

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**NO. 2008-0284**

**IN THE MATTER OF**

**SCOTT R. NASPINSKY AND DEBORAH A. NASPINSKY**

**V.**

**ENERGY SHIELD REALTY, INC.**

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**BRIEF OF APPELLANT, ENERGY SHIELD REALTY, INC.**

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    III.  The trial court erred in its finding that the Naspinskys met their burden of proof with regard to their claim of fraud by clear and convincing evidence, given that there was no evidence of intent and where the alleged fraud consisted of “concealing” information actually possessed by the Naspinskys.

    IV.  The Naspinskys got what they paid for when they purchased the Allens’ home for \$165,000.00 in 2001. The trial court erred in finding the Naspinskys suffered actual damages due to lack of evidence supporting their damages claim.

    V.   The trial court erred in finding that Rogers’ actions constituted a deceptive and/or unlawful or unfair act prohibited under RSA 358-A and a willful or knowing violation of said statute, where there was an absence of evidence of intent and where the “deceptive” act involved “concealing” information was in the possession of Plaintiffs and/or equally available to them.

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### **Questions Presented for Review**

1. Did the District Court err in finding that the Plaintiffs justifiably relied upon the representations of Leslie Rogers, given their concession that they were privy to the same information as Mr. Rogers?
2. Did the District Court err in finding that the Plaintiffs met their burden of proof with regard to their claim of fraud by clear and convincing evidence, wherein there was no evidence of intent and where the alleged fraud consisted of “concealing” information actually possessed by the Plaintiffs?
3. Did the District Court err in finding the Plaintiffs suffered actual damages of \$11,715.00, the cost of installing a new septic system, where the real estate sold for more than it had been purchased and there was no evidence otherwise supporting the claim?
4. Did the District Court err in finding that Leslie Rogers’ actions constituted a deceptive and/or unlawful or unfair act prohibited under RSA 358-A and a willful or knowing violation of said statute, where there was an absence of evidence of intent and where the “deceptive” act involved “concealing” information in the possession of Plaintiffs and/or equally available to them?

### Statement of the Case

Appellees Scott and Debra Naspinsky purchased a residence owned by Robert and Gail Allen in Canaan, New Hampshire (hereinafter “the property”) on or about May 23, 2001 (See *Defendant’s Submission of Additional Facts, p.1 at 1(L)*) for \$165,000.00. *See Id. at p.1, 1(n)*.

Appellant Energy Shield Realty, Inc., doing business as Century 21 Energy Shield Realty (hereinafter referred to as “Energy Shield”), was the sellers’ broker in the transaction. *See Trial Transcript. at p. 4, ll. 15-22*. The property had previously been listed by the Allens with the Staggs-Warren brokerage firm. *See Id. at p. 14, l. 18-19 – p. 15, l. 10*. A copy of Staggs-Warren’s file was transferred to Energy Shield when it was retained by the Allens in March of 2001. *See Id. at p. 4, l. 15 – p. 5, l. 1*. Leslie Rogers (“Rogers”) was the Energy Shield agent assigned to sell the property. *See Id. at p. 39, ll. 20-22 and p. 5, ll. 19-21*. While Rogers was a licensed broker at the time of the transaction, he had recently retired as a postmaster and was relatively inexperienced. *See Defendant’s Submission of Additional Facts, p. 1 at 1(a)*.

The property was listed by Energy Shield in the Real Estate Multiple Listing Service (MLS) for the Northern New England Real Estate Network (NNEREN) as a colonial style, four-bedroom residence. *See Trial Transcript, p. 6, ll. 7-23 and p.9, l.7 – p.10, l. 4*. It is located in a rural area and has a private well and septic system. *See Id. at p. 10, ll.5-9*.

Plaintiffs allege damage due to their reliance on the inexperienced broker’s erroneous description of the property as a four bedroom residence when, in fact, the septic was designed for only two bedrooms, requiring that the property be described as such.

However, prior to closing, the Naspinskys were provided with the correct information both actually and constructively. First, as noted above, they were actually provided with the Staggs-Warren listing that correctly represented the septic size, *i.e.*, a two-to- four bedroom

home with a two-bedroom septic system. *See Defendant's Submission of Additional Facts, p. 2 at 2(h) and Trial Transcript at p. 49, l. 23 – p. 50, l. 2.* Significantly, they were represented by their own buyer's agent, James Bull, who was also privy to the Staggs-Warren information. *See Id. at p. 37, ll. 9-17 and p. 47, ll. 16-19.* In addition, the Naspinskys hired their own home inspector and paid him *an additional fee* for a septic evaluation. *See Id. at p. 48, ll. 2-12. Most importantly, the seller actually informed their home inspector that the septic was limited to two bedrooms. See Defendant's Submission of Additional Facts, p.2 at 2(f).* Finally, the size of the septic system was a public record, available both at the local town hall and the Department of Environmental Services. *See Trial Transcript, p. 18, ll. 16-23.*

The Naspinskys lived in the home without incident until January of 2006. At that point they were listing the property for sale and were told by their broker, that the septic system was designed for a two-bedroom residence and could only be listed for sale as such. *See Id. at p. 40, ll. 3-10.* The Naspinskys installed a four-bedroom capacity septic system in May of 2006 and the subject property was sold in 2007 for \$265,000.00, a gain of \$100,000 over their purchase price five years earlier. *See Id. at p. 51, ll. 11-13, p. 36, ll. 4-5 and p. 51, l.22.*

Following the sale, the Naspinskys filed a Writ of Summons against Energy Shield<sup>1</sup> alleging negligent misrepresentation, fraudulent misrepresentation and violation of the Consumer Protection Act, RSA 358-A. The size of the septic system was undisputed at trial.

The trial was held on November 20, 2007. By Order dated March 14, 2008 (Clerk's Notice dated March 21, 2008) the Lebanon District Court (MacLeod, Jr., J.) found that the Naspinskys had carried their burden of proof on all counts of their declaration.<sup>2</sup> *See Order, p.4.*

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<sup>1</sup> Rogers had since left the area and was unavailable at trial, depriving Energy Shield of first-hand testimony regarding his conduct in the negotiation and sale of the home.

<sup>2</sup> . A large portion of the trial tape was lost, requiring the parties to attempt to re-create that part of the trial via Submissions of Additional Facts.

The trial court held that the Naspinskys' burden of proof with regard to their claim for fraud was met with clear and convincing evidence, that they justifiably relied upon Roger's representations, and that Rogers' misrepresentations were the proximate cause of their damages. See Order, p. 4-5. The court found damages of \$11,715.00, the cost of the new septic system.

Additionally, it was held that Rogers' actions constituted a deceptive and/or unlawful or unfair act prohibited by RSA 358-A and a willful and knowing violation of the statute. See Order, p. 5. The court awarded double damages and judgment was entered for the plaintiffs for \$23,430.00 plus costs, interest and attorney's fees. See Order, p.5. This appeal followed.

### **Summary of Argument**

The trial court erred in finding the Naspinskys met their burden of proof of fraud by clear and convincing evidence in that there was no evidence of Roger's intent and, further, the evidence was directly contrary to the finding of the Naspinsky's reliance upon Roger's "representations" in the listing. The fraud consisted of "concealing" information in their possession (the Staggs-Warren listing), in their buyer's agents' possession (the Staggs-Warren listing), in their septic inspector's actual knowledge and that was a matter of public record.

It is impossible to square a finding of reliance on only one of two conflicting documents when they possessed both. That is, the court found reliance upon the Rogers listing agreement despite the fact that they, and their broker, had differing information in the Staggs-Warren listing. Notably, it was that very same Staggs-Warren listing ignored by the trial court that was relied upon by the Naspinsky's broker when informing them of the actual size of the system in 2006 triggering the litigation.

Most elementally, the error was expressly corrected by the owner's conversation with the buyer's septic designer. *See Defendant's Submission of Additional Facts, p. 2 at 2(f)*. Accordingly, it is impossible to find that the Naspinskys and their agents justifiably relied on one document given the wealth of conflicting information in their actual and constructive possession.

The trial court erred in finding actual damages of \$11, 715.00 (the cost of the new septic system) when the property sold for significantly more than its original purchase price. *See Trial Transcript at p. 51, l. 22*. The Naspinskys are, in essence, attempting to benefit from both ends of the bargain. They claim that they would have "discussed the price" for the house with a two-bedroom septic system, but provided no testimony upon which the court could have found that

the price paid was excessive for what they received. Accordingly, there is no basis upon which to find that they were damaged.

In addition, the Court awarded reimbursement for the costs of the improved septic system, ignoring the obvious gain realized in a sale of a home with a brand new septic system. *See Id. at p. 39, ll. 12-19.* That is, the Court is requiring defendant to pay the costs of the improvement to the home while allowing the plaintiffs to reap the benefit of that improvement.

The trial court also erred in its finding that Rogers' actions constituted a willful and knowing violation of the Consumer Protection Act due to the absence of evidence regarding his actual intent and knowledge when making the representations to the Naspinskys.

## Appellant's Argument

### I. Standard of Review

The trial court's findings and rulings shall not be upheld when the appealing party establishes that the trial court's decision lacks evidentiary support or is legally erroneous. *Green v. Sumner Properties, LLC*, 152 N.H. 183, 184 (2005). This Court shall "defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given to the evidence." *Id.*

### II. The Trial Court Erred in Finding the Naspinskys Justifiably Relied Upon Rogers' Representation.

In order to establish fraud, it must be proven that the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth, with the intention to cause another to rely upon and justifiable reliance thereon. *Snierson v. Scruton*, 145 N.H. 73, 77 (2000). Negligent misrepresentation similarly requires justifiable reliance by the plaintiff. *Snierson*, 145 N.H. at 78.

The evidence at trial clearly negates the Naspinskys' assertion that they justifiably relied upon initial verbal representations of Rogers to their detriment. They conceded that they were handed the very same Staggs-Warren documentation that Rogers possessed, hired their own buyer's agent and hired their own home/septic inspector to represent their interests in the inspection and purchase of the property. Even if the Naspinskys credibly claimed to have disregarded the identification of the two-bedroom septic system in the Staggs-Warren documentation, their agents had actual and constructive knowledge which is imputable to them. *Invest Almaz v. Temple-Inland Forest Products Corporation*, 243 F.3d 57 (2001).

Mrs. Naspinsky testified that she relied on an alleged statement made by Rogers to disregard the Staggs-Warren documentation, however, she saw the documentation and asked no questions - of Rogers, her broker or her home inspector - regarding the discrepancy between the Energy Shield MLS listing indicating “a four-bedroom home” and the “two to four bedroom home with a two bedroom septic system” indicated in the Staggs-Warren listing. *See Id. at p. 46, ll. 6-23, p. 47, l.1 and p. 49, ll. 2-4.* While she may have had no individual duty to investigate the statement made by Rogers, she hired professionals in the industry to inspect and represent the couple’s interests and those agents had actual knowledge, both written and verbal, of the error. The undisputed evidence demonstrates that Mr. Allen, the seller, walked the property with the Naspinskys’ home inspector and expressly discussed the two-bedroom septic system with the inspector. *See Defendant’s Submission of Additional Facts, p. 2 at 2(f).* Mr. Allen was not a party to the action and had no bias for or against either of the parties. In light of Mr. Allen’s disclosure of the two-bedroom septic system to plaintiffs’ agent, any “reliance” cannot be justifiable.

### III. The Trial Court Erred in Finding Clear and Convincing Evidence of Fraud.

Fraud will never be presumed; it must be established by clear and convincing proof and will not be implied from doubtful circumstances. *Burroughs v. Wynn*, 117 N.H. 123, 125 (1977).

Rogers was a new, inexperienced agent, no longer employed by Energy Shield. (*Trial Transcript, p. 7, ll. 18-22*). He had moved out of state and was, therefore, not available for trial. There was no direct evidence presented at trial as to Rogers’ intent when he created the listing without reference to the two-bedroom septic system and that fact is at least equally consistent with honest error as it is with intentional act. Given the equality of options, it is impossible to

find a determination “clearly and convincingly.” In fact, given his inexperience and the fact that Rogers provided plaintiffs with the “smoking gun” copy of the prior Staggs-Warren listing, these are most clearly the “doubtful circumstances” envisioned by *Burroughs, supra*.

#### IV. Plaintiffs’ Evidence Did Not Support A Finding of Damages.

A person who claims damages has the burden of proving that the damages were, in fact, suffered, and that they were caused by the wrongful conduct of another. *Johnston v. Lynch*, 133 N.H. 79, \_\_\_ (1990).

*Undisputed* trial testimony from Mr. Allen demonstrated that, in his opinion, the asking price for the home was such that it reflected a two-bedroom septic system. *See Defendant’s Submission of Additional Facts, p. 2 at 2(k)*. In addition, William Sahlman testified that he believed that the property’s selling price was considerably less compared to four bedroom homes Energy Shield sold in 2001. *See Id., p. 2 at 1(o)*. While three other realtors testified for the Naspinskys during trial, none of them gave an opinion of the fair market value of the subject property in 2001. So, if the only evidence is that the plaintiffs obtained the benefit of their bargain, there can be no finding of damage even in the unlikely event that the other prongs of their claims were met.

While they purchased a four-bedroom home with a two-bedroom septic system in 2001, that is not what they sold. In 2007, they sold a four-bedroom home with a brand new four-bedroom septic system.

Given the appreciation in the property value, and the absence of any opinion itemizing the reasons for that appreciation, there was an absence of evidence upon which to base a finding of damage. In other words, it is equally likely that at least a part of their gain was due to the new septic, and, having reaped that value, the plaintiffs are not damaged. The state of the evidence is

such that the \$11,715.00 incurred to install a new septic system could just as likely resulted in a view by the market as an improvement to the property that increased its value. Again, Energy Shield should not be responsible for paying for the upgrade but be deprived of the benefit of same.

V. The Trial Court Erred in Finding that Rogers' Actions Violated RSA 358-A.

“It should be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state.” NH RSA 358 – A:2.

“If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount.” NH RSA 358-A:10.

The context for this count must include the inexperience of the realtor. As noted above, his production of the “correct” Staggs-Warren listing does not comport either with an intent to deceive or with any other nefarious intent. It is, rather, consistent with simple error and, as such, falls outside of the strictures of 358-A. Likewise, there was no direct evidence presented at trial that Rogers' willfully or knowingly violated the statute.

Add to this context the wealth of other “correct” information actually possessed by the plaintiffs, as opposed to the one erroneous document, and it becomes apparent that application of the significant penalties of 358-A in these circumstances transforms the statute from a deterrent to fraud into a draconian trap door for the unsophisticated. This is particularly so where there is no evidence of damages.

In its decision, the trial court noted that “Leslie Rogers's representations regarding the number of bedrooms in the subject property were integral to the plaintiffs' decision to purchase of the residence, and they justifiably relied upon those representations to their detriment and

damages.” This assessment of the Naspinskys’ decision to purchase the property is however, contrary to the evidence presented. The number of bedrooms has never been disputed; the claim rested solely upon the capacity of the septic system. *See Id., p. 38, ll. 8-13.*

Testimony showed that neither the Allens nor the Naspinskys had any problems with the two-bedroom septic system throughout the time of their respective use and ownership of the property. *See Defendant’s Submission of Additional Facts, p. 2 at 2 ( c ) and Trial Transcript, p. 48, ll. 18-21.* Whether or not the existing septic system could support the Allen household or the Naspinsky household was not an issue at trial. The issue was simply how the Naspinsky’s could market the house - as a “two-to-four bedroom with a two bedroom septic” or as a “four bedroom.” The court had no evidence of the distinction between those marketing strategies because what was marketed was a “four bedroom *with a brand new septic system.*”

### **Conclusion**

Because any reliance by plaintiffs was not justifiable, because there was no clear and convincing evidence of Rogers’ intent in the listing error and because there was no evidence supporting a damages claim, the decision of the trial court must be overturned.

Finally, given the trial court’s reliance on the sufficiency of the earlier counts in finding a violation of the Consumer Protection Act, their failure similarly undercuts the sufficiency of that count. The state of the evidence - or lack thereof - convincingly demonstrates that the trial court’s decision represents an unjustified windfall for the plaintiffs and must be reversed.

**Statement regarding Oral Argument**

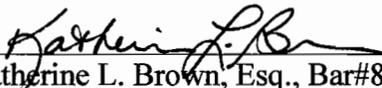
Energy Shield Realty, Inc. requests oral argument, to be presented by Lawrence B. Gormley, Esquire.

Respectfully submitted,

ENERGY SHIELD REALTY, INC.

HOEFLE, PHOENIX, GORMLEY & ROBERTS, P.A.

Dated: 10/19/09

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief of the Appellant has been mailed this 19th day of October 2009 to:

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Case Name: **Scott Naspinsky v. Energy Shield Realty, Inc.**  
Case Number: **452-2007-CV-00037**

Diane M. Carroll, Clerk of Court

(0077)

C: Bradford T. Atwood, ESQ

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STATE OF NEW HAMPSHIRE  
LEBANON DISTRICT COURT

GRAFTON, SS

Docket No. 07-CV-37

Scott R. Naspinsky and Deborah A. Naspinsky

v.

Energy Shield Realty, Inc.

DECREE

This matter was before the court for a bench trial on the plaintiffs' tort claims of common law fraud and negligent misrepresentation. The plaintiffs also claim that the defendant's actions constitute a violation of the New Hampshire consumer protection statute. The plaintiffs appeared and were represented by the law firm of Clauson, Atwood & Spaneas. The defendant was represented by the firm of Hoefle, Phoenix & Gormley. Testimony was given by the parties and several other witnesses. Numerous documents were admitted into evidence as well. The court took the matter under advisement and now finds and rules as follows:

The plaintiffs are married and have children. On or about May 23, 2001 they purchased a residence then owned by Robert and Gail Allen situated on Grafton Turnpike Road in Canaan, New Hampshire (sometimes hereinafter referred to either as the "Allen property" or the "subject property"). The purchase price was \$165,000.00.

The defendant, doing business as Century 21 Energy Shield Realty, was employed as the Allens' real estate broker when the subject property was purchased by the plaintiffs. The defendant has offices in Lebanon, New Hampshire and other locations in New Hampshire and Vermont. The subject property had been listed for sale by the Allens previously with a brokerage firm named Staggs-Warren Associates, which is located in Enfield, New Hampshire. A copy Staggs-Warren's entire file was transferred to the defendant when it was retained by the Allens in March of 2001.

Leslie Rogers was the agent assigned by the defendant to sell the Allen property. The defendant's president, William Sahlmann, testified that Mr. Rogers

was a New Hampshire licensed real estate broker at the time of the transaction. Mr. Rogers is no longer employed by the defendant. He was supervised in 2001 by the defendant's sales manager, William Warrior. Neither Leslie Rogers nor Mr. Warrior testified. William Sahlmann was not directly involved with the sale of the Allen property, and his knowledge regarding the transaction arises primarily from his review of the defendant's records.

Consistent with the Allens' exclusive listing agreement with the defendant, the subject property was described in the real estate Multiple Listing Service (MLS) for the Northern New England Real Estate Network (NNEREN) as a Colonial style four bedroom residence. (See plaintiffs' Exhibit 1) The subject property is located in a rural area and has a private well and septic system. Prior to purchasing the Allen property, the plaintiffs, acting through their broker, Re/Max Group One, had contacted the defendant after reviewing the MLS information on the subject property and driving by the residence.

The plaintiffs were interested in the subject property and testified credibly that they specifically informed Leslie Rogers that they were seeking a four bedroom home to accommodate their family. The court finds that the plaintiffs relied upon Mr. Roger's representations to them regarding the size and bedroom capacity of the Allen residence. The plaintiffs encountered some competition for the home from another potential buyer, which resulted in their having to pay more than the \$159,000.00 listing price to purchase the property.

The gravamen of the plaintiffs' complaint is not that the Allen residence did not have four bedrooms as advertised, but that it did not have a state approved septic system with the capacity to lawfully serve a four bedroom residence at the time they purchased the property. This fact is undisputed.

Scott Naspinsky is a physician and officer with the United States Air Force. In January 2006 he was transferred for duty in Alaska. In preparation for listing the subject property for sale before moving, the plaintiffs consulted with Vanessa Stone Real Estate, LLC to complete a so-called Broker's Price Opinion or "BPO." Vanessa Stone had been employed as a real estate agent with Staggs-Warren Associates

previously and coincidentally had been assigned to sell the subject property for the Allens before they retained the defendant in 2001. Upon completing some initial research, including consulting the municipal records for the Town of Canaan, Mrs. Stone informed the plaintiffs that the septic system serving the property was designed and approved for a two bedroom residence and could only be listed lawfully for sale as such. The credible evidence is that this same information had either been discovered by Mrs. Stone in 2001 or was given to her by the Allens and was included with the information provided to the defendant in the Staggs-Warren client file. (See plaintiff's Exhibit 1)

Robert Allen testified during the defendant's case-in-chief that he and his wife had constructed the subject property in 1982 as a 1½ story, two bedroom Cape Cod style home. A state approved two bedroom septic system with a 1,000 gallon tank was installed on the property in 1983. Mr. Allen testified that he and his wife purchased an adjacent ½ acre lot in 1988. They added two bedrooms to accommodate their growing family but did not increase the capacity of the septic system as it had never failed or malfunctioned. Mr. Allen also testified that he specifically told Leslie Rogers that the subject property had only a two bedroom septic system, and that he also provided him with copies of the same documents pertaining to the real estate that he had given to Staggs-Warren previously. In Mr. Allen's opinion the 2001 listing price for the subject property reflected its actual value at that time, despite having just a two bedroom capacity septic system.

The foregoing notwithstanding, Robert Allen testified that he did not remember reviewing the defendant's MLS information relative to the subject property and had no knowledge of what Leslie Rogers told the plaintiffs about the real estate. Likewise, Mr. Allen also had no memory of discussing the capacity of the septic system with the plaintiffs at their closing or at any other time, but insisted that he did reveal limited capacity of the system to the plaintiffs' home inspector. Mr. Allen acknowledged during his cross-examination that he had exaggerated the septic tank capacity at 1,200 gallons in his listing agreement with the defendant but suggested that it was an innocent mistake on his part. He also acknowledged at the

close of his direct testimony that he first learned of the controversy about the septic system from his lawyer after being sued in 2006.

Before the plaintiffs could lawfully list and sell the subject property through Coldwell Banker in 2006, they were required to install a New Hampshire approved four bedroom capacity septic system. The redesigned system was completed in May 2006. The court finds that the total expense for the new system, including design fees and construction costs, was \$11,715.00. The subject property was eventually sold by the plaintiffs in 2007 for \$265,000.00 after they had departed for Alaska.

Four licensed New Hampshire real estate brokers testified, including William Sahlmann and Vanessa Stone. With the exception of one, all were actively selling real estate in the Upper Valley area in 2001. All four agreed that it is easier to sell a four bedroom than a two bedroom home in the Upper Valley market. They all agreed that four bedroom residences were generally more valuable than two bedroom homes, but they disagreed as to the extent.

There was no evidence given by any of the realtors regarding other issues that might result in a difference in value between four and two bedroom properties, such as location, age, style or construction materials. None of the four realtors gave an opinion of the fair market value of the subject property in 2001 with the exception of William Sahlmann. He believed that the property was sold to the plaintiffs at its fair market value at that time.

Deborah Naspinski testified that the plaintiffs have sustained damages between \$50,000.00 and \$70,000.00. She stated that the plaintiffs may have attempted to purchase the subject property in 2001 if they had known about its lack of septic capacity, but would have offered less money. She suggested that the delay in selling the subject property occasioned by having to install a new septic system caused them to accept a reduced sale price in a declining real estate market. Scott Naspinsky gave no specific evidence regarding damages.

Having weighed the credible evidence presented, the court finds that the plaintiffs have carried their burden of proof on all counts of their declaration. The plaintiffs' burden of proof with regard to their claim of fraud is by clear and

convincing evidence. The credible evidence is that Leslie Rogers had actual knowledge that subject property was served by only a two bedroom capacity septic system, but that he nevertheless listed the property as a four bedroom residence without reference to the substandard waste disposal system. The court finds the plaintiffs' testimony credible that Leslie Rogers told them to disregard the septic system information received from Staggs-Warren.

Leslie Roger's representations regarding the number of bedrooms in the subject property were integral to the plaintiffs' decision to purchase of the residence, and they justifiably relied upon those representations to their detriment and damage. In the end, the plaintiffs did not receive what they bargained for, and Mr. Roger's misrepresentations were the proximate cause of the position taken by plaintiffs in reliance thereon.

The defendant corporation is responsible for its agent's acts and liable for the plaintiffs' damages under the doctrine of *respondeat superior*. See Trahan-Laroche v. Lockheed Sanders, 139 N.H. 483 (1995).

While the plaintiffs' claims with regard to liability are evident from the evidence, the extent of their actual damages is less so. Having weighed the evidence presented, the court finds and rules that the plaintiffs' actual damages as proven are the \$11,715.00 costs incurred for installing a new septic system.

The plaintiffs' remaining claims for damages either unproven or are to speculative to permit recovery on the state of the evidence presented.

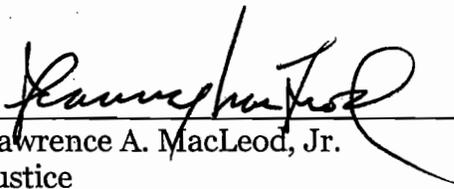
The court holds that the defendant's actions as hereinabove found constituted a deceptive and/or unlawful or unfair act prohibited under RSA 358-A and a willful or knowing violation of said statute. As such, at least double damages, costs and attorney's fees must be awarded. See RSA 358-A:10 I. See also Snierson v. Scruton, 145 N.H. 73 (2000).

Judgment is entered for the plaintiffs in the sum of \$23,430.00, plus costs, interest and attorneys' fees.

The plaintiffs shall submit a taxation of costs and fees to the court for its review within 30 days of the date of the Clerk's notice of decision.

The plaintiffs' requests for rulings of law are granted.

SO ORDERED, this 14<sup>th</sup> day of March 2008.

  
Lawrence A. MacLeod, Jr.  
Justice

STATE OF NEW HAMPSHIRE  
LEBANON DISTRICT COURT

GRAFTON, SS

Docket No. 07-CV-37

Scott R. Naspinsky and Deborah A. Naspinsky

v.

Energy Shield Realty, Inc.

ORDER

RECEIVED

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BY 37

This case is before this court pursuant to an order of remand issued by the New Hampshire Supreme Court on July 9, 2008 "for the limited purpose of allowing the trial judge and counsel to reconstruct the record of the hearing, to the extent possible." Supreme Court Case No. 2008-0284.

On or about September 23, 2009 the parties executed a stipulation for the purpose of effectuating the Supreme Court's order. The stipulation was approved by this court on October 2, 2008. Thereafter, both parties filed submissions of additional facts with this court in March 2009. Having reviewed the parties' pleadings and its trial notes, the court makes the following rulings:

1. The plaintiff's pleading entitled Plaintiffs' Memorandum of Additional Facts Not in Available Tape Recording of Final Hearing dated March 18, 2009 is approved. Those portions of the plaintiffs' memorandum identified as answers by Messrs William R. Sahlman, Robert Allen and Scott R. Naspinsky to questions posed by counsel for the parties are found by this court to accurately reflect said witnesses' trial testimony and are deemed to be a portion of the court's trial record.

2. The defendant's pleading entitled Defendant's Submission of Additional Facts Regarding Missing Trial Testimony of William Sahlman and Robert Allen, paragraphs 1 and 2 (including all lettered subsections) dated March 23, 2009 is found by this court to accurately reflect said witnesses' testimony and is deemed to be a portion of the court's trial record.

3. In addition to any and all other testimony in this case, the court finds further, based upon its contemporaneously compiled trial notes, that William

00020

Sahlman also testified on direct examination that a buyer's broker will typically rely to some unspecified degree upon the seller's broker for accurate information regarding the real estate which his or her client is contemplating purchasing. Mr. Sahlman also testified during cross-examination that he could not say that the defendant's 2001 list price for the Robert Allen property accurately reflected the property's true value with only a two bedroom septic system.

SO ORDERED, this 5<sup>th</sup> day of June 2009.



Lawrence A. MacLeod, Jr.  
Special Justice

GRAFTON, SS.

STATE OF NEW HAMPSHIRE

LEBANON DISTRICT COURT

Docket Nos. 452-2007-CV-00037

SCOTT R. and DEBORAH A. NASPINSKY

v.

ENERGY SHIELD REALTY, INC.



**PLAINTIFFS' MEMORANDUM OF ADDITIONAL FACTS**  
**NOT IN AVAILABLE TAPE RECORDING OF FINAL HEARING**

NOW COME Plaintiffs, Scott R. and Deborah A. Naspinsky, by and through counsel, Clauson Atwood & Spaneas, and respectfully offer the following memorandum of additional facts not available in the tape recording of the final hearing. These additional facts are taken from Attorney Atwood's contemporaneous trial notes of witness testimony.

**William R. Sahlman:**

[William R. Sahlmann first testified on direct examination as part of the Plaintiffs' case. A portion of his direct testimony was cut off. Mr. Sahlmann later testified as part of the Defendant's case. There, his direct testimony and cross-examination are all missing from the Court's tapes. The following additional facts taken from Attorney Atwood's trial notes are of the missing portions of Mr. Sahlmann's testimony. The balance of Mr. Sahlmann's testimony was recorded.]

**Direct Examination by Attorney Clauson:**

- Q. Was it acceptable that the buyers only got the Listing Sheet as a 4-bedroom home, but not the DES Approval for a 2-bedroom home?  
A. "No. The true file has multiple copies."
- Q. Would you assume that the buyers would have gotten a 4-bedroom listing sheet and the 2-bedroom DES Approval?  
A. "Yes."

- Q. Do you agree that if the DES Approval was hidden, it was fraud? If Les Rogers did not disclose the 2-bedroom DES Approval, isn't that defrauding these buyers?

A. "It would have been a mistake, but not fraudulent."

- Q. Did you provide the buyers with all documents that Staggs-Warren or Vanessa Stone provided to Century 21?

A. "Yes."

Before it listed the house for sale, Century 21 received the 2-bedroom DES approval from Staggs-Warren, which had the prior listing. Century 21 got it when they started the listing.

- Q. Do you agree that the Staggs-Warren listing shows a 2-bedroom approval system?

A. "Yes."

We wouldn't normally give someone another broker's listing sheet. Les might have made a mistake. His supervisor had 15 years experience. Les Rogers followed the policy of the company.

- Q. Who was the Naspinskys' broker in 2001?

