapping potential commute routes, and looking at aerials of potential homes through google satellite images and other resources. L. Appx. 47-65; Tr. 119-21. When their initial searches did not come up with viable options, the LaPlantes expanded the geographic regions they were willing to look in and began making compromises on other previous "must haves" such as the size of the lot and pricing. Tr. 123-24. When the search still came up with few options, the LaPlantes again expanded the towns they were willing to look in, and how far Lori would have to commute, in order to find a home. *Id*. As the evidence shows, despite five or six different outings with Ms. Truell to look at housing, touring 20 homes, and looking at many, many more online, there simply were not viable options. Ms. Truell described the market in the spring of 2018 as "really low, which we've been in this stuck market for a while with really low inventory and a lot of buyers." Tr. 205.

An issue continually foiling their effort was that most homes in the seacoast region in the LaPlantes' price range were located within subdivisions with restrictive covenants precluding the type of garage construction necessary for John's workshop. Tr. 206, 265; 269. Without the necessary space for John's workshop, an absolute requirement for his livelihood, a property simply would not work. Tr. 269.

Despite this impediment and low volume of homes for sale, the LaPlantes continued looking, casting an ever-wider net as the drop-dead point for finding a new home quickly approached. Indeed, it was with the knowledge that time was

running out that the LaPlantes first viewed – on June 1, 2018 – the property they would ultimately end up putting an offer on – 114 Tidewater Farm Road, in Stratham, New Hampshire. Tr. 125-127, *see also* Appx. 132, 138. While this property was not without issues, including being at the very top of the price range and the fact there was only a very small garage, the LaPlantes believed it to be workable. Tr. at 127, 265. More particularly, the evidence shows that the LaPlantes understood there were no restrictive covenants on this property – or at least no valid restrictions, which allowed enough space for John to build a detached garage to house his workshop. Tr. 207; 266. On June 3, 2018 the LaPlantes decided to put in an offer contingent upon them reviewing any covenants associated with the house (in addition to usual inspection related contingencies). *See* L. Appx. 69; *see also* Appx. at 134(agreement contingent to Buyers satisfactory review of restrictive covenants of record).

While actively searching for another house, the LaPlantes had put their own home on the market on May 1, 2018, using Linda Rosenthall as the listing agent. On May 24, 2018, appellants viewed the home with realtor Kathy Coen for the first and only time. Tr. 11. They subsequently put in an offer that, for a variety of reasons, was odd to the LaPlantes, including the request to have their closing fees paid and a far extended closing date, which ran up against the start of the new school year. L. Appx. 3-7; L. Appx. 66-68. The LaPlantes quickly rejected the offer but made a counteroffer. *See* L Appx. 36-39. After this exchange, nothing occurred for a number of days. In fact, as the evidence showed, almost a week passed with no communication, during which time Ms. Rosenthall continually reached out to see if appellants would be countering. *See, e.g.,* L. Appx. 34-35, 40-43 ("I am going to assume your buyers have moved on since there has been no communication in the last several days."). It was apparent to the LaPlantes that appellants no longer were interested, and decided to bid against themselves in the hope of furthering communications. L. Appx. 40; Tr.

116-117. Even despite this, it was still days before any response was received – hardly the type of behavior one would expect from potential buyers supposedly enamored with the property.

Eventually appellants did respond, changing nothing but further extending the closing date. Tr. at 117. By this time, the LaPlantes felt enormous pressure because of the timing, and in particular, their concern that the house they had found would not ultimately go through. Tr. at 130; Appx. 131. Not wanting to move unless they had a place to move to, the LaPlantes offered appellants two alternatives to be included in the PSA. Appx. *131*; *see also id*. at 92. The first was a pure contingency, making the sale contingent upon the LaPlantes finding suitable housing. Appx. 92. The second, should appellants have refused the first option, was a request that they be permitted to rent back their home for a period of time after the closing. *Id*. Absent appellants accepting one of these two options, the PSA would not have been signed. Tr. 133.

Ms. Rosenthall conveyed the LaPlantes' message in full to Ms. Coen, who then forwarded it to Mr. Short. Appx. 86-87. Although Mr. Short suggested language he would agree to, the evidence demonstrates the proposals never were conveyed to Ms. Rosenthall or the LaPlantes. *Id*. Instead, Ms. Rosenthall followed up with Ms. Coen via text, specifically making reference to the contingency provision the LaPlantes desired: "Kathy did you see sellers request regarding adding ***the contingency*** for sellers to find suitable housing? Is that ok with Chad?" Appx. 49. (emphasis added). In response, Ms. Coen did not say appellants would not agree to a contingency, did not say they wanted only to defer the closing, and did not say they would allow the LaPlantes to rent for a period of time. Instead, she answered: "I sent an email. I think. 60 days or so would work." *Id*. In other words, Ms. Coen did not provide any context for the 60 days she referenced in response to the clear reference to the contingency the LaPlantes sought to add. Ms. Rosenthall, however, was clear in what she was proposing: "I

just added this language. Subject to Sellers finding suitable housing no later than July 14, 2018. Do you think they will be ok with that?" Appx.49-50.

