STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

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| **IN THE MATTER OF:** | ) | |
| Local Government Center, Inc., *et al.* | ) | Case No: C-2011000036 |

**RESPONDENT JOHN ANDREWS' MOTION TO DISMISS HIM FROM COUNTS I AND II FOR FAILURE TO STATE A CAUSE OF ACTION**

Respondent John Andrews, by and through his counsel, Orr & Reno, P.A., moves for an Order dismissing him from Counts I and II of the Amended Staff Petition for failure to state a cause of action and states the following:

**Amended Petition**

1. On February 17, 2012, the New Hampshire Bureau of Securities Regulation ("BSR") filed its Amended Petition. The Amended Petition contains the following six counts:

Count I – Operation of a Pooled Risk Management Program in Violation of R.S.A. 5-B:5, Improper Corporate Structure;

Count II - Operation of a Pooled Risk Management Program in Violation of R.S.A. 5-B:5, Failure to Return Surplus Funds to Members;

Count III – Sale of Unregistered Securities by Unlicensed Broker-Dealers, Issuer-Dealers, and Agents in Violation of R.S.A. 421-B:6 and 11;

Count IV – Knowing or Negligent Aid in the Sale of Unregistered Securities by Unlicensed Broker-Dealers, Issuer-Dealers, and Agents by the Individual Respondents in Violation of R.S.A. 421-B:26, III-a;

Count V – Fraud, Deceit and Material Omissions in Connection with the Offer or Sale of Securities in Violation of R.S.A. 421-B:3; and

Count VI – Civil Conspiracy.

## Legal Standard for Dismissal for Failure to State a Cause of Action

2. The standard of review for consideration of a motion to dismiss for failure to state a cause of action is "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Beane v. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (citation omitted). "This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law." *Id.* (citation omitted).

3. The decision-maker need not accept allegations in a complaint that are merely conclusions of law. *Id.* "Dismissal is appropriate '[i]f the facts pled do not constitute a basis for legal relief.'" *Id.* (quoting *Hobin v. Coldwell Banker Residential Affiliates*, 144 N.H. 626, 628 (2000)).

## The Facts Pled in Counts I and II Do Not Constitute a Basis for Legal Relief Against Respondent John Andrews

### Count I

4. Count I is entitled "Operation of a Pooled Risk Management Program in Violation of R.S.A. 5-B:5, Improper Corporate Structure." In addition to "restat[ing] and incorporate[ing]" the first 72 paragraphs of the Amended Petition, Count I includes 14 paragraphs of specific allegations.

5. Paragraph 74 includes some of BSR's interpretation of RSA 5-B:5, I(b) and (e), as well as an allegation of conduct by "[t]he LGC entities." Paragraph 75 alleges conduct related to the transfer of assets owned by the HealthTrust and Prop. Liab. Trust Pools. As LGC's former executive director, Mr. Andrews was not empowered to, and is not alleged to have, transferred the assets. *See* Attachment A, LGC Bylaws, Article VIII, Duties and Powers of the Board of Directors, Section 8.2, Power of the Directors, and Section 8.4, Powers of the Executive Director.

6. Paragraph 76 alleges conduct by "LGC Parent." Paragraph 77 contains allegations about "LGC's current structure."

7. Paragraphs 78 and 79 contain allegations about "the LGC Board." Paragraph 80 contains BSR's view of the purpose for LGC's "parent-subsidiary holding company structure with a single board overseeing operations of the multiple 5-B Pools." Paragraph 81 contains an allegation of conduct by "the LGC Board members, including the individual Respondents named in this action." Mr. Andrews is not alleged to have been, and never was, a Board member.

8. There is no conduct alleged in paragraphs 82 and 83. The paragraphs offer BSR's views of the impact and purpose of a single board for multiple risk pools.

9. Paragraph 84 contains an allegation about the LGC Bylaws. While the paragraph alleges that "the LGC Board members relied on the direction of Mr. Andrews, Ms. Carroll, legal counsel, and professional consultants when deciding how to manage Member funds held in the 5-B pools[,]" the only conduct alleged is that of the LGC Board and its members.[1]

10. Paragraph 85 states some of BSR's views on the "intent and purpose" of RSA 5-B:5, I(b) and (e). Paragraph 86 alleges that "HealthTrust, LLC and LGC Prob. Liab. Trust, LLC are in direct violation of R.S.A. 5-B:5, I(b) and (e)." The paragraph also alleges conduct by LGC in 2011, conduct with which Mr. Andrews is not alleged to have participated.

