TITLE XXIII
LABOR

CHAPTER 275
PROTECTIVE LEGISLATION

Noncompete Agreements

Section 275:70

275:70 Noncompete Agreements. – Any employer who requires an employee who has not previously been employed by the employer to execute a noncompete agreement as a condition of employment shall provide a copy of such agreement to the potential employee prior to the employee's acceptance of an offer of employment. A noncompete agreement that has not been disclosed to an employee as required by this section shall not be enforceable against the employee, but all other provisions of any employment, confidentiality, nondisclosure, trade secret, intellectual property assignment, or any other type of employment agreement or provision shall remain in full force and effect.

Source. 2012, 70:1, eff. July 14, 2012. 2014, 289:2, eff. July 28, 2014.

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 350-B
UNIFORM TRADE SECRETS ACT

Section 350-B:1

350-B:1 Definitions. –
As used in this chapter, unless the context requires otherwise:
I. "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.
II. "Misappropriation" means:
(a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
(1) Used improper means to acquire knowledge of the trade secret; or
(2) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it; or acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
(3) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
III. "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.
IV. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:2

350-B:2 Injunctive Relief. –
I. Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.
II. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.
III. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:3

350-B:3 Damages. –
I. Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.
II. If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under paragraph I.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:4

350-B:4 Attorneys' Fees. –
The court may award reasonable attorneys' fees to the prevailing party when:
I. A claim of misappropriation is made in bad faith;
II. A motion to terminate an injunction is made or resisted in bad faith; or
III. Willful and malicious misappropriation exists.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:5

350-B:5 Preservation of Secrecy. – In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:6

350-B:6 Statute of Limitations. – An action for misappropriation shall be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:7

350-B:7 Effect on Other Law. –
I. Except as provided in paragraph II, this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.
II. This chapter shall not affect:
(a) Contractual remedies, whether or not based upon misappropriation of a trade secret;
(b) Other civil remedies that are not based upon misappropriation of a trade secret; or
(c) Criminal remedies, whether or not based upon misappropriation of a trade secret.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:8

350-B:8 Uniformity of Application and Construction. – This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Source. 1989, 220:1, eff. Jan. 1, 1990.

Section 350-B:9

350-B:9 Short Title. – This chapter may be cited as the Uniform Trade Secrets Act.

Source. 1989, 220:1, eff. Jan. 1, 1990.

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142 N.H. 440 (N.H. 1997)

702 A.2d 1273

CONCORD ORTHOPAEDICS PROFESSIONAL ASSOCIATION

v.

H. James FORBES, M.D.

No. 95-865.

Supreme Court of New Hampshire.

December 4, 1997

[702 A.2d 1274]

Nelson, Kinder, Mosseau & Gordon, P.C., Manchester (Martha V. Gordon, on the brief and orally), for plaintiff.

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Upton, Sanders & Smith, Concord (Russell F. Hilliard, orally and on the brief, and David P. Slawsky, on the brief), for defendant.

Glenn W. Bricker, M.D., Ashland, by brief, pro se, as amicus curiae.

THAYER, Justice.

Pursuant to Supreme Court Rule 8, we accepted the Superior Court's (Smukler, J.) transfer of the following two questions: First, whether the trial court correctly concluded as a matter of law and public policy that the analysis of a covenant not to compete between a physician and a professional association is no different than that generally applied to such covenants? We hold that it did. Second, whether the trial court erred when it granted Concord Orthopaedics Professional Association's (COPA's) request to enforce the covenant not to compete to the extent it applies to COPA's existing patients, but denied COPA's request to the extent the covenant applies to new patients. We hold that it did not.

The defendant, H. James Forbes, M.D., and the plaintiff, COPA, executed an employment agreement containing a covenant not to compete. In consideration for COPA's obligation to pay Forbes deferred compensation, Forbes agreed not to practice orthopaedic medicine within a twenty-five mile radius of any COPA office for two years following his termination. The pertinent section of the covenant reads:

[I]t is specifically agreed that when the Doctor's employment by the Association is terminated for whatever reason, the Doctor shall not practice orthopaedic medicine within a twenty-five (25) mile radius of any office out of which the Association is conducting a practice at the date of termination ... for a period of twenty-four (24) months.

In 1995, COPA's board of directors voted to change the deferred compensation formula applicable to all physician-shareholders. Consequently, Forbes resigned, embarked on **[702 A.2d 1275]** the establishment of a medical office in Concord, and sought declaration from the superior court that the covenant not to compete was unenforceable. COPA commenced a separate action seeking injunctive enforcement of the covenant. The superior court temporarily restrained Forbes from practicing orthopaedic medicine within twenty-five miles of COPA's offices in Concord, Peterborough, and New London. The superior court later partially enforced the covenant by issuing a preliminary injunction. That order restrained Forbes from treating existing COPA patients within a twenty-five mile radius of Concord for two

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years with an exception for emergency surgery. The superior court declined to enforce the covenant as to new patients, reasoning that COPA lacked a legitimate interest in preventing Forbes from competing for new patients.

Before proceeding, we note that the covenant's term expired on July 31, 1997. Thus, the matter is technically moot. We recognize, however, valid exceptions to the mootness doctrine where the case concerns important matters of public policy and is "capable of repetition, yet evading review." *Royer v. State Dept. of Employment Security,* 118 N.H. 673, 675, 394 A.2d 828, 829 (1978) (quotation and citation omitted); see also *Weinstein v. Bradford,* 423 U.S. 147, 148, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975). Covenants not to compete run for various durations. Given that restraints on competition must be narrowly tailored as to duration, see *Technical Aid Corp. v. Allen,* 134 N.H. 1, 8, 591 A.2d 262, 266 (1991), it is likely that the issues raised here will recur but continue to evade review. Further, the particular questions here warrant attention because the issue of access to physicians greatly affects the public at large.

With respect to the first transferred question, Forbes urges us to declare covenants not to compete involving physicians to be against public policy and per se unenforceable. We decline Forbes' invitation.

Forbes argues that such covenants impermissibly burden the physician-patient relationship. The weight of authority, however, supports enforcement of reasonable covenants not to compete involving physicians. See, e.g., *Jewett Orthopaedic Clinic, P.A. v. White,* 629 So.2d 922, 925 (Fla.Dist.Ct.App.1993); *Pittman v. Harbin Clinic,* 210 Ga.App. 767, 437 S.E.2d 619, 621 (1993); *Gillespie v. Carbondale & Marion Eye Ctrs.,* 251 Ill.App.3d 625, 190 Ill.Dec. 950, 953, 622 N.E.2d 1267, 1270 (1993); *Raymundo v. Hammond Clinic Ass'n,* 449 N.E.2d 276, 281 (Ind.1983); *Ohio Urology, Inc. v. Poll,* 72 Ohio App.3d 446, 594 N.E.2d 1027, 1031 (1991); see also 54A Am.Jur.2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 939 (1996).

The public policy of New Hampshire encourages free trade and discourages covenants not to compete. See *Laconia Clinic, Inc. v. Cullen,* 119 N.H. 804, 807, 408 A.2d 412, 414 (1979). Nevertheless, our courts uphold a limited restraint if reasonable as applied to the particular circumstances of the parties. *Dunfey Realty Co. v. Enwright,* 101 N.H. 195, 198, 138 A.2d 80, 82 (1957). "A restraint on employment is reasonable only if it is no greater than necessary for the protection of the employer's legitimate interest, does not impose undue hardship on the employee, and is not injurious to the public interest." *Moore v. Dover Veterinary Hosp., Inc.,* 116 N.H. 680, 684, 367 A.2d 1044, 1047 (1976) (per curiam). If the covenant fails one prong, the covenant is unenforceable. Technical Aid Corp., 134 N.H. at 8, 591 A.2d at 266. Our traditional test of reasonableness, outlined in Moore, to determine whether a covenant is enforceable applies to covenants between physicians and their employers. The Moore test sufficiently protects the public interest; therefore, there is no reason to declare such covenants void per se or enunciate a new test applicable to physicians.

The second transferred question is whether the trial court abused its discretion by only partially enforcing the covenant when it issued its preliminary injunction. We first consider the validity of the covenant not to compete by determining its reasonableness under the Moore test.

A covenant's reasonableness is a matter of law for this court to decide. Id. at 8, 591 A.2d at 265. We review the trial **[702 A.2d 1276]** court's factual findings for clear error. See *Ferrofluidics v. Advanced Vacuum Components,* 968 F.2d 1463, 1469 (1st Cir.1992).

Covenants are valid only to the extent that they prevent employees from appropriating assets that are legitimately the employer's. See 6A A. Corbin, Corbin on Contracts § 1391B, at 34 (Supp.1997). COPA has a legitimate interest in preventing Forbes from appropriating the goodwill of its business, developed in part by Forbes' contact with patients in his capacity as a COPA physician. See Technical Aid Corp., 134 N.H. at 9, 591 A.2d at 266 (stating that covenants must focus on protectable interests and must be narrowly tailored to those interests); 6A Corbin, supra § 1394, at 99-100 (1962). We agree with the superior court that as applied to new patients the provision was overbroad. See Technical Aid Corp., 134 N.H. at 9, 591 A.2d at 266. While COPA possesses a legitimate business interest in prohibiting Forbes from competing for existing patients, no such legitimate interest exists as to new patients. The legitimate interests of the employer generally extend only to those areas in which the employee had actual client contact. Cf. Blake, Employee Agreements Not to Compete, 73 Harv. L.Rev. 625, 677 (1960). By definition, Forbes could not have had actual contact with new patients. Thus, COPA lacks any legitimate interest in trying to prevent Forbes from competing for new patients.

COPA would have us consider new patients a subset of referring physicians. COPA apparently argues that because Forbes had actual contact with referring physicians, and those physicians generate new patients, COPA has a legitimate interest in all new patients. We

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find unpersuasive language from other jurisdictions that groups referring physicians with "actual clients." See, e.g., *Fields Foundation, Ltd. v. Christensen,* 103 Wis.2d 465, 309 N.W.2d 125, 130 (Ct.App.1981). This reasoning contravenes the principle of narrowly tailoring covenants not to compete to encompass only legitimate interests of the employer. See Technical Aid Corp., 134 N.H. at 9, 591 A.2d at 266. New patients encompass far more than referring physicians. Such an expansive interpretation of legitimate interests does not foster the public good. Thus, we do not adopt this line of reasoning.

A restraint on competition must be narrowly tailored in both geography and duration to protect COPA's legitimate interest in its goodwill. See id. at 10-11, 14, 591 A.2d at 266-67, 269. Here, the covenant prohibited Forbes from practicing medicine within twenty-five miles of COPA's offices in Concord, Peterborough, and New London. The geographic limits imposed on an employee by a covenant not to compete "generally must be limited to that area in which the employee had client contact, as that is usually the extent of the area in which the employer's goodwill is subject to appropriation by the employee." Id. at 10, 591 A.2d at 266. During oral argument, COPA waived enforcement of the covenant's geographical limitations concerning COPA's two satellite offices (Peterborough and New London). Accordingly, we do not address the validity of the geographic limits concerning the satellite offices. We do hold, however, that the limitation of a twenty-five mile radius of the Concord office is reasonable because it includes COPA's normal market where Forbes had patient contact.

The covenant's duration of two years is also reasonable. A covenant not to compete should last no longer than necessary for the employees' replacements "to have a reasonable opportunity to demonstrate their effectiveness to customers." Berg, Judicial Enforcement of Covenants Not To Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense, 45 Rutgers L.Rev. 1, 24-25 (1992). A court, when evaluating duration, must consider the time necessary to "obliterate in the minds of the public" the association between the identity of the physician with his employer's practice. *Weber v. Tillman,* 259 Kan. 457, 913 P.2d 84, 92 (1996); see also Moore, 116 N.H. at 685, 367 A.2d at 1048 (stating, "business entity was closely identified with the veterinarians who staffed it, and this identification would not soon be extinguished upon a veterinarian's termination"). Two years is a reasonable time to allow a replacement to demonstrate his or her effectiveness and for the public to disassociate Forbes from COPA. See Weber, 913 P.2d at 92. Thus, we hold that the covenant as enforced protects COPA's legitimate

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business interests and that its scope and duration satisfy the rule of reason.

The covenant as enforced also satisfies the second prong of the Moore test because it does not impose an undue hardship on Forbes. See Technical Aid Corp., 134 N.H. at 8, 591 A.2d at 266. As a shareholder, director, and employee, Forbes enjoyed the protections the covenant afforded him in the event other physicians terminated their employment with COPA. Despite this fact, Forbes argues that as applied to him the covenant works an undue hardship, mostly for financial reasons. We are unpersuaded. The covenant does not preclude Forbes from practicing medicine and generating revenue; it merely protects COPA's legitimate interest in protecting its goodwill. Further, as the covenant will not apply to new patients, Forbes' potential financial burden, if any, is diminished.

The covenant as enforced satisfies the third prong of the Moore test because it is not injurious to the public interest. See id. The record reflects that the trial court considered the public interest. The trial court, in its discretion, partially enforced the covenant. The trial court exempted from the covenant's purview emergency surgeries threatening the health or welfare of COPA patients. Modification or partial enforcement, upon a showing of good faith in the employment contract's execution, may be appropriate if in the public interest. See *Smith, Batchelder & Rugg v. Foster,* 119 N.H. 679, 682, 406 A.2d 1310, 1313 (1979). Forbes does not contest the trial court's finding that the employment contract was executed in good faith. *Cf. Ohio Urology, Inc. v. Poll,* 72 Ohio App.3d 446, 594 N.E.2d 1027, 1032 (1991) (stating that a court's power to modify a covenant is a corollary of the rule that courts strictly scrutinize these covenants). The trial court also exempted new patients from the covenant's purview. Thus, the trial court minimized the impact on the public by limiting the restriction to existing COPA patients. See Technical Aid Corp., 134 N.H. 1, 591 A.2d 262.

Other factors support the conclusion that the public will not suffer undue harm. Forbes may treat any person outside the twenty-five mile restriction. Forbes may treat any new patient within the twenty-five mile radius. Partially restricted access to one orthopaedic surgeon in the Concord area does not unduly burden the public.

Finally, we address Forbes' argument that COPA had an adequate remedy at law and, therefore, the trial court erroneously issued an injunction. See *Unifirst Corp. v. City of Nashua,* 130 N.H. 11, 14, 533 A.2d 372, 374 (1987) (stating that an injunction is appropriate if "there is no adequate remedy at law"). "We will

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uphold the decision of the trial court with regard to the issuance of an injunction absent an error of law, abuse of discretion, or clearly erroneous findings of fact." Id. Forbes asserts that the trial court's offer to COPA to elect either a legal or partial equitable remedy implies that an adequate remedy at law existed. We disagree. In the temporary restraining order, the trial court found that COPA did not have an adequate remedy at law. The trial court, apparently concerned that COPA would not want a preliminary injunction partially enforcing the covenant, offered COPA an election between a legal or an equitable remedy. The court's offer, however, does not compel a conclusion that COPA had an adequate remedy at law. True, the trial court's findings of fact for the preliminary injunction did not expressly find that COPA's remedy at law was inadequate. However, the trial court's related findings regarding the temporary restraining order do support a conclusion that COPA's remedy at law was inadequate. Furthermore, the record, on the whole, supports such a conclusion. We cannot conclude that the trial court committed an error of law, abused its discretion, or made clearly erroneous findings of fact with respect to issuing injunctive relief.

With respect to the parties' remaining arguments, we have reviewed the record and find them to be without merit and warranting no further discussion. See *Vogel v. Vogel,* 137 N.H. 321, 322, 627 A.2d 595, 596 (1993).

Affirmed and remanded.

All concurred.

876 A.2d 757

876 A.2d 757 (N.H. 2005)

152 N.H. 192

MERRIMACK VALLEY WOOD PRODUCTS, INC. and another.

v.

Glen NEAR.

No. 2004-447.

Supreme Court of New Hampshire.

May 9, 2005

Argued: March 23, 2005.

As Modified on Denial of Reconsideration June 22, 2005.

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[Copyrighted Material Omitted]

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[152 N.H. 193] McLane, Graf, Raulerson & Middleton, P.A., of Manchester (Thomas J. Donovan

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and Jennifer L. Parent on the brief, and Ms. Parent orally), for the plaintiffs.

[152 N.H. 194] Nixon Peabody LLP, of Manchester (Jamie N. Hage and Gordon J. MacDonald on the brief, and Mr. Hage orally), for the defendant.

DALIANIS, J.

The plaintiffs, Merrimack Valley Wood Products, Inc. and American Cabinet Corp., appeal an order of the Superior Court (*Coffey*, J.) finding a restrictive covenant in an employment agreement entered into with the defendant, Glen Near, unenforceable. We affirm.

The record supports the following facts. Plaintiff Merrimack Valley Wood Products, Inc. (Merrimack Valley) manufactures and sells what is referred to as "millwork": doors, window units, moldings, stair parts, etc. Plaintiff American Cabinet Corp. manufactures and distributes kitchen cabinets and countertops. On February 28, 1994, the defendant began working for the plaintiffs as an outside sales representative. An outside sales representative solicits new customers and services current customers, and is paid on commission.

Prior to his employment with the plaintiffs, the defendant worked at Rivco, another millwork manufacturing company, beginning in 1978. He worked as an outside salesman at Rivco from approximately 1981 until 1991, when he started his own home construction business. He worked as a home builder until he began working for the plaintiffs in 1994.

The defendant was brought to the Merrimack Valley offices for an interview by his friend, vice-president of

friendship with him. The defendant had only one interview with Dow and James Derderian, vice president and general manager of Merrimack Valley. When he started working for the plaintiffs, the defendant was given a price book, a confidential document that outlines the pricing structure used by the plaintiffs.

Dow and Derderian did not explain to the defendant at his interview that he would be required to sign a "salesman agreement," which contained a covenant not to compete and a covenant not to disclose. The defendant worked for the plaintiffs for six months before he was asked to sign the salesman agreement in September 1994. At that time, the defendant was informed that his continued employment with the plaintiffs was contingent upon signing the agreement. The defendant gave the agreement a cursory review and signed it. The agreement provides:

> 7. The [defendant] agrees that he will not, during the term of this agreement, or at anytime thereafter, furnish to an individual, firm or corporation other than [the plaintiffs] any list or lists of customers, business methods, systems, prices, trade secrets, or [152 N.H. 195] information of any kind or nature pertaining to the business of [the plaintiffs].
>
> 8. The [defendant] agrees not to be or become engaged in any competing company or industry during the term of this Agreement, except with the written consent of [the plaintiffs]. If for any reason this agreement or relations with [the plaintiffs] shall be terminated, then he shall not, through employment or agreement with any competitive concern or industry, sell to directly or indirectly, or cause to be sold, any materials to customers which [the plaintiffs] ha[ve] sold to within the twelve (12) months prior to the date of termination, for a period of one (1) year from the date of termination.

876 A.2d 761

The defendant left the plaintiffs' employ in February 1999. Before leaving, he returned his price book to Dow. The defendant was hired that same month by A & B Lumber, one of the plaintiffs' direct competitors, as an outside sales representative. The defendant continued to solicit sales from the customer base he had developed while working for the plaintiffs and from his previous experience in the industry.

On May 7, 1999, the plaintiffs filed a motion for an ex parte temporary restraining order, claiming that the defendant "wrongfully solicited, directly or indirectly, the [plaintiffs'] customers or clients and wrongfully disclosed confidential and proprietary information to others." The Superior Court (*McHugh*, J.) granted the plaintiffs' motion. The order restricted the defendant from disclosing information regarding the plaintiffs' customers and soliciting those customers of the plaintiffs who had transacted business with the plaintiffs during the twelve months prior to the defendant's last day of work. The order did not require a bond:

> C. The [plaintiffs] are not seeking to terminate the [defendant's] employment with his new employer and, therefore, are not seeking to prevent [him] from gainful employment with a competitor. Because it does not appear that the [defendant] will suffer damages by reason of any temporary restraining order or injunction issued on this matter, the [plaintiffs] are not ordered to pay bond.

The defendant moved to dissolve the *ex parte* temporary restraining order and objected to the plaintiffs' petition for a preliminary injunction. In his motion the defendant requested that the court order the plaintiffs to post a bond in the amount of $250,000. The court denied the defendant's [152 N.H. 196] request to dissolve the *ex parte* temporary restraining order, and scheduled the case for a full evidentiary hearing. The court did not address the bond issue in its order, but stated: "The issue of monetary damages by either party as a result of the other party's actions will be heard at a later date." Within ten days, the defendant filed a motion for reconsideration and for a limited evidentiary hearing. The defendant did not specifically mention that he wanted the court to reconsider its May 7, 1999 decision not to require a bond, but did request that the court "[g]rant such other further relief as justice may require." The court denied the defendant's motion for reconsideration because it had determined that the covenant language was not too broad. The court again did not address its failure to require a bond, but indicated that "[t]he other issues will be addressed at the evidentiary hearing."

The Trial Court (*Coffey*, J.) held a full evidentiary hearing and found in favor of the defendant. The court found that the non-compete covenant was unreasonable because it was too broad. The court also found reformation unwarranted because it found that the plaintiffs had not acted in good faith. The court also examined the covenant

did not present evidence that the defendant possessed or intended to disclose any confidential information.

The defendant then filed a motion for assessment of costs and damages against the plaintiffs for wrongful injunction. The trial court addressed the issue of whether the "absence of a bond ... precludes the defendant from recovering damages for wrongful injunction." The court found that it had erred in not requiring a bond when the *ex parte* temporary restraining order was issued, and awarded damages to the defendant as if a bond had been posted. The plaintiffs appealed that decision

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to this court. We issued an order on January 14, 2002, remanding the case to the trial court because we found that the trial court made a factual error in finding that the covenant covered "all Merrimack clients" within a 200-mile radius of Dover. In light of the trial court's error in its factual findings, we held that the trial court's decision concerning the "reasonableness" of the restrictive covenant and subsequent decisions stemming from that factual finding should be reconsidered.

On remand, the trial court again found that the covenant was unreasonable. The court found that, because the non-compete covenant applied to all of the plaintiffs' customers, regardless of whether the defendant had any contact with them, it was broader than necessary to protect the plaintiffs' legitimate interest in protecting their goodwill. The [152 N.H. 197] court again found reformation unwarranted, due to the lack of good faith in the execution of the salesman agreement. The court also found that the covenant not to disclose was an insufficient basis to support a permanent injunction. Finally, the court again found that it had erred by not requiring the plaintiffs to post a bond when they filed the original *ex parte* motion. It awarded damages and attorney's fees to the defendant. This appeal followed.

On appeal, the plaintiffs argue that: (1) the covenant not to compete was reasonable, and therefore was enforceable; (2) even if the covenant was unreasonable, it was executed in good faith and, therefore, the trial court should have reformed it; and (3) the court erred in awarding damages to the defendant in the absence of a bond.

First we address the plaintiffs' argument that the covenant not to compete is reasonable. A covenant's reasonableness is a matter of law for this court to decide. We review the trial court's factual findings for clear error. *Concord Orthopaedics Prof. Assoc. v. Forbes,* 142 N.H. 440, 443, 702 A.2d 1273 (1997).

We have stated that "the law does not look with favor upon contracts in restraint of trade or competition." *Technical Aid Corp. v. Allen,* 134 N.H. 1, 8, 591 A.2d 262 (1991) (quotation omitted). Such contracts are to be narrowly construed. Nonetheless, restrictive covenants are valid and enforceable if the restraint is reasonable, given the particular circumstances of the case. *Id.*

To determine the reasonableness of a restrictive covenant ancillary to an employment contract, we employ a three-pronged test: first, whether the restriction is greater than necessary to protect the legitimate interests of the employer; second, whether the restriction imposes an undue hardship upon the employee; and third, whether the restriction is injurious to the public interest. If any of these questions is answered in the affirmative, the restriction in question is unreasonable and unenforceable. *Id.*

Covenants are valid only to the extent that they prevent employees from appropriating assets that are legitimately the employer's. *Concord Orthopaedics,* 142 N.H. at 443, 702 A.2d 1273. The first step in determining the reasonableness of a given restraint is to identify the legitimate interests of the employer, and to determine whether the restraint is narrowly tailored to protect those interests. *Technical Aid,* 134 N.H. at 9, 591 A.2d 262.

An employee's special influence over an employer's customers, obtained during the course of employment, is one of the legitimate interests an employer may protect against competition. *Nat'l Employment Serv. Corp. v. Olsten*

Staffing Serv., 145 N.H. 158, 160, 761 A.2d 401 (2000) .

876 A.2d 763

When an employee is put in a position involving client contact, it is natural that some of the goodwill emanating

preventing its employees from appropriating this goodwill to its detriment. *Technical Aid,* 134 N.H. at 9, 591 A.2d 262.

The plaintiffs' interest here derives from the defendant's contact with the plaintiffs' customers, as was the case in *Technical Aid.* In *Technical Aid*, we considered two restrictive covenants similar to the one at issue. The first was a covenant not to "engage in competition ... located within a radius of one hundred (100) miles"; the second was a covenant not to "service any customers Technical Aid has done any business with during the preceding year." *Id.* at 6-7, 591 A.2d 262. We found that the general restriction against competition must be limited to the geographic area in which the employee had client contact in order to satisfy the "narrowly tailored" test, because this is "usually the extent of the area in which the employer's good will is subject to appropriation by the employee." *Id.* at 10, 591 A.2d 262. We held that the one-hundred-mile geographic limitation was greater than necessary to protect Technical Aid's legitimate interests. *Id.*

We also found that the restriction against servicing clients with whom Technical Aid had done business in the preceding twelve months, regardless of geographic location, was greater than necessary to protect its legitimate interests. *Id.* at 11, 591 A.2d 262. Technical Aid purported to be an international organization, with clients all over the world. We held that it had no legitimate interest in protecting its entire client base from its former employee, because he had no advantage over any other complete stranger, possessing no special hold on the goodwill of the majority of Technical Aid's customers. *Id.*

In *Concord Orthopaedics*, Concord Orthopaedics Professional Association (COPA) attempted to restrict its former employee from practicing medicine altogether within a certain geographic area. We upheld the trial court's determination that COPA had no legitimate interest in preventing its former employee from soliciting new patients within that area. *Concord Orthopaedics,* 142 N.H. at 443, 702 A.2d 1273. But we found that COPA could prohibit its former employee from competing for existing patients within the area, because the legitimate interests of the employer generally extend to those areas in which the employee had actual client contact. *Id.*

Concord Orthopaedics and *Technical Aid* both addressed covenants restricting appropriation of the goodwill developed through an employee's contact with customers. In both cases we held that the restrictions were greater than necessary to protect the employer's legitimate interest because they extended beyond the sphere of the employee's influence, either beyond the geographic area where the employee would have had actual client contact, or beyond the employee's own clients to the public at large.

We now apply this reasoning to the case at hand. The plaintiffs sought to keep the defendant from doing business with any of the clients who had transacted business with them in the previous year. The trial court heard testimony that Merrimack Valley has approximately 1,200 customers. There are roughly twelve salespersons working for the plaintiffs. The defendant testified that he had about sixty regular customers. It is not clear from the record how many of its 1,200 customers Merrimack Valley does business with in an average

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year. What is clear, though, is that the defendant has no particular claims on the goodwill of roughly 1,140 of the plaintiffs' customers; he is in no better position than a stranger when it comes to these customers. *Technical Aid,* 134 N.H. at 11, 591 A.2d 262. Thus, the restrictive covenant goes far beyond the defendant's sphere of customer goodwill, and was more restrictive than necessary to protect the plaintiffs' legitimate interests.

We recognize that in *Concord Orthopaedics*, we upheld a covenant restricting the former employee from seeing any of the employer's former patients. In that case, however, we found that the employer had no legitimate interest in preventing its former employee from competing for patients he had no "actual contact with." *Concord Orthopaedics,* 142 N.H. at 443, 702 A.2d 1273. Our result today similarly finds that it is unreasonable to prohibit the defendant from soliciting customers with whom he previously had no contact.

The plaintiffs urge us to follow *Emery v. Merrimack Valley Wood Products, Inc.,* 701 F.2d 985 (1st Cir.1983). In *Emery,* a case involving nearly identical restrictive covenant language, the First Circuit Court of Appeals applied New Hampshire law and found that the covenant was reasonable and enforceable. *Emery,* 701 F.2d at 989-90. That case was decided before *Technical Aid* and *Concord Orthopaedics*, however. We find the focus upon the employee's sphere of customer influence in [152 N.H. 200] *Technical Aid* and *Concord Orthopaedics* persuasive, and decline

Because the restrictive covenant fails the first prong of the reasonableness test, it is unreasonable, and therefore unenforceable. *Technical Aid,* 134 N.H. at 8, 591 A.2d 262.

We turn now to the modification issue. The plaintiffs argue that if the covenant is found to be unreasonable, it should have been modified. Courts have the power to reform overly broad restrictive covenants if the employer shows that it acted in good faith in the execution of the employment contract. *Smith, Batchelder & Rugg v. Foster,* 119 N.H. 679, 682, 406 A.2d 1310 (1979). We will sustain the trial court's findings and conclusions unless they are lacking in evidential support or tainted by error of law. *LeTarte v. West Side Dev. Group,* 151 N.H. 291, 294, 855 A.2d 505 (2004).

The trial court found, relying upon *Smith, Batchelder & Rugg*, that "reformation of the covenant is inappropriate ... because petitioners did not act in good faith in the execution of the salesman agreement." The plaintiffs argue that the trial court's finding of a lack of good faith was based solely upon its determination that they did not give the defendant advance notice of the obligations imposed by the employment contract. The plaintiffs argue that "[g]ood faith and advance notice are not coextensive concepts," and that to determine good faith a trial court must examine all of the relevant circumstances of a particular case.

We agree that good faith and advance notice are not one and the same. We do not agree, however, that the trial court relied solely upon the absence of advance notice to find a lack of good faith. The trial court noted: "The facts of the present case are indistinguishable in any meaningful way from the facts of *Smith, Batchelder & Rugg*." We agree. In *Smith, Batchelder & Rugg*, we upheld the master's finding that the restrictive covenant could not be reformed because it was not executed in good faith. The master's finding was supported by evidence that the employment agreements containing the restrictive covenants were not part of the

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oral negotiations, the employees had executed their agreements after they were hired, and the employees did not have a "full understanding" of the restrictive covenants in their employment agreements. *Smith, Batchelder & Rugg,* 119 N.H. at 685, 406 A.2d 1310.

As in *Smith, Batchelder & Rugg*, the trial court in this case found that the plaintiffs "did not discuss the salesman agreement or the restrictive covenants with the [defendant] during his interview," and that the defendant was not presented with the agreement until six months after [152 N.H. 201] he started working for the plaintiffs. Further, when the salesman agreement was finally presented to him, he "was informed his ability to retain his position was contingent upon signing the agreement," which, in its first order in 1999, the trial court found he was in no position to decline. Upon reviewing the record, we find evidence to support the trial court's determination that the plaintiffs acted in bad faith in executing the salesman agreement. Therefore, we see no reason to overturn the trial court's ruling.

Finally we address the court's decision to award damages in the absence of a bond. The plaintiffs argue that: (1) the prior injunction orders requiring no bond became the law of the case and cannot be relitigated; (2) the court's award of damages in the absence of a bond was an error of law; (3) an award of damages in the absence of a bond is erroneous as a matter of equity; and (4) the evidence does not support an award of damages.

Superior Court Rule 161 states:

> Unless the Court, for good cause shown, shall otherwise order, no restraining order or preliminary injunction shall issue except upon the giving of an injunction bond by the applicant ... for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Superior Court Rule 163 requires:

Whenever an injunction is issued without notice to, or appearance by, the adverse party (except in marital cases), the party at whose request it is issued, ordinarily shall, and in any case may, be required to give bond with sufficient sureties, conditioned by reason of the injunction, in case it shall appear that the injunction was improper

We begin by addressing the plaintiffs' argument that the prior order not requiring a bond became the law of the case.

Questions once decided on appeal to this court are not ordinarily reexamined in the same case upon a subsequent appeal. The question decided on the first appeal is known as the law of the case, and becomes binding precedent to be followed in successive stages of the same litigation. Thus, where an appellate court states a rule of law, it is conclusively established and determinative of the rights of the same parties in any subsequent appeal or retrial of the same case. *Taylor v.* [152 N.H. 202] *Nutting,* 133 N.H. 451, 454, 578 A.2d 347 (1990) As we have not previously stated any rule of law in this case, the law of the case doctrine is not applicable. *State v. Patterson,* 145 N.H. 462, 466, 764 A.2d 901 (2000).

The plaintiffs direct our attention to *Bailey v. Sommovigo,* 137 N.H. 526, 529, 631 A.2d 913 (1993), which supports the proposition that if a party acquiesces to a trial court's ruling, that ruling cannot be attacked on appeal. *See also Arnold v. City of Manchester,* 119 N.H. 859, 864, 409 A.2d 1322 (1979). We recognize the validity of this proposition, but hold that it does not apply to the circumstances in this case. The defendant cannot be said to have acquiesced to the

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ruling at the preliminary hearing which failed to require a bond. In his objection to the plaintiffs' petition for a preliminary injunction the defendant requested a bond be posted. The trial court did not respond to the defendant's request in its May 17, 1999 order, stating only that "[t]he issue of any claimed monetary damages by either party as a result of the other party's actions will be heard at a later date."

The plaintiffs make much of the fact that the defendant did not specifically request the court to revisit the bond issue in his subsequent motion for reconsideration. We do not find this fact dispositive, however, because the trial court does not appear to have considered the bond issue in the first place. The court signed an order proposed by the plaintiffs, without making note of the "good cause" required by Rule 161. The court then denied the defendant's request for a $250,000 bond, without remarking upon it apart from its comment on "claimed monetary damages" cited above.