A. "James Bull with ReMax."

- Q. Was the DES Operational Approval given to everyone?

A. "I don't know. I can only assume that it was. I don't have a single piece of evidence that we did."

He does not know why it was listed as a 4-bedroom home, but only had a 2- bedroom septic approval.

- Q. Would the house command a better price if it had a 2-bedroom septic system?

A. "Yes."

- Q. Would you get a higher commission if it sold as a 4-bedroom?
- A. "Yes, but I think it was undervalued as a 2-bedroom."
- Q. If Rogers disclosed the house as a 4-bedroom home, but did not disclose the 2-bedroom septic approval, would that violate rules for real estate brokers in New Hampshire?
- A. Not in 2001. Yes, in 2005.
- Would this have violated New Hampshire broker rules regarding misleading advertising?
- A. "Yes."

[No Cross-Examination at this time.]

Direct Examination by Attorney Brown as Part of Defendant's Case:

- Q. Are you licensed in home construction?
- A. "No."
- Q. Have you received awards?
- A. "Yes."
- 2000 - Home Builder of the Year in New Hampshire.  
2003 - Realtor of the Year in the Upper Valley.
- Q. How did Les Rogers come to work at Century 21?
- A. He had been the Postmaster in Enfield Center. He wanted to get his real estate broker's license.
- Rogers was part-time in 2001. He left to work for ReMax. He worked 9-10 months at Century 21. I had no problems with his work. He was supervised by a guy with 15 years experience. Anal about paperwork.
- Q. Were you aware of any misrepresentations by Les?

- A. "No."
- Q. Where were State septic approvals filed?  
A. The DES and Town of Canaan.
  - Q. Can anyone look at the records at the town hall?  
A. "Yes."
  - Q. Was there a seller disclosure statement?  
A. "Yes."
  - Q. Did the agent participate in preparing it?  
A. "No."
  - Q. James Bull - what was his role?  
A. He represented the Naspinskys. He had an obligation of due diligence.
  - Q. Were you aware of a home inspection by the Naspinskys?  
A. "Yes."
  - Q. The house sold for \$165,000, but was only listed at \$159,000. Why pay more?  
A. Bidding war.
  - Q. Did the listing at \$159,000 reflect the price of a 2-bedroom house?  
A. It was below market value.
  - Q. Did you meet with Bob Allen?  
A. "Yes." In 2006.
  - Q. What did you say to Bob Allen?

A. Sued by Naspinskys.

I'd give them back their money plus interest.

- Q. Defendant's Exhibit A (4/21/2006 MLS sheet on Naspinsky listing at \$315,000.)

A. 4-bedrooms on MLS.

Cross-Examination by Attorney Clauson:

- Q. The 2006 MLS sheet says "4 BR home" just like your listing sheet in 2001, right?

A. "Yes."

- Q. Is it your testimony that claiming this was a 4-bedroom home in 2001 when you have a septic approval listing it as a 2-bedroom home was honest?

A. "Yes."

Robert Allen:

[Robert Allen testified as part of the Defendant's case. None of his testimony was recorded. The following additional facts are taken from Attorney Atwood's trial notes.]

- Resides in Marlow, New Hampshire. Works as a construction superintendent.
- The home was built in 1982 as a 1 ½ story Cape. Brent Stevens designed the septic system in 1982. Difficulties with ledge.
- 2-bedroom septic system in 1982 designed for 750 gallon tank. Went with 1,000 gallon tank.
- Enlarged the home in 1990. Received building permit from Town of Canaan. Purchased additional ½ acre lot later and annexed it to the house lot.
- Walked the lot with the Naspinskys' home inspector.

- Q. Did you list with Staggs-Warren prior to Century 21?
- A. "Yes."
- In 2001, there were 6 people living in the house. The septic system never failed.
- The Allens hired Century 21 / Les Rogers to list the house after Staggs-Warren.
- He provided Century 21 / Les Rogers with the same documents we gave to Staggs-Warren.
- He gave Century 21 / Les Rogers the 2-bedroom septic system approval.
- He told Les Rogers that the house had a 2-bedroom septic system. The asking price reflected this.
- Q. Did you speak to the home inspector?
- A. Yes. He said it was a 2-bedroom.

Cross-Examination by Attorney Clauson:

- He provided the broker with the 2-bedroom septic approval.
- He knew it was a 2-bedroom septic approval.
- Staggs-Warren previously had the listing for 6-12 months. He agrees that the Staggs-Warren listing ran from January 2000 to February 28, 2001.
- He was not aware of the Century 21 listing. "I did not see the listing. I'm not sure if I'd known it was for a 4-bedroom home."
- The house was listed by Staggs-Warren for 1 year and 2 months without selling it.
- Century 21 sold the house less than one month after it listed it as a 4-bedroom home.
- He did not know whether Century 21 disclosed the house to the Naspinskys as having a 2-bedroom septic system approval.

- He made it clear to both Staggs-Warren and Century 21 that the house only had a 2-bedroom septic system approval.
- He did not recall whether he told the Naspinskys that the house had a 2-bedroom septic system approval.
- He disclosed a 1,000 gallon tank to Staggs-Warren.
- He disclosed a 1,200 gallon tank to Century 21. The actual size was 1,000 gallons.
- He has no recollection whether he disclosed that it was a limited 2-bedroom septic system.
- He was unaware that Rogers disclosed the septic system.

Re-direct Examination by Attorney Brown:

- The house was listed by Century 21 for \$159,000.

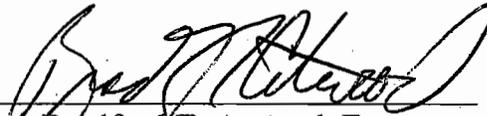
Scott R. Naspinsky:

[Scott R. Naspinsky testified as part of the Plaintiffs' case. A portion of his direct testimony was cut off. There was no cross-examination. The following additional facts are taken from Attorney Atwood's trial notes. The balance of Major Naspinsky's testimony was recorded.]

- Q. "Did they [Century 21] give you the Operational Approval that was in their file for a 2-bedroom septic system?"
  - A. "No."
- Q. Did Century 21 give you the prior Staggs-Warren listing?
  - A. Les Rogers specifically told us to "ignore" and "disregard" the old Staggs-Warren listing sheet; "his information was correct." The Staggs-Warren listing was "just for the photograph." Les Rogers said it was "for the photo only."

RESPECTFULLY SUBMITTED,  
Scott R. and Deborah A. Naspinsky  
By their counsel,  
CLAUSON ATWOOD & SPANEAS

Date: 3/18/2009

By:   
Bradford T. Atwood, Esq.  
N.H. Bar #8512  
10 Buck Road  
Hanover, NH 03755  
(603) 643-2102

CERTIFICATION

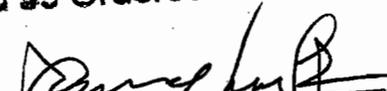
I do hereby certify that the foregoing was mailed this day, First Class, postage prepaid to Katherine L. Brown, Esq., counsel for Energy Shield Realty, Inc.

Date: 3/18/2009

By:   
Bradford T. Atwood, Esq.

Approved and so Ordered

6/5/09  
Date

  
Judge Lawrence A. MacLeod, Jr.

THE STATE OF NEW HAMPSHIRE

GRAFTON COUNTY

LEBANON DISTRICT  
DOCKET#07-CV-00037

SCOTT R. AND DEBORAH A. NASPINSKY

V.

ENERGY SHIELD REALTY, INC.

MAR 25 2009

**Defendant's Submission of Additional Facts**  
**Regarding Missing Trial Testimony of William Sahlman and Robert Allen**

NOW COMES Defendant, Energy Shield Realty, Inc., by and through its counsel, and respectfully provides this Submission of Additional Facts for the court's review and consideration in an attempt to reconstruct the trial record specifically regarding the missing trial testimony of William Sahlman and Robert Allen only, stating as follows:

1. William Sahlman's testimony at trial included the following:
  - a. Les Rogers worked at Energy Shield Realty as a real estate agent.
  - b. Les Rogers was a new, inexperienced agent.
  - c. Les Rogers listed a home located at 421 Grafton Turnpike Road in Canaan, New Hampshire for the Allen family.
  - d. Les Rogers served as the seller's agent in the transaction between the Allens and the buyers, the Naspinskys.
  - e. Les Rogers kept a paper file for the Allen property.
  - f. The paper file for the Allen property contained documents including a current listing for Energy Shield Realty, a prior listing of the property from Staggs Warren, a state Approval for Operation document regarding the septic system and photographs of the property.
  - g. The state approval document regarding the septic system is filed with the town and the state. It is a public record.
  - h. A disclosure statement is given to a buyer during the purchase and sale of property.
  - i. The seller completes the disclosure statement. The seller's agent does not complete the disclosure statement.
  - j. James Bull represented the Naspinskys as their agent in the purchase and sale of the property with Les Rogers, the Allen's agent.
  - k. The Naspinskys hired their own home inspector to perform an inspection of the Allen property prior to the closing.
  - l. The closing took place on May 23, 2001.

- m. The listing price of the property with Energy Shield Realty in 2001 was \$159,000. .
- n. The property sold for \$165,000. in 2001 to the Naspinskys.
- o. This property's selling price of \$165,000. was a lot less when compared to the four bedroom homes Energy Shield sold in 2001.
- p. In the spring of 2006, I spoke with Bob Allen, the seller of the property, regarding the Naspinskys' issue of the two bedroom septic system.
- q. At that time, I searched the property on the current MLS listings and learned the house was already on the market for \$315,000. and advertised as a four bedroom home.

2. Robert Allen's testimony at trial included the following:

- a. I owned the property located at 421 Grafton Turnpike Road in Canaan, New Hampshire.
- b. The home was built in 1982.
- c. In 1990 the home was enlarged and two additional bedrooms were added. The septic system capacity was not increased as it had never failed nor malfunctioned.
- d. We also owned an adjacent one half acre lot.
- e. I showed the adjacent lot to Les Rogers. I told Les Rogers that the home had a two bedroom septic system.
- f. I showed the adjacent lot to the Naspinsky's home inspector. I told the home inspector that the home had a two bedroom septic system.
- g. The property was originally listed with Vanessa Stone at Staggs Warren.
- h. The home was listed with Staggs Warren as a two to four bedroom home with a two bedroom septic system.
- i. I later hired Les Rogers to list the property.
- j. I met with Les Rogers and provided him with the original Staggs Warren listing agreement and the Approval of Operation septic document.
- k. The asking price reflected the two bedroom septic system.
- l. In 2006 I contacted Bill Sahlman to discuss the Naspinsky's issue regarding the two bedroom septic system.
- m. I then learned that the Naspinsky home was on the market and listed as a four bedroom home.
- n. I drove by the Naspinsky home and saw that the ground surrounding the septic system had not been disturbed.

This submission is provided to the court for its kind consideration in reconstructing the missing trial testimony of William Sahlman and Robert Allen. It is based upon counsel's notes taken during the trial. The cassette tapes of the trial provided to counsel contains much of the witness testimony, however, the direct examination of Mr. Sahlman and the direct and cross examination of Mr. Allen were completely missing. This submission does not attempt to add to the testimony of any of the other witnesses as is captured on the trial cassettes.

Respectfully submitted,

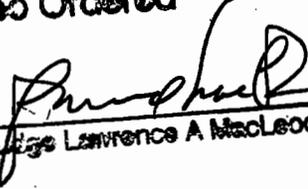
**ENERGY SHIELD REALTY, INC.,**  
By its attorneys,  
HOEFLE, PHOENIX,  
GORMLEY & ROBERTS, P.A.

Dated: 3/23/09

By:   
Lawrence B. Gormley, Esquire, #9999  
Katherine L. Brown, Esquire, #8519  
HOEFLE, PHOENIX,  
GORMLEY & ROBERTS, P.A.  
402 State Street, P.O. Box 4480  
Portsmouth, NH 03802-4480  
(603) 436-0666

Approved and so Ordered

6/5/09  
Date

  
Judge Lawrence A. MacLeod, Jr

Westlaw

873 A.2d 497  
 152 N.H. 183, 873 A.2d 497  
 (Cite as: 152 N.H. 183, 873 A.2d 497)

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C

Supreme Court of New Hampshire.  
 Michael GREEN  
 v.  
 SUMNER PROPERTIES, LLC.  
 No. 2004-317.

Argued: March 23, 2005.  
 Opinion Issued: May 9, 2005.

**Background:** Tenant brought small claims action against landlord for rental reimbursement, alleging that landlord misrepresented number of bedrooms in apartment. The District Court, Durham County, Taube, J., entered judgment for tenant, and landlord appealed.

**Holdings:** The Supreme Court, Galway, J., held that: (1) evidence was sufficient to support finding that landlord misrepresented one-bedroom apartment as a two-bedroom apartment, and (2) tenant could remain in apartment and sue for misrepresentation even if he ratified lease and remained in apartment.

Affirmed.

West Headnotes

**[1] Appeal and Error 30 ↪846(1)**

30 Appeal and Error  
 30XVI Review  
 30XVI(A) Scope, Standards, and Extent, in General  
 30k844 Review Dependent on Mode of Trial in Lower Court  
 30k846 Trial by Court in General  
 30k846(1) k. In General. Most Cited Cases

**Appeal and Error 30 ↪1010.2**

30 Appeal and Error  
 30XVI Review  
 30XVI(I) Questions of Fact, Verdicts, and Findings  
 30XVI(I)3 Findings of Court  
 30k1010 Sufficiency of Evidence in Support  
 30k1010.2 k. Total Failure of Proof. Most Cited Cases  
 The Supreme Court will uphold the findings and rulings of the trial court unless they lack evidential support or are legally erroneous.

**[2] Appeal and Error 30 ↪994(3)**

30 Appeal and Error  
 30XVI Review  
 30XVI(I) Questions of Fact, Verdicts, and Findings  
 30XVI(I)1 In General  
 30k994 Credibility of Witnesses  
 30k994(3) k. Province of Trial Court. Most Cited Cases

**Appeal and Error 30 ↪1011.1(2)**

30 Appeal and Error  
 30XVI Review  
 30XVI(I) Questions of Fact, Verdicts, and Findings  
 30XVI(I)3 Findings of Court  
 30k1011 On Conflicting Evidence  
 30k1011.1 In General  
 30k1011.1(2) k. Province of Trial Court. Most Cited Cases

**Appeal and Error 30 ↪1012.1(2)**

30 Appeal and Error  
 30XVI Review  
 30XVI(I) Questions of Fact, Verdicts, and Findings  
 30XVI(I)3 Findings of Court  
 30k1012 Against Weight of Evidence  
 30k1012.1 In General

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30k1012.1(2) k. Province of Trial Court. Most Cited Cases

The Supreme Court defers to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence.

**[3] Landlord and Tenant 233 ↪ 28(1)**

233 Landlord and Tenant

233II Leases and Agreements in General

233II(A) Requisites and Validity

233k28 Fraud

233k28(1) k. In General. Most Cited Cases

Evidence was sufficient to support finding that landlord misrepresented one-bedroom apartment which shared kitchen with adjoining one-bedroom apartment as a two-bedroom apartment; tenant testified that he was shown both bedrooms and that he joked that he could pick the larger room if he got there first, and tenant testified that adjoining apartment did not have a number on the door.

**[4] Landlord and Tenant 233 ↪ 32**

233 Landlord and Tenant

233II Leases and Agreements in General

233II(A) Requisites and Validity

233k32 k. Ratification of Defective or Invalid Lease or Contract. Most Cited Cases

Tenant was entitled to remain in apartment and sue landlord for misrepresentation as to number of bedrooms in apartment, even if tenant ratified lease by remaining in apartment and sharing bedroom with roommate.

**[5] Fraud 184 ↪ 32**

184 Fraud

184II Actions

184II(A) Rights of Action and Defenses

184k32 k. Effect of Existence of Remedy by Action on Contract. Most Cited Cases

With regard to misrepresentation in a contract, while ratification may deprive a party of contractu-

al remedies, it does not deprive the party of tort remedies.

**[6] Fraud 184 ↪ 32**

184 Fraud

184II Actions

184II(A) Rights of Action and Defenses

184k32 k. Effect of Existence of Remedy by Action on Contract. Most Cited Cases

A party entering into an agreement in reliance upon a misrepresentation of a material fact has two choices; he may justifiably elect to rescind or disaffirm the agreement and refuse to proceed further with the transaction, or he may elect to affirm the contract, keep its benefits, perform his obligations thereunder, and sue for damages for misrepresentation.

**\*\*497 \*183** Joanne M. Stella, of Portsmouth, by brief and orally, for the plaintiff.

Lynne C. Christie, of Durham, by brief and orally, for the defendant.

GALWAY, J.

The defendant, Summer Properties, LLC (landlord), appeals the order of the Durham District Court (*Taube, J.*) awarding the plaintiff, Michael Green (tenant), \$875 **\*\*498** on his small claims action for rental reimbursement. We affirm.

The record supports the following facts. The tenant and his roommate, both college students, entered into a lease with the landlord for apartment number 21 at 24 Madbury Road in Durham. The lease ran from August 27, 2002, through May 25, 2003. It required the tenant and his roommate to pay \$3,500, which was half of the entire rent for the lease's term, on or before August 1, 2002, and the remaining half on or before January 1, 2003. The tenant and his roommate were to share the apartment and split the rent evenly. Thus, the tenant's share of the amount due by August 1, 2002, was \$1,750.

Before entering into the lease, the landlord's repres-

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entative showed the apartment to the tenant. The tenant testified that the apartment had two bedrooms and a kitchen. The tenant believed that he and his roommate would each have a bedroom and would share the kitchen. When the tenant and his roommate arrived at 24 Madbury Road to move into the apartment, however, they discovered that a stranger already occupied one of the bedrooms, forcing the tenant and his roommate to share a bedroom.

The tenant immediately complained to the landlord about having to share a bedroom with his roommate and a kitchen with a stranger, and \*184 continued to complain throughout the first semester. The landlord told the tenant that, as soon as one became available, he could move into a "single" unit. After the first semester of college ended, the landlord permitted the tenant to move into an apartment that allowed him to have his own bedroom. The parties entered into a new lease for this apartment.

The tenant brought a small claims action, seeking to recover \$875, which represented one-half of the rent he paid to live in apartment 21. The tenant sought this amount for having had to share a bedroom with his roommate. The trial court ruled in the tenant's favor, finding that the landlord's agent had induced the tenant to enter into the lease for apartment 21 by misrepresenting the number of bedrooms in the apartment. The court found that \$875 was a "fair measure" of the tenant's damages.

[1][2] On appeal, the landlord first argues that there was insufficient evidence for the trial court to find that the agent misrepresented the apartment's number of bedrooms. We will uphold the findings and rulings of the trial court unless they lack evidential support or are legally erroneous. *Cook v. Sullivan*, 149 N.H. 774, 780, 829 A.2d 1059 (2003). "[W]e defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence." *Id.*

[3] The record supports the trial court's finding of

misrepresentation. The evidence included the tenant's offer of proof that when the landlord's agent showed him the apartment, the tenant joked that "if he got there first, he could pick the larger bedroom." The evidence also included the tenant's testimony that when the agent showed him the apartment, he was shown both bedrooms.

Although the landlord offered evidence that apartment 21 is a one-bedroom apartment that shares a kitchen with apartment 22, another one-bedroom apartment, and that each apartment has its own separately numbered door, the tenant testified that when he was shown the apartment, there was no number on the door. It was for the trial court, as fact finder, to resolve such conflicting evidence and judge the credibility of witnesses. See \*\*499 *Catalano v. Town of Windham*, 133 N.H. 504, 512, 578 A.2d 858 (1990).

[4] The landlord next asserts that the tenant was not entitled to rental reimbursement because, even if he was induced to enter into the lease by a material misrepresentation, he ratified the lease by remaining in apartment 21.

[5][6] The landlord's argument stems from a mistaken assumption. While ratification may deprive a party of contractual remedies, see \*185 *Keshishian v. CMC Radiologists*, 142 N.H. 168, 173, 698 A.2d 1228 (1997), it does not deprive the party of tort remedies, see *Mertens v. Wolfboro Nat'l Bank*, 119 N.H. 453, 455-56, 402 A.2d 1335 (1979). A party entering into an agreement in reliance upon a misrepresentation of a material fact has two choices. See *id.* at 455, 402 A.2d 1335. "[H]e may justifiably elect to rescind or disaffirm the agreement and refuse to proceed further with the transaction [,]" or "he may elect to affirm the contract, keep its benefits, perform his obligations thereunder, and sue for damages" for misrepresentation. *Id.* at 455, 402 A.2d 1335. Thus, even if we assume that the tenant ratified the lease, he was still entitled to seek tort damages for the landlord's misrepresentation. As the landlord does not challenge the amount of damages awarded, we express no opinion thereon.

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*Affirmed.*

BRODERICK, C.J., and NADEAU, DALIANIS  
and DUGGAN, JJ., concurred.  
N.H.,2005.  
Green v. Sumner Properties, LLC  
152 N.H. 183, 873 A.2d 497

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761 A.2d 1046  
 145 N.H. 73, 761 A.2d 1046  
 (Cite as: 145 N.H. 73, 761 A.2d 1046)

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**H**

Supreme Court of New Hampshire.  
 Richard S. SNIERSON and another  
 v.  
 Robert T. SCRUTON and another.  
 No. 97-288.

April 12, 2000.  
 As Modified Nov. 22, 2000.

Home purchasers brought action against vendors, real estate agent, and her agency, alleging they misrepresented and withheld facts relating to the home's septic system. The Superior Court, Rockingham County, McHugh, J., dismissed. Purchasers appealed. The Supreme Court, Horton, J., held that: (1) purchasers stated a claim for fraud against vendors, and (2) purchasers stated a claim against real estate agent and agency under the Consumer Protection Act.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Pleading 302 ↪18**

302 Pleading  
 302I Form and Allegations in General  
 302k18 k. Certainty, Definiteness, and Particularity. Most Cited Cases

**Pleading 302 ↪35**

302 Pleading  
 302I Form and Allegations in General  
 302k35 k. Surplusage and Unnecessary Matter. Most Cited Cases  
 When faced with an excessively burdensome and muddled pleading, the trial court may require the submitting party to file a more orderly and concise pleading.

**[2] Appeal and Error 30 ↪919**

30 Appeal and Error  
 30XVI Review  
 30XVI(G) Presumptions  
 30k915 Pleading  
 30k919 k. Striking Out or Dismissal.

Most Cited Cases

When reviewing a decision of the trial court dismissing a cause of action for failure to state a claim, the Supreme Court assumes all allegations in the plaintiffs' pleadings to be true and construes all reasonable inferences therefrom in the light most favorable to the plaintiffs.

**[3] Appeal and Error 30 ↪919**

30 Appeal and Error  
 30XVI Review  
 30XVI(G) Presumptions  
 30k915 Pleading  
 30k919 k. Striking Out or Dismissal.

Most Cited Cases

When reviewing a decision of the trial court dismissing a cause of action for failure to state a claim, the Supreme Court will not assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law.

**[4] Appeal and Error 30 ↪863**

30 Appeal and Error  
 30XVI Review  
 30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases  
 When reviewing a decision of the trial court dismissing a cause of action for failure to state a claim, the Supreme Court will reverse the trial court when the allegations in the plaintiffs' pleadings are reasonably susceptible of an interpretation that would permit recovery.

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**[5] Fraud 184 ⚡13(2)**

184 Fraud  
 184I Deception Constituting Fraud, and Liability Therefor  
 184k8 Fraudulent Representations  
 184k13 Falsity and Knowledge Thereof  
 184k13(2) k. Knowledge of Defendant.  
 Most Cited Cases

**Fraud 184 ⚡13(3)**

184 Fraud  
 184I Deception Constituting Fraud, and Liability Therefor  
 184k8 Fraudulent Representations  
 184k13 Falsity and Knowledge Thereof  
 184k13(3) k. Statements Recklessly Made; Negligent Misrepresentation. Most Cited Cases

**Fraud 184 ⚡20**

184 Fraud  
 184I Deception Constituting Fraud, and Liability Therefor  
 184k19 Reliance on Representations and Inducement to Act  
 184k20 k. In General. Most Cited Cases  
 To establish fraud, a plaintiff must prove that the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it; in addition, a plaintiff must demonstrate justifiable reliance.

**[6] Fraud 184 ⚡43**

184 Fraud  
 184II Actions  
 184II(C) Pleading  
 184k43 k. Statements, Acts, or Conduct Constituting Fraud. Most Cited Cases  
 A plaintiff cannot allege fraud in general terms, but must specifically allege the essential details of the fraud and the facts of the defendants' fraudulent conduct.

**[7] Fraud 184 ⚡41**

184 Fraud  
 184II Actions  
 184II(C) Pleading  
 184k41 k. Allegations of Fraud in General. Most Cited Cases  
 Allegations that the vendors made written misrepresentations to home purchasers in a disclosure form regarding home's septic system with knowledge of the falsity of the representations, that vendors intended to induce purchasers' reliance, and that purchasers reasonably relied on the misrepresentations to their detriment, was sufficient for purchasers to state claim for fraud against vendors.

**[8] Fraud 184 ⚡13(3)**

184 Fraud  
 184I Deception Constituting Fraud, and Liability Therefor  
 184k8 Fraudulent Representations  
 184k13 Falsity and Knowledge Thereof  
 184k13(3) k. Statements Recklessly Made; Negligent Misrepresentation. Most Cited Cases  
 The elements of a cause of action for negligent misrepresentation are a negligent misrepresentation of a material fact by the defendant and justifiable reliance by the plaintiff.

**[9] Fraud 184 ⚡13(3)**

184 Fraud  
 184I Deception Constituting Fraud, and Liability Therefor  
 184k8 Fraudulent Representations  
 184k13 Falsity and Knowledge Thereof  
 184k13(3) k. Statements Recklessly Made; Negligent Misrepresentation. Most Cited Cases  
 With respect to a cause of action for negligent misrepresentation, it is the duty of one who volunteers information to another not having equal knowledge, with the intention that he will act upon it, to exercise reasonable care to verify the truth of his state-

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ments before making them.

**[10] Fraud 184 ↪ 41**

184 Fraud

184II Actions

184II(C) Pleading

184k41 k. Allegations of Fraud in General. Most Cited Cases

Allegations that included that the representations made by the vendors with respect to home's septic system were false and that the vendors should have known of their falsity, that the representations were integral to the sales agreement, and that purchasers reasonably relied to their detriment on the false representations, were sufficient for purchasers to state claim for negligent misrepresentation against vendors.

**[11] Fraud 184 ↪ 4**

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k2 Elements of Actual Fraud

184k4 k. Intent. Most Cited Cases

**Fraud 184 ↪ 13(3)**

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k8 Fraudulent Representations

184k13 Falsity and Knowledge Thereof

184k13(3) k. Statements Recklessly Made; Negligent Misrepresentation. Most Cited Cases

That seller's disclosure form expressly warned that it did not constitute a warranty and was not a substitute for a buyer's inspection would not preclude a finding that the vendors intended to induce home purchasers' reliance with their written disclosures regarding the home's septic system, as required for home purchasers' fraud and negligent misrepresentation claims against vendors with respect to the septic system, which was allegedly later found to be

faulty.

**[12] Brokers 65 ↪ 106**

65 Brokers

65VIII Rights, Powers, and Liabilities as to Third Persons

65k106 k. Actions by or Against Principals or Brokers. Most Cited Cases

Home purchasers did not have standing to seek repayment of any commission vendors paid to real estate agent and her agency for the sale of the home, in action brought by purchasers alleging fraud and negligent misrepresentation with respect to home's septic system.

**[13] Negligence 272 ↪ 238**

272 Negligence

272III Standard of Care

272k238 k. Standard Established by Statute or Regulation. Most Cited Cases

Before a statutory duty replaces the reasonable person standard in a negligence cause of action, courts must first determine whether the common law recognizes liability for a similar failure to act.

**[14] Fraud 184 ↪ 17**

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k17 k. Duty to Disclose Facts. Most Cited Cases

Statutes requiring disclosure of information relating to a property's sewage disposal system did not define the vendors' standard of conduct, in action brought by home purchasers that alleged vendors made negligent misrepresentations about the home's septic system, in that the statutes duty to disclose was significantly broader than the common law duty to disclose latent defects. RSA 477:4-c, 477:4-d.

**[15] Antitrust and Trade Regulation 29T ↪ 149**

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29T Antitrust and Trade Regulation  
 29TIII Statutory Unfair Trade Practices and  
 Consumer Protection  
 29TIII(A) In General  
 29Tk149 k. Number or Frequency of  
 Transactions or Acts. Most Cited Cases  
 (Formerly 92Hk8 Consumer Protection)  
 A seller of real estate cannot be held liable under  
 the Consumer Protection Act for conduct related to  
 an isolated transaction that was not conducted in  
 the ordinary course of business. RSA 358-A:1,  
 358-A:2.

**[16] Antitrust and Trade Regulation 29T 149**

29T Antitrust and Trade Regulation  
 29TIII Statutory Unfair Trade Practices and  
 Consumer Protection  
 29TIII(A) In General  
 29Tk149 k. Number or Frequency of  
 Transactions or Acts. Most Cited Cases  
 (Formerly 92Hk8 Consumer Protection)

**Antitrust and Trade Regulation 29T 198**

29T Antitrust and Trade Regulation  
 29TIII Statutory Unfair Trade Practices and  
 Consumer Protection  
 29TIII(C) Particular Subjects and Regula- tions  
 29Tk198 k. Real Property in General.  
 Most Cited Cases  
 (Formerly 92Hk8 Consumer Protection)  
 A seller of real estate engaging in deceptive or mis-  
 leading acts while conducting its business falls  
 within the purview of the Consumer Protection Act.  
 RSA 358-A:1, 358-A:2.

**[17] Antitrust and Trade Regulation 29T 199**

29T Antitrust and Trade Regulation  
 29TIII Statutory Unfair Trade Practices and  
 Consumer Protection  
 29TIII(C) Particular Subjects and Regula-

tions  
 29Tk199 k. Housing Sales. Most Cited  
 Cases  
 (Formerly 92Hk8 Consumer Protection)  
 Allegations that real estate agent and her agency  
 misrepresented the vendors' house, lot and utilities,  
 including its septic system, that agent was acting  
 within the course and scope of her employment,  
 and that agent and her agency acted in their busi-  
 ness capacities, stated a claim of unfair or deceptive  
 trade practices against real estate agent and agency  
 under the Consumer Protection Act, in action  
 brought by home purchasers that alleged the home's  
 septic system was faulty. RSA 358-A:1, 358-A:2.  
 \*\*1047 \*75 Backus, Meyer, Solomon, Rood &  
 Branch, of Manchester (Robert A. Backus on the  
 brief and orally), for the plaintiffs.

