State of New Hampshire
Supreme Court

NO. 2021-0344

2022 TERM

AUGUST SESSION

Martin Woodford and Jennifer Woodford,
Trustees of the Woodford Family Trust

v.

Bradford A. Knight d/b/a Knight Custom Homes

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS (APPELLEES & CROSS-APPELLANTS) JENNIFER & MARTIN WOODFORD

August 1, 2022

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CROSS-APPEAL QUESTIONS PRESENTED

I. Did the court err by denying Woodfords damages pursuant to their Consumer Protection Act claim by considering evidence of Knight's interactions within his trade rather than focusing on his course of conduct with Woodfords?

Preserved: COMPLAINT (May 14, 2018), *Appx*. at 5, 41; MOTION FOR RECONSIDERATION (July 6, 2021) at 13-17, *Appx*. at 277-281.

II. Aside from attorney's fees for addressing Knight's counterclaim, did the court err by not awarding Woodfords attorney's fees for their successful construction defects case?

Preserved: MOTION FOR RECONSIDERATION (July 6, 2021) at 13-17, *Appx*. at 277-281.

STATEMENT OF FACTS

I. Woodfords Shop for House Addition, Find New Place in Victoria Ridge

Brad Knight is a residential construction contractor in southern New Hampshire. Doing business as "Knight Custom Homes," he and his wife are the only employees. Although Knight says he is on-site during construction, he subcontracts most work. *Trn*-1546-47; *Appx*-1429.[1] Knight owns excavation equipment and is a septic installer. *Trn*-1548.

Knight owned land at the corner of two quiet roads in Amherst, New Hampshire. In 2005, he subdivided into nine 2-to-3-acre lots including a bisecting road, called "Victoria Ridge," and he lives nearby. *Trn*-21, 1026, 1545; *Appx*-1463-64. Covenants, generally targeting aesthetics, require Knight to approve in writing certain improvement plans. *Appx*-1094.

Jennifer Woodford is a homemaker; Marty Woodford is a technology executive with no experience in building or contracting.[2] *Trn*-18-20, 142-43; *Appx*-1188. They had considered an addition to their existing home in Amherst to accommodate their family, which included two athletic children. *Trn*-20-21, 28-29. In mid-2015, Woodfords contacted Knight, and they eventually met. *Trn*-20-21, 1027, 1553-55.

Knight suggested Woodfords consider buying a lot in Victoria Ridge, which he pitched as exclusive, and proposed he build Woodfords a new home in which they could customize everything. *Trn*-21-23, 1555. Knight had already built several homes in Victoria Ridge, but still owned a few lots. *Trn*-1028-29, 1277.

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[1]Citations to the transcript are in the format of *Trn*-###. Citations to the appendix are in the format of *Appx*-###.

[2]Jennifer and Marty, individually and as trustees of the Woodford Family Trust, are collectively referred to as "Woodfords."

A. Knight Misrepresents Credentials and Attributes of Property

In October 2015, during a site walk on the lot that interested them, Woodfords expressed they wanted a large flat backyard to accommodate their teen athletes, and because of a prior experience, did not want their new home to rely on a sump-pump for drainage. *Trn*-26-29, 59-60, 77, 225. Knight denied any discussion about what Woodfords liked or disliked about the lot. *Trn*-1033-35, 1556.

Unknown to Woodfords, Knight had 10 months earlier prepared a septic plan for the lot, which showed a flat backyard, but which included a notation: "[h]ouse will have a foundation drain … serviced by a pump…." *Appx*-1465; *Trn*-60-62, 1052. Knight testified it "would be typically normal" to show customers the septic plan at a site walk, but could not recall showing it to Woodfords. *Trn*-1037-38, 1053, 1560-61, 1564. Woodfords did not learn a sump-pump was necessary until after the house was under construction and were unaware of Knight's septic plan until after the house was built. Water-pooling occurred after they moved in. *Trn*-59-62, 119-26.

Also after construction, Woodfords saw Knight had shaped the yard with three or four 8-to-10-inch-deep "swales," meaning it was not flat for sports. *Trn*-1612-13, 1642, 1664-66, 1722. Even if Woodfords had seen the septic plan, it did not show swales. *Trn*-352, 496. Moreover, swales should not have been necessary had Knight properly accounted for elevation of the septic tank, propane tank, and foundation. *Trn*-351, 368, 494, 725. Had Woodfords known these things, it would have affected their decisions.

In selling himself as their contractor, Knight claimed he had been in the business of building custom homes since 1985 and is a perfectionist. *Trn*-1544-49. He repeatedly asserted that he had built 124 custom houses in his career. *Trn*-23; *Appx*-1070. The court found this "led [Woodfords] to believe that [Knight] was a capable builder." *Appx*-192.

In November 2015, a month after Woodfords hired Knight, he made several additional assertions about how many houses he had built. In the context of financing, Knight represented he had constructed "over 100 homes." *Appx*-1115; *Trn*-1081-82. In the context of answering Woodfords' email about the construction process, Knight exclaimed, "after 120 houses it is pretty routine for me!" *Appx*-1155.

At most, however, Knight testified he had built about one-third what he claimed. The majority of his projects included kitchen and bathroom renovations, and assembling modular houses, not designing and building custom homes. *Trn*-1029-32, 1048-52, 1080-84, 1551-52, 1706; *Appx*-192.

Had Woodfords known the truth about Knight's misrepresentations, it would have affected their decisions. *Trn*-57-58.

B. Building Contract; No Custom House Plans

On October 26, 2015, Woodfords bought the Victoria Ridge lot they had walked, and simultaneously contracted with Knight to build a custom home. *Trn*-23-24, 34, 145-46; *Appx*-1089, 1097.

Their contract provided for "custom plans for home," including "new designs … at a rate of $2.00 per sq foot." *Appx*-1077. The agreement provides that Woodfords "hereby agree[] to purchase and Seller agrees to build the attached home.… House plans, and specifications are attached and signed by Buyer and Seller." *Appx*-1089. Woodfords understood this meant Knight would "provide the services to have a custom home, custom plans drawn up." *Trn*-39. The contract allowed Woodfords to inspect during construction. *Appx*-1076.

The parties agreed the house would be "approximately" 3,917 square feet, and that pricing would be calculated on a square-footage rate plus "options." From this, the parties agreed on a "base price" of $911,344. *Appx*-1071-74, 1095-96.

The contract price was approximate because there were no actual plans, *Trn*-35, 169, 1064-66, 1075, 1090-91, and Woodfords' preferences had not yet been fully incorporated. *Trn*-28, 148-51, 1066-67; *Appx*-193.

II. Structural Unknowns in Preliminary Sketches; Expectation of Architect or Engineer

Woodfords did not select a standard house layout, but had design ideas they discussed with Knight. *Trn*-154. To accommodate their children's sports, Woodfords wanted their basement to have what Knight called "clear span space," with a minimum of supporting posts, called "lally columns." *Trn*-29, 177, 1071, 1557-58. Knight conceded these conversations occurred before the contract, and understood Woodfords' intent for clear span. *Trn*-1072, 1079, 1106-08, 1559.

At some point, Knight hired Lisa Melvin to draw custom house plans. *Trn*-26-27, 39, 1030; *Appx*-1070. Woodfords indicated they wanted to talk to Melvin. Knight discouraged it, emailing: "I have never had an *architect* sit with my customers. Too expensive and not needed. I have designed/customized every house I have built (124)." *Appx*-1070 (emphasis added). At trial Knight explained:

> [Woodfords] had expressed interest in sitting down with [Melvin] to work with them on the plans. And we find that it is cost prohibitive for the customer because they do take a lot of time and a lot of discussion. And it's easier if we hammer out the changes they want to make or the design they want, and then I sit down with a summary sheet and very quickly go over it with the *architect* or the designer or the home drawer.

Trn-1030 (emphasis added).

A. Knight Misrepresented Association With Engineer

On the day they met to sign the contract, there was a discussion about hiring an engineer, for the purpose of resolving the clear span in the basement, finalizing plans, and as an agent to inspect on Woodfords' behalf. *Trn*-1077-78, 1085-88. Mr. Woodford testified:

> [W]e indicated we … wanted to get an engineer involved. And Mr. Knight indicated to me there was no reason for us to do that as he had an engineer involved throughout the project.

Trn-45. During that conversation, Knight assured Woodfords "he had someone that's an engineer who was overlooking the project." *Trn*-153. Knight conceded the parties talked about an engineer on the day of the contract, and did not deny he implied the involvement of one. *Trn*-1085-88.

On November 10, Knight filed an application for a building permit. On the block for "Architect/Engineer," Knight wrote Melvin's name. *Appx*-1099; *Trn*-1089-90.

On November 17, 2015, about three weeks after the contract, Melvin completed her design sketches. *Appx*-1466-72. Knight understood these were "preliminary," intended as "representative of what we were trying to build." *Trn*-1558, 1059-60, 1077.

For several reasons, Woodfords understood Melvin's preliminaries were not final plans on which construction would be based, and that an architect or engineer would be involved in developing final construction plans. First, Melvin's drawings did not incorporate clear span in the basement. *Trn*-177, 287, 1076-78. Rather, they showed 13 lally columns and numerous structural beams which Melvin indicated were to be determined "by others." *Appx*-1467-69, 1132.

Second, Melvin's sketches contained a notation on each page indicating contractors "should … consult with a licensed structural engineer about any structural concerns before starting construction." *Appx*-1466-72; *Trn*-104-05.

Woodfords inferred from this that Melvin's drawings were "the basis of the plans for building the home." *Trn*-177. Third, Melvin's sketches were not stamped by an architect or engineer. *Appx*-1466; *Trn*-1112, 1155-56. For comparison, the record contains plans for the next-door house, which Knight also built, on which sizes and calculations for all structural beams and posts are specified. *Appx*-1478; *Trn*-1260.

Upon reviewing Melvin's drawing, the parties met. Woodfords identified which basement lally columns they objected to, and Knight identified those he could remove. *Trn*-290, 1077-78.

Twice in the week after Melvin's drawing, Knight updated the building inspector about basement beams, indicating his lumberyard would size them for him. *Appx*-1106, 1131.

The lumberyard apparently had difficulty working from Melvin's drawings. On November 20, the lumberyard emailed Knight, "I could probably take out a column or two, but I would have to reconfigure a lot of beams to do so." *Appx*-1132. On November 30, Knight again contacted the lumberyard about removing lally columns, and the possibility of up-sizing beams. *Appx*-1153; *Trn*-293, 1072, 1099-1100.

Also on November 30, Knight emailed Woodfords about that day's progress, saying, "I'm working with *the engineer* to increase lvl sizes." *Appx*-1157 (emphasis added); *Trn*-45-50*,* 1110.