The trial court's order recognizing its error and reversing itself on the bond issue is also instructive in this regard. This order states that the prior order not requiring a bond "does not specifically address respondent's request for a bond and does not give any reasons for waiving the bond requirement." This characterization of its own order by the trial court bolsters our conclusion that the trial court failed to consider the bond issue. We, therefore, find that since the trial court never considered the bond issue, the defendant did not acquiesce to its ruling not requiring a bond to be posted, and therefore was correct to seek damages after the evidentiary hearing.

Next we address the plaintiffs' argument that the trial court's award of damages in the absence of a bond was an error of law. The plaintiffs argue that in the absence of a bond, the defendant's recovery is limited to taxable costs, or, alternatively, that because liability for an injunction is limited by the bond terms, there are no damages when there is no bond. The plaintiffs rely upon *Tilton v. Sharpe,* 84 N.H. 43, 146 A. 159 (1929), and *Rogers v.* [152 N.H. 203] *Clough,* 76 N.H. 272, 81 A. 1075 (1911) , and their progeny, to support these arguments. They also point to the language of the May 7, 1999 order, drafted by their attorneys, and the May 17, 1999 order, which indicates that "the court will maintain in substance the restraining order that it issued against the defendant on May 7, 1999."

In *Tilton v. Sharpe,* this court denied a damage award to a defendant who had not requested a bond at the time of the injunction, stating "in the absence of such security, the damage claimed is not recoverable." *Tilton,* 84 N.H. at 48, 146 A. 159. In *Rogers v. Clough,* an injunction was granted on the condition that the plaintiffs give a $500 bond. This court found that the injunction order "limits both the amount the defendants can recover and the items of expense which are chargeable to the plaintiffs. In other words, the amount the defendants can recover in excess of their taxable costs and the items which compose it both depend on the terms of the order." *Rogers,* 76 N.H. at 274, 81 A. 1075.

The present case is distinguishable, however, in that the trial court found it was error to not require a bond, and subsequently reversed itself by awarding damages. The trial court's order of March 30, 2004 stated:

> The Court finds it erred by failing to require [the plaintiffs] to post bond, absent a showing of "good cause," when it issued the preliminary injunction. Thus, relying on "the inherent power of the Court to review its own proceedings to

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> correct error or prevent injustice," ... the Court proceeds as if a bond were posted and awards respondent damages accordingly.

(Citation omitted.) "[T]here can be no question of the inherent power of the Court to review its own proceedings to correct error or prevent injustice." *Croteau v. Harvey & Landers,* 99 N.H. 264, 267, 109 A.2d 553 (1954). The trial court noted, as cited above, that the prior order not requiring a bond "does not specifically address respondent's request for a bond and does not give any reasons for waiving the bond requirement." Further, the language in the May 17, 1999 order, that "[t]he issue of any claimed monetary damages ... will be heard at a later date," indicates that the trial court did not consider the bond issue because any damages would presumably be limited to the bond amount according to Superior Court Rule 161(c). *See Rogers,* 76 N.H. at 274, 81 A. 1075. The trial court saw its error and corrected it. We agree with the trial court's finding that it was error not to require a bond, and uphold its decision to correct that error.

[152 N.H. 204] The plaintiffs object to the trial court's correction of its own error on the grounds that it contravenes the purpose of the temporary restraining order bond. The plaintiffs note that "[t]he bond effectively acts 'as a contract in which the court and plaintiff "agree" to the bond amount as the "price" of a wrongful injunction.' " (Quoting Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c),* 99 *Harv. L.Rev.* 828, 833 (1986)).

The purpose of an injunction bond is to protect a party who has been wrongfully enjoined. *Super. Ct. R.* 161(c). There is a long line of cases upholding the rule that a bond effectively limits the amount of damage a wrongfully enjoined party can recover. The decision to require an initial bond affects the substantive rights of the parties, in that it limits the plaintiff's maximum liability, and the defendant's maximum protection. Thus, when the initial decision not to require a bond is made outside the presence of the enjoined party, and not considered again until the merits hearing, as was the case here, the parties' substantive rights cannot rest upon those preliminary orders of the court. The trial court recognized its error in this regard, and corrected it, to protect the defendant's rights. Therefore, we hold it was not erroneous as a matter of law for the trial court to award damages in the absence of a bond.

The plaintiffs also argue that the award of damages in the absence of a bond was erroneous as a matter of equity. The substance of this argument seems to be that it was inequitable for the court to require the plaintiffs to pay damages after they had relied upon its ruling not to require a bond. The plaintiffs were responsible for the trial court's initial decision not to require a bond. They also received the May 17, 1999 order in which the court stated that the "issue of any claimed monetary damages by either party ... will be heard at a later date." The plaintiffs should have recognized a continued potential for liability upon receipt of the May 17, 1999 order. We find that it was not erroneous as a matter of equity for the trial court to correct its error and award damages in the absence of an injunction bond.

Finally, the plaintiffs argue that the evidence presented does not support an award of damages. In reviewing damage awards, we consider the evidence in the light most favorable to the prevailing party, and we will not disturb the decision of the fact finder unless it is clearly erroneous. *Schneider v. Plymouth State College,* 144 N.H. 458, 465, 744 A.2d 101 (1999). The trial court awarded the

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defendant lost income in the amount of $17,463.20, and attorney's fees in the amount of $73,372.39.

[152 N.H. 205] Upon taking the job with A & B Lumber, the defendant informed his new employer of the non-compete agreement, and so was paid on a salary basis rather than on a commission basis. The lost income award was based upon the commissions the defendant would have earned for the twenty weeks he was under the injunction, using his historical commission earnings at Merrimack Valley as a measure. The attorney's fees award

responsible for all of the attorney's fees. The trial court found that the attorney's fees claimed were reasonable, and that the defendant's claim for lost income was reasonable. We see no reason to upset the trial court's determinations, as they are supported by the evidence.

Affirmed.

BRODERICK, C.J., and NADEAU, DUGGAN and GALWAY, JJ., concurred.

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119 N.H. 679 (N.H. 1979)

406 A.2d 1310

SMITH, BATCHELDER & RUGG

v.

William Jay FOSTER, Robert Genovese and Christopher C. Barrett.

No. 79-058.

Supreme Court of New Hampshire.

August 20, 1979

[406 A.2d 1311]

119 N.H. 681

Gardner & Clauson, Hanover (K. William Clauson, Hanover, orally), for plaintiff.

Orr & Reno, Concord (Ronald L. Snow, Concord, orally), for defendants.

DOUGLAS, Justice.

This is an action in equity brought by the plaintiff to enforce restrictive covenants against the defendants. After a hearing, the Master (E. Paul Kelly, Esq.) recommended that the covenants should be held unenforceable and that a temporary and permanent injunction should issue to prevent the plaintiff from enforcing any of the provisions of the restrictive covenants. This recommendation was upheld by the Superior Court (Johnson, J.), which reserved and transferred the plaintiff's exceptions. We overrule the plaintiff's exceptions.

The plaintiff is the largest accounting firm in both New Hampshire and Vermont with four offices in New Hampshire and three in Vermont. The defendants are former employees of the plaintiff. Before beginning his employment, each defendant had orally negotiated the terms of his employment with a representative of the plaintiff. After these agreements were made, each defendant signed a written contract containing a covenant not to compete with the plaintiff upon termination of the employment. These restrictive covenants were not part of the prior oral agreements but defendants were confronted with the written covenants only after they had substantially changed their positions in reliance upon the prior oral agreements.

The covenants provided that for three years after termination of employment, the employee "will not enter into the employ of, or represent in any manner, any person, firm or corporation who or which was a client of the Employers at any time prior to the termination of this employment without the express written approval of the Employer." The covenants contained a liquidated damages clause which provided that in the event of a breach of the restrictive covenant, the employees would have to pay fifty percent of the fees they received from serving the plaintiff's former clients for three years after the termination of their employment.

In August 1976, the defendants voluntarily terminated their employment with the plaintiff and established an accounting firm in White River Junction, Vermont. The defendants are presently serving

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207 clients, 40 of whom are former clients of the plaintiff. The defendants did not receive the express written approval of the plaintiff required by the employment contract before they began to serve these clients.

An employer seeking to enforce a covenant not to compete must show that the covenant is supported by consideration, See *Lang v. Johnson,* 24 N.H. 302 (1851), and that it is reasonable with respect to the interests of the employer, the employee and the public. *Moore v. Dover Veterinary Hospital, Inc.,* 116 N.H. 680, 367 A.2d 1044 (1976). Even if the trial court determines that the covenant is unreasonable, the employer nonetheless may be entitled to equitable relief in the form of reformation or partial enforcement of an overly broad covenant upon a showing of his exercise of good faith in the execution of the employment contract. *Solari Industries, Inc. v. Malady,* 55 N.J. 571, 264 A.2d 53 (1970). See generally *Insurance Center, Inc. v. Taylor,* 94 Idaho 896, 499 P.2d 1252 (1972).

[406 A.2d 1312] We must examine the provisions of the employment contracts to determine whether the restrictive covenants were supported by consideration. The written covenant contained a clause, not contained in the original oral agreement, that employment was terminable by either party on thirty days' written notice, and terminable by the plaintiff if it was not satisfied with the employees' services. The plaintiff reserved the right to be the sole judge of such satisfaction.

The master incorrectly determined that the notice requirement, added by the written covenant, was not sufficient consideration for the defendants' promises not to compete upon termination of their employment. See *Advanced Copy Products, Inc. v. Cool, Ind.App.,* 363 N.E.2d 1070 (1977). The notice provision itself is not invalid for lack of consideration. A provision "that one party shall have the power to cancel by notice given for some stated period, such as 'notice for thirty days' . . . should never be rendered invalid thereby for lack of 'mutuality' or for lack of consideration." 1A A. Corbin, Contracts § 164 at 83 (1963).

The provision permitting the plaintiff to terminate the contract if dissatisfied with the defendants' work does not render its promise to employ illusory because there is an implicit requirement that the employer, in good faith, be dissatisfied with the employee's work when he exercises his power to terminate the employment. 3A A. Corbin, Contracts § 647 at 105 (1960).

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The defendants signed the covenants after they were hired by the plaintiff under oral employment agreements and were employed for approximately three years after they signed their employment contracts. Continued employment after signing an employment contract constitutes consideration for a covenant not to compete contained therein. *Daughtry v. Capital Gas Co.,* 285 Ala. 89, 229 So.2d 480 (1969); *Farm Bureau Service Co. v. Kohls,* 203 N.W.2d 209 (Iowa 1972). *Contra Kistler v. O'Brien,* 464 Pa. 475, 347 A.2d 311 (1975).

The trial court determined that the covenants were unenforceable because they imposed unreasonable restrictions upon the employees. The covenant's validity depends upon its reasonableness given the particular circumstances of each case. *Moore v. Dover Veterinary Hospital, Inc.,* 116 N.H. 680, 684, 367 A.2d 1044, 1047 (1976).

In scrutinizing restrictive covenants, this court employs the following three-pronged test: "(a) restraint on employment is reasonable only if it is no greater than necessary for the protection of the employer's legitimate interest, does not impose undue hardship on the employee and is not injurious to the public interest." *Moore v. Dover Veterinary*

Hospital, Inc., supra at 684, 367 A.2d at 1047; Blake, Employee Agreements Not to Compete, 73 Harv.L.Rev. 625, 648-49 (1960).

The master correctly concluded that the restrictive covenant was unreasonable as it related to the employer's legitimate interest. The master found that the plaintiff's earnings exceed two million dollars per year and that it serves over 3,000 clients. The master also found that the defendants serve only 207 clients and that their gross earnings for the period of June 1, 1977, to January 12, 1978, were $47,900. The master held that in the absence of a defined geographical coverage within the covenants, the two-state region of New Hampshire and Vermont would be established as the area covered. He found that this area is unreasonably large. He further found that the class of clients protected by the covenants was too broad because the class includes all clients served by the plaintiff during its existence, whether or not they were current clients.

Several courts have enforced restrictive covenants in the accounting profession to protect the employer's legitimate interest. See *Faw, Casson & Co. v. Cranston,* 375 A.2d 463 (Del.Ch.1977); *Ebbeskotte v. Tyler,* 127 Ind.App. 433, 142 N.E.2d 905 (1957); *Scott v. Gillis,* 197 N.C. 223, 148 S.E. 315 (1929); *Racine v. Bender,* 141 Wash. 606, 252 P. 115 (1927). These courts reasoned [406 A.2d 1313] that, due to the nature of

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the accounting profession and the accountant-client relationship, the restrictive covenants should be enforced because they furthered the employer's legitimate interest "in protecting its business from former employees who have gained knowledge of its clients and internal operations and who thereafter engaged in a competing practice." *Faw, Casson & Co. v. Cranston,* supra, 375 A.2d at 468. Nevertheless, evidence presented to the master indicates that some members of the accounting profession are not in favor of these types of restrictive covenants. Evidence in the record reveals that the American Institute of Certified Public Accountants opposes such covenants because it believes that the employee is put at a severe disadvantage.

Courts closely examine the effect that enforcement of a covenant will have upon the employee's life. 6A A. Corbin, Contracts § 1394 at 101 (1962). "Disproportionate hardship to the party against whom enforcement is sought has always been regarded as a reason for refusing equitable remedies." Id. In this case, the defendants are earning less than when they were employed by the plaintiff. Requiring the defendants to pay fifty percent of their earnings from 40 of their 207 clients undoubtedly would work hardship upon the defendants. This hardship is disproportionate to the harm that the plaintiff would incur if 40 of its 3,000 clients seek the services of the defendants. The master found that none of the defendants were actively soliciting any former client of the plaintiff. The defendants should not, therefore, be penalized for or precluded from following their chosen profession. "An employer 'has no right to unnecessarily interfere with the employee's following any trade or calling for which he is fitted and from which he may earn his livelihood and he cannot preclude him from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment.' " *Dunfey Realty Co. v. Enwright,* 101 N.H. 195, 199, 138 A.2d 80, 83 (1957), *Quoting Roy v. Bolduc,* 140 Me. 103, 107, 34 A.2d 479, 481 (1943).

The master also ruled that the liquidated damages figure was unreasonable because it was actually a penalty inserted to prohibit the defendants from serving any former clients of the plaintiff after termination of the employment. See *Langlois v. Maloney,* 95 N.H. 408, 64 A.2d 697 (1949). The plaintiff alleges that the liquidated damages figure represents compensation to which it is entitled in return for its expense in educating the defendants. The master found that the liquidated damages figure did not bear a reasonable relation to the injury suffered by the plaintiff, therefore, the clause is not enforceable. Id. at 412-13, 64 A.2d at 701.

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The master finally found that the covenant was unreasonable because the public's ability to choose accountants would be adversely affected. Residents of New Hampshire and Vermont who were dissatisfied with the plaintiff's services could not freely seek out the services of the defendants without causing the defendants to incur severe financial penalties.

The master's conclusion that the restrictive covenants failed all three parts of the reasonableness test is supported by the evidence and will not be overruled. See *Sargent Lake Association v. Dane,* 118 N.H. 720, 393 A.2d 559 (1978).

The plaintiffs argue that even if the restrictive covenants are unreasonable, the trial court incorrectly refused to reform them. Courts reform overly broad restrictive covenants if the employers first show that they acted in good faith in the execution of the employment contracts. *Solari Industries, Inc. v. Malady,* 55 N.J. 571, 264 A.2d 53 (1970). See generally *Insurance Center, Inc. v. Taylor,* 94 Idaho 896, 499 P.2d 1252, (1972); *Raimonde v. Van Vlerah,* 42 Ohio St.2d 21, 325 N.E.2d 544 (1975). The master stated that he would deny the plaintiff's request for a finding that it acted in good faith in the execution of the employment agreements. His statement was based on the fact that all three defendants had executed their employment agreements After they were hired and that none of the three were given any opportunity to [406 A.2d 1314] understand the restrictive covenants in their employment agreements. The defendants, therefore, did not have the "full understanding" of the agreement that was available to the parties in Moore v. Dover Veterinary Hospital, Inc., supra and Dunfey Realty Co. v. Enwright, supra. The master found that when each defendant orally negotiated the terms of his employment with a representative of the plaintiff, there was either no discussion of the employment agreement containing the restrictive covenant or just a general reference to it.

Although the master erred in stating that he had no authority to reform the overly broad restrictive covenants, Solari Industries, Inc. v. Malady, supra, his error is harmless because the plaintiff was not prejudiced by the ruling. *Daniels v. Barker,* 89 N.H. 416, 420, 200 A.2d 410, 415 (1938). The plaintiff is not entitled to reformation because the master found that it failed to sustain its burden of proving good faith in the execution of the employment contracts.

In summary, we hold that the restrictive covenant, although supported by consideration, is unreasonable with respect to the

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interests of the employer, the employee, and the public. The plaintiff is precluded from obtaining the remedy of reformation because it did not prove that it acted in good faith in the execution of the employment contracts.

Exceptions overruled.

All concurred.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. **No. 213-2014-CV-109**

WALPOLE CREAMERY, LTD.

v.

DAVID A. WESTOVER and
WALPOLE ICE CREAM, LLC

ORDER

The plaintiff, Walpole Creamery, Ltd. (the "Creamery"), brings this action against the defendants, David A. Westover and Walpole Ice Cream, LLC, alleging breach of a Non-Competition Agreement. The plaintiff now moves for a preliminary injunction. The defendants object. The Court held an evidentiary hearing on July 21 and 22, 2014. Because the plaintiff has met its burden, the Court GRANTS the motion for preliminary injunctive relief as detailed below.

Background

The Court finds the following facts. Since 2006, the Creamery has manufactured and sold all-natural ice cream products at wholesale to supermarkets and local ice cream scoop shops. The Creamery also sells its products through a retail scoop shop within its manufacturing location at 532 Main Street in Walpole. On April 11, 2011, Robert Kasper, Esq., among others, entered into a Purchase Agreement to buy the Creamery from, among others, David Westover.

The Purchase Agreement recites that the business assets sold were "fixtures, machinery, equipment, ice cream recipes, food products and stock in trade used in

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making ice cream, furnishings, telephone and fax number, website, goodwill, the name 'Walpole Creamery,' the ice cream inventory and all other non-scoop shop assets of the business as more specifically enumerated on Exhibit A . . . ." (Pl.'s Ex. 1.) Exhibit A of the Purchase Agreement included customer lists for "all wholesale and retail customers" and "all prospective wholesale and retail customers." (Pl.'s Ex. 23.) The assets of the retail scoop shop not stated in Exhibit A were not included in the Purchase Agreement and Mr. Westover subsequently purchased them from his partners after the sale of the Creamery.

The Purchase Agreement also provides that:

> Buyers and Sellers agree that this Agreement does not prohibit David Westover from continuing to operate a retail scoop shop in the front of the current space leased by the Sellers at 532 Main Street, Walpole, NH. Buyers and Sellers further agree that any ice cream sold in David Westover's scoop shop will be produced by Buyers' ice cream company which will continue to operate under the name "Walpole Creamery." At closing, Buyers and David Westover are to enter into a separate license to sell, a sub-lease for the current scoop shop, a non-competition agreement and a new lease for retail space . . . .

(Pl.'s Ex. 1.)

On May 2, 2011, at the closing, Mr. Westover, among other sellers, entered into the Non-Competition Agreement, which provided, in part:

> Within the geographic limits of the United States and Canada the Sellers shall not, during a period of ten (10) years from the date hereof:
>
> (i)
>
> Directly or indirectly, for their own account or as agent, servant, employee or consultant (whether or not paid), or as a shareholder of any corporation, partner in a partnership, member of any firm, or otherwise, engage or attempt to engage in any business that solicits or promotes services that are competitive with the Business. In particular, Sellers shall not: (a) produce ice cream or any ice cream product; (b) compete for any ice cream customers (any such customers who contact Sellers shall be

> referred by Sellers to Buyer's new company); or (c) solicit customers or sell ice cream products to or for any other company.
>
> (ii)
>
> Directly or indirectly, for their own account or as agent, servant, employee or consultant (whether or not paid), or as a shareholder of any corporation, partner in a partnership, member of any firm, or otherwise, solicit purchases or sell any services or good that are competitive with the Business from or to any person or entity who is or has been a customer of the Sellers in connection with the Business.
>
> (iii)
>
> The foregoing notwithstanding, David Westover shall be allowed to operate a retail scoop shop serving the Walpole Creamery ice cream products at the present scoop shop location in Walpole, New Hampshire pursuant to the terms and conditions of a Scoop Shop License Agreement . . . .

(Pl.'s Ex. 3.) In addition to agreeing that the remedy at law for breach of the above covenants is inadequate and providing that the buyers are entitled to injunctive relief, the Non-Competition Agreement stated, "in the event that any such territorial or time limitation is deemed to be unreasonable by a court . . . then Buyer agrees and submits to the reduction of either said territorial or time limitation to such an area or period as the court shall deem reasonable." (Pl.'s Ex. 3.)

On May 2, 2011, Mr. Westover also entered into a License Agreement making him the Creamery's "exclusive retail agent to sell and promote the Creamery's products . . . ." (Pl.'s Ex. 2.) The License Agreement provides that Mr. Westover "agrees that he will only sell Creamery ice cream products from his retail scoop shop location" and the territory extends "to the operation of one scoop shop by Westover within a 15 mile radius of the existing scoop shop located at 532 Main Street, Walpole, New Hampshire."

(Id.) In the event Mr. Westover ceased selling the Creamery's ice cream, the License Agreement was to terminate. (Id.)

At the time of the purchase, the intent of Attorney Kasper and the buyers was to become a national distributor. Currently, the plaintiff sells its products wholesale throughout New Hampshire and at numerous locations in Vermont. The plaintiff is also negotiating to sell its products at locations in Massachusetts. Attorney Kasper testified that the 10 year and broad geographic restrictions in the Non-Competition Agreement were based on the buyers' goal of becoming a national distributor quickly: within 5–8 years. This optimistic aspiration was based on a California all-natural ice cream company's recent ability to grow nationally in a short period of time.

In 2012, the plaintiff began selling retail ice cream in Keene through a trailer. From the closing in May of 2011 until July of 2012, Mr. Westover operated the scoop shop at 532 Main Street. In July of 2012, Mr. Westover relocated the scoop shop to 9 Edwards Lane, which is roughly a half a mile away from 532 Main Street. The new location includes different amenities, including a 1950s theme, additional parking, inside and outside seating, and a swing set. Mr. Westover's scoop shop was a vital part of the plaintiff's business because it constituted about 20% of the revenue generated by the plaintiff for the 2011–2013 seasons and provided a platform to experiment new flavors.

Beginning in January 2014, Mr. Westover began considering making his own ice cream and discontinuing the purchase of the plaintiff's. Mr. Westford testified that his decision was, in part, based on concerns about the financial viability of the plaintiff. Furthermore, Mr. Westford had complaints about the quality of the ice cream and returned about 25 tubs of ice cream to the plaintiff for the 2013 season. In total, Mr.

Westford purchased roughly 2,700 tubs of ice cream from the plaintiff for the 2013 season. In the third week of January 2014, Mr. Westover decided he was going to make his own ice cream and subsequently spent approximately $60,000 on equipment and construction.

On February 27, 2014, Mr. Westover wrote a letter to the plaintiff stating: "I am writing to inform you that the Walpole Scoop Shop will not be purchasing ice cream from the creamery this year. I will be making my own ice cream for the scoop shop from [sic.] commercially produced base mix." (Pl.'s Ex. 4.) In April of 2014, Mr. Westover began operating "Walpole Scoop Shop," which sells its own ice cream known as "Dave's Homemade Super Premium Ice Cream." It is undisputed that the defendants do not sell the plaintiff's ice cream.

Mr. Westover advertised his new business through the "Walpole Clarion" in April, May, and June of 2014. The May 2014 advertisement states: "Featuring Award Winning Walpole Creamery Super Premium Ice Cream & Other Fine Frozen Desserts." (Pl.'s Ex. 11). It also claims Walpole Scoop Shop was voted "Best Ice Cream Shop, 2013" by the Monadnock Shopper News and that Mr. Westover is the "Former Founding Partner of Walpole Creamery." (Id.) In the "Best of Monadnock" publication, Mr. Westover advertised that Walpole Scoop Shop was voted best ice cream for six years in a row. (Pl.'s Ex. 12.) At one point in 2014, the defendants' website claimed that it sold the plaintiff's product.

On Yelp.com, the plaintiff's organization is referred to as "moved" and "closed." (Pl.'s Ex. 14, 15.) Moreover, the recommendation section of Yelp.com refers to the plaintiff's amenities as swings and outdoor seating. (Pl.'s Ex. 14 at 2.) On

TripAdviser.com the reviews refer to the plaintiff's business as a "fifties ice cream shop décor," and a "throw back in time" (Pl.'s Ex. 16.) On Yellowbook.com, the plaintiff's phone number is listed as the defendants'.

Attorney Kasper testified that when he was notified by Mr. Westover of his intent to stop selling the plaintiff's ice cream, he felt he needed to setup a retail shop, and the least costly means was to reconstruct 532 Main Street. The plaintiff has incurred roughly $25,000 in expenses in reconstructing the scoop shop at 532 Main Street. In addition, the revenue gained from the plaintiff's retail shop is significantly less than that gained during Mr. Westover's Licensing Agreement. Attorney Kasper testified that the defendants' retail operation has been hurting the plaintiff's wholesale operation, has decreased the plaintiff's retail business, and has had a significant impact on the cash flow available. Furthermore, the defendants' operation has caused confusion in the market place, which has also hurt sales.

Attorney Kasper testified that he understood the Purchase Agreement to include both the wholesale and retail aspects of the Creamery. Mr. Westover testified that he believed the Purchase Agreement only involved selling the wholesale aspect of the Creamery and not the retail. Furthermore, Mr. Westover believes the Non-Competition Agreement only prevents him from selling retail ice cream 15 miles outside of Walpole.

The plaintiff now moves for a preliminary injunction seeking to enjoin the defendants from "operations in the manufacturing and production of ice cream products for a period of 10 years, consistent with the provisions of the Purchase Agreement and Non-Competition Agreement." (Pl.'s Mem. Law 18.) The defendants object and contend that the Purchase Agreement and Non-Competition Agreements include only the wholesale operation and not the retail business of the Creamery. Thus, the defendants argue that they are permitted to sell any retail ice cream within a 15 mile radius of the plaintiff's business. The Court disagrees with the defendants.

Standard of Review

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade, 122 N.H. 314, 316 (1982). "Whether to grant an injunction is within the trial court's sound discretion, exercised after consideration of all the circumstances and controlled by established principles of equity." Smith v. N.H. Bd. of Exam'rs of Psychologists, 138 N.H. 548, 550 (1994). "'An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief . . . there is no adequate remedy at law . . . [and the] party seeking an injunction [is] likely [to] succeed on the merits.'" ATV Watch v. N.H. Dept. of Res. and Econ. Dev., 155 N.H. 434, 437 (2007) (brackets in original) (quoting N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). Courts also consider the impact on the public interest and the possibility of substantial harm to others. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13–14 (1987). The plaintiff bears the burden of establishing the above factors in order to obtain an injunction.

Analysis

1. Likelihood of Success on the Merits

The defendants contend that because the Non-Competition Agreement is ancillary to the sale of a business, the Court should construe it narrowly. The Court disagrees. Generally, "the law does not look with favor upon contracts in restraint of trade or competition," and, as such, non-competition agreements are to be narrowly construed. Merrimack Valley Wood Prods. v. Near, 152 N.H. 192, 197 (2005). In the context of a restrictive covenant ancillary to an employment agreement, the New Hampshire Supreme Court has applied a three-pronged test: first, whether the restriction is greater than necessary to protect the legitimate interests of the employer; second, whether the restriction imposes an undue hardship upon the employee; and third, whether the restriction is injurious to the public interest. Syncom Indus. v. Wood, 155 N.H. 73, 79 (2007). However, here, the Non-Competition Agreement is ancillary to the sale of a business, which does not require such a narrow interpretation.

As the New Hampshire Supreme Court explained:

> Because our caselaw looks upon contracts in restraint of trade with disfavor, courts normally construe noncompetition covenants narrowly. However, where, as in this case, the noncompetition covenant was ancillary to the sale of a business, it may be interpreted more liberally. Under such circumstances, the parties presumably bargain from positions of equal bargaining power. The covenantor is paid a premium as consideration for his agreeing not to compete with the buyer, and the proceeds from the sale assure that the covenant will not result in undue hardship.

Centorr-Vacuum Indus. v. Lavoie, 135 N.H. 651, 654 (1992) (citations and quotations omitted); see also RESTATEMENT (SECOND) CONTRACTS § 188 comment f. ("A promise to refrain from competition made in connection with a sale of a business may be reasonable in the light of the buyer's need to protect the value of the good will that he has acquired. In effect, the seller promises not to act so as to diminish the value of what he has sold."). As one court explained:

> The agreement is not to be narrowly, technically, construed. . . .There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. When a person sells the

contents of a store and agrees not to engage in the same business in the same city as long as the purchaser continues in business, the contract is construed as carrying with it the good will of the business. When the good will of a business is sold, it is not the patronage of the general public which is sold, but that patronage which has become an asset of that business. . . . The law implies in every contract a covenant that neither party will do anything that will deprive the other of the fruits of his bargain.

Harrison v. Cook, 29 Cal. Rptr. 269, 271 (Cal. App. 1963) (citations and quotations omitted). Accordingly, this Court will apply "normal rules of contract interpretation, paying particular attention to the intent of the parties in entering into the noncompetition covenant." Centorr-Vacuum Indus., 135 N.H. at 654–55; see also Gosselin v. Archibald, 121 N.H. 1016, 1021 (1981) (in construing non-competition agreement ancillary to the sale of a business, court affirmed master's finding that covenantor "violated the spirit and intent" of the agreement); Wilmot H. Simonson Co. v. Green Textiles Assocs, 755 F.2d 217, 219 (1st Cir. 1985) (in interpreting non-competition agreement ancillary to the sale of a business, court looked to "particular language used against the background of other indicia of the parties' intention"); Bicycle Transit Auth. v. Bell, 333 S.E.2d 299, 305 (N.C. 1985) ("Generally, when deciding whether a party has breached a restrictive covenant ancillary to the sale of a business, courts will interpret the covenant in the light of the purpose of the parties to provide against competition by the covenantor . . . .").

The next issue is to what extent the Non-Competition Agreement bars Mr. Westover from competing against the plaintiff. The language of the Purchase Agreement is broad and includes the sale of: "fixtures, machinery, equipment, ice cream recipes, food products and stock in trade used in making ice cream, furnishings, telephone and fax number, website, goodwill, the name 'Walpole Creamery,' the ice cream inventory and *all other non-scoop shop assets of the business* as more specifically enumerated on Exhibit A . . . ." (Pl.'s Ex. 1) (emphasis added). Importantly, Exhibit A of the Purchase Agreement includes customer lists for "all wholesale and retail customers," and "all prospective wholesale and retail customers." (Pl.'s Ex. 23.) The clear import of including this language was to make plain that the purchase involved both the wholesale and retail aspects of the business, except to the extent specifically authorized in the License Agreement. Put another way, the purchase was for the entire Creamery—not merely the wholesale aspect. The only assets not sold are those scoop shop assets Mr. Westover retained in order to run the retail scoop shop. (Pl.'s Ex. 1.)

The Non-Competition Agreement states that the "[s]ellers have sold the ice cream production and all retail sales outside of a 15 mile radius from the current scoop shop at 532 Main Street, Walpole, NH (the '*Business*')." (Pl.'s Ex. 3) (emphasis added). It goes on to broadly preclude Mr. Westover from competing against the "Business." (Id.) The defendants argue that the definition of the plaintiff's "Business" is its wholesale operation and all retail sales outside of a 15 mile radius. Thus, the defendants maintain the Non-Competition Agreement permits Mr. Westover to compete as a retail business within 15 miles of the plaintiff. Such a narrow interpretation of the Non-Competition Agreement is in error. See Glick v. Chocorua Forestlands Ltd. P'ship, 157 N.H. 240, 247 (2008) ("[I]t has long been our practice to focus upon the intent of the parties, as manifested in the language of the *entire contract*, in defining the parties' respective rights.").

The Non-Competition Agreement broadly prohibits competition against the plaintiff's wholesale business and retail business 15 miles outside the plaintiff's Walpole location. Importantly, the Non-Competition Agreement carves out an exception to its broad prohibitions:

> The foregoing notwithstanding, David Westover shall be allowed to operate a retail scoop shop serving the Walpole Creamery ice cream products at the present scoop shop location in Walpole, New Hampshire pursuant to the terms and conditions of a Scoop Shop *License Agreement* . . . .

(Pl.'s Ex. 3) (emphasis added). This exception establishes that Mr. Westover cannot operate a retail scoop shop unless it is allowed under the terms and conditions of the License Agreement. The License Agreement only authorizes Mr. Westover to operate a retail store selling exclusively Creamery ice cream products within a 15 mile radius of the plaintiff. See (Pl.'s Ex. 2.) Contrary to the defendants' position, once the License Agreement was terminated, the Non-Competition Agreement prohibited Mr. Westover from selling any ice cream products within 15 miles of the plaintiff's Walpole location. The Purchase Agreement also contemplates this restriction by reciting that Mr. Westover may continue to operate the retail scoop shop at 532 Main Street. Accordingly, the Court finds that the Non-Competition Agreement bars Mr. Westover from competing against the plaintiff in retail within a 15 miles radius.

