State of New Hampshire
Supreme Court

NO. 2007-0447

2007 TERM

DECEMBER SESSION

Harold Lassonde, III d/b/a Mountain View Construction

v.

Charles and Susan Stanton

RULE 7 APPEAL OF FINAL DECISION OF
COOS COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT CHARLES AND SUSAN STANTON

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   Preserved: Trial, *passim*.

2. Did the court err in not taking evidence on whether Mr. Lassonde was a limited public figure when such evidence was offered?
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3. Did the court err in holding that Mr. Lassonde was not a limited public figure when from the evidence submitted he voluntarily commented on matters of public importance?
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4. Did the court err in finding the Stantons were liable for defamation when they had a reasonable basis to believe the statements they made were truthful?
   Preserved: 2 *Trn.* 186-190.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In May 2005 Charles and Susan Stanton entered into a written construction contract with Harold and Lynn Lassonde, doing business as Mountain View Construction, to assemble a log home kit supplied by another company. The written contract spells out the Stantons' duty to pay, and what work Mountain View would do, but does not contain some of the common recitations often found. It does not have, for example, a no-oral-modifications clause requiring changes in writing, a merger clause negating pre-contract promises, nor an integration clause stating it is the entire agreement between the parties. CONTRACTOR AGREEMENT (May 9, 2005), *appx.* at 20.

Differing Expectations

In making their sales pitch, Mountain View made a number of promises about the quality and finish of the homes they build. 2 *Trn.* at 102; 3 *Trn.* at 225. Mountain View told the Stantons they are the "best builder in town," 2 *Trn.* at 103; 4 *Trn.* at 216, and would build the house "as if it was his own home." 2 *Trn.* at 103, 207; 3 *Trn.* at 226; 4 *Trn.* at 216; 5 *Trn.* at 51.

Mountain View told the Stantons they would receive a "turnkey" home, 2 *Trn.* at 101, 201, 208. Although Lynn Lassonde testified that "turnkey" was the Stantons' term, she acknowledged that is what Mountain View promised. 3 *Trn.* at 224, 225. To the Stantons, "turnkey" meant that as general contractor, Mountain View would build the house "soup to nuts." 2 *Trn.* at 101. They understood that was Mountain View's job because the Lassondes said they would be responsible for everything concerning the house. 2 *Trn.* at 53, 54, 101. Mr. Lassonde told Charles Stanton "don't worry"; that Mountain View would "take care of everything." 2 *Trn.* at 101.

The project got a late start, but progressed through the summer, albeit slower than the

Stantons had understood. Mountain View knew at the outset that December 1 was important to the Stantons, as the Stantons wanted to celebrate Christmas in their new house. 1 *Trn*. at 119; 4 *Trn*. at 19, 218. Even though Mountain View refused to put such promises in the contract, 5 *Trn.* at 61-62, it made repeated verbal promises that the Stantons' home would be done by Christmas or sooner. 1 *Trn*. at 110; 2 *Trn*. at 99, 124; 4 *Trn*. at 210 (290?); 5 *Trn*. at 61-62. Charles Stanton recalled the Lassondes saying, "I guarantee you'll be in on Christmas. You might even be in by Thanksgiving." 2 *Trn.* at 124. In any event, the written contract called for substantial completion by December 1 – a date necessitated by a 6-month construction loan. But the Stantons had concerns as early as August, which they repeatedly discussed with Mountain View, that the deadline would not be met. 2 *Trn*. at 122, 124, 125.

Despite the contract, both parties acknowledge that during the building process numerous customizations were orally agreed-to, 1 *Trn*. at 109; 2 *Trn*. at 101-02; 3 *Trn*. at 202; 4 *Trn*. at 39, regarding such items as moving a shower into a space that was intended for a closet, 1 *Trn*. at 115; 2 *Trn*. at 36, installation of a large chandelier, 2 *Trn*. at 55, provisions for an outdoor heating boiler and a backup electrical generator, 2 *Trn*. at 53, 56; 5 *Trn*. at 18-19, landscaping, 5 *Trn*. at 14, final cleanup of debris, 2 *Trn*. at 231-32, and other items. A list – long, although it is not clear from the record whether it is comprehensive – was submitted into evidence. It shows 18 changes totaling $6,273 and involving such things as extra porch framing, dead-bolt locks, special-order door knobs, and plowing the driveway. LIST OF EXTRAS[1] (Dec. 30, 2005), *appx*. at 39. Nothing in the record indicates these changes were made in writing.