The parties ultimately executed the PSA with the language proposed by Ms. Rosenthall. Appx. 49. July 14, 2018 was chosen because the LaPlantes believed it would give them sufficient time to perform inspections and other review associated with the Tidewater property and have an understanding of whether the sale could go through. Tr. 132 ("It gave us sufficient time to get through the inspections at the Tidewater home. We anticipated that there definitely were going to be issues, and so I wanted to leave time to allow us to negotiate with the sellers of Tidewater."). The LaPlantes articulated, through Ms. Rosenthall, that this language was requested because of the Tidewater house. *See* Appx. 92; Tr. 131 ("[O]ur intent was if we didn't make it through inspections or negotiations with a 30-year-old-home – the Tidewater house, I should say – then this would allow us to cancel the agreement, the P and S with the Shorts. Q: Cancel it outright? A: Outright, yes."). Despite the language not looking anything like what Mr. Short had suggested or making reference to deferring the closing, as apparently the Shorts understood the provision to mean, there were not any follow up questions or discussions from the Shorts, who signed the agreement. The LaPlantes understood that this language would allow them to cancel the agreement at any time up to July 14, 2018 if the Tidewater property for whatever reason fell through. Tr. 132; 268. The LaPlantes did not understand the language to mean, and would not have agreed to language, requiring them to continue to look for housing if Tidewater fell through. *Id*.

Unfortunately, as the evidence shows, only a very short time later it became clear that the Tidewater property would not work; the LaPlantes finally received a copy of covenants clearly precluding the type of garage necessary for John's work – among other issues. *See* L. Appx. 70 – 80; Tr. 135; 268-69. At that point the LaPlantes had to evaluate their options, and they ultimately

determined that they could not move forward with the Tidewater property and would exercise the contingency provision to cancel the PSA on their home. As the LaPlantes described, they considered the risks associated with building in light of the covenants, the fast-approaching deadline for moving, and the failure to have found more than this single, quasi-acceptable house despite six weeks of aggressively searching (and many weeks searching online before that). Tr. 138-39. Lori testified at length regarding her allergy treatments and the fact they had perhaps worked sufficiently enough for them to consider the option of staying by that point. *Id*. at 139. They communicated the termination the following morning, roughly 48 hours after the PSA had been signed, and before the initial deposit had been received. L. Appx. 44; Tr. 231-32.

Appellants, however, refused to accept the termination and demanded Ms. Rosenthall accept their deposit. Appx. 52; Tr. 232. In an effort to assuage what she understood to be Mr. Short's concern that the cancellation was a result of a higher offer, Lori prepared an email to appellants confirming their intent to stay in the home and describing why that was now an option for them. Appx. 156; Tr. 69; 99. Lori wanted to "speak to their humanity" and convey they were sorry – sorry that appellants were likely disappointed. Tr. 141. When appellants indicated they would not accept the cancellation, the LaPlantes then reminded them of the contingency provision. Appellants still would not relent, and this lawsuit ensued.

Following a two-day bench trial, the trial court issued an order (the "Order") finding that there was no contract between the parties because there had been no "meeting of the minds" as to an essential term– the contingency provision. Add. 45-54.

SUMMARY OF ARGUMENT

The trial court correctly determined following an objective analysis that the parties had failed to come to a meeting of the minds with respect to a material provision in the contract, and therefore, no valid and enforceable contract had been entered into.

The trial court correctly determined that appellants were not entitled to an award of attorneys' fees with respect to the LaPlantes' counterclaim since the LaPlantes had not acted in bad faith in bringing such a claim.

Appellants remaining arguments have either not been properly preserved or are not ripe for this Court's review, since necessary factual findings by the trial court have not yet been entered. However, should this Court undertake such an analysis, the evidence at trial demonstrates there have been no breaches of either the agreement or the covenant of good faith and fair dealing. The contingency provision is clear, unambiguous, and permits the LaPlantes to cancel the PSA in the timing and manner that they did. The actions taken both before, during the pendency of, and after the termination of the PSA conclusively demonstrate the interpretation allowing for cancellation of the agreement and that no breach of the covenant of good faith and fair dealing has occurred.

Even if this Court were to determine a breach has occurred, the award of specific performance would be inequitable under the factual circumstances presented here.

ARGUMENT

I. The Trial Court Correctly Determined There Was No Meeting of the Minds and Thus No Valid Contract

At its core, this appeal may be distilled to a single question – did the parties reach a meeting of the minds and assent to the same essential terms? Appellants argue[3] the mere signing of the PSA should have been accepted as sufficient evidence that the parties intended to be bound by *appellants' interpretation* of the disputed provision. As described below, appellants' view is inconsistent with both the law and the facts as determined by the trial court. Under New Hampshire law, "[a] valid, enforceable contract requires offer, acceptance, consideration, and a meeting of the minds on all essential terms." *Durgin v. Pillsbury Lake Water Dist.*, 153 N.H. 818, 821 (2006) (internal citations omitted). "For a meeting of the minds to occur, the parties must assent to the same contractual terms. That is, the parties must have the same understanding of the terms of the contract and must manifest an intention . . .to be bound by the contract." *Id*.; *see also Glick v. Chocorua Forestlands Ltd. P'Ship*, 157 N.H. 240, 252 (2008); *Behrens v. S.P. Comstr. Co.*, 153 N.H. 498, 501 (2006) (there "must be a meeting of the minds on all essential terms in order to form a valid contract."). As the trial court recognized, "[t]he question of whether a meeting of the minds has occurred is analyzed under an objective standard and is a question of fact." Order at 5 (Add. 50) *citing Chase Home for Children v. N.H. Div. for Children, Youth & Families*, 162 N.H. 720, 727 (2011).