Additionally, the defendants argue there is no evidence regarding whether the 10 year restriction is reasonable.[1] The Court disagrees. Non-competition agreements are enforceable only to the extent they are "reasonable in time and space, necessary to protect legitimate interests, and not an obstruction of the public interest." Alexander & Alexander, Inc., 488 N.E.2d at 28–29; see also RESTATEMENT (SECOND) CONTRACTS §

[1] The defendants also contend the Non-Competition Agreement is unreasonable because "[t]he 10 year restriction at issue, *if applied to retail as well as to wholesale competition*, is not reasonably necessary to protect any good will purchased by Plaintiff in connection with its wholesale operation." (Def.s' Supp. Brief Opp. Mot. Pre. Inj. 1.) However, as the Court explained above, the Non-Competition Agreement and the Purchase Agreement purport to sell and protect both the retail and wholesale goodwill the buyers purchased. Thus, it is reasonable to protect the goodwill purchased by the buyers by restraining the competition of Mr. Westover in wholesale and retail. See Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986).

188. At the hearing, Attorney Kasper testified that the 10 year limitation was based on projections that the plaintiff would become a national distributor within 5–8 years. While the Court does not expressly rule that the time limitation is reasonable, for the purposes of this preliminary injunction there is sufficient evidence that would support a longer time limitation than the three years the defendants contend is reasonable. Similarly, the geographic restrictions at the time of the purchase may have been too broad; however, the Court finds there is evidence to support that it was reasonable to protect the plaintiff's goal of becoming a national distributor. To the extent the geographic and time restrictions are found to be unreasonable following a final hearing, the Court may alter the agreement to make these restrictions reasonable. See RESTATEMENT (SECOND) CONTRACTS § 184(2).

Because the defendants do not dispute that they are operating a retail scoop shop within 15 miles of the plaintiff's Walpole location, the Court finds and rules that the plaintiff has met its burden that there is a likelihood of success on the merits on the claim that the defendants have breached the terms of the Non-Competition Agreement.

2. Irreparable Harm, No Adequate Remedy at Law, and the Public Interest

The next two prongs of the preliminary injunction standard are whether the plaintiff "has no adequate remedy at law and is likely to suffer irreparable harm unless the conduct of the defendant is enjoined." Timberlane Regional Sch. Dist. v. Timberlane Reg.'l Educ. Ass'n, 114 N.H. 245, 250 (1974). The defendants contend that the plaintiff cannot meet its burden because "the lion's share of Plaintiff's alleged damages consist not of competitive losses that could be avoided by an injunction, but rather of 'losses' that a preliminary injunction cannot avoid." (Defs' Obj. Pre Inj. 9.) In particular, the defendants argue that the losses at wholesale are easily measureable, the expenses the plaintiff incurred in re-entering the retail business cannot be avoided by an injunction, and "the only harm that can possibly be deemed "irreparable" . . . is the lost profit from retail sales in Walpole that Plaintiff would presumably make but for the Defendants' competition . . . . [b]ut . . . those damages are of its own creation." (Id. at 10) (emphasis omitted). The defendants further argue, without citing any authority, that they were in the Walpole retail market first, and any competition with the plaintiff is based on the plaintiff's choice to enter the market, which cannot be a basis for irreparable harm. (Id. at 10–11.) The Court disagrees and finds that the plaintiff has no adequate remedy at law and is likely to suffer irreparable harm unless the conduct of the defendant is enjoined.

As the defendants note and Attorney Kasper testified, there is irreparable harm to the plaintiff based on the lost retail sales. These lost sales are not readily calculable. Moreover, the defendants' close proximity, advertising, and the public's confusion will continue to damage both the retail and wholesale goodwill of the plaintiff. See (Pl.'s Ex. 14–17) (evidencing different websites confusing the two companies). Therefore, the Court finds and rules that the plaintiff has sufficiently shown irreparable harm. Furthermore, the plaintiff lacks an adequate remedy at law in protecting its interests if the defendants are not enjoined.

Additionally, the Court finds that an injunction would be in the public's best interest as it is protecting the goodwill of the plaintiff. While the defendants have expended over $60,000 in capital in connection with selling "Dave's Homemade Super Premium Ice Cream" at retail, the harm to the plaintiff will be greater if the injunction is not granted. As explained above, the retail sales and goodwill of the plaintiff are being irreparably harmed by the continued retail sale by the defendants of ice cream products made by the defendants and/or other third parties. Accordingly, the Court finds and rules that the plaintiff has met its burden of showing that a preliminary injunction is necessary.

3. Bond

At the end of the evidentiary hearing, the defendants argued that, in the event the Court granted the plaintiff's motion, the Court should require the plaintiff to give an injunction bond in the amount of $125,000. The plaintiff objects. Pursuant to Superior Court Civil Rule 48(c):

> Unless the Court, for good cause shown, shall otherwise order, no Restraining Order or Preliminary Injunction shall issue except upon the giving of an injunction bond by the applicant, in such sums as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Based on the evidence submitted, the Court orders that the injunction shall not issue except upon the plaintiff securing an injunction bond in the amount of $125,000.

In sum, the Court GRANTS the plaintiff's motion for a preliminary injunction and, provided the plaintiff secures the necessary injunction bond, ENJOINS the defendants from operations in the manufacturing and production of ice cream products. Further, the defendants are ENJOINED from selling or distributing ice cream products at the wholesale or retail level, including any ice cream products made by themselves or any third party. The defendants are not enjoined from selling soft serve, yogurt, or other non-ice cream dessert products.

SO ORDERED.

7/28/14
Date

John C. Kissinger, Jr.
Presiding Justice

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153 N.H. 764 (N.H. 2006)

904 A.2d 652

MORTGAGE SPECIALISTS, INC.

v.

Joseph C. DAVEY, IV and another.

No. 2005-067.

Supreme Court of New Hampshire.

July 26, 2006

Argued: March 9, 2006.

Rehearing Denied Aug. 28, 2006.

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[Copyrighted Material Omitted]

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Devine, Millimet & Branch, P.A., of Manchester (Alexander J. Walker, Jr. and Danielle L. Pacik on the brief, and Mr. Walker orally), and Shaheen & Gordon, P.A., of Concord (Arpiar G. Saunders, Jr. on the brief), for the plaintiff.

Sheehan Phinney Bass + Green, P.A., of Manchester (Christopher Cole and Robert R. Lucic on the brief, and Mr. Cole orally), for the defendants.

DALIANIS, J.

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The plaintiff, Mortgage Specialists, Inc., appeals: (1) an order of the Superior Court (*Morrill,* J.) denying its motion to set aside the jury verdict on its claim for misappropriation of trade secrets, *see* RSA ch. 350-B (1995); and (2) a pretrial order of the Superior Court (*Coffey,* J.) dismissing its other claims. The defendants, Joseph C. Davey, IV, Team Mortgage, LLC, Steven Michael Carbone, and Signature Mortgage Group, LLC, cross-appeal a post-trial order of the Superior Court (*Morrill,* J.) assessing sanctions against them. We affirm in part, vacate in part, and remand.

I. Background

Mortgage Specialists is a mortgage brokerage and lending company with offices in Massachusetts and New Hampshire. Defendants Davey and Carbone worked as loan originators for Mortgage Specialists. In July 2002, both left Mortgage Specialists to work for a competitor, Mortgage Partners. When they left, each took with him copies of customer information retained in the course of his work. The most important piece of information was the customer's current interest rate, from which a competitor could learn whether refinancing would benefit the customer.

[904 A.2d 657] Davey and Carbone subsequently started their own mortgage businesses. Davey, who worked at Carteret Mortgage for a short time

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after leaving Mortgage Partners, is the owner of defendant Team Mortgage, LLC. Carbone is the owner of defendant Signature Mortgage Group, LLC. Since leaving Mortgage Specialists, Davey and Carbone have both closed loans, with their subsequent employers and with their own businesses, for customers with whom they had previously worked at Mortgage Specialists.

When Mortgage Specialists learned that Mortgage Partners had contacted its former customers, it initiated suit against Mortgage Partners for misappropriation of trade secrets. Davey and Carbone were both deposed in November 2002 in connection with that litigation, and both acknowledged that they had taken copies of customer information with them when they left Mortgage Specialists. Mortgage Specialists brought this suit in 2003, alleging a variety of claims and seeking injunctive relief and damages.

The trial court dismissed all of Mortgage Specialists' claims except for its claim that the defendants misappropriated its trade secrets. It also issued a preliminary injunction prohibiting the defendants from misappropriating or disclosing Mortgage Specialists' customer information and prohibiting them from contacting or communicating with any of Mortgage Specialists' current or former customers, with some limited exceptions.

A jury trial was held in September 2004 on the trade secrets claim. The jury returned a verdict in favor of the defendants. The trial court subsequently imposed sanctions upon the defendants for their conduct prior to and during trial.

II. The Trade Secrets Claim

Mortgage Specialists filed a motion to set aside the jury's verdict. It asserted that the jury's verdict was "against the great weight of the evidence presented at trial" and "[n]o reasonable jury could have reached the verdict it did in this case in the face of such overwhelming evidence." The trial court denied Mortgage Specialists' motion, finding that a reasonable jury could have concluded that the alleged confidential information underlying its claims was not a trade secret because "Mortgage Specialists' customer information was not subject to reasonable efforts to maintain its secrecy under the circumstances." *See* RSA 350-B:1, IV(b). We agree.

A reasonable jury could have found the following facts: Davey and Carbone began working as loan originators for Mortgage Specialists in 1999. Both were hired as independent contractors. Upon hiring, they were neither asked to sign a non-disclosure or confidentiality agreement, nor told that Mortgage Specialists' documents or customer information was

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confidential or constituted trade secrets. Despite a relatively high turnover among its loan originators and the tendency of loan originators to stay in the mortgage business after leaving Mortgage Specialists, throughout the time during which Davey and Carbone worked for Mortgage Specialists, the company had no written policy regarding confidentiality or document destruction and no employee handbook. Although Mortgage Specialists created a confidentiality and non-disclosure agreement by 1999, only some of its loan originators actually signed it between 1999 and 2001. Davey and Carbone deny having seen or heard about the agreement before July 2002, when Mortgage Specialists asked all of its loan originators to sign it. Neither Davey nor Carbone signed the agreement, and each terminated his relationship with Mortgage Specialists shortly thereafter. Prior to being presented with **[904 A.2d 658]** the agreement, neither Davey nor Carbone had been told that customer information belonged to Mortgage Specialists or that they were prohibited from copying or maintaining copies of customer information. Mortgage Specialists did not ask either Davey or Carbone to return or destroy customer information before leaving the company.

While Davey and Carbone were working at Mortgage Specialists, it collected and stored customer information and disseminated it to its employees and independent contractors in various formats. Lists of potential new customers and lists of potential repeat customers were distributed regularly to Mortgage Specialists' telemarketers. The lists of potential repeat customers were not marked as trade secrets or as confidential. Nevertheless, access to the lists of potential repeat customers, which contained information about each customer's loan amount, loan type, and interest rate, was restricted. Supervisors gave telemarketers only a limited number of pages from these lists during a given shift. The telemarketers were not permitted to photocopy the pages, and were required to return all pages of the list to the supervisor at the end of the shift. Davey and Carbone did not have access to these lists, and Mortgage Specialists has not alleged that they took copies of these lists when they left.

As telemarketers contacted individuals interested in doing business with Mortgage Specialists, including both new and repeat customers, the telemarketers created "lead sheets" to be passed on to loan originators such as Davey and Carbone. The lead sheets often included the name and phone number of the individual, and sometimes included the individual's current interest rate. The lead sheets were not marked as trade secrets or as confidential. Neither Davey nor Carbone was ever instructed to destroy the lead sheets or to return them to a particular individual or department.

As loan originators met with customers, the loan originators gathered all of the information needed to complete a standard residential loan

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application. Known as a Form 1003, the application consisted of several pages and required the applicant to disclose a great deal of personal information, including a social security number, detailed information regarding income, bank accounts, and credit history, and the interest rate on the existing mortgage. When meeting with a customer, Davey and Carbone both typically took notes on the back of the lead sheet and filled out the application by hand. The loan application was accompanied by a privacy policy disclosure, indicating that the customer's information would not be disclosed to third parties.

After the loan application was completed, the application package was returned to Mortgage Specialists for processing. Davey and Carbone often retained copies of the lead sheet or the first page of the application. Carbone testified that some loan originators retained this information so that they could keep in touch with the customer throughout the loan application process.

After the completed application was given to the loan processors at Mortgage Specialists, all application information was entered into Mortgage Specialists' computerized database, which could be accessed by the processors. While loans were in process, lists of all open loan applications were regularly generated from this database and distributed to all of Mortgage Specialists' loan originators. These lists, referred to as "pipeline reports," contained basic information about each customer's loan, including the customer's last name, the type of loan, and the interest rate.

[904 A.2d 659] The pipeline reports were not marked as trade secrets or as confidential. Loan originators were not instructed to destroy the pipeline reports or to return them to a particular individual or department.

After the loan was closed, the electronically-stored customer information was transferred into a password-protected database, accessible only by one of the owners and the office manager. If a loan originator needed access to an application after the loan was closed, he could obtain a computer printout of the application information from the individuals who had access to the database. The printout was not marked as a trade secret or as confidential, and loan originators were not instructed to return it or to refrain from copying it.

While Davey and Carbone were working at Mortgage Specialists, the hard copies of customers' closed loan files were stored in the attic of Mortgage Specialists' Plaistow office. Access to the attic was through an unlocked door and was not restricted. Davey and Carbone sometimes entered the attic and retrieved old files from storage when they wanted to review or copy information.

After leaving Mortgage Specialists, Davey and Carbone both worked as loan originators at Mortgage Partners. Carbone gave a telemarketer at

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Mortgage Partners a bag filled with copies of loan applications that he had taken with him from Mortgage Specialists and she was instructed to contact all of his former customers to let them know that he was now working at Mortgage Partners. One of the former customers, when contacted by Mortgage Partners, was angered by the fact that Mortgage Partners had access to his personal information and complained about the situation to Mortgage Specialists in August 2002. The customer spoke to several employees at Mortgage Specialists, and ultimately met with its president. Despite Mortgage Specialists' apparent knowledge that Mortgage Partners had access to its customer information, it took no steps to retrieve the customer information from Mortgage Partners' possession.

On appeal, Mortgage Specialists contends that there was overwhelming evidence that the defendants misappropriated its trade secrets within the meaning of the New Hampshire Uniform Trade Secrets Act, RSA chapter 350-B. It argues that the trial court erred in denying its motion to set aside the jury verdict, claiming that no reasonable juror could have found that its efforts to maintain the secrecy of its customer information were not reasonable under the circumstances.

A jury's verdict may only be set aside if it is conclusively against the weight of the evidence or if it is the result of mistake, partiality, or corruption. *PMC Corp. v. Houston Wire & Cable Co.,* 147 N.H. 685, 692, 797 A.2d 125 (2002). "Conclusively against the weight of the evidence" means that the verdict was one no reasonable jury could return. *Id.* As the plaintiff argues only that the jury verdict was against the weight of the evidence, we limit our review to that issue. We will not overturn the trial court's denial of Mortgage Specialists' motion to set aside the jury verdict unless it is an unsustainable exercise of discretion. *SeeBabb v. Clark,* 150 N.H. 98, 100, 834 A.2d 364 (2003).

For information to be a trade secret, the information must, among other things, be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RSA 350-B:1, IV(b). Mortgage Specialists argues that the measures it took to maintain the secrecy of its customer information were "reasonable under the circumstances because they clearly put the loan originators on notice that [the] type of **[904 A.2d 660]** information contained in the Form 1003s is confidential ... and should not be disclosed." We disagree.

As the trial court indicated in its order, the jury heard testimony that the documents containing customer information, including customers' current interest rates, "were never marked confidential or trade secret," that those documents "were kept in an attic for many years," and that "the

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loan originators were not consistently and uniformly given instructions as to the proper treatment of the information as confidential and/or proprietary." While there was evidence that Mortgage Specialists took specific steps to maintain the secrecy of its lists of potential repeat customers, lists to which the defendants did not have access and did not copy, there was conflicting testimony as to whether Mortgage Specialists took any steps at all to maintain the secrecy of customer information that was stored and disseminated to its employees and independent contractors in other forms. Although Mortgage Specialists provided all of its customers with a privacy policy acknowledgement indicating that it would not disclose the customer's nonpublic personal information to nonaffiliated third parties, and it placed shredders around its office, these efforts could have been found by the jury only to demonstrate a need to protect customers from the sale of their personal information or from the risk of identity theft, rather than an intent to prevent Mortgage Specialists' employees from misappropriating customer information. While access to the electronic copies of old loan applications was restricted by a password, there was testimony at trial indicating that any loan originator could request that a copy of that information be printed and given to him, and that any loan originator could enter the attic storage area to access a hard copy of the closed file. While Mortgage Specialists took some steps to maintain the secrecy of its customer information, the jury could have found that its efforts were inconsistent.

The trial court's decision not to set aside the jury verdict was not an unsustainable exercise of discretion, as a reasonable jury could conclude from the evidence presented at trial that Mortgage Specialists' customer information was not subject to reasonable efforts to maintain its secrecy under the circumstances, and, accordingly, was not a trade secret.

III. Preemption of Other Claims

Mortgage Specialists asserted the following claims against the defendants: misappropriation of trade secrets, *see* RSA ch. 350-B; conversion; tortious interference with advantageous relations; violation of the New Hampshire Consumer Protection Act (CPA), *see* RSA ch. 358-A (1995 & Supp.2005); and breach of fiduciary duty. However, the trial court granted, in part, the defendants' motion to dismiss, allowing Mortgage Specialists to proceed on the trade secrets claim alone. We affirm this decision of the trial court to the extent that it dismissed the claims for conversion and breach of fiduciary duty, but vacate it to the extent that it dismissed the claims for tortious interference with advantageous relations and violation of the CPA.

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Mortgage Specialists alleged the following relevant facts in its writ: While Davey and Carbone were working for Mortgage Specialists, each retained copies of documentation containing confidential information about Mortgage Specialists' customers and their mortgages. While Davey and Carbone were working for Mortgage Partners, Mortgage Specialists received reports from customers that Mortgage Partners "had been contacting them, discussing confidential information with them, reporting that Mortgage Specialists had no license **[904 A.2d 661]** and was in trouble in New Hampshire, and luring them to do business with Mortgage Partners." Carbone admitted that he "informed Mortgage Specialists' customers that Mortgage Specialists was operating without the proper New Hampshire licensing." Since leaving Mortgage Specialists, both Davey and Carbone have used confidential information taken from Mortgage Specialists to contact Mortgage Specialists' customers and solicit business on behalf of Mortgage Partners. The defendants have also solicited Mortgage Specialists' employees.

Prior to trial, the defendants moved to dismiss Mortgage Specialists' claims, arguing in part that the New Hampshire Uniform Trade Secrets Act, *see* RSA ch. 350-B (NHUTSA), preempted Mortgage Specialists' claims for conversion, tortious interference with advantageous relations, violation of the CPA, and breach of fiduciary duty. *See* RSA 350-B:7. The trial court construed RSA 350-B:7 as providing that any of Mortgage Specialists' claims that are "based upon the [defendants'] alleged misappropriation of [Mortgage Specialists'] trade secrets are preempted" by the NHUTSA. Finding that the common law and CPA claims were not "supported by facts other than the misappropriation or misuse of trade secrets ... and/or confidential information," the trial court concluded that the claims were preempted by the NHUTSA. In response to Mortgage Specialists' argument that dismissal of the common law and CPA claims would be premature, given that the parties continued to dispute whether the confidential information at issue was in fact a trade secret within the meaning of the NHUTSA, the trial court ruled that RSA chapter 350-B "displaces ... claims that rely on the misappropriation of trade secrets, regardless of whether [Mortgage Specialists] successfully demonstrates that the information in question qualifies as a trade secret" within the meaning of the NHUTSA.

In reviewing the trial court's grant of a motion to dismiss, our task is to ascertain whether the allegations pled by Mortgage Specialists are reasonably susceptible of a construction that would permit recovery. *SeeBerry v. Watchtower Bible & Tract Soc.,* 152 N.H. 407, 410, 879 A.2d 1124 (2005). We assume that all facts pled are true, and we construe all reasonable inferences drawn from those facts in Mortgage Specialists' favor. *Seeid.*

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We then engage in a threshold inquiry that tests those facts against the applicable law. *Id.* The issue raised here also involves the interpretation of a statute, which is a question of law that we review *de novo. SeeWoodview Dev. Corp. v. Town of Pelham,* 152 N.H. 114, 116, 871 A.2d 58 (2005).

On appeal, Mortgage Specialists argues that preemption pursuant to RSA 350-B:7 is contingent upon the information at issue qualifying as a trade secret within the meaning of the NHUTSA, *see* RSA 350-B:1, IV. Accordingly, it argues that the trial court prematurely dismissed the common law and CPA claims because the parties disputed whether the misappropriated information was a "trade secret" within the meaning of the NHUTSA. Alternatively, Mortgage Specialists argues that, even if preemption is not contingent upon the finding of a statutory trade secret, the claims were not preempted because they were not based solely upon the defendants' alleged misappropriation of statutory trade secrets, but also upon the defendants' alleged misappropriation of confidential information and goodwill and improper competition for customers.

The defendants argue that, pursuant to RSA 350-B:7, the NHUTSA preempts all "other remedies and theories of recovery **[904 A.2d 662]** in which liability is premised upon misappropriation of 'confidential information and trade secrets' " because all such remedies conflict with the NHUTSA. Accordingly, they argue that because "every one of [Mortgage Specialists'] claims [is] based entirely on the alleged misappropriation of alleged 'trade secrets' or 'confidential and proprietary' information," each of the common law and CPA claims is preempted by the NHUTSA.

We begin our review by interpreting RSA 350-B:7. In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Woodview Dev. Corp.,* 152 N.H. at 116, 871 A.2d 58. We examine the language of the statute, ascribing to its words their plain and ordinary meanings, and interpret it in the context of the overall legislative scheme and not in isolation. *In the Matter of Jerome & Jerome,* 150 N.H. 626, 628-29, 843 A.2d 325 (2004). The NHUTSA, which is New Hampshire's codification of the Uniform Trade Secrets Act (UTSA) (amended 1985), 14 U.L.A. 536-659 (2005), must be construed "to effectuate its general purpose to make uniform the law with respect to the subject of [the NHUTSA] among states enacting it." RSA 350-B:8. Therefore, opinions rendered by courts interpreting the UTSA's preemption provision inform our analysis. *See id.*

RSA 350-B:7, entitled "Effect on Other Law," states:

I. Except as provided in paragraph II, this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.

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II. This chapter shall not affect:

(a) Contractual remedies, whether or not based upon misappropriation of a trade secret;

(b) Other civil remedies that are not based upon misappropriation of a trade secret; or

(c) Criminal remedies, whether or not based upon misappropriation of a trade secret.

This provision of the NHUTSA is identical to section seven of the UTSA. *See* 14 U.L.A. 651. Hereinafter, we refer to the two provisions interchangeably as "the preemption provision."

Mortgage Specialists urges us to construe the preemption provision to provide that no claim is preempted unless and until a determination is made that there has been a misappropriation of trade secrets in violation of the NHUTSA. We acknowledge that, if read in isolation, the plain language of RSA 350-B:7, I, appears to support Mortgage Specialists' argument because it explicitly preempts only remedies for "misappropriation of a *trade secret.*" (Emphasis added.) However, such a narrow construction of the preemption provision ignores not only the overall legislative scheme reflected in the NHUTSA, but also the statutory directive that we must construe the NHUTSA "to effectuate its general purpose to make uniform the law with respect to the subject of [the NHUTSA] among states enacting it," RSA 350-B:8. Thus, in construing the language of the preemption provision, we must consider the purpose of the UTSA as well as the construction that other courts have given to the same provision.

Prior to enactment of the UTSA, the Patent Section of the American Bar Association began considering the need for "enactment of a uniform state law to protect against the wrongful disclosure or wrongful appropriation of trade secrets, *know-how* or *other information* maintained in confidence by another." UTSA, 14 U.L.A. 531-32 prefatory note (emphases added;

[904 A.2d 663] quotation omitted). The UTSA arose out of concerns that development of law on the subject had been "uneven" and that there was "undue uncertainty concerning the parameters of trade secret protection, and the appropriate remedies for misappropriation of a trade secret." *Id.* at 531, 843 A.2d 325. The drafters explained that "[t]he contribution of the [UTSA] is substitution of *unitary definitions* of trade secret and trade secret misappropriation, and a single statute of limitations for the *various ... theories of noncontractual liability* utilized at common law." *Id.* (emphases added).

The UTSA "also arose to create a uniform business environment that created more certain standards for protection of commercially valuable

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information." *Auto Channel, Inc. v. Speedvision Network, LLC,* 144 F.Supp.2d 784, 789 (W.D.Ky.2001). "[T]he purpose of the preemption provision is to preserve a single tort action under state law for misappropriation of a trade secret as defined in the statute and thus to eliminate other tort causes of action founded on allegations of misappropriation of information that may not meet the statutory standard for a trade secret." *Burbank Grease Services, LLC v. Sokolowski,* 278 Wis.2d 698, 693 N.W.2d 89, 98 (Ct.App.2005) (hereinafter *Burbank Grease I*), *rev'd in part,* 717 N.W.2d 781, 788-94 (Wis.2006). As such, the UTSA "was meant to codify all the various common law remedies for theft of ideas." *Thomas & Betts Corp. v. Panduit Corp.,* 108 F.Supp.2d 968, 971 (N.D.Ill.2000) (quotation omitted); *see alsoBliss Clearing Niagara v. Midwest Brake Bond,* 270 F.Supp.2d 943, 948 (W.D.Mich.2003). With the enactment of the UTSA, confidential information not rising to the level of a statutory trade secret was left largely unprotected by the law. *See* RSA 350-B:7, I.

Mortgage Specialists urges us to adopt the position of a minority of courts that have held that common law and statutory claims are not preempted by the UTSA if they involve information that does not meet the statutory definition of a trade secret. *See, e.g.,Callaway Golf v. Dunlop Slazenger Group Americas,* 295 F.Supp.2d 430, 437 (D.Del.2003); *Stone Castle v. Friedman, Billings, Ramsey & Co.,* 191 F.Supp.2d 652, 659 (E.D.Va.2002); *Combined Metals of Chicago Ltd. v. Airtek, Inc.,* 985 F.Supp. 827, 830 (N.D.Ill.1997); *see alsoBurbank Grease Services, LLC v. Sokolowski,* 717 N.W.2d 781, 788-94 (Wis.2006) (hereinafter *Burbank Grease II*). We do not find these cases persuasive, however, and the weight of authority among courts that have considered the preemption provision is that the history, purpose, and interpretation of the statutory scheme, as discussed above, do not support Mortgage Specialists' position. *See, e.g.,Weins v. Sporleder,* 605 N.W.2d 488, 491-92 (S.D.), *cert. denied,* 531 U.S. 821, 121 S.Ct. 63, 148 L.Ed.2d 29 (2000); *Ethypharm S.A. France v. Bentley Pharmaceuticals,* 388 F.Supp.2d 426, 433 (D.Del.2005); *see also, e.g.,Burbank Grease II,* 717 N.W.2d at 798-803 (Bradley, J., dissenting); *Savor, Inc. v. FMR Corp.,* 812 A.2d 894, 898 (Del.2002) (rejecting argument that preemption is contingent upon finding of statutory trade secret); *Bliss Clearing Niagara,* 270 F.Supp.2d at 948-49 (same); *Auto Channel,* 144 F.Supp.2d at 788-89 (same); *Thomas & Betts,* 108 F.Supp.2d at 972-73 (same). "If a common law claim for unauthorized use of information that did not meet the statutory definition of a trade secret were permitted, the result 'would undermine the uniformity and clarity that motivated the creation and passage of the [UTSA].'" ' *Burbank Grease I,* 693 N.W.2d at 99 (*quotingAuto Channel,* 144 F.Supp.2d at 789).

[904 A.2d 664]

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Although we rely upon the opinion of the Court of Appeals of Wisconsin in *Burbank Grease Services, LLC v. Sokolowski,* we acknowledge that the Wisconsin Supreme Court recently reversed the portion of that opinion which is relevant to the issue presented here. *SeeBurbank Grease II,* 717 N.W.2d at 788-94. There, the supreme court held that Wisconsin's version of the UTSA does not preempt civil remedies for the misappropriation of information "if the information does not meet the statutory definition of a trade secret." *Id.* at 786. As noted above, while other courts have agreed with the Wisconsin Supreme Court, we do not find that position persuasive. Rather, we believe that the opinion of the Court of Appeals of Wisconsin in *Burbank Grease I* is well-reasoned, particularly for its adherence to the principles of uniformity and clarity that motivated the creation of the UTSA, in light of the legislative directive that the UTSA be construed to make uniform the law among the jurisdictions enacting it. *SeeBurbank Grease I,* 693 N.W.2d at 97-102; *see alsoBurbank Grease II,* 717 N.W.2d at 798-803 (Bradley, J., dissenting). We find the opinion of the Wisconsin Court of Appeals persuasive. *SeeBurbank Grease I,* 693 N.W.2d at 97-102.

We conclude that RSA 350-B:7, viewed in the context of the overall legislative scheme and construed in a manner that effectuates the purpose of making uniform the law among States that have adopted the UTSA, provides that the NHUTSA preempts claims that are based upon the unauthorized use of information, regardless of whether that information meets the statutory definition of a trade secret. Thus, except as otherwise provided in RSA 350-B:7, II, the NHUTSA essentially creates a system in which "information is classified only as either a protected 'trade secret' or unprotected 'general ... knowledge.' " Unikel, *Bridging the "Trade Secret" Gap: Protecting "Confidential Information" not Rising to the Level of Trade Secrets,* 29 Loy. U. Chi. L.J. 841, 867-68 (1998). Although this result may seem harsh, we note that RSA 350-B:7, II(a) continues to permit individuals and corporate entities to protect their valuable commercial information *contractually,* regardless of whether such information meets the statutory definition of "trade secret" in the NHUTSA.

Accordingly, we agree with the trial court's conclusion that the preemption provision did not require that it make a determination of whether the information at issue constituted a trade secret under the NHUTSA prior to determining whether any of Mortgage Specialists' common law or CPA claims was preempted by the NHUTSA.

Our review, however, does not end here. As noted above, Mortgage Specialists argues that, even if preemption is not contingent upon the finding of a statutory trade secret, its claims were not preempted because

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they were not based solely upon the defendants' alleged misappropriation of customer information, but also upon the defendants' alleged misappropriation of goodwill and improper competition for customers. It also argues that, to the extent that any one of its claims is based solely upon the misappropriation of customer information, the "confidential" nature of that customer information entitles it to special protection under New Hampshire law, independent of the NHUTSA. The defendants, however, argue that Mortgage Specialists' "claims for conversion, tortious interference, unfair trade practices and breach of fiduciary duty based on the alleged misuse of confidential information are no longer available in New Hampshire," by virtue of the preemption **[904 A.2d 665]** provision of the NHUTSA. We are not persuaded that the preemption provision should be applied this broadly.

Whether a particular claim is preempted by the NHUTSA turns on whether the claim "conflicts" with the NHUTSA. *See* RSA 350-B:7, I. The majority of courts that have examined this issue have not relied upon the label attached to the claim, but have examined the facts underlying the claim to determine whether it is preempted by the UTSA. *Burbank Grease I,* 693 N.W.2d at 99; *see alsoWeins,* 605 N.W.2d at 491; *Bliss Clearing Niagara,* 270 F.Supp.2d at 946-47.

Some courts have stated that all claims that are factually related to the misappropriation of information are preempted. *SeePowell Products, Inc. v. Marks,* 948 F.Supp. 1469, 1474 (D.Colo.1996) (discussing cases in which courts have done so). However, we disagree with those courts. "The preemption provisions can be somewhat worrisome if they are applied mechanistically or overly conceptually. Our common law is richly flexible in redressing wrongs for improper conduct which in full or in part involves the use of information derived from the plaintiff." 1 R. Milgrim, *Milgrim on Trade Secrets* § 1.01[3] [a] at 1-128.3 (2002). "It is neither necessary nor prudent to preclude all common law claims that are connected with the misappropriation of what a plaintiff claims are trade secrets." *Powell Products,* 948 F.Supp. at 1474.

In determining whether a claim "conflicts" with the UTSA, we agree with the majority of courts, which have looked to the facts alleged or proved in support of the claim and have found that the claim is preempted when it is "based solely on, or to the extent [that it is] based on, the allegations or the factual showings of unauthorized use of ... information or misappropriation of a trade secret." *Burbank Grease I,* 693 N.W.2d at 100 n. 12; *see, e.g.,Savor,* 812 A.2d at 898; *Frantz v. Johnson,* 116 Nev. 455, 999 P.2d 351, 357 & n. 3 (2000); *Weins,* 605 N.W.2d at 492; *Ethypharm,* 388 F.Supp.2d at 433; *Bliss Clearing Niagara,* 270 F.Supp.2d at 946; *Auto Channel,*

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144 F.Supp.2d at 789. We also agree with courts that have concluded that a claim is not preempted where the elements of the claim require some allegation or factual showing in addition to that which forms the basis for a claim of misappropriation of a trade secret. *See, e.g.,Weins,* 605 N.W.2d at 492; *Ethypharm,* 388 F.Supp.2d at 434-35; *Powell Products,* 948 F.Supp. at 1474; *see alsoBurbank Grease I,* 693 N.W.2d at 100 n. 12.