Mountain View's promises concerned general construction quality, specific projects,

[1]The document is not captioned, but the court's exhibits list calls it "List of Extras."

timing of completion, and what constituted completion. But the parties appear to have had different understandings regarding them. The Stantons took the oral guarantees literally, believing they were promises in addition to the written contract. Mountain View regarded them as either sales bluster or accommodations to a cranky customer, but not as contractual commitments. *Compare* 2 *Trn*. at 208 (Mr. Stanton testified, "We were promised a premium home, turnkey.") *with* 3 *Trn*. at 225 (Ms. Lassonde acknowledging Mountain View used term "turnkey," and defining the term). The Stantons' position was made clear by Susan's testimony. She was asked: "So your contention is a general contractor is responsible for everything, whether or not it's on the contract?" She answered: "That's right, especially when they say we don't have to worry about a thing, all we have to worry about is moving in." 5 *Trn.* at 86.

Thus, on December 30, 2005, when Mountain View deemed the house "substantially completed" as required by the written contract, 1 *Trn*. at 53; 3 *Trn*. at 190; 4 *Trn*. at 36-37, it left undone lots of things that the Stantons thought would be attended to. Mountain View thought it was done, but the Stantons believed they did not yet have a finished house in accord with the oral modifications. 2 *Trn*. at 209.

Incomplete Home

Starting as early as August, the Stantons notified Mountain View of problems with the house. 4 *Trn*. at 254-55. The first time Mountain View understood the gravity of the complaints, however, was in late December, 1 *Trn*. at 52-53, when on the 22nd, Mountain View got a voice-mail from the Stantons about a problem with the kitchen floor. 3 *Trn*. at 184. The next day, the Stantons e-mailed Mountain View with a litany of unfinished items, and a request to contact their lawyer. E-MAIL FROM STANTONS TO MOUNTAIN VIEW (Dec. 23, 2005), *appx*. at 34. Mountain

View e-mailed back, quoting the written contract and saying it would soon complete its work. E-MAIL FROM MOUNTAIN VIEW TO STANTONS, *id.* Several days later, the Stantons e-mailed again, setting forth their complaints about both the tardiness in completion and the unfinished items. E-MAIL FROM STANTONS TO MOUNTAIN VIEW (Dec. 27, 2005), *appx.* at 36. Mountain View continued work, and on December 30 turned the keys over to the Stantons. 4 *Trn.* at 36-7.

Believing they were done, Mountain View expected payment within a few days. The Stantons again e-mailed with a list of undone items, this time in less angry tones, and mentioned their intention to soon close on the conversion of their construction loan to a standard mortgage. E-MAIL FROM STANTONS TO MOUNTAIN VIEW (Jan. 6, 2006), *appx.* at 40. The Stantons moved in on January 7, 2006. 2 *Trn.* at 196.

On January 10, the Stantons had documents notarized in preparation for the closing. Although both the Stantons testified the Lassondes "would have gotten the last check" "if [they] would have come back and fixed the things," 5 *Trn.* at 76 (Susan); 2 *Trn.* at 209 (Charles), the notary heard Charles Stanton say that "there were problems with the house and that the Lassondes would never see their last check." 2 *Trn.* at 240, 243. The Lassondes picked up similar rumors from others in town. 1 *Trn.* at 55; 4 *Trn.* at 50. The next day the final construction check issued, 2 *Trn.* at 45, and was deposited into a separate account controlled by the Stantons alone. 4 *Trn.* at 45.