[1] BSR should not be heard at this date to argue that the quoted section of paragraph 84 equates to charging Mr. Andrews with aiding, abetting, soliciting or facilitating the conduct alleged in the Amended Petition. The due process right ensured by the Fourteenth Amendment to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution requires fair notice of the government's claims and the evidence the government intends to introduce in support of its claims. *See Petition of Kilton*, 156 N.H. 632, 638-39 (2007). The quoted language accomplishes neither.

11. Paragraph 87 contains some of BSR's views regarding the purpose of RSA 5-B. While reference is made to "directing Member funds to pay non-Pool expenses, including the expenses of separate 5-B Pools," there is no conduct alleged. Finally, the paragraph offers BSR's view "LGC's single-board and bylaw holding company structure" does not comply with RSA 5-B.

12. As described in the preceding paragraphs, Count I does not allege any conduct by Mr. Andrews. Accordingly, "'the facts pled do not constitute a basis for legal relief[,]'" *see Beane*, 160 N.H. at 711 (quoting *Hobin*, 144 N.H. at 628), and therefore, Count I is not "reasonably susceptible of a construction that would permit recovery." *See Beane*, 160 N.H. at 711 (citation omitted). Count I should be dismissed against Mr. Andrews.

**Count II**

13. Count II is entitled "Operation of a Pooled Risk Management Program in Violation of R.S.A. 5-B:5, Failure to Return Surplus Funds to Members." In addition to "restat[ing] and incorporate[ing]" the first 87 paragraphs of the Amended Petition, Count II includes 16 paragraphs of specific allegations.

14. Paragraphs 89-91 quote RSA 5-B:5, I(c) and offer some of BSR's interpretation of the statute. Paragraphs 89-91 do not contain factual allegations regarding any of the Respondents. Paragraph 92 contains allegations of conduct by "the LGC Board" and HealthTrust, LLC. Paragraph 93 contains a legal opinion and states a BSR interpretation of RSA 5-B:5, I(c).

15. Paragraphs 94-97 contain allegations of the failure to return surplus funds, the misappropriation of assets for non-Pool purposes and the transfer of assets between

risk pools. As LGC's former executive director, Mr. Andrews was not empowered to, and is not alleged to have, failed to return funds, misappropriated assets or transferred assets. *See* Attachment A, LGC Bylaws, Article VIII, Duties and Powers of the Board of Directors, Section 8.2, Power of the Directors, and Section 8.4, Powers of the Executive Director.

16. Paragraph 98 includes allegations about conduct by the LGC Board and statements about "LGC's non-cash investments." Paragraph 99 alleges that "LGC's rate stabilization program is an actuarial formula" that results in surplus funds not being returned to Members. Paragraph 100 alleges conduct by LGC's Board and the retention of surplus funds by LGC. As explained in the preceding paragraph, Mr. Andrews was not empowered to, and is not alleged to have failed to return funds. *See* Attachment A, LGC Bylaws, Article VIII, Duties and Powers of the Board of Directors, Section 8.2, Power of the Directors, and Section 8.4, Powers of the Executive Director.

17. Paragraphs 101 and 103 contain legal arguments about the interplay of municipal budget laws on the one hand, and LGC's rate stabilization and alleged retention of surplus funds on the other. Paragraph 104 contains only a legal conclusion and a request for relief.

18. As described in the preceding paragraphs, Count II does not allege any conduct by Mr. Andrews. Accordingly, "'the facts pled do not constitute a basis for legal relief[,]'" *see Beane*, 160 N.H. at 711 (quoting *Hobin*, 144 N.H. at 628), and therefore, Count II is not "reasonably susceptible of a construction that would permit recovery." *See Beane*, 160 N.H. at 711 (citation omitted). Count II should be dismissed against Mr. Andrews.