Mortgage Specialists contends that, despite the foregoing, its claims are not preempted by the NHUTSA, even to the extent that they rely upon allegations of misappropriation of customer information. It argues first that we have "long recognized a distinction between a claim for the misappropriation of trade secrets and the misappropriation of confidential information," citing *Vigitron, Inc. v. Ferguson,* 120 N.H. 626, 631-32, 419 A.2d 1115 (1980). It also argues that we have "indicated that among the panoply of legitimate interests of an employer which may be protected from competition is 'confidential information communicated by the employer to the employee, but not involving trade secrets,' " quoting *National Employment Service Corporation v. Olsten Staffing Service, Inc.,* 145 N.H. 158, 160, 761 A.2d 401 (2000). However, the language relied upon by Mortgage Specialists from both *Vigitron* and *Olsten Staffing* is not as broad as it contends.

In *Vigitron,* the defendants formed a partnership to sell products that would compete with the plaintiff's products and attempted to sell one of the competing products, all while at least one of the defendants **[904 A.2d 666]** was employed by the plaintiff. *Vigitron,* 120 N.H. at 631, 419 A.2d 1115. We held that, although the defendants may not have disclosed the plaintiff's trade secrets, the plaintiff's right to injunctive relief arose from the defendants' breach of a confidential relationship with the plaintiff, and not from the use or disclosure of any trade secrets. *Id.* at 631-32, 419 A.2d 1115. There, it was not the defendants' misappropriation of confidential information that gave rise to the action, but rather their breach of the confidential relationship they had with their employer while still employed by that employer. Here, the defendants were no longer employed by Mortgage Specialists when they allegedly misappropriated its confidential information. Furthermore, we note that *Vigitron* was decided prior to New Hampshire's enactment of the NHUTSA. Thus, to the extent that *Vigitron* could be read to create a distinct cause of action for the misuse of confidential information not rising to the level of a trade secret, it has since been preempted by the NHUTSA for the reasons discussed above--the common law no longer protects confidential information from mere misuse unless it is a statutory trade secret.

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In *Olsten Staffing,* we examined the validity of a restrictive covenant contained in a contract between an employer and its employees. *Olsten Staffing,* 145 N.H. at 160-61, 761 A.2d 401. We noted that a covenant between an employer and employee is valid only to the extent that it protects legitimate interests of an employer, which interests include maintaining the confidentiality of the employer's confidential information. *Id.* at 160, 761 A.2d 401. While this language provides that an employer may protect his or her confidential information through *contracts* with employees, it does not recognize an independent cause of action for misappropriation of confidential information. Furthermore, the NHUTSA preemption provision explicitly exempts contractual claims from preemption, regardless of whether the information involved is a statutory trade secret. RSA 350-B:7, II(a).

We conclude that, to determine whether a plaintiff's claims are preempted by the NHUTSA, a court must examine the facts alleged in support of each claim to determine the extent to which the claim is based upon the misappropriation of trade secrets or other information. Accordingly, we will examine Mortgage Specialists' common law and CPA claims and the facts alleged in support of each to determine whether each claim is based solely upon the misappropriation of Mortgage Specialists' customer information.

Mortgage Specialists' writ claims that Davey and Carbone are liable for conversion because they "have exercised dominion and control over Mortgage Specialists' property and assets so as to deprive Mortgage Specialists of dominion and control of same." The only factual allegations supporting the conversion claim, however, are that Davey and Carbone took Mortgage Specialists' customer information. Even if there are sufficient factual allegations in the writ to support a claim for conversion, the claim is preempted by the NHUTSA because it is based entirely upon the misappropriation of customer information.

Mortgage Specialists' writ next claims that the defendants are liable for tortious interference with advantageous relations because: (1) "Mortgage Specialists has advantageous, economic, business and contractual relations with its customers"; (2) "[d]efendants are aware of those relationships"; and (3) "[d]efendants ... [have] taken action to induce the disruption or termination of such economic, business and/or contractual relations." Unlike **[904 A.2d 667]** Mortgage Specialists' conversion claim, this claim is not based solely upon the defendants' alleged misuse of Mortgage Specialists' customer information. This claim is supported by the allegation that the defendants intentionally contacted Mortgage Specialists'

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customers, with whom it claimed to have advantageous relations, and persuaded them to do business with the defendants. The claim is also supported by the allegation that Carbone informed Mortgage Specialists' customers that it was not properly licensed in the State, as well as the allegation that the defendants solicited Mortgage Specialists' employees. Thus, to the extent that the tortious interference claim is supported by more than the mere misuse of Mortgage Specialists' customer information, it is not preempted. *See, e.g.,Ethypharm,* 388 F.Supp.2d at 434-35 (finding claim for intentional interference with actual and prospective business relationships not preempted by UTSA); *Bliss Clearing Niagara,* 270 F.Supp.2d at 949-50 (finding claim for tortious interference not preempted by UTSA).

Next, Mortgage Specialists' writ claims that the defendants are liable for violation of the CPA because "[t]he actions of [the] defendants constitute unfair trade practices within the meaning of [the CPA]." The CPA prohibits the "use [of] any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." RSA 358-A:2 (Supp.2005). Such conduct includes, but is not limited to, the specific acts listed in RSA 358-A:2, I-XIV, including "[d]isparaging the goods, services, or business of another by false or misleading representation of fact." RSA 358-A:2, VIII. Like Mortgage Specialists' tortious interference claim, its claim for violation of the CPA is not based solely upon the defendants' alleged misuse of Mortgage Specialists' customer information. This claim is supported by the allegation that Carbone informed Mortgage Specialists' customers that it was not properly licensed in the State. Thus, to the extent that the CPA claim is supported by more than the mere misuse of customer information, it is not preempted.

Finally, Mortgage Specialists' writ claims that Davey and Carbone are liable for breach of fiduciary duty because Mortgage Specialists entrusted them with confidential customer information, that trust gave rise to a fiduciary duty in them, and, "through their conduct," they breached that duty to Mortgage Specialists. The only factual allegations supporting the fiduciary duty claim, however, are that Davey and Carbone took and used Mortgage Specialists' customer information. Mortgage Specialists contends in its brief that there was evidence at trial "that the defendants conspired ... with ... Mortgage Partners during their employment at Mortgage Specialists, and that Carbone acquired a substantial amount of Form 1003s during his last days of employment for the sole purpose of providing this information to Mortgage Partners." However, we note that even if these facts were sufficient to overcome a

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motion to dismiss, such facts were not alleged in Mortgage Specialists' writ, and thus we cannot consider them in our review of the trial court's grant of the defendants' motion to dismiss. Therefore, because the factual allegations in Mortgage Specialists' writ involve only the misappropriation of customer information, the claim is preempted by the NHUTSA.

The defendants' remaining arguments on this issue are without merit and do not warrant further discussion. *SeeVogel v. Vogel,* 137 N.H. 321, 322, 627 A.2d 595 (1993). We thus vacate the trial court's dismissal of Mortgage Specialists' claims **[904 A.2d 668]** for tortious interference and violation of the CPA, and remand to the trial court for further proceedings consistent with this opinion.

IV. Sanctions

The defendants cross-appeal the trial court's post-trial order assessing sanctions against them for: (1) the destruction of the copies of the loan applications that they had taken when they departed from Mortgage Specialists; (2) the origination and closing of loans in violation of the trial court's preliminary injunction order; and (3) the failure to produce client lists in violation of the trial court's discovery order. For the reasons discussed below, we vacate the trial court's order on the motion to reconsider with respect to the sanctions for destruction of documents as well as the order with respect to the sanction for the violation of the preliminary injunction, and remand.

The record reflects the following facts relevant to the trial court's imposition of sanctions: When Davey and Carbone left Mortgage Specialists in July 2002, both took copies of an unknown number of documents that contained information about Mortgage Specialists' customers. In November 2002, during their depositions in the Mortgage Partners litigation, Davey and Carbone admitted to having the copies in their possession. Neither Davey nor Carbone was asked or ordered to return or secure the copies before, during, or after the deposition.

Sometime after the November 2002 deposition, Davey and Carbone each destroyed the copies that he had in his possession. Davey testified that he shredded his copies shortly after the deposition. Carbone testified that he had his copies destroyed by a document destruction company sometime prior to April 2003. However, one of Carbone's former employees testified that Carbone's copies were stored at the Signature Mortgage office until June 2003. The employee testified that Carbone told him in June 2003 that the documents had been shredded the previous night because the documents "got a little too hot to have around." Carbone denied the employee's allegations.

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Mortgage Specialists' suit against the defendants was filed in February 2003. On April 16, 2003, the trial court issued a preliminary injunction order enjoining the "[d]efendants, and their employees, agents and affiliates, or anyone acting by or through them" from, among other things, "contacting, soliciting or otherwise communicating with any customers or former customers of [Mortgage Specialists]" except in limited circumstances. Davey and Carbone both originated and closed loans in violation of the court's order.

On September 15, 2004, in response to a motion for contempt filed by Mortgage Specialists in relation to an earlier discovery order, the trial court ordered the defendants to allow Mortgage Specialists' counsel to inspect the defendants' computers for customer lists. The next day, Mortgage Specialists filed a supplemental motion for contempt, entry of default judgment and sanctions. In that motion, Mortgage Specialists alleged that the defendants had engaged in discovery abuse by falsely claiming that they could not produce customer lists from their computers, and asked the trial court to impose sanctions. Mortgage Specialists also alleged that the customer lists retrieved from the defendants' computers confirmed that the defendants had been violating the trial court's preliminary injunction order by closing loans for Mortgage Specialists' customers after the date of the order, and asked the trial court to impose sanctions for this conduct as well. The record on appeal does not include any hearing transcripts **[904 A.2d 669]** or orders regarding this motion, and the post-trial order on sanctions indicates only that the trial court "withheld judgment on the issue of sanctions until after hearing the testimony presented at trial."

The trial commenced on September 20, 2004. The trial court heard testimony regarding the violations of the preliminary injunction, as well as testimony regarding the defendants' destruction of their copies of documents containing information about Mortgage Specialists' customers. The trial concluded on September 28, 2004.

On October 6, 2004, Mortgage Specialists filed a motion for sanctions and other relief, which restated the allegations contained in its supplemental motion for contempt and further alleged that the defendants had "intentionally destroyed evidence" relating to Mortgage Specialists' claim. Mortgage Specialists asked the trial court to "[e]nter a default judgment against [the] defendants as [a] sanction for the destruction of evidence," to "[h]old [the] defendants in contempt" of the discovery order and preliminary injunction order, to award Mortgage Specialists "its costs and attorneys' fees" resulting from violation of the discovery order, to sanction the defendants in an amount equal to the profits received by the defendants on each loan closed in violation of the preliminary injunction

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order "plus an appropriate sanction for the defendants' utter disregard" for the same order, and to award Mortgage Specialists damages in an amount "appropriate for these flagrant violations" of the trial court's orders and the discovery process.

The trial court held a hearing on the motion for sanctions on October 7, 2004. At the hearing, counsel for Mortgage Specialists emphasized the need to protect and vindicate the integrity of the court, stating that "these issues go to the heart of the process and the Court's integrity in the litigation process and the requirement for the parties in the litigation to play by the rules and to obey the orders of the court." Counsel further argued that violation of the preliminary injunction "goes to the very heart of the integrity of the process" and amounted to the defendants' "thumbing of their noses at [the trial] court's authority and the integrity of the process." Counsel concluded by arguing that the trial court should "send a message to [the defendants] that the integrity of the process has been violated." In the defendants' post-hearing objection to the motion for sanctions, filed October 12, 2004, they acknowledged Mortgage Specialists' emphasis on the integrity of the trial court, but contended that the "post-verdict attack on the Defendants is, respectfully, one founded in the interest of revenge, and not in vindicating the dignity of the Court."

The trial court ultimately sanctioned the defendants for the destruction of documents, violation of the preliminary injunction order, and violation of the discovery order. With respect to the destruction of documents, the trial court ruled as follows:

Although the destruction of the documents caused no prejudice to the outcome of the case, the court finds the documents were destroyed in an effort to conceal information from the court and to thwart [Mortgage Specialists'] prosecution of its case. To make matters worse both Davey and Carbone lied under oath about the timing of the destruction of the documents. Based on all this, the court finds that both men and their companies acted in bad faith, caused the plaintiff to expend time and money to recreate the information, and most significantly injured the integrity of court proceedings. As a sanction, the court orders Davey and Carbone to reimburse the plaintiff $10,000 each for **[904 A.2d 670]** attorneys' fees and expenses. Additionally, because the defendants' actions jeopardize and undermine the integrity of the legal process, the court imposes fines of $20,000 against Davey and Team Mortgage and $40,000 against Carbone and Signature Mortgage. Carbone's fine is greater because the court finds his actions more egregious.

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With respect to the violation of the preliminary injunction order, the trial court found that Davey and Carbone both violated the order and ruled as follows:

Closing on loans originated after April 16, whether done in bad faith or through negligent policing procedures, was in violation of Judge Coffey's injunctive order and undermines the very foundation of our legal system. Accordingly, the court finds Davey and Carbone in contempt. Thus, in order to vindicate the integrity of the court, Davey [and Carbone are each] required to pay the court five times the "gross profit" on each of the loans that [he or his company originated and closed in violation of the preliminary injunction order].

Finally, the trial court sanctioned the defendants for their failure to comply with its discovery order to produce the customer lists, ordering them to pay Mortgage Specialists' reasonable attorney's fees and costs.

The defendants moved for reconsideration of the trial court's order on sanctions. They argued, for the first time, that the sanctions were improper and that the process had been flawed because the sanctions were for criminal, rather than civil, contempt. They also argued that the sanctions were excessive. The trial court reconsidered only the portion of its order relating to the violation of the preliminary injunction, reducing the sanctions from five to three times the defendants' gross profits on loans closed in violation thereof. The trial court rejected the argument that the sanctions were criminal in nature, but found that, even if the sanctions were criminal in nature, the defendants had not been denied due process. Nevertheless, the trial court also found "beyond a reasonable doubt that the defendants knowingly violated [the trial] court's injunction."

On appeal, the defendants argue that the trial court's imposition of fines and attorney's fees for the destruction of documents and for the violation of the preliminary injunction order constituted findings of criminal, rather than civil, contempt. They contend that the trial court found them in criminal contempt of court without adhering to the substantive and procedural requirements attendant to a finding of criminal contempt. Before we reach the merits of the defendants' argument, however, we must address Mortgage Specialists' argument that the defendants failed to preserve this issue for appellate review. *SeeState v. Blomquist,* 153 N.H. ----, ----, 891 A.2d 469, 470-71 (2006).

Mortgage Specialists argues that the defendants were aware of the nature of the sanctions sought by Mortgage Specialists prior to trial and failed to preserve the issue regarding the propriety of criminal contempt sanctions because they raised it for the first time in their motion for reconsideration.

[153 N.H. 786] We have recognized that "parties may not have judicial review of matters not raised at the earliest possible time." *State v. Tselios,* 134 N.H. 405, 407, 593 A.2d 243 (1991). "[T]he rationale behind the rule is that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court." *Id.* Accordingly, we have held that where an issue is raised for the first time in a motion for reconsideration and failure to raise the issue earlier did not deprive the trial court of a full **[904 A.2d 671]** opportunity to correct its error, the issue has been preserved for our review. *See, e.g., Gammans v. FHP Constructors,* 146 N.H. 702, 704, 778 A.2d 419 (2001); *Moulton-Garland v. Cabletron Systems,* 143 N.H. 540, 544, 736 A.2d 1219 (1999); *Tselios,* 134 N.H. at 407, 593 A.2d 243. If, however, the trial court exercises its discretion to refuse to entertain the issue on reconsideration due to the party's failure to raise it at an earlier time, we will uphold that decision absent an unsustainable exercise of discretion. *Mt. Valley Mall Assocs. v. Municipality of Conway,* 144 N.H. 642, 654-55, 745 A.2d 481 (2000); *cf.State v. Lambert,* 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion standard).

The defendants did not argue that the sanctions proceedings were criminal in nature prior to or during the hearing on the motion for sanctions. They did, however, in their motion for reconsideration of the trial court's order on sanctions, argue that the trial court had failed to adhere to the requisite procedural and substantive formalities when it sanctioned the defendants for both the violation of the preliminary injunction and for the destruction of documents.

The trial court, at the hearing on the motion for reconsideration, opened by asking counsel for the defendants, "You are appealing all these decisions in the Mortgage Specialists versus Davey?" When counsel responded in the affirmative, the trial court stated, "All right. So I will hear you only on the violation of the ... injunctive order, at this time." Throughout the remainder of the hearing, no mention was made of the sanctions with respect to the destruction of documents.

In its order on the motion for reconsideration, the trial court noted, "I earlier assessed sanctions against the defendants for destroying evidence, violating an injunction, and discovery abuses. The defendant[s] moved for reconsideration, and I agreed only to reconsider my order regarding the defendants' violation of this court's restraining order." (Citation omitted.) The remainder of the order addressed only the defendants' claim that the sanctions for violation of the preliminary injunction were improper. The trial court neither granted nor denied the defendants' motion for reconsideration with respect to the sanctions for the destruction of documents.

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From this review of the record, we conclude that the trial court was accorded an opportunity to rule on the propriety of the sanctions with respect to both the violation of the preliminary injunction and the destruction of documents. Therefore, because the trial court did not refuse to rule on the propriety of the sanctions with respect to the violation of the preliminary injunction, this issue was properly preserved for appellate review. *SeeTselios,* 134 N.H. at 407, 593 A.2d 243; *compareid. withMt. Valley Mall Assocs.,* 144 N.H. at 655, 745 A.2d 481. However, because we conclude from our review of the record that the trial court refused to entertain the same issue with respect to the destruction of documents, we review only whether the trial court's refusal to entertain the issue on reconsideration was an unsustainable exercise of discretion. *SeeMt. Valley Mall Assocs.,* 144 N.H. at 654-55, 745 A.2d 481. Thus, we will reach the merits of the defendants' arguments that the trial court's imposition of sanctions amounted to a finding of criminal contempt to determine, first, whether the trial court unsustainably exercised its discretion in refusing to entertain the criminal contempt issues with respect to the destruction of documents on reconsideration, and second, whether the trial court erred by making a finding of criminal contempt for the violation **[904 A.2d 672]** of the preliminary injunction without adhering to the requisite substantive and procedural formalities.

In response to the defendants' arguments regarding the criminal nature of the trial court's imposition of sanctions, Mortgage Specialists first argues that the sanctions were for civil, rather than criminal, contempt, and thus the trial court was not required to adhere to the procedural formalities argued by the defendants. Whether a sanction amounts to a finding of indirect criminal contempt is a question of law, which we review *de novo. SeeRogowicz v. O'Connell,* 147 N.H. 270, 272, 786 A.2d 841 (2001). Mortgage Specialists also argues that even if the sanctions were for criminal contempt, the trial court provided the defendants with all of the requisite procedural protections. Whether the trial court adhered to the requisite procedures in a criminal contempt proceeding is also a question of law, which we review *de novo. Seeid. But cf.State v. Lieber,* 146 N.H. 105, 106, 767 A.2d 452 (2001) (where trial court bypasses certain procedural formalities and instead utilizes summary contempt procedures, as is permitted in specific situations involving direct criminal contempt, its decision to do so will be upheld absent an unsustainable exercise of discretion).

The two classes of contempt, civil and criminal, are distinguishable by the character and purpose of the punishment imposed. *Bonser v. Courtney,* 124 N.H. 796, 808, 481 A.2d 524 (1984). In civil contempt, the purpose of the punishment is remedial, coercive, and for the benefit of the plaintiff. *Id.* The purpose of criminal contempt, however, is punitive and to

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vindicate the "authority and dignity" of the court. *Id.* (quotation omitted). To be punished for criminal contempt, the defendant must have intentionally failed to comply with a valid order, of which the defendant had knowledge. *State v. Wallace,* 136 N.H. 267, 270-71, 615 A.2d 1243 (1992).

Contempt is either direct or indirect. *Bonser,* 124 N.H. at 808, 481 A.2d 524. A direct contempt is one committed in the presence of the court and in its immediate view. *Id.* All elements of the contempt must be personally observable by the judge. *Id.* An indirect contempt is committed outside the presence of the court and without the judge having full personal knowledge of every element of the contempt. *Id.* Thus, indirect contempt arises from events of which the presiding judge could not take judicial notice. *Id.* The significance of the distinction between direct and indirect contempt lies in the procedural requirements to which the court must adhere. *Town of Nottingham v. Cedar Waters, Inc.,* 118 N.H. 282, 285, 385 A.2d 851 (1978).

A direct contempt may be punished summarily. *Id.; see Super. Ct. R.* 95(a). Certain procedural formalities may be bypassed in light of the court's personal knowledge of the contemnor's conduct and because of the immediacy of the conduct and the need for prompt action. *Lieber,* 146 N.H. at 107, 767 A.2d 452. The summary contempt power, however, should be used only when the contemnor's conduct openly threatens the orderly procedure of the court or publicly defies its authority. *Town of Nottingham,* 118 N.H. at 285, 385 A.2d 851. The contumacious behavior must constitute a threat that *immediately* imperils the administration of justice. *Id.* at 285-86, 385 A.2d 851.

An indirect criminal contempt cannot be punished without adherence to certain procedural formalities. Generally, the proceeding must satisfy the procedural requirements of a criminal proceeding. *Rogowicz,* 147 N.H. at 273, 786 A.2d 841.

[904 A.2d 673] The alleged contemnor must first be provided notice, stating the time and place of hearing and the essential facts constituting the criminal contempt charged, and describing the charge as one for criminal contempt. *Super. Ct. R.* 95(b); *Town of Nottingham,* 118 N.H. at 286, 385 A.2d 851. The notice must also allow the defendant a reasonable time for the preparation of a defense. *Super. Ct. R.* 95(b); *Town of Nottingham,* 118 N.H. at 286, 385 A.2d 851.

An action for indirect criminal contempt should be treated as a misdemeanor. *Town of Nottingham,* 118 N.H. at 286, 385 A.2d 851. The prosecutor must prove the elements of the case beyond a reasonable doubt. *Id.* The contemnor is entitled to be represented by counsel. *Id.* The right against self-incrimination also applies. *Id.* The contemnor is entitled to a jury trial if the court intends to punish the contempt by imposing a sentence greater

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than six months in the house of correction if the contemnor is found guilty. *Id.*

"[C]riminal contempt proceedings arising out of civil litigation are between the public and the defendant, and are not a part of the original cause." *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 804, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (quotation omitted); *seeRogowicz,* 147 N.H. at 273, 786 A.2d 841. Although a criminal contempt proceeding may be initiated and prosecuted by a private attorney, *Rogowicz,* 147 N.H. at 273, 786 A.2d 841, the private attorney must be disinterested, *id.* at 274, 786 A.2d 841. A private attorney who represents the beneficiary of a court order cannot prosecute a criminal contempt action arising from that order. *Id.* at 274-75, 786 A.2d 841.

A. Destruction of Documents

With respect to the finding of criminal contempt for the destruction of documents, the defendants argue on appeal that: (1) the trial court failed to adhere to the requisite procedural safeguards in finding them in criminal contempt; (2) the finding of criminal contempt was improper because the documents in question were not subject to any preservation or discovery order and because the trial court found that the destruction was not prejudicial to Mortgage Specialists' case; and (3) the award of attorney's fees as a sanction for the destruction of documents was not supported by sufficient evidence. In their notice of appeal, the defendants also argue that the sanction imposed by the trial court for the destruction of documents was excessive. However, because the defendants did not adequately brief this issue, we decline to address it. *SeeAppeal of AlphaDirections,* 152 N.H. 477, 483-84, 880 A.2d 380 (2005).

As explained above, the defendants objected to the criminal nature of the sanctions for the destruction of documents for the first time in their motion for reconsideration. Prior to that time, they had not argued that the sanctions sought by

Mortgage Specialists' were for criminal contempt, that the trial court did not adhere to adequate procedures, or that an award of attorney's fees would be an improper sanction for the destruction of documents. Because the trial court refused to entertain the issue of the propriety of the sanctions for the destruction of documents, we review its refusal to do so on reconsideration for an unsustainable exercise of discretion. *SeeMt. Valley Mall Assocs.,* 144 N.H. at 654, 745 A.2d 481; *cf.Lambert,* 147 N.H. at 296, 787 A.2d 175 (explaining unsustainable exercise of discretion standard). The trial court's decision is not sustainable if it is "clearly untenable **[904 A.2d 674]** or unreasonable to the prejudice of [the defendants'] case." *Lambert,* 147 N.H. at 296, 787 A.2d 175 (quotation omitted).

[153 N.H. 790] The trial court's order imposing sanctions upon the defendants suggests that the trial court may have made an improper finding of indirect criminal contempt with respect to the destruction of documents. It appears that the fines were punitive in nature because the trial court separately ordered the defendants to reimburse Mortgage Specialists for attorney's fees. Although it is not clear from the trial court's order to whom these fines were to be paid, it appears that they were to be paid to the court. The other fines imposed by the trial court in the same order were all to be paid to the court, and the trial court did not order that these fines be paid to Mortgage Specialists, as it had done with the attorney's fees. The increased fine imposed upon Carbone, because the trial court found his actions to be more egregious, further indicates that the fines were punitive and not remedial in nature. In imposing these fines, the trial court found that the defendants "injured the integrity of court proceedings." All of this is indicative of a finding of indirect criminal contempt.

The trial court also appears to have failed to adhere to the requisite procedural formalities in arriving at this finding of indirect criminal contempt. While the trial court heard evidence regarding the destruction of documents during the course of the trial, the first notice to the defendants of the potential for sanctions on this issue appears to have been provided some time after the evidence was presented, possibly as late as Mortgage Specialists' post-trial motion for sanctions. Although the trial court appears to have based the imposition of fines in part upon its finding that the defendants lied under oath about the timing of the destruction of documents, Mortgage Specialists did not specifically allege this factual basis for the imposition of sanctions in its post-trial motion for sanctions. Neither Mortgage Specialists nor the trial court ever described the claims against the defendants as charges of criminal contempt. Finally, it appears that the trial court either erroneously attempted to utilize summary procedure or, instead, permitted Mortgage Specialists to prosecute the contempt despite its status as an interested party.

The procedures utilized by the trial court in imposing sanctions for the destruction of documents were at least irregular. More importantly, although the defendants may have been able to raise the issue of the propriety of sanctions at an earlier time than on reconsideration, it appears that the defendants did not have sufficient notice of the actual nature of the proceedings prior to the trial court's order imposing sanctions. Given the foregoing, and given the unusual circumstances of this case--that the inadvertent imposition of sanctions for indirect criminal contempt is exceedingly rare, and that trial courts have little guidance as to how to handle such a situation beyond this court's opinion in *Town of*

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Nottingham, 118 N.H. at 286-87, 385 A.2d 851--we conclude that the trial court committed an unsustainable exercise of discretion in refusing to entertain these issues on reconsideration. In light of this conclusion, we need not address the defendants' argument that we should review this issue for plain error. *SeeSup.Ct. R.* 16-A.

B. Violation of the Preliminary Injunction

With respect to the finding of criminal contempt for the violation of the preliminary injunction, the defendants argue on appeal that: (1) the trial court failed to adhere to the requisite procedural safeguards **[904 A.2d 675]** in finding the defendants in criminal contempt; (2) the finding of criminal contempt was erroneous because there was insufficient evidence to support the trial court's finding beyond a reasonable doubt that the defendants willfully violated the preliminary injunction order; and (3) the fines imposed as a sanction for violation of the preliminary injunction were excessive.

The sanctions for the defendants' violation of the preliminary injunction presuppose a finding of criminal contempt. The fines imposed by the trial court--three times the gross profit earned on loans originated and closed in violation of the order--were punitive in nature. The fines were neither remedial nor for the benefit of Mortgage Specialists, as they were not to be paid to Mortgage Specialists. The fines were not coercive, as the preliminary injunction order was presumably dissolved when the jury returned a verdict in the defendants' favor. Most importantly, the language of the trial court's order clearly states that the trial court chose to impose these fines "in order to vindicate the integrity of the court" rather than to vindicate the rights of the parties. *SeeTown of Epping v. Harvey,* 129 N.H. 688, 691-92, 531 A.2d 345 (1987).

The sanctions were also for indirect, rather than direct, criminal contempt. The trial court fined the defendants because they "[c]los[ed] on loans originated after April 16," in violation of the preliminary injunction order. Thus, the alleged contempt was committed outside the presence of the trial court and without the trial court having full personal knowledge of every element of the contempt. *SeeBonser,* 124 N.H. at 808, 481 A.2d 524.

Because the sanctions were for indirect criminal contempt, the trial court was required to adhere to the procedural formalities attendant thereto. We conclude that the trial court did not do so.

It is unclear whether the defendants received the requisite notice. Given that the various motions filed by Mortgage Specialists sought punitive sanctions, the defendants could have understood that Mortgage Specialists was seeking a finding of criminal contempt from the trial court. However, prior to the defendants' motion for reconsideration, the words [153 N.H. 792] "criminal contempt" were never uttered by Mortgage Specialists or the trial court. Notice of the essential facts constituting the contempt charged and the nature of the punishment sought may be insufficient to provide a defendant adequate notice that he faces a charge of criminal contempt where the notice does not describe the charge as one for criminal contempt. *See Super. Ct. R.* 95(b); *Town of Nottingham,* 118 N.H. at 286, 385 A.2d 851.

Moreover, even if the notice was adequate, the trial court erred in failing to refer the matter for prosecution and in permitting Mortgage Specialists to present evidence and argument regarding the criminal contempt charges against the defendants. Although the beneficiary of a court order, or counsel representing the beneficiary, may argue to the court that criminal contempt charges arising from that order should be referred to a public or private prosecutor for prosecution, he or she cannot actually prosecute those charges. *SeeRogowicz,* 147 N.H. at 274-75, 786 A.2d 841; *see also, e.g.,State ex rel. Koppers v. Intern. Union, Etc.,* 171 W.Va. 290, 298 S.E.2d 827, 830 (1982); *Peterson v. Peterson,* 278 Minn. 275, 153 N.W.2d 825, 830 (1967); *Ramos Colon v. U.S. Atty. for D. Puerto Rico,* 576 F.2d 1, 5 (1st Cir.1978). Criminal contempt is collateral to the proceeding out of which the contempt arose, "and the parties to the action out of which the alleged criminal contempt arose have no interest in it." *Peterson,* 153 N.W.2d at 830. Thus, with the exception of the limited cases of criminal **[904 A.2d 676]** contempt that may be adjudicated utilizing summary procedure, *seeTown of Nottingham,* 118 N.H. at 285-86, 385 A.2d 851, "criminal contempt should, in the first instance, be referred to the executive branch for prosecution." *Rogowicz,* 147 N.H. at 273, 786 A.2d 841. While the trial court may choose not to refer the case for prosecution, it may not allow the beneficiary of the court order or his or her counsel to continue to pursue sanctions that are in the nature of criminal, rather than civil, contempt. *Seeid.* at 274-75, 786 A.2d 841.

Accordingly, the trial court here erred in permitting Mortgage Specialists to prosecute the charges that constituted criminal contempt. We therefore vacate the trial court's order of sanctions for violation of the preliminary injunction, and remand this portion of the case to the trial court for further proceedings consistent with this opinion.

Because we remand the trial court's order of sanctions for the violation of the preliminary injunction on procedural grounds, we need not address the defendants' remaining arguments pertaining to these sanctions.

C. Violation of the Discovery Order

In their notice of appeal, the defendants argue that the sanction imposed by the trial court for violation of the discovery order was incorrect and excessive. However, the defendants did not adequately brief these issues,

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and thus we decline to address them. *SeeAlphaDirections,* 152 N.H. at 483-84, 880 A.2d 380.

Affirmed in part; vacated in part; and remanded.

BRODERICK, C.J., and DUGGAN, GALWAY and HICKS, JJ., concurred.

167 N.H. 583 (N.H. 2015)

116 A.3d 1054

CaremarkPCS Health, LLC

v.

New Hampshire Department of Administrative Services

No. 2014-120

Supreme Court of New Hampshire

April 30, 2015

Argued October 15, 2014.

Merrimack.

[167 N.H. 584] Ransmeier & Spellman, P.C., of Concord (Daniel J. Mullen on the brief), and Foley & Lardner LLP, of Chicago, Illinois (John F. Zabriskie on the brief and orally), for the petitioner.

Joseph A. Foster, attorney general (Richard W. Head, associate attorney general, on the brief and orally), for the respondent.

BASSETT, J. DALIANIS, C.J., and HICKS, CONBOY, and LYNN, JJ., concurred.

OPINION

[116 A.3d 1055]

Bassett, J.

The respondent, the New Hampshire Department of Administrative Services (Department), appeals an order of the Superior Court (*Smukler*, J.) granting summary judgment in favor of the petitioner, CaremarkPCS Health, LLC (Caremark). The trial court ruled that certain information constituting trade secrets under the New Hampshire Uniform Trade Secrets Act (UTSA), RSA ch. 350-B (2009), is exempt from disclosure under the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2014). Specifically, the trial court ruled that disclosure of Caremark's trade **[116 A.3d 1056]** secrets by the Department would constitute a " misappropriation" under

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the UTSA and, therefore, that the subject information is exempt from disclosure under the Right-to-Know Law. *See* RSA 91-A:4, I (2013). On appeal, the Department argues that the trial court erred in finding that the UTSA prohibits the Department from disclosing Caremark's trade secrets under the " otherwise prohibited by statute" exemption in RSA 91-A:4, I. We affirm.