On January 16, Mountain View received the Stantons their "punch list" – the final itemization of undone things. 4 *Trn.* at 43; LETTER FROM STANTONS TO LASSONDES (Jan. 16, 2006), *appx.* at 41. It requested completion by January 20. The items listed were: missing electric outlets in garage, unbuilt bedroom closet, missing or damaged metal trim in entry and

cellar, unpainted outdoor PVC, leaking jacuzzi, unsanded water stains[2] on the ceiling, rough and unfinished log walls, non-working switch on basement stairs, hook-up of gas and electric to generator, uninstalled chandelier, non-functioning propane stove remote control, and unconnected second phone line. *Id.* The punch list somewhat duplicates the lists the Stantons had provided to Mountain View in their December e-mails.

Dispute and Lawsuit

The next day, January 17, Mountain View worked for about an hour, and addressed some items on the list. 1 *Trn*. at 54; 4 *Trn*. at 43; 5 *Trn*. at 21. Having taken the day off work to ensure completion, both Mr. and Ms. Stanton were present. 4 *Trn*. at 278-80. At about noon, Mr. Lassonde and his crew indicated they were leaving and would return in 45 minutes. Mr. Stanton waited, but Mountain View did not return that day or ever. 2 *Trn*. at 200; 5 *Trn*. at 21.

This appears to be the final break-down between the parties, and each blame the other. 1 *Trn*. at 186-87; 3 *Trn*. at 202, 204. More important, it shows their conflicting views of the contract. The Stantons felt stood-up and unwilling to pay the final bill, while Mountain View considered most of the items on the punch list outside its responsibility and believed it was done with the project. 2 *Trn*. at 189; 4 *Trn*. at 45-46. Cross-examination testimony by Lynn Lassonde demonstrates:

> Q: You know if someone has a reasonable dispute, not paying is a way of trying to resolve the dispute, isn't that correct?
>
> A: Right. But you said reasonable dispute.
>
> Q: Okay. And based upon the documents and the e-mails and everything that was going on, we've testified to, and they speak for themselves and your testimony and

[2]These water stains were alleged to be mold, an issue that occupied much of the trial.

what other evidence is in there, there was a dispute between Mountain View and the Stantons, is that correct?

A: No. We had no dispute. We were done our contract. There was no dispute.

Q: Listen to my question.

A: Okay.

Q: There was a dispute. The Stanton's had some problems. They were setting forth those problems in the e-mails, is that correct?

A: But they weren't in the scope of our contract.

Q: But there was a dispute between you and the Stantons in the range of January 16th through the 20th?

A: Well, I don't understand by a dispute because we had a complete punch list and we went and did everything that had to do with our contract on that punch list. So I don't understand where the dispute was. That's why I don't feel there was a dispute because we were given a punch list and everything that was pertaining to us, we did. So I guess that's why I don't understand as far as –

Q: Wasn't the dispute the Stanton's didn't believe you had done everything under the contract, which you didn't agree with, correct?

A: I guess so.

Q: And you had a dispute that they weren't paying you, is that correct?

A: Yes, we did.

Q: So there was a dispute?

A: Yes, okay. I'll accept that.

4 *Trn*. at 48-50. Although Lynn Lassonde attempted to learn more about the water stains mentioned the punch list, 4 *Trn*. at 45, without further trying to resolve their dispute, Mountain View met with its attorney the very next day, 4 *Trn*. at 46, and filed suit on January 19. WRIT OF SUMMONS (Jan. 19, 2006).

Mr. Stanton again e-mailed Mountain View on January 20, summarizing the problems between the parties, again listing some of the work the Stantons considered unfinished,[3] complaining about delays and poor workmanship, expressing dismay at being stood up several days before, and announcing that the final payment money would therefore not be paid until the work was completed. E-MAIL FROM STANTONS TO MOUNTAIN VIEW (Jan. 20, 2006), *appx*. at 42; 2 *Trn*. at 46, 196. Although the Lassondes complained that they were not given a chance to repair some items and were fired by the Stantons, 1 *Trn*. at 66, 173, 176-77, they acknowledged that their own immediate lawsuit "kind of put the kibosh to going back." 1 *Trn*. at 162.