Appellants argue that the trial court misapplied the law in referencing the parties' conflicting understanding of the contingency provision. App. Br. at 15.

[3] Appellants do not appear to dispute that the contingency provision is an essential term.

However, noting conflicting understandings was entirely appropriate under an objective standard. Importantly, as the trial court stated, "[e]ven though the parties manifest a mutual assent to the same words of agreement, there may be no contract because of a material difference of understanding as to the terms of the exchange." *Restatement (Second) of Contracts* §20, cmt. *c* (Am. Law. Inst. 1981). Noting the conflicting interpretations of the same words was the starting point for the trial court's further objective analysis – an objective analysis that ultimately determined, based upon the facts before it, that the parties had not assented to the same essential terms and thus, there had not been a meeting of the minds. This precise approach has previously been upheld by this Court. *See Behrens,* 153 N.H. at 502

As reflected in the Order, the trial court correctly went through the objective evidence of a fundamental conflict beyond merely the parties' subjective understanding. The trial court noted the objective evidence supporting that the parties were not assenting to the same terms when they each signed the PSA, including the fact the term "closing" was removed and "agreement" was entered into the provision that was executed, the realtor explanation of the language and the communications all of which, from an objective standpoint, amounted to the absence of assent to the essential terms given the conflict. In other words, the trial court did not merely accept, as appellants seem to suggest, that the parties *now* seek a different application or interpretation of the words as determinative. Rather, looking objectively at the evidence, the trial court correctly determined that before the document even was executed the parties were using the same words to talk about two fundamentally different things – with one party understanding that it was a pure cancellation clause, the other party understanding that it would simply defer the closing for some undefined period of time. In that sense, this is exactly like the Peerless ship situation described by appellants: a party to an agreement uses certain words to indicate one thing, and

the other party uses those same words to indicate something entirely different, with the result that neither actually agreed with the other at the time of the signing. This is precisely what the law of meeting of the minds is intended to cover: "[f]or a meeting of the minds to occur . . . the parties must have the same understanding of the terms of the contract . . . ." *Durgin*, 153 N.H. at 821.

As a result, the trial court correctly determined that there had been no meeting of the minds and no valid contract between these parties. With no valid contract, there could be no breach of the covenant of good faith and fair dealing, and no award of specific performance. As such, the trial court properly denied appellants' claims for relief.

II. The Trial Court Correctly Determined Appellants Were Not Entitled to Attorneys' Fees

Appellants argue that the trial court erred in refusing to award them attorneys' fees in the defense of the LaPlantes' counterclaim (which sought attorneys' fees for appellants' bad faith in bringing the lawsuit). However, there are a number of flaws with appellants' arguments. First, appellants have not properly preserved this issue. More specifically, while appellants challenged the trial court's decision not to award them fees in their motion to reconsider, it was done on an entirely different basis; appellants argued that the trial court had somehow erred in relying upon the LaPlantes' interpretation of the pertinent provision as the basis for its denial. *See* Appx. 264. However, on appeal appellants' argument has shifted, evolving to fit the newly created position (described below) that somehow the June 5, 2018 termination was not effective and thus appellants "could not have acted in bad faith by refusing to accept" it. (App. Br. 40). While the LaPlantes dispute that the trial court erred, there is no evidence that this "ineffective notice" argument ever was presented to the trial court, and thus, provided with the opportunity to consider this issue. It simply is

not what appellants had argued and it should not be considered now, for the first time, on appeal. *See Vention Med. Adv. Components, Inc. v. Pappas*, 171 N.H. 13, 27 (2018) ("This court has consistently held that [it] will not consider issues raised on appeal that were not presented in the lower court.").

Second, even if this Court were to review this claim in substance, the evidence supports the trial court's decision. The trial court expressly concluded following multiple days of evidence that "neither party displayed bad faith or vexatious, wanton or oppressive motives" supporting any claim for fees. Add. 54. Appellants' misplaced emphasis on the trial court's statement that the LaPlantes "were reasonable in interpreting the Disputed Provision as they did" and their suggestion that this represents the sole basis of the trial court's decision, ignores the context provided by the court's subsequent explanation and rationale. Viewed as a whole, the trial court's conclusion is not based solely upon the LaPlantes' "reasonable interpretation", but rather, the collective reasonableness of their decision to bring a claim in light of their "reasonable interpretation" of the contingency provision (as an absolute ability to cancel the contract) together with what was known of the intent and actions taken by appellants. *Id*.