On December 9, Knight again emailed Woodfords:

> I spoke to *engineer*. *He has speced out* lvl's vs steel in basement.… [I]f you want steel I would have to start over with the steel supplier.… *He is recalculating* first and second floor ones based on change to size and length on those 3 in basement.… *He is upgrading* ones above larger ones to reflect new point load locations.

Appx-1186-87 (emphasis added); *Trn*-294, 1138.

These representations led Woodfords to understand Knight had an architect or engineer on their project, *Trn*-43-45, 153, and caused them to respond, "at this point stick with whatever keeps us moving." *Appx*-1186.

Knight's representations that there was "an engineer who was overlooking the project" dissuaded Woodfords from engaging an engineer to review plans and inspect construction, as the contract permitted and the parties had discussed. *Trn*-43-45, 153.

After construction was completed, but before Knight engaged any engineer, he made on-going representations giving the impression he had an engineer involved all along. In July 2017, after Woodfords discovered problems and alerted Knight, Knight emailed Woodfords:

> I will be providing you … with the expert documentation regarding your concerns …. I would … appreciate access at a time convenient … so I can show *my engineers* your concerns.

Appx-1356 (emphasis added), 196.

B. No Architect or Engineer Involved

No architect or engineer was ever involved with the project until after construction when Woodfords discovered problems. *Trn*-1129-30.

The court found that Knight represented and Woodfords believed Melvin was an architect. *Appx*-193.Yet Melvin never exaggerated her credentials to Knight, *Appx*-1466-72; *Trn*-43-44, 1091-92, 1580, and he knew she was a "house designer," not an architect or an engineer. *Trn*-1089-90, 1029, 26, 41-42.

Knight acknowledged he is not an engineer. *Trn*-1291.

Despite Knight's suggestion that customers do not talk to architects, and repeated references to an engineer, Knight did not consult with an architect or engineer on how to structurally accomplish Woodfords' preferences or produce final construction plans. Rather, Knight brought Melvin's preliminary sketches to his lumberyard, Belletetes of Nashua, *Trn*-107, 567, 1103, 1159, 1559, 1581-83, who subcontracted beam-specification services to Coastal Forest Products of Bow, a manufacturer of "engineered wood products." *Trn*-525, 529, 535-36, 545, 562. "Engineered" beams are designed within certain parameters, not for a particular project. *Trn*-536, 561, 758.

Jamie Pouliot, who worked for Coastal, provided to Knight "calc sheets" specifying the size of various beams. *Trn*-533, 544, 547. He was, however, unaware of Woodfords' intention for clear span in the basement, *Trn*-1108-09, and assumed the presence of numerous lally columns. *Trn*-538-41, 546; *Appx*-1131-32.

Coastal does not have an engineer on staff. Pouliot is not an engineer, and he rarely works with one. Rather, Pouliot performs services using proprietary software provided by his employer, which he assumes is accurate. *Trn*-528-34, 561. Pouliot's role is limited; it does not extend to ensuring the general integrity of buildings. *Trn*-526, 540. He appears on communications

and calculations without credentials, and his calc sheets lack engineering stamps. *Trn*-327, 528-34, 540, 554, 1111-12; *Appx*-1131-32. Pouliot did not consult with an engineer regarding Woodfords' house, *Trn*-539-40, 554, and made no effort to confirm beams were adequately supported. *Trn*-569.

Knight assumed Pouliot was an engineer "[b]ecause he … was the person doing the engineering," *Trn*-1100-01, but admitted he had no evidence for his assumption. *Trn*-1102-04, 1111-12.

Pouliot testified he often performs his services for customers of lumberyards, in this case Knight through Belletetes. *Trn*-526-32, 562. Knight testified this arrangement – contractors relying on lumberyards to supply beam calculations – is common in the building industry, *Trn*-1103, 1582-83, as did Curtis Guild, a tradesperson hired by Knight who framed Woodfords' house. *Trn*-1430, 1438-39, 1473, 1477.

Woodfords do not dispute that it is normal and customary in the construction industry that contractors rely on lumberyards to calculate beams. *Appx*-247. Woodfords, however, were not privy to arrangements Knight made with Belletetes and Coastal, had no knowledge of how Knight arrived at beam specifications, and were unaware of construction-industry practices. *Trn*-107, 292, 1581-82.

C. Lack of Engineer Resulted in Building Code Violations

Knight commenced construction of Woodfords' home based on Melvin's "preliminary" sketch and Pouliot's non-engineered "calc sheets," with no final plan. *Trn*-154-56, 1063, 1071-72, 1558, 1560, 1599, 1658-60; *Appx*-1157. Consequently, Woodfords' house was constructed in violation of building codes and with structural defects, detailed *infra*.

After construction, and after Woodfords notified Knight of defects, Knight finally hired an engineer, Linda McNair-Perry of Portsmouth. *Trn*-1129-30.

Knight engaged McNair-Perry in July 2017. He presented her with a draft response, statutorily due the next day, to Woodfords' RSA 359-G warranty notice. Knight sought McNair-Perry's comments, and she provided several.

First, Knight's draft included an assertion, "I have included the engineered lumber layout and stamped beam designs for the structure. The Frame plan meets (and exceeds) all building codes." McNair-Perry excised that statement, but Knight nonetheless retained it in his 359-G response. *Compare Appx*-1389-90 *with Appx*-1363. He claimed inclusion was inadvertent, *Trn*-1157-58, but the court did not believe him. *Appx*-197.

Second, McNair-Perry advised Knight:

> [T]here is a misconception by contractors and building inspectors that the practice of the lumber yards to input loads (determined by non-engineer technicians) into a computer is somehow engineered plans. They are not. They are computer generated documents that state the component (a beam in this case) with loads (and how they are loaded) as presented on the sheet are structurally adequate if constructed as such INCLUDING THE BEARING CONDITIONS. *They say nothing as to the adequacy*

> *of the framing system as a whole*. I highly doubt they accounted for the bearing condition with the short lally column. I can't check because there are no basement beams in the package you gave me.

Appx-1412 (capitalization in original, italics added).

Third, McNair-Perry advised Knight that because he "set the fee rather low," she did "no independent review of the framing." *Appx*-1412.

Thus, McNair-Perry made clear that calc sheets are not confirmation of structural adequacy, that how installation is done is crucial, and because she lacked information, she was unable to form engineering conclusions. *Trn*-1890-91. Accordingly, McNair-Perry commented that the way Knight failed to support the building may be a "real structural concern." *Appx*-555.

The court found the lack of an engineer before construction "likely caused the code violations." *Appx*-247.

III. Woodfords Move In; Things Don't Work

A. Woodfords Report Problems; Knight Rejects Responsibility

Construction commenced in November 2015, about a month after the contract. *Appx*-1107. Woodfords toured the building site frequently and brought snacks for subcontractors. *Trn*-1382, 1574. The house was completed during late summer 2016, the certificate of occupancy issued on September 1, and Woodfords occupied on October 14. *Appx*-1230; *Trn*-70.

They immediately began having problems. *Trn*-70. The malfunctioning heating and cooling system (HVAC) was the most immediate, but they also observed flaws in the kitchen and other areas, noticed floors squeaking, and saw uneven edges of floor tiles and gaps between floorboards. *Trn*-82-83.

In cold weather, Woodfords had problems with the foundation drainage system. The sump-pump ran constantly, became noisy, and was floudering. Woodfords estimated during winter, they pumped 900,000 gallons from the drywell area, and come spring, puddles accumulated in their backyard. *Trn*-119, 124-25, 271.

Woodfords twice approached Knight about problems in August 2016 before they moved in. *Trn*-71, 1609, 1715; *Appx*-1228, 1235. Woodfords contacted him again in December and January 2017 about the HVAC, the sump-pump, and the propane tank hood having frozen. *Appx*-1256-58.

In February 2017, Woodfords showed Knight some areas of concern, with an understating Knight would return and further inspect. *Trn*-78, 232. Instead, the following day Knight wrote to Woodfords, blaming them for everything, and making clear that "[t]his is your home to do as you please, but understand that I'm not responsible." *Appx*-1263-64, 195.

B. Woodfords Find Experts to Understand Defects

Because Knight's response was so discordant with their expectations, *Trn*-73, Woodfords decided:

> We needed someone to perform home inspections or an engineer or something along those lines to come help us … determine if they are actually real issues or if they're normal because we did not perceive them to be normal.

Trn-84, 1610.

1. Turner (Architectural Engineer)

Accordingly, Woodfords engaged John Turner, a well-credentialed architectural engineer with experience in building inspections. Turner toured "as built" conditions in February and May 2017. Woodfords showed Turner the HVAC and sump-pump. Observing on his own, however, Turner identified several structural problems and, to him, readily apparent building code violations. *Trn*-85-87, 120, 348-49, 359, 364-65. In his report, Turner wrote:

> There are several significant concerns with the construction of your home. Some of the more egregious areas of concern and/or failure include:
>
> 1. Failure to comply with … Plans;
> 2. Foundation Design and Construction Errors;
> 3. Floor Framing Design and Construction Errors;
> 4. Roof Framing Design and Construction Errors;
> 5. Chronic basement water condition related to an excessively "deep" basement and failure to properly drain groundwater;
> 6. Abnormally squeaky subfloors and/or finish flooring;
> 7. An underground propane tank … set too low.

Appx-369. Turner also noticed possible structural issues with the foundation. *Appx*-372.

It was apparent to Turner that Knight had no structural building plan. *Appx*-370; *Trn*-364. Turner inspected during the winter before Woodfords cut additional trees, and observed sump-pump operation and drainage problems. *Trn*-119. He roughly estimated the required repairs would cost $265,000. *Appx*-369.

2. Denoya (Structural Engineer)

Because Turner identified at least two structural issues, Woodfords hired a structural engineer, Joaquin Denoya, a well-credentialed professional engineer with experience in structural analysis. *Trn*-85, 753. Denoya inspected in April and May 2017. He found Knight's construction was outside prescriptive building codes, but also not engineered. *Appx*-314. Denoya bulleted his findings:

- Slab elevation excessively below groundwater table
- Taller than specified basement foundation walls
- Several lally columns were not installed
- Poorly supported first floor beams
- Floor noises throughout majority of house …
- Inadequately supported roof rafters
- Poorly supported roof valley beams
- Lack of ridge beams and posts
- Overall substitution of beams from those specified in calculations.

Appx-314-15. Denoya identified several roof framing structural issues, recommended installing beams and posts, and suggested further evaluation. *Appx*-317-18.