## Prayer for Relief

For the foregoing reasons, Respondent John Andrews requests an Order dismissing him from Counts I and II of the Amended Petition for failure to state a cause of action.

Respectfully Submitted,

JOHN ANDREWS

Date: 3/12/12 By: _____

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded this day via electronic mail to all counsel of record.

_____
Michael D. Ramsdell, Esq.

**Alan F. Beane v. Dana S. Beane & Co., P.C. & a.**
**SUPREME COURT OF NEW HAMPSHIRE**
**160 N.H. 708; 7 A.3d 1284; 2010 N.H. LEXIS 106**
**No. 2009-431**
**March 31, 2010, Argued**
**September 22, 2010, Opinion Issued**

**Editorial Information: Subsequent History**

Released for Publication December 13, 2010.

**Editorial Information: Prior History**

.Beane v. Dana S. Beane & Co., P.C., 2009 N.H. Super. LEXIS 20 (2009)

**Disposition:**
Affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff client brought suit against defendants, an accountant and his firm, alleging malpractice. The Belknap Superior Court (New Hampshire) granted defendants' motion to dismiss the suit as time-barred under RSA 508:4 (2010). Plaintiff appealed.The trial court properly dismissed an accounting malpractice suit as time-barred under RSA 508:4. Plaintiff knew or should have discovered the causal relationship between defendants' negligence and the harm caused him, at the latest, when the IRS issued a notice of deficiency.

**OVERVIEW:** The court first held that because the issues before the trial court were limited to legal analysis of the facts asserted by plaintiff, an evidentiary hearing on the motion to dismiss was not required. The trial court did not err in concluding that the action was time-barred. The record supported the finding that plaintiff knew or should have discovered the causal relationship between defendants' negligence and the harm caused him, at the latest, on April 5, 2005, when plaintiff lost his administrative appeal before the Internal Revenue Service (IRS) and the IRS issued a notice of deficiency. For similar reasons, plaintiff's fraudulent concealment argument also failed. Assuming that defendants were fiduciaries, there was no support in New Hampshire case law for the proposition that a limitations period was tolled until the fiduciary disclosed his misconduct. Moreover, by April 5, 2005, plaintiff was on notice of the causal connection between his harm and defendants' conduct. The facts did not justify the application of the continuing representation rule, as plaintiff engaged two law firms after the deficiency notice to evaluate the deficiency and initiate a tax court proceeding.

**OUTCOME:** The court affirmed the judgment.

**LexisNexis Headnotes**

***Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss***
***Civil Procedure > Appeals > Standards of Review > General Overview***

In reviewing an order granting a motion to dismiss, an appellate court assumes the truth of the facts as alleged in the plaintiff's pleadings and construes all reasonable inferences in the light most favorable to the

plaintiff. It will uphold the granting of the motion to dismiss if the facts pleaded do not constitute a basis for legal relief.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss***

A trial court's evaluation of a motion to dismiss does not necessarily require an evidentiary hearing. The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery. This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. Dismissal is appropriate if the facts pled do not constitute a basis for legal relief. The trial court may also consider documents attached to the plaintiff's pleadings or documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint. The trial court need not accept allegations in the writ that are merely conclusions of law.

***Governments > Legislation > Statutes of Limitations > Time Limitations***

Statutes of limitation place a limit on the time in which a plaintiff may bring suit after a cause of action accrues. Although a cause of action arises as soon as all of the necessary elements are present, it does not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, both the fact of an injury and the cause thereof.

***Governments > Legislation > Statutes of Limitations > Time Limitations***

See RSA 508:4, I (2010).

***Governments > Legislation > Statutes of Limitations > Pleading & Proof***
***Governments > Legislation > Statutes of Limitations > Tolling***
***Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule***

The statute of limitations constitutes an affirmative defense, and the defendant bears the burden of proving that it applies in a given case. That burden, however, is met by a showing that the action was not brought within three years of the act or omission complained of. RSA 508:4, I (Supp. 1994). Once the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of raising and proving that the discovery rule is applicable to an action otherwise barred by the statute of limitations. The statutory discovery rule is designed to provide relief in situations where the plaintiff is unaware of either his injury or that the injury was caused by a wrongful act or omission.

***Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule***

The discovery rule is a two-pronged rule requiring both prongs to be satisfied before the statute of limitations begins to run. First, a plaintiff must know or reasonably should have known that it has been injured; and second, a plaintiff must know or reasonably should have known that its injury was proximately caused by conduct of the defendant. Thus, the discovery rule exception does not apply unless the plaintiff did not discover, and could not reasonably have discovered, either the alleged injury or its causal connection to the alleged negligent act.

***Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule***

Although the discovery rule tolls the limitations period until a plaintiff discovers, or should reasonably have discovered, the causal connection between the harm and the defendant's negligent or wrongful act, this rule is not intended to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself. Rather, that the plaintiff could reasonably discern that he suffered some harm caused by the defendant's conduct is sufficient to render the discovery rule inapplicable. Further, a plaintiff need not be certain of this causal connection; the possibility that it existed will suffice to obviate the protections of the

discovery rule.

*Governments > Legislation > Statutes of Limitations > Tolling*

The fraudulent concealment rule states that when facts essential to the cause of action are fraudulently concealed, the statute of limitations is tolled until the plaintiff has discovered such facts or could have done so in the exercise of reasonable diligence.

*Torts > Intentional Torts > Breach of Fiduciary Duty > Defenses*
*Torts > Procedure > Statutes of Limitations > Tolling > General Overview*

There is no support in New Hampshire case law for the proposition that a limitations period is tolled in fiduciary cases until the fiduciary discloses his or her misconduct.

*Torts > Malpractice & Professional Liability > Attorneys*
*Torts > Procedure > Statutes of Limitations > Accrual of Actions > Continuous Torts*

Under the continuing representation rule, which other jurisdictions have established in the context of legal malpractice actions, a client's cause of action against his attorney does not accrue until the attorney ceases representing the client. The rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.

*Contracts Law > Remedies > General Overview*

Recoupment refers to the defendant's right, in the same action, to reduce or eliminate the plaintiff's claim, either because the plaintiff has not complied with some cross-obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract.

**Headnotes**

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES:

1.**1. Pleading-Motion to Dismiss-Hearing**

A trial court's evaluation of a motion to dismiss does not necessarily require an evidentiary hearing. The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery. This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. Dismissal is appropriate if the facts pleaded do not constitute a basis for legal relief. The trial court may also consider documents attached to the plaintiff's pleadings or documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint. The trial court need not accept allegations in the writ that are merely conclusions of law.

2.**2. Pleading-Motion to Dismiss-Particular Cases**

The trial court held a hearing on a motion to dismiss, accepted the truth of plaintiff's allegations, and ruled based upon plaintiff's pleadings. Because the issues before the trial court were limited to legal analysis of the facts asserted by plaintiff, an evidentiary hearing was not required.

3.**3. Limitation of Actions-Accrual of Actions-Discovery Rule**

Statutes of limitation place a limit on the time in which a plaintiff may bring suit after a cause of action accrues. Although a cause of action arises as soon as all of the necessary elements are present, it does

not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, both the fact of an injury and the cause thereof.

4.**4. Limitation of Actions-Accrual of Actions-Discovery Rule**

The statute of limitations constitutes an affirmative defense, and the defendant bears the burden of proving that it applies in a given case. That burden, however, is met by a showing that the action was not brought within three years of the act or omission complained of. Once the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of raising and proving that the discovery rule is applicable to an action otherwise barred by the statute of limitations. The statutory discovery rule is designed to provide relief in situations where the plaintiff is unaware of either his injury or that the injury was caused by a wrongful act or omission. RSA 508:4, I.

5.**5. Limitation of Actions-Accrual of Actions-Discovery Rule**

The discovery rule is a two-pronged rule requiring both prongs to be satisfied before the statute of limitations begins to run. First, a plaintiff must know or reasonably should have known that it has been injured; and second, a plaintiff must know or reasonably should have known that its injury was proximately caused by conduct of the defendant. Thus, the discovery rule exception does not apply unless the plaintiff did not discover, and could not reasonably have discovered, either the alleged injury or its causal connection to the alleged negligent act.