The following facts are undisputed. In 2010, the Department issued a Request for Proposals (RFP) for pharmacy benefit management services for the State of New Hampshire's health plan. The RFP, in pertinent part, provided that:

If a request is made to the State to view portions of a proposal that the Vendor has properly and clearly marked confidential, the State will notify Vendor of the request and of the date the State plans to release the records. By submitting a proposal, Vendor agrees that unless the Vendor obtains a court order, at its sole expense, enjoining the release of the requested information, the State may release the requested information on the date specified in the State's notice without any liability to Vendor.

In response to the RFP, Caremark submitted a bid, which ultimately led to a final negotiated contract with the Department. The Governor and Executive Council approved the contract on November 17, 2010. Both the bid and final contract included statements to the effect that certain information set forth in those documents is proprietary and constitutes trade secrets of Caremark.

In 2011, the Department received multiple requests to inspect and copy Caremark's bid and the final contract. Two of the requests were made by Caremark's competitors. Caremark, after being informed by the Department of the requests, responded that certain confidential information contained in the bid and final contract was exempt from disclosure under the Right-to-Know Law. The parties disputed whether certain information was subject to disclosure.

Caremark filed a petition for declaratory and injunctive relief seeking to enjoin the Department from disclosing certain information. Thereafter, the parties filed pleadings that the trial court treated as cross-motions for summary judgment. As part of the summary judgment proceedings, the parties filed a joint stipulation of facts, identified the information as to which they continued to disagree (designated information), and stipulated that the designated information constitutes " trade secrets" as defined in the UTSA, RSA 350-B:1, IV, and constitutes " confidential, commercial, or financial information" within the meaning of the Right-to-Know Law, RSA 91-A:5, IV (Supp. 2014).

The parties also agreed that disclosure of the

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designated information " could have a chilling effect on the willingness of potential bidders to submit proposals for [pharmacy benefit management] services to a government entity ... ."

Following a non-evidentiary hearing, the trial court entered summary judgment in favor of Caremark and granted its request for injunctive relief. The trial court ruled that RSA 91-A:4, I, which exempts from disclosure information that is " otherwise prohibited by statute," did not require a balancing of interests. The court further found that Caremark " provided the [D]epartment with the information under the duty of confidentiality." The court concluded that, pursuant to RSA 350-B:1, II(b)(2), the UTSA " prohibits disclosure of the designated information" by the Department and, therefore, the designated information was exempt from disclosure under RSA 91-A:4, I. This appeal followed.

[116 A.3d 1057] On appeal, the Department asserts that the trial court erred in ruling that the designated information was exempt from disclosure. Although the Department acknowledges that RSA 91-A:4, I, does not require the trial court to engage in the same balancing test required under RSA 91-A:5, IV, *seeGoode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 554, 813 A.2d 381 (2002), it argues that the UTSA " does not contain sufficient explicit language prohibiting disclosure to fall under RSA 91-A:4." Rather, the Department contends that the trial court should have engaged in the balancing test applicable to " confidential, commercial, or financial information" under RSA 91-A:5, IV. *SeeGoode*, 148 N.H. at 554. Caremark counters that the trial court correctly ruled that the UTSA prohibits the disclosure of trade secrets and that, therefore, the designated information is exempt from disclosure under RSA 91-A:4, I. Alternatively, Caremark argues that the designated information is exempt from disclosure under RSA 91-A:5, IV.

In reviewing the trial court's rulings on cross-motions for summary judgment, " we consider the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, we determine whether the moving party is entitled to judgment as a matter of law." *Bovaird v. N.H. Dep't of Admin. Servs.*, 166 N.H. 755, 758, 103 A.3d 1207 (2014). " On appeal, we review the trial court's application of law to the stipulated facts *de novo*." *Nash Family Inv. Properties v. Town of Hudson*, 147 N.H. 233, 234, 786 A.2d 825 (2001). This case presents the legal question of whether the UTSA prohibits disclosure of trade secrets and, therefore, whether the designated information falls under the exemption in RSA 91-A:4, I, for information the disclosure of which is " otherwise prohibited by statute."

" Resolution of this case requires us to interpret several statutory provisions, including certain provisions of the Right-to-Know Law."

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Lambert v. Belknap County Convention, 157 N.H. 375, 378, 949 A.2d 709 (2008). " The ordinary rules of statutory construction apply to our review of the Right-to-Know Law." *Id.* " Thus, we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole." *Id.* " When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used." *Id.* " We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* " We also interpret a statute in the context of the overall statutory scheme and not in isolation." *Id.*

" The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." *38 Endicott St. N. v. State Fire Marshal*, 163 N.H. 656, 660, 44 A.3d 571 (2012) (quotation omitted). " Although the statute does not provide for unrestricted access to public records, we resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." *Id.* ; *see also* N.H. Const. pt. I, art. 8. " As a result, we broadly construe provisions favoring disclosure and interpret the exemptions restrictively." *Ettinger v. Town of Madison Planning Bd.*, 162 N.H. 785, 788, 35 A.3d 562 (2011). " The party seeking nondisclosure has the burden of proof." *N.H. Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 439, 821 A.2d 1014 (2003).

[116 A.3d 1058] Therefore, Caremark has the burden of demonstrating that the designated information is exempt from disclosure under the Right-to-Know Law.

RSA 91-A:4, I, in relevant part, states:

Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, ... *except as otherwise prohibited by statute or RSA 91-A:5.*

(Emphasis added.) Caremark argues that, because the UTSA precludes disclosure of the designated information under the circumstances here, that information is exempt from disclosure under RSA 91-A:4, I.

The UTSA does not prohibit the disclosure of trade secrets under all circumstances; rather, it provides remedies for the " [a]ctual or threatened misappropriation" of trade secrets. RSA 350-B:2, I. The UTSA defines misappropriation as:

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(a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) *Disclosure or use of a trade secret of another without express or implied consent by a person who* :

(1) Used improper means to acquire knowledge of the trade secret; or

(2) *At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was* derived from or through a person who had utilized improper means to acquire it; or *acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use* ; or derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(3) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

RSA 350-B:1, II (emphases added).

Caremark argues that, under RSA 350-B:1, II(b)(2), disclosure of its trade secrets by the Department would constitute a " misappropriation" because the Department " knew or had reason to know" that it acquired the trade secrets " under circumstances giving rise to a duty to maintain [their] secrecy or limit [their] use" and Caremark does not consent to their disclosure. Although the Department agrees with Caremark " that a misappropriation occurs under the [UTSA] when (1) a direct commitment is made to maintain the confidentiality of a trade secret, and (2) the trade secret is disclosed without consent," it maintains that there has been no actual or threatened misappropriation of the designated information because, here, it " did neither of those things."

Turning to the first prong of the Department's argument, we note that a direct commitment to maintain the secrecy of a trade secret is not required for the disclosure of a trade secret to constitute a misappropriation. Rather, a misappropriation occurs if a person discloses a trade secret without the owner's consent when the person " knew or had reason to know that his knowledge of the trade secret" was " acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." RSA 350-B:1, II(b)(2). Here, it is undisputed that the RFP specifically provided that, " to the extent consistent with applicable state and federal law[,] ... the State will endeavor to maintain **[116 A.3d 1059]** the confidentiality of portions of the proposal that [are] clearly and properly marked confidential." Notably, Caremark specifically marked the designated information as confidential and proprietary. Moreover, the contract provides that both parties are under a duty of confidentiality not to disclose trade secrets. Accordingly, we conclude that the Department " knew or had reason to know that [its] knowledge of the trade secret was ... acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." *Id.*

The undisputed facts establish that Caremark did not expressly or impliedly consent to disclosure of the designated information. Although the Department contends that submitting a bid constituted " consent" to the disclosure of the designated information, the language of the RFP contradicts this assertion. Caremark marked the information as " confidential," objected to its disclosure, and sought an injunction to prevent disclosure. Disclosure of Caremark's trade secrets under these circumstances would constitute a " misappropriation" as defined by the UTSA.

However, our conclusion that the disclosure would constitute a misappropriation does not end the analysis because the Department next argues that the UTSA does not contain " sufficient explicit language prohibiting" the misappropriation of trade secrets such that the misappropriation falls within the " otherwise prohibited by statute" exemption in RSA 91-A:4, I. We disagree.

The purpose of the UTSA is to protect trade secrets from being misappropriated and to provide redress in the event of a misappropriation. *See generally* RSA ch. 350-B. The UTSA grants courts broad authority to protect trade secrets, specifically stating that a court may enjoin an " [a]ctual or threatened misappropriation," and that " affirmative acts to protect a trade secret may be compelled by court order." RSA 350-B:2, I, III. In the event of a misappropriation, the UTSA provides that the complainant may be entitled to recover damages. RSA 350-B:3, I. If the misappropriation is " willful and malicious" the trial court may award " exemplary damages" up to twice the amount of the actual damage award. RSA 350-B:3, II. Moreover, the UTSA expressly provides that it does not displace existing " [c]riminal remedies, whether or not based upon misappropriation of a trade secret." RSA 350-B:7, II(c). Notably, the definition of " property" in the theft chapter of the Criminal Code includes " trade secrets, ... which the owner thereof intends to be available only to persons selected by him." RSA 637:2, I (Supp. 2014).

[167 N.H. 590] Given the plain language of the UTSA, the broad remedial powers vested in the courts under the

UTSA, as well as the express statement that criminal liability may arise from acts within the scope of the statute, we hold that a " misappropriation" of a trade secret is " prohibited" by the UTSA. Accordingly, because disclosure of the designated information by the Department would be a misappropriation of Caremark's trade secrets under the UTSA, we conclude that disclosure of that information is " prohibited by statute" under RSA 91-A:4, I, and, therefore, we hold that the designated information is exempt from disclosure under RSA 91-A:4, I. Accordingly, we need not address Caremark's argument that RSA 91-A:5 exempts trade secrets from disclosure.

We note that our holding is in accord with cases in other jurisdictions, in which courts have held that, if the disclosure of trade secrets would constitute a misappropriation, such information is exempt from disclosure under public record laws. We agree with the Supreme Court **[116 A.3d 1060]** of Washington, which held that Washington's public record law " is simply an improper means to acquire knowledge of a trade secret." *Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592, 603 (Wash. 1994) (en banc); *see alsoState ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 2000 Ohio 475, 721 N.E.2d 1044, 1049 (Ohio 2000) (" [W]e hold that trade secrets [are] exempt from disclosure under the 'state or federal law' exemption of [Ohio's Public Records Act]."); *Pfizer Inc. v. Oregon Dept. of Justice*, 254 Or.App. 144, 294 P.3d 496, 510 (Or. Ct. App. 2012) (concluding that the Oregon Uniform Trade Secrets Act exempts trade secrets from disclosure under the Oregon Public Records Law); *American Family Mut. Ins. v. Missouri Dept.*, 169 S.W.3d 905, 913-14 (Mo.Ct.App. 2005) (affirming the trial court's conclusion that the Missouri Uniform Trade Secrets Act protects trade secrets from disclosure under Missouri's public record laws).

Finally, the Department argues that there are overriding public policy reasons that favor disclosure of the designated information. However, the Department makes " [its] argument in the wrong forum." *Petition of Kilton*, 156 N.H. 632, 645, 939 A.2d 198 (2007). With the enactment of the UTSA, the legislature made the policy determination to prohibit the misappropriation of trade secrets. Accordingly, misappropriated trade secrets fall squarely within the exemption in the Right-to-Know Law for information the disclosure of which is " otherwise prohibited by statute." RSA 91-A:4, I. To the extent that the Department argues that the legislature improperly balanced policy considerations, we observe that " [m]atters of public policy

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are reserved for the legislature, and we therefore leave to it the task of addressing the [Department's] concerns." *Petition of Kilton*, 156 N.H. at 645.

Affirmed.

Dalianis, C.J., and Hicks, Conboy, and Lynn, JJ., concurred.

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188 A.3d 261 (N.H. 2018)

VENTION MEDICAL ADVANCED COMPONENTS, INC. d/b/a Advanced Polymers, a Vention Medical Company

v.

Nikolaos D. PAPPAS & a.

No. 2016-0696

Supreme Court of New Hampshire

June 8, 2018

Argued: October 25, 2017

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Welts, White & Fontaine, P.C., of Nashua (Jack S. White on the brief), and Cook, Little, Rosenblatt & Manson, PLLC, of Manchester (Arnold Rosenblatt and Kathleen Mahan on the brief, and Mr. Rosenblatt orally), for the plaintiff.

Devine, Millimet & Branch, Professional Association, of Manchester (Steven E. Grill on the brief and orally), for the defendants.

OPINION

LYNN, C.J.

The defendants, Nikolaos D. Pappas (Pappas) and Ascend Medical, Inc. (Ascend), appeal multiple orders of the Superior Court (*McNamara*, J.) ruling that they misappropriated trade secrets of the plaintiff, Vention Medical Advanced Components, Inc. d/b/a Advanced Polymers, a Vention Medical Company (Vention), in violation of the New Hampshire Uniform Trade Secrets Act, RSA chapter 350-B (2009) (UTSA). Vention cross-appeals the trial court's denial of its request for attorney's fees. We affirm.

I

The pertinent facts follow. Vention is a medical components manufacturer in the medical device industry. Vention makes medical balloons, medical tubing, and heat shrink tubing (HST). Vention's current chief technology officer, Mark Saab, co-founded the company Advanced Polymers in 1989. KRG Capital Management (KRG), a majority shareholder of Vention, acquired Advanced Polymers in 2010 for a substantial purchase price. A KRG officer testified that, at that time, a core consideration of KRG's decision to purchase Advanced Polymers was its belief that the company's "proprietary [HST] capabilities offer high margin component business with significant trade secret protection." (Quotation omitted.) After the acquisition, Advanced Polymers became part of Vention, which conducted a financial analysis and attributed more than a third of the purchase price to the value of Advanced Polymers' unpatented technology.

Pappas began working at Vention after he graduated from the University of Massachusetts Lowell with a bachelor of science degree in plastics engineering and a master's degree in innovative and technological entrepreneurship. Prior to working at Vention, Pappas had neither specifically studied HST nor had any experience working with HST. In December 2013, after working for Vention for about ten years, Pappas resigned from the company.

During his employment, Pappas signed an "Employee Invention Assignment and Confidentiality Agreement" (confidentiality agreement). The confidentiality agreement provides:

At all times, both during my employment and after its termination, I will keep and hold all such Proprietary Information in strict confidence and trust, and I will not use or disclose any of such Proprietary Information without the prior

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written consent of the Company, except as may be necessary to perform my duties as an employee of the

Company.

The confidentiality agreement defined proprietary information to mean "information of a confidential or secret nature," including but not limited to "Inventions, Intellectual Property Rights, Moral Rights, marketing plans, product plans, business strategies, financial information, forecasts, personnel information and customer lists."

During his employment, Pappas was exposed to Vention's confidential HST technology and information. He also had knowledge of Vention's business and marketing information and strategies, including the sales volumes for Vention's various products. At the time he resigned, he was serving as the engineering manager of the HST department. At some point before Pappas resigned, he consulted with an attorney about his obligations under the confidentiality agreement.

Almost immediately after leaving Vention, Pappas established Ascend. In late December 2013 and January 2014, the defendants began working with a website developer, communicated with one equipment vendor, and provided an initial machine design to a second equipment vendor. This design included extensive detail and critical specifications of the equipment they wanted built. By August 2014, the defendants began actively marketing HST. After the defendants launched their HST line, Vention requested information about the products. The defendants sent Vention samples of their HST in August and September 2014.

Vention petitioned the trial court for injunctive and other relief under the UTSA in October 2014. On November 4, 2014, counsel for the defendants filed appearances, in which they requested a jury trial. On November 14, 2014, the defendants filed an answer, but they did not request a jury trial in the answer. *SeeSuper. Ct. Civ. R.* 9(c) (requiring a defendant to request a jury trial in his or her answer to preserve the right to a jury trial). The defendants included several paragraphs in their answer under the heading "counterclaims."

Subsequently, on January 7, 2015, the defendants filed a motion to amend their answer. In the motion, the defendants asserted that the original answer "contains a single counterclaim for unfair business practices, based on the New Hampshire Consumer Protection Act, RSA [chapter] 358-A." The defendants further asserted that they "wish to amend the counterclaim by adding allegations of additional conduct which they believe support the unfair trade practices counterclaim" and that "because some of the conduct alleged, if proven, would amount to defamation, they also wish to add a cause of action for defamation." The defendants also sought to "add a jury demand to the pleading."

After a four-day hearing conducted between November and December, the trial court granted a preliminary injunction in January 2015 that, among other relief, enjoined the defendants from "directly or indirectly designing, manufacturing, producing and/or selling" certain HST products. In February 2016, the trial court issued another order, ruling that the defendants had waived their right to a jury trial by failing to assert it in their answer and ordered that the case proceed by bench trial.

During discovery, Vention filed a trade secret disclosure and an amended "Trade Secret/Confidential Information Disclosure" with the trial court. Sometime thereafter, Vention moved to compel responses to certain interrogatories and production requests from the defendants. The defendants objected, arguing that they should not be required to provide discovery

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until Vention produced an adequate description of its trade secrets, and they moved to compel an adequate trade secret designation and responses to interrogatories that would require Vention to specify its trade secrets. The trial court denied the defendants' motion to compel and granted Vention's motion to compel, ruling that Vention had adequately disclosed its trade secrets.

The trial court held an eight-day bench trial in June 2016. During the trial, Vention presented expert testimony from Dr. Chris Rauwendaal, who had worked for 43 years in plastics extrusion. Rauwendaal testified that the technology Vention used to create HST was proprietary, as were a number of features in Vention's process for making HST. Rauwendaal testified that these features were all trade secrets, and that the defendants' process for making HST utilized all of these features. Rauwendaal further testified that Vention's process for making HST was distinguishable from several other industry and competitor processes. Additionally, Rauwendaal reviewed the defendants' design and experimentation records and concluded that they could not have duplicated Vention's technology without copying it, based upon the timeframe in question and the lack of documentation of experimentation.

Vention also presented expert testimony from Dr. Amad Tayebi, a retired professor in mechanical and plastics engineering. Tayebi testified regarding a certain part of Vention's equipment, which he concluded was a trade secret. He testified that he had never seen a design like that used by Vention, and he identified four specific component features of the part. He testified that Vention designed and fabricated each of these components and that the components were not available on the open market. Tayebi compared Vention's part to a part that the defendants used, and he opined that the two parts were "substantially identical." Tayebi distinguished Vention's part from those used by three other companies. Additionally, Tayebi reviewed the defendants' design and experimentation records and concluded that the defendants could not have duplicated Vention's part without copying it, based upon the timeframe in question and the lack of documentation of experimentation.

In September 2016, the trial court issued an order ruling that the defendants had misappropriated Vention's trade secret technology for producing certain HST. The trial court further ruled that Vention was entitled to equitable relief on its breach of contract claim, but it denied Vention's request for attorney's fees. The trial court ruled that the defendants were not entitled to judgment on their counterclaims for violation of RSA chapter 358-A and business disparagement.

The trial court issued five injunctions against the defendants:

1. The Defendants are hereby permanently enjoined and restrained from directly or indirectly disclosing or utilizing in any way any confidential or proprietary information, trade secrets, designs, inventions, intellectual property, and moral rights or processes of the Plaintiff.

2. The Defendants are hereby permanently enjoined and restrained from directly or indirectly designing, manufacturing, producing, selling, or consulting on polyester heat shrink tubing with a [specified] wall thickness ...;

3. The Defendants are hereby enjoined and restrained for ten years from directly or indirectly designing, manufacturing, producing, selling, or consulting on heat shrink tubing made with materials other than polyester with a [specified] wall thickness ...;

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4. The Defendants are hereby permanently enjoined from directly or indirectly designing, manufacturing, producing, selling, or consulting on [the part that Tayebi testified was trade secret] or ... [a] substantially similar [part] ...;

5. The Defendants are ordered to destroy all their equipment, designs, and testing within 30 days of this Court's order and provide certification of such destruction ....

(Footnote omitted.)

Vention filed a motion for reconsideration of the trial court's denial of its request for attorney's fees, which the trial court denied. The defendants did not file a motion for reconsideration. This appeal followed.

On appeal, the defendants argue that: (1) the trial court erred in denying the defendants' request for a jury trial; (2) the trial court erred as a matter of law in failing to require Vention to specify its trade secrets prior to discovery; (3) the trial court erroneously shifted Vention's burden of proof at trial to the defendants; (4) the trial court's finding that the defendants did not misappropriate certain specified Vention technology was fatal to Vention's case; (5) certain admissions of Vention's trial witnesses were fatal to Vention's case; and (6) the trial court's injunctions were not supported by specific findings, were overbroad, and were not tailored to remedy the alleged harm. We will address each argument in turn.

II

The defendants argue that the trial court erred in denying their request for a jury trial. The right to a jury trial is guaranteed by the New Hampshire Constitution. *See* N.H. CONST. pt. I, art. 20. "To preserve the right to a jury trial, a defendant entitled to a trial by jury must indicate his or her request for a jury trial upon the first page of the Answer at the time of filing." *Super. Ct. Civ. R.* 9(c). "Failure to request a jury trial in accordance with this rule shall constitute a waiver by the defendant thereof." *Id* . "The trial court has broad discretion in determining whether to waive its rules, and we will not reverse its decision absent an unsustainable exercise of discretion." *Anna H. Cardone Revocable Trust v. Cardone,* 160 N.H. 521, 525, 8 A.3d 1 (2010).

The defendants acknowledge that they did not comply with Rule 9(c) by asserting their right to a jury trial in the answer that they filed in November 2014. However, they argue that the trial court had the discretion to waive the application of Rule 9(c). *SeeSuper. Ct. Civ. R.* 1(d) ("As good cause appears and as justice may require, the court may waive the application of any rule."). The defendants argue that the trial court unsustainably exercised its discretion by denying their request because they indicated at the beginning of the case, albeit in improper form, that they wanted a jury trial, and the case was still at a very early stage when they recognized the error and requested to cure it. They further argue that "Vention did not demonstrate that any prejudice or harm would result from granting the request [for] a jury trial." According to the defendants, "these facts simply cannot be construed as an intentional waiver of the right to a jury."

The defendants failed to demand a jury trial in their answer. Rule 9(c) is clear that such a failure constitutes a waiver of the right to a jury trial. The trial court considered and ultimately denied the defendants' request that it allow for a late assertion of a jury trial. In making its ruling, the trial court reasoned that the trial would involve "many confidential documents" and that "the difficulties in ensuring that the jury be given access to relevant documents but

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that those documents do not fall into the public domain will undoubtedly lengthen the trial." *SeeSuper. Ct. Civ. R.* 1(b) ("The rules shall be ... administered to secure the just, speedy, and cost-effective determination of every action.").

Considering all the circumstances, as well as the defendants' request to deviate from the clear terms of Rule 9(c), we cannot say that the trial court committed an unsustainable exercise of discretion when it decided not to grant relief from the rule under these circumstances.

The defendants alternatively argue that, even if they did waive their right to a jury in their original answer, they did not waive their right to a jury for the "entirely new claim for defamation" that they included in their amended answer. The defendants contend that, because they were entitled to a jury on this counterclaim, it was an unsustainable exercise of discretion for the trial court not to allow a jury trial on all counts.

We have previously stated that waiver of the right to a jury trial "extends only to the issues then formed at the time of waiver and does not apply to new and different issues that may thereafter be raised under amended pleadings." *Lucas v. Cate,* 99 N.H. 134, 135, 106 A.2d 200 (1954). The defendants' motion to amend their answer did purport to add a new cause of action and demanded a jury trial. In the motion, the defendants stated: "In addition, because some of the conduct alleged [in the motion], if proven, would amount to defamation, they also wish to add a cause of action for defamation. Finally, they seek to add a jury demand to the pleading." The trial court, however, rejected the defendants' argument that the defamation counterclaim was new because "the [c]ounterclaim for defamation was contained in the original answer."

We agree with the trial court that this was not a new claim for defamation. In the defendants' original answer, they described communications from Vention's agents to the defendants' landlord and sales representatives in Europe, and then they alleged as follows:

187. As described above, Vention, through its agents, Mr. Saab and/or Ms. Albert, has intentionally and without reasonable care, communicated false and misleading statements to third parties about the scope and enforceability of Mr. Pappas' covenants, and has also intentionally made false and misleading statements to third parties to impugn Mr. Pappas' character and to irreparably harm his professional reputation. The third parties understood the defamatory meaning [of] Vention's statements, and Vention had no valid privilege for making such false and defamatory statements about Mr. Pappas. Vention's conduct in this regard constitutes defamation, for which Mr. Pappas has and continues to suffer damages, including consequential damages, harm to his reputation and loss of business, all within the jurisdictional limits of this Court.

This is a claim for defamation. *SeePierson v. Hubbard,* 147 N.H. 760, 763, 802 A.2d 1162 (2002) ("A plaintiff proves defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication."). Nor are we persuaded by the defendants' reliance on the fact that, in their amended answer, they described additional communications from Vention to "other business associates of Mr. Pappas and Ascend." The defendants cannot withdraw their waiver simply by alleging additional facts to support an existing claim for defamation. This is not a "new and different issue[ ]."

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Lucas, 99 N.H. at 135, 106 A.2d 200. Accordingly, we reject the defendants' argument that the trial court erred by denying their request for a jury trial on this issue.

III

The defendants next argue that the "trial court erred as a matter of law in failing to require Vention to specify its trade secrets prior to discovery." Vention counters that the trial court correctly ruled that Vention had disclosed its trade secrets with "reasonable particularity."

Before turning to the merits of the defendants' argument, we must determine the appropriate standard of review. The defendants argue that we should review *denovo* the trial court's determination that Vention carried its burden of disclosing its claimed trade secrets with reasonable particularity before discovery. According to the defendants, this issue is a question of law. Vention disagrees, arguing that because the defendants are appealing the trial court's rulings on motions to compel, we should apply our unsustainable exercise of discretion standard. According to Vention, this is a discovery issue, which is a matter within the sound discretion of the trial court.

We agree with Vention that the trial court's determination that Vention had adequately specified its trade secrets such that the parties could move to discovery was ultimately a determination regarding discovery. *SeeVesta Corp. v. Amdocs Management Ltd.,* 147 F.Supp.3d 1147, 1155 (D.

Or. 2015) (stating that "whether a plaintiff has sufficiently disclosed its trade secrets is a fact-specific question to be decided on a case-by-case basis" (quotation omitted)); *State v. Brown,* 154 N.H. 345, 349, 910 A.2d 1203 (2006) (noting that we "review the trial court's fact-specific determinations for an unsustainable exercise of discretion"). Such a determination is appropriately left to the trial court. *SeeMiller v. Basbas,* 131 N.H. 332, 338, 553 A.2d 299 (1988) (observing that "control over the breadth and scope of pre-trial discovery is left to the sound discretion of the trial judge"). "We review a trial court's rulings on the management of discovery under an unsustainable exercise of discretion standard." *N.H. Ball Bearings v. Jackson,* 158 N.H. 421, 429, 969 A.2d 351 (2009).

Nevertheless, the defendants maintain that this issue is a substantive issue, rather than a discovery issue. The defendants cite numerous cases in which courts dismissed trade secret claims for failure to adequately identify the alleged secrets. *See, e.g., Beane v. Beane,* 856 F.Supp.2d 280, 285, 305 (D.N.H. 2012). However, the cases that the defendants rely upon involved rulings on the merits. *See, e.g.*, id. at 314. Accordingly, they provide no support for the defendants' argument, and we will review the trial court's ruling on the adequacy of Vention's pre-discovery trade secret disclosure using our unsustainable exercise of discretion standard.

The trial court, relying on several federal cases, ruled that parties claiming misappropriation of trade secrets are required to disclose their trade secrets at the outset of discovery. The trial court identified several policy considerations that support requiring such a disclosure: (1) it promotes investigating trade secret claims prior to suit and discourages filing meritless claims; (2) it prevents plaintiffs from using the discovery process to obtain the defendant's trade secrets; (3) it frames the appropriate scope of discovery; and (4) it enables the defendant to form complete and well-reasoned defenses. *SeeDelPhon Indus., LLC v. Int'l Test Solutions, Inc., No. C* 11-01338 PSG, 2012 U.S. Dist. LEXIS 659 (N.D. Cal. Jan. 4, 2012);

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see alsoDeRubeis v. Witten Technologies, Inc., 244 F.R.D. 676, 681 (N.D.Ga. 2007) (reasoning that "requiring the plaintiff to state its claimed trade secrets prior to engaging in discovery ensures that it will not mold its cause of action around the discovery it receives"). The trial court also identified competing considerations: (1) plaintiffs have a broad right to discovery; and (2) a trade secret plaintiff may have no way of knowing what trade secrets have been misappropriated until it receives discovery on how the defendant is operating. *SeeDeRubeis*, 244 F.R.D. at 680.

The trial court acknowledged that these competing policies can make resolving this type of dispute difficult, and it concluded that the proper approach is fact dependent. *See* id. at 681. The trial court then ruled that a plaintiff must disclose its trade secrets with "reasonable particularity," which it defined as "a description of trade secrets that is sufficient to put the defendant on notice of the claims against him, and that allows a defendant to discern the relevancy of any requested discovery." (Quotation omitted.)[1]

After determining which standard it would apply, the trial court ruled that Vention's trade secret disclosure sufficiently described Vention's claimed secrets with reasonable particularity. Vention identified its claimed trade secrets as the process and equipment that it uses to make HST. In making this ruling, the trial court noted the detailed specifications that Vention provided for the individual steps of its process and cited specific examples.

The defendants argue that Vention's disclosure was insufficient because it: (1) impermissibly shifted the burden to the defendants to ascertain Vention's trade secrets from the 55-page disclosure and over 100,000 pages of incorporated documents; (2) impermissibly hedged by stating only ranges of processing parameters; and (3) did not distinguish between confidential information and trade secret information.

Vention counters that its trade secret disclosure described its trade secret technology in "step-by-step detail," including component process parameters, and "reference[d] specific documents further describing these processes." Vention further identified the critical equipment that it designed and used in this process. Vention argues that it gave ranges of parameters and specifications because its claimed trade secrets are the processes and technology it uses to make HST, not a single product, material, or tube size.

Based upon our review of the trade secret disclosure, we find that the trial court sustainably exercised its discretion in ruling that Vention had adequately specified its alleged trade secrets prior to discovery. Vention's disclosure described each step of Vention's alleged trade secret process and referenced documents that contained more specific information. In particular, the disclosures described in detail the discrete steps in the manufacturing process, equipment and technology used, raw materials used, and design parameters of end products.

To the extent that the disclosures contained ranges of processing parameters or qualifying language, we also find no error. As discussed above, Vention only needed to identify its trade secrets with "reasonable particularity," sufficient to put the

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defendants on notice of the claims against them and allow them to discern the relevancy of any requested discovery. The disclosures were sufficiently specific that the defendants could discern what information Vention claimed was trade secret and the relevancy of requested discovery, particularly considering that Pappas, as the former engineering manager at Vention, was familiar with Vention's technology for making HST. Moreover, we note that these disclosures did not need to prove the existence of trade secrets. That was Vention's ultimate burden at trial, not its burden for proceeding with discovery.

Finally, the defendants argue that Vention's disclosures were insufficient as a matter of law because they did not distinguish between confidential information and trade secret information. In support of their argument, the defendants rely upon *Big Vision Private v. E.I. DuPont De Nemours & Co.,* 1 F.Supp.3d 224 (S.D.N.Y. 2014). *SeeBig Vision Private*, 1 F.Supp.3d at 262 (noting that the plaintiff erroneously used the terms "trade secret" and "confidential" as if they were interchangeable (quotations omitted)). However, the court in that case ruled on summary judgment that the plaintiff's trade secret was too vague and indefinite to deserve protection. *Seeid.* at 257-66. Accordingly, it provides no support for the defendants' argument that a pre-discovery trade secret disclosure that does not specifically distinguish between confidential information and trade secret information is insufficient as a matter of law.

IV

The defendants next argue that the trial court "failed to require Vention to specify at trial exactly what it claimed as a secret and accepted conclusory and superficial testimony as to essentially every element of Vention's claim." The defendants argue that this failure "improperly allocated the burden of proof," constituting reversible error. In particular, the defendants challenge the sufficiency of Vention's evidence, arguing that Vention failed to: (1) specifically identify its trade secrets and show that they were unique; (2) show that the identified information was neither general knowledge in the trade nor special knowledge of those skilled in the trade; and (3) show an absence of publicly available information.

Vention first contends that the defendants did not preserve these arguments because they did not move for a directed verdict challenging the sufficiency of Vention's evidence and did not move for reconsideration on these grounds or on the grounds of the alleged burden shifting.

"This court has consistently held that we will not consider issues raised on appeal that were not presented in the lower court." *LaMontagne Builders v. Bowman Brook Purchase Group,* 150 N.H. 270, 274, 837 A.2d 301 (2003) (quotation omitted). "This principle applies to legal issues that arise after trial as a result of the court's order." *Id.* "This requirement is designed to discourage parties unhappy with the trial result [from] comb[ing] the record, endeavoring to find some alleged error never addressed by the trial judge that could be used to set aside the verdict." *Id.* (quotation omitted). To satisfy this preservation requirement, any issues which could not have been presented to the trial court prior to its decision must be presented to it in a motion for reconsideration. *Seeid.*; *N.H. Dep't of Corrections v. Butland,* 147 N.H. 676, 679, 797 A.2d 860 (2002).