Denoya said code violations in the roof framing were "[v]ery apparent. To me … it was as simple as poking my head up in the attic." *Trn*-782. Although Denoya could detect no "significant signs of structural distress," he concluded "there are several structural related issues that are alarming." *Appx*-315, 318. He also pointed out flooring problems: "squeaking, creaking, and popping sounds with foot traffic," and recommended further evaluation. *Appx*-317.

In February 2018, Denoya completed the full structural review he had recommended. Its purpose was

> to provide … more detailed information relating to each area of concern. As part of this, summaries of our additional observations, code reviews, and engineering assessments are included to better understand whether conditions meet 1) minimum code requirements and/or 2) accepted engineering practice.

Appx-588.

Denoya provided a "conceptual repair plan" so Woodfords could "begin understanding the extent of recommended repairs." *Appx*-318. He also offered an estimate based on "experience with similar projects," that "the cost of overall repairs [will] be within a range of $50,000 to $200,000." *Appx*-318. Denoya later updated the conceptual repair plan, so Woodfords could "obtain pricing estimates from licensed contractors." *Appx*-588.

3. Buss (Flooring Expert)

Because Turner and Denoya identified flooring issues, Woodfords enlisted David Buss, a well-credentialed flooring expert. Buss observed "crowning of boards, excessive gapping,… the floor squeaking when trafficked on … and tile edge lippage." Buss conducted field tests to determine moisture content, measure extent of crowning and gapping, and determine reasons for problems. *Appx*-336-37.

C. Woodfords Allege Construction Defects

Given Turner's, Denoya's, and Buss's conclusions and recommendations, Woodfords hired a lawyer. On June 22, 2017, they issued notification pursuant to New Hampshire's statute governing disputes between homeowners and contractors, RSA 359-G. The warranty notice included detailed descriptions of problems Woodfords encountered, and appended three experts' reports. *Trn*-91; *Appx*-1284-1351. Knight responded in July, denying

defects and blaming Woodfords for problems.[3] *Appx*-1389-1404; 1416-19; 1420-25.

In May 2018, Woodfords sued Knight for, among other things, having constructed their house with structural defects, in violation of express and implied warranties, and of the State building code, RSA 155-A. *Appx*-5. The court ultimately awarded Woodfords $279,990.05 in damages. *Appx*-308.

[3]The court held Knight's response constituted statutory rejection. *Appx*-199-202. *See* RSA 359-G:4, III ("[I]f the contractor … wholly rejects the claim, … the homeowner may immediately bring an action against the contractor for the claims described in the notice of claim without further notice.").

IV. Construction Defects: Testimony of Experts and Lay Witnesses

A. Experts Qualified at Trial

At trial, both parties' experts testified regarding construction defects. Because their evidence was central to the court's damages awards, and because Knight appears to attack their qualifications, credibility, or bases of opinion, KNIGHT'S BRF. 23-27, following are short profiles of each.

At trial, no party objected to any expert's status; the court recognized each as an expert, and all were subject to cross-examination. Collectively, they offered opinions regarding construction defects, alternative approaches to repairs, and cost estimates.

1. Turner

Turner was Woodfords' expert architectural engineer. He has a degree in engineering, passed the architectural professional engineer (PE) exam, worked with engineering firms for two decades, is a home inspector, is a member of professional associations, has testified as an expert dozens of times, and has conducted thousands of building inspections. *Trn*-338-47; *Appx*-396. Woodfords moved to qualify Turner "to offer an opinion on all inspections, residential construction." Knight did not object, and the court recognized Turner as an expert. *Trn*-347.

2. Denoya

Denoya was Woodfords' expert structural engineer. He has a masters in structural engineering, is a structural PE, has worked with structural engineering firms for 15 years, is the senior project manager at his current firm, is a member of professional associations, has served on New Hampshire's code revision advisory board, and has been involved with over 600 residential, commercial, and municipal engineering projects. *Trn*-744-52; *Appx*-629. Woodfords moved to qualify Denoya "to offer an opinion in the various aspects of structural engineering." Knight did not object, and the court recognized

Denoya as an expert. *Trn*-752-53.

3. Buss

Buss was Woodfords' flooring expert. Working in the flooring industry for four decades, he laid flooring and restored damaged flooring. He established a flooring inspection business in 2007, regularly attended flooring seminars, and earned flooring industry credentials. Buss was on the board of national flooring education organizations, wrote for industry publications, was involved with thousands of forensic flooring analyses including for well-known institutions, and has previously been accepted as an expert. *Trn*-614-621. Woodfords moved to qualify Buss "to offer an expert opinion relative to the installation of hardwood flooring, and mastic, and tile." Knight did not object, and the court recognized Buss as an expert. *Trn*-622.

4. McNair-Perry

Linda McNair-Perry was Knight's expert engineer. She has a degree in civil engineering, is a PE, has been practicing engineering since 1985, is senior structural engineer at her current firm, and was on the board of New Hampshire's engineers' association where she helped revise building codes. *Trn*-1900-09; *Appx*-562.

After her first brush with Knight (when he misrepresented her advice in response to Woodfords' warranty notice), McNair-Perry issued two reports. *Trn*-1881, 1885.

The first, which she undertook without a house-inspection because Knight did not pay her enough, *Trn*-1868; *Appx*-1412, was a "rebuttal," "limited to a review of the findings as represented" in Turner's and Denoya's reports, and did not address framing. McNair-Perry opined that construction errors they found may be more "paperwork" than structural. *Appx*-553-54; *Trn*-1853-54, 1928, 1944, 1961, 2015.

The second was "a review of the evaluations, calculations, conceptual

repair plans and expert opinions offered" in Denoya's report – not her own independent calculations. *Appx*-854. McNair-Perry again critiqued Woodfords' experts for "remain[ing] focused on finding deviation with the [International Residential Code] rather than using other engineering avenues for analysis and evaluation." *Appx*-856.

McNair-Perry nonetheless conceded the building may pose "real structural concern," *Appx*-555, and wrote "most of the roof framing does not meet the caveats and limitations of the prescriptive codes." *Appx*-861.

During trial, Knight moved McNair-Perry be "accepted as an expert structural engineer." Woodfords did not object, and the court recognized her as an expert. *Trn*-1909-10.

B. Non-Expert Witnesses

Woodfords testified regarding their experience purchasing, building, and living in their home. Knight testified, generally claiming he constructed Woodfords' house in the same fashion as other projects, and that it "exceeds" code. *Trn*-1205.

Beyond the parties, four other fact witnesses testified regarding defects.

Ernie Mayo testified for Woodfords regarding costs to repair. His career started as a construction laborer, then he established his own framing company with over 70 employees, worked at construction firms where he managed residential and commercial construction projects, and is the principle of Corbell Development, which does construction management. He has been involved in bidding and building hundreds of residential, commercial, and government projects. *Trn*-1298-1305; *Appx*-798. Mayo explained that estimating repair projects is normally done with reference to engineers' conceptual repair plans. *Trn*-1306-07, 1365-66. Along with Denoya, he inspected the property, assessed each defect identified in Denoya's conceptual repair plan, provided an item-by-item breakdown including labor and materials, and estimated the total cost of repair would be $271,203. *Trn*-1325-26, 1354.

Curtis Guild testified for Knight regarding his experience framing Woodfords' house. Guild first worked at a manufactured beam fabricator, has been a residential framer for several decades, is the proprietor of his framing firm, and subcontracted with Knight for nearly 20 years. *Trn*-1376-79. He is not an engineer, and is not familiar with details of building codes. *Trn*-1432-34. Guild criticized engineers for overlooking everyday framing practices, claimed his work was approved by the building inspector even if not conforming to code, and said there was nothing out of the ordinary framing Woodfords' house. *Trn*-1428-30, 1438-39, 1452, 1469, 1473, 1480-82. He asserted that pricing based on engineers' conceptual repair plans was unreliable, and that

Mayo's estimates were too high. *Trn*-1420-21, 1454.

Jamie Pouliot testified regarding how he specified wood beams for Woodfords' house. Although he has no education in engineering or architecture, he worked for a firm where he was trained, and oversees sales of "engineered wood products" as a freelancer and for his employer. He inputs information from contractors into the company computer to develop material lists and "calc sheets" specifying beam sizing. *Trn*-524-36. Pouliot prepared beam calculations for Woodfords' house through the lumberyard, and acknowledged his "calc sheets" were not seen by an engineer until after construction. *Trn*-534, 556-58.

Scott Tenney was the Town's building inspector, with a depth of experience. He testified about the building permit application and inspection process for Woodfords' home. *Trn*-571-613. Tenney conceded, despite occupancy permits, building inspections might "unfortunately" overlook code violations, but emphasized contractors bear responsibility for compliance.[4] *Trn*-605-07, 1007, 1896; *Appx*-1230.

[4]RSA 155-A:2, VII ("The contractor of a building, building component, or structure shall be responsible for meeting the minimum requirements of the state building code and state fire code. No municipality shall be held liable for any failure on the part of a contractor to comply with the provisions of the state building code.").

V. Evidence on Construction Defects

Denoya labeled the roof as six areas – A, B, C, D, E, and F[5] – and conducted structural analysis of each. *Appx*-596-97. He also identified adequacy and placement of foundation footings, capacity of lally columns, reinforcement of foundation walls, elevation of the foundation slab, efficacy of foundation drainage, and installation of hardwood and tile flooring.

A. Roof Areas A & B

Roof areas A and B are two halves of the same roof. Denoya said they violated prescriptive portions of the building code and accepted engineering practice. He recommended adding a ridge beam, support posts, and supporting elements. *Appx*-587, 602-03; *Trn*-892-93, 898, 921.

To repair, Mayo said he would cover floors and furniture, use fans to control dust, and remove existing sheetrock. Because it is a cramped workspace, he would build a catwalk for laborers. He would install three support columns upstairs, put up scaffolding outside, use a crane and rollers to slide in the beam, and attach it to columns. He would redo siding and drywall, and retouch inevitable cracks. *Trn*-1313-16, 1349.

Based on time and materials, Mayo calculated fixing roof area A would cost $42,989, and roof area B $46,524. *Appx*-799-800; *Trn*-1316-18.

McNair-Perry conceded deficiencies in roof areas A and B, and said that while Denoya's recommendation for adding a ridge beam was reasonable, it would require less reinforcement than Denoya suggested. McNair-Perry said Mayo overestimated, and repair would cost between $6,000 and $8,000. *Appx*-863.

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[5]Roof areas A and B cover the bedrooms over the garage, C a portion of the upstairs, D a fourth bedroom upstairs, E the primary bedroom, and F the downstairs family room with vaulted ceilings. *Appx*-596-97; *Trn*-820.