As described somewhat in the trial court's order, the evidence supporting the good faith nature of the claim included Mr. Short's admitted excitement over the experience of refusing to acknowledge the proper termination of the PSA despite the clear contingency language, demanding that the LaPlantes sell their home and thus embarking on an otherwise unnecessary path of protracted litigation that has forced the LaPlantes to incur the significant expense and mental anguish of not knowing whether they will be forced out of their home. The evidence demonstrated that mere minutes after receiving notice the PSA was cancelled, appellants already were gearing up for a long and "exciting" battle, immediately engaging counsel and refusing to meet with the LaPlantes to discuss any sort of resolution. Tr. 54-55. The evidence showed appellants were bent on

continuing to battle regardless of the contractual language and the efforts taken to address the proclaimed concerns about a higher bidder, even keeping Mrs. Short in the dark about the LaPlantes' offer of a right of first refusal, an offer she admitted at trial would have "allayed her fears." Tr. 51, 69. While ultimately the trial court concluded the LaPlantes' evidence was insufficient to prevail, it provided support for the conclusion there was no bad faith conduct and the consequent denial of fees to either party. *Id*. The trial court therefore did not err in its denial of fees.

III. Appellants' Remaining Arguments Are Not Ripe For This Court's Review

Even assuming this Court determines the trial court incorrectly determined the meeting of the minds question, appellants' remaining arguments are not ripe for review since the trial court did not make any of the necessary, underlying factual findings[4]. In other words, the entire remainder of appellants' arguments go to issues that would require this Court to determine, in the first instance, if there was a valid agreement between the parties, whether there was a breach of that alleged agreement (and each of the underlying factual questions associated with a breach finding) and even whether specific performance, the equitable relief demanded by appellants, is an appropriate award under the factual circumstances here.

However, the law on this is well-established: it is up to the trial court to make the initial determination of whether a contract has been breached. *See Axenics, Inc. v. Turner Constr. Co.*, 164 N.H. 659, 668, (2013) (remanding question of whether there was a breach of contract for the trial court's

[4] The lack of underlying factual findings is not in dispute; appellants acknowledge this in their brief at p. 23.

determination in the first instance); *see also Barrows v. Boles*, 141 N.H. 382, 388, (1996) ("Whether conduct is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case."); *Cohen v. Raymond*, 168 N.H. 366, 369 (2015) (leaving breach of contract claim for trial court to address on remand); *Victor Virgin Constr. Corp. v. N.H. Dep't of Transp.*, 165 N.H. 242, 243, 246 (2013) (remanding where trial court had not ruled on breach of contract, "for a determination by the trial judge, as the finder of fact, as to liability for breach of contract, and, if liability does lie, the amount of damages sustained.").

Similarly, specific performance is a factually intensive determination that is to be made by the trial court in the first instance. It is well settled that the question of whether an award of specific performance is warranted is highly factual, and within the discretion of the trial court. "The granting of specific performance of a contract is not a matter of right to which the party is entitled when he has proved his contract." *Bourn v. Duff*, 96 N.H. 194, 200 (1950)(internal citations omitted). Rather, granting such relief "is *always* a matter of sound and reasonable discretion on the part of the Court" given the circumstances of each case. *Id*. (Emphasis added); *see also Hanslin v. Keith*, 120 N.H. 361, 364 (1980)(granting of specific performance in land contracts is discretionary); *Ross v. Eichman*, 130 N.H. 556, 559 (1988) (specific performance award "rests within the sound discretion of the trial court, which may grant or withhold relief *according to all the circumstances of a case*." (emphasis added)); *Gregoire v. Paradis*, 100 N.H. 21, 22 (1955) ("[i]t is axiomatic that the granting of [specific performance] is discretionary with the [trial court] depending upon the circumstances of the case and is not a matter of right.").

Indeed, it is well established that, "when real estate is involved, specific performance will be decreed *unless* there are circumstances which make it inequitable or impossible to do so." *Johnson v. William P. Korsack, Inc.*, 120

N.H. 412, 415 (1980) (emphasis added and internal citations omitted); *see also Bailey v. Musumeci*, 134 N.H. 280, 284 (1991)(citing *Perlmutter v. Bacas*, 219 Md. 406, 412-13, (1959) and 5A A. Corbin, *supra* § 1145, at 138) ("[S]uch relief may be withheld . . . where specifically enforcing the . . . agreement would be highly unreasonable."). Thus, the question of specific performance is fundamentally factual in nature, specific to the circumstances of each case, and requires a finding by the trier of fact.

For example, in *Ross,* although this Court reversed the determination of the trial court with respect to a land contract and noted the possible award of specific performance, it remanded to the trial court. *Ross*, 129 N.H. at 480. This is in accord with *Olszewski v. Sardynski*, 316 Mass. 715, 718 (1944) where, even though the Massachusetts Supreme Court stated, "[i]f the reported evidence in favor of the plaintiff is believed, she should obtain a decree for specific performance[,]" the court refused to make such a determination, stating, "[w]e ought not, we think, to assume the function of a court of first instance by finding the facts upon the printed report of the evidence. The facts should be found in the first place by a tribunal that can see and hear the witnesses." *Id*. *Accord Freedman v. Walsh*, 331 Mass. 401, 406, (1954); s*ee also BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 729 (Minn. Ct. App. 2011) (citation and quotation omitted) (remanding determination on grant of specific performance because such determination is entrusted to trial court's discretion and should be made in first instance by that court - function of appeals court is limited to identifying and correcting errors); *Fletcher v. Frisbee*, 119 N.H. 555, 560, (1979) (citing *Chute v. Chute*, 117 N.H. 676, 678 (1977); *cf. N.H. Supply Company, Inc. v. Steinberg*, 119 N.H. 223 (1979) (remanding case for "trial court to determine from the record, viewed in the light of this opinion, whether in its discretion a specific performance . . . should be decreed.").