The defendants argue that they satisfied the preservation requirement with respect to their argument that the trial court improperly shifted some of Vention's trial burden to the defendants by stating in their opening memo and their post-trial

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brief that Vention carried the burden of proof on these issues. We disagree. The trial court stated in its order that the "claimant must establish" the elements of trade secret misappropriation and found that Vention satisfied these elements. Thus, the trial court agreed with the defendants that it was Vention's burden to prove trade secret misappropriation. If, in making its ruling, the trial court improperly shifted some of Vention's burden to the defendants, this was a new error. Because the defendants did not bring this issue to the attention of the trial court in a motion to reconsider, the trial court had no opportunity to address it, and it is not preserved for our review.

The defendants argue that they satisfied the preservation requirement of their sufficiency of the evidence challenges by filing a post-trial brief arguing that Vention had failed to meet its burden of proof on its causes of action. We agree. The defendants presented their arguments to the trial court that Vention failed to carry its burden to prove that its trade secrets were unique and that the defendants' process for making HST was not based upon publicly available information or Pappas's industry knowledge and experience. By ruling that Vention had carried its burden of proof to show misappropriation, the trial court implicitly rejected each of the defendants' arguments regarding insufficient evidence. Because the trial court addressed these arguments, the defendants were not required to raise them in a motion for reconsideration, and the arguments are preserved for our review.

We now turn to the merits of the defendants' argument that the evidence was insufficient to support the trial court's ruling that Vention proved it held trade secret information. When a trial court renders a decision after a trial on the merits, we uphold its factual findings and rulings unless they lack evidentiary support or are legally erroneous. *SeeJesurum v. WBTSCC Ltd. P'ship,* 169 N.H. 469, 476, 151 A.3d 949 (2016). "Thus, we 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.* (quotation omitted); *see alsoAppeal of Pennichuck Water Works*, 160 N.H. 18, 41, 992 A.2d 740 (2010) (stating that trier of fact was free to "accept or reject such portions of the evidence as it found proper, including that of expert witnesses"). We review the trial court's application of the law to the facts *denovo* . *Jesurum,* 169 N.H. at 476, 151 A.3d 949; *see alsoUnited States v. 15 Bosworth Street,* 236 F.3d 50, 53 (1st Cir. 2001) (stating that determinations about the sufficiency of evidence is a legal determination that engenders *denovo* review).

The UTSA defines "[t]rade secret" to mean: "information, including a formula, pattern, compilation, program, device, method, technique, or process" that "(a) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and "(b) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RSA 350-B:1, IV.

The defendants first argue that Vention failed to carry its burden of specifically identifying a trade secret and proving that it was unique. They argue that Saab testified broadly about Vention's trade secrets, but failed to identify any specific process, which is insufficient as a matter of law. They argue that Rauwendaal's testimony "was far short of the proof required in a trade secret case" because he "had no basis to opine as to whether there was

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anything unique about Vention's ... technology." According to the defendants, neither Rauwendaal nor any other Vention witness ever offered evidence establishing how Vention's technology was unique as compared to the technology used by similar companies. The defendants further argue that Tayebi "lacked any basis to opine that Vention's [part] was unique" because he "only briefly examined [certain equipment used by other companies] ... [that] Vention asked him to examine and did not evaluate other available [equipment] in the market."

The trial court determined that Vention identified trade secrets: the process and equipment that it uses to manufacture its medical HST. In making that determination, the trial court relied upon the testimony of Rauwendaal, which the court found to be credible. Rauwendaal testified that he had never encountered any other company using Vention's technology to manufacture medical HST with the same characteristics. Rauwendaal testified that several specific processes that Vention uses to make HST were trade secrets. He further testified that the processes that Vention uses were not the same as other industry HST processes. The trial court also relied upon the testimony of Tayebi. Tayebi testified that a specific part that Vention uses to make its HST is a trade secret. He also testified that he had never seen another design with the features of Vention's part, and explained why the equipment of three other companies was different and not functional equivalents of the Vention part.

The trial court found that Vention derives an "economic, competitive advantage" because its HST process and equipment allow it to "serve a niche market in which it is the only company capable of manufacturing such products with the degree of enhanced characteristics." The trial court credited evidence that KRG purchased Advanced Polymers for a substantial purchase price because the company was the "market leader in heat shrink tubing and complex medical balloons that had incredibly high profit margins that KRG believed were sustainable for many, many years" and because KRG believed the purchase price reflected trade secret protection for Vention's medical balloons and HST. (Quotation and brackets omitted.)

In sum, there was evidence before the trial court that Vention held a niche market position with a competitive advantage due to its use of certain technology to make medical HST. Vention's experts identified specific aspects of the company's technology, testified that the technology was trade secret and was unique to Vention, and distinguished the technology of a number of other companies and industries. Based upon our review of the record, we cannot say that these findings of fact were legally erroneous. The trial court, as the trier of fact, could properly credit this evidence, *seePennichuck Water Works*, 160 N.H. at 41, 992 A.2d 740, which supports the trial court's ultimate ruling that Vention carried its burden of proving that it possessed unique trade secret information.

The defendants next argue that Vention "never even attempted to meet [its] burden" of distinguishing its alleged secrets from the "enhanced skill, scientific knowledge and inventive faculties" that Pappas acquired while working for Vention. (Quotation and ellipsis omitted.) They further argue that "[t]he trial court even accepted Vention's argument that [the defendants were] obligated to show that [they] had independently developed [their] product." Vention counters that the "evidence at trial conclusively demonstrated that Vention's trade secrets were neither

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generally known nor readily ascertainable."

The trial court found that Rauwendaal "credibly testified" that the processes that Vention and the defendants used to make HST were "virtually identical." The trial court also relied on Rauwendaal's testimony that "no company had been able to develop technology similar to Vention's over the past 26 to 27 years" and that, to duplicate Vention's technology, "it would take a team of people" a "period of four to five years." Rauwendaal concluded that the defendants could not have duplicated Vention's technology without copying it because of the defendants' lack of documented experimentation, lack of prototypes, and the timeframe in which the defendants were able to produce HST. Tayebi drew a similar conclusion regarding the defendants' design of a part that they used in their HST machine.

From this evidence, the trial court could properly conclude that the defendants did not develop their HST using enhanced skill, scientific knowledge, and inventive faculties regarding HST; rather, they developed their HST by misappropriating Vention's trade secret HST technology. Moreover, the record does not support the defendants' argument that the trial court "obligated" the defendants to show that they independently developed their product. The trial court relied upon Rauwendaal's and Tayebi's testimony, which supported Vention's burden of proving that the defendants misappropriated, rather than independently developed, Vention's trade secret HST technology. Although the defendants argue that this evidence was contradicted by Pappas's "uncontroverted" testimony that he "conducted many experiments which he did not record" and had "independently developed his machine and process parameters," the trial court did not need to accept this testimony. *SeeIn the Matter of Geraghty & Geraghty*, 169 N.H. 404, 416, 150 A.3d 386 (2016) (noting that the trial court may reject the testimony of any witness and is "not required to believe even uncontroverted evidence" (quotation omitted)).

Finally, the defendants argue that Vention "failed to demonstrate that its allegedly secret information was different from information in the public domain." According to the defendants, "[t]here was substantial and essentially undisputed evidence regarding the widespread availability of information about similar technologies."

The defendants' argument that Vention could have done more to prove that its technology is not publicly available is unavailing. Vention produced expert testimony that its HST technology is not information that is in the public domain. Rauwendaal, in particular, opined that information from the companies identified by the defendants explained none of the choices that the defendants made when designing their machine. The defendants cross-examined Vention's experts regarding these conclusions. The trial court weighed this evidence and determined that Vention had met its burden. Because there was expert testimony, which the trial court could properly credit, that supported the trial court's conclusion that Vention proved its information was different from information in the public domain, we uphold the trial court's determination.

V

The defendants next argue that the trial court's "finding that [other specified Vention technology] was not misappropriated was fatal to Vention's case." According to the defendants, this other technology "was the foundation for Vention's entire case." (Quotation omitted.) Vention argues that this argument is not

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preserved because the defendants did not raise it in a motion for reconsideration. We agree with Vention that this argument is not preserved.

The defendants' argument is essentially that this other finding contradicted the rest of the trial court's order, which found that the defendants misappropriated Vention's trade secret HST technology. Even assuming that a contradiction exists, the defendants never argued in a motion to reconsider that this contradiction in the trial court's order should preclude relief on Vention's entire misappropriation claim. The purported error did not exist until the trial court issued its order, and "any issues that could not have been presented to the trial court before its decision must be presented to it in a motion for reconsideration." *State v. Mouser,* 168 N.H. 19, 27, 119 A.3d 870 (2015). Accordingly, because this issue was not raised before the trial court in a motion for reconsideration, it is not preserved for our review. *SeeButland*, 147 N.H. at 679, 797 A.2d 860.

VI

The defendants next argue that certain admissions of Vention's trial witnesses were fatal to Vention's case. We decline to address this issue, however, because the defendants raised it for the first time on appeal in their reply brief. *SeePanas v. Harakis & K-Mart Corp.,* 129 N.H. 591, 617, 529 A.2d 976 (1987) (stating that "a reply brief may only be employed to reply to the opposing party's brief, and not to raise entirely new issues"). The defendants do indicate in their reply brief that they are responding to inaccurate statements that Vention made in its brief. However, the statements that the defendants point to come from Vention's recitation of the underlying facts and procedural history and not from any particular argument. Thus, while it is appropriate for the defendants to attempt to correct these inaccuracies, it is not appropriate for the defendants to raise the entirely new issue of whether certain admissions of trial witnesses were fatal to Vention's case.

VII

The defendants raise several challenges to the injunctions that the trial court issued. "It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity." *Town of Atkinson v. Malborn Realty Trust,* 164 N.H. 62, 66, 53 A.3d 561 (2012). "We will uphold the trial court's factual findings unless the evidence does not support them or they are erroneous as a matter of law." *Id.* "We will uphold the issuance of an injunction absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." *Id.* (quotation omitted).[2]

The UTSA provides that courts may enjoin "[a]ctual or threatened misappropriation" of trade secrets. RSA 350-B:2, I. Furthermore, a party enjoined from misappropriating a trade secret may petition the court to terminate the injunction if the trade secret has ceased to exist. *Id* . "Usually the duration of an injunction is designed

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to preclude defendant's wrongful activities for a period of time reasonably necessary to protect plaintiff's interests; the period of time that would be required for independent development is the most commonly employed standard." 4 Roger M. Milgrim & Eric E. Bensen, *Milgrim on Trade Secrets* § 15.02[1][d], at 15-248 to 15-248.1 (2017).

The defendants argue that the trial court erred in its grant of injunctive relief because the injunctions: (1) are not supported by specific factual findings; (2) improperly expand upon Pappas's employment covenants; and (3) are overbroad because they are not tailored to remedy the alleged harm.

Before we address the merits of the defendants' arguments, we turn to Vention's argument that the defendants did not preserve their challenges to the trial court's injunctions. Vention argues that the defendants "failed to file a motion to reconsider or otherwise bring these specific issues to the trial court's attention." The defendants argue that they preserved their challenges by objecting to the injunctions that Vention proposed in its post-trial brief. According to the defendants, the trial court adjudicated their objections when it "incorporated verbatim" five of Vention's proposed injunctions. (Italics omitted.)

Based upon our review of the record, we agree with the defendants that they preserved their arguments that the injunctions improperly expand upon Pappas's employment covenants and are overbroad because they are not tailored to remedy the alleged harm. The defendants, in their post-trial brief, argued that "Vention ... is not entitled to any relief, let alone to the outrageous demands in its Post-Trial Memorandum and Proposed Order, by which it seeks to expand greatly the unreasonable and unenforceable restrictions in the Agreement Mr. Pappas was forced to sign in 2004." The defendants also argued that "the relief requested by Vention is oppressive and punitive; the broadly worded language proposed by Vention would place [Pappas] at risk for the rest of his life without prior notice of what, exactly, is prohibited."

However, these arguments from the defendants' post-trial brief are not sufficient to preserve their argument that the trial court erred by granting injunctions that were not supported by specific factual findings. At the time that the defendants objected to Vention's proposed injunctions, the trial court had neither made any factual findings nor granted any permanent injunctive relief. The alleged error— a lack of specific factual findings supporting the injunctions— could not have occurred until after the trial court issued its order. Consequently, the trial court never had an opportunity to address this alleged error in the first instance. If the defendants had brought this alleged error to the trial court's attention through a motion to reconsider, the trial court could have stated why its factual findings were sufficient or, if it believed that its findings were insufficient, corrected its error by modifying the injunctions or issuing additional findings of fact. Accordingly, this argument is not preserved for our review. *SeeButland*, 147 N.H. at 679, 797 A.2d 860.

The first injunction that the defendants challenge provides: "1. The Defendants are hereby permanently enjoined and restrained from directly or indirectly disclosing or utilizing in any way any confidential or proprietary information, trade secrets, designs, inventions, intellectual property, and moral rights or processes of [Vention]." The defendants argue that this injunction is "unnecessary and unfair" because it turns a contractual clause into a permanent injunction. According to the defendants, "[i]f Vention believes in the future

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that [the defendants are] violating a confidentiality obligation, it no doubt will find [them] and sue [them]."

One of Vention's claims was for breach of contract. The trial court found that the confidentiality agreement was enforceable to the extent that it barred Pappas from disclosing or using Vention's proprietary information. The trial court ruled that the defendants misappropriated Vention's trade secret information. Based on this record, the trial court sustainably exercised its discretion in deciding to enjoin the defendants from further violating the confidentiality agreement.

The defendants raise the same challenges to the second and third injunctions, which prohibit the defendants from "directly or indirectly designing, manufacturing, producing, selling, or consulting" on HST with specified characteristics, perpetually for HST made of polyester, and for ten years for HST made from other materials. The defendants argue that it was reversible error for the trial court to issue these injunctions because the injunctions are not limited to the specific process or products at issue in the case. We disagree.

The trial court stated in its order that it wanted to delineate prohibited conduct by providing a bright line. It then explained that the defendants were "enjoined from utilizing Vention's trade secrets to manufacture the specified products at issue in this case." Thus, looking at the trial court's order as a whole, it is apparent that the primary purpose of the injunctions is to enjoin the defendants from using the specific information at issue in the case—Vention's trade secret technology for making HST. To the extent that the injunctions prohibit the defendants from working with HST using a different process, the trial court noted that "if [the defendants] are able to produce such products without the use of Vention's trade secrets, then they may petition to modify this injunction." In other words, the injunctions place the burden on the defendants to prove that they are using a process other than Vention's trade secret technology before they can work with HST. Without such a burden, if the defendants began to work with HST, Vention would have no way of knowing whether they were doing so with the use of Vention's trade secret technology. Vention would then be in a position where it would need to sue the defendants to determine whether they were violating the court's injunctions.

Therefore, although the injunctions prohibit conduct that falls outside the scope of Vention's trade secrets, they do so only for the limited purpose of placing the burden on the defendants to prove that they are not using Vention's trade secret technology for making HST. Considering that the trial court found that the defendants misappropriated Vention's trade secret technology for making HST, we cannot say the trial court committed an unsustainable exercise of discretion by placing this additional burden on the defendants, should they seek to work with HST by using another process. *See* RSA 350-B:2, III ("In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.").

The defendants next argue that the injunctions do not define Vention's trade secrets. We disagree. In prior sections of the trial court's order, the court describes Vention's technology and determines that this technology is a trade secret. Thus, considering the trial court's order as a whole, it is clear that the trial court's subsequent references to "Vention's trade secrets" refer to its earlier determinations regarding what information constituted

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Vention's trade secrets.[3]

The defendants next argue that "there was no basis" for the durations of these injunctions. We disagree.

The trial court granted a perpetual injunction for HST made from polyester and a ten-year injunction for HST made from other materials. The trial court reasoned that the durations were appropriate because "Vention has proved that its product cannot be reverse engineered"; "Vention has proved that its process has not been duplicated by any competitor"; and Vention's expert Rauwendaal "expressed doubt that a company undertaking to develop this technology would be successful, but opined that if successful, the project would take at least four to five years and involve many people and many resources." Based upon these findings, we cannot say that the trial court erred in determining the duration of the injunctions. *SeeCurtiss-Wright Corp. v. Edel-Brown Tool & Die,* 381 Mass. 1, 407 N.E.2d 319, 326 (1980) (ruling that trial judge did not abuse his discretion in issuing a permanent injunction where he determined that neither the defendant nor "others in the trade" were "likely through legitimate procedures to learn the [trade secret]"). Furthermore, we note that if Vention's trade secrets cease to exist, the defendants can petition the court to terminate the injunction. *See* RSA 350-B:2, I.

The fourth injunction that the defendants challenge provides, in relevant part: "4. The Defendants are hereby permanently enjoined from directly or indirectly designing, manufacturing, producing, selling, or consulting on [the part that Tayebi testified was trade secret] or ... [a] substantially similar [part]." The defendants argue that this injunction is improper because "by referring to 'substantially similar' [parts] it seems to prevent [the defendants] even from using [parts] which can be purchased on the open market." We disagree. By its plain terms, the injunction prohibits "designing, manufacturing, producing, selling, or consulting" on a substantially similar part, but does not prohibit purchasing or using a substantially similar part. Thus, the injunction would not prohibit the defendants from purchasing or using commercially available equipment.

The fifth injunction that the defendants challenge provides, in relevant part: "5. The Defendants are ordered to destroy all their equipment, designs, and testing within 30 days of this Court's order and provide certification of such destruction." The defendants argue that the injunction orders them to destroy "all [their] equipment" "without explaining what equipment was included and without delineating between the only component that had been found to have been misappropriated ... and any other components." (Quotations omitted.) The defendants further request that the destruction be "limited solely to the specific item found to have been misappropriated, and not to the rest of the [defendants'] [m]achine or to any other equipment."

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We find no ambiguity in the trial court's injunction. The trial court ordered the defendants to destroy "all" of their equipment. There was no need for the trial court to delineate between the part that Tayebi testified was trade secret and the other components because they were all encompassed by the injunction.

Additionally, we decline the defendants' invitation to limit the destruction solely to the part that Tayebi testified was trade secret. The trial court made several findings that support its injunction ordering the destruction of the defendants' entire machine. For example, the trial court stated that "[a]lthough Pappas claims to have developed Ascend's technology independently of Vention, there is very little documentation of experimentation that would explain how he came to design his machine[ ] and select the parameters on which [it] ran and select the materials he used," and credited the conclusions of Rauwendaal and Tayebi that the defendants "copied Vention's technology." Thus, even though the defendants' machine was not identical to Vention's machine, by virtue of its design, it employed Vention's trade secrets for producing HST. Therefore, it was an appropriate exercise of discretion for the trial court to order the destruction of the defendants' machine. *SeeTown of Atkinson*, 164 N.H. at 66, 53 A.3d 561 ("We will uphold the issuance of an injunction absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." (quotation omitted)).

VIII

Vention cross-appeals the trial court's ruling that it was not entitled to attorney's fees. Vention argues that it is entitled to attorney's fees either pursuant to RSA 350-B:4, III because the defendants willfully and maliciously misappropriated Vention's trade secrets; pursuant to RSA 350-B:4, I, because they filed a counterclaim for trade secret misappropriation in bad faith; or under the common law because they committed numerous bad faith litigation actions.

"The general rule in New Hampshire is that parties pay their own attorney's fees." *Fat Bullies Farm, LLC v. Devenport,* 170 N.H. 17, 29, 164 A.3d 990 (2017). However, "[a] court may award attorney's fees when specifically authorized by statute." *Id.* Here, RSA 350-B:4 provides such an exception. That statute provides, in relevant part, that the trial court "*may* award reasonable attorneys' fees to the prevailing party when: I. A claim of misappropriation is made in bad faith ... or III. Willful and malicious misappropriation exists." RSA 350-B:4 (emphasis added). Another exception to the general rule is the bad faith litigation theory. *SeeFat Bullies Farm*, 170 N.H. at 30, 164 A.3d 990.

Under the bad faith litigation theory, an award of attorney's fees is appropriate when one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, when the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and when it should have been unnecessary for the successful party to have brought the action.

Id. (quotation and brackets omitted).

"We will not overturn the trial court's decision concerning attorney's fees absent an unsustainable exercise of discretion." *Id.* (quotation omitted). "To warrant reversal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party." *Id.* (quotation omitted). "In evaluating the trial court's ruling on this issue, we acknowledge the tremendous deference given a trial court's decision regarding attorney's

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fees." *Id.* (quotation omitted). "If there is some support in the record for the trial court's determination, we will uphold it." *Id.* (quotation omitted).

Here, the trial court acknowledged that the defendants "engaged in intentional misappropriation of Vention's intellectual property." The trial court noted, however, that Pappas "acted reasonably in consulting with counsel before proceeding" and that "she advised him that he was able to proceed [with] producing [certain HST products]." The trial court further noted that "Vention appear[ed] to have suffered no significant financial harm from the misappropriation." Although the trial court concluded that the "case is a close one," it ultimately declined to award attorney's fees against the defendants.

Vention first argues that the trial court should have awarded fees under RSA 350-B:4, III because the defendants "willfully misappropriated [its] trade secrets." Vention argues that the trial court correctly found that the defendants "engaged in intentional misappropriation of Vention's intellectual property," but, in declining to award fees, improperly relied upon the facts that Pappas met with an attorney and that she advised him that he was able to proceed with making HST. Vention argues that this "limited advice" "does not apply to the circumstances of defendants' misappropriation and should not have been used to militate against an award of fees to Vention." In particular, Vention argues that "there is no evidence to support that Mr. Pappas' use of Vention's technology ... in his competing venture was ever within the scope of [the attorney's] representation of Mr. Pappas."

The trial court, however, acknowledged weaknesses in the advice the attorney gave to Pappas: "whether due to [Pappas's] insufficient disclosure to [the attorney] or due to her misunderstanding of the technology, she advised him that he was able to proceed [with] producing [certain HST products]." Thus, it does not appear that the trial court misunderstood the circumstances relating to Pappas's receipt of that advice, and we cannot say, based upon this record, that it was an unsustainable exercise of discretion for the trial court to give some weight to this fact.

Vention additionally argues that the "trial court's reliance upon the apparent lack of financial harm as a factor militating against an award of attorneys' fees also is misplaced." Vention argues that it "spent both significant time and incurred substantial costs in order to protect its intellectual property."

Notwithstanding Vention's litigation expenses, the trial court is correct that Vention's prompt action likely prevented the defendants from causing Vention to lose sales or customers. In other words, the defendants' misappropriation did not cause "significant financial harm" to Vention's business in the medical HST field. Given the wide discretion and deference that the trial court has in determining whether to award attorney's fees, we cannot say that it was unreasonable for the trial court to consider the fact that Vention did not suffer "significant financial harm" to its business beyond the cost of litigating its claims.

Therefore, we affirm the trial court's decision not to award Vention attorney's fees under RSA 350-B:4, III because it was supported by a finding that Vention suffered "no significant financial harm" and by the fact that Pappas at least attempted to obtain legal advice prior to forming Ascend and building his machine.

Vention next argues that the trial court should have alternatively awarded it attorney's fees pursuant to RSA 350-B:4, I. *See* RSA 350-B:4, I (permitting a court

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to award reasonable attorney's fees to the prevailing party when "[a] claim of misappropriation is made in bad faith"). According to Vention, the defendants asserted their counterclaim for misappropriation in bad faith because, late in the proceedings, they argued that Vention had brought its lawsuit in order to steal their technology. According to Vention, the trial court recognized in its order that "[u]ltimately, defendants implicitly conceded that there were, in fact, no trade secrets." Vention argues that "[g]iven the absence of any information even purporting to support the alleged trade secret claim, it is apparent that defendants asserted this claim even though they understood the claim had no merit and ultimately did not move forward with it at trial."

We disagree with Vention's contention that the defendants produced no evidence to support their counterclaim. For example, the defendants produced evidence of Vention's "Project 250," which was an attempt by Vention to commercialize products similar to those produced by the defendants. Although the trial court ultimately believed Vention's evidence that it "ha[d] long been aware of the materials, process, equipment, and technology necessary to produce" those products and that it decided not to go forward with the project for another reason, that does not mean that there was "an absence of any information even purporting to support" the defendants' claim. Therefore, we cannot say, based upon our review of the record, that the trial court unsustainably exercised its discretion by deciding not to grant attorney's fees on this ground.

Vention next argues that it is entitled to attorney's fees because the defendants engaged in bad faith litigation. Vention relies upon the defendants' "bad faith misappropriation of Vention's trade secrets"; their "bad faith assertion of a trade secret counterclaim"; their "unreasonable method of conducting a search for documents" during discovery; their "failure to preserve obviously relevant information, including technical specifications for defendants' HST products"; and testimony indicating that the defendants may not have produced an additional lab notebook. According to Vention, this evidence "demonstrates by a preponderance of the evidence that defendants engaged in bad faith actions, actions which not only unnecessarily prolonged the litigation, but [were] patently unreasonable, and thus sufficient to support an award of attorneys' fees." *But seeFat Bullies Farm*, 170 N.H. at 30, 164 A.3d 990 ("If there is some support in the record for the trial court's determination, we will uphold it." (quotation omitted)).

As discussed above, the trial court determined that the defendants neither willfully and maliciously misappropriated Vention's trade secrets nor made a bad-faith claim of misappropriation, and there was support in the record for these determinations. With regard to the purported discovery issues, we note that the trial court is given "tremendous deference" in determining whether a party's actions warrant an award of attorney's fees. *See* id. (quotation omitted). Based upon our review of Vention's arguments and the record, we cannot say that it was "clearly untenable" or "clearly unreasonable" for the trial court to decline to award fees for bad faith litigation. *See* id. (quotations omitted). Accordingly, we affirm its decision not to award attorney's fees.

Finally, all issues raised in the defendants' notice of appeal that they have not briefed are deemed waived. *SeeLake Forest R.V. Resort v. Town of Wakefield,* 169 N.H. 288, 293, 146 A.3d 615 (2016).

Affirmed .

HICKS, BASSETT, and HANTZ MARCONI, JJ., concurred; DALIANIS, C.J., retired, specially assigned under RSA 490:3, concurred.

Notes:

[1] Although no part of the UTSA explicitly requires a trade secret plaintiff to describe its trade secret in a trade secret disclosure prior to discovery, the parties do not challenge the trial court's ruling that Vention was required to disclose its trade secrets with reasonable particularity prior to discovery. Accordingly, we assume for the purposes of this appeal that such a requirement exists under New Hampshire law.

[2] The defendants argue that we should review the trial court's injunctions *denovo* . They provide only one supporting cite, with no explanation: *MAI Systems Corp. v. Peak Computer, Inc.,* 991 F.2d 511, 516 (9th Cir. 1993). Although the Ninth Circuit in that case noted that it reviewed "questions of law underlying the issuance of a preliminary injunction" *denovo*, it nevertheless reviewed the grant of a preliminary injunction for an abuse of discretion. *SeeMAI Systems Corp.* , 991 F.2d at 516. Accordingly, we are not persuaded that we should diverge from New Hampshire precedent, and we will uphold the trial court's injunctions "absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." *Town of Atkinson*, 164 N.H. at 66, 53 A.3d 561.

[3] With regard to the second injunction, the defendants additionally argue that there "is no rhyme or reason for this injunction" because "[i]t was undisputed that Pappas had not attempted to make [polyester HST]." For the reasons described above, we interpret the trial court's order as prohibiting the defendants from working with polyester HST using the trade secrets that they misappropriated. The injunction's broader prohibition on the use of other technology can be modified should the defendants choose to petition the court and demonstrate that they are using a process other than the process that the trial court found them to have misappropriated.

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143 N.H. 576 (N.H. 1999)

729 A.2d 422

Hughes

v.

Giacomo DiSALVO.

No. 97-144.

Supreme Court of New Hampshire.

May 25, 1999

[729 A.2d 423]

Ruth P. Gulick, P.A., of New Hampton (Ruth P. Gulick, on the brief and orally), for the plaintiff.

Scott A. Trendell, of Plymouth, by brief and orally, for the defendant.

JOHNSON, J.

The plaintiff, Susan Hughes, appeals a decision of the Superior Court (Fauver, J.) denying her motion for judgment notwithstanding the verdict, see Super. Ct. R. 73, after the jury found that she violated the Consumer Protection Act, see RSA ch. 358-A (1995 & Supp.1998), and awarded damages to the defendant, Giacomo DiSalvo. We reverse.

The following facts appear in the parties' agreed statement of facts. The plaintiff acquired and began occupying property in New Hampton as her primary residence in February 1987. She unsuccessfully attempted to sell the property in the late 1980s. The plaintiff relocated in July 1991 and began renting the property in September 1991. Between September 1991 and June 1994, three different sets of tenants rented the property.

The plaintiff placed classified advertisements in newspapers to rent the property. From August 1994 to June 1995, the plaintiff rented the property to the defendant under a "Lease and Sales Agreement." During the defendant's tenancy, the plaintiff was

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employed as a school teacher in Moultonborough. The lease and sales agreement was not handled by a real estate broker but was drafted by either the plaintiff or her husband.

The property was rented to different tenants under a similar lease and sales agreement from August 1995 to January 1996. Between February 1996 and January 28, 1998, when the parties agreed to these facts, two additional sets of tenants rented the property.

The parties also agreed that the plaintiff's husband and three other persons bought a four-unit investment property and established a real estate trust "[d]uring 1983-1984." In 1984, the trust property was disposed of and the trust was terminated.

The plaintiff filed an action in district court for non-payment of rent. The defendant requested a jury trial and filed counterclaims alleging, inter alia, violation of the Consumer Protection Act, see RSA ch. 358-A, and the Unfair Collection Practices Act, see RSA ch. 358-C (1995 & Supp.1998). A jury trial was held in superior court. The jury found, inter alia, that the plaintiff had engaged in unlawful trade or deceptive business practices, and awarded the defendant $100.00 in damages under the Consumer Protection Act. The jury further found that the plaintiff used unfair, deceptive, or unreasonable collection practices and awarded the defendant $600.00 under the Unfair Collection Practices Act.

The plaintiff moved for judgment notwithstanding the verdict arguing that RSA chapters 358-A and 358-C were inapplicable. The court agreed that RSA chapter 358-C did not apply because "one who acts in the ordinary course of business does so as part of regular business dealings, and not as an isolated act, such as in this case." The court held, however, that the Consumer Protection Act "clearly extends to lessors of real property ... and thus to the landlord-tenant relationship ... [because] tenants are among those for whose benefit the Consumer Protection Act was passed." The plaintiff appeals this decision.

The applicability of the Consumer Protection Act involves a matter of statutory construction, and we begin our analysis **[729 A.2d 424]** by considering the plain meaning of the words of the statute. *Gilmore v. Bradgate Assoc.*, 135 N.H. 234, 237, 604 A.2d 555, 556 (1992).

RSA 358-A:2 declares it "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 in this state." (Emphasis added.) The Consumer Protection Act further defines trade and commerce:

"Trade" and "commerce" shall include the advertising, offering for sale, sale, or distribution of any services and

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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.

RSA 358-A:1, II (1995).

In *Chase v. Dorais,* 122 N.H. 600, 601, 448 A.2d 390, 391 (1982), we noted that the statute applies to "persons engaged in trade or commerce." Although the Consumer Protection Act "is a comprehensive statute whose language indicates that it should be given broad sweep .... it is not unlimited in scope." *Roberts v. General Motors Corp.,* 138 N.H. 532, 538, 643 A.2d 956, 960 (1994). We previously rejected the contention that all transactions should be included within the scope of the Act in Chase, noting that "[s]uch a reading would remove even isolated, non-business sales or contracts from the realm of contract and sales law and subject them to [the Consumer Protection Act]." Chase, 122 N.H. at 601-02, 448 A.2d at 391.

To determine whether the Consumer Protection Act applies to a particular transaction, we analyze the activity involved, the nature of the transaction, and the parties to determine whether a transaction is a personal or business transaction. See *Begelfer v. Najarian,* 381 Mass. 177, 409 N.E.2d 167, 176 (1980).

The plaintiff rented and attempted to sell her former residence through a lease and sales arrangement. The plaintiff agreed to provide the defendant, if necessary, with a purchase money mortgage in an amount between $5,000.00 and $7,500.00 at a rate of prime plus two per cent for a five-year period. The defendant would obtain financing for the outstanding balance. Other than this property, the plaintiff was not in the business of renting or selling residential property.

Remedies under the Consumer Protection Act are "not available where the transaction is strictly private in nature, and is in no way undertaken in the ordinary course of a trade or business." *Lantner v. Carson,* 374 Mass. 606, 373 N.E.2d 973, 975 (1978). We do not find the plaintiff's involvement in this transaction, by itself, sufficient to constitute "trade or commerce" within the meaning of RSA 358-A:2.

Similarly, isolated sales of property by an owner are not subject to the Consumer Protection Act. The purpose of the Act "is to ensure an equitable relationship between consumers and persons engaged in business." *McGrath v. Mishara,* 386 Mass. 74, 434 N.E.2d 1215, 1222 (1982). The plaintiff was not a real estate professional engaged in the

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business of renting or selling properties. Cf. Gilmore, 135 N.H. at 236, 604 A.2d at 555; *Nei v. Burley,* 388 Mass. 307, 446 N.E.2d 674, 680 (1983).

An individual homeowner who decides to sell his residence stands in no better bargaining position than the individual consumer. Both parties have rights and liabilities established under common law principles of contract, tort, and property law. Thus, arming the "consumer" in this circumstance does not serve to equalize the positions of buyer and seller. Rather, it serves to give superior rights to only one of the parties, even though as nonprofessionals both stand on equal footing.

