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
Docket No. 217-2018-CV-00422

BRIEF OF PLAINTIFFS/APPELLANTS CHAD AND KELLY SHORT

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15 Minute Oral Argument Requested

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QUESTIONS PRESENTED

I. Manifestations of assent to contract, rather than an actual "meeting of the minds," controls whether an enforceable contract is formed. The parties testified to conflicting interpretations about whether the LaPlantes could terminate a Purchase and Sale Agreement ("PSA") with the following provision: **This Agreement is subject to the sellers finding suitable housing no later than July 14, 2018** (the "provision"). Did the court err by finding no "meeting of the minds" occurred because the parties' interpretations conflicted?
App. 255-258.

II. The goal of contract interpretation is to effectuate the parties' intent under an objective standard. Contemporaneous emails of the LaPlantes and their realtor indisputably showed neither conceived that the above provision might allow for termination until a stranger suggested it. Did the court err by not concluding the LaPlantes breached the PSA because the parties never intended the provision to include termination rights?
App. 212-220, 248-250.

III. An ambiguous contract term is objectively interpreted according to how the party using certain words should have reasonably apprehended the other party would understand them. The parties' realtors' shared trade practice expected clear communication about a seller's desire to reserve termination rights, but the LaPlantes' realtor never communicated such a desire. Did the court err by not concluding the LaPlantes breached the PSA because the provision included no termination rights?
App. 257-262, 274-278.

IV. A party must unequivocally exercise an option to terminate. Even assuming the provision imbued the LaPlantes with termination rights, they only requested the Shorts' assent to cancel the PSA, later agreed the Shorts could exercise their contractual inspection rights, and never declared the PSA terminated by the July 14 deadline. Did the court err by not concluding the LaPlantes breached the PSA?
App. 204, 220, 263.

V. The implied covenant of good faith performance requires a party to strictly comply with conditions precedent. The LaPlantes acknowledged they could have found suitable housing by the July 14 deadline had they not ended their search five weeks earlier. Even assuming the LaPlantes could have terminated the PSA, did the court err by not concluding the LaPlantes breached the covenant?
App. 220-223, 263.

VI. The default remedy for a seller's breach of a real estate contract is specific performance, which may only be denied for "significant equitable reasons" including bad faith, mistake, or impossibility. The record contains no such evidence. Did the court err in not awarding the remedy of specific performance for the LaPlantes' breach of the PSA?
App. 223-226, 265.

VII. The LaPlantes asserted a bad faith counterclaim against the Shorts for filing suit after refusing to accept that the PSA was terminated on June 5. That day, the LaPlantes only asked the Shorts to "agree to cancel" the PSA, and never declared it terminated by July 14. Did the court err by not concluding the LaPlantes' counterclaim was patently unreasonable?
App. 226-227, 264.

STATEMENT OF THE FACTS AND CASE

The LaPlantes had hoped to grow old at 58 Hot Hole Pond, Concord, NH (the "property"). Tr. 103. Many would. It offers "complete privacy on 60 acres in Concord [] only 3.5 miles to the highway," mountain views, personal walking trails, and 500 feet of water frontage on Hot Hole Pond for kayaking, fishing, and swimming (with a dock). App. 5.

Id.

But the LaPlantes' life plans were soon uprooted. The mass of birch trees on the property started to cause Ms. LaPlante "life-altering" allergy symptoms. Tr. 103-105, 262-63. These "very severe" symptoms forced her to move into a hotel, then quarantine herself in the basement for months. Tr. 103-104, 155, 273. The LaPlantes were "very sure" about their decision to sell; only then could they escape their "living hell." Tr. 156, 272. The LaPlantes were "relieved" to receive the Shorts' purchase offer "given how motivated we were to move." Tr. 157, 264. The Shorts' offer was not ideal,

but they accepted because there were no other interested purchasers. Tr. 157, 277.

After the parties agreed on the purchase price, the LaPlantes planned to submit an offer to purchase another house, but were concerned if their offer "fell through" they might not "have a house to move into" after conveying the property at the closing. App. 131. They proposed two different options to include in the PSA. Both focused on their deadline to find suitable housing and vacate the property. The first option ensured the closing would occur only after the LaPlantes found suitable housing. *Id.* With no deadline to find suitable housing, the LaPlantes acknowledged this would be "an open-ended arrangement" with which the buyers would likely be "uncomfortable." *Id.* So they suggested a more definite second option: if the LaPlantes had yet to find suitable housing by the closing date, they had "the option of paying [the Shorts] rent…for up to 60 days, prorated." *Id.*; App. 92; App. 87.

After no response, Ms. LaPlante emailed her realtor Linda Rosenthall: "we hope [the Shorts] are receptive to our rental request and are ready to start the process." App. 98. Rosenthall believed Ms. LaPlante's "rental request" would need to be a separate agreement, (Tr. 246), so she recommended it would be "easier" and "quicker" to "add the language 'Subject to Sellers finding suitable housing no later than July 14, 2018.'" App. 97. Instead of a separate agreement, the LaPlantes would "only need [the Shorts] to initial" the provision. *Id.* (emphasis added).

Ms. LaPlante agreed – with a condition. *Id.* The "7/14 date is acceptable as long as" the parties executed the PSA within the next few days. App. 97. Ms. LaPlante's conditional acceptance of the July 14 date was consistent with Rosenthall's understanding that the provision was the LaPlantes' deadline to find suitable housing. Tr. 248. Rosenthall did not

believe the LaPlantes wanted to reserve the right to unilaterally terminate the PSA when drafting the provision. Tr. 257-58.

Before the Shorts' realtor Kathy Coen knew about the provision's existence, she texted Rosenthall that the Shorts would agree to the second option: allowing the LaPlantes to remain at the property for 60 days after the closing if they still needed to find suitable housing. App. 50. Rosenthall was unaware of what the Shorts would agree to, but told Coen that she had "just" added the provision. *Id*. Coen texted again: "60 days from proposed closing." *Id.* at App. 50. Rosenthall never addressed this, but instead said she "just need[ed]" the Shorts to initial the provision "ASAP. Thanks!!" *Id.* Relying on her 30-year experience that a seller who seeks unilateral termination rights clearly announces such a desire, Tr. 81, Coen counseled the Shorts that instead of a deadline 60 days after closing, the LaPlantes "only wanted" July 14. App. 86.

The parties fully executed the PSA on June 3. App. 39. The next day, the Shorts' lender wondered if the LaPlantes' offer to purchase a new house was accepted. App. 107. Ms. LaPlante was resolute:

> I strongly urge the buyers proceed on their part. Whatever happens in regards to purchasing a home on our part, should not be affecting their process in moving forward.

Id.

But after talking "all night" about their decision to sell, the LaPlantes about-faced the next day. Tr. 218-91, 253, 269. On June 5, Ms. LaPlante first told her buyer agent, Mary Truell, that they decided to stay "no matter the cost." Tr. 169, 218-19. What did that mean for the Shorts? The LaPlantes were "prepared to give up the deposit money" and would "try to make it right with the buyers." Tr. 220-21. Ms. LaPlante next called Rosenthall, saying she "felt awful" and was "incredibly sorry" that they no

longer wanted to sell. Tr. 169, 253-54. Rosenthall was "beside herself" with surprise. Tr. 254.

This news would also surprise Coen, so Rosenthall emailed advanced warning of a "[v]ery important" call. Tr. 256-57; App. 93. Without mentioning the provision to Coen, Rosenthall asked if the Shorts would agree to cancel the PSA. Tr. 83-84, Tr. 257. Coen later texted that the Shorts were "not withdrawing from the contract." App. 52-53.

Ms. LaPlante was "very sad" that the Shorts "wanted to move forward with the sale." App. 129. She hoped "a more detailed explanation for our decision will help him understand why we would like to cancel the agreement." *Id.* She then drafted a letter to the Shorts. It first expressed a "sincere apology for wanting to cancel the [PSA] at this stage" and acknowledged the Shorts "deserve[d] an explanation." App. 88. With no mention of the provision, Ms. LaPlante narrated how her severe allergies to birch trees forced them to sell the property, but only after signing the PSA did she first comprehend that "I had no allergy symptoms!" *Id.* Ms. LaPlante offered to pay for any costs the Shorts had incurred and ended by asking "for your understanding in canceling the [PSA]." *Id.* After Rosenthall read this letter, she likewise never mentioned the provision, but was "hopeful" the Shorts would be "very understanding." App. 129.

After the Shorts declined to withdraw again, Ms. LaPlante and Rosenthall were both unsure what to do. Tr. 177-78. Rosenthall referred Ms. LaPlante to a lawyer who had no prior involvement with the transaction. Tr. 178. That lawyer recommended Ms. LaPlante "write to the buyers pointing out the provision in section 19" of the PSA. App. 109. Only then did the LaPlantes first cite the provision to the Shorts. App. 90. But instead of declaring the PSA terminated, the LaPlantes sought the Shorts' agreement "to cancel the [PSA] rather than extend the process to July 14." *Id.*

After the Shorts did not "agree to cancel the [PSA]," *id.*, the LaPlantes asked for an in-person meeting to convey "we were very sorry this all happened." Tr. 279. The Shorts declined. Tr. 26. The Shorts later requested to exercise their inspection rights under the PSA. The LaPlantes assumed that refusing would "be a breach on our part? I don't want to do anything to risk our getting out of the contract come 7/14." App. 112. Rosenthall then began to schedule the Shorts' inspection. *Id.*

The Shorts never received word by July 14 that the LaPlantes considered the provision exercised and the PSA terminated. Yet the LaPlantes still refused to sell. So the Shorts asserted their breach of contract claims on July 27, 2018. App. 139. The LaPlantes later counterclaimed for attorney's fees, alleging that the Shorts had in bad faith initiated their suit after declining to accept the LaPlantes' purported cancellation on June 5. App. 115. A two-day bench trial was held in late August 2019. App. 177. The trial court denied the Shorts' breach of contract claims because it found the parties' PSA unenforceable for lack of mutual assent. Add. 51. It also denied both parties' claims for attorney's fees. Add. 53-54. The Shorts' Motion for Reconsideration was later denied. Add. 55.

SUMMARY OF THE ARGUMENT

The trial court failed to objectively interpret the parties' undisputed contemporaneous manifestations of contractual intent.

The trial court should have found a "meeting of the minds" occurred because the parties agreed to the PSA's terms by signing it. Their subjective interpretations of the provision at trial are irrelevant to whether they manifested mutual assent to contract.