Mountain View's initial suit in January sought to collect $36,550 under the written contract and $6,273 for changes made by oral modifications. 3 *Trn*. at 202. The Stantons withheld the money. In March the Stantons counterclaimed, alleging the Lassondes had breached the written contract and its various oral modifications by not completing work or not completing it timely, and seeking a set-off for the necessary repairs and costs of completion.[4]

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[3]The record does not disclose a comprehensive list of unfinished components. There appears to be three categories: problems with items that are clearly within the written contract, problems with an item that is clearly within the written contract but was further negotiated during the building process, and problems that are clearly not within the written contract but are the result of the series of oral agreements. Moreover, some of the problems may have been corrected. Problems clearly within the written contract include: water stains and mold on walls and ceilings; flooring that is bubbling and buckling or containing staples and nails; unsanded and unfinished portions of walls and rails; windows and doors that do not close or lock, are drafty, or are unaligned; porch support posts that do not properly rest on their foundation; baseboard trim and window or door trim that is missing, inconsistent, unfinished, or damaged; light switches sloppily installed; leaking bathtub; fireplace that does not work; insufficient water pressure; and rough or unsanded log walls that splinter. The problem that is clearly within the written contract but was subject to later negotiation is the lack of a closet in the second bedroom. Problems that are clearly not within the written contract but resulted from oral promises include: installation of outdoor generator and furnace, installation of a "trout chandelier," landscaping and a sidewalk, and picking up construction debris.

[4]The counterclaim also alleged negligence and violation of the Consumer Protection Act. Those claims were dismissed below, and are not addressed in this brief.

Burn Down the House

In preparation for the lawsuit, and to satisfy their own curiosity regarding strange growths forming on the finish wood, logs, and windows inside their house, the Stantons hired a number of experts during the spring and summer of 2006.

They offered a variety of explanations and remedies. One of them, Servpro, a remediation company in Lebanon, inspected the house and provided an estimate of remediation costs. SERVPRO ESTIMATE (May 8, 2006). From the statements made by the inspector during that visit, Mr. Stanton believed the growth was mold, that the mold would continue to plague the house, and that there was no way to successfully combat it short of declaring the house a total loss.

Within a few weeks, the town assessor did its first tax assessment of the property. On advice of his attorney, Mr. Stanton did not let the official in, but made statements about the house to the assessor. The resulting tax card reports: "Per owner, building has toxic mold, with need to be burned." TAX CARD (Jan. 23, 2007), ***appx.*** at 45 (abbreviations and capitalization altered).

Mountain View learned of the tax card, similar statements Mr. Stanton made at a selectmen's meeting, SELECTMEN'S MEETING MINUTES (Dec. 4, 2006), ***appx.*** at 49, and other similar statements heard from people both in town, 4 ***Trn.*** at 63, and in the home-building industry. 4 ***Trn.*** at 63. Mountain View thus amended its suit to include a claim of defamation.[5]

Several other experts inspected the house for the Stantons. Four of them were disclosed in accord with the discovery rules. This prompted Mountain View, in October, to have its own expert evaluation. Another of the Stantons experts conducted its inspection ***before*** Mountain

[5]The amended suit also alleged fraud and negligent misrepresentation, violation of the Consumer Protection Act, and enhanced damages. Those claims were dismissed below, and are not addressed in this brief.

View's evaluator visited the site. But the Stantons other expert's findings – the "Morrissey Report" – was not prepared until about a week *after*.

The letter accompanying the Morrissey Report reported that the "[b]uilding has been severely compromised by excessive moisture content in exterior log walls. The only 100% effective method to prevent continued mold growth would be declare the building a total loss and demolish it." LETTER FROM R.H.TILLSON OF MORRISSEY ENVIRONMENTAL TO CHARLES RUSSELL, ESQ. (Oct. 13, 2006), *appx.* at 47.

Also important was the report's apparent credibility. It was neatly bound, entitled "Indoor Air Quality Assessment," and its author, Ronnie H. Tillson, signed his communication as Vice President of Morrissey Environmental. Mr. Tillson has three sets of initials after his name – "RPIH, CIEC, CIAQC" – and the report included copies of certificates explaining the initials stand for "Registered Professional Industrial Hygienist," "Certified Indoor Environmental Consultant," and "Certified Indoor Air Quality Professional." Both the report and the accompanying letters are educational to the lay person, and sound like the author knows what he is talking about.