6.**6. Limitation of Actions-Accrual of Actions-Discovery Rule**

Although the discovery rule tolls the limitations period until a plaintiff discovers, or should reasonably have discovered, the causal connection between the harm and the defendant's negligent or wrongful act, this rule is not intended to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself. Rather, that the plaintiff could reasonably discern that he suffered some harm caused by the defendant's conduct is sufficient to render the discovery rule inapplicable. Further, a plaintiff need not be certain of this causal connection; the possibility that it existed will suffice to obviate the protections of the discovery rule.

7.**7. Limitation of Actions-Accrual of Actions-Particular Cases**

In an accounting malpractice case, the trial court did not err when it found that plaintiff's claim arose no later than April 5, 2005, the date of an Internal Revenue Service (IRS) notice of deficiency. The record supported the trial court's finding that plaintiff knew or in the exercise of reasonable diligence should have discovered the causal relationship between the defendants' negligence and the harm caused him in late 2002 when the IRS increased his tax liability for 1998 and 1999, or when the IRS issued its final report on December 21, 2004, or, at the latest, when he lost his administrative appeal on April 5, 2005. RSA 508:4.

8.**8. Limitation of Actions-Accrual of Actions-Particular Cases**

The fraudulent concealment rule states that when facts essential to the cause of action are fraudulently concealed, the statute of limitations is tolled until the plaintiff has discovered such facts or could have done so in the exercise of reasonable diligence. Here in an accounting malpractice case, the rule was inapplicable because, as the trial court found, plaintiff knew, or in the exercise of reasonable diligence should have discovered the causal relationship between defendants' negligence and the harm caused at the latest by April 5, 2005, the date of an Internal Revenue Service notice of deficiency.

9.**9. Limitation of Actions-Accrual of Actions-Particular Cases**

Even if accountants were in a fiduciary relationship with plaintiff, there was no support in New Hampshire case law for the proposition that a limitations period was tolled in fiduciary cases until the fiduciary disclosed his or her misconduct. Moreover, despite defendants' failure to disclose their alleged errors, the record showed that by April 5, 2005, at the latest, plaintiff was on notice of the causal connection between his harm and defendants' conduct.

10.**10. Limitation of Actions-Accrual of Actions-Particular Cases**

Under the continuing representation rule, which other jurisdictions have established in the context of legal malpractice actions, a client's cause of action against his attorney does not accrue until the attorney ceases representing the client. The rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. The facts in the accounting malpractice case did not warrant the adoption of the rule. Plaintiff engaged two law firms after receiving a deficiency notice to evaluate the deficiency and initiate a tax court proceeding. Thus, ``innocent reliance'' on defendants' professional services was no longer reasonably warranted.

11.**11. Pleading-Joinder of Claims-Recoupment**

Recoupment refers to the defendant's right, in the same action, to reduce or eliminate the plaintiff's claim, either because the plaintiff has not complied with some cross-obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract. Any claim for recoupment here was not properly before the trial court, as the claim did not involve the same action as the present one.

**Counsel** *William S. Gannon, PLLC*, of Manchester (*William S. Gannon* on the brief and orally), for the plaintiff.

*Nelson, Kinder, Mosseau & Saturley, P.C.*, of Manchester (*E. Tupper Kinder & a.* on the brief, and *Kenneth E. Rubinstein* orally), for the defendants.

**Judges:** CONBOY, J. BRODERICK, C.J., and DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Opinion**

**Opinion by:** CONBOY

**Opinion**

**{160 N.H. 710}** Conboy, J. The plaintiff, Alan F. Beane, appeals the decision of the Superior Court (*McGuire*, J.) dismissing his lawsuit alleging accounting malpractice as barred by the statute of limitations. We affirm.