McKittrick Law Offices, of North Hampton (J.  
 Joseph McKittrick on the brief and orally), for de-  
 fendants Robert T. and Janet E. Scruton.

Law Office of Rodney L. Stark, P.A., of  
 Manchester (Sherry M. Hieber on the brief and or-  
 ally), for defendants Tate & Foss, Inc. and Barbara  
 Dunkle.

HORTON, J.

The plaintiffs, Richard and Alexandria Snierson,  
 appeal the decision of the Superior Court (*McHugh*,  
 J.) dismissing their petition in equity for failure to  
 state claims upon which relief could be granted. We  
 affirm in part, reverse in part, and remand.

\*\*1048 In August 1994, the plaintiffs entered into a  
 sales agreement to purchase a residence from de-  
 fendants Robert and Janet Scruton. The closing oc-  
 curred on September 27, 1994. The plaintiffs al-  
 legedly encountered subsequent difficulties with the  
 septic system. They contend that the Scrutons, the  
 Scrutons' realtor, defendant Tate & Foss, Inc. (Tate  
 & Foss), and the real estate agent, defendant Bar-  
 bara Dunkle, misrepresented and withheld facts re-  
 lating to the septic system and various other defi-

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ciencies in the property in a seller's disclosure form and in oral communications. Based primarily on these allegations, the plaintiffs filed a lengthy petition in superior court requesting rescission of the real estate conveyance, disgorgement of the realtor's commission, and other relief.

The petition contains the following counts: count I (against the Scrutons), entitled "Rescission [B]ased Upon Common Law Fraud and Misrepresentation and Fraud in the Inducement"; count II (against Tate & Foss and Dunkle), entitled "Rescission [B]ased Upon Common Law Fraud and Misrepresentation and Fraud in the Inducement by the Scrutons' Agent"; count III (against the Scrutons), entitled "Rescission for Failure of Consideration"; count IV (against Tate & Foss and Dunkle), entitled "Re[s]cis[s]ion Based Upon Violation of Consumer Protection Act, RSA Ch[apter] 358-A"; count V (against the Scrutons), entitled "Rescission Based Upon Written Misrepresentations"; count VI (against the Scrutons), entitled "Rescission Based Upon Violation of Duties Under RSA 477:4-c and RSA 4[7]7:4-d"; count VII (against the Scrutons), entitled "Rescission [B]ased Upon Common Law Negligent Misrepresentation"; count VIII (against the Scrutons), entitled "Rescission \*76 Based Upon Violation of Implied Covenant [t]o Act in Good Faith and [t]o Deal Fairly"; count IX (against Tate & Foss and Dunkle), entitled "Rescission Based Upon Violation of Implied Covenant [t]o Act in Good Faith and [t]o Deal Fairly"; count X (against Tate & Foss and Dunkle), entitled "Violation of Duty under RSA Chapter 331-A"; count XI (against Tate & Foss and Dunkle), entitled "Violation of Duty under RSA Chapter 331-A and N.H. Real Estate Commission Rule Rea 701.02"; count XII (against Tate & Foss and Dunkle), entitled "Violation of Duty under RSA Chapter 331-A and N.H. Real Estate Commission Rule Rea 701.05"; and count XIII (against Tate & Foss and Dunkle), entitled "Negligence."

The defendants moved to dismiss the petition. The court dismissed all counts for failure to state a

claim upon which relief could be granted, and the plaintiffs unsuccessfully moved for reconsideration. The court also denied the plaintiffs' motion to amend because, among other reasons, the petition was a "blatant abuse of the system."

[1] Both structurally and substantively, the plaintiffs' petition is onerous. It is forty-four pages long and contains nearly two hundred paragraphs. The first twenty-four pages are an amalgam of diverse factual and legal assertions relating to the property at issue. In the remaining twenty pages of the petition, the plaintiffs plead thirteen counts. Several counts are repetitious, most are captioned in a confusing fashion, and many lack elements and/or sufficient supporting factual allegations. We do not condone pleadings that reach such a level of prolixity. See *Green v. Shaw*, 114 N.H. 289, 291, 319 A.2d 284, 285 (1974); *Morency v. Plourde*, 96 N.H. 344, 346, 76 A.2d 791, 792 (1950). When faced with an excessively burdensome and muddled pleading, the trial court may require the submitting party to file a more orderly and concise pleading. See *Porter v. Dziura*, 104 N.H. 89, 90, 179 A.2d 281, 282 (1962).

[2][3][4] The plaintiffs argue on appeal that certain of their claims were sufficiently pleaded. When reviewing a decision of the trial court dismissing a cause of action for failure to state a claim, we assume all allegations in the plaintiffs' pleadings to be true and construe all reasonable inferences \*\*1049 therefrom in the light most favorable to the plaintiffs. *Thompson v. Forest*, 136 N.H. 215, 216, 614 A.2d 1064, 1065 (1992). We will not, however, "assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law." *ERG, Inc. v. Barnes*, 137 N.H. 186, 190, 624 A.2d 555, 558 (1993). We will reverse the trial court when the allegations in the plaintiffs' \*77 pleadings are reasonably susceptible of an interpretation that would permit recovery. *Thompson*, 136 N.H. at 216, 614 A.2d at 1065.

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*I. Fraud and Negligent Misrepresentation as to the Scrutons*

The plaintiffs first argue that their petition states a claim of fraud against the Scrutons. We agree.

[5][6] To establish fraud, a plaintiff must prove that the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it. *Patch v. Arsenault*, 139 N.H. 313, 319, 653 A.2d 1079, 1083-84 (1995). In addition, a plaintiff must demonstrate justifiable reliance. *Gray v. First NH Banks*, 138 N.H. 279, 283, 640 A.2d 276, 279 (1994). A plaintiff cannot allege fraud in general terms, but must specifically allege the essential details of the fraud and the facts of the defendants' fraudulent conduct. *Proctor v. Bank of N.H.*, 123 N.H. 395, 399, 464 A.2d 263, 265 (1983).

[7] The plaintiffs allege in count V that: (1) the Scrutons made written misrepresentations to them in a disclosure form regarding their septic system and compliance with various legal requirements with knowledge of the falsity of the representations or with conscious indifference to the truth; (2) the Scrutons intended to induce their reliance; and (3) the plaintiffs reasonably relied on the Scrutons' misrepresentations to their detriment. The plaintiffs specifically allege that, in a form entitled "REPRESENTATIONS BY SELLER," the Scrutons represented that: (1) they had had no problems with their septic tank or leaching field; (2) there had been no room additions, structural modifications, or other alterations or repairs made to the property without the necessary permits or that were noncompliant with building codes; (3) there were no zoning violations, non-conforming uses, or setback requirement violations; and (4) the septic system was neither installed nor modified after August 30, 1977. The plaintiffs allege that, in fact, the Scrutons had encountered difficulties with their septic system, and that they had built an addition to the home and modified its plumbing in violation of the Rye Building Code, Rye Zoning Ordinance, and other provisions of law. They further allege that the

septic system was modified by the Scrutons after August 30, 1977, and that the property does not actually contain a leach field. Finally, they allege that the Scrutons knew or should have known about the property's defects because they lived there for nineteen years. Further supporting the plaintiffs' allegation that the Scrutons knew or should have known of the septic defects are specific allegations that \*78 the septic tank has a working capacity substantially smaller than that required when the Scrutons obtained the building permit for their addition in 1977, that the Scrutons themselves had problems with the septic tank, and that the plaintiffs have noticed a foul odor from time to time since they moved in.

The plaintiffs have sufficiently pleaded the elements of fraud by specifically alleging the "essential details of the fraud" and "the facts of the defendant's fraudulent actions." *Proctor*, 123 N.H. at 399, 464 A.2d at 265. The plaintiffs' petition is, therefore, reasonably susceptible of a construction that would permit recovery for fraud against the Scrutons.

The plaintiffs next argue that the petition states a claim of negligent misrepresentation against the Scrutons. We agree.

[8][9] The elements of that cause of action are a negligent misrepresentation of a material fact by the defendant and justifiable\*\*1050 reliance by the plaintiff. *Hydraform Prods. Corp. v. American Steel & Alum. Corp.*, 127 N.H. 187, 200, 498 A.2d 339, 347 (1985). "It is the duty of one who volunteers information to another not having equal knowledge, with the intention that he [or she] will act upon it, to exercise reasonable care to verify the truth of his [or her] statements before making them." *Patch*, 139 N.H. at 319, 653 A.2d at 1084 (quotation omitted).

[10] As outlined in our analysis of the fraud claim, the allegations in count V include that the representations made by the Scrutons were false and that the Scrutons should have known of their falsity. In

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addition, the plaintiffs allege that the representations were integral to the sales agreement and that they reasonably relied to their detriment on the false representations. Accordingly, the plaintiffs have sufficiently pleaded negligent misrepresentation against the Scrutons.

[11] The Scrutons argue that because the seller's disclosure form expressly warned that it did not constitute a warranty and was not a substitute for a buyer's inspection, it would be "illogical to conclude that [they] intended the [plaintiffs] to rely upon their statements" in the form. We disagree. The warning in the disclosure form does not preclude the finder of fact from determining in the context of a fraud or negligent misrepresentation claim that the Scrutons intended to induce the plaintiffs' reliance with their written disclosures.

The Scrutons also argue that because the disclosure form required them to reveal only known "significant" defects, they did not \*79 misrepresent facts when they answered questions in the form. The plaintiffs allege that the Scrutons knew or should have known of the alleged defects and that their disclosures were misrepresentations. The plaintiffs also allege defects in the property that could be considered significant. Whether the Scrutons' written disclosures constitute misrepresentations, and whether the language of the disclosure form is pertinent to those determinations, are questions for the fact finder on remand.

## *II. Equitable Rescission as to Tate & Foss and Dunkle*

[12] The plaintiffs argue that the trial court erroneously dismissed their claim, set forth in count II of the petition, for rescission as to Tate & Foss and Dunkle based on their fraud and misrepresentation. The plaintiffs elected to seek rescission as to these defendants in lieu of seeking damages. Specifically, they seek the disgorgement of the real estate commission paid by the Scrutons to Tate & Foss and Dunkle. According to the plaintiffs' prayer for re-

lief, the disgorged commission, plus interest, is to be paid directly to them, whereupon they will credit the Scrutons with that amount against the amount due them from the Scrutons.

We conclude that the plaintiffs have no legal interest in any commission paid to Tate & Foss and Dunkle by the Scrutons, and thus they have no standing to seek its repayment. *See* 59 Am.Jur.2d *Parties* § 30 (1987). We therefore affirm the trial court's dismissal of count II.

## *III. Violation of RSA 477:4-c and:4-d*

The plaintiffs next argue that they have adequately pleaded a claim against the Scrutons in count VI of the petition, entitled "Rescission Based Upon Violation of Duties Under RSA 477:4-c and 4[7]:4-d." We disagree.

The plaintiffs argue that RSA 477:4-c and:4-d (Supp.1999) create private causes of action. Nowhere in these statutes, however, does the legislature indicate an intention to create a private right of action. Further, the plaintiffs fail to point to any legislative history in support of their interpretation. Absent the legislature's express or implied intent to create a private right of action, we conclude that the statute does not do so. *Marquay v. Eno*, 139 N.H. 708, 715-16, 662 A.2d 272, 278 (1995).

[13] \*\*1051 The plaintiffs also argue that RSA 477:4-c and:4-d define a standard of conduct applicable to sellers of real estate. Before a statutory duty replaces the reasonable person standard in a negligence \*80 cause of action, we must first determine whether the common law recognizes liability for a similar failure to act. *See id.* at 716, 662 A.2d at 278. The statutes required the Scrutons to disclose, prior to the sale of the property, information relating to the property's sewage disposal system, including the size of the tank, the type of system, its location, any malfunctions, the age of the system, the date it was most recently serviced, and the name of the contractor who services the system.

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See RSA 477:4-c, I(b);4-d, I(b). If the requisite information was unknown or unavailable to the Scrutons, they were required to so state in writing. See RSA 477:4-c, II;4-d, II. In contrast, a seller of real estate is required by common law to disclose concealed defects that are known to the seller, unknown to the buyer, incapable of detection upon a reasonable inspection, and dangerous to property or life. See *Ingaharro v. Blanchette*, 122 N.H. 54, 57, 440 A.2d 445, 447 (1982).

[14] The statutes in question require a seller to disclose information that would not necessarily have to be disclosed under the common law. They require disclosure of information other than concealed defects, a written statement confirming the seller's lack of knowledge of any requisite information, and disclosure of defects regardless of the buyer's knowledge, whether or not the defects could be detected upon a reasonable inspection, and whether or not the defects are dangerous to property or life. Because a seller's statutory duty to disclose information relative to septic systems is significantly broader than the common law duty to disclose latent defects, we conclude that it cannot define the standard of conduct in a common law negligence cause of action.

#### IV. Consumer Protection Act

The plaintiffs next argue that the trial court erred in dismissing count IV, which asserts a claim under the Consumer Protection Act, RSA ch. 358-A (1995) (amended 1996, 1997, 1999). The trial court dismissed count IV, ruling that the real estate transaction was not commercial in nature and therefore the statute afforded the plaintiffs no basis for relief. Tate & Foss and Dunkle argue that their agency relationship with the sellers does not alter the strictly private nature of the real estate transaction under RSA chapter 358-A and that the plaintiffs fail to allege unfair or deceptive conduct. We disagree.

[15][16] RSA 358-A:2 (1995) (amended 1996, 1997, 1999) prohibits unfair or deceptive acts in the

conduct of any trade or commerce. "Trade" and "commerce" include acts incidental to the sale of real \*81 estate. See RSA 358-A:1, II (1995). A seller of real estate cannot be held liable under the Consumer Protection Act for conduct related to an isolated transaction that was not conducted in the ordinary course of business. *Hughes v. DiSalvo*, 143 N.H. 576, 578-79, 729 A.2d 422, 424 (1999). A realtor engaging in deceptive or misleading acts while conducting its business, however, falls within the purview of the statute. See *id.*; RSA 358-A:1, II.

[17] The plaintiffs allege in count IV that Tate & Foss and Dunkle violated RSA 358-A:2 "by misrepresenting the Scrutons' house, lot and utilities, including but not limited to the septic system, to the [plaintiffs], as set forth herein." Count IV incorporates allegations of misrepresentation made against Tate & Foss and Dunkle previously in the petition, including that: (1) Dunkle misrepresented material facts; (2) she did so to induce the plaintiffs to enter into the real estate contract; (3) "Dunkle had reason to know that she did not have sufficient knowledge to make such statements and, therefore, made such statements with reckless disregard for their truth or correctness"; (4) the plaintiffs believed and relied on the representations; and (5) "[t]he Scrutons, Tate & Foss and Dunkle did not give the [plaintiffs] reason to believe that the said representations\*\*1052 were not true," thus alleging the reasonableness of their reliance. Count IV also incorporates the averment that Dunkle was acting within the course and scope of her employment by Tate & Foss, sufficient to allege *respondeat superior*, see *Trahan-Laroche v. Lockheed Sanders*, 139 N.H. 483, 485, 657 A.2d 417, 419 (1995), and allegations that Tate & Foss and Dunkle acted in their business capacities. We conclude that the allegations of misrepresentation against Tate & Foss and Dunkle support a claim of unfair or deceptive trade practices under the Consumer Protection Act. Accordingly, the trial court erred in dismissing the plaintiffs' Consumer Protection Act claim.

We reject the contention by Tate & Foss and

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Dunkle that the Consumer Protection Act claim was untimely filed. Pursuant to the version of RSA 358-A:3, IV-a (1995) (amended 1996) in effect at the time of the real estate transaction, the plaintiffs were required to bring their claim within two years of the real estate transaction. *See Catucci v. Lewis*, 140 N.H. 243, 244-45, 665 A.2d 378, 379 (1995). The real estate transaction was consummated at the closing, *see Bursey*, 118 N.H. at 415-16, 387 A.2d at 348, which occurred on September 27, 1994. The petition was filed on September 25, 1996, within two years of the closing. Therefore, the plaintiffs' Consumer Protection Act claim was timely filed.

pursuant to RSA 490:3; all concurred.  
 N.H.,2000.

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*\*82 V. Remaining Counts*

We need not address the dismissal of the claims asserted in counts III, VIII, and IX because the plaintiffs offer no legal argument in their brief concerning these counts and thus have waived their appeal as to them. *See Aubert v. Aubert*, 129 N.H. 422, 428, 529 A.2d 909, 913 (1987). We affirm the dismissal of the claims in counts X through XII because "the legislature intended [RSA chapter 331-A] to have no effect outside the ethical, licensing, and disciplinary confines of the business." *Finlay Commercial Real Estate v. Paino*, 133 N.H. 4, 8, 573 A.2d 125, 127 (1990). Because count XIII was withdrawn below, we need not address it. The claims asserted against the Scrutons in counts I and VII, fraud and negligent misrepresentation, are redundant in light of our decision; therefore, we affirm the dismissal of these counts.

In conclusion, the plaintiffs' petition states claims of fraud and negligent misrepresentation against the Scrutons, and violation of the Consumer Protection Act against Tate & Foss and Dunkle. In view of the foregoing, we need not address the plaintiffs' remaining issues on appeal.

*Affirmed in part; reversed in part; remanded.*

BRODERICK and NADEAU, JJ., did not sit;  
 JOHNSON, J., retired, sat by special assignment

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(Cite as: 243 F.3d 57)

**H**

United States Court of Appeals,  
First Circuit.  
INVEST ALMAZ, Plaintiff, Appellant,  
v.  
TEMPLE-INLAND FOREST PRODUCTS COR-  
PORATION, Defendant, Appellee.  
No. 00-1340.

Heard Nov. 8, 2000.  
Decided March 16, 2001.

Russian company brought suit against seller of manufacturing equipment, alleging unjust enrichment, fraudulent concealment, and aiding and abetting buyer's joint venture partner in breaching partner's fiduciary duties to company. The United States District Court for the District of New Hampshire, James R. Muirhead, United States Magistrate Judge, 2000 WL 1480366, granted seller's motion for judgment as matter of law on fraudulent concealment claim, entered judgment on jury verdict for seller on aiding and abetting claim, and entered judgment on its findings denying unjust enrichment claim. Buyer appealed. The Court of Appeals, Stahl, Circuit Judge, held that: (1) Russian company failed to prove that seller was unjustly enriched under New Hampshire law when its partner allowed seller to retain both equipment and downpayment upon partner's default on promissory note; (2) refusal to allow company to amend complaint to add claim for affirmative fraud at close of its case was not abuse of discretion; (3) seller did not fraudulently conceal value of plant and equipment, plant's obsolescence, or environmental problems; and (4) actual knowledge was required of seller before it might be held liable for tort of aiding and abetting joint venturer's breach of fiduciary duty owed to Russian company.

Affirmed.

West Headnotes

**[1] Implied and Constructive Contracts 205H**

205H Implied and Constructive Contracts  
205HI Nature and Grounds of Obligation  
205HI(A) In General  
205Hk2 Constructive or Quasi Contracts  
205Hk3 k. Unjust Enrichment. Most  
Cited Cases

Under New Hampshire law, defendant is unjustly enriched, and a plaintiff is entitled to restitution, when defendant has received a benefit and it would be unconscionable for the defendant to retain that benefit.

**[2] Implied and Constructive Contracts 205H**

205H Implied and Constructive Contracts  
205HI Nature and Grounds of Obligation  
205HI(A) In General  
205Hk2 Constructive or Quasi Contracts  
205Hk3 k. Unjust Enrichment. Most  
Cited Cases

Under New Hampshire law, plaintiff in an unjust enrichment case need not prove that the defendant obtained the benefit through wrongful acts; passive acceptance of a benefit may also constitute unjust enrichment.

**[3] Implied and Constructive Contracts 205H**

205H Implied and Constructive Contracts  
205HI Nature and Grounds of Obligation  
205HI(A) In General  
205Hk2 Constructive or Quasi Contracts  
205Hk3 k. Unjust Enrichment. Most  
Cited Cases

Under New Hampshire law, unjust enrichment does not require a contractual relationship between the plaintiff and defendant.

**[4] Implied and Constructive Contracts 205H**

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205H Implied and Constructive Contracts  
205HI Nature and Grounds of Obligation  
205HI(A) In General  
205Hk2 Constructive or Quasi Contracts  
205Hk3 k. Unjust Enrichment. Most

Cited Cases

Under New Hampshire law, more than moral claim for reimbursement is required for restitution to be justified on basis of unjust enrichment; there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of the doctrine.

**[5] Implied and Constructive Contracts 205H**  
⚡3

205H Implied and Constructive Contracts  
205HI Nature and Grounds of Obligation  
205HI(A) In General  
205Hk2 Constructive or Quasi Contracts  
205Hk3 k. Unjust Enrichment. Most

Cited Cases

Under New Hampshire law, in determining the extent to which a defendant may have been unjustly enriched, the focus is not upon the cost to the plaintiff, but rather it is upon the value of what was actually received by the defendant.

**[6] United States Magistrates 394** ⚡31

394 United States Magistrates  
394k31 k. Further Review; Direct Appeal. Most  
Cited Cases  
United States Magistrate judge's articulation and application of legal principles is scrutinized de novo on appeal.

**[7] Federal Courts 170B** ⚡841

170B Federal Courts  
170BVIII Courts of Appeals  
170BVIII(K) Scope, Standards, and Extent  
170BVIII(K)5 Questions of Fact, Verdicts and Findings  
170Bk841 k. Extent of Review in General. Most Cited Cases

Findings of fact predicated upon, or induced by, errors of law will be accorded diminished respect on appeal.

**[8] Federal Courts 170B** ⚡813

170B Federal Courts  
170BVIII Courts of Appeals  
170BVIII(K) Scope, Standards, and Extent  
170BVIII(K)4 Discretion of Lower Court  
170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases  
Exercise of discretion by lower court in granting or denying restitution is reviewed only for an abuse of discretion to the extent that the ultimate decision rests on a judgment regarding the equities of the case, rather than application of an established rule of restitution.

**[9] Implied and Constructive Contracts 205H**  
⚡15.1

205H Implied and Constructive Contracts  
205HI Nature and Grounds of Obligation  
205HI(B) Money Received  
205Hk15 Consideration or Purpose for Which Money Was Received  
205Hk15.1 k. In General. Most Cited Cases  
Under New Hampshire law, a payor cannot recover in restitution from a payee who accepts a payment in satisfaction of the debt of a third party.

**[10] Implied and Constructive Contracts 205H**  
⚡15.1

205H Implied and Constructive Contracts  
205HI Nature and Grounds of Obligation  
205HI(B) Money Received  
205Hk15 Consideration or Purpose for Which Money Was Received  
205Hk15.1 k. In General. Most Cited Cases  
Under New Hampshire law, seller either provided value or was otherwise legally entitled to \$2.3 mil-

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lion it indirectly received from payor for equipment purchased by payor's joint venturer partner with sums advanced by payor, and thus did not receive double recovery and was not unjustly enriched when partner allowed seller to retain both title to manufacturing equipment and \$2.3 million advanced upon partner's default under promissory note calling for additional \$3 million.

**[11] Implied and Constructive Contracts 205H**  
91

205H Implied and Constructive Contracts  
 205HII Actions

205HII(C) Evidence  
 205Hk91 k. Presumptions and Burden of Proof. Most Cited Cases  
 In order to establish that its joint venture partner's creditor was unjustly enriched when partner defaulted on purchase of equipment and creditor retained both sums advanced by payor and equipment, payor plainly had the burden of proving the extent to which creditor was benefitted by the transaction.

**[12] Implied and Constructive Contracts 205H**  
15.1

205H Implied and Constructive Contracts  
 205HI Nature and Grounds of Obligation  
 205HI(B) Money Received  
 205Hk15 Consideration or Purpose for Which Money Was Received

205Hk15.1 k. In General. Most Cited Cases

Under New Hampshire law, amount that could be realized at foreclosure sale of equipment could be used to determine whether seller/creditor was unjustly enriched when seller was allowed by payor's joint venturer partner and buyer both to retain downpayment advanced by payor and to regain title to equipment upon partner's default on purchase agreement; approach was generous to payor in that it assigned no value to risk of deficiency judgment if property had been foreclosed upon and auctioned.

**[13] Evidence 157** 51

157 Evidence

157I Judicial Notice

157k51 k. Mode of Ascertaining Facts Required to Be Noticed; Motions and Notice of Reliance. Most Cited Cases

In considering fact solely for purpose of ruling on admissibility of evidence, district court ordinarily is not bound by rule requirements for taking judicial notice of facts. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

**[14] Implied and Constructive Contracts 205H**  
92

205H Implied and Constructive Contracts  
 205HII Actions

205HII(C) Evidence  
 205Hk92 k. Admissibility in General. Most Cited Cases

In suit by payor against creditor of its joint venture partner for unjust enrichment based on what creditor was allowed to retain after default on promissory note, evidence of what new buyer was willing to pay for equipment 18 months after default could be found not relevant to its value at time of default, and thus insufficient to show that value of equipment exceeded amount remaining due.

**[15] Implied and Constructive Contracts 205H**  
98

205H Implied and Constructive Contracts  
 205HII Actions

205HII(C) Evidence  
 205Hk98 k. Weight and Sufficiency in General. Most Cited Cases

Under New Hampshire law, joint venture partner, which put up money for buyer's purchase, was not entitled to restitution from seller for unjust enrichment, when buyer defaulted on note and agreed in mutual release to allow seller to retain downpayment and to regain title to plant and equipment, absent adequate proof as to value in seller's hands and thus proof that seller made net gain.

**[16] Federal Courts 170B** 624

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#### 170B Federal Courts

##### 170BVIII Courts of Appeals

170BVIII(D) Presentation and Reservation in  
Lower Court of Grounds of Review

##### 170BVIII(D)2 Objections and Exceptions

170Bk624 k. Pleading. Most Cited  
Plaintiff adequately preserved issue of whether it  
should have been allowed to amend its complaint to  
assert affirmative fraud claims by requesting  
amendment at close of its case in response to de-  
fendant's motion for judgment as matter of law on  
plaintiff's claims for fraudulent concealment.  
Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

#### [17] Federal Courts 170B ⚡763.1

#### 170B Federal Courts

##### 170BVIII Courts of Appeals

##### 170BVIII(K) Scope, Standards, and Extent

##### 170BVIII(K)1 In General

170Bk763 Extent of Review Depend-  
ent on Nature of Decision Appealed from  
170Bk763.1 k. In General. Most  
Cited Cases

#### Federal Courts 170B ⚡817

#### 170B Federal Courts

##### 170BVIII Courts of Appeals

##### 170BVIII(K) Scope, Standards, and Extent

##### 170BVIII(K)4 Discretion of Lower Court

170Bk817 k. Parties; Pleading. Most  
Cited Cases

Denial of leave to amend is reviewed only for abuse  
of discretion, and will be affirmed if any adequate  
reason for the denial is apparent on the record.  
Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

#### [18] Federal Civil Procedure 170A ⚡840

#### 170A Federal Civil Procedure

##### 170AVII Pleadings and Motions

##### 170AVII(E) Amendments

##### 170Ak839 Complaint

##### 170Ak840 k. Time for Amendment.

#### Most Cited Cases

Refusal to allow plaintiff to amend pleadings at  
close of its case to assert affirmative fraud claims  
on ground that defendant would have been unfairly  
prejudiced was not abuse of discretion, where af-  
firmative fraud had only been obliquely mentioned  
in presenting plaintiff's case and key defense wit-  
ness was scheduled to testify at beginning of de-  
fendant's case via videotaped deposition, leaving  
defendant with limited ability to adapt its defense to  
counter new claims. Fed.Rules Civ.Proc.Rule 15,  
28 U.S.C.A.

#### [19] Federal Civil Procedure 170A ⚡840

#### 170A Federal Civil Procedure

##### 170AVII Pleadings and Motions

##### 170AVII(E) Amendments

##### 170Ak839 Complaint

##### 170Ak840 k. Time for Amendment.

#### Most Cited Cases

Refusal to allow plaintiff to amend its complaint at  
close of its case to assert new fraud claims was not  
abuse of discretion, given that only reason plaintiff  
gave for delay in seeking amendment was that it  
had not occurred to plaintiff to seek to add claims  
earlier. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

#### [20] Principal and Agent 308 ⚡181

#### 308 Principal and Agent

##### 308III Rights and Liabilities as to Third Persons

##### 308III(E) Notice to Agent

##### 308k181 k. Collusion or Fraud of Agent.

#### Most Cited Cases

Under New Hampshire law, principal is not charged  
with the knowledge of his "faithless" agent when  
the latter is engaged in committing an independent,  
fraudulent act on his own account.

#### [21] Federal Courts 170B ⚡382.1

#### 170B Federal Courts

##### 170BVI State Laws as Rules of Decision

170BVI(B) Decisions of State Courts as Au-  
thority

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170Bk382 Court Rendering Decision

170Bk382.1 k. In General. Most Cited

Cases

Under its obligation in diversity case to determine rule that state supreme court would follow, federal court was obligated to follow decision that state supreme court had not overruled, despite some misgivings expressed by state supreme court about decision, where federal court could not reasonably assume that state court would overrule decision if directly faced with issue.

[22] Federal Courts 170B ⚡776

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K) In General

170Bk776 k. Trial De Novo. Most

Cited Cases

Grant of judgment as a matter of law is reviewed de novo under the same standards as the district court. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[23] Fraud 184 ⚡16

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k16 k. In General. Most Cited Cases

Under New Hampshire law, liability for fraudulent concealment does not arise in the absence of a duty of disclosure.

[24] Fraud 184 ⚡17

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k17 k. Duty to Disclose Facts. Most

Cited Cases

Under New Hampshire law, seller did not assume duty to disclose is own views regarding value of plant and equipment, such that it could be held li-

able for fraudulently concealing value, by inviting prospective buyer to tour plant and offering to answer "any questions" that buyer might have.

[25] Fraud 184 ⚡17

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k17 k. Duty to Disclose Facts. Most

Cited Cases

Under New Hampshire law, seller did not make any deceptive, "partial disclosure" that might give rise to duty to disclose information about value of plant and equipment and cause of action for fraudulent concealment when its tour guide remained silent when one of buyer's representatives asked about price of plant.

[26] Fraud 184 ⚡16

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k16 k. In General. Most Cited Cases

Under New Hampshire law, seller that was under no duty to disclose information about value of plant and equipment did not fraudulently conceal information when it failed to inform prospective buyer about auction value of equipment or book value and tax assessment value of plant.