In its order:

> The Court found Denoya more credible on this issue in light of the fact that he performed calculations carrying the loads down through the second floor, while McNair-Perry failed to do so. In other words, the Court is not persuaded by McNair-Perry's proposed repair plan because it lacks certain calculations, whereas Denoya's repair plan is complete.

Appx-206.

In accord with Mayo's estimates, the court awarded Woodfords $42,989 damages for roof area A, and $46,524 for roof area B. *Appx*-208.

B. Roof Area C

Denoya said roof area C complied with neither code nor engineering practice, and opined it would need a ridge beam, support posts, and reinforcement below. *Appx*-604; *Trn*-921.

To repair, Mayo said he would add the ridge beam from the stairwell to the back, with new window headers and support posts. He said accessing this portion was difficult, so he would first build scaffolding inside in order to move materials and connect the beams, valley rafters, and valley caps. *Trn*-1318-20. Mayo estimated repair would cost $47,934. *Appx*-800-01; *Trn*-1320.

McNair-Perry conceded roof area C was deficient. She said a new ridge beam is not the best fix, thought additional strengthening unnecessary because of how posts are configured, and felt it could be repaired with strapping. She therefore thought fixing roof area C would cost $300 to $500. *Appx*-863-64; *Trn*-2102-12.

The court understood roof area C was "overstressed," but Denoya and McNair-Perry disagreed on repairs. *Appx*-208. The court found "in light of the fact that [McNair-Perry] did not perform complete calculations to adequately support her position [while Denoya] performed calculations tracing the

additional loads all the way to the foundation," Mayo's cost estimate was unrebutted. *Appx*-209-10. It awarded Woodfords $47,934 damages. *Appx*-210.

C. Roof Area D

Denoya said roof area D complied with neither code provisions nor engineering practice. Fixing it would require a ridge beam and support posts with reinforcement, and addition of hangers for rafters. *Appx*-605; *Trn*-921. Because he identified rafters already twisting, Denoya recommended installing blocking to avoid further damage. *Trn*-849-50.

Guild said blocking was unnecessary because it is "not customary and ordinary," regardless of what the code requires. *Trn*-1419.

Mayo said the fix would require some demolition and scaffolding. *Trn*-1320-23. He estimated cost to repair would be $32,858. *Appx*-801-02; *Trn*-1322. McNair-Perry could not evaluate because she could not see connections, but thought it could be fixed with ties, and estimated repair would cost "around $1,000 to $1,500." *Appx*-864-65.

The court found blocking was already done following Denoya's advice, Guild's denial of problems was not credible, and Knight offered no evidence to show blocking was unnecessary. It also found Denoya conceded that McNair-Perry's repair plan was acceptable, and accordingly awarded damages to Woodfords for the $2,615 already paid for remedies. *Appx*-210-12, 299.

D. Roof Area E

Turner said in roof area E, joists were "situated too low in the gable frame to provide sufficient outward thrust resistance," and code violations were so apparent that confirmatory calculations were unnecessary. *Appx*-374; *Trn*-397-98, 739.

Denoya and McNair-Perry agreed it was non-compliant, and repair would require a ridge beam, support posts, and reinforcement below. *Appx*-606. Mayo said the process would be similar to other roof areas, and because the

ceiling is tall, scaffolding would be necessary. Mayo estimated the cost of repairs would be $46,585, *Appx*-802; *Trn*-1323, but McNair-Perry said it would cost $6,000 to $7,000. *Appx*-865-66; *Trn*-921.

The court found that because McNair-Perry did not trace loads to the ground, Denoya's plan was more credible; because McNair-Perry did not calculate costs of Denoya's plan, Mayo's estimate was unrebutted. It therefore awarded damages of $46,585, in accord with Mayo's estimate. *Appx*-212-14.

E. Roof Area F

Denoya said that because wrong or insufficient nails were used, connections in roof area F did not comply with code nor engineering practice, and were therefore under-capacity. He suggested re-nailing with appropriate hardware. *Appx*-607; *Trn*-846.

Mayo estimated repairs would cost $24,690. *Appx*-803; *Trn*-1322-25. McNair-Perry said that, although unable to see the nails, she thought the problem could be fixed by lowering ceiling ties, which could be accomplished for $300 to $500. *Appx*-866-67.

The court found that because Denoya and McNair-Perry agreed that re-nailing would be sufficient, it awarded Woodfords $500, in accord with McNair-Perry's estimate. *Appx*-214-15; 299-300.

F. Basement Footings and Columns

Knight appears to address footings, which are concrete blocks under the slab on which lally columns stand to support building weight. KNIGHT'S BRF. 31-32; *Trn*-400.

Turner and Denoya raised potential issues, *Appx*-600; *Trn*-363, 448-50, 728-29, 885-86, 1004, Knight gave conflicting information, and McNair-Perry said differences did not matter. *Appx*-857, 870-72; *Trn*-1124, 1572, 1697-1701, 1947, 1976-77, 2069. The court evaluated the experts' calculations, determined Woodfords offered insufficient evidence of inadequacy, and denied damages.

Appx-221-23. It is unclear why footings appear in Knight's brief.

Denoya opined that the lally columns were insufficiently sturdy, and McNair-Perry agreed they posed structural concerns. *Appx*-601, 867; *Trn*-1971-72. Mayo explained his estimate for repairs, *Trn*-1308-09, and the court awarded Woodfords $3,541 for the cost of replacing two. *Appx*-219-21. The matter was not appealed.

G. Foundation Walls

Woodfords expressed during early planning they wanted a 9-foot foundation wall. *Appx*-1467; *Trn*-29. Ultimately, Knight poured the wall about a foot taller, without informing Woodfords until later. *Appx*-1162-63; *Trn*-30, 37, 41, 53-54, 56-57, 762-63, 1115, 1130-31, 1135.

Knight put rebar in the wall, but only horizontally. He reported to the building inspector he used three pairs of horizontal rebar, but did not allow for an inspection before concrete was poured. *Appx*-1106; *Trn*-587, 595, 1122-26, 1573. Turner reported the wall was higher than planned, and that vertical rebar, in addition to horizontal, had not been added to comply with code. *Appx*-372; *Trn*-360-65; 432-33, 446-47.

Denoya's report explained:

> Per [the building] code, prescriptive requirements are set forth for traditional and commonly constructed foundation and framing conditions. In areas that are not covered by prescriptive methods, an engineered design performed by a licensed structural engineer is typically completed.

Appx-314; *Trn*-757, 808-09, 1943, 2061-62. Turner clarified:

> The code … helps us build a simple house.…[Y]ou can pretty much follow the code … for an ordinary ranch with a more shallow basement, exactly how you're supposed to cast that concrete – exactly what reinforcing it needs.

> But the moment that you start to do things like 10-foot-tall walls in the basement, the code no longer gives you prescriptive answers for that. And … then that's where now you would cross the line where you need a registered design professional or an engineer to design what should be done.

Trn-364. The court understood that because no prescriptive code exists for the foundation wall, it should have been engineered. *Appx*-215-18; *Trn*-361, 1123-24.

Denoya pointed to particular sections of the code, determined vertical rebar was required, and recommended reinforcement. *Appx*-639; *Trn*-761, 765-66, 855-61. McNair-Perry pointed to different sections of the code, although she was equivocal, and said construction was adequate. *Appx*-556, 867-70; *Trn*-1937-38, 1972-75, 2054, 2061-67. The court found Denoya was "credible on this issue," and that McNair-Perry ultimately agreed with Denoya's calculations. *Appx*-215-18, 296.

Woodfords engaged a foundation repair company, which estimated the cost to implement Denoya's plan was between $45,550 and $52,397. *Appx*-723. The court noted Knight "stipulated to [Woodfords'] estimated cost." *Appx*-301; *Trn*-1039-40.

Adjusting for scope of work, the court awarded Woodfords damages of $48,373. *Appx*-215-18, 300-02.

H. Elevation of Foundation

Another foundation issue involves elevation of the slab, or basement floor, in relation to the water table and presence of groundwater.

In planning, Woodfords told Knight they wanted a house without a sump-pump; Knight already had a septic plan, about which Woodfords were unaware, which necessitated a sump-pump. *Trn*-26-29, 59-62, 80-81 119-26, 147, 281, 225, 1052.

After Woodfords moved in and the sump-pump ran constantly, they contacted Turner, *Trn*-119, 120, 124-25, 271, who discovered the slab was 6-inches below the high water table, and Knight had planned it that way. Turner wrote:

> [A]n interior sump was installed to manage the chronic ground water problem. This condition was exacerbated when, rather than constructing the "plan specified" 8'8"-foot foundation walls, the foundation walls were cast at 9'6" … thus pushing the basement floor slab down another 10 inches into the water table. As a result, despite current drought conditions, the sump operates virtually 24-7 to keep the basement from flooding.

Appx-372; *Trn*-366-80, 443.

Denoya opined that slab elevation was "excessively below groundwater table," *Appx*-314; *Trn*-928-30, and the taller wall exacerbated the problem because Knight kept sill elevation fixed but lowered the slab. *Trn*-366, 468-72, 375-78, 382, 468-72, 724. Turner warned that a "sump-pump and associated discharge [was] crucial," *Appx*-785, because "if the sump pump shuts down, one might expect the basement to fill with 12" of water (or more) during the spring thaw." *Appx*-785. Knight characterized the super-tall wall as a benefit because he did not charge Woodfords extra. *Trn*-1131-32; *Appx*-1162-63.

Although Knight did not consult Woodfords about the foundation pour, *Trn*-54, 80-81, Knight blamed Woodfords because they never requested elevation changes. *Trn*-1565-66. Although he offered no hydrogeology evidence, Knight also claimed the water table was "irrelevant" because the foundation hole was blasted. *Trn*-1707-08; *see Appeal of Nottingham*, 153 N.H. 539 (2006) (hydrogeologic modeling of groundwater flow). McNair-Perry offered that sump-pumps are "code compliant." *Appx*-557, 872-74.

The court found Knight "admitted … he departed from the design plans

and dug a deeper foundation than the parties had agreed." *Appx*-297. It held that "[t]hough [Knight] characterized his actions as a 'gift' to [Woodfords], it is nonetheless a clear departure," and therefore "the original plans do not absolve [Knight] of liability." *Appx*-297. The court thus found Knight 25 percent liable for defects in the foundation drainage system. *Appx*-242-43.

I. Foundation Drainage

Knight appears to contest damages awarded to Woodfords for defects in the foundation drainage system.

After Woodfords moved in, they engaged a landscaper and a tree removal service. *Trn*-94-97, 1747, 1761. To prevent damage, Woodfords marked locations of buried pipes and tanks. *Trn*-97, 140-41, 270.