The trial court should have also concluded the LaPlantes breached the PSA in three separate ways. First, the undisputed evidence regarding the parties' contemporaneous conduct was so clear the only reasonable conclusion was that the parties never intended the provision to include

termination rights. Second, the parties' realtors' unanimous trade practice required clear communication about a seller's desire to reserve termination rights. Because the LaPlantes' realtor never communicated such a desire, the LaPlantes are bound by the Shorts' understanding that the provision includes no termination rights. Finally, the LaPlantes could not have terminated the PSA because they failed to unequivocally declare it void by the July 14 deadline.

The trial court should have also concluded that the LaPlantes breached the covenant of good faith performance. It requires parties to strictly comply with conditions precedent. Even assuming the provision allowed termination, the LaPlantes ended their search for suitable housing weeks before the July 14 deadline, preventing the Shorts from obtaining the benefit of their bargain.

For these breaches the trial court should have awarded the Shorts the presumptive remedy of specific performance. The record contains no evidence of "significant equitable reasons" which could deny such an award.

Finally, the trial court should have awarded the Shorts their attorney's fees for defending against the LaPlantes' bad faith counterclaim. The LaPlantes maintained no reasonable basis to allege that the Shorts acted unreasonably by filing suit after not treating the PSA terminated as of June 5. That day, the LaPlantes only requested that the Shorts "agree to cancel the [PSA] rather than extend the process to July 14." They subsequently agreed the Shorts could exercise their contractual inspection rights, and never unequivocally declared the PSA terminated by July 14.

LEGAL ARGUMENT

I. A MEETING OF THE MINDS OCCURRED

A. Standard of Review.

"For a contract to be valid, there must be a meeting of the minds on all essential terms of the contract, meaning that the parties must have assented to the same contract terms." *Chase Home v. N.H. [DCYF]*, 162 N.H. 720, 727 (2011). This is analyzed objectively and is a factual question. *Id.* This Court will sustain the trial court's finding "unless it is lacking in evidentiary support or tainted by an error of law." *Id.*

B. The Trial Court Misapplied the Law When Finding That The Parties' PSA Lacked Mutual Assent.

The trial court found that the parties failed to create an enforceable contract because they testified to conflicting subjective interpretations of the provision. Add. 51. This finding misapplied the law because it relied on the parties' mental impressions of the provision. "The parties' subjective understanding of [a contract] term [] is irrelevant." *Chase Home*, 162 N.H. at 727 (rejecting argument that no mutual assent occurred because of differing interpretations); *see also Kilroe v. Troast*, 117 N.H. 598, 601 (1977) (a "mistaken idea of one or both parties in regard to the meaning of (the agreement) will not prevent" its formation); *N.A.P.P. Realty Tr. v. CC Enters*., 147 N.H. 137, 140 (2001) ("Looking at the parties' subjective intentions alone accomplishes no more than restating their conflicting positions" and is no standard to resolve disputes).

A "meeting of the minds" is absent only "where there appears to be a manifestation of assent initially, but, following appropriate interpretation or construction, it becomes clear that the parties' apparent assent did not in fact indicate assent at all." 11 *Williston on Contracts* § 3:4 (4th ed.). The classic illustration is *Raffles v. Wichelhaus*. *Id.* There two parties agreed to ship goods on a boat named Peerless. But each party was referring to a

different vessel of the same name, and neither knew of the different ship to which the other party referred. *Id.*

Citing *Raffles* in a lengthy exposition about the "strained" premise of the phrase "meeting of the minds," Judge Richard Posner summarized when no enforceable contract exists for failure of mutual assent: "If neither party can be assigned the greater blame for the misunderstanding, there is no nonarbitrary basis for deciding which party's understanding to enforce, so the parties are allowed to abandon the contract without liability." *Colfax Envelope Corp. v. Local No. 458-3M*, 20 F.3d 750, 754 (7th Cir. 1994) (citing cases where a misunderstanding arose because the parties spoke different languages, or when the parties were equally at fault when the mortgage identified the wrong property). In other words, a "party may abandon a contract without liability only where there exists merely an arbitrary basis for deciding whose understanding to enforce because neither party is at greater fault for the misunderstanding." *Int'l Indus. Park, Inc. v. United States*, 100 Fed. Cl. 638, 651 (2011).

This standard precludes a party from contracting "on the premise that either its interpretation [is] correct or it [can] walk away from the contract." *Colfax*, 20 F.3d at 754. The trial court's reasoning would allow just that. Subjective disagreement over a reasonable ambiguity would bar contract formation. *See id*. ("It is common for contracting parties to agree—that is, to *signify* agreement—to a term to which each party attaches a different meaning.") (emphasis in original).

C. The Parties' Undisputed Intent to Enter Into the PSA Mandates a Finding of Mutual Assent.

A "meeting of the minds" occurred because the parties' objective manifestations – signing the PSA and specifically initialing the provision – demonstrated they agreed to be bound by its terms. *See also* App. 43 at ¶ 19, ¶ 21 ("This Agreement is a binding contract when signed"). The parties'

"assented to the same contract terms." *See Chase Home*, 162 N.H. at 727; *see also* 11 *Williston on Contracts* § 3:4 (4th ed.) ("offer and acceptance" is the quintessential example of mutual assent); *Woburn Nat. Bank v. Woods*, 77 N.H. 172 (1914) (contract formation depends on "overt acts. We are to fix the person with such expressed consequences as are the reasonable result of his volition.").

Further, as shown below, the parties' conduct after execution shows they assented to the enforceability of the PSA.

II. BREACH OF CONTRACT: THE PARTIES' CONDUCT INDISPUTABLY SHOWS THEY NEVER INTENDED THE PROVISION TO GRANT TERMINATION RIGHTS

A. Standard of Review.

When contractual language is ambiguous,[1] a court determines what the parties understood the ambiguous language to mean under an objective standard. *Birch Broad., Inc. v. Capitol Broad. Corp*., 161 N.H. 192, 196 (2010). While seeking to effect the parties' intentions, a court examines the object intended by the parties, the contract as a whole, and the parties' conduct before and after formation. *Id*. at 196-97. When possible, an interpretation should avoid placing one party at the mercy of the other. *Thiem v. Thomas*, 119 N.H. 598, 604 (1979).

Here, the trial court never found "the meaning that would be attached to [the provision] by a reasonable person" under the circumstances. *See Galloway v. Chicago-Soft, Ltd*., 142 N.H. 752, 756 (1998). But there is no need to remand because the "meaning of the extrinsic evidence is so clear that reasonable men could only reach one

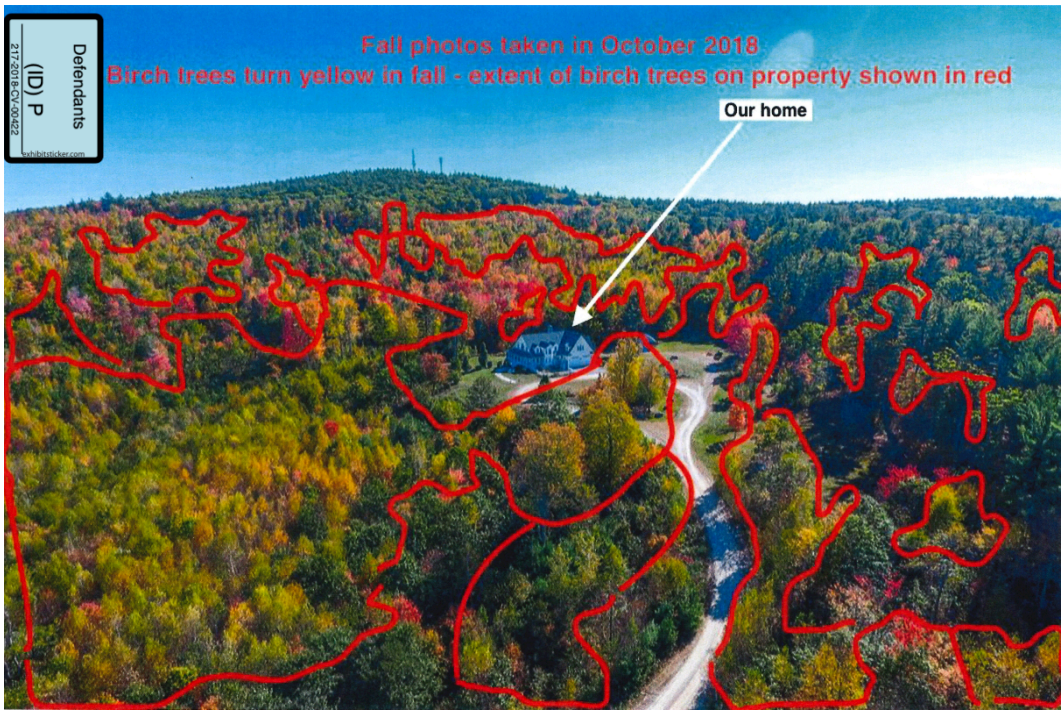
[1] The provision is ambiguous because it contains no language clarifying who (if anyone) may have the right to terminate, while the PSA includes express termination language six different times. App. 39 at ¶¶ 3, 14, 18. The provision's "no later than" phrase allows for a reading that the LaPlantes must find suitable housing by July 14, failing which the buyers could terminate. The provision is subject to more than one reasonable interpretation, and thus ambiguous. *See Birch Broad*, 161 N.H. at 198.

conclusion." *See id.* The parties' outward manifestations before and after execution indisputably demonstrates neither party intended the provision to grant termination rights.

B. Before the PSA Was Executed.

1. The LaPlantes had no motivation to reserve termination rights.

A "living hell." Tr. 272. That's how the LaPlantes described their life on the property due to Ms. LaPlante's "debilitating," "life-altering" allergy symptoms caused by the birch trees encircling the property. Tr. 103, 110, 263.