Accepting the facts as alleged in the plaintiff's writ, the trial court found as follows. The defendants, D. Scott Beane (Scott Beane), the plaintiff's brother, and Dana S. Beane & Co., P.C. (Beane Co.), the company created by Alan and Scott Beane's father and currently run by Scott Beane, prepared and filed all of the plaintiff's federal tax returns for the years 1985 through 2002. Between 2001 and 2004, the Internal Revenue Service (IRS) conducted an audit of the plaintiff's tax returns for years 1998 and 1999. Due to medical issues, as well as his confidence in the defendants, the plaintiff did not participate in the IRS examination. Following the examination, the IRS increased the plaintiff's tax liability in late 2002 and again when it issued its Final Income Tax Examination Changes report on December 21, 2004. The defendants represented the plaintiff in an administrative appeal of the IRS's action. The administrative appeal failed, and the IRS issued notice of a $ 3,080,430 deficiency. Although the deficiency notice itself is dated January 5, 2005, the trial court accepted the plaintiff's representation that the actual date of the notice was April 5, 2005.

The plaintiff then retained two law firms: Palmer & Dodge, to obtain advice regarding the tax deficiency; and Proskauer Rose, to challenge the deficiency finding in the United States Tax Court. At some point after October 19, 2006, the defendants terminated their relationship with the plaintiff and refused to cooperate with him or his tax counsel. During the plaintiff's tax court trial on September 21,

2008, the IRS examiner testified as to the nature of her examination of the plaintiff's 1998 and 1999 tax liability. The tax court's decision was pending when the plaintiff filed this action against the defendants on December 22, 2008. The plaintiff asserts claims for breach of fiduciary duty, professional errors and omissions, and violation of the New Hampshire Unfair Trade Practices Act. On May 19, 2009, the trial court granted the defendants' motion to dismiss based on the statute of limitations. The court ruled that the plaintiff's December 2008 **{160 N.H. 711}** writ was time-barred because he knew or should have known of his cause of action against the defendants no later than April 5, 2005, the date of the IRS notice of deficiency.

The plaintiff asserts that the trial court's decision should be reversed because the court: (1) failed to conduct an evidentiary hearing; (2) failed to balance the equities as required by *Shillady v. Elliot Community Hospital*, 114 N.H. 321, 320 A.2d 637 (1974); (3) erred in concluding that the limitations period began to run no later than the date of the IRS deficiency notice; (4) erred in refusing to extend the limitations period based upon the defendants' failure to disclose their alleged breach of fiduciary duties to the plaintiff; (5) erred in refusing to extend the limitations period based upon the continuing representation doctrine; and (6) erred in ruling that the statute of limitations also barred the plaintiff's alleged ``offset recoupment'' against the defendants' claims in the plaintiff's bankruptcy case in Florida.

In reviewing an order granting a motion to dismiss, ``we assume the truth of the facts as alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to the plaintiff.'' *Perez v. Pike Inds.*, 153 N.H. 158, 159, 889 A.2d 27. ``[W]e will uphold the granting of the motion to dismiss if the facts pled do not constitute a basis for legal relief.'' *Id.* at 159-60.

[1, 2] **[1, 2]** As to the plaintiff's first claim of error, we note that a trial court's evaluation of a motion to dismiss does not necessarily require an evidentiary hearing. ``The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery.'' *Perez*, 153 N.H. at 159 (quotation and brackets omitted). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. *Williams v. O'Brien*, 140 N.H. 595, 597-98, 669 A.2d 810 (1995). Dismissal is appropriate ``[i]f the facts pled do not constitute a basis for legal relief.'' *Hobin v. Coldwell Banker Residential Affiliates*, 144 N.H. 626, 628, 744 A.2d 1134 (2000) (quotation omitted). The trial court may also consider documents attached to the plaintiff's pleadings, *see Chasan v. Village District of Eastman*, 128 N.H. 807, 813, 523 A.2d 16 (1986), or ``documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint,'' *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). The trial court ``need not accept allegations in the writ that are merely conclusions of law.'' *Konefal v. Hollis/Brookline Coop. School Dist.*, 143 N.H. 256, 258, 723 A.2d 30 (1998) (quotation omitted). Here, the trial court held a hearing on the motion to dismiss, accepted the truth of the plaintiff's allegations, and ruled based upon the **{160 N.H. 712}** plaintiff's pleadings. Because the issues before the trial court were limited to legal analysis of the facts asserted by the plaintiff, an evidentiary hearing was not required.