The landscaper removed stumps, laid walkways and patios, built an irrigation system, placed loam and mulch, installed gutter downspouts and drywells as required by the contract, and planted trees, shrubs, and flowers. *Appx*-1087, 1246; *Trn*-268-69, 1760-65. While no swales were noted on Knight's septic plan, Woodfords admitted it was possible swales were altered during landscaping and in making Woodfords' yard amenable for sports and activities. *Trn*-77, 225, 352.

When the sump-pump constantly ran and water pooled in the backyard, *Trn*-120-23, 270-71, Turner observed the slab's low elevation led to discharge pipes pitched so that water flowed toward the house. *Trn*-124-26, 378, 417-18, 726. He recommended upgrading the drywell and piping. Because there is no prescriptive code, it must be engineered, and he supplied a plan by a civil engineering firm. *Appx*-788-90.

Lee Gilman, Woodfords' expert arboriculturist, suggested pooling was caused by the location where Knight's system discharged the water – into "a seasonally wet bottomland area in front of the stone wall [where] [s]tanding water and saturated soil conditions are reportedly present … during most of

the year." *Appx*-742. Gilman said cutting trees did not have an impact on drainage because soils were unchanged. *Trn*-1797.

Knight claimed his drainage system worked fine, *Trn*-1575-76, 1613-14, 1626-27, 1664-72, 1708-11, 1722, and blamed Woodfords for any problems because they cut trees and did landscaping. *Trn*-1612, 1641-42, 1666, 1672-82, 1723.

On Turner's recommendation, Woodfords exposed drainage pipe in their yard using a shovel. While drywells Knight claimed he installed were not located, Woodfords found discharge pipes sloped backward. *Trn*-123-24. Woodfords determined Turner's remedy was too expensive. *Trn*-126-27, 266. Knight offered another solution, but relative elevations made it impracticable. *Trn*-267.

The court held both parties at fault for foundation drainage problems, finding them partially caused by Knight setting the slab too low and partially by Woodfords' landscaping alterations. *Appx*-237-43. The court thus allocated 25 percent fault to Knight and 75 percent to Woodfords.

Woodfords had paid $5,625 to repair, *Appx*-1456; *Trn*-127-28, 266-67, 273, so the court awarded Woodfords $1,406.25 damages. *Appx*-243.

Finally, Woodfords testified landscaping did not affect areas around the propane tank. *Trn*-76. But during the winter, the tank dome froze, rendering appliances inoperable. *Trn*-75-76, 1610. Turner opined the tank was set too low. *Appx*-371; *Trn*-351, 418, 494. The propane company bid $750 to fix it. *Appx*-1435-36. The court held Knight not liable.

J. Hardwood Flooring

Both Turner and Denoya observed "[a]bnormally squeaky … flooring" "throughout majority of house." *Appx*-369, 317.

Buss, Woodfords' flooring expert, measured gapping and crowning. *Appx*-336; *Trn*-627-28, 639, 674. He explained floorboards must be properly

acclimated to the humidity and temperature of the environment where they are intended to perform, a process that cannot be rushed. There must be attention to storage locations, scrutiny of humidity and temperature of boards and site, and climate-control systems "that mimic normal temperature and humidity conditions." *Appx*-337, 341; *Trn*-626-27, 630-634, 653.

Buss noted there was no dehumidification or air conditioning before or during installation, *Appx*-341; *Trn*-626-27, 630-634, and those systems were indeed not operational until months later. *Appx*-1215; *Trn*-194, 305. Buss blamed issues on installation at the wrong temperatures and humidity, and opined that "[t]he home was not installation job site ready in accordance with [flooring industry] standards." *Appx*-341; *Trn*-626-27, 630-634, 647-49, 686. He said the remedy is reinstallation with new materials. *Appx*-368; *Trn*-649-50.

Knight alleged Woodfords were at fault for insisting on sanding and refinishing before full acclimation. *Appx*-1422, 1207-08; *Trn*-68-69, 625, 1604-05. But Knight had made clear to Woodfords that the Town would not issue a certificate of occupancy until the floors were completed, *Appx*-1245; *Trn*-195-96, so at a meeting with Knight and Knight's flooring subcontractor, all agreed that the floors should be sanded and finished. *Trn*-195-97, 208, 305. Unknown to Woodfords, however, the certificate of occupancy had already issued. *Appx*-1230; *Trn*-195-98. Woodfords relied on Knight's professional judgment, and believe he misled them into premature sanding. *Trn*-195-96.

The court recognized the floors had gapping and crowning exceeding industry standards. *Appx*-229-31. It first denied damages because it appeared Woodfords instigated the haste, *Appx*-230, but on reconsideration acknowledged the lack of operational climate-control before, during, and after installation. It thus held Knight partially responsible for the result, allocating Woodfords 90 percent of the fault, and Knight 10 percent. *Appx*-304-05.

Woodfords' flooring installer estimated the cost of repair, to which

Knight stipulated, was $18,267. *Appx*-794. The court thus awarded Woodfords damages in the amount of $1,826.70. *Appx*-305.

K. Tile Flooring

Tile flooring was installed in several places. Buss noted almost half the tiles had "lippage" (high edges constituting tripping hazards), *Appx*-336; *Trn*-628, 635-36, 646, and believed it was not installed correctly. *Appx*-342.

Knight claimed Woodfords bought poor quality tile, especially given the pattern in which it was to be laid, *Trn*-1605, 1652-56, but Knight commended Woodfords' choice before installation. *Trn*-89.

The court initially found Knight had not "failed to install the tile flooring in a workmanlike manner." *Appx*-234. On reconsideration, however, the court held that because installation occurred in a "non-climate-controlled environment," Knight was 10 percent liable. Woodfords' flooring installer estimated repairs at $13,321, *Appx*-794, to which Knight stipulated, and the court awarded Woodfords $1,332.10 in damages. *Appx*-305.

L. Other Defects

Woodfords raised several additional defects, including problems with HVAC, the propane tank, and kitchen cabinets. *Appx*-225-27, 235-37, 243-44. After a review of the evidence, including expert and lay testimony, the court found Woodfords did not prove fault regarding them.

VI. Damages Based on Conceptual Repair Plan

The court awarded Woodfords a total of $279,990.05 for Knight's construction defects. *Appx*-308.

Knight claims that because Woodfords' experts based their cost estimates on Denoya's conceptual repair plan, the court's damages calculations were "mere speculation of a worse [sic] case scenario repair cost." KNIGHT'S BRF. 15, 27.

Both Denoya and Mayo testified that in the construction industry, engineers' conceptual repair plans are typically used as a basis for estimating costs, and that is their purpose. *Appx*-612-15; *Trn*-792, 882-83, 1306-07, 1365-66. McNair-Perry said basing estimates on Denoya's conceptual repair plan was not problematic. Though she did not offer a repair plan of her own, *Trn*-893-94, 2020, she provides similar plans to her clients for the same purpose. *Trn*-2159.

The court rejected Knight's assertion. *Appx*-207, 294-95.

VII. Woodfords Landscape Property, Cut Trees to Complete Backyard

In November or December 2015, before construction began, Woodfords had two meetings with Knight about the size and shape of the clearing for their house and yard. *Trn*-1173; *Appx*-249, 1159 (Knight: "We met at site and … had you identify additional trees that you wanted taken town to enlarge yard and accommodate home and driveway."). In those conversations, Knight recommended Woodfords should clear the trees "back to the rock wall." *Trn*-95; *Appx*-249-52.

The "rock wall" refers to an old stone wall running behind the houses on Woodfords' side of the road. *Appx*-1463; *Trn*-33, 98. Some of Woodfords' neighbors had cleared their trees back to it. *Trn*-1783-84. The court viewed a circa 2010 promotional video[6] about Victoria Ridge produced by Knight, in which he explained:

> This particular house is a 300-foot driveway. But we had a lot of trees growing all the way up and down around here. It was a much closer area. They opted to have a really big yard for their kids, so we actually took down about 200 trees all the way around the outside of the yard to give a nice big yard. Their plan is to put a pool in back here, and obviously, there's plenty of room for all that.

Trn-98 (video played, starting at 13:13); Day 1 (Excerpt) at 2; PROMOTIONAL VIDEO, Exh. 048. During Knight's voice-over, the video shows Knight walking a large grassy backyard pointing toward the same stone wall that is behind Woodfords' property. *Trn*-98.

In December 2015, Knight cut trees to prepare Woodfords' house site. *Trn*-99, 1166-70. As post-construction landscaping was required by the covenants, *Appx*-1093, and Woodfords wanted to finalize their backyard as part

[6]Inferring from evidence in the record, the portion of the promotional video showing the stone wall was filmed around the end of 2010.

of later landscaping, Knight's initial cut did not extend to the wall. *Trn*-96, 1172-73. In January 2016, Knight executed covenant approval for the trees he had previously cut. *Appx*-1192. It was the first in-writing covenant approval for any improvement in Victoria Ridge. *Trn*-276.

After Woodfords moved in, their landscaper produced a landscaping plan, and recommended a tree removal service. *Trn*-94-95, 1747, 1761.

In July 2017, Woodfords' tree service removed approximately 109 trees to the stone wall, thus forming the backyard. *Appx*-741, 249; *Trn*-93-94, 97. At the time, Woodfords had no written approval, *Trn*-173-74, 1667, 1691, but understood they had Knight's permission. *Trn*-299, 1172; *Appx*-249-53.

The next day, however, Knight issued a "cease and desist order" alleging "clear cutting" in violation of covenants.[7] Knight wrote "[a]ny removal of stumps … will be in direct violation of this order [and] will also be deemed an obvious attempt to hide evidence and scope of work." Knight directed Woodfords "start your research on sourcing 80' + trees, crane service, etc and have this ready." *Appx*-1357.

Knight threatened "[i]n the event [Woodfords] refuse[] to comply … and [take] required actions to rectify the violation, we fully intend to pursue prosecution of this violation." *Appx*-1357. Knight admonished:

> The enforcement of the covenants provide for full size trees (80+' – 120+') to be transplanted to replace the ones "clear cut." We fully intend to have the affected area returned to its previous state. Hopefully you have started your research for sources and cost. I have found these run in the $10,000 to $20,000 per tree depending o[n] species, plus crane and equipment services.

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[7]The covenant provides: "No 'clear cutting' of the lots will be allowed. No more than 15 trees per year can be removed without … written consent. Replacement of any trees … will be at the lot owners expense…. It will be at the developers sole discretion as to approvals on tree cutting." *Appx*-1094.

Appx-1389. Knight suggested "[t]he cost of replacing these trees is in the range of $600,000 (not including the cost of the trees, which are about $10,000 each) to $5,000,000." *Appx*-1425.