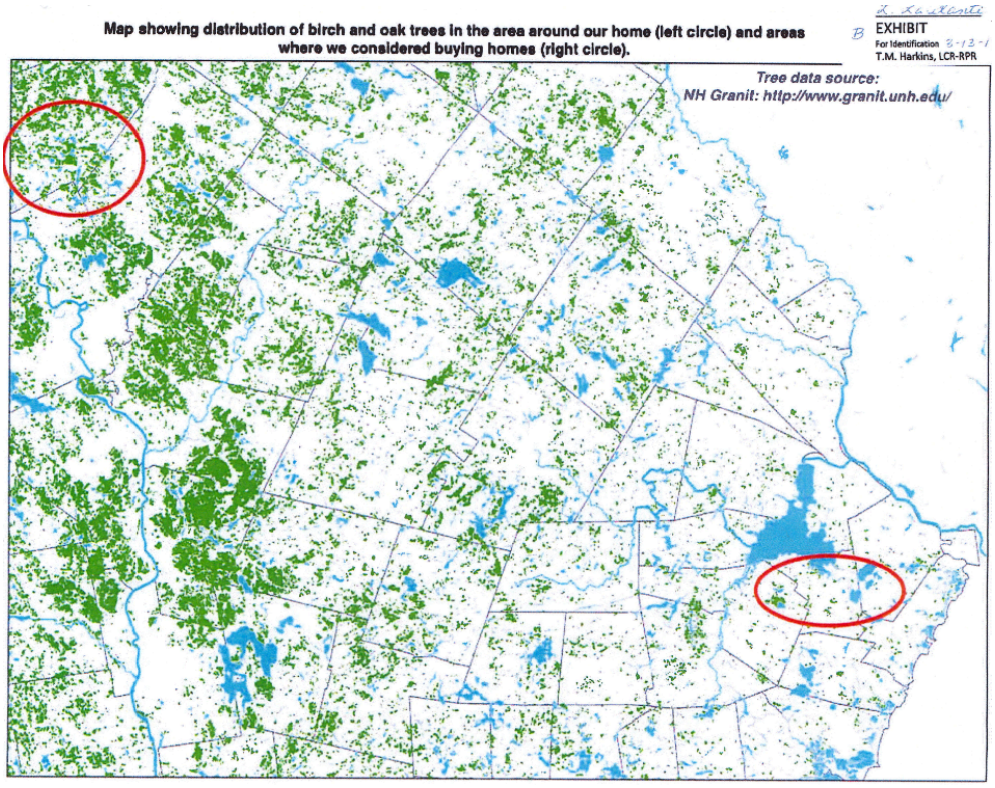


App. 137; Tr. 111. An "outdoorsy person," Ms. LaPlante was depressed and miserable "having to just be indoors." Tr. 103-04, 156. Her "very severe" symptoms forced her into a hotel, and then into the property's basement. Tr. 103-104, 155-56, 204. The LaPlantes "just couldn't live like that" and decided these "symptoms were too severe to continue living" at the property. Tr. 104, 156. Given their love for the property, it was a "very painful decision" to sell, but one they were "very sure" about. Tr. 156, 263.

While the LaPlantes hoped to "sell quickly," three weeks passed before receiving their first offer – from the Shorts. Tr. 114-15, 156. The LaPlantes were glad to receive the offer "given how motivated we were to move." Tr. 156, 264. They accepted the offer, which was $70,000 less than what they had paid in 2010 – not including the property's substantial upgrades. Tr. 14, 277; App. 23. To "make sure that…they were serious" about purchasing, the LaPlantes requested that the Shorts increase their deposits. Tr. 157; App. 82. Overall, the LaPlantes were "100% committed to moving" given Ms. LaPlantes' "untenable" symptoms. Tr. 263, 275.

2. Emails proving the provision's origin directly contradicted the LaPlantes' trial testimony.

After the parties had agreed on financial terms, the LaPlantes planned to submit a purchase offer on 114 Tidewater Farm Road, Stratham, NH (the "Tidewater property"). Tr. 131; App. 48-49, 131, 132. This geographic area, unlike the property's, had few trees which caused Ms. LaPlante's debilitating allergies.



App. 138; Tr. 112-13.

If the Tidewater property's inspection results were unsatisfactory, the LaPlantes were concerned they might not "have a house to move into" after conveying the property on the closing date. App. 131. Without mentioning any desire to possibly terminate the PSA, Ms. LaPlante emailed two "options" focusing on the LaPlantes' deadline to find suitable housing and vacate the property:

Hi Linda:
Per our conversation, we are looking at a 30-year old house and are not sure how the inspection on that house will go. Our concern is if the purchase of the 30-yr old house falls through, then we may not have a house to move into when the 58 hot hole pond house closes on 8/10.

So, we'd like to make the following request to the sellers.

1. The closing of the house is contingent on the sellers finding suitable housing.
2. If the buyers are uncomfortable with an open-ended arrangment such as this, then we would request to have the option of paying them rent, whatever their mortgage cost comes to, for up to 60 days, prorated.

Id.

Ms. LaPlante testified that she would not have signed the PSA without termination rights she read into option 1, and later the provision. Tr. 131, 133. Yet her emails proved the opposite. Ms. LaPlante contemporaneously said nothing about possible termination rights. Instead, she hoped the Shorts would agree to their "rental request." App. 98.

On Sun, Jun 3, 2018 at 8:11 AM, Lori LaPlante <LLaPlante@anselm.edu<mailto:LLaPlante@anselm.edu><mailto:LLaPlante@anselm.edu<mailto:LLaPlante@anselm.edu>><mailto:LLaPlante@anselm.edu<mailto:LLaPlante@anselm.edu><mailto:LLaPlante@anselm.edu<mailto:LLaPlante@anselm.edu>>>> wrote:
Hi Linda:
Were you able to get a hold of the buyers realtor yesterday? we hope they are receptive to our rental request and are ready to start the process.

On Sun, Jun 3, 2018 at 8:37 AM, Linda Rosenthall <linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com><mailto:linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com>><mailto:linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com><mailto:linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com>>>> wrote:
Good Morning Lori,

I left her a voicemail, sent her an email and texted her and have not heard back yet. I'll let you know as soon as I hear anything.

On Jun 3, 2018, at 8:39 AM, Linda Rosenthall <linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com><mailto:linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com>><mailto:linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com><mailto:linda.rosenthall@fourseasonssir.com<mailto:linda.rosenthall@fourseasonssir.com>>> wrote:

I think it might just be easier for me to add the language "Subject to Sellers finding suitable housing no later than July 14, 2018." What do you think? Would that work for you?

Then we would only need them to initial that addition.

Might make this get done a bit quicker.

On Sun, Jun 3, 2018 at 8:54 AM, Lori LaPlante <LLaPlante@anselm.edu<mailto:LLaPlante@anselm.edu><mailto:LLaPlante@anselm.edu<mailto:LLaPlante@anselm.edu>>> wrote:

Hi

Yes, let's do that. The 7/14 date is acceptable as long as the agreement is signed within the next day or two.

With that added language do we sign the p and s first or do we wait for them to sign first?

App. 97-98.

Like Ms. LaPlante, Rosenthall's initial testimony about the provision was directly contradicted by her contemporaneous writings above (and subsequent testimony). First, Rosenthall testified that she recommended the provision to the LaPlantes so they could terminate by July 14.

Q What did you tell them?

A Well, that's -- I put -- I said we should put that contingency in there. So --

Q The contingency allowing them to do what?

A To yeah, well, be able to get out of it if they -- if can't they find suitable housing by a certain date, it's -- it's an out.

Tr. 228. But on cross-examination, after Rosenthall was first shown the email exchange showing the provision's genesis, her testimony changed. She reaffirmed the contents of her email by agreeing that the provision would be "easier" and "quicker" because Ms. LaPlante's "rental request would need [to be] a separate agreement." Tr. 245-46. Rosenthall began the provision with the phrase "This Agreement is subject to" not as a condition

precedent, but because she typically starts language in the "Additional Provisions" section of the standard form with this phrase. Tr. 247. Ms. LaPlante's caveat that the "7/14 date is acceptable as long as" the PSA was executed within a few days was consistent with Rosenthall's own understanding that July 14 would be their deadline to find suitable housing. Tr. 248; App. 97.

Most importantly, Rosenthall's trade practice adheres to the tenet that a seller's desire to reserve termination rights should be clearly expressed to a buyer. Tr. 234-35. Yet she did not believe explicit termination language was necessary. Tr. 247. Rosenthall's testimony on redirect-examination confirmed this:

Q We already heard testimony about your discussions with the LaPlantes regarding the contingency clause. Did the LaPlantes want to be able to cancel the contract?

A When I wrote that?

Q Yes.

A I don't believe -- that was not -- I don't believe so.

Tr. 257-58.

3. With no clear request, the Shorts could not have known the LaPlantes desired termination rights.

The trial court found that the Shorts interpreted the provision "to mean only that the LaPlantes could extend the closing date if they were unable to find suitable housing by July 14." Add. 49, 52. This finding is unsupported by any evidence.

After Rosenthall first communicated the provision to Coen, Coen counseled the Shorts that instead of a deadline to find "suitable housing…60 days from [the] original closing date," the LaPlantes "only wanted" the July 14 date. App. 86. In Coen's 30-year career an express termination clause is "always" included if a seller desires to reserve

termination rights in a PSA. Tr. 81. So like Rosenthall, the Shorts understood the provision as the LaPlantes' deadline to find suitable housing with no termination rights. App. 86; Tr. 19, 63-65.

C. After the PSA Was Executed.

The trial court made no factual findings after the parties entered into the PSA on June 3. App. 39. Yet after the PSA was executed, the LaPlantes' undisputed conduct and contemporaneous writings were fundamentally inconsistent with a reasonable person who would not have signed the PSA but for a termination clause.

When considering the conduct of parties after contract execution, this Court has noted that there "is no surer way to find out what the parties meant, than to see what they have done." *See Bogosian v. Fine*, 99 N.H. 340, 342 (1955) (the "course of business followed by [the parties] is evidence of their common understanding of the meaning of their contract"); *see also* Restatement (Second) of Contracts § 202 cmt. g ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.").

1. The LaPlantes avowed that their suitable housing search would not affect the Shorts' purchase.

Ms. LaPlante testified that the provision was directly linked to the LaPlantes' desire to remain at the property if they needed to withdraw their offer to purchase the Tidewater property. Tr. 140. But, again, her contemporaneous writings said the opposite.

The day after the PSA was executed, the Shorts' lender was wondering whether the LaPlantes' offer to purchase a new house was accepted. App. 107. Rosenthall thought the lender wanted to ensure "they can get going on this." *Id.* Ms. LaPlante confirmed her promise to sell unconditionally, irrespective of their search for suitable housing:

Linda:
I strongly urge the buyers to proceed on their part. Whatever happens in regards to purchasing a home on our part, should not be affecting their process in moving forward.

Id. (emphasis added). This unequivocal affirmation was provided to the Shorts. App. 103. No reasonable seller who had purposely reserved termination rights would have made such an absolute statement in response to a narrow question about whether their purchase offer was accepted.