Lantner, 373 N.E.2d at 977.

If we were to adopt the defendant's view that the Consumer Protection Act applied **[729 A.2d 425]** to this transaction, any isolated lease or sale of property would be a commercial transaction subject to the Act, and every buyer would be at an advantage over the seller. Cf. Chase, 122 N.H. at 601-02, 448 A.2d at 391-92. We decline to hold homeowners, such as the plaintiff, who personally sell their homes either directly or through lease and sales arrangements, liable under the Consumer Protection Act.

Reversed.

BRODERICK, J., did not sit; the others concurred.

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164 N.H. 659 (N.H. 2013)

62 A.3d 754

AXENICS, INC. f/k/a RenTec Corporation

v.

TURNER CONSTRUCTION COMPANY and another.

No. 2011-219.

Supreme Court of New Hampshire.

March 13, 2013

Argued: Sept. 12, 2012.

[62 A.3d 755] [Copyrighted Material Omitted]

[62 A.3d 756] [Copyrighted Material Omitted]

[62 A.3d 757] [Copyrighted Material Omitted]

[62 A.3d 758]

David N. Cole, of Hanover, by brief and orally, for the plaintiff.

Pierce Atwood LLP, of Portsmouth (David A. Anderson and Mark B. Rosen on the brief, and Mr. Anderson orally), for the defendants.

BASSETT, J.

The defendants, Stryker Biotech, LLC (Biotech) and Stryker Sales Corporation (Sales) (collectively Stryker), and Turner Construction Company (Turner), appeal a ruling of the Superior Court *(McNamara,* J.) finding them liable on a theory of unjust enrichment and awarding damages to the plaintiff, Axenics, Inc. f/k/a RenTec Corporation (Axenics). Axenics cross-appeals, challenging the amount of damages awarded and the trial court's failure to find the defendants liable on its breach of contract and New Hampshire Consumer Protection Act (CPA) claims, see RSA ch. 358-A (2009 & Supp.2012). We affirm in part, reverse in part, vacate in part, and remand.

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The trial court found, or the record establishes, the following facts. This case arises out of the construction of a biotech facility (facility) in West Lebanon. Biotech operates the facility, and Sales owns the property where it is located. Turner was hired as the general contractor to build the facility. Axenics provides "manufacturing, installation, and field services for ultrapure gas and liquid distribution systems in the biotechnology, pharmaceutical, and semiconductor industries."

On April 15, 2004, Axenics entered into a subcontract with Turner to furnish labor, materials, equipment, and services for the installation of "process pipe" at the facility. The original subcontract price was $1,992,506. Both parties agreed that the facility would be completed as quickly as possible. The "mechanical completion" date for the facility, including the process pipe installation, was December 2004. Ultimately, Axenics' last day on the job was June 2, 2005.

The subcontract contemplated the possibility of delays and hindrances as well as changes to the scope of the work and its cost. The subcontract provided that "all instructions given to [Axenics'] supervisory or management personnel by Turner's Superintendent, Engineer, or other duly authorized representative shall be understood to be included as part of this Subcontract." If Axenics believed "work to be beyond the scope of" the subcontract, it was required to inform Turner before proceeding.

[62 A.3d 759] In the event that the parties could not reach an agreement at that time, Turner could issue "an S.I.S. (Superintendent's Instructions to Subcontractors) for record purposes until such an agreement [could] be reached."

In the event that Turner directed additional work to be performed "and the value of such work [was] to be determined other than by actual signed tickets for material," Axenics was to "submit a lump sum proposal accompanied by an itemized breakdown of material, using established contract unit rates where applicable." The "lump sum proposal" had to be "accompanied by accurate written estimates of the cost" and "be submitted to Turner within five (5) calendar days of the receipt of the directive." If the "[p]roposals for additional work" were not received within five calendar days, Turner would "assign a fair and reasonable value for the additional work, and the additional work w[ould] become part of [Axenics'] scope of work."

Likewise, when Axenics initiated requests for changes to the work, it had to "provide [a] written request for change and obtain Turner's written

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concurrence *before* proceeding with any Work believed not to be within the scope of [the] subcontract." The subcontract further provided that if Axenics was "delayed, obstructed, hindered or interfered with in the commencement, prosecution or completion of the" work, it was required to notify Turner in writing about what caused the delay within forty-eight hours "of the commencement thereof." Axenics also had to demonstrate that it could not have anticipated or avoided the delay and had "used all available means to minimize the consequences thereof." This notice was "an essential condition precedent to [Axenics'] rights in connection with any such delays, obstructive hindrances or interferences."

In addition, in the subcontract, Axenics agreed:

that it shall not be entitled to nor claim any cost reimbursement, compensation or damages for any delay, obstruction, hindrance or interference to the Work except to the extent that Turner has actually recovered corresponding cost reimbursement, compensation or damages from the Owner under the Contract Documents for such delay, obstruction, hindrance or interference, and then only to the extent of the amount, if any, which Turner on behalf of [Axenics], actually received from the Owner on account of such delay, obstruction, hindrance or interference. Notwithstanding any term or provision herein to the contrary, [Axenics] expressly waives and releases all claims or rights to recover lost profit (except for profit on work actually performed), recovery of overhead (including home office overhead), and any other indirect damages, costs or expenses in any way arising out of or related to the [subcontract], including the breach thereof by Turner, delays, charges, acceleration, loss of efficiency or productivity disruptions and interferences with the performance of the work.

Axenics' "work [was] to be coordinated with the structural, architectural and [mechanical, electrical, and plumbing] services prior to fabrication," and "[p]roject coordination procedures [were] outlined in [an] attached project coordination plan." The project coordination plan provided that: (1) Turner was responsible for scheduling, facilitating, and controlling the "coordination process" ; (2) the engineer was responsible for supporting and reviewing "design changes required due to field coordination issues" ; and (3) Axenics was responsible for producing, maintaining, and approving "coordination drawings" as well as implementing "coordination[-]driven images."

[62 A.3d 760] Several delays, which affected Axenics' work, arose during construction of the facility. Some of the delays caused the schedule to be compressed and required Axenics personnel to work overtime to complete the work on time. [164 N.H. 664] In addition, there were occasions when Turner requested changes to the process piping, which Axenics believed to be a "change in scope." When this occurred, Axenics was instructed to continue working and that "SISs [would] follow."

During construction, Turner met with Stryker weekly to review change order requests. Change order requests, as well as applications for payment, had to be approved by Stryker. Axenics submitted eight written change orders, which upon approval by Turner and Stryker, increased the contract price to $2,518,078. The change orders that increased the contract price contained the following language:

Through acceptance of this Change Order, [Axenics] acknowledges that it has reviewed the progress of the Work related to this Project and the potential impact of the added work on the progress of the project in the future. As a result, this Change Order includes compensation to [Axenics] for any and all effects, delays, inefficiencies or similar demands associated with this Project and [Axenics] recognizes that there is no basis for any such claim in the future.

Please note that all other terms and conditions of the subcontract remain unchanged and that all costs to maintain our original contract schedule with the inclusion of the adjusted scope of work as set forth by this change order are included within the lump sum change order amount stated herein.

Axenics later submitted a ninth change order, in the amount of $435,929, which it characterized as a "Claim Settlement." The defendants did not pay this change order.

In late 2004, a dispute arose when Axenics notified Turner of additional change orders related to delays and work that it believed to be outside the scope of the contract. Turner initially responded to Axenics' request with an email "rejecting the claim." However, during the next several months, Axenics worked with Turner to obtain payment from Stryker for these change orders. Stryker questioned some of the work for which Axenics sought payment and requested that Axenics submit backup documentation for its requests. Turner assisted Axenics in preparing a presentation for Stryker regarding the requested funds, and Axenics made its presentation to Stryker in April 2005. Before the presentation, Turner representatives provided Stryker with rebuttal to some of Axenics' requests for additional payment, but also told Stryker that it agreed with several of them. Subsequently, Stryker refused to pay Axenics the requested funds.

In November 2007, Axenics sued the defendants, asserting that Turner had breached the subcontract when it failed to pay Axenics sums due.

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Axenics also brought claims against Turner and Stryker for violation of the CPA and unjust enrichment. It sought $1.7 million in damages for materials, labor, equipment, and services as well as enhanced damages under the CPA and attorney's fees. In response, the defendants counterclaimed, alleging breach of contract and violations of the CPA.

At the conclusion of the eighteen-day trial, in its post-trial memorandum Axenics alleged that "Turner deviated from the ... subcontract ... in so many material respects" that Turner had "abandoned the [s]ubcontract, and [Axenics], rather than declaring breach, continued working." According **[62 A.3d 761]** to Axenics, this reflected the parties' mutual agreement to abandon the subcontract, making unjust enrichment "available to compensate [Axenics] for the benefits it conferred on Turner and Stryker through its work at the" facility. Axenics further alleged that Turner breached the subcontract by intentionally delaying payments and failing to coordinate Axenics' work with that of the other subcontractors, which hindered and delayed Axenics' performance of its contractual duties.

The court issued a lengthy decision in which it found that neither party had abandoned the subcontract and ruled against Axenics on its breach of contract claim. However, the trial court ruled in favor of Axenics on its unjust enrichment claim, concluded that the defendants were jointly liable, and awarded Axenics $1,080,000 in restitution damages. With respect to Axenics' CPA claim, the court ruled "that neither Stryker's nor Turner's actions" violated the CPA. Finally, the court ruled against the defendants on all of their counterclaims, including their request for attorney's fees. This appeal and cross-appeal followed.

On appeal, the defendants argue that the trial court erred in allowing Axenics to recover "in unjust enrichment because a valid, express contract governed the precise subject matter of Axenics' unjust enrichment claim, and that contract was neither abandoned nor breached." They further contend that the court erred in finding them "liable for unjust enrichment when they did not receive a benefit that would be unconscionable to retain," and "the record was devoid of any evidence showing the value of any extra-contractual benefit [they] purportedly received." Finally, they argue that the court violated New Hampshire Rule of Evidence 408 by failing to exclude evidence of an offer to compromise.

Axenics cross-appeals, arguing that the trial court erred in failing to find that the parties had abandoned the subcontract. In the alternative, Axenics argues that the trial court should have found "that Turner breached the [s]ubcontract." Axenics also claims that, regardless of whether the subcontract was abandoned or breached, the trial court erred by not awarding it "damages measured by its costs plus reasonable profit, or $1.7 million." In addition, Axenics maintains that the trial court erred in failing to find that

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the defendants violated the CPA. We first address the parties' arguments regarding abandonment and breach of contract and then turn to their arguments regarding unjust enrichment, damages, and the CPA.

I. Contract Abandonment

Axenics argues that the trial court erred in failing to find that the subcontract was abandoned because it was "referred to by all parties on a ' guideline' basis if at all and was never adhered to by any of the parties." "Generally, contract abandonment occurs when both parties depart from the terms of the contract by mutual consent." *J.A. Jones Constr. v. Lehrer McGovern Bovis,* 120 Nev. 277, 89 P.3d 1009, 1019 (2004); see *Young v. Barry,* 107 N.H. 294, 296, 220 A.2d 735 (1966). Abandonment "may be accomplished by express mutual consent or by implied consent through the actions of the parties." *O'Brien & Gere Technical v. Fru-Con/Fluor Daniel,* 380 F.3d 447, 455 (8th Cir.2004) (quotation omitted) (applying Missouri law). "Where acts and conduct are relied on to constitute an abandonment, they must be positive, unequivocal and inconsistent with an intent to be further bound by the contract." *Fru-Con/Fluor Daniel v. Corrigan Brothers,* 154 S.W.3d 330, 335 (Mo.Ct.App.2004); see also

[62 A.3d 762] *Harris v. IES Associates, Inc.,* 69 P.3d 297, 308 (Utah Ct.App.2003) (" A contract may be [abandoned] by acts or conduct of the parties inconsistent with the continued existence of the contract." (quotation omitted)); 17A Am.Jur.2d *Contracts* § 528 (2004) (" A contract will generally be treated as abandoned when one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior."). Abandonment of a construction contract may occur because of "the aggregation of numerous changes to the contract over time." *Clarendon America v. General Sec. Indem.,* 193 Cal.App.4th 1311, 124 Cal.Rptr.3d 1, 6 (2011).

"Abandonment of a contract is a mixed question of law and fact; what constitutes an abandonment is a matter of law, and whether there has been an abandonment is a question of fact." 17A Am.Jur.2d *Contracts* § 529. *But* see *J.A. Jones Const.,* 89 P.3d at 1019 (" The issue of whether contract abandonment has occurred generally presents a question of fact."); *Fru-Con/Fluor Daniel,* 154 S.W.3d at 335 (same). "We will not overturn the trial court's ruling on a mixed question unless it is clearly erroneous." *Hogan Family Enters. v. Town of Rye,* 157 N.H. 453, 456, 951 A.2d 159 (2008) (quotation omitted). If the court misapplies the law to its factual findings, however, we will review the matter *de novo. Seeid.*

In this case, there was no express agreement to abandon the contract. Rather, in support of its abandonment theory, Axenics points to specific instances where Axenics and Turner deviated from, or failed to follow,

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provisions of the subcontract, and it argues that the parties' conduct evinced an intention to abandon the subcontract. We disagree. Although there were a number of change orders that caused the work and its cost to differ from that to which the parties originally agreed, the scope of the work— the installation of process pipe— did not change. *SeeClarendon America,* 124 Cal.Rptr.3d at 6 (finding there was no "evidence that an excessive number of changes to the scope of work resulted in abandonment"). In *Fru-Con/Fluor Daniel,* 154 S.W.3d at 335, the Missouri Appeals Court found that, despite a large number of changes, the parties had not abandoned the construction contract because the contract itself allowed such changes. Likewise, the subcontract in this case contemplated that there might be changes to the work and its cost. Importantly, the subcontract also provided for possible schedule adjustments, delay, hindrances, and obstructions. Accordingly, the fact that there were numerous change orders does not evidence the parties' intent to abandon the subcontract. Moreover, there is no evidence that either party failed to preserve its rights under the contract. See *Clarendon America,* 124 Cal.Rptr.3d at 6 (finding no contract abandonment, in part, when underlying parties expressly retained rights under contract); *EMF General Contracting Corp. v. Bisbee,* 6 A.D.3d 45, 774 N.Y.S.2d 39, 43 (2004) (citing to cases in which abandonment was found when parties took steps inconsistent with enforcing their rights under contract). Under these circumstances, we conclude that the trial court correctly determined that the parties did not abandon the subcontract.

II. Breach of Contract

Axenics next argues that the trial court erred in failing to find that Turner breached the subcontract. Axenics maintains that the trial court conflated breach of contract with contract abandonment, "which led [it] to erroneously conclude that because it found no abandonment there was no breach, although the court's specific **[62 A.3d 763]** findings detailed numerous breaches." Thus, Axenics asserts that "the court failed to consider the elements of breach ... and failed to consider whether Turner had breached the contract by any means other than abandoning it."

The defendants maintain that Axenics waived this issue by failing to raise it in its notice of cross-appeal. *SeeProgressive N. Ins. Co. v. Argonaut Ins. Co.,* 161 N.H. 778, 784, 20 A.3d 977 (2011). Axenics' notice of cross-appeal presented the question: "Did the Superior Court err in determining that the parties had not abandoned the subject Subcontract?" Supreme Court Rule 16(3)(b) provides, in relevant part

While the statement of a question [in a brief] need not be worded exactly as it was in the appeal document, the question presented

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shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

Because of the fashion in which the trial court addressed Axenics' breach of contract and abandonment claims, we conclude that Axenics' abandonment question fairly encompasses the issue of whether the trial court erred in conflating abandonment with breach of contract. Cf. *In re Juvenile 2003-187,* 151 N.H. 14, 16, 846 A.2d 1207 (2004) (concluding that, under facts and circumstances of case, question of whether evidence of juvenile's *actus reus* was sufficient was "inextricably linked with, and fairly comprise[d] a subsidiary question to, the ultimate issue of the sufficiency of the evidence as to the juvenile's *mens rea* with regard to that action"). Accordingly, we will address this argument.

We agree with Axenics that the trial court conflated breach of contract and contract abandonment and, therefore, failed to rule specifically on Axenics' breach of contract claim. In its order, the trial court characterized Axenics' breach of contract claim as alleging "that Turner breached its contractual agreement by abandoning the contract." It then analyzed whether the parties had abandoned the subcontract, finding that "neither Axenics nor Turner expressed any intent to abandon the contract," and concluding not only that "the contract was not abandoned," but that Turner had not breached the subcontract.

Whether the parties abandoned the subcontract, and whether Turner breached the subcontract, however, are two separate questions. As stated above, "contract abandonment occurs when both parties depart from the terms of the contract by mutual consent." *J.A. Jones Constr.,* 89 P.3d at 1019. On the other hand, "[a] breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." *Lassonde v. Stanton,* 157 N.H. 582, 588, 956 A.2d 332 (2008) (quotation and brackets omitted). Here, because the trial court conflated contract abandonment with contract breach, it failed to specifically address Axenics' claim that Turner breached the subcontract. We, therefore, vacate the trial court's finding against Axenics on its breach of contract claim and remand for the trial court to determine whether Turner breached the subcontract as alleged by Axenics. *SeeBarrows v. Boles,* 141 N.H. 382, 388, 687 A.2d 979 (1996) (" Whether conduct is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case." (quotation and brackets omitted)). It is within the trial court's discretion as to whether it should hold an additional hearing.

[164 N.H. 669] *III. Unjust Enrichment*

The defendants argue that the trial court erred in ruling that they were **[62 A.3d 764]** unjustly enriched. "The propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court." *Clapp v. Goffstown Sch. Dist.,* 159 N.H. 206, 210, 977 A.2d 1021 (2009) (quotation omitted). Consequently, we review a trial court's equitable determination for an unsustainable exercise of discretion. *Seeid.* To show an unsustainable exercise of discretion, the defendants must demonstrate that the court's ruling was clearly unreasonable or untenable to the prejudice of their case. *Id.* Although the award of equitable relief is within the sound discretion of the trial court, that "discretion must be exercised, not in opposition to, but in accordance with, established principles of law." *Id.* (quotation omitted). We will first address the trial court's finding that Turner was unjustly enriched and, therefore, liable to Axenics.

A. Turner

The defendants maintain that the trial court erred in allowing recovery against Turner under the theory of unjust enrichment "because the precise subject matter of Axenics' claim— the Extra Work purportedly performed in completing the piping installation— was covered by the parties' contract." Axenics counters that it was entitled to recover under a theory of unjust enrichment because the extra work that it performed was outside the scope of the subcontract.

Unjust enrichment is an equitable remedy that is available when an individual receives "a benefit which would be *unconscionable* for him to retain." *Id.* (quotation omitted). It is not a boundless doctrine, but is, instead, "narrower, more predictable, and more objectively determined than the implications of the words unjust enrichment." *Id.* (quotation omitted). One general limitation is that unjust enrichment may not supplant the terms of an agreement. *Id.* It is a well-established principle that the court cannot allow recovery under a theory of unjust enrichment when there is a valid, express contract covering the subject matter at hand. *Id.* at 210-11, 977 A.2d 1021; *seeSinger Asset Finance Co. v. Wyner,* 156 N.H. 468, 476, 937 A.2d 303 (2007) (finding that, in absence of valid and enforceable contract, trial court properly entered summary judgment for plaintiff on unjust enrichment claim). This is so because "[r]estitution is ... subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach." *Restatement (Third) of Restitution and Unjust Enrichment* § 2 comment c at 17 (2011). Nevertheless, unjust enrichment

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may be available to contracting parties if the benefit received is outside the scope of the contract. *Clapp,* 159 N.H. at 211, 977 A.2d 1021.

We agree with the defendants that Axenics cannot recover against Turner under an unjust enrichment theory. The gravamen of Axenics' unjust enrichment claim is that Turner's failure to properly coordinate construction of the facility caused Axenics personnel to work overtime and to incur additional costs that it would not have had to incur in order to fulfill its obligations in a timely manner. This subject matter— Turner's responsibilities for coordinating changes to the work and Axenics' entitlement to payment for any resulting extra work it performed or extra costs it incurred— was addressed in the subcontract itself. Axenics does not argue that the ultimate contractual objective— installing process piping— changed during the course of the contract. Instead, it argues that to achieve that objective on time required extra work and costs. As laid out above, the terms of the subcontract **[62 A.3d 765]** expressly addressed the possibility of delays and hindrances as well as the process by which Axenics would receive payment for any extra work that it performed because of change orders. The subcontract also established a mechanism for proceeding when Axenics believed the "work to be beyond the scope of" the subcontract, and delineated Turner's responsibilities for coordinating changes to the work. Since the subcontract governed the subject of Axenics' unjust enrichment claim, and the subcontract was not abandoned by the parties, the trial court erred in allowing Axenics to recover against Turner under a theory of unjust enrichment. *Seeid.* at 211-12, 977 A.2d 1021; *ADP Marshall, Inc. v. Noresco, LLC,* 710 F.Supp.2d 197, 230 (D.R.I.2010) (applying Rhode Island law and finding that subcontractor could not recover against general contractor under theory of unjust enrichment when majority of subcontractor's claims were based upon work that was within scope of parties' agreement).

Axenics argues that the parties orally modified the change order process set forth in the subcontract and that the extra work it performed pursuant to the modifications necessarily fell outside the scope of the subcontract. It asserts, therefore, that it is entitled to unjust enrichment damages.

As discussed above, we disagree that the extra work performed fell outside the scope of the subcontract. Simply because the parties may have orally modified the change order *process* does not render the *work* Axenics performed after such modifications outside the scope of the subcontract itself.

Axenics further relies upon *R.J. Berke & Co. v. J.P. Griffin, Inc.,* 116 N.H. 760, 367 A.2d 583 (1976), in arguing that it is entitled to recover against Turner on a theory of unjust enrichment. In *R.J. Berke,* we held that *quantum meruit* is a restitutionary remedy available to a party that materially breaches a

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contract, and thus, has no contract remedies. *R.J. Berke,* 116 N.H. at 764, 367 A.2d 583. This holding does not support Axenics' argument. Here, Axenics does not argue that *it* breached the subcontract, is therefore without contract remedies, and, consequently, would be entitled to recover the value of the labor and materials furnished under the breached subcontract. Rather, Axenics claims that "the parties orally modified the change order procedure for Axenics' extra work and that the extra work fell outside the scope of the Subcontract." Thus, *R.J. Berke* is inapposite.

Axenics' reliance upon *Puritan Mills, Inc. v. Pickering Construction Co.,* 152 Ga.App. 309, 262 S.E.2d 586 (1979), is also misplaced. In *Puritan Mills,* the defendant entered into a contract with the plaintiff to construct loading docks. *Puritan Mills,* 262 S.E.2d at 587. Upon completion, the defendant sought recovery against the plaintiff in *quantum meruit* for expenses incurred resulting from a change order, which required the removal of rock. *Id.* The Georgia Court of Appeals found that "[t]he contract between the parties clearly set[ ] forth the work to be performed and none of the five items describing the work or the drawings reflect[ed] the removal of rock as a part of the contract." *Id.* Accordingly, since the contract did not contemplate the removal of rock, and there was no question that the plaintiff knowingly accepted the defendant's services in removing the rock, the court upheld the trial court's monetary award for the reasonable value of removal of rock. *Id.* at 587-88. Here, however, the subcontract addressed the subject matter of Axenics' unjust enrichment claim. Accordingly, we reverse the trial court's decision finding Turner liable to Axenics on its theory of unjust enrichment.

[62 A.3d 766]*B. Stryker*

The defendants further argue that Axenics' "unjust enrichment claim [against Stryker] must fail as a matter of law because [Stryker] has paid for the contractual benefit it received— the construction of [the facility] according to [the] contract." They maintain that any benefit received by Stryker was both bargained and paid for and that Stryker, therefore, should not be required to "make restitution."

"The party seeking restitution must establish not only unjust enrichment, but that the person sought to be charged had wrongfully secured a benefit or passively received one which it would be unconscionable to retain...." *Gen. Insulation Co. v. Eckman Constr.,* 159 N.H. 601, 611, 992 A.2d 613 (2010) (quotation omitted). When, as here, no express contractual relationship exists between the parties, "a trial court may require an individual to make restitution for unjust enrichment if he has received a benefit that would be unconscionable to retain." *Pella Windows and Doors v. Faraci,* 133 N.H. 585, 586, 580 A.2d 732 (1990) (quotation and brackets omitted).

[164 N.H. 672] "[T]he circumstances under which an unjust enrichment claim may be brought by a subcontractor against an owner, absent privity, are ... limited." *Haz-Mat Response v. Certified Waste Serv.,* 259 Kan. 166, 910 P.2d 839, 847 (1996). There may be "special circumstances that would justify requiring the owner to pay," such as when the owner accepts "benefits rendered under such circumstances as reasonably notify the owner that the one performing such services expected to be compensated therefore by the owner." *Id.* However,

[t]he general rule in this area is that a subcontractor who furnishes material or labor pursuant to an agreement with, or upon the order and credit of[,] a general contractor cannot recover against the property owner upon the basis of an implied promise to pay arising from the owner's receipt and acceptance of the benefit of the material and labor furnished.

Great Plains Equipment v. N.W. Pipeline, 132 Idaho 754, 979 P.2d 627, 641 (1999) (quotation omitted); *see alsoA & V 425 LLC Contracting v. RFD 55th St.,* 15 Misc.3d 196, 830 N.Y.S.2d 637, 646 (Sup.Ct.2007) (" It is a firmly established principle that a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi-contract theory unless it *expressly* consents to pay for the subcontractor's performance." (quotation and brackets omitted)).

Consistent with this rule, other courts have found that "[w]here an owner has fulfilled its financial obligation to a general contractor, a subcontractor cannot rely on the owner to satisfy the relationship between the subcontractor and the general." *DJ Painting v. Baraw Enterprises,* 172 Vt. 239, 776 A.2d 413, 418 (2001) (collecting cases). This is so, in part, because "[t]he point of hiring a general contractor for a construction job is for the general to manage the job and hire the subcontractors." *Id.* at 419. "The owner pays the general contractor, but if the general does not pay the subcontractors, the subcontractors have the statutory lien mechanism to attach money as yet unpaid to the general contractor." *Id.;see* RSA 447:5 (Supp.2012).

Here, there appears to be no dispute that Stryker has fulfilled its financial obligation to Turner. Nor is there any indication that Stryker accepted benefits under circumstances reasonably notifying it that Axenics expected to be compensated directly by Stryker rather than by Turner. While the trial court found that Stryker "thanked all of the subcontractors for staying **[62 A.3d 767]** on schedule despite several problems that occurred," the court's reliance on this finding to support its award against Stryker is misplaced. In our view, Stryker's expression of gratitude does not demonstrate that Stryker had knowledge that it would be directly liable to Axenics for the

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cost of additional work requested by Turner; to the contrary, this finding arguably supports the conclusion that Stryker did not expect to pay additional sums directly to subcontractors such as Axenics. Thus, there is no evidence that Stryker accepted a benefit that would be unconscionable to retain. *SeePella Windows and Doors,* 133 N.H. at 586, 580 A.2d 732; *see alsoS & M Rotogravure Service, Inc. v. Baer,* 77 Wis.2d 454, 252 N.W.2d 913, 916-18 (1977) (reviewing cases involving actions for money by subcontractors against property owners upon whose property subcontractor had performed construction work pursuant to agreement with general contractor and finding rationale to be that when "the defendant had paid another for the benefits conferred, ... it was not inequitable to permit the defendant to retain the benefits without paying the plaintiff"). Indeed, as the trial court itself found, what Stryker "received was a project completed on time and in accordance with the contract specifications." Accordingly, we hold that the trial court erred in allowing Axenics to recover against Stryker under a theory of unjust enrichment. We, therefore, reverse its decision with respect to that issue.

In view of our rulings that the trial court erred in finding the defendants liable under the theory of unjust enrichment, we need not address Axenics' argument concerning the proper measure of damages under that theory.

IV. Damages— Admission of Internal Memoranda

The defendants argue that the trial court erred in admitting and considering as evidence of damages a communication regarding an offer to compromise in contravention of New Hampshire Rule of Evidence 408. Because this issue may arise on remand, we address it. *SeeGeorge v. Al Hoyt & Sons, Inc.,* 162 N.H. 123, 138, 27 A.3d 697 (2011).

At trial, Axenics sought to admit an internal email memorandum composed by Turner, which listed possible contribution amounts from both Turner and Stryker toward a potential settlement with Axenics. The defendants objected on the ground that the memorandum constituted a statement made in compromise negotiations and, thus, was inadmissible under New Hampshire Rule of Evidence 408. The trial court overruled the defendants' objection, finding that because the memorandum "was never communicated to the ... other side," it was not a statement made in compromise negotiations. In its final order, the court reaffirmed this ruling and relied upon the memorandum in its determination of damages.

New Hampshire Rule of Evidence 408 provides, in relevant part:

[E]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a

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claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The Rule "states the basic proposition that evidence of compromise offers [,] compromise agreements, and conduct or statements made in compromise negotiations is **[62 A.3d 768]** inadmissible on questions of liability and damages." *N.H. R. Ev.* 408 Reporter's Notes. "The Rule ... reflects both doubt as to the probative value of the fact of settlement and a policy to encourage settlements." *Id.*

To the extent that Axenics argues that the internal memorandum did not constitute a statement made to compromise the claim or during compromise negotiations, we disagree. The language in the memorandum demonstrates that the amounts listed were under consideration by the defendants as part of a settlement package to be submitted to Axenics. *Cf.Slattery v. Norwood Realty,* 145 N.H. 447, 450, 765 A.2d 143 (2000) (finding that statement was not offer to compromise disputed claim but was admission of contractual obligations). The trial court itself observed that the memorandum "suggests an ' offer' to settle the case."

We have not had occasion to address whether an internal memorandum, evincing an offer to compromise, which has not been disclosed to the opposing party, is protected under Rule 408. However, "[t]he [federal] circuits that have addressed this issue have agreed that internal memoranda, although not communicated to the opposing side, are encompassed within" the similar Federal Rule of Evidence

408. *Xcoal Energy & Resources, LP v. Smith,* 635 F.Supp.2d 453, 454 (W.D.Va.2009) (discussing cases from the Third, Fifth, Seventh, Eighth, and Eleventh Circuits). Conversely, in *Blue Circle Atlantic v. Falcon Materials,* 760 F.Supp. 516, 522 (D.Md.1991), *aff'd* on *other grounds,* 960 F.2d 145 (4th Cir.1992) (unpublished opinion), the United States District Court for the District of Maryland ruled that Federal Rule of Evidence 408 "does not apply to internal memoranda unless communicated to the other side in an attempt at settlement."

We now join the federal circuits in concluding that the policy objectives of Rule 408 weigh in favor of exclusion of internal memoranda prepared for the purpose of compromise negotiations. "The spirit of the Rule, as recognized by several circuits and as set forth in the commentary to the Rule, supports the exclusion of certain work product, internal memos, and other materials created specifically for the purpose of conciliation,

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even if not communicated to the other party." *Xcoal Energy & Resources, LP,* 635 F.Supp.2d at 454 (quotation omitted). Accordingly, we hold that the trial court erred in admitting the internal memorandum outlining the defendants' possible contributions to a settlement with Axenics. Since we have found the internal memorandum was admitted in error, we further find that the trial court erred in relying upon it in assessing damages.

V. CPA Claim

Finally, Axenics challenges the trial court's conclusion that the defendants did not violate the CPA. "The trial court's findings of fact and rulings of law will be upheld unless they lack evidentiary support or constitute clear error of law." *George,* 162 N.H. at 129, 27 A.3d 697 (quotation omitted).

Axenics argues that the trial court's finding that the defendants' conduct did not violate the CPA was erroneous "as a matter of law because the court did not make adequate findings" and "merely jumped to an unsupported conclusion." Axenics maintains that Turner instructed it to perform extra work, which was necessary to complete the facility on time, and "then secretly subvert[ed] Axenics' legitimate efforts to be paid." Specifically, Axenics asserts that Turner assured Axenics that it would support Axenics' claims for payment from Stryker for the extra work **[62 A.3d 769]** performed and "then presented [a] rebuttal to Stryker without disclosing to Axenics the existence of the rebuttal or that Turner had given it to Stryker." According to Axenics, these actions constituted unfair or deceptive acts under the CPA. Axenics also argues that "[g]iven [the defendants'] business sophistication and the length and breadth of the steps each took to subvert, delay, and deny Axenics' claims, the only reasonable conclusion is that their [conduct] constitutes a willful or knowing violation of the [CPA]," entitling Axenics to exemplary damages. We note that the parties do not dispute on appeal that RSA chapter 358-A applies.

RSA 358-A:2 (2009) states that "[i]t 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." We have previously recognized that, although this provision is broadly worded, not all conduct in the course of trade or commerce falls within its scope. *Id.* "An ordinary breach of contract claim, for example, is not a violation of the CPA." *Id.* (quotation omitted). In determining which commercial actions not specifically delineated are covered by the CPA, we have employed the "rascality" test. *Id.* Under the rascality test, "the objectionable conduct must attain a level of rascality that would raise an

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eyebrow of someone inured to the rough and tumble of the world of commerce." *Becksted v. Nadeau,* 155 N.H. 615, 619, 926 A.2d 819 (2007) (quotation omitted).