Simultaneous with this, Knight was building a house on the lot directly next-door. *Trn*-297-98, 1273-74. It violated the minimum size requirements also contained in the covenants. *Trn*-609-12. Knight said he built it despite its violation because he liked the owners and thought they would be "a great addition to the neighborhood." *Trn*-1268.

The stumps in Woodfords' backyard were finally pulled in August 2019 by the landscaper, who also spread loam, graded for proper drainage, seeded the backyard, and planted 34 nursery-raised trees along the stone wall and 38 others around the property. *Appx*-1252, 1254; *Trn*-1762-65.

STATEMENT OF THE CASE

In June 2017, Woodfords notified Knight pursuant to RSA 359-G, which encourages "out-of-court resolution of disputes between homeowners and contractors relative to residential construction defects." RSA 359-G:1; *Appx*-1284-1351. Knight responded in July and October, denying defects and blaming Woodfords for any problems. *Appx*-199-202, 1389-94, 1420.

Woodfords sued Knight for breaches of contract and implied warranties for construction defects and violation of the State building code, RSA 155-A. They also stated violation of the Consumer Protection Act, RSA 358-A (CPA), for Knight having misled them about his credentials, the lot, contracting of an engineer, and other misrepresentations. *Appx*-5. Knight counterclaimed, alleging tree cutting violated covenants, and sought replacement of the trees or $5.6 million in damages. *Appx*-60.

Between October 2020 and February 2021, the Hillsborough County Superior Court (*David A. Anderson*, J.), held a 13-day bench trial. There was testimony by the parties, tradespeople who built portions of the house, the town building inspector, and both parties' expert engineers regarding defects. The court took a view, *Trn*-91, and accepted 89 exhibits, including communications between the parties and others, expert reports, cost estimates, receipts, photos, and videos.

In finding Woodfords did not prove CPA violations, the court ruled the CPA does not apply when a practice is common within an industry. The court wrote:

> [Knight] did not consult with engineers and … this failure likely caused the code violations…. A clear theme that emerged at trial, however, is that builders in New Hampshire do not commonly engage structural engineers or build in exact compliance with the code.

> The court found [Knight] and Pouliot credible in their testimony that it is common for builders to engage lumber yards to input beam calculations into a computer program, and that these builders believe the beam designs to be "engineered" designs. Pouliot even testified that the designs are advertised as "engineered."… [Knight's] failure to construct in accordance with building code is certainly a breach of contract. The Court cannot say, however, that [Knight's] actions would "raise an eyebrow" of someone in the construction industry. To the contrary, [Knight's] conduct, while not ideal, appears to be common-place among builders in New Hampshire. The Court therefore finds that [Knight's] course of action while building the residence does not meet the rascality test.

Appx-247.

Woodfords requested reconsideration, *Appx*-265, which the court denied, *Appx*-305-06, reiterating "it is common practice among some contractors in the construction industry to focus on satisfying the building inspector, rather than meeting specific code requirements." *Appx*-305.

Regarding violation of warranties against defects, the court made findings in detail on the evidence of each defect. It addressed the nature of each, necessary repairs, and costs. The court found in favor of Woodfords on most defects and awarded them a total of $279,990.05, but denied attorney's fees regarding their defects claims. *Appx*-306, 308.

Knight alleged Woodfords cut trees in violation of covenants; Woodfords responded that Knight had permitted the cutting. *Appx*-67; *Trn*-100-03.

The court found Knight's prior permission extended back to the stone wall, and Knight "did not limit his consent in any way." *Appx*-252. It held Knight waived the in-writing provision of the covenants, and under equitable

estoppel, "[i]t would be wholly inequitable for the court to require [Woodfords] to replace the trees that [Knight] previously encouraged them to cut down." *Appx*-253. The court also found that Knight's responses to Woodfords were "threatening." *Appx*-252.

> The combative nature of these communications, coupled with [Knight's] references to [Woodfords'] claims, supports Woodfords' testimony that [Knight] previously encouraged the tree cutting and only objected later in an attempt to intimidate them.

Appx-251-52.

Accordingly, the court found against Knight on his counterclaim, and denied reconsideration. *Appx*-248-53, 298.

The covenants provide that "[a] prevailing defendant shall be entitled to payment of its attorney's fees and costs incurred in defending such an action by the plaintiff." *Appx*-1094. The court thus held that Woodfords, "as prevailing counterclaim defendants, are therefore entitled to reasonable attorney's fees and costs associated with their defense against this claim." *Appx*-306, 308.

Knight appealed, and Woodfords cross-appealed.

SUMMARY OF ARGUMENT

Knight repeatedly and knowingly misrepresented the nature of Woodfords' lot, his credentials as a contractor, the existence of building plans, clear span in the basement, employment of an architect or engineer, that the house met code, timing of issuance of a certificate of occupancy, and other matters. Any one of these acts was unfair and deceptive, and collectively created an overall false impression on which Woodfords relied.

Lies have consequences. Because Woodfords were dissuaded by Knight from hiring an architect or engineer, problems ensued. A structurally-sound building plan was never developed, the basement was poured so the house has permanent water handling issues, the roofs are overstressed, flooring must be replaced, and the house generally does not comply with the building code.

Woodfords take no position regarding the practices between construction industry professionals, and do not dispute that receiving beam calculations from lumberyards is generally efficient. But they were misled by Knight's deceptions about these matters, and should have been awarded damages under the Consumer Protection Act.

Regarding construction defects, it is apparent the court carefully considered the evidence in each defect area, finding for Knight in some, and Woodfords in others, depending upon the credibility of witnesses and the weight of corroborating evidence. The damage awards were based on the evidence, and deference to the trial court mandates affirmance.

As to the trees, Knight had previously encouraged Woodfords to cut them to the stone wall, thus waiving the covenants and making enforcement inequitable. Because the covenants provide for attorney's fees, the court's award was proper.

ARGUMENT

I. Knight's Conduct Justifies Consumer Protection Act Damages

A. CPA Bars Rascality in Commerce

Because "[i]t would be harmful for commerce … to allow … unethical and unscrupulous activity to occur," *Milford Lumber v. RCB Realty*, 147 N.H. 15, 19-20 (2001), in 1970 New Hampshire enacted the Consumer Protection Act (CPA). RSA 358-A. The CPA "regulate[s] business practices for consumer protection by making it unlawful for persons engaged in trade or commerce to use various methods of unfair competition and deceptive business practices." *Chase v. Dorais*, 122 N.H. 600, 601 (1982).

The CPA broadly bans "any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." RSA 358-A:2. The act contains a "non-exhaustive list" of unfair or deceptive acts. *Milford Lumber*, 147 N.H. at 20.

A "course of conduct," in addition to discrete events, may cumulatively constitute an unfair or deceptive practice under the CPA. A "series of acts … becomes a course of conduct violative of the CPA when the acts collectively constitute an unfair or deceptive act or practice." *Fat Bullies Farm v. Devenport*, 170 N.H. 17, 26 (2017).

While the CPA does not apply to isolated sales, it regulates those who are in the business of whatever they are selling. *See Hughes v. DiSalvo*, 143 N.H. 576 (1999) (one-time real estate sale); *Chase*, 122 N.H. at 600 (one-time car sale).

Because "it is impossible to establish a fixed definition of unfair or deceptive acts," *Barrows v. Boles*, 141 N.H. 382, 390 (1996), "[i]n determining which commercial actions, not specifically delineated, are covered by the act," this court applies the "rascality" test. *ACAS Acquisitions v. Hobert*, 155 N.H. 381, 402 (2007). Under the test, "[t]he 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." *Barrows*, 141 N.H. at 390. CPA damages are available even if there are no actual damages. *Becksted v. Nadeau*, 155 N.H. 615, 621 (2007). The rascality test is applied objectively. *Fat Bullies Farm,* 170 N.H. at 26-27.

Although the CPA does not address ordinary contract disputes, *Barrows*, 141 N.H. at 390, facts surrounding formation and breach of contract can meet the rascality standard. *State v. Moran*, 151 N.H. 450, 453-54 (2004).

In construing the CPA, this court commonly refers to the "similarly worded Massachusetts consumer protection statute." *Milford Lumber*, 147 N.H. at 17-18; *Fat Bullies Farm*, 170 N.H. at 24. This court defers to the reasonable findings of the trier of fact on conflicting testimony, *Barrows*, 141 N.H. at 391, but construes the statute *de novo*. *George v. Al Hoyt & Sons*, 162 N.H. 123 (2011)

B. Misrepresentations Prohibited

Misrepresentations under the CPA are statements that, even if they contain some "literal truth," "create[] an overall misleading impression." *Beer v. Bennett*, 160 N.H. 166, 170 (2010). Misrepresentations need not be purposeful; those made "with reckless disregard for their truth or correctness" violate the CPA. *Id.* at 171. Misrepresentations may be excused when the falsity would have been unreasonably difficult for the misleader to know. *Kelton v. Hollis Ranch*, 155 N.H. 666 (2007) (no party could have reasonably discovered the horse was not a gelding).

The CPA prohibits misrepresentations, including those related to inducement to purchase or improve real estate. *Snierson v. Scruton*, 145 N.H. 73 (2000) (misrepresentations by sellers and real estate agent about age and capacity of home's septic system relied upon by buyers and induced purchase); *see Heller v. Silverbranch Const.*, 376 Mass. 621, 382 N.E.2d 1065 (1978) (contractor misrepresented to purchaser that property did not have drainage problem); *McNeal v. Lebel*, 157 N.H. 458 (2008) (CPA inapplicable because misrepresentations by contractor about condition of driveway and suitability of site did not induce any action).

The CPA applies to on-going misrepresentations made post-contract when the promisor does not intend to perform. *State v. Sideris*, 157 N.H. 258, 263 (2008) (roofing contractor's misrepresentations of imminent performance); *Moran*, 151 N.H. at 454 (siding contractor's misrepresentations of imminent performance); *George v. Al Hoyt*, 162 N.H. at 130 (bridge-builder did not intend to complete bridge installation).

C. Knight's Lies Had Consequences

Knight lied, both before and after Woodfords hired him, about his supposed on-going relationship with an architect or an engineer. There was no such professional involved, and Knight had no intent to engage one.

Knight's lies had consequences. Woodfords were prepared at the time of the contract to hire an engineer to help them develop plans and inspect construction. Had Knight not lied, they would have retained one.

Had an architect or engineer been involved, there would have been an actual plan from which a structurally sound house was to be built. Such a plan would have ensured posts, beams, roof framing, and foundation were code-compliant. An engineer would have evaluated septic plans before the foundation was poured, to ensure proper elevations and drainage. An engineer may even have avoided the flooring problems by identifying inappropriate temperature and humidity. At the least, an architect or engineer would have facilitated communication between Knight and Woodfords, especially concerning technical questions about which Woodfords knew they had little experience or information.