[27] Fraud 184 ⚡17

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k17 k. Duty to Disclose Facts. Most

Cited Cases

Under New Hampshire law, seller was not under any general duty to disclose information regarding obsolescence and general unprofitability of plant to prospective buyer of plant and equipment, which

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planned to disassemble plant and relocate equipment in Russia, for purposes of fraudulent concealment claim, particularly where buyer had superior knowledge about suitability of equipment for its purposes and it was understood that equipment would be extensively modified.

**[28] Fraud 184** ⚡16

184 Fraud  
184I Deception Constituting Fraud, and Liability Therefor  
184k15 Fraudulent Concealment  
184k16 k. In General. Most Cited Cases

**Fraud 184** ⚡18

184 Fraud  
184I Deception Constituting Fraud, and Liability Therefor  
184k18 k. Materiality of Matter Represented or Concealed. Most Cited Cases  
Under New Hampshire law, seller's statements that high timber costs had made plant unprofitable, even if a partial disclosure that gave rise to limited duty to clarify reasons why the plant closed, could not support fraudulent concealment claim by buyer, absent any evidence that information was false, that seller intended to mislead buyer, or that information was material to buyer, which intended to disassemble plant and relocate equipment to Russia for manufacturing under different economic conditions.

**[29] Fraud 184** ⚡16

184 Fraud  
184I Deception Constituting Fraud, and Liability Therefor  
184k15 Fraudulent Concealment  
184k16 k. In General. Most Cited Cases  
Under New Hampshire law, seller of plant and equipment, which offered buyer opportunity to inspect and test plant, and disclosed information regarding environmental contamination of soils and past environmental violations, was not liable for fraudulent concealment simply because it did not

disclose full environmental history of plant.

**[30] Fraud 184** ⚡16

184 Fraud  
184I Deception Constituting Fraud, and Liability Therefor  
184k15 Fraudulent Concealment  
184k16 k. In General. Most Cited Cases  
Under New Hampshire law, seller of plant and equipment could not be held liable to joint venturer for fraudulent concealment of environmental problems, simply because joint venturer's partner, which already held option to purchase, may have been engaged in separate fraud of nondisclosure to induce joint venture agreement, particularly where there was no evidence that seller withheld or intended to withhold existence of environmental problems from joint venturer during plant tour or had any knowledge of alleged nondisclosure between joint venturers.

**[31] Fraud 184** ⚡30

184 Fraud  
184I Deception Constituting Fraud, and Liability Therefor  
184k30 k. Persons Liable. Most Cited Cases  
Under New Hampshire law as predicted by federal circuit court, actual knowledge by alleged tortfeasor is required to prove tort of aiding and abetting breach of fiduciary duty.

**[32] Federal Courts 170B** ⚡644

170B Federal Courts  
170BVIII Courts of Appeals  
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review  
170BVIII(D)2 Objections and Exceptions  
170Bk644 k. Motions for New Trial.  
Most Cited Cases  
Request for new trial based on claimed error in jury instructions was to be considered under harmless error standard, where plaintiff properly preserved its objection to standard incorporated in instruction

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at all appropriate points in trial court. Fed.Rules Civ.Proc.Rule 61, 28 U.S.C.A.

\*60 Mark H. Alcott, with whom John F. Baughman and Paul, Weiss, Rifkind, Wharton & Garrison, were on brief, for appellants.

Russell F. Hilliard, with whom Charles W. Grau and Upton, Sanders & Smith, were on brief, for appellees.

Before BOUDIN, Circuit Judge, BOWNES, Senior Circuit Judge, and STAHL, Circuit Judge.

STAHL, Circuit Judge.

Plaintiff-appellant Invest Almaz appeals from adverse rulings of the district court regarding claims arising out of a failed attempt to purchase manufacturing equipment from defendant-appellee Temple-Inland Forest Products Corporation ("Temple-Inland"). Invest Almaz contends that the district court abused its discretion by failing to order restitution of funds retained by Temple-Inland after the deal collapsed and by erroneously granting Temple-Inland's motion for judgment as a matter of law on Invest Almaz's fraud claims. Invest Almaz also contends that the jury was not properly instructed on a claim that, in the course of these events, Temple-Inland aided and abetted Invest Almaz's joint venture partner, Pathex International Ltd. ("Pathex"), in breaching its fiduciary duty to Invest Almaz. We affirm.

\*61 I.

Invest Almaz, a subsidiary of a Russian company engaged in diamond mining, was formed for the purpose of investing the pensions and savings of the parent company's employees. In early 1993, Invest Almaz became interested in developing a plant to manufacture oriented strand board ("OSB"), a wood and wafer resin board used as a construction material. Invest Almaz's intent was to build housing for the parent company's retired employees and also

to sell OSB for needed hard currency in the export market. After considering the possibility of building a new plant for this purpose, Invest Almaz came to the conclusion that it would be more cost-effective to purchase the equipment from an existing plant in North America and have it transported back to Russia.

With this in mind, Invest Almaz entered into discussions with Pathex,<sup>FN1</sup> a Canadian corporation with expertise in the field, regarding the formation of a joint venture to effectuate these plans. Under the arrangement contemplated by the parties, Pathex would select and procure suitable equipment from an existing plant, transport it to Russia, reconstruct and upgrade the equipment once transported, and maintain it thereafter. Invest Almaz would provide the capital, as well as the land, labor and materials in Russia. During these negotiations, Pathex allegedly represented that acquiring suitable OSB manufacturing equipment would cost more than \$17 million.<sup>FN2</sup>

FN1. Some of Pathex's actions with respect to these events were undertaken through subsidiaries. For simplicity, we refer to these entities collectively as "Pathex" unless otherwise identified.

FN2. There is some dispute as to what this estimate was understood to include. Invest Almaz contends that Pathex quoted a purchase price of \$17.25 million. Temple-Inland argues that the price was understood to cover purchase, disassembly and renovation of the equipment with only \$8 million allocated to the purchase price. We do not consider the difference particularly germane to our analysis, especially as either estimate exceeded the price Pathex actually expected to pay.

Unbeknownst to Invest Almaz, Pathex was at this time already engaged in negotiating an option to purchase a Claremont, New Hampshire OSB plant from Temple-Inland (a Delaware corporation) for

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\$5 million. The plant was complete and operational, although it had been closed since 1988 because it could not compete with newer plants in the North American market. The option was structured to allow Pathex access to the plant and the site prior to deciding whether to go forward with the transaction. In addition, the option gave Pathex the choice of purchasing the entire facility, including real estate,<sup>FN3</sup> or only the equipment and buildings.<sup>FN4</sup> Although the option agreement was finalized on August 5, 1993-before the joint-venture agreement between Invest Almaz and Pathex was signed-its contents were never disclosed to Invest Almaz.

FN3. While only the equipment was of interest to Invest Almaz, Pathex was willing to consider taking the real estate-at no additional cost-for possible resale. This issue was left open in the option agreement because of questions concerning the value of the real estate and the extent of environmental contamination at the site.

FN4. The option required Pathex to purchase the buildings because removal of the equipment would, in at least some instances, require the buildings to be dismantled.

In late September 1993, representatives from Invest Almaz traveled to Canada to finalize the joint-venture agreement with Pathex. Pathex arranged with Temple-Inland for Invest Almaz's representatives to tour the Claremont OSB plant during their stay, and Vladimir Semkin and Viktor Tikhov, both engineers employed by Invest Almaz, were shown the facility by Temple-Inland employee Earl Taylor. Semkin and Tikhov were given written information about the plant and afforded considerable opportunity to inspect the plant's equipment and ask questions of Taylor, although Invest Almaz later came to believe that the information it obtained about the equipment was not entirely accurate, candid or complete.

Invest Almaz formally entered into the joint-

venture agreement with Pathex on October 4, 1993. The agreement detailed the respective obligations of Invest Almaz and Pathex, requiring Invest Almaz to contribute in excess of \$21 million in "investments and services" to the overall project and Pathex to contribute a little less than half that amount, all in services. The agreement also established a schedule for Invest Almaz's payments. Although the agreement did not specifically identify Temple-Inland's facility as the source of the equipment that would be purchased by the joint venture, Invest Almaz's officials testified that they understood this to be the case, and there is no evidence in the record that any other facility was under consideration at the time.

While the final negotiations with Invest Almaz were taking place, Pathex exercised its right under the option agreement to inspect the Claremont plant, making a number of visits with its own personnel, commissioning a professional appraisal of the plant and requesting two assessments from an environmental consultant, Aries Engineering ("Aries"). The appraisal, received by Pathex in December 1993, revealed, among other things, that the property and buildings were assessed for tax purposes at \$1.6 million. The environmental assessments, received in March and May 1994, indicated that, while in operation and subsequent to its closure, the plant had run afoul of environmental regulations, including those governing wastewater discharges and hazardous materials storage. The Aries report noted the presence of lead and other potentially hazardous substances in site soils and sediments, petroleum-related contamination in the groundwater, and contaminant stains on cement at various locations in the facility. Invest Almaz never received copies of any of these documents from Pathex, nor was it informed of the information they contained.

In March 1994, Pathex, through a subsidiary, exercised its option to purchase the equipment at the Claremont plant. Because of the environmental problems identified by Aries, Pathex decided not to

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acquire the real estate. The Asset Purchase Agreement Pathex and Temple-Inland executed provided for \$2 million to be paid at the closing and the remaining \$3 million to be remitted in the form of a non-recourse promissory note,<sup>FN5</sup> payable in three installments. The parties also executed a Security Agreement, giving Temple-Inland a security interest in the equipment. Invest Almaz was not informed by Pathex of the terms of the Asset Purchase Agreement or the Security Agreement.

FN5. Although the promissory note indicates that there is no recourse to Pathex, this provision is inconsistent with language in the accompanying Security Agreement, which provides that, in the event of default and foreclosure, Pathex would remain liable for any deficiency (and also could recover any surplus). Because the promissory note specifically states that, if there is a default, "Payee [Pathex] shall look to the security interests referenced in the ... security agreement ... for satisfaction of payment of any amounts due", we think it likely that the Security Agreement language would control. However, resolution of this anomaly is not ultimately necessary to our analysis.

Invest Almaz almost immediately failed to meet the schedule of payments laid out in the joint-venture agreement,<sup>FN6</sup> although it did eventually transfer over \$6 million to Pathex pursuant to that agreement. Of this amount, Pathex paid approximately \$2.3 million to Temple-Inland and used the \*63 remainder for other purposes.<sup>FN7</sup> The bulk of the funds paid to Temple-Inland went towards the \$2 million down payment required by the Asset Purchase Agreement. Subsequently, and in part as a result of Invest Almaz's inability to make its own payments to the joint venture, Pathex failed to make the three installments required by the Agreement. After negotiating a series of extensions with Temple-Inland and paying Temple-Inland a further \$300,000 in delinquency payments-Pathex default-

ted on the debt.<sup>FN8</sup>

FN6. The first two installments required by the agreement were \$7.22 million in November 1993 and \$5.5 million in February 1994. The record indicates that Invest Almaz's first payment was made in February 1994 and was for only \$1.3 million. A second payment of \$3.5 million was made in March 1994 and two smaller payments were made in the fall of 1994.

FN7. Approximately \$1.5 million of the Invest Almaz payments were diverted, at Invest Almaz's request, to a third party, Burnell Limited, for purposes which are the subject of dispute. The record does not detail the disposition of the remainder, although Charles Kosa, former President of Pathex, testified that what was not paid to Temple-Inland pursuant to the Asset Purchase Agreement was used to defray other costs associated with inspecting and purchasing the plant and implementing the joint-venture agreement.

FN8. The final extension negotiated between Pathex and Temple-Inland ran out on December 2, 1994.

The Security Agreement gave Temple-Inland the right to foreclose on the equipment to satisfy the debt in the event of a default by Pathex. The Agreement also specified that, in the event of foreclosure, Temple-Inland would have to account to Pathex for any surplus resulting from the sale, while Pathex would be responsible for any deficiency. Temple-Inland chose not to foreclose, however. Instead, Temple-Inland and Pathex negotiated a "Mutual Release and Cancellation of Debt" (the "Mutual Release"). Under the Mutual Release, Pathex's \$3 million debt was cancelled, and Temple-Inland regained title to the purchased assets. Temple-Inland also was allowed to retain the \$2.3 million in payments already made by Pathex. In addition, each party gave up any claims it might have had against

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the other arising out of the Asset Purchase Agreement and associated documents. The Mutual Release was executed by Pathex on December 13, 1994. Although Invest Almaz was informed at the time that Pathex was "terminating" the project, Invest Almaz was not involved in the discussions concerning the Mutual Release and was never informed of its terms.

In late 1996, attorneys representing Invest Almaz contacted Pathex in an effort to determine what had become of the funds Invest Almaz contributed to the joint venture. Shortly thereafter, however, Pathex filed for bankruptcy. Invest Almaz commenced the present action against Temple-Inland in August 1997, filing a complaint that initially included only an unjust enrichment count. The complaint was amended in October 1997 to include an allegation that Temple-Inland had aided and abetted Pathex in breaching a fiduciary duty to Invest Almaz. Nearly two years later, in June 1999, Invest Almaz was allowed to amend its complaint once again, this time to add a fraudulent concealment count.

The fraud and aiding and abetting claims were tried to a jury while the unjust enrichment count was tried to the court. The trial took place in December 1999, before Magistrate Judge James Muirhead.<sup>FN9</sup> At the end of plaintiff's case, Temple-Inland moved for judgment as a matter of law on the fraud and aiding and abetting claims. Invest Almaz, in its response, sought recognition that its fraud count also encompassed a theory that Temple-Inland made affirmative misstatements to Invest Almaz. Magistrate Judge Muirhead refused Invest Almaz's request to include an affirmative fraud count in the case and granted Temple-Inland's motion for judgment as a matter of law on the existing fraudulent concealment count. The magistrate judge denied Temple-Inland's motion with respect to the aiding and abetting count and that count went to the jury. The jury subsequently found in favor of Temple-Inland.

FN9. Magistrate Judge Muirhead exercised

jurisdiction over the case by consent of the parties, pursuant to 28 U.S.C. § 636(c).

\*64 On February 8, 2000, the magistrate judge issued a Memorandum and Order denying Invest Almaz's unjust enrichment claim. The same day, final judgment was entered, incorporating the magistrate judge's orders and the jury's verdict. This appeal followed.

## II.

On appeal, Invest Almaz challenges the magistrate judge's rulings with respect to the unjust enrichment and fraud claims and his instructions to the jury with respect to the aiding and abetting claim. For the reasons set forth below, we affirm the judgment of the district court in all respects.

### A. *Unjust Enrichment*

It is undisputed that when the dust settled on Invest Almaz's failed attempt to purchase the Claremont plant, Temple-Inland held title to the plant and also retained the approximately \$2.3 million in payments it had received from Pathex. The question on appeal is whether, under the circumstances, the magistrate judge erred in concluding that Temple-Inland was not unjustly enriched by this outcome.<sup>FN10</sup>

FN10. The body of this opinion analyzes in detail Invest Almaz's restitution arguments under New Hampshire common law principles. However, Invest Almaz's brief also presses a second claim for restitution premised on section 201(1) of the *Restatement (Second) of Restitution*. Section 201(1) provides that "[w]here a fiduciary in violation of his duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon a constructive trust for the benefi-

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ciary.”

The magistrate judge rejected this claim on the alternative grounds that: (1) it was not clear that a New Hampshire court would adopt the principle contained in section 201(1); and (2) Invest Almaz had failed to prove that Temple-Inland either had notice of Pathex's wrongdoing or failed to provide value. Finding nothing in Invest Almaz's conclusory arguments on appeal sufficient to disturb the magistrate judge's ruling with respect to this theory of recovery, we affirm the magistrate judge's conclusion for the reasons set forth in his opinion.

[1][2][3][4][5] In New Hampshire common law, “[t]he doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity.” *Cohen v. Frank Developers, Inc.*, 118 N.H. 512, 389 A.2d 933 (1978). A defendant is unjustly enriched, and a plaintiff is entitled to restitution, when the court determines that the defendant has “received a benefit and it would be unconscionable for the defendant to retain that benefit.” *Nat'l Employment Serv. Corp. v. Olsten Staffing Serv., Inc.*, 761 A.2d 401, 406 (N.H.2000). Of relevance in this case, a plaintiff in an unjust enrichment case need not prove that the defendant obtained the benefit through wrongful acts; passive acceptance of a benefit may also constitute unjust enrichment. *R. Zoppo Co. v. City of Manchester*, 122 N.H. 1109, 453 A.2d 1311, 1313 (1982); see also *Petrie-Clemons v. Butterfield*, 122 N.H. 120, 441 A.2d 1167, 1172 (1982) (“Unjust enrichment may exist when an individual receives a benefit as a result of his wrongful acts, or when he innocently receives a benefit and passively accepts it.”). Nor does unjust enrichment require a contractual relationship between the plaintiff and defendant. *Presby v. Bethlehem Vill. Dist.*, 120 N.H. 493, 416 A.2d 1382, 1383 (1980). However, more than a moral claim for reimbursement is required for restitution to be justified. *Cohen*, 389 A.2d at 937. In-

stead, “[t]here must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of the doctrine.” *Id.* Finally, in determining the extent to which a defendant may have been unjustly enriched, “the focus is not upon the cost to the plaintiff, but rather it is upon the value of what was actually received by the defendants.” *R. Zoppo Co.*, 453 A.2d at 1314.

The magistrate judge found that, because Invest Almaz was the source of the \*65 \$2.3 million paid to Temple-Inland by Pathex, Invest Almaz had conferred a “benefit” on Temple-Inland. However, he concluded that equity did not entitle Invest Almaz to restitution for two reasons. First, he found that Temple-Inland either provided value for or was otherwise legally entitled to retain all of the \$2.3 million it received from Pathex. One million dollars of this amount represented option payments (\$700,000) made prior to the sale<sup>FN11</sup> or delinquency payments (\$300,000) made after the closing to avoid a default on the promissory note. The magistrate judge found that Temple-Inland gave full value for these amounts, by keeping the plant off the market during the option period and by agreeing to extend the payment schedule after the sale, and was not required to return them. A further \$320,000 was not subject to restitution because it defrayed a payment Temple-Inland was required to make to General Electric (“GE”) if the equipment was removed from the plant, as Invest Almaz's plans required.<sup>FN12</sup> With respect to the remaining \$980,000, the magistrate judge relied on the principle that a payor typically cannot recover in restitution from a payee who accepts a payment in satisfaction of a third party's debt—even if it turns out the payor made the payment by mistake. See *United States v. Bedford Assocs.*, 713 F.2d 895, 904 (2d Cir.1983) (holding that restitution is not available against a defendant “where the defendant has received the payment in good faith and used it in satisfaction of the debt of a third person to the defendant”); *Equilease Corp. v. Hentz*, 634 F.2d 850, 853 (5th Cir.1981) (“It is patently unfair to require an

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innocent payee who has received and used the money to satisfy a debt to repay the money.”). See generally *Greenwald v. Chase Manhattan Mortgage Corp.*, No. 00-1447, 241 F.3d 76, 79 (1st Cir.2001) (analyzing and applying this principle in a case involving Massachusetts law). Because Temple-Inland innocently received the money as partial payment on Pathex's debt, the magistrate judge reasoned, Temple-Inland was entitled to keep it.

FN11. Pathex paid \$150,000 for the initial option with the right to extend for four more months for \$100,000 per month. Temple Inland ultimately allowed Pathex to extend the option still further for another \$150,000, resulting in a total of \$700,000 in option payments being made to Temple-Inland. Pursuant to the option agreement's terms, that amount was credited towards the \$2 million down payment required by the Asset Purchase Agreement.

FN12. This payment was made pursuant to a tax benefit transfer agreement executed in 1981 by GE and the prior owner of the facility. The agreement provided GE with certain tax benefits if the equipment remained in use at the plant for fifteen years. When Temple-Inland sold the equipment to Pathex for removal to Russia, GE incurred a tax liability in the amount of \$320,000 that Temple-Inland was required to reimburse. The magistrate judge found this expense chargeable against Invest Almaz because it would not have been incurred if Temple-Inland had sold the plant to a buyer that did not intend to remove the equipment.

In the alternative, the magistrate judge held that Invest Almaz's restitution claim failed because Invest Almaz had introduced no evidence demonstrating that Temple-Inland was unfairly advantaged by the outcome resulting from the Mutual Release. Invest Almaz could have met its burden, the magistrate

judge suggested, with evidence establishing that a sale of the secured assets (the equipment) would have yielded an amount larger than the \$3 million Pathex still owed on the promissory note. Under the Security Agreement and New Hampshire law, any such excess would have been returned to Pathex and potentially could have been recovered by Invest Almaz. However, the court found that Invest Almaz had “failed to present any evidence that the equipment could have been sold at auction for an amount greater than the ... debt owed by Pathex.” In the absence of such evidence, it was “neither unreasonable nor unconscionable to allow Temple Inland to retain both the collateral and the funds [Pathex] paid...”

\*66 [6][7][8] Familiar standards govern our review of the magistrate judge's conclusions. The factual findings underlying the magistrate judge's determination are reviewed for clear error. Fed.R.Civ.P. 52. By contrast, the magistrate judge's “articulation and application of legal principles is scrutinized *de novo*.” *Texaco P.R., Inc. v. Dept. of Consumer Aff.*, 60 F.3d 867, 874 (1st Cir.1995). As a corollary of the latter principle, findings of fact “predicated upon, or induced by, errors of law ... will be accorded diminished respect on appeal.” *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 457 (1st Cir.1992). Finally, to the extent that the ultimate decision in a restitution case rests on a judgment regarding the equities of the case, rather than application of an established rule of restitution,<sup>FN13</sup> that exercise of judgment is reviewed only for abuse of discretion, reflecting our view that the finder of fact “who has had first-hand exposure to the litigants and the evidence is in a considerably better position to bring the scales into balance than an appellate tribunal.” *Texaco P.R.*, 60 F.3d at 875 (quoting *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 323 (1st Cir.1989)); see also *Pella Windows & Doors, Inc. v. Faraci*, 133 N.H. 585, 580 A.2d 732, 733 (1990) (“Unless it is unsupported by the record, we generally defer to the trial court's determination as to whether the facts and equities of a particular case warrant [restitution].”).

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FN13. We have recently noted that, although “[t]he origins of unjust enrichment actions largely lie in equity,” many restitution decisions involve the application of restitution “rules,” such as those articulated in the *Restatement of Restitution* (1936), rather than purely equitable judgments as to the fair or just result. *Greenwald*, at 80. To the extent that a decision relies upon the “articulation and application” of such rules, a less deferential standard of review is arguably appropriate. See *Texaco P.R.*, 60 F.3d at 874.

Bearing in mind the foregoing, we conclude that Invest Almaz has not demonstrated that the magistrate judge abused his discretion in ruling for Temple-Inland on the unjust enrichment claim. Invest Almaz's argument that the magistrate judge improperly analyzed the value Temple-Inland provided and costs it incurred is largely conclusory and, with one exception, wholly without merit.<sup>FN14</sup> With respect to the \$1 million in option and delinquency payments made by Pathex, Invest Almaz states only that there is “no evidence that Temple-Inland gave up a thing” in exchange for these funds. This assertion is directly at odds with the magistrate judge's finding that Temple-Inland *did* provide the bargained-for consideration, in the first instance by keeping the plant off the market for the agreed period of time <sup>FN15</sup> and in the second by extending the deadline for Pathex to make payments under the Asset Purchase Agreement. Invest Almaz does not suggest that the magistrate judge was wrong in finding that Temple-Inland fulfilled its obligations under the two agreements. Nor does Invest Almaz point to any evidence indicating, for example, that the amount paid by Pathex for the option was grossly unfair. Under the circumstances, we see no reason to conclude that the magistrate judge erred in finding that Temple-Inland “gave full value” for the \$1 million received under the option agreement or the subsequent extension payments.

FN14. In its preface to the arguments analyzed in the body of this opinion, Invest Almaz contends that the court should not have even attempted an independent analysis of costs incurred and value provided because an internal memorandum from Temple-Inland's financial officer showed a “profit” on the transaction of \$1,478,156. This is frivolous. As Temple-Inland correctly notes, such internal calculations of cash flow are not equivalent to a legal analysis of the benefits and burdens resulting from a transaction.

FN15. Invest Almaz makes much of the fact that no other purchasers appeared during the option period. However, Invest Almaz cites no precedent, in New Hampshire or elsewhere, supporting its argument that Temple-Inland therefore failed to “give value” in exchange for the payments.

\*67 So too, Invest Almaz provides no convincing reason for us to conclude that the magistrate judge erred in allowing Temple-Inland to retain a further \$320,000 because of the payment made to GE. Invest Almaz's sole argument is that the magistrate judge improperly credited the testimony of George Vorpahl, Temple-Inland's general counsel, who stated that the payment would not have been required if the equipment were sold to most other buyers, over that of Stacey Cooke, a financial analyst at Temple-Inland, who stated that the payment would have been required no matter who purchased the property. Had the magistrate judge relied on the proper testimony, Invest Almaz contends, he would have concluded that the payment was not attributable to this particular sale and therefore could not be offset against the payments Temple-Inland received. We are not inclined to second-guess the magistrate judge's reasoned conclusions concerning the credibility of competing testimony, especially as Invest Almaz gives us no reason to believe that the magistrate judge's decision was in fact incorrect.

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[9] With respect to the remaining \$980,000 paid to Temple-Inland, Invest Almaz first suggests that New Hampshire law does not recognize the principle that a payor cannot recover in restitution from a payee who accepts a payment in satisfaction of the debt of a third party. Invest Almaz is incorrect. See *Winslow v. Anderson*, 78 N.H. 478, 102 A. 310, 312 (1917) (holding that, where plaintiff mistakenly overpaid the creditor of a third party, and the amount of the overpayment was innocently accepted by the creditor as payment for additional debts owed by the third party, equity would not require creditor to refund the amount of the overpayment; plaintiff's only cause of action was against the third party, who benefitted from the mistake).

[10] Invest Almaz's second and more compelling contention is that the factual circumstances of this case counsel against application of the foregoing rule to offset the \$980,000 payment. Invest Almaz correctly notes that there is no indication in the cases cited by the magistrate judge that the innocent creditor/defendant ultimately received more than the third-party debtor owed. The same appears to be true of *Winslow*. As a result, the possibility of the defendant enjoying a double recovery was not presented in these cases; the only issue before each court was whether the plaintiff could get his money back from the innocent defendant who was actually paid or had to pursue the (unintentionally benefitted) third-party debtor instead. By contrast, Temple-Inland ultimately received money from Invest Almaz (via Pathex) and the facility from Pathex. To the extent that this resulted in Temple-Inland recovering more than the amount it was owed by Pathex, Invest Almaz argues, these cases do not preclude Invest Almaz from obtaining restitution.

Invest Almaz's argument has a certain logic and is not without precedential support. See *Strubbe v. Sonnenschein*, 299 F.2d 185, 192 (2d Cir.1962) (holding, as an exception to the general rule, that restitution is justified to the extent that a payment to a third party's creditor "exceed[s] the amount due [the creditor] from [the third party]"); see also *Bed-*

*ford Assoc.*, 713 F.2d at 904 (distinguishing a case in which the creditor ultimately received less than the total amount it was owed from situation posed by *Strubbe*). However, accepting *arguendo* that Invest Almaz is correct, we think it evident that winning this point does not conclusively resolve the issue in Invest Almaz's favor. If Invest Almaz can potentially recover the excess Temple-Inland received over Pathex's debt, the question becomes whether, as a factual matter, Temple-Inland actually has recovered more than it was properly owed by retaining the plant plus the \$980,000. The magistrate judge, in his alternative holding, concluded that this had not been established. As a result, all Invest Almaz's\*68 argument accomplishes is to make the third part of the magistrate judge's offset analysis contingent on his assessment of whether Temple-Inland recovered more than was equitable as a result of the Mutual Release. Accordingly, we turn to that question.

[11][12] Invest Almaz raises two challenges to the magistrate judge's analysis of the outcome of the Mutual Release. First, Invest Almaz argues that, by requiring Invest Almaz to offer proof that the value of the plant at auction would exceed the \$3 million remaining on the promissory note, the magistrate judge "introduced an element that simply is not part of a claim of unjust enrichment, and then assigned Invest Almaz the burden of proof on that element." Invest Almaz offers no support for this position and we find it unpersuasive. In order to establish that Temple-Inland was unjustly enriched, Invest Almaz plainly had the burden of proving the extent to which Temple-Inland was benefitted by the transaction in question. See, e.g., *Moore v. Knight Founds., Inc.*, 122 N.H. 334, 444 A.2d 546, 547 (1982). We see no error in the magistrate judge's methodology, which used the amount that could be realized in a foreclosure sale as the benchmark of the value of the plant at the time Pathex defaulted. To the contrary, that approach is substantially in accord with other cases using the market value of property to measure the extent to which a party may have been unjustly enriched. See *Petrie-Clemons*,

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441 A.2d at 1172 (holding that, where plaintiffs sought restitution for improvements made to premises leased from defendants, the "appropriate basis for determining the amount of the defendant's benefit is the difference between the market value of the realty before and after the improvements"); *see also Moore*, 444 A.2d at 547 (reversing restitution award to plaintiff for improvements made to house prior to purchase where "plaintiff presented no evidence as to any increase in the fair market value of the real estate ..."). The magistrate judge's approach also strikes us as reasonable in light of the terms of the Security Agreement, which specified that Temple-Inland could retake and sell the collateral in the event of a default and apply the net proceeds (after deducting the costs of the sale) towards the amount due on the note. Under this provision, there would have been no question of a surplus arising unless the net proceeds of a foreclosure sale, after costs, exceeded the remaining indebtedness.<sup>FN16</sup>

FN16. As the magistrate judge noted, this would also be the result under the applicable provisions of the New Hampshire Uniform Commercial Code. *See* N.H.Rev.Stat. Ann. § 382-A:9-504 (discussing secured party's right to dispose of collateral after default and the order in which the proceeds of disposition are to be applied).

Indeed, the magistrate judge's approach could be considered generous to Invest Almaz's case, because it assigns no value to what Pathex and, indirectly, Invest Almaz, gained by avoiding foreclosure. Under the Security Agreement, if the amount realized at auction had been less than the \$3 million remaining on the note, Pathex could have been liable for the deficiency. Agreeing to the Mutual Release avoided the possibility of such a deficiency being assessed against Pathex.