Should this Court reach the conclusion that appellants' demand for specific performance must be considered, the trial court is in the best position to undertake such an intensely factual analysis. Since the trial court has not, in the first instance, made *any* factual determinations, provided an assessment of witness credibility or considered other factors it may deem relevant, the matter is not ripe for this Court's review and this Court to impart judgment in the first instance, should not be allowed.

IV. Even If There Was A Valid Purchase and Sale Agreement, Appellees Did Not Breach The Agreement

Setting aside the fact that the trial court found there was no valid and enforceable contract, appellants demand this Court decide, in the first instance, that the evidence is so clearly in their favor no actual factual findings from the trial court are necessary to determine a breach has occurred. Needless to say, the LaPlantes disagree. Indeed, such a conclusion would be contrary to the expansive evidence supporting that the only reasonable interpretation of this contingency language is one allowing the cancellation of the PSA.

a. The Contingency Provision Clearly and Unambiguously Allows for The Termination of the PSA by the LaPlantes.

Under New Hampshire law, "[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." *Lassonde v. Stanton*, 157 N.H. 582, 588 (2008). When interpreting the contract, the court must "give the language used by the parties its reasonable meaning, considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole." *Id*. at 594. "Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used." *Id*. Further, "[a]mbiguity exists only when the parties could reasonably disagree as to the clause's meaning." *Id*.

Here, appellants' lengthy argument as to why their interpretation should be accepted as the correct interpretation simply presumes (in a footnote) a necessary element to their entire position – that the language of the contingency provision actually is ambiguous. Of course, the trial court did not make such a finding. However, had it reached this issue, the trial court would have concluded that the contingency provision is clear, it is unambiguous, and it unequivocally allowed the LaPlantes to cancel when they did.

In large part, appellants artfully avoid directly quoting or even discussing the actual language of the contingency provision. The reason is apparent: no reasonable person analyzing the plain language of the provision on its face could conclude the language is either unclear or that it is open to interpretation. The pertinent language states: "this agreement *is subject to* Sellers finding suitable housing no later than July 14, 2018." Appx. 43 (emphasis added). In this context, "subject to" is synonymous with contingent – the agreement only happens if sellers find suitable housing. Appellants stretch credulity in asking this Court to accept this language is open to any interpretation other than one allowing for the cancellation of the PSA upon the occurrence of the contingency. This is only highlighted by the purported "reasonable" alternative interpretation proffered by appellants – that the "subject to" language was meant only as an option to defer the closing. This strained interpretation finds zero support in the words actually used and agreed upon by the parties; the words "defer", "closing", "option" or any synonymous word just does not appear. Appellants' desire for the language to mean something different than what it plainly means does not create an ambiguity where one otherwise simply does not exist. *Suffolk Constr. Co. v. Lanco Scaffolding Co.*, 716 N.E. 2d 130, 133 (1999) ("ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other's").

If this Court were to find the language ambiguous, the evidence dictates that the only objectively reasonable interpretation of this language is that it allowed the PSA to be cancelled outright, and was not simply an option to defer the closing. The undisputed evidence at trial is that the LaPlantes requested the contingency provision to deal with the very real risk, as described above, that they would not be able to move forward with the Tidewater property, as documented at the time and explained in the parties' testimony. Appx. 131. Indeed, as Ms. Rosenthall testified, when the LaPlantes raised this concern with her, she suggested the contingency as an out – not a chance to defer, not an opportunity to keep looking – *an out*. Tr. 228. Regardless of the basis for the LaPlantes' desire to move, the evidence unequivocally demonstrates that, before the PSA was executed, the LaPlantes were concerned about Tidewater falling through and wanted to have a contingency in place based upon that concern.

Contrary to appellants' arguments, neither Lori's nor Ms. Rosenthall's emails or testimony prior to or during the short 48 hours this agreement was in place indicate anything contrary to this view. Indeed, Ms. Rosenthall uses the word contingency in referencing the proposal with appellants' realtor, Ms. Coen, Appx. 49, and proposed language that she described was an effort to "protect" the LaPlantes. Tr. 258. Although appellants try to suggest that was not Ms. Rosenthall's understanding at the time, quoting certain trial testimony, appellants fail to include the clarification Ms. Rosenthall made in the very next line of the transcript: Q: "Did they want the ability to . . . cancel the contract?" A: "Yes." Tr. 258; *see also* Tr. 228.