Although later communications from Morrissey were less definitive, the initial report having mentioned "total loss" and "demolish" confirmed the information Mr. Stanton had learned from the Servpro remediation evaluator in May, bolstered the Stantons' view that their house could not be saved, and provided a credible source for the Stantons' opinion that they had rampant mold growing in their house.

Because of its timing, however, Mountain View filed a motion in *limine* to exclude the Morrissey Report. It argued that the disclosure deadlines had come and gone, and because

Mountain View had intentionally arranged its expert's visit to occur after the Stantons' had finished, Mountain View would be prejudiced. The court exercised its discretion before trial in granting the motion on explicitly those grounds. NOTICE OF DECISION (Dec. 21, 2006) ("Motion to Strike; The Morrissey Report and Testimony of R.H. Tillson As An Untimely Disclosure of an Expert Witness - granted; see paragraph 11"); MOTION TO STRIKE THE MORRISSEY REPORT AND TESTIMONY OF R.H. TILLSON AS AN UNTIMELY DISCLOSURE OF AN EXPERT WITNESS (Nov. 9, 2006) (paragraph 11 citing cases supporting proposition that untimely expert disclosure results in exclusion).

During the non-jury trial, the court summarily excluded testimony about what Mr. Stanton believed based on the Morrissey report, 2 *Trn.* at 60, 68 174-75, and about the reasonableness of Mr. Stanton's belief that the house had to be destroyed based on the report. 2 *Trn*. at 186-190.

Extreme Makeover

Entirely separate, in August during the construction of the Stantons house, the New Hampshire Union Leader ran a front page story, featuring a picture of Mr. Lassonde standing in front of a log home manufactured by Katahdin, the same company that manufactured the Stantons'. The article quoted Mr. Lassonde and addressed public controversies regarding development in the north country, economic development and the establishment of snowmobile trails, the increasing price of land and both the benefits and problems associated with it, the increase in residential building and its effect on the north country hospitality industry, and the tendency of taxes to rise along with land values. Paula Tracy, *Boom Hits NH's Upper Tip*, N.H.UNION LEADER (Aug. 15, 2005), p. A1, *appx.* at 26 (page 1 copy only); Paula Tracy, *Boom Hits NH's Upper Tip*, N.H.UNION LEADER (Aug. 15, 2005), p. A1, *appx.* at 27 (continuation of

story from Union Leader website). In September, Mountain View was on the reality TV program "Extreme Makeover: Home Edition" helping construct a home for a disabled fisherman in Maine. Several local papers, WMUR's website, and WMUR Channel 9 television news covered the event and the fact that a local person was part of it, with interviews and pictures of both Mr. and Ms. Lassonde. EXTREME MAKEOVER: HOME EDITION (Oct. 16, 2005); Chad Dryden, *Pittsburg Company Helps Build Home for ABC Show*, BERLIN DAILY SUN, *appx.* at 30; Claire Lynch, *Pittsburg Builders Among Crew on 'Extreme Makeover: Home Edition,'* COLEBROOK NEWS AND SENTINEL (Oct. 12, 2005), *appx*. at 32; www.wmur.com, *Maine Family Gets 'Extreme Makeover,'*(posted Sept. 30, 2005), *appx*. at 31.

Trial and Appeal

Trial in the Coos County Superior Court (*Timothy J. Vaughan*, J.) was held over five days in February and March 2007. The court awarded Mountain View $42,824.62 on its contract claim – $36,550 under the written contract and the $6,273 for the various oral modifications – plus $10,000 on its defamation claim. ORDER ON THE MERITS (May 4, 2007), *appx.* at 1, 10; LIST OF EXTRAS (Dec. 30, 2005), *appx.* at 39. This appeal and cross-appeal followed.

SUMMARY OF ARGUMENT

The Stantons first point out that this case combines a grandiose-talking seller with a literal-minded buyer. Noting that the written contract does not constitute the entire arrangement between the parties, and the record of oral modifications during construction, they argue that the grandiose promises constitute oral modifications to the parties' construction contract. They demonstrate a willingness to pay extra for the oral modifications, but argue that the Lassondes were not willing to complete the house in accord with the grandiose promises Mountain View made.