[3] **[3]** The plaintiff's remaining five arguments center on the application of the statute of limitations and its tolling provisions. ``Statutes of limitation . . . place a limit on the time in which a plaintiff may bring suit after a cause of action accrues.'' *Big League Entm't v. Brox Indus.*, 149 N.H. 480, 483, 821 A.2d 1054 (2003) (citation omitted). Although a cause of action arises as soon as all of the necessary elements are present, *Conrad v. Hazen*, 140 N.H. 249, 252, 665 A.2d 372 (1995), it does not accrue ``until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, both the fact of an injury and the cause thereof.'' *Id.* at 251 (quotation and brackets omitted).

The plaintiff argues that the trial court erred in concluding that the limitations period began to run no later than the date of the IRS notice of deficiency. He claims that he did not discover the defendants' negligence until September 23, 2008, when he heard the IRS examiner testify at the tax court trial. He

contends that the trial court erred in failing to apply *Shillady*, which states that ``the discovery rule and the fraudulent concealment doctrine require that the interests of the opposing parties be identified, evaluated and weighed in arriving at a proper application of the statute [of limitations]." *Shillady*, 114 N.H. at 325. *Shillady* is inapplicable, however, because in that case we interpreted a prior version of RSA 508:4 (Supp. 1973), which did not expressly set forth a discovery rule standard. Here, the trial court properly applied the current version of RSA 508:4, which provides in pertinent part:

> Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.RSA 508:4, I (2010).

[4] **[4]** ``[T]he statute of limitations constitutes an affirmative defense, and . . . the defendant bears the burden of proving that it applies in a given case.? *Glines v. Bruk*, 140 N.H. 180, 181, 664 A.2d 79 (1995) (citations omitted). ``That burden, however, is met by a showing that the action was not 'brought within 3 years of the act or omission complained of.'" *Id.* (quoting RSA 508:4, I **{160 N.H. 713}** (Supp. 1994)) (ellipses omitted). ``Once the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of raising and proving that the discovery rule is applicable to an action otherwise barred by the statute of limitations." *Id.* The statutory discovery rule ``is designed to provide relief in situations where the plaintiff is unaware of either his injury or that the injury was caused by a wrongful act or omission." *Id.* at 182.

[5] **[5]** The discovery rule ``is a two-pronged rule requiring both prongs to be satisfied before the statute of limitations begins to run." *Big League Entm't*, 149 N.H. at 485. ``First, a plaintiff must know or reasonably should have known that it has been injured; and second, a plaintiff must know or reasonably should have known that its injury was proximately caused by conduct of the defendant." *Id.* ``Thus, the discovery rule exception does not apply unless the plaintiff did not discover, and could not reasonably have discovered, either the alleged injury or its causal connection to the alleged negligent act." *Perez*, 153 N.H. at 160.

[6] **[6]** Although the discovery rule tolls the limitations period until a plaintiff discovers, or should reasonably have discovered, the causal connection between the harm and the defendant's negligent or wrongful act, this rule ``is not intended to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself." *Furbush v. McKittrick*, 149 N.H. 426, 431, 821 A.2d 1126 (2003). ``Rather, that the plaintiff could reasonably discern that he suffered some harm caused by the defendant's conduct is sufficient to render the discovery rule inapplicable." *Id.* Further, a plaintiff need not be certain of this causal connection; the possibility that it existed will suffice to obviate the protections of the discovery rule. *Pichowicz v. Watson Ins. Agency*, 146 N.H. 166, 168, 768 A.2d 1048 (2001).

[7] **[7]** Given this legal framework, we conclude that the trial court did not err when it found that the plaintiff's claim arose no later than April 5, 2005, the date of the IRS notice of deficiency. The record supports the trial court's finding that the plaintiff