Appellants also point to Lori's email referencing the alternative option of a "rental request" that had been made to appellants, Appx. 131, as if a smoking gun reflecting her alleged "true" intent: that despite the express language used in the proposal, Ms. Rosenthall's characterizations to Ms. Coen, and all of the other evidence to the contrary, Lori never really intended the contingency to be an

actual contingency. However, appellants' interpretation ignores the context in which this communication was offered. The undisputed evidence at trial demonstrates at the time of Lori's June 3, 2018 email, the LaPlantes had not heard from appellants regarding their contingency proposal and were anxious to have the PSA finalized, either with the proposed contingency or the alternative proposed option – a rental arrangement. Tr. 149. Understanding that contingency provisions are generally not favored by buyers and not having heard from appellants, Lori assumed they would need to negotiate a rental agreement and were ready to "start the process." *Id*., Appx. 131. The willingness to move forward with a rental request does not negate that the LaPlantes' preferred option was the contingency proposal. Appx. 131. As Lori described at trial, the rental option was a "worst-case scenario", one that they hoped to avoid and believed that they had when appellants accepted the contingency language. Tr. 131; 133; 268.

Suggesting a purported violation of trade practice to "clearly convey" a proposal, appellants also condemn Ms. Rosenthall as having failed to adequately convey the contingency request. However, the record illustrates quite the opposite. Ms. Rosenthall emailed Ms. Coen with the LaPlantes' request for a suitable housing contingency (and alternative rental request). Appx. 92. When she received no communication from Ms. Coen, Ms. Rosenthall followed up, specifically inquiring about *the contingency* request. Appx. 49. Noting she had not seen anything from Ms. Coen, Ms. Rosenthall then proposed contingency language – both in the text and incorporated into the written agreement. *Id*. It is unclear what more appellants expect Ms. Rosenthall to have done to indicate the desire for a contingency, the fact she had entered proposed contingency language into the document, and *asking* if the proposed language was acceptable. *Id*. at 49-50.

If anything, it is Ms. Coen who has created confusion with her lack of adequate communication. Although Ms. Coen received proposed language from

Mr. Short purporting to reflect his desire to defer the closing, Appx. 86, there is no evidence to suggest this ever was provided to Ms. Rosenthall or indeed, that any information purporting to represent appellants' position was conveyed to her. Instead, Ms. Rosenthall receives an incomplete sentence, "60 days or so should work" as the sum total of appellants' position at that time. Appx. 49-50. Given her earlier communications, including the fact Ms. Rosenthall began this very communication string by asking about "the contingency" provision, it was not unreasonable for Ms. Rosenthall to understand from that text that appellants had agreed to the contingency. With this reasonable understanding, Ms. Rosenthall then suggested proposed language consistent with a contingency – language accepted without issue by appellants. *Id*.

Appellants emphasize Ms. Coen's further text "60 days to closing," as suggesting Ms. Rosenthall knew that they meant something different. However, appellants overlook that this further text was sent ***after*** Ms. Rosenthall provided her proposed contingency language. *Id*. In other words, Ms. Rosenthall had proposed language consistent with a contingency before ever receiving Ms. Coen's follow up text –it was therefore incumbent upon Ms. Coen to follow up if she felt there was a need for clarification given the lack of any language supporting her purported understanding and her clients' purported intent. But Ms. Coen did nothing despite the proposed language making no mention of sixty days, the closing, renting or anything else that would have reflected what appellants apparently desired. That is because Ms. Coen understood what it was – a contingency - as she noted in a text to appellants: "the last letter reminded me about the suitable housing contingency. I'm not sure what we can do here." L. Appx. 8-31. At least at that point, she certainly considered this language to represent a contingency allowing the LaPlantes to terminate the agreement.

Appellants' reliance upon the post-termination communications as a condemnation of the LaPlantes and their purported "real" intent is likewise

unavailing. Appellants are quick to vilify the LaPlantes for feeling compassion and seeking to explain the decision they had made. However, appellants' attempt to turn Lori's emails into some sort of subconscious admission of guilt not only is a stretch, but is entirely inconsistent with the record. The record is replete with Lori explaining her intent in sending the communications, including her desire to appeal to appellants' humanity and not wanting to raise the hostility by throwing legalese at them, to assure appellants they were not being tricked or swindled and that there was no better deal on the table -- she asked for understanding, not permission. Appx. 88; Tr. 69; 99. Moreover, appellants' hindsight interpretation of the communications, beyond the self-serving nature, fails to consider the context of the communications, that the LaPlantes were in unchartered territory fighting a battle over a termination they thought would have been a foregone conclusion given the express contingency language, and their confusion over what to do when appellants refused to acknowledge the black and white language allowing the termination.

In sum, the evidence supports the conclusion that the LaPlantes always intended the contingency to allow a termination should the Tidewater property fall through. Contrary to appellants' statement, there is no support for the notion that this language was intended to offer some unarticulated deferral of the closing for some undefined period of time and without setting forth any subsequent terms of conditions for what would happen then. As a result, there has been no breach of the PSA.

b. **The Desire to Add a Contingency Provision was Adequately Conveyed.**

Appellants argue that the LaPlantes must be forced to accept their interpretation of the contingency because, in their view, Ms. Rosenthall failed to adequately convey the contingency proposal. However, as described more fully above, this argument simply is inconsistent with the record. The evidence reflects

Ms. Rosenthall clearly and adequately conveyed the proposal from the LaPlantes via email, followed up with Ms. Coen via text when she did not hear back, provided proposed language consistent with the earlier proposal, and asked if the proposed language was acceptable. *See supra* at Appx. 49-50. Although it is easy in hindsight to look back and proclaim Ms. Rosenthall should have known that Ms. Coen would not interpret the contingency provision as a contingency, and perhaps would not explain it to her clients as a contingency, there simply is no evidence that Ms. Rosenthall should have understood Ms. Coen's lack of appreciation as to what a contingency was.