Invest Almaz's second argument on this point is that the magistrate judge improperly failed to consider the evidence it did present concerning the

value of the plant's assets at the time of the default. Invest Almaz's evidence showed that, in May 1996, Temple-Inland entered into an agreement to sell the Claremont plant for \$5 million to another buyer, Ced-Or, Inc. ("Ced-Or"). The transaction ultimately fell through, for reasons the parties do not explain. At trial, Invest Almaz offered this evidence in support of its contention that the value of the plant was approximately \$5 million in December 1994, when Pathex defaulted. The magistrate judge ruled the evidence inadmissible, suggesting that significant changes in the economic climate during the intervening period, of \*69 which he took judicial notice, rendered the later transaction irrelevant to the value of the plant at the earlier time.<sup>FN17</sup>

FN17. With respect to the economic conditions at the time of the default the magistrate judge stated:

In 1995, when every big bank in this state had gone down the tubes, when people-when the real estate price, when all other prices in this state were incredibly depressed, a fact of which I cannot but take judicial notice because I lived here during that time-and in fact I practiced commercial litigation during that time and had enough lender liability cases to fill file drawers and tried those cases. You know it's smoke and mirrors to say you would have sold that equipment for \$3 million.

Shortly thereafter, when Invest Almaz's counsel pressed the Ced-Or agreement, the magistrate judge added:

What somebody is willing to pay a year or two later in an economic climate which had hit the bottom and was on its way up is not evidence of what somebody would have paid at a foreclosure sale in 1995.

On appeal, Invest Almaz contends that the magis-

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trate judge improperly “chose to rely on personal and anecdotal experience outside the record” in making his ruling on the evidence. According to Invest Almaz, whether prices were depressed in 1994, and whether the economy had begun to improve by 1996, are questions “subject to reasonable dispute,” and therefore not proper subjects of judicial notice under Fed.R.Evid. 201. See Fed.R.Evid. 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”); see also *Coalition for Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 15 F.Supp.2d 918, 928 (Ct. Int'l Trade 1998) (refusing, pursuant to Fed.R.Evid. 201, to take judicial notice of the fact that the economy grew and light auto sales increased in 1996). As a result, Invest Almaz argues, the magistrate judge's reliance on this information as a basis for rejecting the Ced-Or evidence constituted an abuse of discretion. See *United States v. Pitrone*, 115 F.3d 1, 7 (1st Cir.1997) (stating that decisions regarding admissibility of evidence are reviewed for abuse of discretion); see also *United States v. Roberts*, 978 F.2d 17, 21 (1st Cir.1992) (noting that an abuse of discretion may be found “when a relevant factor ... is overlooked, or when an improper factor is accorded significant weight ...”).

[13] We find Invest Almaz's argument unavailing. To begin with, we are not convinced that the magistrate judge had any obligation to meet the judicial notice requirements of Fed.R.Evid. 201 under the circumstances presented here. As Fed.R.Evid. 104(a) and 1101(d)(1) make clear, Fed.R.Evid. 201 typically does not apply to facts considered by a court when ruling on the admissibility of evidence. See Fed.R.Evid. 104(a) (stating that, when deciding “[p]reliminary questions concerning ... the admissibility of evidence[,] ... [the court] is not bound by the rules of evidence except those with respect to privileges”); Fed.R.Evid. 1101(d)(1) (stating that the Federal Rules of Evidence, except with respect

to privileges, are “inapplicable ... [to][t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104”); see also 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5103, at 479 (1977) (“Where the judge is taking judicial notice of a fact for the purpose of ruling on the admissibility of evidence, he may do so without regard to Rule 201.”). Nor do we consider Invest Almaz's summary argument that the state of the New Hampshire economy is “subject to reasonable dispute” persuasive as to whether the requirements of Fed.R.Evid. 201(b), even if applicable, were violated in this instance.

However, we need not reach the judicial notice issue, as we conclude that the magistrate judge's finding that value had not \*70 been established is supportable even if the magistrate judge erred in considering the state of the New Hampshire economy. The fact that the Ced-Or transaction occurred nearly eighteen months later would undercut its probative value in any event, as would the fact that the Ced-Or deal ultimately fell apart. We find in the record no corroborative evidence, such as expert testimony, supporting Invest Almaz's contention that the Ced-Or price of May 1996 was a good indicator of the plant's value in December 1994. Absent such evidence, we think the magistrate judge reasonably could have concluded that the mere fact of the Ced-Or transaction was inadequate to establish the value of the plant.

[14][15] Having accepted the magistrate judge's conclusion that Invest Almaz did not establish that the plant's value exceeded the \$3 million owed on the promissory note, Invest Almaz's restitution claim fails under either prong of his analysis. Absent proof that Temple-Inland recovered more than it was owed, Invest Almaz's argument that it is entitled to recover the last \$980,000 of the amount paid by Pathex evaporates, for reasons already discussed. Given our agreement with the remainder of the magistrate judge's analysis of value given and

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costs incurred by Temple-Inland, there is no “enrichment” left on which an unjust enrichment claim could be premised. In addition, Invest Almaz’s failure to introduce adequate evidence regarding the value of the plant precludes its restitution claim on a more fundamental level: without adequate evidence of the value left in Temple-Inland’s hands at the end of the day, there is no proof that Temple-Inland experienced a net benefit even if the magistrate judge’s various offsets were disregarded. Affirmance is justified on either ground.

### B. *Fraud*

On appeal, Invest Almaz challenges both the magistrate judge’s denial of its belated motion to add an affirmative fraud count to its complaint and the magistrate judge’s ruling granting Temple-Inland judgment as a matter of law on its fraudulent concealment count. We treat each in turn.

#### 1. *Refusal to Allow Invest Almaz to Add Affirmative Fraud Count*

As previously noted, Invest Almaz did not assert its affirmative misrepresentation claims until very late in the proceedings. No allegations of affirmative fraud were included in Invest Almaz’s second amended complaint, nor was this theory of the case identified in Invest Almaz’s proposed jury instructions, final pretrial statement, or opening argument at trial. Even when Invest Almaz finally asserted the claims at the close of plaintiff’s evidence, it did not do so directly. Instead, Invest Almaz incorporated the claims into its opposition to Temple-Inland’s motion for judgment as a matter of law, accusing Temple-Inland of “misreading Invest Almaz’s theory of the case” by “ignoring” the affirmative misrepresentation claims.

At the hearing on its motion, Temple-Inland commented that the claims had never been pleaded, even though, under the Rules, they needed to be pleaded “with some specificity.” Temple-Inland did not, however, expressly contend that the inclusion

of the claims would be prejudicial. Invest Almaz, for its part, did not dispute that the claims were being raised for the first time. However, it argued that all it was requesting was amendment of the pleadings to conform to the evidence already introduced. Invest Almaz contended that doing so would not prejudice Temple-Inland because the affirmative fraud claims largely tracked the concealment claims.

At the conclusion of the hearing, the magistrate judge denied Invest Almaz’s request to add the affirmative fraud claims to the case, holding that their last minute inclusion would be prejudicial to Temple-Inland “in view of the very special fraud pleading requirements of [Fed.R.Civ.P.] Rule 9.” The magistrate judge did not \*71 refer to specific evidence of prejudice, other than the “untimeliness” of the effort to amend.<sup>FN18</sup> On appeal, Invest Almaz argues that it should have been allowed to amend its pleadings to include the affirmative fraud count, in view of the liberal policies governing amendments to conform pleadings to the evidence contained in Fed.R.Civ.P. 15(b) and the magistrate judge’s failure to cite evidence that Temple-Inland would be prejudiced by the amendment. Temple-Inland responds that Invest Almaz failed to move to amend its pleadings below, thus waiving this argument, or, in the alternative, that Temple-Inland is entitled to judgment as a matter of law on the merits of the affirmative fraud claims.

FN18. The magistrate judge also stated that, in his view, omitting the claims would not prejudice Invest Almaz, because the alleged affirmative misstatements could equally be construed as actionable partial disclosures.

[16] As a threshold matter, we find Temple-Inland’s argument that Invest Almaz failed to preserve the issue of amendment of its pleadings unpersuasive. Although Invest Almaz chose to broach its affirmative fraud claims for the first time in its opposition to Temple-Inland’s motion, Invest Almaz’s counsel clearly indicated at the hearing that it wished to

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amend the pleadings if the magistrate judge thought it necessary. In addition, the magistrate judge himself framed his decision as a denial of Invest Almaz's request for leave to amend. Invest Almaz's appeal of the denial of leave to amend is therefore properly before us.<sup>FN19</sup>

FN19. Although it does not change our conclusion, we note that Invest Almaz's characterization of what the magistrate judge did is not, strictly speaking, correct. Invest Almaz plainly believes it requested—and was improperly denied—leave to amend its pleadings to conform with the evidence pursuant to Fed.R.Civ.P. 15(b). However, Rule 15(b) applies under only two circumstances: when an issue not contained in the pleadings is tried by consent (express or implied) of the parties, or when a party objects to evidence as outside the pleadings and the court exercises its discretionary right to allow amendment. Neither circumstance is present here, indicating that the magistrate judge's decision actually was rendered pursuant to Fed.R.Civ.P. 15(a). Because the arguments made by Invest Almaz are also relevant in the context of Fed.R.Civ.P. 15(a), this error is not fatal to Invest Almaz's appeal on this issue.

[17] We turn to the merits of Invest Almaz's argument guided by the following principles. “While leave to amend shall be freely given when justice so requires ... the liberal amendment policy prescribed by Rule 15(a) does not mean that leave will be granted in all cases.” *Acosta-Mestre v. Hilton Int'l of P.R., Inc.*, 156 F.3d 49, 51 (1st Cir.1998) (internal citations and quotation marks omitted). “Among the adequate reasons for denying leave to amend are ‘undue delay’ in filing the motion and ‘undue prejudice to the opposing party’ by virtue of allowance of the motion.” *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Furthermore, “when considerable time has elapsed between the filing of the complaint and

the motion to amend, the movant has the burden of showing some valid reason for his neglect and delay.” *Acosta-Mestre*, 156 F.3d at 52 (quoting *Stepanischen v. Merchs. Despatch Transp. Corp.*, 722 F.2d 922, 933 (1st Cir.1983)) (internal quotation marks omitted). We also note that, in reviewing a decision denying leave to amend, we accord significant deference to the decisionmaker below. Denial of leave to amend is reviewed only for abuse of discretion, and we will affirm the decision below “if any adequate reason for the denial is apparent on the record.” *Acosta-Mestre*, 156 F.3d at 51 (quoting *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 5 (1st Cir.1995)).

[18] We find that the magistrate judge's refusal to allow amendment withstands Invest Almaz's challenge. We concede that the magistrate judge's finding of prejudice could have been accompanied by a clearer explanation of its grounds than \*72 was given.<sup>FN20</sup> Nonetheless, we think the record adequate to sustain the magistrate judge's conclusion. The fact that the theory underlying the affirmative fraud counts had yet to be more than obliquely mentioned, moments before Temple-Inland was scheduled to begin presenting its case, certainly supports an inference of prejudice to Temple-Inland's defense. The inference seems particularly strong here, given that some of Temple-Inland's testimony—including the important testimony of Charles Kosa, former president of Pathex and Temple-Inland's first witness—was to be presented via videotaped deposition. Under the circumstances, Temple-Inland had a limited ability to adapt its defense on short order to counter Invest Almaz's new claims.

FN20. Indeed, it is possible to read the transcript to suggest that, because of the pleading requirements for fraud claims imposed by Fed.R.Civ.P. 9, the magistrate judge simply presumed that prejudice to Temple-Inland would result from Invest Almaz's late inclusion of such claims. We do not believe that any court has used Rule 9 to raise the Rule 15(a) bar in this way

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and we are not inclined to do so now. *Cf.* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1300 & n. 1 (2d ed.1990) (stating that “[a]n insufficient allegation of fraud or mistake is subject to the liberal amendment provisions of Rule 15” and citing numerous cases allowing amendments to cure insufficient fraud pleadings).

[19] In addition, there is nothing in the record suggesting that Invest Almaz met its burden of showing a “valid reason for [its] neglect and delay” in proposing the amendment. *Acosta-Mestre*, 156 F.3d at 52. To the contrary, Invest Almaz’s counsel admitted at the hearing on Temple-Inland’s motion that the affirmative fraud claims were raised at this late stage simply because it hadn’t occurred to Invest Almaz to add them earlier. As we recently said, “[w]hat the plaintiff knew or should have known and what he did or should have done are relevant to the question of whether justice requires leave to amend under this discretionary provision.” *Leonard v. Parry*, 219 F.3d 25, 30 (1st Cir.2000). Such considerations counsel against amendment here.

## 2. Judgment as a Matter of Law on Fraudulent Concealment Count

Invest Almaz’s second amended complaint alleged that Temple-Inland fraudulently failed to disclose a substantial number of material facts regarding the plant. The alleged omissions fell into three broad categories: omissions regarding the monetary value of the plant (dubbed by the magistrate judge the “value” claims); omissions regarding alleged obsolescence of the plant’s equipment (the “obsolescence” claims); and omissions regarding environmental problems at the plant (the “environmental” claims). Consistent with the elements of fraudulent concealment, Invest Almaz alleged, with respect to each omission: that the information was material; that Temple-Inland intentionally concealed the information despite having a

duty to disclose it; that Invest Almaz reasonably relied upon the omissions; and that Invest Almaz was damaged as a result. *See MAC Fin. Plan of Nashua, Inc. v. Stone*, 106 N.H. 517, 214 A.2d 878, 880 (1965) (summarizing the elements of fraudulent concealment); *see also Batchelder v. Northern Fire Lites, Inc.*, 630 F.Supp. 1115, 1118 (D.N.H.1986) (discussing, in a case applying New Hampshire law, the requirement that there be a duty to disclose and citing cases).

At the close of Invest Almaz’s case, Temple-Inland moved for judgment as a matter of law with respect to all of Invest Almaz’s fraud claims. Following a hearing, the magistrate judge granted the motion, concluding, for each category of allegations, that Invest Almaz had failed to introduce evidence sufficient to establish that Temple-Inland had intentionally concealed the information in question:

[W]ith regard to the environmental claims there were-the evidence is that there were substantial negotiations as to \*73 who is to be responsible for what. That in fact Pathex was given and ultimately Invest Almaz was given unfettered access to the plant and to the property with the full ability to observe, to test. The fact that Aries [the environmental consultant hired by Pathex] was late with regard to its test was because they didn’t get in and do the test before the snow fell and they themselves asked for an extension; in other words, there was no intentional concealment.

With regard to obsolescence, no reasonable jury could determine that there was an intentional concealment of the obsolescence where in fact there was a full right by Pathex, which was in the equipment business, to thoroughly inspect, nor even with respect to Invest Almaz, where Invest Almaz sent two engineers to inspect the equipment.

With regard to the value issue, there is no evidence from which a reasonable jury could determine that there was an intentional concealment of value, particularly with respect to all of the alleg-

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ations of value, vis-a-vis the Town of Claremont, the court takes judicial notice of the fact that all of those documents were public documents on record in the Town of Claremont Tax Assessor's office open to everyone in the public. They were specifically referenced in Exhibit Y [the appraisal prepared for Pathex in December 1993]. And in fact there was no evidence that the defendant ever represented any value to Pathex or to Invest Almaz. They simply negotiated a sales price.

On appeal, Invest Almaz argues, unsurprisingly, that it introduced sufficient evidence with respect to each element of fraudulent concealment, and each category of omission, that a reasonable jury could have found in its favor; therefore, the magistrate judge erred in granting judgment as a matter of law for Temple-Inland. In addition, Invest Almaz argues that the magistrate judge's analysis must be rejected because it proceeds from a legal error: the magistrate judge assumed, for purposes of his analysis, that any knowledge obtained from Temple-Inland by Pathex was chargeable to Invest Almaz. Invest Almaz contends that it is not chargeable with such knowledge under New Hampshire agency law because Pathex was a "faithless agent." Temple-Inland, in turn, argues that Invest Almaz's faithless-agent defense does not apply to this case and that the magistrate judge was correct in concluding that no reasonable jury could find in Invest Almaz's favor on the fraud claims. Because the applicability of the faithless-agent defense is critical to our review of the evidence, we address it first.

#### a. Invest Almaz's Faithless-Agent Defense

[20] Invest Almaz's argument that a principal is not chargeable with knowledge obtained by a "faithless agent" relies on *Boucouvalas v. John Hancock Mut. Life Ins. Co.*, 90 N.H. 175, 5 A.2d 721 (1939). In *Boucouvalas*, the defendant insurer sought to be relieved of its obligations under a life insurance policy procured through the fraud of its agent. The agent, in completing paperwork for an illiterate applicant, had deliberately omitted information the

applicant provided concerning a serious illness. When the applicant died shortly thereafter from the same illness, the insurer argued that it was not chargeable with knowledge of the plaintiff's illness and therefore not bound by the policy.

The New Hampshire Supreme Court ruled for the defendant, reversing an earlier decision, *Domocaris v. Metropolitan Life Ins. Co.*, 81 N.H. 177, 123 A. 220 (1923), which had held that an insurer was chargeable with knowledge of a deceitful agent. In its decision, the *Boucouvalas* court cited back to pre-*Domocaris* precedent holding that "the principal is not charged with the knowledge of his agent when the latter is engaged in committing an independent, fraudulent act on his own \*74 account, and the facts to be imputed relate to this fraudulent act." *Brookhouse v. Union Publ'g Co.*, 73 N.H. 368, 62 A. 219, 222 (1905); see also *Warren v. Hayes*, 74 N.H. 355, 68 A. 193, 194 (1907) ("The test, therefore, to determine whether an agent's knowledge is to be imputed to his principal is to inquire whether or not the agent was acting for the principal when he did that in respect to which is sought to charge the principal with his knowledge."). The court acknowledged that there was no evidence of wrongdoing by the applicant, but nonetheless concluded that he (or, in this case, his beneficiary) was entitled to no more than a refund of premiums paid. See *Boucouvalas*, 5 A.2d at 724.

[21] Although *Boucouvalas* has never been overruled, and has been followed on at least one occasion, see *Leclerc v. Prudential Ins. Co. of Am.*, 93 N.H. 234, 39 A.2d 763 (1944), we harbor some doubt concerning its vitality and applicability to this case. In the majority of jurisdictions, the law has evolved towards a recognition that information given to even a fraudulent agent should normally be imputed to the principal, unless the third party providing the information has notice that the agent is acting adversely or otherwise colludes with the faithless agent. See B.H. Glenn, *Insured's responsibility for false answers inserted by insurer's agent in application Following Correct Answers by In-*

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*sured, or Incorrect Answers Suggested by Agent*, 26 A.L.R.3d 6, 33-45 (1969 & Supp.2000) (showing state courts to be virtually unanimous in holding that knowledge of an insurance agent will be imputed to insurer, despite fraud of agent, unless the applicant has notice of the fraud); *see also Restatement (Second) of Agency* § 282, cmt. d (adopting the same position as a general principle of agency law). While the New Hampshire Supreme Court has not yet formally adopted this view, it has expressed clear misgivings about *Boucouvalas*. *See Mut. Benefit Life Ins. v. Gruette*, 129 N.H. 317, 529 A.2d 870, 872-73 (1987) (conceding that the *Boucouvalas* rule “acts harshly as to [those] who fall prey to devious agents” and noting public policy reasons supporting its reversal, but concluding that factual circumstances of the case—including evidence of collusion between the applicant and agent—“[did] not furnish an appropriate basis for returning to the rule of *Domocaris* ”); *see also Perkins v. John Hancock Mut. Life Ins. Co.*, 100 N.H. 383, 128 A.2d 207, 208 (1956) (questioning whether, in light of *Boucouvalas*, New Hampshire insurance law “permits the issuance of a policy to bind the insurer to the extent that reasonable person in the position of the insured would understand that it did” but concluding that the problem was more properly resolved by the legislature); *Taylor v. Metro. Life Ins. Co.*, 106 N.H. 455, 214 A.2d 109, 113 (1965) (same). It also appears that *Boucouvalas* has been limited to its facts by the New Hampshire Supreme Court: although the pre-*Domocaris* cases to which *Boucouvalas* refers involved a range of factual circumstances, we find no subsequent case applying the rule except in the context of duplicitous insurance agents.

Nonetheless, given our obligation in diversity cases to “determine the rule that the state Supreme Court would probably follow,” *Moore v. Greenberg*, 834 F.2d 1105, 1107 n. 3 (1st Cir.1987) (internal punctuation marks omitted), we find these doubts to be insufficient grounds for ruling that *Boucouvalas* is either invalid or inapplicable. The New Hampshire Supreme Court has not seen fit to overrule *Bou-*

*couvalas*, and we cannot reasonably assume that it would do so now, if it faced the issue directly. In addition, we find support for *Boucouvalas*’ holding and its applicability to the present facts in New Hampshire’s Uniform Partnership Act (“UPA”), which states, in pertinent part:

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner ... operates as notice to or knowledge of the partnership, *except in the \*75 case of a fraud on the partnership committed by or with the consent of that partner.*

N.H.Rev.Stat. Ann. § 304-A:12 (emphasis added).<sup>FN21</sup> The New Hampshire Supreme Court looks to state partnership law in deciding cases involving joint ventures. *Miami Subs Corp. v. Murray Family Trust*, 142 N.H. 501, 703 A.2d 1366, 1370 (1997). Although this provision of the UPA has not been given an authoritative reading by the New Hampshire Supreme Court, we find its plain language sufficiently persuasive to outweigh our doubts concerning the applicability of the rule of *Boucouvalas*.

FN21. In its brief, Temple-Inland points us to a second provision of the UPA which could be read to take a different view. This provision states in substance that each partner will be considered an agent of the partnership whose acts bind the partnership, unless the partner lacks authority for the act in question “and the person with whom [the partner] is dealing has knowledge of the fact that he has no authority.” N.H.Rev.Stat. Ann. § 304-A:9. We think it clear that section 304-A:12, which specifically concerns the imputation of knowledge to a partnership, governs here.

Having accepted that Invest Almaz’s “faithless agent” defense is available as a matter of New Hampshire law, we still must determine whether there is sufficient evidence that Pathex was engaged

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in a fraud against Invest Almaz to justify its application here. Unlike Invest Almaz, we do not consider the issue free from dispute. While the Pathex former president, Charles Kosa, admitted that information regarding the plant was not conveyed to Invest Almaz, Kosa suggested that this occurred because Pathex believed the joint venture agreement assigned it primary responsibility for selecting, purchasing and preparing a suitable plant. Nonetheless, we think enough evidence was introduced to permit a reasonable jury to find that Pathex intentionally withheld the information as part of an effort to conceal from Invest Almaz the condition and value of the facility. Therefore, for purposes of Temple-Inland's motion for judgment as a matter of law, Invest Almaz should not have been charged with knowledge of information that was never revealed to it by Pathex.

#### b. Judgment as a Matter of Law

Although we find that Invest Almaz was entitled to the benefit of its faithless-agent defense for purposes of the Fed.R.Civ.P. 50(a) motion, this result is not conclusive on the question of whether Temple-Inland was entitled to judgment as a matter of law. As we read it, the magistrate judge's ruling rested on two distinct grounds: first, that Temple-Inland's grants of access to Pathex and/or Invest Almaz to inspect and conduct tests negate any reasonable inference of fraudulent intent; and, second, that the availability of certain information to Pathex or Invest Almaz negates the inference that there was ultimately any concealment.<sup>FN22</sup> Invest Almaz's faithless-agent defense plainly weakens the second rationale, but it does not affect the first. Nor are we limited to upholding the magistrate judge's conclusion only for the reasons actually invoked in his ruling. *E.g.*, *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 172 (1st Cir.1998) (noting, in the summary judgment context, that this court "[w]ill affirm a correct result reached by the court below on any independently sufficient ground made manifest by the record"); *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 80 (1st Cir.1999) (applying the

same rule in reviewing a grant of judgment as a matter of law). We therefore \*76 proceed to the merits of Temple-Inland's Rule 50(a) motion.

FN22. While the language of the magistrate judge's ruling suggests that he viewed this evidence as undercutting "concealment," our reading of New Hampshire precedent suggests that it might more properly be viewed as undermining Invest Almaz's ability to claim justifiable reliance. *Cf. Cross v. Lake*, 122 N.H. 142, 441 A.2d 1179, 1180 (1982) (holding that a buyer's knowledge of the "true state of affairs" precluded the buyer from claiming that he relied on seller's misrepresentations concerning the acreage of a property offered for sale).

[22] We review a grant of judgment as a matter of law *de novo*, "under the same standards as the district court." *Katz v. City Metal Co.*, 87 F.3d 26, 28 (1st Cir.1996). In so doing, we "examine the evidence and all fair inferences in the light most favorable to the plaintiff and may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence." *Id.* (quoting *Richmond Steel, Inc. v. P.R. Am. Ins. Co.*, 954 F.2d 19, 22 (1st Cir.1992)) (internal punctuation marks omitted). At the same time, it remains the responsibility of the party with the burden of proof to present "more than a mere scintilla" of evidence in its favor; and to do more than "rely on conjecture or speculation" in support of its position. *Katz*, 87 F.3d at 28. To the contrary, "[t]he evidence offered must make the existence of the fact to be inferred more probable than its nonexistence." *Id.* (quoting *Resare v. Raytheon Co.*, 981 F.2d 32, 34 (1st Cir.1992)). We also bear in mind the plaintiff's burden of proof at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that

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would apply at the trial on the merits.”). New Hampshire common law provides that fraud must be proved by “clear and convincing proof” and “will not be implied from doubtful circumstances.” *Sheris v. Thompson*, 111 N.H. 328, 295 A.2d 268, 271 (1971); accord *Snow v. Am. Morgan Horse Ass’n, Inc.*, 141 N.H. 467, 686 A.2d 1168, 1170 (1997). Ultimately, we will affirm the magistrate judge’s ruling if we find that “as a matter of law, the record would permit a reasonable jury to reach only one conclusion as to that issue.” *Katz*, 87 F.3d at 28.

Because our analysis differs with respect to each category of allegedly concealed information, we treat them separately, employing, for simplicity, the magistrate judge’s labels.

#### i. Value

Invest Almaz’s complaint alleges that Temple-Inland fraudulently concealed three specific facts regarding the plant’s value: the “book value” of the Claremont OSB plant (carried in Temple-Inland’s internal records as \$2.4 million); the fair market value of the plant (calculated by Temple-Inland for tax assessment purposes as \$1.6 million); and the “fact” that Temple-Inland could not have realized \$5 million on a sale of the equipment at auction. We think that the trial record provided an adequate basis from which a reasonable jury could have concluded that the alleged “facts” were true and known to Temple-Inland, were not disclosed by Temple-Inland to either Pathex <sup>FN23</sup> or Invest Almaz, and were material to Invest Almaz. However, we find that Invest Almaz has presented no legally sufficient grounds for concluding that Temple-Inland was under any duty to reveal the information in question.

FN23. Pathex eventually learned at least the market value through its independent appraisal, a fact on which the magistrate judge apparently relied in determining that there was no concealment. However, there

is no evidence that Pathex passed the information up to Invest Almaz and, because of our conclusion on the agency issue, we do not charge Invest Almaz with this knowledge.

[23][24] In New Hampshire, as elsewhere, liability for fraudulent concealment does not arise in the absence of a duty of disclosure. *Batchelder*, 630 F.Supp. at 1118 (“[F]or a failure to disclose to be actionable fraud, there must be a duty arising from the relation of the parties to so disclose.”); *Benoit v. Perkins*, 79 N.H. 11, 104 A. 254, 256 (1918) (“[T]he fraudulent concealment of known facts with intent to mislead, and which in fact does mislead, ... does not constitute actionable \*77 fraud, unless there be some obligation which the law recognizes to disclose the facts concealed.”); see also *Restatement (Second) of Torts* § 551(1). Invest Almaz does not dispute this, but instead argues that, under the circumstances of this case, Temple-Inland acquired such a duty. Invest Almaz’s first rationale is that Temple-Inland’s invitation to representatives of the Russian company to tour the plant, accompanied by the offer to answer “any questions,” by itself gave rise to an obligation fully to disclose information regarding the condition and value of the plant. However, Invest Almaz provides no support for this curious contention. Nor are we aware of any cases suggesting that, simply by inviting a prospective purchaser to tour a property, a seller assumes an obligation to volunteer its own views as to the property’s value.

[25] Invest Almaz’s second contention is that Temple-Inland made “partial disclosures” concerning value which gave rise to a duty of full disclosure. Of the examples of such statements offered, only one merits discussion.<sup>FN24</sup> At trial, Invest Almaz played a videotaped deposition of Invest Almaz’s president, Yuriy Zepavalov. Zepavalov testified that Viktor Tikhov—one of the Invest Almaz engineers who toured the plant—told Zepavalov that he had asked tour guide Earl Taylor about the price of the plant, but Taylor provided “no response” and,

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instead, “evaded the question.” Although plainly hearsay, this statement apparently entered the record because Temple-Inland’s counsel failed to object at the appropriate time.

FN24. The other examples of “partial disclosures” offered—Temple-Inland’s alleged descriptions of the plant as in “good condition” and “well maintained”—are frivolous. We do not believe that such statements could reasonably be seen as indicative of value and, therefore, could not create a duty of further disclosure. Furthermore, these statements are exactly the kind of “loose general statements made by sellers in commending their wares” upon which purchasers are not entitled to rely. *Restatement (Second) of Torts* § 542, cmt e; *accord Sipola v. Winship*, 74 N.H. 240, 66 A. 962, 966 (1907) (noting that purchasers are not entitled to rely on “mere general commendations or expressions of opinion” made by a seller).

[26] Assuming, without deciding, that this statement is appropriately part of the record for purposes of our review, we think it insufficient to support a finding that Temple-Inland acquired a duty of disclosure with respect to value. Invest Almaz points to no case, and we are aware of none, suggesting that merely not answering a question, without more, creates a duty of disclosure.<sup>FN25</sup> While there is precedent in New Hampshire case law for the proposition that a vendor offering a deceptive opinion as to value may be liable in fraud, nothing in the deposition testimony indicates that Taylor gave an opinion of value,<sup>FN26</sup> or, indeed, even knew the sale price of the plant. *Compare Shafmaster v. Shafmaster*, 138 N.H. 460, 642 A.2d 1361, 1364 (1994) (holding that a defendant’s inclusion of incorrect opinions of value in a financial statement submitted as part of divorce proceeding was fraudulent). We therefore conclude that Temple-Inland had no duty to disclose the information respecting value it is charged with concealing

and that judgment as a matter of law was appropriate with respect to these allegations.