2. The LaPlantes then pledged not to sell "no matter the cost," and to "try to make it right with the buyers."

What happened next is undisputed: the LaPlantes changed their minds. They no longer wanted to sell. If they intended the provision to allow for termination, the only reasonable next step would have been to provide notification that the provision was exercised and the PSA void. The Shorts never received this notice. Instead, the conduct of both the LaPlantes and Rosenthall indisputably shows they never intended that the provision could possibly be used to terminate the PSA.

It was uncontradicted that Ms. LaPlante informed her buyer agent Truell that they had decided not to sell "no matter the cost." Tr. 218-19. As for their PSA with the Shorts, the LaPlantes were "prepared to give up the deposit money" and "try to make it right with the buyers." Tr. 220-21.

Ms. LaPlante called Rosenthall next. Tr. 169. At trial, Ms. LaPlante testified that she told Rosenthall on this call that she was "exercising the contingency." Tr. 139-40. But Rosenthall did not recall hearing this. Tr. 254. Instead Rosenthall's contemporaneous summary of this call for the LaPlantes' attorneys made no mention of the disputed provision:

> you told me that you and John had decided not to sell your home due to the fact that you realized that you had not been affected by your allergies and that was the reason you had decided to sell.

App. 103. On this call, Rosenthall testified that Ms. LaPlante said she "felt awful" and was "incredibly sorry." Tr. 253-54. Rosenthall was "beside herself" with surprise. Tr. 254.

To lessen the surprise for Coen, Rosenthall wanted to speak with her by phone. Tr. 256-57.

Hi Kathy,

I need to call you at 10:30a. Very important. Are you available?

App. 93. Both Coen and Rosenthall testified that the provision was never mentioned on this call. Tr. 83, 257. Rather, Rosenthall asked a surprised Coen if the Shorts would agree to cancel the PSA. Tr. 83-84, 97, 257. The Shorts declined to "withdraw[] from the contract," and believed the LaPlantes had received a better offer. App. 52-53; App. 103.

3. The LaPlantes first apologized to the Shorts for wanting to cancel and asked for their assent to mutually terminate the PSA.

Ms. LaPlante testified that she first called Rosenthall to "exercise[] the contingency," and would have never signed the PSA if it omitted termination rights. Tr. 133, 139-140. But her contemporaneous writings showed otherwise.

After hearing the Shorts "wanted to move forward with the sale," Ms. LaPlante emailed Rosenthall to express how she was "very sad." App. 129. To help the Shorts "understand why we would like to cancel," Ms. LaPlante decided to write a "more detailed explanation for our decision." *Id.* This "explanation" was consistent with Rosenthall's and Truell's testimony about their respective phone conversations with Ms. LaPlante earlier that day.

Ms. LaPlante began by expressing a "sincere apology for wanting to cancel the [PSA] at this stage." App. 88. The Shorts "deserve[d] an explanation." *Id.* The explanation was that the property's birch trees caused

Ms. LaPlante severe allergy symptoms, but just the day after the LaPlantes entered into the PSA, she "realized spring passed and I had no allergy symptoms!" *Id.* Now she "really want[ed] to stay." *Id.* She sought to reassure the Shorts they would not sell to a different buyer, were "happy to pay for any fees incurred on your part," and concluded by asking for the Shorts' "understanding in canceling the [PSA]. Gratefully, Lori LaPlante." *Id.* Upon reading, Rosenthall never questioned why Ms. LaPlante omitted the provision. Instead, Rosenthall thought it was "great" and was "hopeful" the Shorts would be "very understanding." App. 90.

No reasonable seller who had purposely reserved a termination right (or realtor who had recommended such a provision) would have neglected to reference it in this critical email exchange. *See* App. 129.

4. Ms. LaPlante communicated the provision to the Shorts only after a stranger recommended it.

Unlike reasonable people who had negotiated the provision for this exact circumstance, Ms. LaPlante testified that she and Rosenthall were unsure how to handle the Shorts' declination to cancel. Tr. 177-78; App. 90. Oblivious as to next steps, Rosenthall referred Ms. LaPlante to a lawyer who had no prior involvement with the transaction. Tr. 178. That lawyer recommended citing the provision:

> Hi Linda:
> I spoke with Jackie who recommended I write to the buyers pointing out the provision in section 19. Please forward the message below to them.

App. 109; Tr. 178. Only then did the LaPlantes first communicate the provision to the Shorts – but with no declaration they were exercising the provision. App. 90. Rather they were:

> not confident we would be successful in finding "suitable housing" prior to July 14, 2018. In an effort of good faith, we respectfully provide you with this information so you may agree to cancel the [PSA] rather than extend the process to July 14, 2018.

Id. (emphasis added).

After the Shorts again would not agree to cancel, the LaPlantes sought a face-to-face meeting. The LaPlantes never testified that the purpose of this proposed meeting was to discuss the provision, but rather to "really try and convince them that we did not have another buyer" and convey "we were very sorry this all happened." Tr. 187-88, 279. The Shorts declined. Tr. 26.

The Shorts also sought to exercise their inspection rights under the PSA. The LaPlantes assumed that allowing the inspection was still required under the PSA and refusing would be a breach:

> Linda:
> I didn't realize he requested an inspection. We were prepared to let him go through with the inspection if that is required under our contract. Wouldn't refusing the inspection be a breach on our part? I don't want todo anything to risk our getting out of the contract come 7/14.

App. 112. Rosenthall then began to make arrangements for the Shorts' inspection. *Id.*

The LaPlantes never declared the PSA terminated by July 14.

D. An Objective Interpretation of the Parties' Conduct Indisputably Shows They Never Intended the Provision to Grant Termination Rights.

The "meaning of the extrinsic evidence is so clear that reasonable men could only reach one conclusion." *See Galloway*, 142 N.H. at 756.

The LaPlantes testified that they would not have signed the PSA if it did not reserve termination rights. But they had no motivation for such a position given their unequivocal testimony that Ms. LaPlante's hellish allergy symptoms – caused by the property itself – forced the sale. As Mr. LaPlante conceded, only after the PSA was executed did they begin "thinking about the possibility that we could potentially stay. Up until that point, we [] had every intention of moving." Tr. 275.

The LaPlantes created a trail of contemporaneous writings and uncontradicted conduct – before and after the PSA was formed – fundamentally inconsistent with a reasonable person who would not have

signed the PSA but for termination rights. The same is true for Rosenthall's initial testimony that she recommended the provision as an "out." Her emails (along with the remainder of her subsequent testimony) were in direct conflict.

"[T]estimony in conflict with contemporaneous documentary evidence deserves little weight." *See Banks v. United States*, 721 F. App'x 928, 935 (Fed. Cir. 2017) (citing *U.S. v. U.S. Gypsum Co*., 333 U.S. 364, 396 (1948)). The LaPlantes' post-hoc rationalizations at trial cannot erase their documented contemporaneous conduct, which was reinforced by their own realtors' testimony. At all critical junctures the LaPlantes acted contrary to that of a reasonable person who had purposefully secured termination rights. Under an objective analysis, only one reasonable conclusion can be drawn: the parties never intended the provision to grant termination rights. By refusing to sell the property, the LaPlantes breached the PSA.

III. BREACH OF CONTRACT: THE PARTIES' REALTORS' UNANIMOUS TRADE PRACTICE REQUIRES A DETERMINATION THAT THE PROVISION INCLUDES NO TERMINATION RIGHTS

The parties' realtors' identical trade practice required clear notice of a seller's request for termination rights. But Rosenthall never informed Coen that the LaPlantes might use the provision to terminate. Without an unambiguous communication, the LaPlantes are bound by the Shorts' understanding that the provision includes no termination rights.

A. The Parties' Intentions Are to be Interpreted Consistently With the Realtors' Trade Practice.

This Court has "long held that evidence of usage of trade is admissible in interpreting the meaning of an agreement." *Matter of Cotran*, No. 2011-0216, 2012 WL 12830343, at *2 (N.H. Aug. 6, 2012) (citing *Farnsworth v. Chase*, 19 N.H. 534, 541 (1849)); *see also* Restatement

(Second) of Contracts § 202(5) ("the manifestations of intention of the parties…are interpreted as consistent with…any relevant…usage of trade"); *id.* at § 219 (a "habitual or customary practice"); *cf*. RSA 382-A:1-303(c) ("any practice or method of dealing…as to justify an expectation that it will be observed with respect to the transaction in question.")

When determining the parties' contractual intentions under an objective standard, disputed terms are imbued with the meaning "which the party using the words should reasonably have apprehended that they would be understood by the other party, and the meaning which the recipient of the communication might reasonably have given to it." *N.A.P.P. Realty*, 147 N.H. at 140–41. Put differently, "a usage of trade of which [the parties] know or have reason to know gives meaning to" their contract. Restatement (Second) of Contracts § 222(3).

The realtors' trade practices are imputed to the parties. *See Warren v. Hayes*, 74 N.H. 355, 357 (1907) ("agent's knowledge is to be imputed to his principal" when "acting for the principal"); *see also* Restatement (Third) of Agency § 5.03 (2006) ("notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal"); *see id.* at cmt. d(1) (the agent's knowledge is relevant for interpreting the principal's contractual relationships); Restatement (Second) of Contracts § 272 (a principal's contractual liability is affected by agent's knowledge).

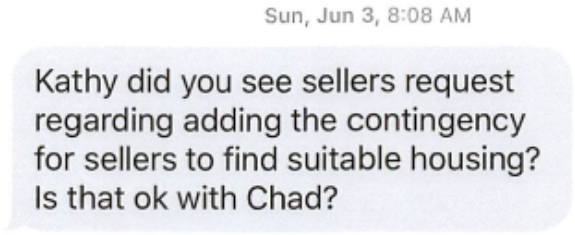
B. Both Realtors Expected Timely, Clear Communication About a Seller's Desire to Condition a Sale on Discovering Suitable Housing.

Coen testified that her practice expects a seller who seeks termination rights to clearly announce this desire. Tr. 81. This typically occurs in the property's written listing. *Id.* Regardless, express termination language is "always" included in a PSA. *Id.* Rosenthall agreed. Her practice

adhered to the general principal that all parties should be clear about what they want. Tr. 235. Specifically, a seller's desire to reserve termination rights needs to be disclosed early on so all potential buyers understand how their agreement could change. Tr. 234-35. Coen's and Rosenthall's shared trade practice is buttressed as a matter of law by the overarching duty that each realtor be "honest" with the other. *See* RSA 331-A:25-b, II(a); 25-c, II(a).