This, of course, was not helped by the complete lack of any communication from Ms. Coen conveying a desire to defer the closing. Indeed, although Ms. Coen had an understanding of what her clients wanted L. Appx. 32-33, that never was conveyed to Ms. Rosenthall. Moreover, even though Ms. Rosenthall's proposed language did not have any reference to deferring the closing or to the rental arrangement (an agreement that would have been necessary under appellants' apparent understanding), neither Ms. Coen nor appellants followed up upon their review of the language and they signed the agreement. Tr. 41-44 (plaintiff acknowledging that the language in the PSA is not what appellants proposed, and that this language did not defer closing or otherwise indicate by its language that the closing would be impacted.) Appellants' attempt to place blame on Ms. Rosenthall, and thus force their interpretation upon the LaPlantes, simply is improper and not supported by the undisputed evidence here.

c. The LaPlantes Cancellation Remains Effective

Appellants argue for the first time on appeal that the LaPlantes' June 5, 2018 cancellation of the PSA somehow was deficient and did not provide proper notice. While the record fails to support such a notion, the Court need not consider it in the first instance because it has not been preserved. "Issues [must

be] raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct [claimed] errors in the first instance." *Sklar Realty v. Town of Merrimack*, 125 N.H. 321, 328 (1984) (citation omitted). This issue simply never was put to the trial court. The fact that the trial court did not reach the breach of contract issues should not provide appellants license to come up with wholesale new arguments on appeal.

However, the evidence supports that clear and adequate notice of termination was provided to appellants. Indeed, although omitted from appellants' argument, the notice of termination first was provided by Ms. Rosenthall to Ms. Coen via telephone. There is no dispute that the cancellation was conveyed at that point. Tr. 231. Appellants skip this event, and rely instead on a distorted interpretation of Lori's subsequent email as a failed termination attempt. App. Br. 34. There are at least two issues with appellants' argument. First, Lori's email was sent only after appellants refused to accept the termination as conveyed by Ms. Rosenthall. This provided important context for Lori's email, which was to assure them there was no better offer, not to ask for permission. This was not intended to be the termination notice; the termination had already occurred through the realtors.

Likewise, reliance upon communications surrounding the inspection, which ultimately did not occur, is misplaced. Failing again to take into account any context, appellants simply charge that this changed the game. However, the evidence reflects the LaPlantes were confused and unsure what to do when appellants indicated they simply would not accept the termination despite the express contingency language. The LaPlantes acted reasonably in responding to communications, but, as the record reflects, did not allow the inspection to go forward as all parties understood the LaPlantes position was the contract had been terminated. Indeed, Ms. Rosenthall noted to Ms. Coen following her request for

an inspection: "That is not going to happen. This is crazy Kathy. They are not going to let them have access as they are not going to sell the house." Appx. 55.

V. There Has Been No Breach of the Covenant of Good Faith and Fair Dealing

Again, assuming the presence of a valid, enforceable contract, appellants argue that they are entitled to a finding that the LaPlantes breached the covenant of good faith and fair dealing. Assuming such an analysis is appropriate, it is readily apparent that appellants failed to sustain their burden.

"In every agreement, there is an implied covenant that the parties will act in good faith and deal fairly with one another." *Livingston v. 18 Mile Point Drive, Ltd.*, 158 N.H. 619, 624 (2009). This covenant serves as a limitation of discretion in contractual performance, the function of which is to "prohibit behavior inconsistent with the parties' agreed-upon common purpose and justified expectations, as well as with common standards of decency, fairness and reasonableness." *Id*. Decency, fairness and reasonableness. That is precisely what drove the LaPlantes to exercise the contingency provision when they did. The LaPlantes terminated the PSA in a thoughtful manner, with the understanding that they were not only acting validly under the terms of the PSA, but in a way that would ultimately save appellants from potentially missing opportunities and wasting money. The evidence in this case, had the trial court reached this issue, demonstrates the LaPlantes validly exercised their discretion.

Appellants' sole argument is that the LaPlantes were required to continue ***looking*** for a home up until July 14, 2018. Appellants' argument is illogical, both given the plain meaning of the language and given the undisputed circumstances under which this provision was proposed and agreed to. The LaPlantes requested the contingency provision for one reason and one reason only – to protect them

against the real risk that the Tidewater purchase may not happen. The undisputed evidence reflects that the Tidewater house was not in a risk-free position, both because of its age and readily apparent condition (including roof and foundation issues) and, more importantly, the fact the LaPlantes had not yet received the restrictive covenants applicable to the property. Tr. 127; 208-09; 266-67. Even Mr. Short admitted at trial he understood the need for the contingency arose from the Tidewater offer. Tr. 40. Thus, all parties understood this provision was tied to the fate of the Tidewater house.