The Stantons then argue that court refused to hear evidence that Mr. Lassonde was a limited public figure, but then on the basis that there wasn't enough evidence, made the erroneous judgment that he was not. They point out the Mr. Lassonde voluntarily made statements on matters of public concern. Finally, they suggest that their own statements were not defamatory because they were reasonably based on credible expert reports.

ARGUMENT

I. Mountain View Breached by Not Performing on its Oral Promises

Oral modifications to construction contracts are enforceable. *Bailey v. Sommovigo*, 137 N.H. 526 (1993); *McIntire v. Woodall*, 140 N.H. 228 (1995); *Phillips v. Verax Corp.*, 138 N.H. 240 (1994). Unlike for instance, contracts for the sale of goods, construction projects progress gradually, over many months, and often involve customization. Thus modifications to construction contracts are not uncommon. *See e.g., Gintzler v. Melnick*, 116 N.H. 566 (1976).

The written contract between Mountain View and the Stantons did not contain a no-oral-modification clause. *See e.g., Renovest Co. v. Hodges Development Corp.*, 135 N.H. 72 (1991). Oral modifications, therefore, are enforceable.

The written contract also did not contain an integration clause. *See e.g., Parkhurst v. Gibson*, 133 N.H. 57, 62 (1990) ("As a matter of substantive law, where the parties to an agreement adopt a writing as the final and complete expression of that agreement an integration results; the act of embodying those terms in the writing becomes the contract.") (quotations and citations omitted). The written contact also did not contain a merger clause. *See e.g., Kentucky Fried Chicken Corp. v. Collectramatic, Inc.*, 130 N.H. 680 (1988). Pre-writing and post-writing promises about move-in dates and extra projects, therefore, are also enforceable

Neither party disputes that a variety of oral promises modified their written contract. They also do not dispute that $6,273 of Mountain View's judgment – noted in the "List of Extras" – is as a result of modifications to a variety of construction details. ORDER ON THE MERITS (May 4, 2007), *appx.* at 1, 10; LIST OF EXTRAS, *appx.* at 39.

Nor does Mountain View appear to dispute that it made larger promises – the Stantons

would receive a "turnkey" home, Mountain View would "take care of everything," all the Stantons had "to worry about is moving in." Mountain View does not appear to dispute that Mr. Lassonde told the Stantons "I guarantee you'll be in on Christmas. You might even be in by Thanksgiving." What Mountain View appears to dispute, rather, is that these promises constitute enforceable modifications. But just because they were grand does not make them less unenforceable.

The Stantons *believed* Mountain View's sales patter. While Mountain View apparently thought they were merely being salespeople, the Stantons heard promises. While Mountain View might have thought it was merely being accommodating, the Stantons heard modifications to the contract. While Mountain View might have thought it was just trying to sound reassuring, the Stantons heard firm deadlines.

In essence, this case combines a grandiose-talking seller with a literal-minded buyer. When Mr. Lassonde said his statements – whether they were boasting or mollifying his customers – he thought the parties had a meeting of the minds on the understanding that *that* was their meaning. Likewise, when Mr. Stanton heard the statements – and heard promises – he thought the parties had a meeting of the minds on the understanding that *that* was their meaning.

During trial the Stantons readily conceded that responsibility for many of the various undone items were not in the written contract. 5 *Trn.* 56-61. And Mountain View does not deny that the various oral assurances and promises occurred. Because they did, the Stantons were justified in withholding the final payment.

The Stantons were willing to give Mountain View more time to finish performing on their promises. Instead of performing, however, Mountain View sued. Mr. Stanton testified that in

mid-January, Mr. Lassonde "never finished the punch list we gave him. He had us subpoenaed for court and started a lawsuit against us. He initialized the lawsuit, we didn't. We were still trying to work it out. He sued us, we didn't sue him." 2 *Trn*. at 210.

Thus, by not paying Mountain View for undone work, the Stantons did not breach the contract. Rather Mountain View breached. *Dandeneau v. Seymour*, 117 N.H. 455, 461 (1977) (abandoning a construction site is a material breach of contract); *Marcou Const. Co., Inc. v. Tinkham Indus. & Development Corp.*, 117 N.H. 297, 299 (1977) (builder's failure to finish job constitutes breach of contract).