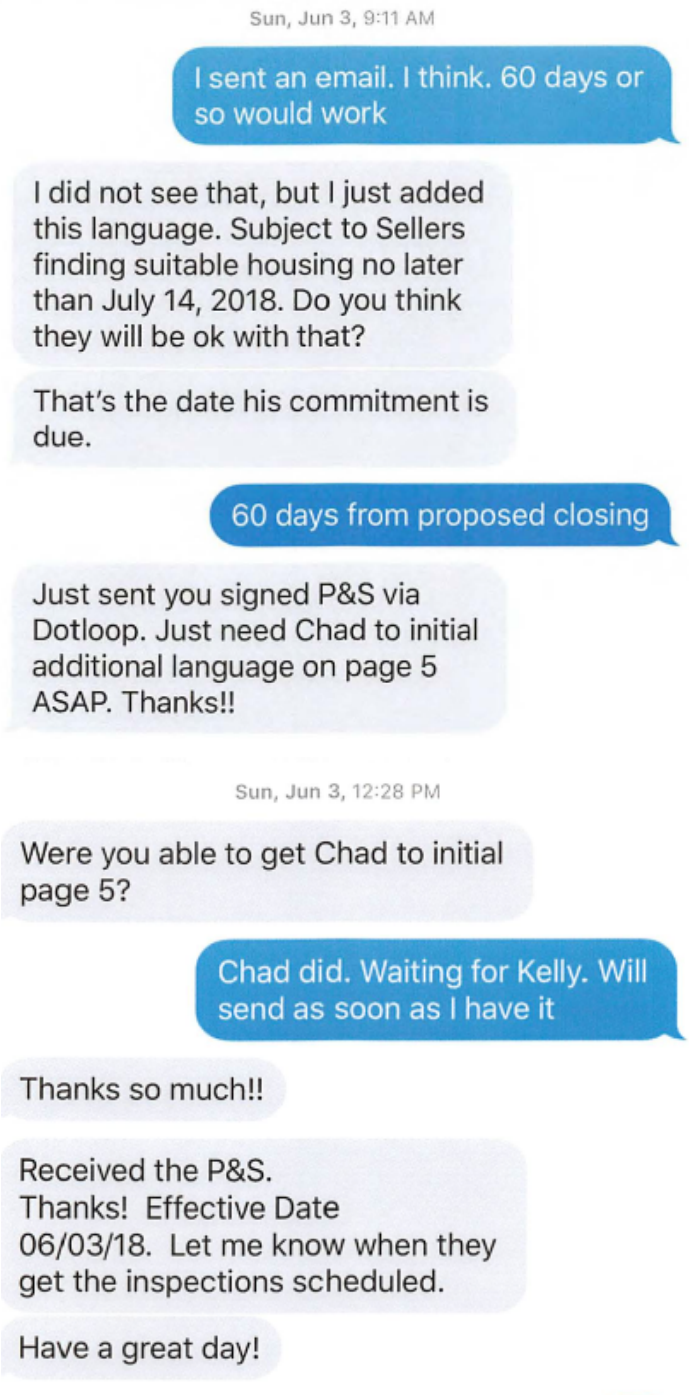
C. Without an Unambiguous Disclosure, Rosenthall Had Reason to Know Coen Would Not Read Termination Rights Into the Provision.

The LaPlantes' request for additional language in the PSA made no mention of a desire to potentially terminate. App. 92. *Id.* Rather Ms. LaPlante's two proposed options directly focused on the LaPlantes' timing to vacate the property while they were searching for suitable housing. *Id.* The next day, Rosenthall followed up about this request:



App. 49. 30 minutes later, Rosenthall first drafted the provision. App. 97.

By 9:10 AM, Rosenthall had inserted the provision into the PSA and sent it to the LaPlantes for a final sign-off. App. 96. Just one minute later, Coen (blue) and Rosenthall (gray) began texting about the disputed provision:



App. 50-51. Instead of clarifying that a 60-day deadline to find suitable housing and vacate was inconsistent with the intent of the provision,

Rosenthall explained that she had "just" inserted the provision, and only needed the Shorts to initial "ASAP. Thanks!!" *Id.* The trial court found that Rosenthall "suggested the LaPlantes only wanted to change the date." Add. 49.

Rosenthall gave no hint that the provision could radically alter its initial purpose from the LaPlantes' deadline to find suitable housing and vacate, to unilateral termination rights. By noting July 14 was the date the Shorts' financing "commitment is due," Rosenthall implied the Shorts might have the option to terminate if the LaPlantes had not found suitable housing by July 14. App. 42 (allowing buyer to terminate by July 14 with "evidence of inability to obtain financing"), 50. Even assuming Rosenthall believed the provision vested the LaPlantes with termination rights, she acted contrary to her and Coen's shared trade custom that a seller must clearly communicate its desire to condition a sale on finding suitable housing. Rosenthall was given many opportunities to clarify. Instead she induced Coen to believe that the provision could prejudice the Shorts no more than a deadline 60 days post-closing.

D. The LaPlantes Are Bound By the Shorts' Interpretation.

With no clear termination desire expressed to Coen – in the listing, before the PSA was executed, or in the PSA itself – the realtors' identical trade practice gave Coen and her buyers no reason to know the LaPlantes intended to use the provision to terminate. Tr. 81. Rosenthall, however, did have reason to know Coen and the Shorts would not interpret the provision to grant termination rights. Tr. 234-35.

Under such circumstances, it is "fundamental contract law" that the LaPlantes are bound by the Shorts' understanding that the provision included no termination rights. *See Copeland Process Corp. v. Nalews Inc*., 113 N.H. 612, 617 (1973) (the plaintiff "would be bound by [the defendant's] understanding" when the plaintiff had reason to know it

created the uncertainty); *Kilroe*, 117 N.H. at 601-02 (affirming the defendant's interpretation controlled because they "had no reason to know that their interpretation differed from that of the plaintiffs, and the plaintiffs should have realized that their intentions were not clearly manifested."); *Hayford v. Century Ins. Co*., 106 N.H. 242, 245 (1965) (if the agent "had no reason to know that the plaintiff's understanding differed from his own, but the plaintiff did…the plaintiff would be bound by the agent's understanding"); *Pettee v. Omega Chapter of Alpha Gamma Rho*, 86 N.H. 419 (1934) (same); *see also* Restatement (Second) of Contracts, § 20(2) (same); *N.A.P.P. Realty*, 147 N.H. at 140–41 (defining the standards of reasonable expectation and understanding).

Without termination rights, the LaPlantes breached the PSA by refusing to sell the property.

IV. BREACH OF CONTRACT: THE LAPLANTES NEVER PROVIDED THE REQUISITE TERMINATION NOTICE

Even assuming the provision vested the LaPlantes with termination rights, they never declared the PSA terminated by July 14 as a matter of law. The absence of any such declaration, along with their refusal to sell, constitutes a breach of contract.

A. A Termination Notice Must Be Definite and Unequivocal.

"A notice of termination should be clear and unequivocal so that the parties to the contract know without question that their relations are no longer governed by its terms." *City of Dover v. Int'l Assoc. of Firefighters*, 114 N.H. 481, 484 (1974) (affirming finding that the contract remained effective even though one party provided written notice it was "rejected," because such notice fell "short of expressly stating that the contract was terminated."); *see also* 17B C.J.S. Contracts § 614 ("A clear and unambiguous notice, timely given, and in the form prescribed by the contract, is essential to the exercise of an option to terminate the contract.").

B. The LaPlantes' Request That the Shorts Agree to Cancel Could Not Have Terminated The PSA.

The LaPlantes testified that they were "very sure" the PSA was terminated on June 5. Tr. 186. But there was no such evidence. Instead, the LaPlantes asked the Shorts to "agree to cancel the [PSA] rather than extend the process to July 14." App. 90. Put differently, the LaPlantes acknowledged that if the Shorts did not agree to cancel, the PSA would be operative until July 14. This statement could not have legally terminated the PSA. *See City of Dover*, 114 N.H. at 484.

Accordingly, the trial court erred to the extent it found that the LaPlantes validly terminated the PSA on June 5 by "decided[ing] to exercise Option 1 and cancel their agreement with the Shorts." Add. 50. No evidence exists to support this finding. And the trial court's definition of "Option 1" was never included in the PSA. Add. 48.

C. After Ratifying the PSA's Existence, the LaPlantes Never Declared it Terminated.

Even if the LaPlantes had unequivocally declared the PSA terminated on June 5, they later ratified its ongoing effect. A "person seeking to rescind cannot treat the contract as rescinded and binding at the same time. Where he does any act which amounts to a ratification after full knowledge of all the facts and circumstances he cannot afterward elect to treat it as void." *Sawtelle v. Tatone*, 105 N.H. 398, 403 (1964) (citing *Weeks v. Robie*, 42 N.H. 316, 320 (1861) (quotations and ellipses omitted).

Ms. LaPlante testified that it would have been "misleading" to allow the Shorts to inspect the property because the PSA had been terminated on June 5. Tr. 182-83. But she felt differently on June 8. The LaPlantes agreed that the Shorts could inspect the property out of fear that refusing would "be a breach" and "risk our getting out of the contract come 7/14." App. 112. This conduct rescinded any potentially effective termination on June 5.

Subsequently, there is no evidence the LaPlantes notified the Shorts that they deemed the provision exercised and the PSA terminated by July 14. *See* App. 43, ¶ 21 (the PSA required written notice); Tr. 83-84, Tr. 257 (Rosenthall never mentioned the provision to Coen during their June 5 call). The PSA was effective as a matter of law after July 14 when the LaPlantes' purported termination rights would have expired. Their refusal to sell the property to the Shorts breached the PSA.

V. THE LAPLANTES' BREACHED THE COVENANT OF GOOD FAITH PERFORMANCE

A. The LaPlantes Breached By Ending Their Search For Suitable Housing Weeks Before July 14.

New Hampshire recognizes an implied covenant of good faith performance where a contract "invest[s] one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value." *Centronics Corp. v. Genicom Corp*., 132 N.H. 133, 143 (1989). The purpose is to "exclude[] behavior inconsistent with...the parties' agreed-upon common purpose and justified expectations." *Id*. at 140.

As shown by the four *Centronics* factors below, the LaPlantes breached the implied covenant of good faith and fair dealing as a matter of law by ending their search for suitable housing before July 14.