The evidence also demonstrates that the LaPlantes relied upon their realtor's recommendation for proposed language to add to the PSA and agreed to that language understanding it allowed them to terminate if the Tidewater property fell through. Tr. 268. As Lori explained, the contingency language was not intended to be a "search until" date, but rather, a date that would give them a reasonable period of time to investigate and inspect Tidewater. Tr. 132. As the trial court correctly determined, the LaPlantes' interpretation of the provision was "reasonable in light of their realtor's characterization of the provision as a means to not follow through with the sale *in case the Tidewater property did not meet their specifications*." Add. 52 (emphasis added).

Under appellants' interpretation, a party would be required to search for a new property up until the 11th hour of the drop-dead date in order to exercise the contingency. But taking this to its logical conclusion leads to an absurd result; the party that continues searching and identifies a new property on the last day to exercise the contingency does not have time to perform due diligence on the house, engage in an inspection, ensure financing, and any other components of a residential property sale that happen only after the house has been identified and a purchase and sale has been entered. In other words, the very purpose of the contingency, to find suitable housing to actually move to, cannot be sustained simply by identifying the house. It makes little sense that a party in the

LaPlantes' position would be forced to continue looking for a new home up to the deadline, potentially costing their buyers money and lost opportunity, when the decision can validly be made earlier depending upon the circumstances of the case. In this case, when the Tidewater property fell through the LaPlantes knew they would exercise the contingency and, as decent people, immediately informed appellants, as appropriate given the contingency language, the purpose of that language, the expansive searches that had been performed, the stagnant market at that time, and the pertinent time frame to close on a home.

The LaPlantes' exercise of discretion under these circumstances was both reasonable and consistent with the parties' expectations and those of common decency and fairness.

VI. The Equities Do Not Support an Award of Specific Performance

If this Court were to consider the appropriateness of appellants' requested award on appeal, the evidence conclusively demonstrates that specific performance in this case would be a far cry from an equitable resolution. Appellants rely entirely upon the notion that specific performance is presumptive in the sale of land, completely ignoring that, as described above, the award of such relief is a fact intensive, wholly equitable decision within the discretion of the trial court given the circumstances of each case. Here, the equitable considerations presented at trial strongly militate against the type of draconian application appellants demand.

Appellants brush past the significant equitable evidence submitted by the LaPlantes at trial without comment on why such evidence would be insufficient to overcome any specific performance claim. App. Br. 39. The case law cited by appellants likewise does not support their cause, as each of the cases cited is readily distinguishable. Indeed, it would have been difficult for appellants to

meaningfully compare the limited monetary disputes over stale option contracts at issue in their cited cases to the circumstances here -- the forcible removal of a family from their home following the exercise of what they understood to be a valid contingency provision – a contract that *would not have been signed* but for that contingency provision and ability to cancel the PSA. Tr. 133.

Indeed, appellants avoid discussing the evidence of the real prejudice that would be incurred by the LaPlantes had specific performance been awarded because the inequitable outcome is so readily apparent. The LaPlantes are not seeking to capitalize on a better deal or somehow enrich themselves. To the contrary, this is a case where the LaPlantes understood they were validly exercising a contingency provision put into the agreement expressly for the circumstances they unfortunately found themselves in: if the Tidewater house fell through for whatever reason, they would have the option to stay. That is exactly what occurred here. With no property to purchase, no reasonable ability for such a purchase to occur within the established timeframe given the market, and not wanting appellants to incur unnecessary costs and lost opportunities on other properties, the LaPlantes immediately gave notice of their decision in an effort to act in the upmost good faith toward the Shorts. Tr. 139; 264. The evidence reflects, and there is no dispute, that the Property is the LaPlantes' only home; it is not a vacation property, a commercial property, or a raw piece of land – such as the cases cited by appellants. This is their home where they remain living and hope to remain.

On quite the opposite spectrum, the undisputed evidence illustrates nothing has changed for appellants, except perhaps their disappointment in the contingency being exercised. The appellants acknowledged that they suffered no change in their position or living situation, nor did they suffer any financial hardship as a result of the cancellation of a contract that was only in place for roughly 48 hours. The appellants remain in the same residence they have lived in

for the last 14 years and concede there was no particular urgency or need to purchase a property in the summer of 2018. Tr. 31, 67. There was no evidence of any missed opportunities on other properties during the 48 hours the contract was in place. *Id*. at 35.

The facts of this case are exactly why an assessment of the equities is required in the application of specific performance. Even if ultimately the LaPlantes are found to have been unintentionally wrong in some action, the facts in this case simply do not support the forcible loss of their home.

CONCLUSION

For all the foregoing reasons, the LaPlantes respectfully request that this Court affirm the decision of the Superior Court and conclude there was no meeting of the minds, and thus, no valid agreement, and further, that appellants were not entitled to an award of attorneys' fees. Should this Court reverse the trial court's determination, the question of whether there has been a breach and the appropriate remedy should be remanded for a determination in the first instance.

STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully requests fifteen minutes of oral argument before the full Court. Kathleen Mahan, Esquire will argue on behalf of the LaPlantes.

Respectfully submitted,

John and Lori LaPlante as Trustees of the LaPlante Family Revocable Trust

by their attorneys,

COOK, LITTLE, ROSENBLATT & MANSON, p.l.l.c.

Dated: September 29, 2020

By: */s/ Kathleen Mahan*

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Date: September 29, 2020

/s/ Kathleen Mahan
Kathleen Mahan