Here, the trial court found that Turner's conduct in attempting to rebut certain claims by Axenics for payment for the extra work it performed "may have been unjustified or inaccurate based on its own failure to coordinate, but neither Turner's nor Stryker's behavior rose to the level of rascality required under the" CPA. Although the court noted Axenics' allegation that "Turner *never* requested additional funds from Stryker" for the extra work performed by Axenics, it ultimately found that was "not the case." The court found that "Turner merely requested back-up from Axenics [to support its claims for payment] and provided Stryker with a rebuttal to some of Axenics' claims." Indeed, the court found that Turner provided documentation to Stryker concerning Axenics' claims for payment, "stating that many of Axenics' claims had merit." The trial court further found that:

Although Turner's own documents suggest that it knew that Axenics' claim had value, Axenics did a poor job of documenting why its claims exceeded the amount bid. Moreover, both the documents introduced at trial and the public record of the litigation establish[ed] a level of brinkmanship and hard bargaining, by both sides, which is hardly commendable, but far from uncommon.

These findings are sufficient to support the trial court's ultimate conclusion "that the parties' conduct, in the context of the ' rough and tumble' construction business, did not violate the CPA."

Moreover, the record supports the trial court's findings that Turner made efforts to collect and organize back-up documents to support some of Axenics' claims for payment, and that Turner supported the validity of some of Axenics' claims for payment. In addition, trial testimony indicated that "there was no secret" that Turner was going to review the back-up. Although Turner did not inform Axenics that it was preparing a rebuttal to some of Axenics' claims because it believed it "had an obligation to Stryker to review the backup and present it to them," this conduct is not of the type proscribed by the CPA. Cf.

[62 A.3d 770] *State v. Moran,* 151 N.H. 450, 453-54, 861 A.2d 763 (2004) (defendant violated CPA by inducing homeowners to enter into contract with him to install siding when he did not intend to perform work, and he made misrepresentations to homeowners in effort to avoid performing work or refunding deposit).

Axenics further contends that certain of the defendants' litigation strategies violated the CPA because they were "unfair" and were "designed

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to further delay the adjudication of Axenics' claim and make the litigation prohibitively expensive." Assuming, without deciding, that unfair litigation tactics fall within the scope of the CPA, Axenics has failed to demonstrate that the defendants' litigation tactics in this case were so egregious as to satisfy the rascality test. Accordingly, we conclude that the trial court did not err in finding that the defendants did not act "in a way that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Boles,* 141 N.H. at 391, 687 A.2d 979 (quotation omitted).

Affirmed in part; reversed in part; vacated in part; and remanded.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

170 N.H. 17 (N.H. 2017)

164 A.3d 990

Fat Bullies Farm, LLC

v.

Lori Devenport & a

No. 2015-0692

Supreme Court of New Hampshire

May 26, 2017

Argued November 9, 2016.

[164 A.3d 991]Editorial Note:

Under New Hampshire procedural rule this decision is subject to motion for rehearing, as well as formal revision before publication in the New Hampshire reports.

Rockingham.

[170 N.H. 20] Douglas, Leonard & Garvey, P.C., of Concord (Charles G. Douglas, III on the brief and orally), for the plaintiff and counterclaim defendants.

Hinckley, Allen & Snyder, LLP, of Concord (Christopher H.M. Carter and Daniel M. Deschenes on the brief, and Mr. Carter orally), for the defendants.

HICKS, J. DALIANIS, C.J., and CONBOY, LYNN, and BASSETT, JJ., concurred.

OPINION

[164 A.3d 992]

Hicks, J.

The plaintiff, Fat Bullies Farm, LLC (Fat Bullies), and the counterclaim defendants, Donald Gould and Peter Simmons, appeal various findings and rulings of the Superior Court (*Wageling*, J.) made during the course of litigation with the defendants, Alan and Donna Perkins and Lori and Bret Devenport, involving the sale of a 3.1 acre horse farm in North Hampton known as Runnymede Farm. We affirm in part, reverse in part, and remand.

I. Factual Background

The following facts, taken from the trial court's various orders in this case, are relevant to our analysis. The Devenports bought Runnymede Farm in 1998. The property housed a barn, an apartment, and stables, and included a grazing easement over adjoining lots. When the Devenports purchased the property, they promised to operate it as a horse farm in perpetuity, and to allow the former owner -- not a party to this case -- to maintain an office on site.

On July 15, 2010, the Devenports ran into Simmons -- a real estate investor -- at a local restaurant. Because they had been contemplating selling Runnymede, the Devenports asked Simmons if he knew someone **[164 A.3d 993]** who might be interested in purchasing the property. Simmons later told them that he was interested, and inquired into its purchase price. Bret Devenport responded that they were asking $800,000, and that they would only sell Runnymede if the buyer agreed to continue operating the property as a horse farm and to allow the former owner to maintain an office on site.

Simmons thereafter spoke with Gould -- a retired Massachusetts attorney -- about purchasing the property jointly with the intent to develop and/or resell it. Gould agreed, and the two created Fat Bullies " for the purpose of acquiring real estate for development or resale." Simmons and Gould then contacted an attorney, who drafted an " option agreement" to be executed by the Devenports and Fat Bullies. The draft option agreement stated a purchase price of $700,000.

According to the testimony generally credited by the trial court, the following day, July 16, Simmons and Gould went to Runnymede to meet with the Devenports. Simmons introduced Gould as his attorney, and

explained that they were there to talk about purchasing the farm. Simmons asked to see the trophies won by the farm's horses and the stall of a famous horse previously boarded there. Simmons, Gould, and the Devenports also discussed various topics, including the cost of running Runnymede, who would manage the farm, and the horses that were currently being boarded there.

Simmons provided the Devenports with a copy of the draft option agreement. The Devenports reviewed the draft agreement, which they believed to be akin to a right of first refusal. The contract was amended to reflect a purchase price of $800,000. The Devenports reiterated that they would sell the property only if Fat Bullies committed to operating it as a horse farm. Despite their intentions to develop the property, Simmons and Gould agreed. The

Devenports and Fat Bullies then executed the agreement, which provided:

OPTION TO PURCHASE

The Parties, Bret Devenport and Lori Devenport (" Sellers") ... and Fat Bullies Farm (" Buyer"), do hereby agree as follows:

1. That Buyer shall have an Option to Purchase (" Option") the approximately 3-acre farm, commonly known as Runnymede Farm, located at 62 Atlantic Avenue (" Property") for $800,000.

2. That such Option shall be for a 90-day period from the date of the signing of this Option. Such 90-day period ends on October 14, 2010.

3. That such Option shall be in consideration for $1,000.00 cash, the receipt of which is hereby acknowledged by Sellers.

4. During the 90-day Option period, the parties shall consult with each other in order to determine the method of payment that is most mutually beneficial for tax purposes.

Pursuant to this agreement, Fat Bullies paid the Devenports $1,000.

The next day, Simmons and Gould returned to Runnymede to take photographs of the property. While there, Simmons told Lori Devenport that he could see his grandchildren growing up on the farm.

Later that month, Bret Devenport called Simmons to speak about the manner of payment. Simmons told Bret Devenport that he was busy and would return the call later, but it appears that he did not do so. On several occasions Bret Devenport tried to speak with Simmons about payment, to no avail.

[170 N.H. 22] Also in July 2010, Simmons began speaking to others in North Hampton, asking whether they were interested in purchasing **[164 A.3d 994]** Runnymede. After hearing this, Lori Devenport sent a letter on October 11, 2010, to Simmons informing him that the Devenports no longer wanted to sell the farm. She sent this letter because she believed that Simmons had lied to them when he promised to operate Runnymede as a horse farm. However, the letter stated that the Devenports had decided not to sell Runnymede because their children were still in school.

On October 12, 2010, Simmons visited Runnymede and asked the Devenports if they were ready to close the sale on the property. Bret Devenport replied that they were not going to sell Simmons the farm. As stated by the trial court, Simmons responded that he would sue the Devenports and would " own Runnymede within 24 hours." Fat Bullies also sent a letter to the Devenports purporting to invoke the option to purchase the farm. Despite Fat Bullies' efforts, the Devenports refused to sell it the property. Instead, in April 2011, the Devenports sold Runnymede to the Perkinses.

Simmons thereafter confronted Bret Devenport at a gas station, and stated something to the following effect:

You've got to make this better. You have until Wednesday morning or the hammer is going to come down. I know where you live . ... You can run but you cannot hide. I will take you to court and it will cost you thousands of dollars and not cost me anything.

(Quotation omitted.) The Devenports refused to attempt to invalidate the sale of the property to the Perkinses and this litigation followed.

II. Procedural History

This litigation consists of four separately filed actions, which the trial court consolidated. Fat Bullies first filed suit against the Devenports, alleging, among other things, breach of the option agreement. It thereafter filed two actions against the Perkinses alleging tortious interference with contractual relations -- one seeking monetary relief, and the other seeking equitable relief. Finally, the defendants brought an action against Fat Bullies, Simmons, and Gould in which the Devenports asserted a fraudulent inducement claim, and the Devenports and Perkinses collectively asserted a claim under the Consumer Protection Act (CPA), *see* RSA ch. 358-A (2009 & Supp. 2016), among other things.

The parties' claims were resolved at various stages of litigation. The trial court dismissed Fat Bullies' claim seeking equitable relief against the Perkinses for purported tortious interference with the option agreement,

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and granted summary judgment to the Perkinses on Fat Bullies' remaining tortious interference claim. The Perkinses voluntarily non-suited their CPA claim. After trial, the jury returned a verdict in favor of the Devenports on Fat Bullies' breach of contract claim, finding that Fat Bullies failed to prove the existence of a contract by a preponderance of the evidence, and a verdict in favor of Fat Bullies, Simmons, and Gould on the Devenports' fraudulent inducement claim. Additionally, the jury returned an advisory verdict against Fat Bullies and Simmons, but in favor of Gould, on the Devenports' CPA claim. The trial court then denied Fat Bullies and Simmons's motion to set aside the advisory verdict on the Devenports' CPA claim, effectively adopting the jury's advisory verdict.

The trial court also made various non-dispositive rulings against Fat Bullies during the course of litigation. The adverse rulings relevant to this appeal include a ruling granting the defendants' motion to quash a deposition subpoena duces tecum and a ruling limiting the cross-examination of one of the Devenports' witnesses at trial. The trial court also: (1) awarded **[164 A.3d 995]** attorney's fees and costs to the Perkinses, finding that Fat Bullies' claims against them were brought in bad faith; (2) awarded double attorney's fees and double costs to the Devenports as damages under the CPA; (3) determined that the Devenports reasonably incurred $323,593 in fees and $18,233.41 in costs, and that the Perkinses reasonably incurred $199,181.84 in fees and $955.60 in costs; and (4) determined that both Simmons and Gould were personally liable for the payment of the Perkinses' attorney's fees and costs. This appeal followed.

III. Analysis

Fat Bullies, Simmons, and Gould now appeal: (1) the trial court's adoption of the advisory jury verdict on the Devenports' CPA claim; (2) the trial court's award of double attorney's fees and costs to the Devenports as damages under the CPA; (3) the trial court's grant of summary judgment to the Perkinses on Fat Bullies' claim seeking monetary relief for the Perkinses' purported tortious interference with the option agreement; (4) the trial court's award of attorney's fees and costs to the Perkinses; (5) the trial court's determination as to the reasonableness of the requested fees; (6) the trial court's ruling that Gould and Simmons were personally liable for payment; and (7) the trial court's rulings quashing Fat Bullies' deposition subpoena duces tecum and limiting the cross-examination of one of the Devenports' witnesses at trial. We address these issues in turn.

A. CPA Claim

Fat Bullies and Simmons argue that the trial court erred in finding that they violated the CPA. *See* RSA ch. 358-A. They assert, among other

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things, that their conduct did not rise to the level of a CPA violation -- in other words, that it did not constitute an " unfair or deceptive act or practice" as contemplated by the act. RSA 358-A:2 (Supp. 2016). In opposition, the Devenports contend that the trial court properly ruled that Fat Bullies and Simmons violated the CPA by engaging in " one long unfair and unscrupulous course of conduct." " The trial court's findings of fact and rulings of law will be upheld unless they lack evidentiary support or constitute clear error of law." *Beer v. Bennett*, 160 N.H. 166, 168-69, 993 A.2d 765 (2010) (quotation omitted); *cf.Incase, Inc. v. Timex Corp.*, 421 F.Supp.2d 226, 239 (D. Mass. 2006) (explaining that question of whether conduct is unfair or deceptive is a question of fact under Massachusetts Consumer Protection Act).

The CPA proscribes unfair or deceptive trade practices in general, and sets forth a list of specific types of conduct that qualify as unfair or deceptive trade practices. *State v. Moran*, 151 N.H. 450, 452, 861 A.2d 763 (2004). Here, it is the general proscription that is at issue. Although the general provision of the CPA is broadly worded, we have recognized that not all conduct in the course of trade or commerce falls within its scope. *Id.* " An ordinary breach of contract claim, for example, is not a violation of the CPA." *George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123, 129, 27 A.3d 697 (2011) (quotation omitted).

" In determining which commercial actions not specifically delineated are covered by the act, we have employed the 'rascality' test." *Id.* " Under the rascality test, the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Id.* In addition to employing the rascality test, " we ... look to the federal courts' interpretation of the Federal Trade Commission Act for guidance" when determining what actions are unlawful under the statute's general proscription. *Moran*, 151 N.H. at 452-53;

[164 A.3d 996]*see* RSA 358-A:13 (2009).

The Federal Trade Commission determines if actions are unfair or deceptive by inquiring: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Moran, 151 N.H. at 453 (quotation omitted).

[170 N.H. 25] We have had limited occasion to interpret the CPA in the context of real estate transactions. Specifically, we have: (1) recognized that " [t]rade" and " commerce" as defined by the act " include[s] acts incidental to the sale of real estate," *Snierson v. Scruton*, 145 N.H. 73, 80-81, 761 A.2d 1046 (2000); *see* RSA 358-A:1, II (2009); (2) considered whether a particular real estate transaction occurred " in the conduct of any trade or commerce," *Hughes v. DiSalvo*, 143 N.H. 576, 577-79, 729 A.2d 422 (1999) (quotation and emphasis omitted); and (3) determined whether conduct relating to the sale and development of condominiums is exempt from the act, *Gilmore v. Bradgate Assocs.*, 135 N.H. 234, 236-37, 604 A.2d 555 (1992), *overruled byAverill v. Cox*, 145 N.H. 328, 332, 761 A.2d 1083 (2000). However, we have only once considered whether particular acts incidental to the sale of real estate constituted " unfair or deceptive act[s] or practice[s]" under RSA 358-A:2. *SeeSnierson*, 145 N.H. at 81.

Here, when it adopted the advisory jury verdict, the trial court found that the general proscription of RSA 358-A:2 applied to Fat Bullies and Simmons's conduct. It reasoned:

... Simmons showed up without any prior notice at [Runnymede] with Gould, who the Devenports did not know. Simmons introduced Gould as his attorney and displayed what Gould and Simmons both believed to be a binding legal document and cash deposit. The Devenports did not have a lawyer and Simmons did not suggest they retain one. Simmons, despite knowing the asking price was $800,000, produced a document ... for signature depicting the sale price as $700,000. He did not warn the Devenports ahead of time that he would be bringing a binding legal document, an attorney, or changing the price term of the proposal. He did not point out the change of term. He did not explain what an option was. He led the Devenports into believing that Fat Bullies would keep Runnymede as a horse farm and honor the Devenports' promise to [the former owner]. He showed interest in the horses, trophies and [the former owner], said he was interested in raising llamas and cows, and expressed a dream of having his grandchildren visit the farm. This conduct, the Court finds, was " unscrupulous" and unfair. When Simmons saw Bret [Devenport] at the gas station, he placed his hand on Bret's car or arm and threatened him. ... This conduct was " oppressive" and unfair.

In ruling upon the Devenports' request for damages, the trial court made additional findings relevant to the Devenports' CPA claim. Specifically, the court found that Fat Bullies and Simmons violated the CPA by engaging in a " continuing course of conduct," which " beg[an] with an unfair attempt at

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contract formation" and included " threaten[ing] the Devenports with legal action, ... sen[ding] demand letters, ... br[inging] suit against the Devenports and the [Perkinses,] ... [and] enact[ing] a **[164 A.3d 997]** contentious litigation strategy which had the effect of causing the Devenports to incur over $200,000 in legal fees over the course of more than four years" -- all while knowing " that the Devenports were in financial straits." (Emphasis omitted.) The court described this conduct as " unscrupulous," " deceptive," and " unfair."

We agree with the trial court and the Devenports that a course of conduct can violate the CPA. *See, e.g., Milford Lumber Co. v. RCB Realty*, 147 N.H. 15, 20, 780 A.2d 1259 (2001). However, a series of acts only becomes a course of conduct violative of the CPA when the acts collectively constitute an " unfair or deceptive act or practice." RSA 358-A:2; *seeMilford Lumber Co.*, 147 N.H. at 20 (concluding misrepresentations to procure materials and use of same misrepresentations to avoid payment collectively constituted " course of deceptive acts and practices"); *E. Microwave, Inc. v. Am. Private Line Servs., Inc.*, No. 912850, 1993 WL 818931, at *2 (Mass. Super. Ct. Oct. 6, 1993) (concluding defendants engaged in a " course of conduct" violating Massachusetts Consumer Protection Act when they " deliberately siphoned" funds owed to plaintiff out of " sham corporation" in " an intentional scheme to defraud" plaintiff). Based upon our review of the record, we hold that the trial court erred in finding that Fat Bullies and Simmons engaged in a course of conduct that was " unfair or deceptive" as contemplated by the CPA. RSA 358-A:2.

The record supports the trial court's determination that Fat Bullies and Simmons misrepresented their intentions regarding Runnymede. However, we conclude that the misrepresentation of a buyer's intentions regarding the future use of real property does not, as a matter of law, rise to the level of rascality necessary for it to constitute an " unfair or deceptive act or practice." RSA 358-A:2. Under the statute of frauds, oral agreements restricting the use of real property are generally unenforceable. *See* RSA 506:1 (2010) (statute of frauds); *Tibbetts v. Tibbetts*, 66 N.H. 360, 361-62, 20 A. 979 (1890) (reasoning that oral agreement restricting use of land could not create a negative easement); Annotation, *Oral Agreement Restricting Use of RealProperty as within Statute of Frauds*, 5 A.L.R.2d 1316, 1318 (1949) (noting that " a marked majority of the cases on th[e] subject have concluded that an oral agreement restricting the use of real property is within the application and operation of ... the statute of frauds" (citing *Tibbetts*)). We conclude that someone inured to the rough and tumble world of real estate transactions would be aware of the statute of frauds. Although the Devenports may not have been aware of the statute of frauds, we apply

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the rascality test objectively. *SeeMulligan v. Choice Mortgage Corp. USA*, No. CIV. 96-596-B, 1998 WL 544431, at *11 (D.N.H. Aug. 11, 1998). Because someone inured to the rough and tumble world of real estate transactions would know that an oral agreement restricting the use of real property is unenforceable, the misrepresentation of one's intent to abide by such an agreement is neither " unfair" nor " deceptive" under RSA 358-A:2. *Cf.Madan v. Royal Indem. Co.*, 26 Mass.App.Ct. 756, 532 N.E.2d 1214, 1218 (Mass. App. Ct. 1989) (finding breach of oral lease agreement that " was not enforceable because of the Statute of Frauds" did not satisfy rascality test); *cf.Snierson*, 145 N.H. at 75, 81 (holding that plaintiffs sufficiently stated a claim for relief under the CPA when they alleged that defendants, as agents of sellers of real property, " misrepresented and withheld facts relating to the [property's] septic system and various other deficiencies in the property in a seller's disclosure form and in oral communications"). Although the misrepresentation encouraged the Devenports to sell Runnymede to Fat Bullies, a **[164 A.3d 998]** misrepresentation does not rise to the level of rascality necessary to establish a consumer protection violation merely because it encourages a sale. *SeeTagliente v. Himmer*, 949 F.2d 1, 7 (1st Cir. 1991) (concluding, as a matter of law, that rascality test not met when seller misrepresented " that the property had not been previously marketed for sale, and that there were other buyers ready and willing to pay more than the agreed upon ... purchase price").

Moreover, even if we were to look outside the context of real property transactions, the nature and circumstances of Fat Bullies and Simmons's misrepresentation differentiate it from the types of misrepresentations we have previously found to fall within the CPA's general proscription. Because the jury found that there was no contract, the misrepresentation was not made to avoid an *enforceable contractual obligation. Cf.George*, 162 N.H. at 126, 129-30 (rascality test met where defendant entered into contract with plaintiff real estate developer for construction of road, accepted deposit from plaintiff for bridge needed to complete road, and then misrepresented status of his performance under the contract); *Becksted v. Nadeau*, 155 N.H. 615, 616, 619-20, 926 A.2d 819 (2007) (trial court erred in ruling no rational juror could have found rascality test met because rational jury could have found that defendants intentionally sent plaintiffs inflated legal bill to use as leverage in dispute concerning law firm's payment obligation under construction contract); *Moran*, 151 N.H. at 450-51, 453-54 (rascality test met when trial court could have reasonably found that defendant entered into construction contract with homeowner then used misrepresentations to induce homeowner to pay in advance for construction materials " at a time when he clearly did not intend to perform the work"). The misrepresentation was not used to obtain a benefit only to later be used

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to disclaim liability. *Cf.Milford Lumber Co.*, 147 N.H. at 19-20 (affirming trial court's finding of CPA violation when defendants " made intentionally vague representations regarding their relationship with [a third party] to facilitate the use of [the third party's] account with the plaintiff to procure lumber," and then " used those same misrepresentations as a basis for disclaiming liability").

Viewing Fat Bullies and Simmons's misrepresentation in conjunction with the remainder of their course of conduct does not alter our determination. Even taken together, the acts of showing up unannounced with an attorney and an option agreement, not recommending that the Devenports obtain legal counsel, attempting to negotiate price, not explaining the meaning of the language contained in the draft agreement, threatening and attempting to enforce an option agreement, and pursuing a contentious litigation strategy would not " raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *George*, 162 N.H. at 129; *seeBarrows v. Boles*, 141 N.H. 382, 390, 687 A.2d 979 (1996) (" '[S]elfish bargaining and business dealings will not be enough to justify a claim for damages' under the Consumer Protection Act." (quoting *Eastern Motor Inns, Inc. v. Ricci*, 565 A.2d 1265, 1274 (R.I. 1989))); *cf.Monotype Imaging Inc. v. Deluxe Corp.*, 883 F.Supp.2d 317, 323 (D. Mass. 2012) (concluding that bringing of lawsuit regarding " a reasonable disagreement over the meaning of contract terms" was not consumer protection violation); *Trenwick America Reinsurance Corp. v. IRC, Inc.*, 764 F.Supp.2d 274, 308 (D. Mass. 2011) (considering litigation tactics part of course of conduct in violation of consumer protection law when offending party utilized " moving target [litigation] strategy" and engaged in " discovery abuses").

[164 A.3d 999] We cannot conclude that the subject conduct offends established public policy, is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury. *SeeMoran*, 151 N.H. at 453.

For these reasons, we reverse the trial court's ruling on the Devenports' CPA claim and its award of attorney's fees to the Devenports as damages under the CPA. In light of this determination, we need not address Fat Bullies and Simmons's remaining arguments regarding the CPA.

B. Tortious Interference Claim

Next, Fat Bullies, Simmons, and Gould argue that the trial court erred in granting summary judgment to the Perkinses on Fat Bullies' claim seeking monetary relief for the Perkinses' purported tortious interference with the option agreement. They assert that " [t]he trial judge did not set forth the facts in a light most favorable to Fat Bullies" and erroneously made credibility determinations that should have been left for the jury. (Emphasis

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omitted.) They contend that, " at a minimum, the trial court should have concluded that there were material facts in dispute." (Emphasis omitted.)

In its order granting summary judgment to the Perkinses, the trial court ruled that Fat Bullies " failed to present any evidence showing a genuine issue of material fact that the Perkins[es] intentionally and improperly interfered" with the option agreement. (Quotation omitted.) Assuming, without deciding, that the trial court erred in making this determination, in light of the jury's finding that there was no contract, we conclude that any error was harmless. *SeeMcNair v. McNair*, 151 N.H. 343, 355, 856 A.2d 5 (2004) (concluding any error was harmless when we " identified other grounds that independently compel the conclusion" reached by the trial court); *Barrows*, 141 N.H. at 392 (explaining that, to succeed on claim for tortious interference with contractual relations, plaintiff must prove, among other things, that it " had a contractual relationship with a third party"); *Attorney General v. Morgan*, 132 N.H. 406, 408, 565 A.2d 1072 (1989) (explaining that " [a] harmless error is an error that does not affect the outcome," and concluding that, " [a]lthough the trial judge erred in entering a final judgment at the arbitration hearing, the outcome of the case was not affected" (quotation omitted)). Accordingly, we affirm the trial court's grant of summary judgment to the Perkinses on Fat Bullies' tortious interference with contractual relations claim.

C. Award of Attorney's Fees and Costs to the Perkinses

Fat Bullies, Simmons, and Gould next argue that the trial court erred by awarding attorney's fees and costs to the Perkinses on grounds of bad faith. They contend, among other things, that their filing of the two tortious interference claims against the Perkinses was, " at most, a considered but good faith mistake." In opposition, the Perkinses argue that " the facts found by the trial court provide ample support for the court's determination that [the tortious interference claims] were brought in bad faith as a continuation of the course of unfair, unscrupulous, and oppressive conduct that Fat Bullies and Simmons directed against the Devenports." (Quotations omitted.)

The general rule in New Hampshire is that parties pay their own attorney's fees. *In the Matter of Mallett & Mallett*, 163 N.H. 202, 211, 37 A.3d 333 (2012). However, we have recognized exceptions to this rule. *Id.* A court may award attorney's fees when specifically authorized by statute. *Id.*; *see, e.g.*, RSA 358-A:10, I (2009). Otherwise, an award of **[164 A.3d 1000]** attorney's fees must be grounded upon an agreement between the parties or a judicially-created exception to the general rule. *Mallett*, 163 N.H. at 211. " Underlying the rule that the prevailing litigant is ordinarily not entitled to collect his

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counsel fees from the loser is the principle that no person should be penalized for merely defending or prosecuting a lawsuit." *Harkeem v. Adams*, 117 N.H. 687, 690, 377 A.2d 617 (1977).

" As to judicially-created exceptions, attorney's fees have been awarded in this State based upon two separate theories: bad faith litigation and substantial benefit." *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 377-78 (2012) (quotation omitted).

Under the bad faith litigation theory, an award of attorney's fees is appropriate [when] one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, [when] the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and [when] it should have been unnecessary for the successful party to have brought the action.

Id. at 378 (quotation omitted). " When attorney's fees are awarded against a private party who has acted in bad faith, the purpose is to do justice and vindicate rights, as well as to discourage frivolous lawsuits." *Jesurum v. WBTSCC Ltd. Partnership*, 169 N.H. 469, 483 (2016) (quotation omitted).

" We will not overturn the trial court's decision concerning attorney's fees absent an unsustainable exercise of discretion." *Frost*, 163 N.H. at 377. " To warrant reversal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party." *Id.* " In evaluating the trial court's ruling on this issue, we acknowledge the tremendous deference given a trial court's decision regarding attorney's fees." *Id.* (quotation omitted). " If there is some support in the record for the trial court's determination, we will uphold it." *Id.*

Here, the trial court found that Fat Bullies brought its tortious interference claims against the Perkinses " in bad faith," explaining that Fat Bullies' initiation of the lawsuit against the Perkinses was " part of th[e] course of conduct" that it ruled violative of the CPA. It reasoned that Fat Bullies brought the tortious interference claims against the Perkinses " [p]erhaps because [it] feared that the Devenports did not have sufficient money to pay any judgment it sought, and perhaps as a litigation strategy." It explained that the claims against the Perkinses " should never have been brought" because Fat Bullies: (1) failed to state a claim for tortious interference with contractual relations seeking equitable relief; and (2) failed to " produce[ ] any evidence that the Perkins[es] had tortiously interfered with the [o]ption." Based upon our review of the record, we conclude that the trial court unsustainably exercised its discretion to the prejudice of Fat Bullies. *Id.*

[170 N.H. 31] The trial court appeared to offer three bases for its finding of bad faith -- none of which properly supports such a finding. First, the trial court concluded that

Fat Bullies' initiation of the lawsuit against the Perkinses was " part of th[e] course of conduct" that it earlier ruled violative of the CPA. As discussed above, as a matter of law, Fat Bullies and Simmons's conduct did not violate the CPA.

Next, the trial court noted the possibility that Fat Bullies brought suit against the Perkinses " as a litigation strategy" or " because [it] feared that the Devenports did not have sufficient money to pay any judgment." However, the trial court's use of the term " perhaps" indicates that it did not make any factual findings about Fat **[164 A.3d 1001]** Bullies' motive in bringing suit against the Perkinses. *See* Webster's Third New International Dictionary 1679 (unabridged ed. 2002) (defining " perhaps" as " possibly but not certainly: MAYBE"); *Fischer v. Superintendent, Strafford County House of Corrections*, 163 N.H. 515, 519, 44 A.3d 493 (2012) (stating that we interpret trial court orders *de novo*). Additionally, even if the trial court had made such factual findings, the trial court did not articulate, the Perkinses do not argue, and we cannot discern, how a plaintiff engages in bad faith litigation merely by bringing suit against a solvent defendant when it fears that it may not be able to collect on a judgment against another defendant.

Finally, the trial court pointed out that one of Fat Bullies' tortious interference claims failed to survive a motion to dismiss, and the other failed to survive a motion for summary judgment. Although the trial court's order is not clear, we construe it as finding that the claims against the Perkinses were patently unreasonable. *SeeGrenier v. Barclay Square Commercial Condo. Owners' Assoc.*, 150 N.H. 111, 117, 834 A.2d 238 (2003) (recognizing that attorney's fees may be awarded to " those who are forced to litigate against an opponent whose position is patently unreasonable" (quotation omitted)); *Glick v. Naess*, 143 N.H. 172, 175, 722 A.2d 453 (1998) (describing a party's unreasonableness as " a variety of bad faith" (quotation omitted)). " A claim is patently unreasonable when it is commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." *Glick*, 143 N.H. at 175 (quotation omitted).

Based upon our review of the record, we cannot conclude that Fat Bullies' tortious interference claims were patently unreasonable. Although the Perkinses argue that " the trial court ruled [that] Fat Bullies had no evidence to support its claims against the Perkins[es]," the trial court made no such ruling. Rather, based upon its review of the summary judgment record, the trial court concluded only that there was insufficient evidence to create a genuine issue of material fact as to *one* of the elements of a tortious

interference claim -- specifically, interference. Further, in support of its argument that the Perkinses interfered with the option agreement, Fat Bullies submitted telephone records indicating that there were " frequent phone calls" between the Perkinses, the Devenports, and the Devenports' attorney " in the days leading up to the cancellation of the [o]ption [a]greement," and evidence that the Runnymede Farm Homeowners Association held a meeting at the Perkinses' home in October of 2010, at which the members voted " to eliminate an unused secondary driveway easement and to place ownership of ... Runnymede['s] grazing rights in an LLC." In light of this evidence, we cannot conclude that Fat Bullies' claims that the Perkinses interfered with the option agreement were " without any reasonable basis in the facts provable by evidence." *Glick*, 143 N.H. at 175 (quotation omitted). Under such circumstances, an award of fees to the Perkinses would run counter to the principle that " no person should be penalized for merely defending or prosecuting a lawsuit." *Harkeem*, 117 N.H. at 690.

In sum, we conclude that none of the proffered justifications provide a proper basis for the trial court's finding of bad faith litigation. Accordingly, we hold that the trial court unsustainably exercised its discretion in awarding attorney's fees and costs to the Perkinses under *Harkeem*.

D. Reasonableness of Fees and Costs

Fat Bullies, Simmons, and Gould next challenge the trial court's determinations **[164 A.3d 1002]** concerning the reasonableness of the attorney's fees awarded to the Devenports and to the Perkinses. The parties raise various arguments relating to this issue. However, because we have reversed the trial court's awards of attorney's fees and costs to the Devenports and the Perkinses, we find it unnecessary to address these arguments.

E. Gould's and Simmons's Personal Liability

Fat Bullies, Simmons, and Gould next argue that the trial court erred by determining that both Simmons and Gould are personally liable for the payment of the Perkinses' attorney's fees and costs. Because we have concluded that the trial court erred in awarding attorney's fees and costs to the Perkinses, we need not address this issue.

F. Remaining Issues

Fat Bullies, Simmons, and Gould also argue that the trial court erred by quashing Fat Bullies' deposition subpoena duces tecum and limiting the cross-examination of one of the Devenports' witnesses at trial. They appear to assert that the evidence sought by the subpoena and the evidence that would have been elicited on cross-examination was relevant to the court's assessment of Fat Bullies' tortious interference claim against the Perkinses seeking monetary damages. They claim that the trial court's error " led to a summary judgment adverse to Fat Bullies due to a lack of evidence of any interference." (Quotation omitted.) Because we have concluded that any error in granting summary judgment to the Perkinses was harmless in light of the jury's finding that there was no enforceable contract with which to interfere, we need not consider these arguments.

Finally, any issues raised in the defendant's notice of appeal, but not briefed, are deemed waived. *SeeTown of Barrington v. Townsend*, 164 N.H. 241, 251, 55 A.3d 952 (2012).

Affirmed in part; reversed in part; and remanded.

Dalianis, C.J., and Conboy, Lynn, and Bassett, JJ., concurred.