FN25. We acknowledge that there are circumstances in which silence could be deceptive, as, for example, when the party asking the question states its own understanding as to a fact and the respondent’s silence could be taken as assent. Nothing in the deposition testimony suggests that Tikhov understood Taylor’s response, whatever it actually was, to contain any such implication.

FN26. In this context, we note that the jury also heard the videotaped deposition of Vladimir Semkin, the other Invest Almaz engineer on the tour. Semkin stated that he inquired as to the price of the equipment of Taylor, and Taylor responded that he “had no information about that.”

## ii. *Obsolescence*

Seven of Invest Almaz’s allegations of concealment relate to the “obsolescence” \*78 issue. According to Invest Almaz, Temple-Inland improperly failed to reveal that the plant was “not capable of manufacturing OSB above cost in the current or foreseeable market”; the plant was “economically and functionally obsolete”; the plant was closed because it lost money; the plant was “one of the oldest OSB lines in America”; the plant was characterized by Temple-Inland’s CEO as “economically not viable”; the prior owner of the plant had gone bankrupt; and Temple-Inland “knew as early as 1990” that the plant would “never make money.”

We have some doubt as to whether all seven of these allegations were seriously advanced below or are meaningfully pressed on appeal. Nor do we think that Invest Almaz’s evidence supports the full breadth of these allegations. However, we find evidence in the record from which a reasonable jury could infer the truth of what we take to be the core

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of these allegations: that Temple-Inland's Claremont plant was old and, at least in its current location and configuration, unable to make a profit;<sup>FN27</sup> that its unprofitability was due in part to long-term changes in the regulatory regime and market in which it operated, including competition from newer, larger OSB plants able to operate with lower costs; and that Temple-Inland closed the plant because it was losing money.

FN27. Several pieces of evidence indicated that the plant's ability to upgrade to compete was limited by the size of the existing buildings and the site on which it was located. No evidence was introduced concerning the equipment's ability to operate profitably in any other location.

Invest Almaz also introduced evidence generally tending to show that information of this kind was not revealed to Pathex or Invest Almaz by Temple-Inland.<sup>FN28</sup> However, on this point Invest Almaz's position was contradicted in part by an admission by Vladimir Semkin. In his videotaped deposition, Semkin testified that he was told by Earl Taylor that the plant was closed because it was "loss-making" and "could not make a profit," a fact that Taylor allegedly attributed to increases in the price of obtaining timber. In addition, the record indicates that Taylor in fact told the Russian engineers that the plant began operation in 1981.<sup>FN29</sup>

FN28. Here, again, it is clear that Pathex eventually obtained much of this information through its appraisal, but there is no evidence that Pathex reported it to Invest Almaz.

FN29. This fact appears in notes taken by Invest Almaz engineer Tikhov during the tour on Tikhov's copies of written materials distributed by Taylor at that time. These materials, including the notes, were introduced during plaintiff's case, although the translation of Tikhov's notes was not placed in evidence until after Invest Almaz

rested its case.

To establish the materiality of the concealed information, Invest Almaz introduced videotaped testimony of president Zapevalov. Zapevalov's testimony with respect to the materiality of the plant's alleged obsolescence, however, was not particularly helpful to Invest Almaz, as the following colloquy indicates:

Q. Were you ever told that production costs at the plant had exceeded the market price for the product?

A. No, I was never been told [sic] that.

Q. And when your representatives visited the plant in October 1993 were they told that?

A. No, they were not told that, *but you have to bear in mind that the production cost in the United States can differ from that in Russia*, but nevertheless nobody told us about the production price and the fair market value of the product.

Q. If you had been informed of those facts, would it have made a difference to you?

A. *For us the most important is the production cost in Russian conditions, not in the United States, because we paid [sic] differently for \*79 electricity, for everything which comprises the production cost.*

Zapevalov Dep. p. 50-51(emphasis added). No other testimony was introduced directly bearing on the materiality of the plant's obsolescence to Invest Almaz, although there was witness testimony and documentary evidence concerning the performance expectations Invest Almaz had for the rebuilt, relocated plant.

[27] For the reasons discussed with respect to Invest Almaz's value claims, we do not think that Temple-Inland was under any general duty to disclose the information regarding obsolescence that Invest Almaz claims was concealed. It is apparent

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from Invest Almaz's allegations, and, indeed, conceded in Invest Almaz's brief, that the term "obsolescence" is meant to refer only to the alleged inability of the equipment to produce OSB profitably, not to any defects affecting its operation. *See* Pl's. Br. at 48 ("The equipment was not obsolete in the sense that it did not work; it was obsolete in the sense that it was economically inefficient and could not make OSB at a competitive price."). Furthermore, as Invest Almaz's evidence regarding obsolescence indicates, the unprofitability of the plant was the result of circumstances—such as increased energy and pollution control costs and the development of larger, more cost-effective plants—external to the equipment itself. Invest Almaz has identified no precedent, and we are aware of none, obligating a seller as a general matter to reveal this kind of information, which appears relevant primarily to the suitability of the equipment for purposes and under conditions about which Invest Almaz plainly had superior knowledge. Such a duty seems particularly inappropriate here, where it was understood that the equipment would be put into operation only after extensive modification.

[28] Invest Almaz has a stronger case that a limited duty of disclosure arose as a result of Taylor's alleged comments to the effect that high timber costs made the plant unprofitable. As noted above, the evidence at trial pointed to several other reasons why the plant could not make money. Given this, Taylor's statements could be construed as a "partial disclosure" requiring further clarification concerning the reasons why the plant closed. *See, e.g., Dawe v. Am. Univ. Ins. Co.*, 120 N.H. 447, 417 A.2d 2, 4 (1980) ("[P]artial disclosure may give rise to a duty to fully disclose when the partial disclosure, standing alone, is deceptive.").

Ultimately, however, we do not think that this line of argument could have succeeded. First, it is not clear that Invest Almaz actually contends on appeal that Temple-Inland's duty to disclose obsolescence arose in this way.<sup>FN30</sup> Instead, Invest Almaz appears to rely on the same general grounds already

considered and rejected as creating any duty of disclosure with respect to the "value" allegations. We consider it telling that Invest Almaz introduced no evidence in its affirmative case indicating that the information Taylor gave was actually false, that Taylor intended to mislead the Russian representatives by his statement, or that anyone else at Temple-Inland knew what Taylor told Invest Almaz.<sup>FN31</sup>

FN30. It seems somewhat clearer that Invest Almaz did raise this argument in its opposition to Temple-Inland's motion for judgment as a matter of law.

FN31. This is particularly surprising because Taylor was later called as a witness for Temple-Inland and Invest Almaz's counsel cross-examined him at some length about the possibility that he might have been biased in the information he gave Invest Almaz. Had Invest Almaz wanted to put Taylor's intention at issue, we think it would not have rested its own case without attempting to develop this testimony.

In addition, we do not believe that a reasonable jury could find on this record "clear and convincing" evidence that the information Temple-Inland arguably came under a duty to disclose was material to Invest Almaz. As Zepavalov's deposition testimony plainly states, Invest Almaz's concern was with the ability of the equipment to operate profitably in its new location. Yet none of the reasons for the plant's unprofitability introduced as part of Invest Almaz's case are ultimately germane to that question. Zepavalov specifically acknowledges that the costs of production, which were the primary reasons for the plant's unprofitability in the United States, would be completely different in Russia. It is also far from self-evident that, in Russia, the plant would be directly competing with the same kinds of higher-volume facilities apparently dominating the North American market.<sup>FN32</sup> Invest Almaz introduced no evidence suggesting that paral-

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lels could be drawn between Russian and North American conditions, nor did it introduce any other evidence from which it could be inferred that the equipment could not be operated at a profit in Russia, or that it could not be rebuilt to meet the standards called for in the joint-venture agreement. Absent such evidence, we think any argument that the improperly concealed information was material to Invest Almaz would rest on sheer speculation.

FN32. In fact, Zepavalov testified that, at least in 1993, there were no OSB plants operating in all of Russia.

For the foregoing reasons, we think judgment as a matter of law was appropriately granted with respect to the obsolescence allegations.

### iii. Environmental Problems

Invest Almaz's final allegation of fraud asserts that Temple-Inland concealed "significant environmental problems at the plant, including the presence of hazardous and non-hazardous waste, chemical pollution, and radioactive material." Like the magistrate judge, who characterized the environmental issue as a "red herring," we view this allegation with particular skepticism. While there were clearly environmental problems at the plant-including both historical noncompliance with environmental regulations and present contamination of site soils and sediments-we find it hard to discern how those problems were relevant to the equipment purchase Invest Almaz hoped to accomplish.<sup>FN33</sup> Invest Almaz does not appear to argue that the equipment itself was contaminated. Nor does Invest Almaz point to evidence suggesting that the plant was incapable of being operated in a non-polluting manner. Indeed, as we read the record, the environmental issues were only evaluated so that Pathex could decide whether or not to purchase the property on which the plant was built, an aspect of the transaction unrelated to the joint venture's purposes.

FN33. We acknowledge that Invest Almaz

president Zepavalov testified in his deposition that the environmental problems at the plant would have been of importance to him. However, this does not automatically establish the materiality of this information as a matter of law. If it were objectively unreasonable for Zepavalov to consider such information "in determining his choice of action in the transaction," *Restatement (Second) of Torts* § 538(1)(a), materiality would require a showing that Temple-Inland knew, or had reason to know, that Zepavalov nonetheless viewed the information as critical to his decision, *id.* § 538(1)(b).

Furthermore, we think that the magistrate judge was plainly correct in concluding that, in view of the extensive interactions between Pathex and Temple-Inland regarding the environmental issues, no reasonable jury could find that Temple-Inland intentionally concealed environmental information in order to defraud either Pathex or Invest Almaz. See *Hall v. Merrimack Mut. Fire Ins. Co.*, 91 N.H. 6, 13 A.2d 157, 160 (1940) (fraud requires a "deliberate falsehood ... made for the purpose or with the intention of causing the other party to act upon it"). Uncontradicted evidence in the record shows that the existence of environmental problems at the facility and the parties' respective obligations for analyzing and resolving those problems were discussed throughout the \*81 negotiations between Pathex and Temple-Inland, beginning, at latest, by mid-July 1993-before Pathex entered into the option agreement with Temple-Inland and well before Invest Almaz signed the joint-venture agreement. It is also beyond dispute that Pathex fully understood the importance of undertaking its own environmental assessment to determine the full scope of the environmental problems at the plant,<sup>FN34</sup> and there is no evidence that Temple-Inland sought to impede the assessments performed for Pathex by Aries.<sup>FN35</sup> Furthermore, the record indicates that Pathex and Temple-Inland continued to discuss the results of these environmental surveys, the progress

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of Temple-Inland's cleanup efforts, and the impact of environmental issues on the final shape of the Asset Purchase Agreement, throughout the option period. In our view, this uncontradicted evidence of extensive, ongoing discussions regarding environmental matters, begun before any agreement was signed and culminating in an unfettered opportunity to discover the true state of affairs prior to purchasing the property, precludes any reasonable jury from finding that Temple-Inland intentionally concealed any environmental problems the plant may have had.<sup>FN36</sup>

FN34. In fact, Invest Almaz's attorney elicited uncontradicted testimony from Temple-Inland General Counsel Vorpahl indicating that responsibility for environmental investigation was a critical component of the successive drafts of the option agreement and Asset Purchase Agreement, and that Temple-Inland took the position throughout that Pathex should make an independent investigation.

FN35. To the contrary, the contents of the assessments make clear that Earl Taylor, at least, provided significant information to Aries.

FN36. We acknowledge that Invest Almaz sought to develop, and to some minor extent succeeded in developing, evidence to the effect that Temple-Inland may have had a motive to "cut corners and shade the truth in order to sell." For example, Invest Almaz elicited testimony indicating that Temple-Inland was incurring substantial carrying costs on the facility. In the face of the overwhelming evidence indicating that Temple-Inland did reveal the existence of environmental problems at the plant, we do not think Invest Almaz's circumstantial and speculative evidence of a possible "motive" creates a trialworthy dispute concerning Temple-Inland's intent.

[29] Invest Almaz's arguments against this result are unpersuasive. Invest Almaz first suggests that giving Pathex notice of the environmental problems and the opportunity to learn more was not sufficient to avert a finding of fraudulent concealment. Instead, Invest Almaz argues, Temple-Inland was obliged to disclose the full environmental history of the plant and to do so from the outset. Invest Almaz offers no precedential support for this proposition, which strikes us as wholly at odds with established business practice. While we can certainly imagine circumstances in which notice and an opportunity to inspect would be inadequate—as when the party providing notice intentionally misdirects the other party or prevents it from completing an investigation, *see Bergeron v. Dupont*, 116 N.H. 373, 359 A.2d 627, 629 (1976) (plaintiff's own investigation not a defense to misrepresentation when the investigation was restricted by bad weather and by defendant's request that it be curtailed)—we think it more generally the case that accepting such an opportunity prevents a party from later claiming that it acted in reliance on an adverse party's representations. *See Restatement (Second) of Torts* § 547(1) (“[T]he maker of a fraudulent misrepresentation is not liable to another whose decision to engage in the transaction that the representation was intended to induce ... is the result of an independent investigation by him.”); *see also Sipola*, 66 A. at 966 (noting that, although there is generally no duty of purchaser to investigate the truthfulness of representations made by a seller, such a duty arises when the purchaser has “knowledge of his own, or of any facts which would excite suspicion”).<sup>FN37</sup>

FN37. Also relevant in this context is the fact that both parties were experienced business entities, clearly having the capacity to evaluate the information available to them. *See Smith v. Pope*, 103 N.H. 555, 176 A.2d 321, 324 (1961) (noting that, in determining “whether the plaintiffs were justified in accepting the defendant's statements at face value” the court applies “an individual standard, based upon [the

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plaintiffs'] own capacity and knowledge”).

\*82 [30] Invest Almaz's second argument is that, notwithstanding Temple-Inland's above-board dealings with respect to Pathex, Temple-Inland remains liable vis á vis Invest Almaz, because it failed to disclose the environmental problems at the plant *during the tour* and Invest Almaz relied on that omission to its detriment by signing the joint-venture agreement. Under this theory, Temple-Inland's disclosures to Pathex are not evidence of Temple-Inland's lack of fraudulent intent, because Temple-Inland was engaged in a separate fraud against Invest Almaz specifically. The problem with this contention is that it presumes a degree of coordination between Pathex and Temple-Inland for which there is simply no evidence. To conclude that Temple-Inland intentionally defrauded Invest Almaz alone, a jury would seemingly have to find that Temple-Inland withheld the environmental information knowing that Pathex also had not and would not reveal it; knowing that Invest Almaz was about to sign a deal committing itself to this plant (although the option clock still had time to run); and expecting and intending that Invest Almaz would rely on these omissions. Although Invest Almaz's briefs assert that such collusion occurred, the evidence presented at trial does not begin to support this elaborate chain of inferences.

Indeed, we think it questionable whether a reasonable jury could conclude that Temple-Inland even withheld the existence of environmental concerns from Invest Almaz during the tour. The packet of written information given to Invest Almaz's representatives by Earl Taylor specifically mentions that the plant equipment includes gauges containing radioactive materials; that the plant used phenol formaldehyde as a binder; and that Temple-Inland contracted with an entity named Jet Line for environmental services relating to hazardous waste, oil in the ponds and drums of waste at the facility. This information would appear sufficient to put Invest Almaz on notice and therefore to defeat any claim of reliance. *See Sipola*, 66 A. at 966. At the very

least, we consider the fact that Taylor handed out this information fatal to any argument that Temple-Inland *intended* to conceal the plant's environmental problems during the tour.

Given the foregoing, we conclude that judgment as a matter of law was properly granted with respect to this final group of allegations of fraudulent concealment.

### C. Aiding and Abetting

[31] Invest Almaz's final claim of error concerns the instructions given the jury with respect to the knowledge element of the tort of aiding and abetting a breach of fiduciary duty. The magistrate judge, following the majority of jurisdictions recognizing this tort, concluded that Invest Almaz had to prove that Temple-Inland had actual knowledge that Pathex was breaching a duty to Invest Almaz. Invest Almaz argued below, and presses on appeal, that a constructive knowledge instruction should have been given.

It is undisputed that, as the magistrate judge found, the New Hampshire Supreme Court has yet to expressly consider whether to adopt the tort of aiding and abetting a breach of fiduciary duty. It was therefore the magistrate judge's duty to determine whether New Hampshire's Supreme Court would recognize the tort and how that Court would define the elements of the cause of action. *See Moores*, 834 F.2d at 1107. The magistrate judge, in a ruling that has not been appealed, concluded that the New Hampshire Supreme Court would recognize the tort, and would adopt a version incorporating the principles of aiding and abetting liability set forth in the *Restatement\*83 (Second) of Torts*. *See Restatement* § 876(b) (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself...”). Following other jurisdictions relying on these principles, he held that the

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tort would require Invest Almaz to prove three elements: (1) a breach of fiduciary obligations by Pathex; (2) knowing inducement or participation in the breach by the Temple-Inland; and (3) damages to Invest Almaz as a result of the breach. *E.g.*, *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 847-48 (2d Cir.1987) (applying New York law); *Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542, 546 (1994).

[32] With respect to the “knowledge” element, the magistrate judge noted that, in the majority of jurisdictions recognizing the tort, actual knowledge of the breach of fiduciary duty is required. Concluding that the New Hampshire Supreme Court would adopt the majority rule on this issue, he instructed the jury as follows:

In the context of this claim, to act knowingly means to act with actual knowledge. This means that Invest Almaz must prove that Temple-Inland actually knew two things: That Pathex owed a fiduciary duty to Invest Almaz, and that Pathex was breaching that duty. It is not enough for Invest Almaz to show that Temple-Inland would have known these things if it had exercised reasonable care. However ... it is not required to show that Temple-Inland acted with an intent to harm Invest Almaz.

Invest Almaz's position, below and on appeal, is that the magistrate judge should instead have followed a Second Circuit case employing a constructive knowledge standard. *See Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 283 (2d Cir.1992) (holding that “[a] defendant who is on notice that conduct violates a fiduciary duty is chargeable with constructive knowledge if a reasonably diligent investigation would have revealed the breach”). Invest Almaz further argues that the magistrate judge's error entitles it to a new trial on the aiding and abetting count. Because Invest Almaz properly preserved its objection to the actual knowledge standard at all appropriate points below, its request for a new trial will be considered under the harmless-error standard of Fed.R.Civ.P. 61 if the actual knowledge instruction is determined to

be incorrect. *See Beatty v. Michael Bus. Mach. Corp.*, 172 F.3d 117, 120 (1st Cir.1999).

We find no error and therefore do not reach the harmless error analysis. As is clear from *Diduck* itself, the constructive knowledge standard adopted in that case reflected unique factual and policy considerations not relevant here. The *Diduck* rule was developed by the Second Circuit as part of a federal common law right of action against non-fiduciaries arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101 *et seq.* as amended (ERISA). *See id.* Following ERISA precedent, the court looked to trust case law and provisions of the *Restatement of Trusts* in devising its constructive knowledge rule. *See Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 16-18 (2d Cir.1991) (concluding that Congress intended the courts to “fill any gaps in [ERISA] by looking to traditional trust law principles”); *see also Diduck*, 974 F.2d at 283 (noting *Restatement* rule that a defendant may be chargeable with notice either as to fiduciary's status as trustee or that trustee is committing breach of trust) (citing *Restatement of Trusts* § 326, cmt. b); *Id.* (noting *Restatement* rule that a defendant on notice is chargeable with constructive knowledge if a reasonable investigation would have revealed the breach) (citing *Restatement of Trusts* § 297, cmt. a). It is readily apparent that *Diduck*'s constructive knowledge holding has not been considered, even by courts in the Second Circuit, to alter the actual knowledge standard\*84 applied in other contexts. *See, e.g., Kolbeck v. LIT Am., Inc.*, 939 F.Supp. 240, 246 (S.D.N.Y.1996), *aff'd*, 152 F.3d 918 (2d Cir.1998) (unpublished table decision) (distinguishing *Diduck* and holding that, in cases of aiding and abetting a breach of fiduciary duty arising under New York common law, the actual knowledge standard remains in force). We find nothing in Invest Almaz's unsupported arguments remotely adequate to convince us that this unique rule would be applied by the New Hampshire Supreme Court to this case.

III.

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Having invested over \$6 million in a transatlantic deal that ultimately came to naught, Invest Almaz's effort to recover some part of what it lost is understandable. However, we find no error in the magistrate judge's rulings and concur that the facts of this case ultimately do not support a judgment against this defendant on the theories proposed. The judgment of the district court is affirmed in all respects.

*It is so ordered.*

C.A.1 (N.H.),2001.  
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**C**

Supreme Court of New Hampshire.  
 Leslie BURROUGHS and Vera Burroughs Raymond  
 v.  
 Hilda WYNN.  
 No. 7449.  
 Feb. 28, 1977.

Life tenant and remainderman sued contingent remainderman to cancel tax deed to property. The Trial Court, Johnson, J., entered a decree for plaintiffs and denied a motion for new trial and questions of law were reserved and transferred. The Supreme Court, Bois, J., held that evidence supported finding of fraud and that defendant's offered 'new' evidence in form of evidence of defendant's expenditures for benefit of a plaintiff and evidence that other plaintiff knew of tax sale was insufficient to probably cause different result and did not require new trial.

Exceptions overruled.

West Headnotes

**[1] Fraud 184 ⚡50**

184 Fraud  
 184II Actions  
 184II(D) Evidence  
 184k50 k. Presumptions and Burden of Proof. Most Cited Cases

**Fraud 184 ⚡58(1)**

184 Fraud  
 184II Actions  
 184II(D) Evidence  
 184k58 Weight and Sufficiency  
 184k58(1) k. In General. Most Cited Cases  
 Fraud is never presumed but must be established by

clear and convincing proof and will not be implied from doubtful circumstances.

**[2] Fraud 184 ⚡58(1)**

184 Fraud  
 184II Actions  
 184II(D) Evidence  
 184k58 Weight and Sufficiency  
 184k58(1) k. In General. Most Cited Cases  
 Evidence in action by owner of life estate and remainderman against contingent remainderman, who had voluntarily paid taxes for life tenant for several years but who thereafter failed to pay taxes and purchased property at tax sale, including evidence of defendant's subsequent efforts to conceal her ownership, supported finding of fraud.

**[3] New Trial 275 ⚡6**

275 New Trial  
 275I Nature and Scope of Remedy  
 275k6 k. Discretion of Court. Most Cited Grant or denial of new trial, after notice and opportunity for hearing, is in discretion of court.

**[4] New Trial 275 ⚡108(2)**

275 New Trial  
 275II Grounds  
 275II(H) Newly Discovered Evidence  
 275k108 Sufficiency and Probable Effect  
 275k108(2) k. Nature of Action or Issue and Character of Evidence in General. Most Cited Cases  
 Defendant's offered "new" evidence, in action to cancel tax deed to plaintiffs' property, allegedly obtained through fraud, in form of evidence of defendant's expenditures for benefit of a plaintiff and evidence that other plaintiff knew of tax sale, was insufficient to probably cause different result and did not require new trial.  
 \*\*642 \*124 Sullivan & Wynot, Manchester

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(Edward D. Wynot, Manchester, orally), for plaintiffs.

Nixon, Christy, Tessier & Peltonen, Manchester, and Randolph J. Reis, Nashua\*\*643 (David L. Nixon, Manchester), for defendant.

BOIS, Justice.

Bill in equity to declare a conveyance of property null and void. Trial by the court resulted in a decree for the plaintiffs. Subsequent to the decree, the defendant filed a motion for rehearing so as to permit the consideration by the court of testimony and exhibits claimed to be material to the defendant's case but not introduced at the time of the original hearing allegedly due to accident, mistake, and misfortune, and through no fault of the defendant. After hearing, the motion was denied. Defendant duly excepted. All questions of law were reserved and transferred by the Trial Court (Johnson, J.).

All parties to this action are children of Rhoda M. Burroughs who died testate on October 30, 1946. Under her will, plaintiff Leslie Burroughs was given a life estate in certain realty, with a remainder to the plaintiff Vera Burroughs Raymond if she survived Leslie. The defendant Hilda Wynn was one of the remaining children who were given a contingent remainder in said property in the event Vera predeceased the life tenant.

Leslie Burroughs, a handicapped person not completely self-supporting, received assistance from members of his family, including his plaintiff and defendant sisters. Plaintiff Vera paid the taxes for several years after the mother's death and the defendant Hilda then volunteered to pay them from 1951 to 1966. There was no evidence suggesting that the defendant, or anyone else, expected repayment of monies expended for Leslie's support and/or the taxes.

In 1967, the defendant failed to pay the taxes when due, but this was not unusual as she had been late paying them in several prior years. On this occa-

sion, however, the defendant not only failed to pay the taxes but she purchased the real estate at a tax collector's sale held on April 5, 1968. A deed dated April 8, 1970, was obtained from the tax collector and recorded by the defendant in the Grafton County Registry of Deeds. In 1971 the plaintiffs learned of the tax sale, and they commenced this action alleging that the defendant had obtained the real estate by fraud. Plaintiffs further alleged that defendant thereafter concealed her actions and \*125 deliberately led plaintiffs to believe that they continued to hold title to said property. The trial court found for the plaintiffs, ordering the defendant to reconvey the property under the same terms of ownership as existed prior to the tax collector's deed. Plaintiffs were ordered to reimburse the defendant for taxes paid plus interest at six percent per year.

The first issue raised on appeal is whether the evidence was sufficient to support the court's finding that the defendant acted fraudulently.

[1] We agree that fraud will never be presumed, but must be established by clear and convincing proof, and that fraud will not be implied from doubtful circumstances. *Sheris v. Thompson*, 111 N.H. 328, 331-32, 295 A.2d 268, 271 (1971). 'However, the proof need not be absolute but may be founded on circumstances such as existed here where the defendant's motive to mislead was strong and his conduct both before and after the misrepresentation complained of evinced a controlling intent to look after his own interests rather than carry out his commitments to the plaintiff.' *Lampesis v. Comolli*, 101 N.H. 279, 283, 140 A.2d 561, 564 (1958).

[2] A review of the transcript shows ample evidence to support a finding of fraud. For example, on two occasions subsequent to the 1967 tax sale, the defendant arranged meetings between the plaintiff Vera and prospective buyers. The defendant, never indicating she owned the premises, refused to participate in any of the \*\*644 conferences and created an impression that ownership was still in the

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plaintiffs. Mrs. Wynn's conduct, subsequent to her purchase for unpaid taxes, evidenced an intention to keep information of the sale from the plaintiffs while exercising control over the property under the guise of protecting the interest of Leslie. Accordingly, the defendant's exception as to the sufficiency of the evidence is overruled.

[3] Defendant's second contention is that the trial court erred in denying her motion for a new trial. RSA 526:1 provides for the granting of a new trial in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable. The granting or denial of a new trial, after notice and an opportunity to be heard, is in the discretion of the court. DiPietro v. Lavigne, 98 N.H. 294, 99 A.2d 413 (1953). In the instant case, an opportunity to be heard was provided to the \*126 parties in conference with the court, and therefore the question posed is basically one of abuse of discretion.

As set forth in Rautenberg v. Munnis, 109 N.H. 25, 26, 241 A.2d 375, 376 (1968), the findings which are prerequisite to the granting of a new trial are:

'(1) that the moving party was not at fault for not discovering the evidence at the former trial; (2) that the evidence is admissible (citation omitted), material to the merits, and not cumulative; and (3) that it must be of such a character that a different result will probably be reached upon another trial.'

Barton v. Plaisted, 109 N.H. 428, 432, 256 A.2d 642, 645 (1969); Bricker v. Sceva Speare Hosp., 114 N.H. 229, 231, 317 A.2d 563, 565 (1974).

In discussing whether the movant has made the requisite showing, we have noted that issues of fact are to be determined by the trial court and the court's findings will be sustained unless clearly unreasonable. Bricker v. Sceva Speare Hosp., supra; DiPietro v. Lavigne, 99 N.H. 173, 175, 106 A.2d 395, 397 (1954). We have further noted that the new evidence must go to the merits of the case and must not merely have a tendency to impeach or dis-

credit a witness and must be of such a character that it is at least probable that a different result will be reached upon another trial. State v. Nelson, 105 N.H. 184, 193, 196 A.2d 52, 59 (1963).

[4] There were two items of 'new' evidence offered by the defendant at the hearing on the motion. The first of these is a list of fifty-seven checks totalling \$3,867.33 allegedly representing expenditures by the defendant for the benefit of Leslie. The other item, presented orally to the court, is summarized in defendant's brief as '(e)vidence that Plaintiff Vera Raymond knew that the real estate in question was being sold for the non-payment of taxes due in 1967.'

The trial court found '(a)fter a complete and thorough review of the transcript of this proceeding . . . that no further evidence could overcome the defendant's own statements and admissions as to her conduct and the reasons for such conduct.'

The defendant failed in her burden of convincing the original trier of facts that the suggested new evidence 'was of such a character\*127 that a different result will probably be reached upon another trial.' We conclude that the motion was properly denied.

Exceptions overruled.

All concurred.

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**C**

Supreme Court of New Hampshire.

Cain A.J. JOHNSTON, by his father and next  
 friend James M. JOHNSTON, and James M. John-  
 ston, individually

v.

Frank LYNCH.  
 No. 88-058.

April 30, 1990.

Suit was brought arising out of a bicycle-automobile collision. The Superior Court, Carroll County, McHugh, J., entered judgment on a jury verdict in favor of defendant motorist, and bicyclist appealed. The Supreme Court, Thayer, J., held that: (1) jury could reasonably have concluded that motorist was not negligent in operation of his automobile and therefore trial court did not err in failing to set aside verdict in favor of motorist on ground that it was against weight of the evidence; (2) trial court correctly excluded opinion testimony of investigating officer; and (3) trial court did not abuse its discretion in compelling plaintiffs to disclose identity of neurologist which they did not intend to call as a witness at trial since results of neurologist's examination of bicyclist were critical and irreplaceable evidence concerning bicyclist's condition during period of time when he would have suffered from postconcussion syndrome.

Affirmed.

West Headnotes

**[1] New Trial 275 ↪72(1)**

275 New Trial  
 275II Grounds  
 275II(F) Verdict or Findings Contrary to Law  
 or Evidence  
 275k67 Verdict Contrary to Evidence  
 275k72 Weight of Evidence  
 275k72(1) k. In General. Most

Cited Cases

Whether a jury verdict is against weight of the evidence is a separate issue from whether it is product of plain mistake, passion, partiality or corruption.