1. Assuming the LaPlantes could have terminated the PSA, they maintained sufficient discretion to deprive the Shorts of the contract's value.

The parties never intended, as shown above, that the provision could allow the LaPlantes to cancel the PSA. For purposes of this claim, the Shorts assume the LaPlantes could have cancelled the PSA if their search for suitable housing was unsuccessful by July 14. After a stranger recommended it, the LaPlantes interpreted the provision this way. App. 90.

The trial court also found the LaPlantes believed their deadline to find suitable housing was July 14. Add. 51.

Under this interpretation, the LaPlantes' discovery of suitable housing, under their exclusive control, bore "directly on the purpose and expectations of the parties under the [PSA]." *See Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270, 293 (1992).

2. The parties intended the PSA to be binding.

As shown above, the PSA is an enforceable contract. App. 43 ¶ 21.

3. The LaPlantes unreasonably exercised their discretion by prematurely ending their search for suitable housing before July 14.

On June 5 – with July 14 more than five weeks away – the LaPlantes stopped looking for a new house to purchase. Tr. 167-68. The trial court erroneously found that "given their particular needs, the LaPlantes were justified in concluding that there was no reasonable likelihood they would find a suitable house by the July 14, 2018 deadline." Add. 52.

This is finding is unsupported by the record because the LaPlantes acknowledged they could have found suitable housing by July 14 if they continued looking. Tr. 168-69. This finding is also tainted by an error of law. When parties "expressly condition their performance upon the occurrence or non-occurrence of an event…the parties' bargained-for expectation of strict compliance should be given effect." *Renovest v. Hodges Dev. Corp*., 135 N.H. 72, 78-79 (1991). In *Renovest*, a buyer's obligation to perform was contingent upon a building inspection and financing. *Id*. at 74. The buyer's inspection revealed a crack in the foundation. *Id.* Believing it futile to seek financing, the buyer declined to pursue it further, and then declared the agreement terminated for a lack of financing. *Id*. at 74-75. The court held that the buyer "did not use all reasonable efforts to obtain financing" and thus breached the covenant. *Id*.

at 83; *see also Seaward Constr. Co, Inc. v. City of Rochester*, 118 N.H. 128 (1978) (in defending a claim for payment, the city could not rely on a lack of federal funds without also proving it exerted a good faith effort to obtain the funds); *Griswold v. Heat Inc*., 108 N.H. 119, 124 (1967) (a party with an explicit right to not act could not frustrate the other party's expectation of reasonable performance).

Overall, "[s]ubterfuges and evasions violate the obligations of good faith in performance even though the actor believes his conduct to be justified." *Livingston v. 18 Mile Point Drive, Ltd*., 158 N.H. 619, 625 (2009). Even if the provision could have allowed termination, the LaPlantes thwarted the reasonable expectation that their search for suitable housing would at least continue until July 14. The LaPlantes' failure to strictly comply with a condition precedent was inconsistent with the parties' purpose in entering into the PSA, and thus an unreasonable exercise of discretion.

4. The LaPlantes' abuse of discretion caused the Shorts harm.

The LaPlantes' unreasonable decision to stop looking for suitable housing more than five weeks before July 14 rendered impossible the Shorts' ability to obtain the benefit of their bargain.

In sum, the LaPlantes were precluded as a matter of law from ending their search for suitable housing before July 14. By doing so they breached the covenant of good faith performance.

VI. THE SHORTS SHOULD HAVE BEEN AWARDED THE REMEDY OF SPECIFIC PERFORMANCE

A. The Presumptive Remedy of Specific Performance May Only Be Denied For "Significant Equitable Reasons," Which Include Bad Faith, Impossibility, or Mistake.

The Shorts' sole requested remedy for their breach of contract claims is specific performance. The "unique character of real estate" renders damages in a breach of a land sales contract irreparable as a matter of law. *Jesseman v. Aurelio*, 106 N.H. 529, 532 (1965). When a buyer of real property proves a breach of contract, the default remedy of specific performance may only be denied because of "significant equitable reasons." *Chute v. Chute*, 117 N.H. 676 (1977). In *Chute,* the plaintiff proved his mother breached an agreement to sell him land, but the lower court denied specific performance after "balancing the equities." *Id.* at 677-78. This Court reversed and ordered the defendant to "convey the property to plaintiffs as specified in the agreement" because there were "no significant equitable reasons for refusing to grant specific performance." *Id.*

Since *Chute*, this Court has ordered specific performance because the record below contained no significant equitable reasons for denying it. In *Emerson v. King*, the trial court denied specific performance because it would "work an unconscionable result." 118 N.H. 684, 685, 687 (1978). This Court reversed, reasoning that: "There is no law or judicial power by which considerations of equity may reform contracts which are free from legal attack on the grounds of fraud or mistake." *Id.* at 689 (emphasis added). The *Emerson* Court affirmatively ordered specific performance: "The provisions of the deed on these facts must be specifically enforced." *Id.* at 690; *see also Hanslin v. Keith*, 120 N.H. 361, 362 (1980) (the "record reveals that there are no significant equitable reasons for refusing to grant specific performance."); *Erin Food Servs., Inc. v. Derry Motel, Inc*., 131 N.H. 353, 364 (1988) (there was "no evidence that this agreement was not

made at arm's length or was in any sense unconscionable or inequitable when made" and "[e]quity will not refuse specific performance of a bargain merely because it has proven unexpectedly advantageous to a plaintiff"); *Atl. Rest. Mgmt. Corp. v. Munro*, 130 N.H. 460, 465 (1988) ("we see no significant equitable reason for specific performance to have been denied in this case"); *Ferrero v. Coutts*, 134 N.H. 292 (1991) (denying specific performance when buyer was unable to finance the transaction).

B. No "Significant Equitable Reasons" Exist Which Could Deny an Award of Specific Performance.

The LaPlantes made no allegation that the Shorts engaged in bad faith before entering into the PSA. The Shorts demonstrated they are able to perform their contractual obligations. App. 38, 44, 94. The record reveals no "significant equitable reason" to rebut the presumption of specific performance as the remedy for the LaPlantes' contractual breaches. The trial court erred by not ordering specific performance as the remedy for the LaPlantes' contractual breaches.

VII. THE SHORTS SHOULD HAVE BEEN AWARDED THEIR ATTORNEY'S FEES FOR BEING FORCED TO DEFEND AGAINST THE LAPLANTES' BAD FAITH COUNTERCLAIM

One judicially-created exception to the rule that each party pays its own attorney's fees includes situations where one party is forced to litigate against another's "patently unreasonable" position. *Glick v. Naess*, 143 N.H. 172 (1998). "A claim is patently unreasonable when it is commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." *Id.*

A. The Trial Court Erred by Denying the Shorts' Claim On Unrelated Grounds.

The LaPlantes asserted a bad faith counterclaim seeking attorney's fees against the Shorts. They alleged that the Shorts' breach of contract

lawsuit after refusing to accept that the PSA was terminated on June 5 was in bad faith. App. 115, 125 at ¶ 53 (the LaPlantes "provided notice to [the Shorts] that they were exercising the [disputed provision] and terminating the PSA" on June 5), ¶ 54 (the Shorts "refused to accept the termination"), 127 at ¶ 63 (the Shorts "actions, as described above," "in light of the clear and unambiguous" provision were in bad faith). At trial, Ms. LaPlante affirmed these allegations: "We thought it was unreasonable, yes, that [the Shorts]…didn't accept the fact that we had cancelled the agreement" on June 5. Tr. 190-191.

The Shorts sought their attorney's fees because the LaPlantes had no factual or legal basis for claiming the Shorts acted in bad faith by not accepting that the PSA was terminated on June 5, and later initiating suit. The trial court denied the Shorts' claim, concluding that "[u]nder the circumstances, the LaPlantes were reasonable in interpreting the Disputed Provision as they did." Add. 54.[2] Denial on this basis was an unsustainable exercise of discretion because the LaPlantes' subjective interpretation of the provision had no bearing on the Shorts' attorney's fees claim. *Fat Bullies Farm, LLC v. Devenport*, 170 N.H. 17, 30 (2017) (reversal is warranted when there is no support for the trial court's determination).

Rather, the Shorts' claim was wholly grounded on the LaPlantes' patently unreasonable counterclaim. It had no legal or factual basis because the Shorts could not have acted in bad faith by refusing to "accept" a non-existent termination on June 5. The LaPlantes only asked the Shorts to agree to cancel the PSA on June 5, later allowed them to exercise their contractual inspection rights, and never declared the PSA terminated. App. 88, 90, 112. Further, the Shorts could not have in bad faith filed suit

[2] Relatedly, the trial court erred when it determined that the LaPlantes interpreted the provision as allowing them to cancel the PSA "if they were unable to find suitable housing by the" July 14 deadline. Add. 51. The LaPlantes had "no doubt" that the provision allowed them to cancel before July 14. Tr. 191, 132.

alleging that the parties never intended the provision to include termination rights. The LaPlantes (and their realtor) objectively never intended the provision to grant them termination rights until a stranger recommended they adopt such a belief. *See, e.g.,* App. 109, 129.

The Shorts should be awarded their reasonable attorney's fees for being forced to defend against the LaPlantes' counterclaim.

CONCLUSION

Plaintiffs Chad and Kelly Short respectfully request that this Court reverse the finding that no meeting of the minds occurred, and determine that they are entitled to the remedy of specific performance for the LaPlantes' breaches of the PSA, along with their reasonable attorney's fees and costs for the LaPlantes' patently unreasonable bad faith counterclaim.

REQUEST FOR ORAL ARGUMENT

Appellants request 15 minutes for formal argument. Attorney Gregory L. Silverman will present for Appellants.

RULE 16(3)(i) CERTIFICATION

Counsel certifies that the orders being appealed are in writing and appended to this brief.

Respectfully submitted,

CHAD AND KELLY SHORT

By their Attorneys,

/s/ Gregory L. Silverman
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Dated: July 31, 2020

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)–(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 9,491 words (including footnotes)[3] from the "Question Presented" through the "Conclusion" sections of the brief.

/s/ Gregory L. Silverman

Gregory L. Silverman

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on counsel for Appellees, Kate Mahan, Esq., via the court's electronic filing system on today's date.

Dated: July 31, 2020 */s/ Gregory L. Silverman*

Gregory L. Silverman

[3] The textual words total 8,919, and the words within the excerpts of Appendix documents pasted in the Brief total 572.