In Knight's response to the Woodfords' RSA 359-G warranty notice, Knight gave Woodfords beam calculations, indicating the house had been approved by the Town, been engineered, and met code: "I have included the stamped *engineering* plans for the home. The frame plan meets (and exceeds) all building codes." *Appx*-1390 (emphasis added).

However, the "stamp" was affixed *after* construction, and attested only to the adequacy of the calc sheets, not fitness of installation or structure of the house. *Appx*-1367; *Trn*-1151-52. Knight's own engineer, whom he hired for the litigation, had excised that passage and recommended a more accurate description. *Compare Appx*-1389-90 *with Appx*-1363. The framing parts that Knight asserted "meets (and exceeds)" code were not actually installed, *Appx*-

588, 591, and not town-approved. *Trn*-581-84, 602. The court found these misrepresentations were purposeful. *Appx*-197.

Knight later acknowledged, *Trn*-1205, 1211-12, 1220, 1223, 1429-30, and his engineer testified, that it could not be certified the house met applicable building codes. *Trn*-1872, 1876-78, 1881-82.

Knight made several other material misstatements which were individually and collectively unfair and deceptive.

- Woodfords told Knight they wanted a flat backyard, but Knight delivered a site with swales, making active outdoor sports unsafe. Woodfords told Knight they wanted a house with no sump-pump, but Knight built a house that required one. The septic plan, which indicated a sump-pump, existed before Woodfords purchased, but Knight did not show it to Woodfords, and did not disclose that the house would rely on a sump-pump. By the time Woodfords learned of its existence, it was far too late to alter.
- Knight repeatedly lied about his qualifications. He claimed he had built 120 custom houses, when two-thirds of his projects were renovations and not custom homes. It was a substantial overstatement, and induced Woodfords' decision-making.

- Knight was responsible under the contract for developing building plans, for which he charged Woodfords over $7,000. Yet, there were never any final plans from which the house was to be built.

  Knight testified that, despite the contract, his process was to plan and build simultaneously:

  > I guess you could say, you know, with … the changes that were made, I would say that [Melvin's plan] was the framework for the home we built but there's certainly significant changes that we made to the structure during the – during the process of – of building it based on our back and forth with the customer. *Trn*-1063.

  Knight nonetheless blamed the lack of any plan on Woodfords, *Trn*-1063, attempting to put them in charge of structural decisions

between "lvl's vs steel in basement," *Appx*-1186, about which they had no knowledge or expertise.

Knight was fully aware of the lack of final building plans because, as enforcer of the Victoria Ridge covenant restrictions, he would have had to approve them. *Appx*-1094. At no point during planning or construction did Knight disclose to Woodfords that he was building without a plan, or that he was making it up as he went along. *Trn*-1618.

- Knight told Woodfords floors needed to be resolved before issuance of a certificate of occupancy, but the certificate had already issued.

These examples (of which there are more in the record) "collectively constitute an unfair or deceptive act or practice" "violative of the CPA." *Fat Bullies Farm*, 170 N.H. at 26. Knight's conduct also violated several statutorily delineated prohibitions. RSA 358-A:2, II, III, V, VII, IX.

This Court should accordingly reverse, and order CPA damages and costs based on Knight's course of unfair, willful, and deceptive conduct. RSA 358-A:10.

D. Court Focused on Wrong Players

"The purpose of the [CPA] is to ensure an equitable relationship between consumers and persons engaged in business." *Hughes*, 143 N.H. at 578 (quotation omitted). There is thus a distinction between CPA cases where both parties are in an industry and CPA cases where one party is in the business and the other is not.

When both parties regularly operate in the same industry and are likely to be equally "inured to the rough and tumble" in that "world of commerce," the CPA rarely applies because the conduct would be anticipated or expected between similarly-experienced parties.

For example, in *Hair Excitement v. L'Oreal U.S.A.*, 158 N.H. 363 (2009), a hair-products manufacturer dispatched undercover informants – a form of deception – to police product resale contracts. Everyone in the industry, however, including the plaintiff which was a chain of hair salons, knew of the practice.

Similarly, in *Hobin v. Coldwell Banker Residential Affiliates*, 144 N.H. 626 (2000), the CPA did not protect a franchisee when the franchisor sited a competing real estate sales office nearby, because both understood the operation of their industry. In *Axenics v. Turner Const.*, 164 N.H. 659, 676 (2013), the parties were a manufacturer of biotechnology products and builders of biotech facilities, and "there was no secret" in the industry that billing statements would be reviewed. In *State v. Priceline.com, Inc*., 172 N.H. 28 (2019), the defendant was an experienced aggregator of hotel reservations who understood how taxes and fees were bundled in their contracts. In *ACAS Acquisitions*, 155 N.H. at 402, there was an expectation between employer and employee that non-disclosure agreements would be enforced. In *Barrows*, 141 N.H. at 390, both parties were sophisticated – land developers versus equity financiers.

By contrast, when a business in a particular industry makes misrepresentations to consumers who are not regular participants in the misleader's industry, the CPA exists to "ensure an equitable relationship between consumers and persons engaged." *Hughes*, 143 N.H. at 578.

In *Beer v. Bennett*, 160 N.H. at 171, a car dealer advertised a restoration vehicle in "very good condition," promising it had "pretty vigorous performance." The car was actually missing crucial parts of its motor, which the seller could have easily ascertained, while the buyer was a hobbyist who could not have discovered defects until after delivery. This court held that the dealer "made representations, knowing he lacked sufficient knowledge to substantiate them, to induce the plaintiff's purchase." Such "reckless disregard of the truth of his statements satisfies" the CPA. *Id*. Likewise, in *Sideris*, 157 N.H. at 258 (roofing), and *Moran*, 151 N.H. at 454 (siding), the contractors' misrepresentations were to homeowners making one-time purchases in the contractors' industries.

Here, Knight, Belletetes, Coastal, and Pouliot were all participants in the building industry, expected to understand how business-to-business arrangements are made and the limitations of various players' services. They would mutually understand, for instance, as the court pointed out, that Knight's conduct "appears to be commonplace among builders in New Hampshire." *Appx*-247. Woodfords take no position on industry practices.

But Woodfords were one-time consumers of custom-home services, with no construction or contracting experience. They had no knowledge – and no reason to raise questions – about services lumberyards provide to contractors, the expertise of lumberyards' subcontractors, or whether Knight's attestation of having professionals associated actually meant something less.

By basing its holding on the "commonplace" nature of business-to-business arrangements in the contracting industry, the court focused on the

wrong players. Rather than looking at what is commonplace within the industry, the court should have focused on Knight's interactions with Woodfords. Had its attention been there, the court would have recognized the rascality and repercussions of Knight's misrepresentations about industry practices and his own conduct.

Because the purpose of the CPA is "to ensure an equitable relationship *between consumers and persons engaged* in business," *Hughes*, 143 N.H. at 578 (emphasis added), the court misconstrued the statute, which this court reviews *de novo*. This court should reverse, and order CPA damages based on Knight's course of unfair, willful, and deceptive conduct. RSA 358-A:10.

II. Court Carefully Assessed Defects

Knight argues that because he believes his expert more worthy than Woodfords' "so called experts," the court erred by crediting their opinions and recommendations. KNIGHT'S BRF. 24-25.

Experts were clearly necessary because the claims involved issues "particularly esoteric or … so distinctly related to a particular science, occupation, business, or profession … beyond the ability of the average layperson to understand." *Schneider v. Plymouth State College*, 144 N.H. 458, 464 (1999).

A. Experts Properly Admitted

Before trial, Knight moved to disallow the testimony of Woodfords' experts, which the court treated as a *Daubert* motion, and denied. *Appx*-80, 108. *See Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

To admit expert testimony, the court must find it is "based upon sufficient facts or data, … is the product of reliable principles and methods, … and [t]he witness has applied the principles and methods reliably to the facts of the case." RSA 516:29-a; *see also* N.H. ADMIN R. Eng. 501.03; N.H. ADMIN R. Arch. 501.03.

"[T]he overall purpose of Rule 702 and RSA 516:29-a is to ensure a fact-finder is presented with reliable and relevant evidence, not flawless evidence." *Moscicki v. Leno*, 173 N.H. 121, 125 (2020).

> The trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony. Although the proponent of an expert witness bears the burden of proving the admissibility of the expert's testimony, the burden is not especially onerous because Rule 702 has been interpreted liberally in favor of the admission of expert testimony.

Stachulski v. Apple New England, LLC, 171 N.H. 158, 164 (2018) (quotations and

citations omitted); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) ("*Daubert*'s general holding – setting forth the trial judge's general gatekeeping obligation – applies not only to scientific knowledge, but also to testimony based on technical and other specialized knowledge.") (quotations omitted).

The admissibility of expert evidence is within the discretion of the trial court, *Gulf Insurance v. AMSCO*, 153 N.H. 28, 33 (2005), and "[t]he mere fact that two experts disagree is not grounds for excluding one's testimony." *Feliciano-Hill v. Principi*, 439 F.3d 18, 25 (1st Cir. 2006).

Woodfords' experts were obviously qualified professionals; they had studied the building and applied engineering knowledge, and had the experience to generate reliable conclusions and recommendations. Despite his *Daubert* motion, by assenting to their qualifications at trial, Knight waived any objection to admissibility. *Eduardo L.*, 136 N.H. 678, 689 (1993) ("Because the defendant … failed to contest the qualifications of the State's expert, any objection grounded in this issue shall be deemed waived.") (quotation omitted).

To the extent Knight contests the admissibility of Woodfords' experts' reports and testimony, or alleges their opinions were improperly influenced, KNIGHT'S BRF. 16, 23-27, 31-33, this court should affirm admissibility and defer to the court's factual assessments.

B. Resolution of Conflicting Evidence

While Knight mentions *de novo* review of construction defects, he offers no more than sufficiency-of-the-evidence arguments, which require deference to trial court findings.

"When faced with conflicting [expert] testimony, a trier of fact is free to accept or reject an expert's testimony, in whole or in part." *Appeal of New Hampshire Elec. Coop.*, 170 N.H. 66, 74 (2017).

> In reviewing a trial court's decision rendered after a trial on the merits, we uphold the trial court's factual findings and rulings unless they lack evidentiary support or are legally erroneous. We do not decide whether we would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence. 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.

O'Malley v. Little, 170 N.H. 272, 275 (2017) (quotations and citations omitted).