Given this Court's *de novo* review of contracts, and a review of the promises in the record, *Czumak v. New Hampshire Div. of Developmental Services*, 155 N.H. 368 (2007), this court should reverse the lower court's award of damages to Mountain View. Moreover, because there essentially was not a meeting of the minds each time Mr. Lassonde made a statement that Mr. Stanton believed was a promise, this court can remand for reformation of the series of oral contracts.

II. Mr. Lassonde was a Limited Public Figure Who Failed to Show Actual Malice

A. Limited Public Figure Must Show Actual Malice

This Court has recently taken the opportunity to spell out what constitutes a "public figure" who must, in addition to the common law elements of defamation, "establish actual malice to recover actual damages." *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 341 (2007).

Malice is publication of a statement "with knowledge that it was false or with reckless disregard for the truth." *McCusker v. Valley News*, 121 N.H. 258 (1981). This is "more than the mere absence of good faith or reasonable belief of the truth." *Pickering v. Frink*, 123 N.H. 326, 331 (1983). The lack of malice can be shown by being "informed of a fact by one in whom he might, for some special reason, have confidence," *See Carpenter v. Bailey*, 53 N.H. 590 (1873), including the report of "responsible expert opinion," *Dolcin Corp. v. Reader's Digest Ass'n, Inc.*, 183 N.Y.S.2d 342, 347 (N.Y.A.D. 1959); *Melaleuca, Inc. v. Clark*, 78 Cal.Rptr.2d 627 (Cal. App.1998).

There are "two subclassifications of public figures: (1) persons who are public figures for all purposes; and (2) so-called limited-purpose public figures who are public figures for particular public controversies." *Id.* at 340.

"With respect to the first group" – all-purpose public figures – "'an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.'" *Id.* quoting, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

"As to the second group, individuals may become limited-purpose public figures when they 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.' Then, they 'become a public figure for a limited

range of issues.' Courts make the limited-purpose public figure determination 'by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Thomas v. Telegraph*, 155 N.H. at 341, quoting *Gertz*, 418 U.S. at 345, 351 & 352.

This Court said, "we must draw a distinction between these public figures and private citizens." Defamation defendants "are entitled to act on the assumption that … public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not … assumed an influential role in ordering society. He has relinquished no part of his interest in the protection of his own good name." *Thomas v. Telegraph*, 155 N.H. at 341, quoting *Gertz*, 418 U.S. at 345.

"A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 8 R. McNamara, *New Hampshire Practice, Personal Injury-Tort and Ins. Prac.* § 1.08 (2003), citing *Wolston v. Reader's Digest*, 443 U.S. 157 (1979) ; *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

B. Court Excluded Evidenced of Mr. Lassonde Being a Limited Public Figure

Several times during trial the Stantons tried to enter evidence that the Lassondes were limited public figures.

Attorney Russell, the Stantons' lawyer, asked Mr. Lassonde a series of questions about his appearance in newspapers and on television, and put portions of the articles into evidence. 1 *Trn.* at 156-59. Mountain View questioned the relevance, and the court replied that they are relevant

to whether the Lassondes' reputation suffered harm in the community. Attorney Russell however, made clear that the purpose of the evidence was "a person that freely participates in public debate with this type of publicity could be considered a public figure." 1 *Trn.* at 159. The court allowed the articles to be marked as a full exhibit, but noted it was "not going to rule" on the public figure issue and commented that "I think you're going to have to go a long way … to make that convincing argument." *Id.*

The next trial day Attorney Russell asked about Mr. Lassonde's television and newspaper publicity, and Mountain View's attorney objected on the grounds that the determination of public figure is an issue for the court. 2 *Trn.* at 210-11.