ADDENDUM

BRIEF OF PLAINTIFFS/APPELLANTS
CHAD AND CHELLY SHORT

CASE NO 2020-0113

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THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Chad Short, et al v John and Lori LaPlante as Trustees of the LaPlante Family Revocable Trust**
Case Number: **217-2018-CV-00422**

Enclosed please find a copy of the court's order of December 06, 2019 relative to:

ORDER

December 10, 2019

Catherine J. Ruffle
Clerk of Court

(485)

C: Gregory L. Silverman, ESQ; Kathleen M Mahan, ESQ

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

CHAD and KELLY SHORT

v.

JOHN and LORI LAPLANTE, as
TRUSTEES of the LAPLANTE FAMILY REVOCABLE TRUST

Docket No.: 217-2018-CV-00422

ORDER

The Court held a bench trial in this matter on August 27 and August 28, 2019. The Plaintiffs, Chad and Kelly Short ("the Shorts"), seek specific performance in connection with an alleged contract to purchase real estate from the Defendants, John and Lori LaPlante ("the LaPlantes"). The LaPlantes counterclaim for damages and attorney's fees. Following the trial, both sides submitted post-trial memoranda and responded to opposing memoranda. Upon consideration of the testimony at trial and the briefs submitted by both parties, the Shorts' request for specific performance is DENIED and the LaPlantes' request for damages and attorney's fees is also DENIED.

I. Background

In the early 2010s, the LaPlantes purchased the property that forms the subject of this litigation, 58 Hot Hole Pond Road in Concord. (H'rg at 262.) The LaPlantes moved into the Hot Hole Pond property with the intention to live on the property as long as they had the energy or ability to maintain it. (Id. at 103, 263.) Mrs. LaPlante, however, suffered from debilitating allergies caused mainly by birch and oak trees on

the property. (Id. at 103-105.) In 2017, Mrs. LaPlante's symptoms became so severe that she developed allergy-induced asthma, post-nasal drip, and itchy eyes. (Id. at 103, 204.) She could not physically remain on the Hot Hole Pond property at the height of allergy season. (Id.) Mrs. Laplante lied on the couch with cold packs on her eyes for extended periods and stayed in a hotel room in an unwooded area for part of the year. (Id. at 103-104, 204, 273.) Mrs. LaPlante sought treatment for her allergies, including steroid allergy shots, but the LaPlantes were not confident treatment would be effective. (Id. at 104, 273.) In the summer of 2017, the LaPlantes decided to sell the property. (Id. at 103, 263.)

The LaPlantes listed the property in the Spring of 2018 when the Shorts were looking to buy a house. (Id. at 9, 109.) At that time, the Shorts were working with their sixth realtor and viewing multiple properties. (Id. at 33.) The Shorts also performed their own online research, and they were receiving daily emails with automated search results for properties. (Id. at 35.) It was as a result of that online research that the Shorts came upon the Hot Hole Pond property. (Id. at 36.)

In the meantime, the LaPlantes were engaged in a home search of their own. (Id. at 110.) To ensure their next home would not have the same impact on Mrs. LaPlante's allergies, the LaPlantes set out to find a property with limited exposure to birch and oak trees. (Id.) Towards that end, Mrs. LaPlante developed a map identifying areas of the State with heavy birch and oak tree concentrations. (Id. at 113.) Given the nature of his employment, Mr. LaPlante's work imposed its own set of restrictions on a new property, namely a full, two bay garage to house large, dirty equipment. (Id. at 262.) The LaPlantes also needed space to park their two vehicles, so they looked for a

property with a four bay garage. (Id. at 119.) Over the course of several months, the LaPlantes viewed in excess of 100 properties online and visited 15-17 houses in person. (H'rg.) They also expanded the communities where they were looking for a house. (Id.) By late May, 2018, they had not found a home that met their highly specific search criteria. (Id.)

On May 24, the Shorts visited the Hot Hole Pond property for the first time. (Id. at 11, 36.) The Shorts were impressed by the build quality, the condition of the house, the wood floors, the pond, and the trails. (Id. at 13.) They decided to offer $690,000 that same day. After negotiations, both parties preliminarily agreed to the original $690,000 purchase price, a closing deposit of $10,000, and to the LaPlantes covering up to $7,250 towards closing costs. (Id. at 15.) Both parties agree the final contract had yet to be executed. (See id. at 20.)

On June 1st, the LaPlantes located Tidewater, a property by the seacoast. (Id. at 126, 265.) The LaPlantes initially had many concerns regarding whether the Tidewater property would suit their needs. (Id. at 126.) Later that day, the Laplantes, through their realtor, requested additional terms to the sale of the Hot Hole Pond property. The intent and understanding of this language is at issue in this matter. (Id. at 131.) The LaPlantes suggested two alternative terms, the first of which ("Option 1") read, "The closing of the house is contingent on the sellers finding suitable housing." (Id. at 130.) The alternative suggestion ("Option 2"), read, "If the buyers are uncomfortable with an open-ended agreement such as this, then we would request to have the option of paying them rent, whatever their mortgage cost comes to, for up to 60 days prorated." (Id.)

The Shorts interpreted the suggested language as a request by the LaPlantes for additional time to close on the Tidewater property. (Id. at 17.) Concerned that Option 1 had no deadline to close, the Shorts suggested an amendment, which read in part, "The closing of the house is contingent on the Sellers finding suitable housing within 60 days of the original closing date." (Id. at 18.) The Shorts maintain they did not contemplate that the LaPlantes could use this provision to back out of the purchase and sale agreement at any point in time. (Id.) About two hours later, the LaPlantes' realtor emailed that she "just sent the revised offer" back to the Shorts. (Id. at 19.) She added that the Shorts "just need[ed] to initial the change on page 5" and suggested the LaPlantes only wanted to change the date. (Id.)

In her communications with the Shorts' realtor, the LaPlantes' realtor referred to Option 1 as a "contingency" clause. (Id. at 248.) She suggested to the LaPlantes that they should add this language so they had the option to cancel the contract in case they could not find housing by a certain date. (Id. at 228.) The Disputed Provision, as included in the Purchase and Sale Agreement both parties signed on June 3, 2018, read "This agreement is subject to Sellers finding suitable housing no later than July 14, 2018." (Id. at 238.); (Defs.' Ex. E at 5.). The Shorts interpreted this provision to mean only that the LaPlantes could extend the closing date if they were unable to find suitable housing by July 14, 2018. (Id.) The LaPlantes, however, interpreted Option 1 as a mechanism that enabled them to back out of the contract altogether if they were unable to find suitable housing by that date. (Id. at 267-268.)

Also on June 3, 2018, the LaPlantes made an offer on the Tidewater property. (H'rg. at 127-128.) On June 4, 2018, the LaPlantes discovered the property's restrictive

covenants would not allow expansion of the garage. (Id. at 268-269.) The LaPlantes learned that all the homes they were considering were in plotted subdivisions with similar restrictions and reevaluated whether to continue their search. (Id. at 270) The LaPlantes also discussed that Mrs. LaPlante's allergy symptoms were not as severe as they had been at the same time the previous year and attributed the improvement to her medical treatment. (Id. at 273.) Consequently, the LaPlantes decided to exercise Option 1 and cancel their agreement with the Shorts. (Id.)

The Shorts interpreted the LaPlantes' attempt to cancel the contract as an indication that the LaPlantes had received a better offer and were canceling the agreement in violation of what they viewed as their executed contract. (Id. at 50, 53.) The Shorts then instituted this action.

II. Analysis

1. The Nature of the Parties' Agreement

"A valid, enforceable contract requires offer, acceptance, consideration, and a meeting of the minds." Durgin v. Pillsbury Lake Water Dist., 153 N.H. 818, 821 (2006). "The question of whether a meeting of the minds has occurred is analyzed under an objective standard and is a question of fact." Chase Home for Children v. N.H. Div. for Children, Youth & Families, 162 N.H. 720, 727 (2011). "The parties' subjective understanding of the. . . term[s]. . . is irrelevant;" "what matters is whether from an objective viewpoint the parties assented to the same" essential terms. Id. at 728. "Even though the parties manifest 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). An

essential term denotes "an indispensable condition"—one that "seriously affects the rights and obligations of the parties" or that is a "vitally important ingredient of their bargain." Behrens v. S.P. Constr. Co., 153 N.H. 498, 505 (2006) (citations and ellipses omitted). The Court "interprets a disputed term according to what a reasonable person" in the position of the parties "would expect it to mean under the circumstances." Id. at 502.

The Court finds the Shorts and the LaPlantes did not enter into a binding and enforceable contract for the purchase and sale of the Hot Hole Pond property. There was no meeting of the minds regarding the Disputed Provision because that provision was essential and both parties were objectively reasonable in their conflicting interpretations of the provision. Syncom Indus. v. Wood, 155 N.H. 73, 83, (2007) ("Because [the parties] reached no agreement on this essential term, there was no enforceable. . . agreement.").

The LaPlantes were objectively reasonable in interpreting the Disputed Provision as a "contingency" that allowed them to not go through with the purchase and sale agreement if they were unable to find suitable housing by the deadline set out in the agreement. First, a prior version of the provision had been amended specifically from stating that the "closing" is "subject to Sellers finding suitable housing" to stating that "[t]his Agreement is subject to Sellers finding suitable housing. . ." (H'rg at 130, 238.) (emphasis added). The change in language must reasonably be accompanied by a change in meaning or it would be rendered superfluous. It is reasonable in the context of the amendment to interpret "Agreement" as used in the signed version of the Disputed Provision to denote all contractual rights and obligations set forth in the written

purchase and sale document. The Disputed Provision by its terms makes the entire "Agreement"—not merely the closing—"subject to" the LaPlantes finding suitable housing. The LaPlantes' interpretation was also reasonable in light of their realtor's characterization of the provision as a means to not follow through the sale in case the Tidewater property did not meet their specifications.

Similarly, the Shorts were objectively reasonable in interpreting the Disputed Provision to mean the parties agreed only to a deferral of performance on the agreement in the event the LaPlantes were unable to find suitable housing by July 14, 2018. Further, "no later than" can be reasonably interpreted as an indication that the LaPlantes would continue to search for housing "until" July 14, 2018. After all, the Shorts had no reason to know of the highly specific criteria of the LaPlantes' search or the great number of properties the LaPlantes had already considered. However, the Court finds that, given their particular needs, the LaPlantes were justified in concluding that there was no reasonable likelihood they would find a suitable house by the July 14, 2018 deadline.