Here, the trial court commented on its own credibility determinations, noting "this case … is going … down to the fine details that some of the witnesses have gotten into." *Trn*-2040. It wrote:

> The court recognizes that it found multiple witnesses credible with respect to some issues and non-credible with respect to other issues. Several witnesses testified about several different alleged deficiencies in the home over the course of many days. The court assessed the credibility of witnesses separately with respect to different issues depending upon its own observations of the witnesses' demeanor when speaking about different areas. The court also considered whether accompanying exhibits or other witnesses

> supported each witnesses' testimony. The nature and complexity of this case prevented the court from making general credibility determinations that applied to all issues.

Appx-297.

In each defect area, the court assessed credibility of witnesses, evidence of defects, and documentary corroboration. The court's diligence is manifest by having credited Knight's witnesses for some issues and Woodfords' for others, by its finding liability on some issues and not others, and by its percentage allocation of fault when both parties contributed. Given the level of detail, the conflicting evidence, and the deferential standard of review, this court should affirm.

III. Construction Defects Damages Reliably Based on Evidence

Knight does not dispute the court's calculation of damages, but appears to argue that basing damages on the estimated cost of implementing Denoya's "conceptual repair plan" is unreliable. KNIGHT'S BRF. 27.

The ordinary way to calculate damages is estimating the cost of fixing the problem the defendant caused.

> In breach of contract cases, the purpose of awarding damages is not merely to restore the plaintiff to his former position, but to give him the benefit of his bargain to put him in the position he would have been in if the contract had been fulfilled. When a contractor breaches his agreement by defective performance, that purpose is effectuated by using one of two measures of damages, depending upon the circumstances of each case. The ordinary measure of damages is the cost of remedying the defective work.

Goodell Construction v. Monadnock Skating Club, 121 N.H. 320, 322 (1981) (quotations and citations omitted); *see also A.B.C. Builders v. American Mutual Insurance*, 139 N.H. 745, 751 (1995).

Damages must be based on evidence in the record. *Hangar One v. Davis Assocs.*, 121 N.H. 586, 590 (1981). There must be an "indication that the award of damages was reasonable" and this court will not overturn damages calculations unless they are "clearly erroneous." *McNeal*, 157 N.H. at 466.

When there is "no precise legal measure for the recovery of damages, the amount to be awarded is largely discretionary." *Miami Subs v. Murray Family Trust*, 142 N.H. 501, 517 (1997). This includes when repair estimates are based on an accepted methodology within an industry. *See Bezanson v. Hampshire Meadows Development*, 144 N.H. 298 (1999) ("Because the payment schedule does not necessarily reflect the amount of the contract completed, the court properly applied an accepted method of calculating damages."). There are

innumerable pricing methodologies in the construction industry. *See* Bruner & O'Connor, *Construction Law* §§ 6:96 *et seq.* (2022).

Courts generally accept engineers' conceptual plans as a basis for estimating repair costs. *Alexander v. Sanford*, 325 P.3d 341, 350 (Wash. 2014) (engineer's "repair plan" used as cost base for estimates in residential defects); *see also Madonna v. Tamarack Air, Ltd*., 298 P.3d 875, 879 (Alaska 2013) (repair plan used to estimate cost to repair damaged airplane); *Bonner v. City of Brighton*, 848 N.W.2d 380, 394 (Mich. 2014) (cost estimate held not reliable in absence of repair plan).

In this case, Denoya and Mayo both testified that conceptual repair plans are the ordinary way contractors estimate costs when engineers are involved; McNair-Perry did not disagree. Only the framer, Guild, who showed some nescience about engineers generally, did not concur.

The court reached its damages awards by estimating the cost of repair, hewing to one or the other party's cost estimates depending upon the credibility of witnesses for each defect area, and allocating damages according to percentage of fault. Its calculations were based on evidence, grounded in industry practice, and reasonable. This court should accordingly affirm.

In addition, this court should order Knight pay Woodfords' attorney's fees. Knight obdurately contested construction defects, even after his own engineer told him – before his RSA 359-G response – that the house was not structurally adequate due to how it was built. *Harkeem v. Adams*, 117 N.H. 687, 690-91 (1977).

IV. Woodfords Permissibly Cut Trees

A. Knight Waived Covenants

"A covenant, as used in the context regarding the use of property, is an agreement by one person … to do or refrain from doing something enforceable by another." *Carter Country Club v. Carter Community Bldg. Ass'n*, 174 N.H. 686, 699 (2021).

Restrictive covenants may be waived by the entity with authority to enforce. *Rodrigue v. LaFlamme*, 122 N.H. 966 (1982); *Nashua Garden Corp. v. Gordon*, 118 N.H. 379, 381 (1978), *cf.*, *Shaff v. Leyland*, 154 N.H. 495 (2006) (lacking authority). Knight conceded he had authority to waive Victoria Ridge covenants. *Trn*-1266. Covenants can be waived explicitly, *Concord Orthopaedics v. Forbes*, 142 N.H. 440, 444 (1997) (waiver during Supreme Court oral argument), or implicitly by inaction of the parties. *Chase v. Joslin Mgmt. Corp.*, 128 N.H. 336, 337 (1986) ("The record indicates that these covenants were waived to some extent.").

A requirement that a covenant waiver be in writing can itself be waived, *Rodrigue*, 122 N.H. at 966, if that is the intent of the parties, which "may itself be implied from the conduct of the parties." *Prime Financial Group v. Masters*, 141 N.H. 33, 37 (1996).

"Waiver is a question of fact and [this court] will not overturn the trial judge's determination unless clearly erroneous." *South Willow Properties v. Burlington Coat Factory*, 159 N.H. 494, 499 (2009).

Knight encouraged Woodfords to cut the trees in their backyard to the stone wall. The reason it was not done during Knight's initial cutting was because Woodfords planned landscaping later, in accord with the contract. Nonetheless, Woodfords understood they had Knight's permission.

Knight consented to at least some of Woodfords' neighbors cutting to the stone wall – even exulting it in his promotional video – and conducted at

least one of those cuttings himself, all without any explicit covenant waivers. Knight himself built a neighbor's house adjacent to Woodfords' which violated the minimum-size covenant, again without any explicit covenant waiver.

There is sufficient evidence in the record to support the court's finding that Knight waived the tree-cutting and waiver-in-writing requirements, and this court should affirm.

B. Prior Permission Estopped Covenant Enforcement

"Equitable estoppel serves to forbid one to speak against his own act, representations or commitments communicated to another who reasonably relies upon them to his injury." *J.G.M.C.J. Corp. v. C.L.A.S.S., Inc.*, 155 N.H. 452, 462 (2007).

> A party asserting equitable estoppel must prove four elements: (1) a representation or concealment of material facts made with knowledge of those facts; (2) the party to whom the representation was made must have been ignorant of the truth of the matter; (3) the representation must have been made with the intention of inducing the other party to rely upon it; and (4) the other party must have been induced to reasonably rely upon the representation to his or her injury.

Zannini v. Phenix Mut. Fire Ins. Co., 172 N.H. 730, 738 (2019).

Knight represented to Woodfords they could cut back to the stone wall, Woodfords had no reason to doubt their permission, Knight gave his permission with the intent that Woodfords cut the trees, and Woodfords relied on Knight's permission.

Even if Knight did not waive the covenants, the court was correct in equitably estopping enforcement, and this court should affirm.

C. Covenants Grant Attorney's Fees

"New Hampshire generally follows the American Rule; that is, absent statutorily or judicially created exceptions, parties pay their own attorney's fees." *Shelton v. Tamposi*, 164 N.H. 490, 501 (2013).

> A prevailing party may be awarded attorney's fees when that recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees.

Blouin v. Sanborn, 155 N.H. 704, 708 (2007). When there is an explicit attorney's fees agreement between the parties, however, this court enforces the provision. *See*, *e.g.*, *Holloway Auto. Group v. Giacalone*, 169 N.H. 623, 631 (2017) (reversing denial of attorney's fees specified in franchise agreement); *Turner v. Shared Towers*, 167 N.H. 196, 208 (2014) (reversing denial of fees specified in loan agreement)

In this case, the covenants provided that "[a] prevailing defendant shall be entitled to payment of its attorney's fees and costs incurred in defending such an action by the plaintiff." *Appx*-1094. The court held that "as prevailing counterclaim defendants, [Woodfords] are therefore entitled to reasonable attorney's fees and costs associated with their defense against this claim." *Appx*-306, 308.

This court defers to the trial court regarding awards of attorney's fees, including in cases involving construction disputes. *LaMontagne Builders v. Brooks*, 154 N.H. 252, 259 (2006).

> [This court] will not overturn a trial court's award of attorney's fees unless it is an unsustainable exercise of discretion. In applying this standard, we keep in mind the substantial deference given to the trial court's decision on attorney's fees, and uphold the decision if the record provides some support for it.

Bennett v. Hampstead, 157 N.H. 477, 483 (2008); *Shelton*, 164 N.H. at 501.

Accordingly, this court should affirm the attorney's fees award for Woodfords' defending Knight's covenant counterclaim.

CONCLUSION

The damages awarded to Woodfords for Knight's violation of his express and implied warranties provided minimal compensation – covering only the direct cost of repairing some of the home's construction defects. *See Mentis Sciences v. Pittsburgh Networks,* 173 N.H. 584, 587 (2020). Woodfords have not been compensated, however, for the time and money they have spent on engineers and lawyers to prove the defects, nor for the uncertainty regarding the future value of a house that does not meet code. As these losses were caused by a pattern of deception and could have been avoided, this court should reverse and order payment of damages, costs, and fees, pursuant to the Consumer Protection Act.

Regarding construction defects, it is apparent the trial court carefully considered the evidence in each area, finding for Knight in some and Woodfords in others, depending upon the credibility of witnesses and the nature of corroborating evidence. The damages awards were based on reliable evidence, and deference to the trial court mandates affirmance.

Knight counterclaimed for Woodfords' having cleared trees to form their backyard. But he had previously encouraged cutting to the stone wall, thus waiving the covenants and making it inequitable for the court to enforce them. Because the covenants provide for attorney's fees, the court's award should be affirmed.

Respectfully submitted,

Jennifer and Martin Woodford,
and Woodford Family Trust,
By their Attorney,
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Dated: August 1, 2022

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CERTIFICATIONS AND REQUEST FOR ORAL ARGUMENT

Oral argument is requested.

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 13,985 words, exclusive of those portions which are exempted.

I further certify that on August 1, 2022, copies of the foregoing will be forwarded to Bruce J. Marshall, Esq. via the court's efiling system.

Dated: August 1, 2022

Joshua L. Gordon, Esq.

ADDENDUM

1. Order (on merits) (June 24, 2021) 72
2. Order (on reconsideration) (July 26, 2021) 136
3. Order (denying *Daubert* motion) (Dec. 19, 2019) 153