> MR. RUSSELL: Well, I believe I'm entitled to offer evidence on this subject matter that if he's able to, in the town, a member of the community, to offer an opinion based upon what he's observed on a man he's had considerable dealings with, whether in fact he could answer –
>
> THE COURT: Are you attempting to show that Mr. Lassonde is a public figure?
>
> MR. RUSSELL: Yes, that's correct, your Honor. And I believe –
>
> THE COURT: To the extent the objection goes to that question, I'm going to not permit that line of questioning. Public figure has a very specific meaning within the statute. If you have a case that you can provide to me and that case is supportive of your position, I'll allow you to renew that question; otherwise, the objection's sustained.

2 *Trn.* at 211-212.

Later Attorney Russell again attempted to ask a witness question about Mountain View's TV and newspaper publicity. 3 *Trn.* at 68. When asked for authority, *Thomas v. Telegraph* having not yet been decided, Attorney Russell produced *McCusker v. Valley News*, quoted *supra*. 3 *Trn.* at 71. He argued that Mr. Lassonde had voluntarily thrust himself into public issues

thereby relinquishing some part of his interest in privacy, and had therefore become a limited public figure. 3 *Trn.* at 69-70. He told the court the Stantons were "entitled to offer evidence" of that. 3 *Trn.* at 72.

The court ruled: "Based on the information that's been provided, I find that Mr. Lassonde is not a public figure and the question is not permitted." 3 *Trn.* at 73.

This ruling is in error. As noted, "[c]ourts make the limited-purpose public figure determination 'by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Thomas v. Telegraph*, 155 N.H. at 341, quoting *Gertz*, 418 U.S. at 352 (criminal defendant may be limited public figure depending upon various factors such as "the nature of his involvement in crime," the seriousness of the crime, and whether "media covered his arrest and trial").

The "nature and extent of an individual's participation in the particular controversy" necessarily requires a factual inquiry. The court circularly barred itself from the inquiry, but then held there wasn't enough information to make the determination. 2 *Trn*. 188. This Court should remand for the purpose of inquiring into the extent Mr. Lassonde "relinquished … part of his interest in the protection of his own good name." *Thomas v. Telegraph*, 155 N.H. at 341, quoting *Gertz*, 418 U.S. at 345.

C. Mr. Lassonde is a Limited Public Figure

Even on the evidence in the record, Mr. Lassonde is a limited public figure. He voluntarily commented on matters of public concern. When confronted by the Union Leader reporter he was free to politely refuse, but rather went ahead and gave an interview. Although one does not become a public figure "just by becoming involved in or associated with a matter that attracts

public attention" 8 R. McNamara, *New Hampshire Practice* § 1.08, Mr. Lassonde did not, for example, merely join the Chamber of Commerce which took a position on development, land values, and taxes. He commented all by himself.

Accordingly, this Court may deem Mr. Lassonde a limited public figure, and remand for a determination of whether Mountain View proved actual malice.

D. Mountain View Failed to Prove Actual Malice

From the evidence in the record, Mountain View failed to prove actual malice.

The Stantons reasonably believed, based on what Mr. Stanton heard from the Servpro remediation evaluator and read in the initial version of the Morrissey Report, that their house had to be destroyed. The Stantons comments that it had to be burned down substantially comport with that reasonable belief. Thus they did not make a statement "with knowledge that it was false or with reckless disregard for the truth." *McCusker v. Valley News*, 121 N.H. 258 (1981).

This Court should accordingly reverse the lower court's award of damages for defamation.

CONCLUSION

Charles and Susan Stanton respectfully request that this Court hold that the Lassondes, doing business as Mountain View Construction, breached the contract between them, and that the Stantons did not, and to reinstate the Stantons' contract counterclaims. They also request that this Court find they did not defame the Lassondes or Mountain View.

Respectfully submitted,

Charles and Susan Stanton
By their Attorney,

Law Office of Joshua L. Gordon

Dated: December 31, 2007

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Charles and Susan Stanton requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel regarding 1) the extent to which broad oral promises made during the pendency of a written contract are enforceable modifications of the contract, and 2) regarding the extent to which an otherwise private person becomes a limited public figure by taking public positions on important matters of public concern.

I hereby certify that on December 31, 2007, copies of the foregoing will be forwarded to John L. Riff, IV, Esq., and to Nicholas D. Wright, Esq.

Dated: December 31, 2007

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