The Disputed Provision is material to the contract because answering whether the provision governs merely the date of closing or, rather, the date by which the contract may be terminated "seriously affects" the rights and obligations that the Shorts and the LaPlantes have with respect to one another. Behrens, 153 N.H. at 505. Accordingly, the Shorts and the LaPlantes did not enter into a contract for the purchase and sale of the Hot Hole Pond property because there was no meeting of the minds respecting the Disputed Provision. Any related claims for damages or interest arising from breach of contract must therefore be denied.

2. Breach of the implied covenant of good faith and fair dealing

Since there is no contract between the parties, there can be no breach of an implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing is a doctrine of contract law. Birch Broad. v. Capitol Broad. Corp., 161 N.H. 192, 198 (2010). There is no comparable duty of good faith and fair dealing in tort law and the Court construes non contractual claims of breach of the covenant of good faith and fair dealing as actions under contract. See Centronics Corp. v. Genicom Corp., 132 N.H. 133, 137 ("The trial court treated the covenant of good faith mentioned in count two as [a contractual] term said to have been breached under count one, and we will accept that."). Consequently, the Shorts' claim with respect to the covenant of good faith and fair dealing is denied.

3. Litigation costs and attorney's fees

Finally, the parties seek litigation costs. A litigant is not ordinarily entitled to collect interest, litigation costs or attorney's fees. See e.g., Emerson v. Town of Stratford, 139 N.H. 629, 633 (1995). However, litigation costs and attorney's fees are available to the prevailing party where opposing counsel acted (1) "in bad faith, vexatiously, wantonly, or for oppressive reasons," (2) "where the litigant's conduct can be characterized as unreasonably obdurate or obstinate," and (3) "where it should have been unnecessary for the successful party to have brought the action." Id. (quotations and citations omitted).

The LaPlantes contend they are entitled to attorney's fees citing, in relevant part, (1) to the Shorts' description of the litigation as "exciting," (2) to the Shorts' readiness to secure counsel before the LaPlantes contacted them regarding Tidewater on June 5,

2018, and (3) to their refusal to meet with the LaPlantes to resolve this dispute outside of court. (Defs.' Post-tr. Mem.) The Shorts contend the attorney's fees counterclaim by the LaPlantes is unmeritorious and is itself grounds for attorney's fees. (Pls.' Post-tr. Mem.) The Court finds that neither party displayed bad faith or vexatious, wanton, or oppressive motives.

The Shorts and the LaPlantes are not entitled to litigation costs or attorney's fees. Under the circumstances, the LaPlantes were reasonable in interpreting the Disputed Provision as they did. The Shorts, however, sought nothing more than to vindicate what they saw as their contractual rights to the Hot Hole Pond property. The Court finds their conduct also to be in good faith. Mr. Short's description of the litigation as "exciting" does not by itself establish that the Shorts brought this action in bad faith or otherwise improperly, and the Shorts did nothing wrong by securing counsel at an early stage given the magnitude of the transaction. The LaPlantes have not shown the Shorts refused to meet with them in advance of litigation because of improper motives and the refusal to meet does not rise to unreasonably obdurate or obstinate conduct meriting attorney's fees.

For the foregoing reasons, the Shorts' requests for relief are DENIED and the LaPlantes' requests for relief are similarly DENIED, except in so far as the LaPlantes request the denial of the Shorts' prayers for relief.

So Ordered.

DATED: 12/6/19

JOHN C. KISSINGER
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

FILE COPY

Case Name: **Chad Short, et al v John and Lori LaPlante as Trustees of the LaPlante Family Revocable Trust**
Case Number: **217-2018-CV-00422**

Please be advised that on January 23, 2020 Judge Kissinger made the following order relative to:

Plaintiffs' Motion for Reconsideration

"DENIED"

January 24, 2020

Catherine J. Ruffle
Clerk of Court

(485)

C: Gregory L. Silverman, ESQ; Kathleen M Mahan, ESQ

TITLE XXX
OCCUPATIONS AND PROFESSIONS

CHAPTER 331-A
NEW HAMPSHIRE REAL ESTATE PRACTICE ACT

Section 331-A:25-b

331-A:25-b Seller Agent; Duties. –

I. A licensee engaged by a seller or landlord shall:
(a) Perform the terms of the written brokerage agreement made with the seller or landlord.
(b) Promote the interests of the seller or landlord including:
(1) Seeking a sale, lease, rent, or exchange at the price and terms stated in the brokerage agreement or a price and terms acceptable to the seller or landlord except that the licensee is not obligated to seek additional offers to purchase the real estate while the real estate is subject to a contract of sale unless the brokerage agreement so provides.
(2) Presenting in a timely manner all offers and agreements to and from the seller or landlord, even if the real estate is subject to a contract of sale.
(3) Accounting in a timely manner, during and upon termination, expiration, completion, or performance of the brokerage agreement for all money and property received in which the seller or landlord has or may have an interest.
(4) Informing the seller or landlord that such seller or landlord may be liable for the acts of the principal broker and subagents who are acting on behalf of the seller or landlord when the licensee is acting within the scope of the agency relationship.
(5) Informing the seller or landlord of the laws and rules regarding real estate condition disclosures.
(c) Preserve confidential information received from the seller or landlord that is acquired during a brokerage agreement. This obligation continues beyond the termination, expiration, completion, or performance of the fiduciary relationship. Confidentiality shall be maintained unless:
(1) The seller or landlord to whom the information pertains grants written consent to disclose the information;
(2) The information is made public from a source other than the licensee;
(3) Disclosure is necessary to defend the licensee against an accusation of wrongful conduct in a judicial proceeding before a court of competent jurisdiction, the commission, or before a professional committee; or
(4) If otherwise required by law.
(d) Be able to promote alternative real estate not owned by the seller or landlord to prospective buyers or tenants as well as list competing properties for sale or lease without breaching any duty to the seller or landlord.
II. The duties of a licensee acting on behalf of a seller or landlord to a buyer or tenant include:
(a) Treating all prospective buyers or tenants honestly and insuring that all required real estate condition disclosures are complied with.

(b) The ability to provide assistance to the buyer or tenant by performing ministerial acts such as showing property, preparing offers or agreements, and conveying those offers or agreements to the seller or landlord and providing information and assistance concerning professional services not related to the real estate brokerage services. Performing ministerial acts for the buyer or tenant shall not be construed as violating the brokerage agreement with the seller or landlord, provided that agency disclosure has been given in writing to the buyer or tenant. Performing ministerial acts for the buyer or tenant shall not be construed as forming an agency relationship with the buyer or tenant.
(c) Disclosing to a prospective buyer or tenant any material physical, regulatory, mechanical, or on-site environmental condition affecting the subject property of which the licensee has actual knowledge. Such disclosure shall occur at any time prior to the time the buyer or tenant makes a written offer to purchase or lease the subject property. This subparagraph shall not create an affirmative obligation on the part of the licensee to investigate material defects.

Source. 1996, 196:9. 2008, 12:5, eff. Jan. 1, 2009.

TITLE XXX
OCCUPATIONS AND PROFESSIONS

CHAPTER 331-A
NEW HAMPSHIRE REAL ESTATE PRACTICE ACT

Section 331-A:25-c

331-A:25-c Buyer Agent; Duties. –

I. A licensee engaged by a buyer or tenant shall:
(a) Perform the terms of the written brokerage agreement made with the buyer or tenant.
(b) Promote the interests of the buyer or tenant including:
(1) Seeking real estate at a price and terms specified by the buyer or tenant except that the licensee is not obligated to seek other real estate for the buyer or tenant while the buyer or tenant is a party to a contract to purchase, exchange, rent, or lease that real estate unless the brokerage agreement so provides.
(2) Presenting in a timely manner all offers to and from the buyer or tenant on real estate of interest.
(3) Accounting in a timely manner, during and upon termination, expiration, completion, or performance of the brokerage agreement for all money and property received in which the buyer or tenant has or may have an interest.
(4) Informing the buyer or tenant of the laws and rules regarding real estate condition disclosures.
(c) Preserve confidential information received from the buyer or tenant that is acquired during a brokerage agreement. This obligation continues beyond the termination, expiration, completion, or performance of the fiduciary relationship. Confidentiality shall be maintained unless:
(1) The buyer or tenant to whom the information pertains grants written consent to disclose the information;
(2) The information is made public from a source other than the licensee;
(3) Disclosure is necessary to defend the licensee against an accusation of wrongful conduct in a judicial proceeding before a court of competent jurisdiction, the commission, or before a professional committee; or
(4) If otherwise required by law.
(d) Be able to introduce the same real estate to other prospective buyers or tenants without breaching any fiduciary duty to the buyer or tenant.
(e) Disclose to a prospective buyer or tenant any material physical, regulatory, mechanical, or on-site environmental condition affecting the subject property of which the licensee has actual knowledge. Such disclosure shall occur at any time prior to the time the buyer or tenant makes a written offer to purchase or lease the subject property. This subparagraph shall not create an affirmative obligation on the part of the licensee to investigate material defects.
II. The duties of a licensee acting on behalf of a buyer or tenant to a seller or landlord include:
(a) Treating all prospective sellers or landlords honestly.
(b) The ability to provide assistance to the seller or landlord by performing ministerial acts such

as showing property, preparing offers or agreements, and conveying those offers or agreements to the buyer or tenant and providing information and assistance concerning professional services not related to the real estate brokerage services. Performing ministerial acts for the seller or landlord shall not be construed as violating the brokerage agreement with the buyer or tenant, provided that agency disclosure has been given in writing to the seller or landlord. Performing ministerial acts for the seller or landlord shall not be construed as forming an agency relationship with the seller or landlord.

Source. 1996, 196:9. 2008, 12:6, eff. Jan. 1, 2009.

TITLE XXXIV-A
UNIFORM COMMERCIAL CODE

CHAPTER 382-A
UNIFORM COMMERCIAL CODE

ARTICLE 1
GENERAL PROVISIONS

Part 3
Territorial Applicability and General Rules

Section 382-A:1-303

382-A:1-303 Course of Performance, Course of Dealing, and Usage of Trade. –
(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.
(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as fact. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.
(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.
(e) Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade shall be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:
(1) express terms prevail over course of performance, course of dealing, and usage of trade;
(2) course of performance prevails over course of dealing and usage of trade; and
(3) course of dealing prevails over usage of trade.

(f) Subject to Section 2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.
(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

Source. 2006, 169:1, eff. Jan. 1, 2007.