**[2] Automobiles 48A ↪245(8)**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak245 Questions for Jury

48Ak245(2) Care Required and Negligence

48Ak245(8) k. Children. Most

Cited Cases

Jury could reasonably have concluded that motorist was not negligent in operation of his automobile, which collided with child bicyclist, and therefore trial court did not err in failing to set aside verdict in favor of motorist on ground that it was against weight of the evidence.

**[3] Automobiles 48A ↪247**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak247 k. Verdict and Findings. Most

Cited Cases

Verdict in favor of motorist in suit seeking damages for injuries sustained by child bicyclist in a collision with automobile was not product of plain mistake, passion, partiality or corruption.

**[4] Evidence 157 ↪514(2)**

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k514 Management and Operation of Vehicles, Machinery, and Appliances

157k514(2) k. Vehicles. Most Cited

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Cases

**Evidence 157** ⚡ **527**

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k526 Cause and Effect

157k527 k. In General. Most Cited

Opinion testimony of investigating officer concerning fault and cause of automobile-bicycle collision was properly excluded; testimony would have involved mixed questions of law and the evidence on which his opinion rested was available to jurors so that his testimony would not have assisted them in their search for the truth.

**[5] Evidence 157** ⚡ **472(1)**

157 Evidence

157XII Opinion Evidence

157XII(A) Conclusions and Opinions of Witnesses in General

157k472 Matters Directly in Issue

157k472(1) k. In General. Most Cited

Cases

Even if opinion testimony bears directly on a main issue, evidence is admissible if it will help jury arrive at the truth.

**[6] Evidence 157** ⚡ **506**

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k506 k. Matters Directly in Issue.

Most Cited Cases

Opinions of a police officer on fault and causation, which are mixed questions of law and fact, must be excluded.

**[7] Automobiles 48A** ⚡ **243(14)**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak243 Admissibility

48Ak243(14) k. Conditions After Accident. Most Cited Cases

**Automobiles 48A** ⚡ **244(13)**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak244 Weight and Sufficiency

48Ak244(2) Negligence

48Ak244(13) k. Collision with

Bicycle or Motorcycle. Most Cited Cases

Evidence established that motorist did not flee from scene of automobile-bicycle accident and therefore trial court did not abuse its discretion in excluding from jury evidence of circumstances surrounding motorist's leaving the scene.

**[8] Trial 388** ⚡ **203(1)**

388 Trial

388VII Instructions to Jury

388VII(B) Necessity and Subject-Matter

388k203 Issues and Theories of Case in General

388k203(1) k. In General. Most Cited

Cases

Purpose of jury instructions is to identify factual issues which are material for a resolution of case, and to inform jury of appropriate standards by which they are to decide them.

**[9] Trial 388** ⚡ **267(1)**

388 Trial

388VII Instructions to Jury

388VII(E) Requests or Prayers

388k267 Modification or Substitution by Court

388k267(1) k. In General. Most Cited

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As long as court adequately states law that applies to case, it is not necessary that it use the identical language requested by a party.

**[10] Trial 388 ↪ 295(1)**

388 Trial  
 388VII Instructions to Jury  
 388VII(G) Construction and Operation  
 388k295 Construction and Effect of Charge as a Whole  
 388k295(1) k. In General. Most Cited Cases  
 Jury charge is adequate if, taken as a whole, it fairly presents case to jury in such a manner that no injustice is done to legal rights of the litigants.

**[11] Appeal and Error 30 ↪ 1064.1(1)**

30 Appeal and Error  
 30XVI Review  
 30XVI(J) Harmless Error  
 30XVI(J)18 Instructions  
 30k1064 Prejudicial Effect  
 30k1064.1 In General  
 30k1064.1(1) k. In General.  
 Most Cited Cases  
 Test for determining whether an erroneous civil jury charge is reversible error is whether jury could have been misled.

**[12] Trial 388 ↪ 186**

388 Trial  
 388VII Instructions to Jury  
 388VII(A) Province of Court and Jury in General  
 388k186 k. Comments by Judge on Evidence in General. Most Cited Cases

**Trial 388 ↪ 260(8)**

388 Trial  
 388VII Instructions to Jury  
 388VII(E) Requests or Prayers  
 388k260 Instructions Already Given  
 388k260(8) k. Personal Injuries. Most

**Cited Cases**

In action arising from automobile-bicycle collision, trial court did not err in refusing portion of plaintiffs' requested instruction which involved a comment on the evidence and did not err in declining to give remainder of requested instruction on standard of reasonable care where court gave substance of that instruction in other language.

**[13] Trial 388 ↪ 186**

388 Trial  
 388VII Instructions to Jury  
 388VII(A) Province of Court and Jury in General  
 388k186 k. Comments by Judge on Evidence in General. Most Cited Cases

**Trial 388 ↪ 209**

388 Trial  
 388VII Instructions to Jury  
 388VII(B) Necessity and Subject-Matter  
 388k209 k. Circumstantial Evidence.  
 Most Cited Cases

**Trial 388 ↪ 267(1)**

388 Trial  
 388VII Instructions to Jury  
 388VII(E) Requests or Prayers  
 388k267 Modification or Substitution by Court  
 388k267(1) k. In General. Most Cited Cases  
 Trial court properly instructed jury about circumstantial evidence in suit arising from automobile-bicycle collision, and plaintiffs were entitled neither to court's comment on the evidence, nor to exact wording they desired concerning circumstantial evidence.

**[14] Automobiles 48A ↪ 246(10)**

48A Automobiles  
 48AV Injuries from Operation, or Use of Highway

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48AV(B) Actions  
 48Ak246 Instructions  
 48Ak246(2) Care Required and Negli-  
 gence  
 48Ak246(10) k. Collision with Bi-  
 cycle or Motorcycle. Most Cited Cases

**Trial 388 ↪186**

388 Trial  
 388VII Instructions to Jury  
 388VII(A) Province of Court and Jury in  
 General  
 388k186 k. Comments by Judge on Evid-  
 ence in General. Most Cited Cases  
 Trial court did not err in refusing to instruct jury  
 that they must award damages to plaintiff if they  
 found that defendant motorist was as negligent or  
 more negligent than plaintiff bicyclist, who was  
 struck by automobile, and in refusing to comment  
 on medical expert's testimony.

**[15] Damages 115 ↪208(1)**

115 Damages  
 115X Proceedings for Assessment  
 115k208 Questions for Jury  
 115k208(1) k. In General. Most Cited  
 A jury is not obligated to award a plaintiff dam-  
 ages, even if it finds for plaintiff on liability issue.

**[16] Appeal and Error 30 ↪1064.1(4)**

30 Appeal and Error  
 30XVI Review  
 30XVI(J) Harmless Error  
 30XVI(J)18 Instructions  
 30k1064 Prejudicial Effect  
 30k1064.1 In General  
 30k1064.1(2) Particular Cases  
 30k1064.1(4) k. Passengers,  
 Pedestrians, Children and Cyclists, Automobiles.  
 Most Cited Cases  
 In view of bicyclist's concession that cars traveling  
 in a westerly direction had right-of-way, trial

court's instruction that motorist had right-of-way,  
 even if erroneous, was harmless in suit arising from  
 automobile-bicycle collision.

**[17] Automobiles 48A ↪246(10)**

48A Automobiles  
 48AV Injuries from Operation, or Use of High-  
 way  
 48AV(B) Actions  
 48Ak246 Instructions  
 48Ak246(2) Care Required and Negli-  
 gence  
 48Ak246(10) k. Collision with Bi-  
 cycle or Motorcycle. Most Cited Cases  
 Trial court did not err in granting motorist's pro-  
 posed instruction, which was merely a recital of the  
 rules of the road, in suit arising from automobile-bi-  
 cycle collision.

**[18] Pretrial Procedure 307A ↪40**

307A Pretrial Procedure  
 307AII Depositions and Discovery  
 307AII(A) Discovery in General  
 307Ak36 Particular Subjects of Disclos- ure  
 307Ak40 k. Identity and Location of  
 Witnesses and Others. Most Cited Cases  
 Party may discover identity of an expert the oppos-  
 ing party has retained but does not intend to call at  
 trial, absent some evidence that information is irrel-  
 evant, upon making showing provided by applic-  
 able rule. Superior Court Rule 35, subd. b(3)(b).

**[19] Pretrial Procedure 307A ↪40**

307A Pretrial Procedure  
 307AII Depositions and Discovery  
 307AII(A) Discovery in General  
 307Ak36 Particular Subjects of Disclos- ure  
 307Ak40 k. Identity and Location of  
 Witnesses and Others. Most Cited Cases

**Pretrial Procedure 307A ↪379**

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307A Pretrial Procedure  
 307AII Depositions and Discovery  
 307AII(E) Production of Documents and  
 Things and Entry on Land  
 307AII(E)3 Particular Documents or Things  
 307Ak379 k. Experts' Reports; Ap-  
 praisals. Most Cited Cases

**Pretrial Procedure 307A ↪382**

307A Pretrial Procedure  
 307AII Depositions and Discovery  
 307AII(E) Production of Documents and  
 Things and Entry on Land  
 307AII(E)3 Particular Documents or Things  
 307Ak382 k. Medical and Hospital Re-  
 cords. Most Cited Cases

In suit arising from automobile-bicycle collision, trial court did not abuse its discretion in compelling plaintiffs to disclose identity of neurologist which they did not intend to call as a witness at trial since results of neurologist's examination of bicyclist were critical and irreplaceable evidence concerning bicyclist's condition during period of time when he would have suffered from postconcussion syndrome; furthermore, neurologist's medical records and notes were also discoverable. Superior Court Rule 35, subd. b(3)(b).

**[20] Pretrial Procedure 307A ↪386**

307A Pretrial Procedure  
 307AII Depositions and Discovery  
 307AII(E) Production of Documents and  
 Things and Entry on Land  
 307AII(E)3 Particular Documents or Things  
 307Ak384 Statements  
 307Ak386 k. Statements of Wit-  
 nesses. Most Cited Cases

Trial court did not abuse its discretion in compelling plaintiffs to produce statements taken by their counsel from investigating officer and two boys who were riding bicycles with bicyclist at time of

bicycle-automobile collision.

**[21] Costs 102 ↪193**

102 Costs  
 102VII Amount, Rate, and Items  
 102k193 k. Discovery; Incidental Expenses.  
 Most Cited Cases

Trial court did not abuse its discretion in ordering plaintiffs to pay defendant's costs in redepositing plaintiffs concerning a neurologist's examination of plaintiff bicyclist in suit arising from bicycle-automobile collision.

**\*\*936 \*83** Law Offices of James J. Kalled, Ossipee (James J. Kalled and John P. Kalled on the brief, and John P. Kalled orally), for plaintiffs.

Wiggin & Nourie, Manchester (Fred J. Desmarais, et al., on the brief, and Diane M. Smith orally), for defendant.

THAYER, Justice.

This negligence action arose from a collision between an automobile driven by the defendant, Frank Lynch, and a bicycle ridden by Cain A.J. Johnston (Cain). Following a trial in the Superior Court (*McHugh, J.*), the jury returned a verdict for the defendant. The plaintiffs appeal from the jury verdict and the trial court's denial of their post-trial motion to set aside the verdict, alleging the following errors: (1) the verdict is against the weight of the evidence or is the product of plain mistake, passion, partiality or corruption; (2) the trial court erroneously excluded the opinion testimony of the investigating officer concerning fault, and the manner and cause of the collision; (3) the trial court erroneously excluded evidence of the defendant's leaving the scene of the accident; (4) the trial **\*\*937** court's jury instructions misled the jury on vital issues, thereby causing undue prejudice to the plaintiffs; and (5) the trial court wrongfully compelled the plaintiffs to disclose the identity of an expert they did not intend to call as a witness at trial, to produce the expert for a deposition by the de-

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defendant, to produce statements taken by the plaintiffs' counsel from the investigating officer and two eyewitnesses, and to pay the defendant's costs of redepositing James M. Johnston (Mr. Johnston). For the reasons that follow, we affirm.

The facts are as follows. On July 27, 1983, around 10:50 a.m. thirteen-year-old Cain Johnston and two friends were at Patch's Store, in Glen, which is located on the south side of Route 302. The boys left \*84 the store and began riding their bicycles in a westerly direction on the left side of the road. Soon thereafter, one of the boys crossed from the left to the right side of Route 302, still traveling west.

The defendant, who was driving an automobile, was also traveling west along Route 302. When he first saw the boys, there were two on the left side of the highway and one on the right. Mr. Lynch testified that he was driving approximately thirty miles per hour and was around 1,000 feet away from the boys when they first came into his view. The defendant explained that, when he saw the three boys, he immediately "let go of the gas." As he approached the boys, the one further away on the left crossed over to the right side of the highway. Then, out of the corner of his eye, the defendant saw the closer boy on the left, Cain, turn to come onto the road. The defendant testified that, when he saw Cain, he jammed on his brakes. However, he was unable to stop his car before colliding with the rear wheel of Cain's bicycle.

According to Cain, he looked both behind and in front of him before he crossed Route 302. He testified that after he had started across he "glanced back and saw a car coming, figured [he] had plenty of time to make it ... [and] kept going." When he was almost across the highway, Cain heard tires squealing, and the next thing he remembered was starting to get up from the ground.

Following the collision, the defendant got out of his car and went over to Cain, who was already standing up. Mr. Lynch asked Cain whether he was hurt and offered to drive him to the hospital. Cain re-

sponded that he was "okay" and did not want any help from the defendant. Cain and his friends then started walking away, and the defendant followed them in his car. He stopped and got out of his car once more to make sure Cain was all right and to offer his assistance. However, after Cain repeatedly refused his help, Mr. Lynch drove off.

Cain's mother testified that after Cain told her about the accident, she noticed that Cain had a bump on his head, and scratches and bruises on his body. On the same day that the collision occurred, Cain's grandmother took him to see a doctor, who found that Cain suffered from nothing more than some bruises and abrasions. After learning a few days later that Cain was having headaches, the doctor had Cain's skull x-rayed. The x-rays came back indicating no skull fracture. In April, 1985, Dr. Abrams, who practiced in Worcester, Massachusetts, performed a pediatric neurological examination of Cain. Dr. Abrams concluded that although he had suffered a cerebral \*85 concussion at the time of the injury, Cain's neurological evaluation was normal. Then, during the summer of 1985, another neurologist, named Dr. Poser, examined Cain. This doctor also determined that Cain had had a cerebral concussion, but contrary to Dr. Abrams, this doctor concluded that the concussion resulted in moderate to severe permanent brain damage.

Cain Johnston and his father brought suit by a writ of summons dated April 25, 1985, alleging that Mr. Lynch operated his automobile in a negligent manner, causing Cain to suffer permanent personal injuries, and his father to incur expenses for Cain's medical treatment. Following a two-week trial, the jury returned a verdict for the defendant. The plaintiffs filed a motion to set aside the verdict and for a new trial, \*\*938 which the court denied. This appeal followed.

[1] The first argument the plaintiffs make on appeal is that the verdict is against the weight of the evidence or is the product of plain mistake, passion, partiality or corruption. Whether a jury verdict is against the weight of the evidence is a separate is-

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sue from whether it is the product of plain mistake, passion, partiality or corruption. *Panas v. Harakis & K-Mart Corp.*, 129 N.H. 591, 600-01, 529 A.2d 976, 982 (1987) (citing *Wisutskie v. Malouin*, 88 N.H. 242, 245-46, 186 A. 769, 771 (1936)). Both issues, however, are questions of fact for the trial court. See *Bennett v. Larose*, 82 N.H. 443, 447, 136 A. 254, 256 (1926). On appellate review, we will not disturb the trial court's ruling absent an abuse of discretion. See *Panas v. Harakis & K-Mart Corp.*, 129 N.H. at 599, 529 A.2d at 981. The standard that a trial court must apply in ruling on a motion to set aside a jury verdict is whether or not the verdict was reasonable in light of the evidence. *Id.* at 603, 529 A.2d at 983.

[2] Initially we will address whether the trial court abused its discretion in failing to set aside the jury's verdict on the ground that it was against the weight of the evidence. Based on the evidence included in the record, the jury could have found that the defendant was traveling approximately thirty miles per hour when he first saw Cain and his friends about 1000 feet ahead of his car. Mr. Lynch testified that he took his foot off the gas when he saw the boys. He further testified that after seeing the boy farthest on the left cross to the right side of Route 302, out of the corner of his eye, he saw Cain turn into the highway. The jury could have found that Mr. Lynch jammed on his brakes when he became aware of Cain's crossing the highway, and that he was unable to stop quickly enough before colliding with Cain's bicycle. The jury also could have found from Cain's testimony \*86 that he saw the defendant's car when he was halfway across Route 302, but that instead of turning back, Cain chose to continue across the road.

In support of their position that Mr. Lynch was negligent in hitting Cain, the plaintiffs cite cases from other jurisdictions which hold that defendant motorists who strike children are negligent as a matter of law. The plaintiffs in effect are urging this court to adopt a theory of strict liability in cases involving collisions between motorists and children.

However, since 1956 this court has limited its application of strict liability for damages to cases involving consumers of unreasonably dangerous and defective products. *Bagley v. Controlled Environment Corp.*, 127 N.H. 556, 559, 503 A.2d 823, 825 (1986). Moreover, we have held that "a motorist is not an insurer against all accidents involving injuries to children...." *Ross v. Express Co.*, 100 N.H. 98, 100, 120 A.2d 335, 336 (1956). Instead, both the child and the driver owe each other the reciprocal duty to act reasonably under the circumstances. *Shimkus v. Caesar*, 95 N.H. 286, 287, 62 A.2d 728, 729 (1948); see *Dorais v. Paquin*, 113 N.H. 187, 188, 304 A.2d 369, 371 (1973) (child normally held to standard of care reasonable for children of like age, intelligence and experience). Contrary to the plaintiffs' position, "[t]he issues of fault on the part of each operator cannot be so simply decided as by considering only the physical possibility of vision that each had of the other.... Whether each exercised reasonable care must be determined in the discretion of the jury by all the circumstances under which each respectively acted." *Shimkus v. Caesar*, 95 N.H. at 287, 62 A.2d at 729. Based on the evidence presented at trial, we hold that a jury could reasonably conclude that the defendant was not negligent in the operation of his automobile, and we accordingly hold that the trial court did not err in failing to set aside the verdict on the ground that it was against the weight of the evidence.

[3] Having concluded that the trial court did not abuse its discretion in refusing to set aside the verdict as against the weight of the evidence, we now consider whether the trial court erred in refusing to set aside the verdict on the ground that it was the product of plain mistake, passion, partiality or corruption. In *Panas v. Harakis & K-Mart Corp.* this court discussed\*\*939 a trial court's setting aside a verdict on these grounds:

"Undoubtedly, it is possible to demonstrate that the jury made an affirmative mistake, as for example, by rendering \*87 internally inconsistent findings

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that manifest legal error. Similarly, the fact that the jury had been bribed would warrant setting aside a verdict on the basis of corruption. The crucial distinction is that in a motion to set aside a verdict because of mistake, partiality, or corruption, the moving party must demonstrate the mistake, partiality or corruption as grounds independent of a verdict conclusively against the weight of the evidence. As a practical matter, it will often be easier to demonstrate that the verdict was conclusively against the weight of the evidence than it will be to demonstrate jury mistake."

129 N.H. at 603, 529 A.2d at 983-84. The jury in this case did not return internally inconsistent findings. Additionally, the plaintiffs have failed to demonstrate that the verdict was the result of passion, corruption or partiality. For these reasons, we hold that the trial court did not err in denying the plaintiffs' motion to set aside the verdict on the ground that it was the product of plain mistake, passion, partiality or corruption.

[4] The second argument the plaintiffs make on appeal is that the trial court erroneously excluded the opinion testimony of the investigating officer concerning fault, and the manner and cause of the collision. Prior to trial, the defendant filed a motion *in limine* to exclude the expert testimony of Officer Moulton, the investigating officer. The court responded that it would defer making a ruling until the trial.

The record indicates that Officer Moulton did not arrive at the scene of the accident until after Cain's bicycle and Mr. Lynch's automobile had been moved from the site. He conceded at trial that he did not consider himself to be an accident reconstructionist expert. His opinion concerning fault, and the manner and cause of the collision, was based on his examination of the accident site after the vehicles had been removed, photographs taken by Mr. Johnston, statements made by the plaintiffs and the defendant, and interviews with several witnesses, most of whom testified at trial. The jury

went to the scene of the accident the day before the trial began, where they were able to examine the site. Moreover, the photographs on which the officer relied were introduced into evidence. Essentially all of the evidence on which the officer based his opinion was available to the jury. When the officer was asked whether he thought the jury would be able to determine how the collision occurred based on this evidence, he answered in the affirmative. After the defendant asked \*88 the court to rule on the admissibility of the officer's opinion regarding the fault and causation of the accident, the trial judge ruled that the officer's opinion would not be admissible, explaining that "any opinions that he could give are opinions that any layman could reach, ... based upon what they see and what this jury is going to see." While the trial court excluded the officer's testimony regarding the fault and cause of the collision, it did not exclude his testimony concerning the manner of the accident, as the plaintiff alleges.

[5][6] The trial court has wide discretion in admitting or excluding an expert opinion, and we will not reverse its ruling unless there is a "clear abuse of discretion." *Tullgren v. Phil Lamoy Realty Corp.*, 125 N.H. 604, 609, 484 A.2d 1144, 1148 (1984) (quoting *Peters v. McNally*, 123 N.H. 438, 440, 462 A.2d 119, 121 (1983)). Even if the opinion testimony bears directly on a main issue, the evidence is admissible if it will help the jury arrive at the truth. *Brown v. Cathay Island, Inc.*, 125 N.H. 112, 116, 480 A.2d 43, 45 (1984); see *N.H. R. Ev.* 702. However, we have held that the opinions of a police officer on fault and causation, which are mixed questions of law and fact, must be excluded. *Saltzman v. Town of Kingston*, 124 N.H. 515, 524, 475 A.2d 1, 6 (1984). We stated in that opinion:

"[A] witness may not testify to an opinion or conclusion which contains matters of law. On mixed questions of law and \*\*940 fact the jury, after being properly instructed by the court as to the law, can draw the required conclusion from the facts as well as can the expert, so that the opinion of

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the witness, be he expert or layman, is superfluous in the sense that it will be of no assistance to the jury.”

*Id.* at 524-25, 475 A.2d at 6 (quoting *Prudential Insurance Co. of America v. Uribe*, 595 S.W.2d 554, 566 (Tex.Civ.App.1979)). Because Officer Moulton's opinion testimony concerning the fault and cause of the collision would have involved mixed questions of law and fact, and also because the evidence on which his opinion rested was available to the jurors so that his testimony would not have assisted them in their search for the truth, we hold that the trial court correctly excluded the opinion testimony of Officer Moulton.

[7] The next argument the plaintiffs make is that the trial court abused its discretion in excluding evidence that the defendant left the scene of the accident. The defendant filed a pre-trial motion *in limine* to prevent the plaintiffs from introducing evidence of the defendant's having left the scene of the accident after the collision occurred. The trial court granted the defendant's motion, and the \*89 plaintiffs argue that the circumstances surrounding Mr. Lynch's departure from the scene were probative on the issue of his culpability. Specifically, the plaintiffs argue they should have been permitted to introduce and develop evidence of the fact that Mr. Lynch left the scene without leaving his name, address and telephone number with Cain's parents, and without notifying the police.

The circumstances surrounding Mr. Lynch's leaving the scene became an issue during trial when the court was asked to give an instruction concerning what facts it would allow into evidence. In ruling that the events that took place after the accident other than conversations between Cain and Mr. Lynch would not be admitted, the court explained that Mr. Lynch

“in his conduct asked several questions of the boy before leaving. This certainly is not the situation where he knows he's made an impact, doesn't slow down, speeds up and has-shows by his ac-

tions a willful intent to run away from the situation. If that were the evidence, then I think that is probative, and I think that has some bearing on culpability, but that's not the evidence here, and I'm concerned that perhaps the prejudicial effect of what took place after the accident is very close to, if not outweighing, any probative value that that evidence might have.”

The law is well established that a trial court has broad discretion in ruling on the admissibility of evidence, and we will not disturb its ruling absent an abuse of discretion. *See Fenlon v. Thayer*, 127 N.H. 702, 705, 506 A.2d 319, 321 (1986); *Brown v. Cathay Island, Inc.*, 125 N.H. at 115-16, 480 A.2d at 44; *N.H. R.Ev.* 104(a). While evidence of a defendant's flight is admissible to show consciousness of guilt, *see State v. Glidden*, 123 N.H. 126, 134, 459 A.2d 1136, 1141 (1983), the evidence in this case reveals that Mr. Lynch did not flee from the scene of the accident. Accordingly, we hold that the trial court did not abuse its discretion in excluding from the jury evidence of the circumstances following the collision.

[8][9][10][11] The plaintiffs next argue that the trial court's denial of four of the plaintiffs' requested jury instructions, and the granting of two of the defendant's requested instructions, misled the jury on vital issues, thereby constituting undue prejudice to the plaintiffs. The purpose of jury instructions is to identify the factual issues which are material for a resolution of the case, and to inform the jury of the appropriate standards by which they are to decide them. \*90 *Gagnon v. Crane*, 126 N.H. 781, 788, 498 A.2d 718, 723 (1985); *State v. Bird*, 122 N.H. 10, 15, 440 A.2d 441, 443 (1982). As long as the court adequately states the law that applies to the case, it is not necessary that it use the identical language requested by a party. *State v. Taylor*, 121 N.H. 489, 495-96, 431 A.2d 775, 779 (1981). A jury charge is adequate if, “taken as a whole, ‘it fairly present[s] the \*\*941 case to the jury in such a manner that no injustice [is] done to the legal rights of the litigants.’ ” *Rawson v. Bradshaw*, 125 N.H. 94, 100,

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480 A.2d 37, 41 (1984) (quoting *Poulin v. Provost*, 114 N.H. 263, 264, 319 A.2d 296, 297 (1974)). “[T]he test for determining whether an erroneous civil jury charge is reversible error is whether the jury *could have been misled*.” *Bernier v. Demers*, 121 N.H. 217, 218, 427 A.2d 514, 515 (1981) (citing *Lindberg v. Swenson*, 95 N.H. 184, 187, 60 A.2d 458, 460 (1948)) (emphasis in original).

[12] The plaintiffs' proposed jury instruction Number 1, which the trial court denied, reads as follows:

“Because of the disparity between the injury-producing capacity of a car when compared to that of a child on a bicycle, I instruct you that in determining the standard of care required in given circumstances, the greater the degree of danger the higher is the amount of care required.”

(Citation omitted.)

In refusing to give the above charge, the trial court instructed the jury that “all drivers on our highways have a duty to use due care at all times to avoid or prevent harm to others.” The court also explained that “[n]egligence is the failure to use reasonable care. Reasonable care is that degree of care which an ordinary, prudent person would use under the circumstances.” Later in its charge, the court stated: “Every driver of a vehicle shall exercise due care to avoid colliding with any person propelling a human-powered vehicle, and shall give an audible signal when necessary, and shall exercise proper precaution upon observing any child.”

Although in an earlier time a trial court was thought to have discretion to comment on the evidence when instructing the jury, *Cleveland v. Reasby*, 92 N.H. 518, 521, 33 A.2d 554, 556 (1943), this practice was not followed as a matter of course, *see Cook v. Brown*, 34 N.H. 460, 470 (1857) (it is not ordinary practice for court to comment on evidence), and accepted modern practice is not to do so. The initial portion of the plaintiffs' requested instruction involved a comment on the evidence, and we hold that it was not error for the court to decline

giving this portion of the instruction. The remainder \*91 of the requested charge is merely a statement of the standard of reasonable care that does not differ in substance from the instruction given by the court. Since a court need not adopt the exact wording of a party's requested instruction as long as the jury is adequately instructed on the proper law to apply, *see State v. Taylor*, 121 N.H. at 495-96, 431 A.2d at 779, the trial court did not commit error in denying the plaintiffs' requested instruction Number 1.

[13] The next instruction the plaintiffs allege the court erred in denying was their instruction Number 11, which states:

“On determining issues such as speed you are entitled to interpret the severity of impact as indicated by the evidence of physical impact and damage and in accordance with your common knowledge and experience.”

The record indicates that the bent bicycle rim was introduced as an exhibit during trial, and the court instructed the jury that they could consider the exhibits during their deliberations. The court also explained in detail that the jury was entitled to rely on circumstantial evidence and told the jurors that in reaching their verdict, they were obligated to consider all of the evidence, giving each piece the weight they found it deserved.

While the defendant's speed prior to the collision was most likely a factor which the jury considered in determining whether Mr. Lynch was negligent in the operation of his automobile, the court was not obligated to encourage the jurors to speculate on the defendant's speed based on the bent bicycle rim. The court properly instructed the jury about circumstantial evidence, and the plaintiffs were entitled neither to the court's comment on the evidence, nor to the exact wording they desired concerning circumstantial evidence, *State v. Taylor*, 121 N.H. at 495-96, 431 A.2d at 779. Hence, we hold that the trial court did not err in refusing the plaintiffs' requested instruction Number 11.

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**\*\*942** The third instruction that the plaintiffs claim the court erred in not granting was their proposed Number 26, which provides:

“Evidence has been presented that Frank Lynch fled from the scene of the collision. You may consider flight as tending to show feelings of guilt. You may also consider feelings of guilt as evidence tending to show actual guilt. You should consider the evidence of flight by Frank Lynch in connection with all other evidence in the case.”

(Citations omitted.)

**\*92** During trial the court excluded evidence of the circumstances surrounding the defendant's leaving the scene of the accident because the court found the defendant exhibited no “willful intent to run away from the situation.” Having ruled that the pre-judicial effect of this evidence outweighed any probative value it might have had, the court did not err in denying the plaintiffs' requested instruction Number 26.

[14] The final proposed instruction that the plaintiffs argue the court should have granted is their Number 27, which reads:

“You are hereby instructed that if you find the parties are equally negligent, or that the defendant is more negligent than the plaintiff, then at the very least you must return a verdict for the plaintiff in some amount. This is because Dr. Bagan has conceded that as a result of this collision Cain has suffered at least a cerebral concussion and anterograde and retrograde amnesia. In the event that you find that Cain's injuries are more extensive than a cerebral concussion and amnesia, then your award must, in addition, include full, fair and complete compensation for all his injuries, past and future, bodily, emotional and mental, in consequence of the defendant's negligence.”

When the court delivered its charge, it instructed

the jury about the comparative fault standard. The court explained that if the jurors found that the parties were equally negligent, or that the defendant was more negligent than Cain, that they would then determine the amount of damages sustained. The court told the jurors that a person claiming damages has the burden of proving that damages were in fact suffered, and that they were caused by the wrongful conduct of another. The court then told the jury they could consider the reasonable value of past and future medical care, future tutoring expenses, and reasonable compensation for any past and future pain, discomfort, fears, anxiety and other mental and emotional distress suffered when determining the amount of damages that the plaintiffs were entitled to recover.

[15] A jury is not obligated to award a plaintiff damages, even if it finds for the plaintiff on the liability issue. *See Grant v. Town of Newton*, 117 N.H. 159, 162, 370 A.2d 285, 287 (1977). Moreover, weighing the evidence is a proper function of the jurors, who are not bound to accept even uncontested testimony. *93 Clearing House, Inc. v. Khoury*, 120 N.H. 346, 350, 415 A.2d 671, 674 (1980). For these reasons, the trial court did not err in refusing to instruct **\*93** the jury that they must award damages to the plaintiffs if they found that the defendant was as negligent or more negligent than Cain, and in refusing to comment on Dr. Bagan's testimony. The court informed the jurors of the types of damages they could consider, which did not differ substantively from those described in the plaintiffs' requested instruction. Because the plaintiffs are not entitled to the exact language of their requested instruction, *see State v. Taylor*, 121 N.H. at 495-96, 431 A.2d at 779, and since the court properly instructed the jury about comparative negligence and damages, we hold that the court did not commit error in denying the plaintiffs' proposed instruction Number 27.

[16] The plaintiffs next argue that the trial court erred in granting two of the defendant's proposed instructions. In accordance with the defendant's re-

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quested Number 17, the court instructed the jury that “the defendant had the right of way.” Under similar facts involving a collision between a motorist and a bicyclist, we stated, “Neither party had a statutory right of way ...; each owed to the other the reciprocal\*\*943 duty to act reasonably.” *Shimkus v. Caesar*, 95 N.H. at 287, 62 A.2d at 729. In this case, the court did not instruct the jury that the defendant had a statutory right of way. Moreover, the plaintiff Cain's admission obviates the need to address any non-statutory right of way that may have existed. During trial, Cain was asked on cross-examination, “Now, if you are going across that roadway, all right, and head north, was it your understanding that you were to yield the right of way to cars that were going westerly?” Cain answered “Yes.” In light of this plaintiff's concession that cars traveling in a westerly direction had the right of way, the court's instruction, even if erroneous, was harmless.

[17] The final error that the plaintiffs assign to the trial court concerning the defendant's requested instructions is also without merit. The portion of the defendant's proposed instruction Number 20 which the court allowed and to which the plaintiffs object states: “Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway.” This instruction is merely a recital of the rules of the road. *See* RSA 265:16. Contrary to the plaintiffs' allegation, this instruction did not direct the jury to find that the defendant had the right of way as a matter of law at the time of the accident. Instead, this portion of the charge informed the jury of the applicable law in effect at the time of the collision, and aided them in determining the factual issue of the defendant's negligence. *See Gagnon v. Crane*, 126 N.H. at 788, 498 A.2d at 723 (purpose of jury instruction\*94 is to explain rules of law applicable to issues of fact). Accordingly, we hold that the trial court did not err in granting the defendant's proposed instruction Number 20.

The plaintiffs next argue that the trial court abused its discretion in compelling the plaintiffs to disclose

the identity of an expert they did not intend to call as a witness at trial, to produce this expert for a deposition by the defendant, to produce statements taken by the plaintiffs' counsel from the investigating officer and two eyewitnesses, and to pay the defendant's costs of redeposing Mr. Johnston. New Hampshire law favors liberal discovery, *Yancey v. Yancey*, 119 N.H. 197, 198, 399 A.2d 975, 976 (1979), and the trial court has broad discretion in controlling its scope, *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388, 253 A.2d 831, 833 (1969). This court has recognized that “discovery is an important procedure ‘for probing in advance of trial the adversary's claims and his possession or knowledge of information pertaining to the controversy between the parties. [The] underlying purpose is to reach the truth....’ ” *Id.* at 388, 253 A.2d at 832-33 (quoting *Hartford Accident etc., Co. v. Cutter*, 108 N.H. 112, 113, 229 A.2d 173, 175 (1967)).

The record discloses that prior to trial, the defendant moved to compel the plaintiffs (1) to disclose the identity of Dr. Abroms, the physician who examined Cain in Worcester, Massachusetts, after the collision; (2) to provide the defendant with Dr. Abroms' medical records and copies of the statements of the two boys who were bicycling with Cain at the time of the accident, and of the investigating officer that were taken by the plaintiffs' counsel shortly after the collision; and (3) to pay the cost of additional depositions of the plaintiffs concerning the examination and treatment of Cain by Dr. Abroms. The plaintiffs objected to the defendant's motion to compel, arguing that the information sought was protected under the attorney work product doctrine as reflected in Superior Court Rules 35.b(2) and (3). Following a hearing, the trial court granted the defendant's motion without providing reasons therefor. There is no evidence in the record either that the defendant asked the plaintiffs to produce Dr. Abroms or that the court ordered the plaintiffs to produce him.

The scope of discovery in New Hampshire is set forth in Superior Court Rule 35, which provides in

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part:

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, ... including ... the identity and \*95 location of persons having \*\*944 knowledge of any discoverable matter....”

*Super. Ct.R.* 35.b(1). The rule continues that:

“[A] party may obtain discovery of documents and tangible things otherwise discoverable ... prepared in anticipation of litigation or for trial by or for another party ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means....”

*Super. Ct.R.* 35.b(2). With respect to information known and opinions held by an expert whom a party has retained but does not expect to call as a witness, the rule provides that:

“A party may discover facts known or opinions held ... only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.”

*Super. Ct.R.* 35.b(3)(b).

[18][19] The rule quoted above does not indicate whether a party is entitled to discover the identity of an adversary's expert whom the adversary does not intend to call as a witness at trial, and there are no State cases directly on point. *But see Fenlon v. Thayer*, 127 N.H. 702, 707, 506 A.2d 319, 322 (1986) (court may, under exceptional circumstances, compel one party's expert to testify at trial as opponent's witness). However, federal precedent indicates that pursuant to the federal rules of discovery, which are essentially the same as the State rule quoted above, *see Fed.Rs.Civ.Proc.* 26(b)(1), 26(b)(4)(B), the identity of an expert whom the opposing party has retained but does not expect to call

as a witness is discoverable without any special showing of exceptional circumstances. *See Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 303 (E.D.Pa.1980); *Baki v. B.F. Diamond Const. Co.*, 71 F.R.D. 179, 181-82 (D.Md.1976). Based on the federal law and our preference for liberal discovery, we hold that a party may discover the identity of an expert the opposing party has retained but does not intend to call at trial, absent some evidence that the information is irrelevant, privileged or for some other reason should not be disclosed, none of which is claimed here. *See Baki v. B.F. Corp.*, 71 F.R.D. at 182. Accordingly, the trial court did not err in compelling the plaintiffs to disclose the identity of Dr. Abroms.

\*96 As far as Dr. Abroms' medical records and notes are concerned, we also hold that the trial court did not err in compelling the plaintiffs to produce this information to the defendant. Experts' reports obtained by a lawyer are almost always considered to be part of his or her work product. *Willett v. General Elec. Co.*, 113 N.H. 358, 359, 306 A.2d 789, 790 (1973). However, this does not automatically protect them from discovery if “relevant facts are unobtainable by other means, or are obtainable only under such conditions of hardship as would tend unfairly to prejudice the party seeking discovery....” *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275, 220 A.2d 751, 756 (1966); *see Super. Ct.R.* 35.b(3)(b).

The record indicates that Dr. Abroms, who examined Cain in April of 1985, was the first neurologist to examine Cain after the accident. Dr. Poser, who examined Cain in July, 1985, held the opinion that Cain had suffered a concussion and exhibited symptoms of post-concussion syndrome. Dr. Poser stated that post-concussion syndromes are limited events which may last, in his experience, for three to four years. In November of 1987, Dr. Bagan performed an independent medical examination on Cain at the defendant's request, and he found no signs of post-concussion syndrome. Dr. Bagan examined Cain over four years after the collision oc-

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curred, and by this time, the defendant's opportunity to determine independently whether Cain had sustained post-concussion syndrome was irretrievably lost. The results of Dr. Abroms' examination of Cain in 1985 were therefore critical and irreplaceable evidence concerning Cain's condition during the period of time when he would have suffered from post-concussion syndrome. These circumstances are sufficiently exceptional to warrant the plaintiffs' production of Dr. \*\*945 Abroms' records to the defendant, and we hold that the trial court did not commit error in ordering the plaintiffs to produce this information. See *Super.Ct.R.* 35.b(3)(b); *Willett v. General Electric Co.*, 113 N.H. at 360-61, 306 A.2d at 791 (change in condition of product at issue in case demonstrates that factual and conclusory determinations of opponent's experts may be necessary to party and otherwise unobtainable); see also *Dixon v. Cappellini*, 88 F.R.D. 1, 3 (M.D.Pa.1980) (where plaintiff placed physical and psychological condition at issue, and where independent medical examination by defendant would not compare to medical reports by plaintiff's expert made shortly after litigated incident, defendant demonstrated sufficient exceptional circumstances to obtain earlier reports).

[20] \*97 The plaintiffs also object to the trial court's order compelling them to produce statements taken by their counsel from the investigating officer and the two boys who were riding bicycles with Cain at the time of the collision. As we stated earlier, a trial court has the authority to determine the scope of discovery, and we will not reverse its rulings absent an abuse of discretion. See *Scotsas v. Citizens Insurance Co.*, 109 N.H. at 388, 253 A.2d at 833.

The record indicates that the plaintiffs' counsel took statements from the two boys two months after the accident, and the investigating officer several months thereafter. The plaintiffs did not initiate this lawsuit until two years after the collision. In his motion to compel, the defendant claimed that these witnesses' statements were vital to defending the

plaintiffs' claims, and that he was unable to obtain the substantial equivalent of these witnesses' statements because their memories had faded during the intervening time. Keeping in mind the trial court's broad discretion in ordering discovery, we cannot say that the court abused its discretion in compelling the plaintiffs to produce these witnesses' statements. See *Super.Ct.R.* 35.b(2); *United States v. Murphy Cook & Co.*, 52 F.R.D. 363, 364 (E.D.Pa.1971) (mere lapse of time in itself enough to justify production of material otherwise protected as work product).

[21] The final issue before us is whether or not the trial court abused its discretion in ordering the plaintiffs to pay the cost of additional depositions of Cain and Mr. Johnston concerning the examination and treatment of Cain by Dr. Abroms. In light of our holding above that the trial court did not err in ordering the plaintiffs to disclose Dr. Abroms' identity and to produce his medical records and notes on Cain, we further hold that the trial court did not abuse its discretion in also ordering the plaintiffs to pay the defendant's costs of redepositing the plaintiffs concerning Dr. Abroms' examination.

*Affirmed.*

All concurred.  
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# TITLE XXXI TRADE AND COMMERCE

## CHAPTER 358-A REGULATION OF BUSINESS PRACTICES FOR CONSUMER PROTECTION

### Section 358-A:1

**358-A:1 Definitions.** – As used in this chapter, the following terms shall have the following meaning:

I. "Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

II. "Trade" and "commerce" shall include the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

III. "Documentary material" shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

IV. "Examination of documentary material" shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgement in respect of any such documentary material or copy thereof.

IV-a. "Gift certificate" means a written promise given in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount.

V. "Going out of business sale" means any sale advertised, represented or held forth under the designation of: "going out of business," "close out," "quitting business," "discontinuance of business," "selling out," "liquidation," "lost our lease," "must vacate," "forced out," "removal," "branch store discontinuance sale," "building coming down," "end," "final days," "last days," "lease expires," "we give up sale," "we quit sale," "reorganization sale," or any other advertising or designation by any other expression similar to any of the foregoing giving notice to the public that the sale will precede the termination of a business or the abandonment of a business location.

**Source.** 1970, 19:1. 1994, 226:1, eff. July 26, 1994. 2003, 193:1, eff. Jan. 1, 2004.

### Section 358-A:2

**358-A:2 Acts Unlawful.** – It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:

I. Passing off goods or services as those of another;

II. Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

III. Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

IV. Using deceptive representations or designations of geographic origin in connection with goods or

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services;

V. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that such person does not have;

VI. Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

VII. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

VIII. Disparaging the goods, services, or business of another by false or misleading representation of fact;

IX. Advertising goods or services with intent not to sell them as advertised;

X. Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

X-a. Failing to disclose the legal name, street address, and telephone number of the business under RSA 361-B:2-a;

XI. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or

XII. Conducting or advertising a going out of business sale:

(a) Which lasts for more than 60 days;

(b) Within 2 years of a going out of business sale conducted by the same person at the same location or at a different location but dealing in similar merchandise;

(c) Which includes any goods, wares, or merchandise purchased or received 90 days prior to commencement of the sale or during the duration of the sale and which are not ordinarily sold in the seller's course of business;

(d) Which includes any goods, wares, or merchandise ordered for the purpose of selling or disposing of them at such sale and which are not ordinarily sold in the seller's course of business;

(e) Which includes any goods, wares, or merchandise consigned for the purpose of selling or disposing of them at such sale;

(f) Without conspicuously stating in any advertisement for any such sale, the date such sale is to commence or was commenced;

(g) Upon the conclusion of which, that business is continued under the same name or under a different name at the same location; or

(h) In a manner other than the name implies.

XIII. Selling gift certificates having a face value of \$100 or less to purchasers which contain expiration dates. Gift certificates having a face value in excess of \$100 shall expire when escheated to the state as abandoned property pursuant to RSA 471-C. Dormancy fees, latency fees, or any other administrative fees or service charges that have the effect of reducing the total amount for which the holder may redeem a gift certificate are prohibited. This paragraph shall not apply to season passes.

XIV. Pricing of goods or services in a manner that tends to create or maintain a monopoly, or otherwise harm competition.

**Source.** 1970, 19:1. 1973, 383:2. 1986, 137:1. 1994, 226:2, eff. July 26, 1994. 1996, 165:1, eff. Jan. 1, 1997. 1997, 302:1, eff. Jan. 1, 1998. 1999, 49:1, eff. Jan. 1, 2000. 2002, 276:1, eff. July 17, 2002. 2003, 193:2, eff. Jan. 1, 2004. 2004, 228:1, eff. Aug. 10, 2004.

### Section 358-A:3

**358-A:3 Exempt Transactions; etc.** – The following transactions shall be exempt from the provisions of this chapter:

I. Trade or commerce that is subject to the jurisdiction of the bank commissioner, the director of securities regulation, the insurance commissioner, the public utilities commission, the financial

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institutions and insurance regulators of other states, or federal banking or securities regulators who possess the authority to regulate unfair or deceptive trade practices. This paragraph includes trade or commerce under the jurisdiction of, and regulated by, the bank commissioner pursuant to RSA 361-A, relative to retail installment sales of motor vehicles.

II. [Repealed.]

III. Trade or commerce of any person who shows that such person has had served upon such person by the Federal Trade Commission a complaint pursuant to 15 U.S.C. 45(b) relating to said trade or commerce until the Federal Trade Commission has either dismissed said complaint, secured an assurance of voluntary compliance, or issued a cease and desist order relating to said complaint pursuant to 15 U.S.C. 45(b);

IV. Publishers, broadcasters, printers, or other persons engaged in the dissemination of information or reproduction of printed or pictorial matter who publish, broadcast, or reproduce material without knowledge of its deceptive character;

IV-a. Transactions entered into more than 3 years prior to the time the plaintiff knew, or reasonably should have known, of the conduct alleged to be in violation of this chapter; provided, however, that this section shall not ban the introduction of evidence of unfair trade practices and deceptive acts prior to the 3-year period in any action under this chapter;

IV-b. Violations of RSA 205-A which have occurred more than 3 years prior to the complaint alleged to be in violation of this chapter;

V. The burden of proving exemptions from the provisions of this chapter by reason of paragraphs I, II, III, IV and IV-a of this section shall be upon the person claiming the exemption.

**Source.** 1970, 19:1. 1973, 383:3, 4. 1985, 172:1, eff. July 26, 1987. 1996, 165:2-4, eff. Jan. 1, 1997. 2002, 276:2, eff. July 17, 2002. 2004, 141:1, eff. July 23, 2004.

### **Section 358-A:4**

#### **358-A:4 Administration; Enforcement. –**

I. The provisions of this chapter shall be administered and enforced by the consumer protection and antitrust bureau, department of justice established by RSA 21-M:8.

II. [Repealed.]

III. (a) Whenever the attorney general has reason to believe that trade or commerce declared unlawful by this chapter has been, is being or is about to be conducted by any person, the attorney general may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such trade or commerce and may petition the court for an order of restitution of money or property to any person or class of persons injured thereby. The action may be brought in the superior court of the county in which the person allegedly in violation of this chapter resides or in which the principal place of business is located, or, with the consent of the parties or if the person is a nonresident and has no place of business within the state, in the superior court of Merrimack county.

(b) Upon a finding that any person has engaged or is engaging in any act or practice declared unlawful by this chapter, the court may make any necessary order or judgment and may award to the state civil penalties up to \$10,000 for each violation of this chapter. No such order shall require the payment of civil penalties until the process of appeal has been exhausted. Any such order or judgment shall be prima facie evidence in any action brought under RSA 358-A:10 that the respondent has engaged in an act or practice declared unlawful by this chapter. For the purpose of this section, the court shall determine the number of unlawful acts or practices which have occurred without regard to the number of persons affected thereby. It shall be an affirmative defense to the assessment of civil penalties that the defendant acted pursuant to a good faith misunderstanding concerning the requirements of this chapter.

III-a. In connection with any action brought under paragraph III, the attorney general may also petition the court to appoint a receiver to take charge of the business of any person during the course of

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litigation when the attorney general has reason to believe that such an appointment is necessary to prevent such person from continuing to engage in any act or practice declared unlawful by this chapter and of preserving the assets of said person to restore to any other person any money or property acquired by any unlawful act or practice. The receiver shall have the authority to sue for, collect, receive and take into the receiver's possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, including property with which such property has been mingled if it cannot be identified in kind because of such commingling derived by means of any unlawful act or practice, and to sell, convey and assign the same and hold, dispose and distribute the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of any unlawful act or practice and submits proof to the satisfaction of the court that such person has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent that the person has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments as may be required. In lieu of the foregoing procedure, the court may permit any person alleged to have violated this chapter to post a bond in a manner and in an amount to be fixed by the court. The bond shall be made payable to the state and may be distributed by the court only after a decision on the merits and the process of appeals has been exhausted.

IV. Any county attorney or law enforcement officer receiving notice of any alleged violation of this chapter shall immediately forward written notice of the same with any other information that the county attorney or law enforcement officer may have to the department of justice.

**Source.** 1970, 19:1. 1975, 417:1-3. 1979, 171:1. 1985, 300:7, I, 23; 300:30, eff. July 1, 1987; 410:8, eff. July 3, 1985. 1996, 165:5, 6, eff. Jan. 1, 1997.

### **Section 358-A:5**

**358-A:5 Notice.** – At least 10 days prior to commencement of any action under RSA 358-A:4, the attorney general shall notify the person of the attorney general's intended action, and give the person an opportunity to confer with the attorney general, or agent, in person or by counsel or other representative as to the proposed action. Said notice shall be given by mail, postage prepaid, sent to the person's usual place of business, or, if none, to the person's last known address. Such notice need not be given if the attorney general has reason to believe that any potential recipient of such notice may after receipt thereof destroy or move or cause to be destroyed or cause to be moved any assets which might otherwise be available to claims of restitution, leave the state or cause material witnesses to leave the state, or take other action or omit to perform other duties to the immediate and irreparable harm of the public.

**Source.** 1970, 19:1. 1975, 417:4, eff. Aug. 15, 1975. 1996, 165:7, eff. Jan. 1, 1997.

### **Section 358-A:6**

#### **358-A:6 Penalties.** –

I. Any person convicted of violating RSA 358-A:2 hereof shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

II. Any person who violates the terms of an injunction issued under RSA 358-A:4, III, shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person. For the purposes of this section, the court issuing said injunction shall retain jurisdiction.

III. Any person who subverts the intent and purposes of this chapter by filing false, misleading, or substantially inaccurate statements with the attorney general for the purposes of effecting prosecution

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under this chapter shall be guilty of a violation.

IV. If any person is found to have engaged in any act or practice declared unlawful by this chapter, the court may award to the state in any action brought under this chapter all legal costs and expenses. RSA 525:12 shall apply to civil actions commenced under this chapter.

**Source.** 1970, 19:1. 1973, 529:85. 1975, 417:5, eff. Aug. 15, 1975.

### **Section 358-A:7**

**358-A:7 Assurance of Discontinuance.** – Nothing contained in this chapter shall be construed as preventing the attorney general, in cases in which the attorney general is authorized to bring an action, from accepting in lieu thereof an assurance of discontinuance of any act or practice which violates this chapter. Such assurance may include a stipulation for the voluntary payment by the alleged violator of the costs of investigation by the attorney general, or of an amount to be held in escrow pending the outcome of an action, or of an amount to restore to any person any money or real or personal property which may have been acquired by such alleged violator, or all 3. Any such assurance of discontinuance shall be in writing and be filed with the superior court of Merrimack county. Matters thus closed may be reopened by the attorney general at any time it is in the public interest. Evidence of a violation of such assurance shall constitute prima facie evidence of an act or practice declared to be unlawful by this chapter in any action thereafter commenced by the attorney general.

**Source.** 1970, 19:1, eff. April 30, 1970. 1996, 165:8, eff. Jan. 1, 1997.

### **Section 358-A:8**

#### **358-A:8 Subpoena; Production of Books, Examination of Persons, etc. –**

I. **AUTHORITY OF ATTORNEY GENERAL.** The attorney general shall have the power to subpoena and subpoena duces tecum in the name of the attorney general for the purposes of this chapter. Witnesses summoned by the attorney general shall be paid the same fee and mileage that are paid witnesses in the superior court of the state. A subpoena or subpoena duces tecum of the attorney general may be served by any person designated in the subpoena or subpoena duces tecum to serve it. The attorney general may administer an oath or affirmation to any person and conduct hearings in aid of any investigation. The attorney general may also require any person to make a statement in writing under oath concerning any matter under investigation provided that the due date for receipt of such a statement shall be no sooner than 10 calendar days after receipt of such demand. Any testimony or statement given by any person so sworn shall be subject to the pains and penalties of perjury.

II. Without limiting the authority granted in paragraph I, whenever the attorney general believes any person to be or to have been in violation of this chapter, the attorney general may examine or cause to be examined for that purpose any books, records, papers, or other documentary materials, or may examine any person under oath and subject to the pains and penalties of perjury that the attorney general thinks may have knowledge of such violation. For such examination, the attorney general may require the person to appear at such person's place of residence, place of business or any place in this state.

#### **III. NOTICE.**

(a) The attorney general shall serve notice of the time, place, and cause of said examination at least 10 days prior to the date of the examination. Service of any such notice may be made by:

- (1) Delivering a duly executed copy of the notice to the person to be served or an agent authorized by law to receive service of process; or
- (2) Delivering a duly executed copy of the notice to the person's principal place of business in this state, if any; or
- (3) Registered mail, return receipt requested, to the person to be served, or an agent authorized by

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law to receive service of process. These limitations do not apply to a written statement required under paragraph I which can be required by a reasonable notice thereof.

(b) Such notice need not be given if the attorney general has reason to believe that any potential recipient of such notice may move, conceal, alter or destroy, or cause to be moved, concealed, altered or destroyed, any documents to which it refers, or move or conceal or cause to be moved or concealed any person whose testimony is sought pursuant thereto. In any of such cases, the notice served by the attorney general pursuant to this paragraph may require the immediate production or examination of any document or person therein referred to.

IV. LIMITATIONS. No such notice shall make improper or unreasonable requirements, nor require the production of privileged information.

V. EXTENSION; MODIFICATION. At any time prior to the date specified in the notice, or within 21 days after the notice has been served, whichever period is shorter, the superior court may, upon motion for good cause shown, extend said reporting date, or modify or set aside the demand. The motion may be filed in the superior court of the county in which the person resides or in which the person's usual place of business is located, or in Merrimack county.

VI. USE OF INFORMATION. Any information, testimony, or documentary material obtained under the authority of this section shall be used only for one or more of the following purposes:

(a) In connection with investigations instituted under this chapter or for the prosecution of legal proceedings instituted under this chapter or other provisions of the RSA; and

(b) In connection with any formal or informal program of or request for information exchange between the department of justice and any other local, state or federal law enforcement agency. However, no information or material obtained or used pursuant to the authority of this section shall be released publicly by any governmental agency except in connection with the prosecution of legal proceedings instituted under this chapter or other provisions of the RSA. In addition, any information, testimony or documentary material obtained or used pursuant to a protective order shall not be exchanged or released, as provided herein, publicly except in compliance with such protective order.

VII. PENALTY. Any person who fails to comply with any notice served upon such person under this section shall be fined not more than \$5,000.

**Source.** 1970, 19:1. 1975, 417:6-8. 1985, 300:7, I(a). 1996, 165:9-11, eff. Jan. 1, 1997.

### **Section 358-A:9**

**358-A:9 Habitual Violation of Injunction.** – Upon petition by the attorney general, the court may order, for habitual violation of injunctions issued pursuant to RSA 358-A:4, III, the dissolution, suspension, or forfeiture of franchise of any corporation, or the right of any foreign corporation to do business in the state.

**Source.** 1970, 19:1, eff. April 30, 1970.

### **Section 358-A:10**

#### **358-A:10 Private Actions. –**

I. Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or \$1,000, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted

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waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this chapter without bond, subject to the discretion of the court.

II. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

**Source.** 1970, 19:1. 1975, 417:9. 1981, 243:1. 1994, 226:3, eff. July 26, 1994.

### **Section 358-A:10-a**

#### **358-A:10-a Class Actions. –**

I. Persons entitled to bring an action under RSA 358-A:10 may, if the unlawful act or practice has caused similar injury to numerous other persons, institute an action as representative or representatives of a class of persons who are residents of this state or whose cause of action arose within this state against one or more defendants as individuals or as representatives of a class or against one or more such defendants having a principal place of business within this state, and the petition shall allege such facts as will show that these persons or the named defendants specifically named and served with process have been fairly chosen and adequately and fairly represent the whole class, to recover actual damages as provided for in RSA 358-A:10. The court may require the plaintiff to prove such allegations, unless all of the members of the class have entered their appearance, and the court may also determine that it shall not be sufficient to prove such facts by the admissions of the defendants who have entered their appearance. In any action brought under this section, the court may order, in addition to actual damages, injunctive or other equitable relief and reasonable attorney's fees.

II. An action may be maintained as a class action if:

(a) The class is so numerous that joinder of all members is impracticable; and  
 (b) There are questions of law or fact common to the class; and  
 (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(d) The representative parties will fairly and adequately protect the interests of the class; and, in addition

(e) (1) The prosecution of a separate action by or against individual members of the class would create a risk of:

A. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: the interest of members of the class in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the difficulties likely to be encountered in the management of a class action.

III. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. Such order may be conditional, and may be

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altered or amended before the decision on the merits.

IV. In any class action maintained other than under paragraph II(e)(2), the court shall direct to the members of the class the best notice practicable under the circumstances, which may include, as the plaintiff so elects, either individual notice or publication or both.

(a) If the plaintiff elects notice by publication, the notice shall advise each member that:

(1) The court will include the member in the class if such member so requests by a specified date;

(2) The judgment, whether favorable or not, will include all members who request inclusion; and

(3) Any member who does request inclusion may, if the member desires, enter an appearance through the member's counsel.

(b) If the plaintiff elects individual notice, the notice shall advise each member that:

(1) The court will include the member in the class unless the member requests exclusion by a specified date;

(2) The judgment, whether favorable or not, will include all members who do not request exclusion;

(3) Any member who does not request exclusion may, if the member desires, enter an appearance through the member's counsel.

V. The judgment in an action maintained as a class action under paragraph II(e)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph II(e)(1) or (3), whether or not favorable to the class, shall include and specify or describe those who have requested inclusion and those who have not requested exclusion as provided in paragraph IV, and whom the court finds to be members of the class.

VI. When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and this section shall then be construed and applied accordingly.

VII. In the conduct of actions to which this section applies, the court may make appropriate orders:

(a) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(b) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(c) Imposing conditions on the representative parties or on intervenors;

(d) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(e) Dealing with similar procedural matters.

VIII. An action once determined to be a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IX. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

X. (a) The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those to whom notice was directed, and whom the court finds to be members of the class and, in an action in which a money judgment is sought, shall not affect the rights of any person who was not included through use of the judgment by way of collateral estoppel or otherwise. In an action in which a money judgment is sought and which is determined in favor of the members of the class, after proof by each member of the existence and extent of that member's actual monetary damage, judgment shall be entered stating the amount awarded to each such member, and the total amount of damages assessed against the defendant shall not exceed the aggregate of the total amount awarded to

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each such member plus legal expenses and costs as awarded by the court.

(b) If the court renders judgment in favor of a plaintiff class, the court may order the defendant to pay damages directly to members of the class, or order the defendant to pay damages into the court and require each member of the class to file a claim with the court. If within one year after the date of final judgment, any plaintiff fails to file a claim for damages actually awarded the plaintiff or cannot be located despite diligent efforts by the parties, the amount of damages actually awarded the plaintiff will be refunded to the paying defendant.

(c) Any judgment awarding damages to one party against a second party in a class action or counterclaim therein may be set off against any other judgment awarding damages to the second party against the first party in such action or counterclaim.

**Source.** 1975, 417:10, eff. Aug. 15, 1975. 1996, 165:12, 13, eff. Jan. 1, 1997.

### **Section 358-A:11**

**358-A:11 Proof Required.** – In order to prevail in any prosecution under this chapter, it is not necessary to prove actual confusion or misunderstanding.

**Source.** 1970, 19:1, eff. April 30, 1970.

### **Section 358-A:12**

**358-A:12 Other Actions Saved.** – This chapter does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.

**Source.** 1970, 19:1, eff. April 30, 1970.

### **Section 358-A:13**

**358-A:13 Interpretation and Construction of Act.** – It is the intent of the legislature that in any action or prosecution under this chapter, the courts may be guided by the interpretation and construction given Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), by the Federal Trade Commission and the federal courts.

**Source.** 1975, 417:11, eff. Aug. 15, 1975.

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