> knew ``or in the exercise of reasonable diligence should have discovered" the causal relationship between the defendants' negligence and the harm caused him in late 2002 when the IRS increased his tax liability for 1998 and 1999, or when the IRS issued its final report on December 21, 2004 or, at the latest, when he lost his administrative appeal on April 5, 2005.*Accord Federated Industries, Inc. v. Reisin*, 402 Ill. App. 3d 23, 927 N.E.2d 1253, 1264-65, 340 Ill. Dec. 242 (Ill. App. Ct. 2010) (adopting majority rule that ``the statute of limitations in an accountant malpractice case involving increased tax liability begins to run **{160 N.H. 714}** when the taxpayer

receives the statutory notice of deficiency . . . , or at the time when the taxpayer agrees with the IRS's proposed deficiency assessments"); *Wall v. Lewis*, 366 N.W.2d 471, 473 (N.D. 1985) (actual damage has been incurred when the IRS imposes a tax assessment, thereby creating an enforceable obligation against the client); *Chisholm v. Scott*, 86 N.M. 707, 526 P.2d 1300, 1302 (N.M. 1974) (accountant malpractice suit arose when the plaintiffs received the IRS's notice of deficiency); *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967) (statute of limitations in accountant malpractice action began to run when the IRS assessed the tax deficiency); *cf. Isaacson, Stolper & Co. v. Artisan's Savings Bank*, 330 A.2d 130, 133-34 (Del. 1974) (holding that the statute of limitations began to run when the plaintiff first received notice of an alleged deficiency from the IRS, not when he received a final determination of tax liability).

[8] **[8]** For similar reasons, the plaintiff's argument regarding the fraudulent concealment rule also fails. The plaintiff contends that he could not discover the defendants' negligence because they fraudulently concealed their accounting errors. ``[T]he fraudulent concealment rule states that when facts essential to the cause of action are fraudulently concealed, the statute of limitations is tolled until the plaintiff has discovered such facts or could have done so in the exercise of reasonable diligence." *Bricker v. Putnam*, 128 N.H. 162, 165, 512 A.2d 1094 (1986). Here, the rule is inapplicable because, as the trial court found, the plaintiff knew, or ``in the exercise of reasonable diligence should have discovered the causal relationship between the defendants' negligence and the harm caused" by April 5, 2005, at the latest.

[9] **[9]** The plaintiff's argument regarding fiduciary tolling is also unavailing. The plaintiff contends that the defendants were fiduciaries who breached their duty to disclose their errors. The plaintiff alleges that the defendants withheld from him their accounting errors in 1998 and 1999, failed to inform him of the nature of the IRS examination, and refused to cooperate with him or his counsel during the tax court proceedings. He argues that the defendants' failure to disclose these alleged breaches of duty tolls the limitation period. Assuming, without deciding, that the defendants acted in a fiduciary capacity, *but see Sorenson v. H & R Block, Inc.*, 107 Fed. Appx. 227, 230-31 (1st Cir. 2004) (holding that under Massachusetts law, agency or fiduciary relationship did not exist between tax preparer and its client); *Block v. Razorfish, Inc.*, 121 F. Supp. 2d 401, 403 (S.D.N.Y. 2000) (New York courts ``do not generally regard the accountant-client relationship as a fiduciary one" (quotation omitted)), there is no support in our case law for the proposition that a limitations period is tolled in fiduciary cases until the fiduciary discloses his or her misconduct. *See Furbush*, 149 N.H. at 430-31 (holding that although the defendant-attorney did not disclose to the **{160 N.H. 715}** plaintiff his failure to file a claim in a timely manner, the limitations period on the legal malpractice claim began to run when the plaintiff ``could reasonably discern that he suffered some harm caused by the defendant's conduct"). Moreover, despite the defendants' failure to disclose their alleged errors, the record shows that by April 5, 2005, at the latest, the plaintiff was on notice of the causal connection between his harm and the defendants' conduct.

[10] **[10]** We are also not persuaded by the plaintiff's contention that the trial court erred in refusing to extend the limitations period based upon the continuing representation rule, which we have yet to adopt. Under this rule, which other jurisdictions have established in the context of legal malpractice actions, ``a client's cause of action against his attorney does not accrue until the attorney ceases representing the client." *Coyle v. Battles*, 147 N.H. 98, 101, 782 A.2d 902 (2001). ``The rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Id.* (quotations omitted). In *Coyle*, we declined to adopt the rule because the facts in that case did not raise ``the innocent reliance which the continuing representation doctrine seeks to protect." *Id.* (quotation and brackets omitted). Similarly, the facts here do not warrant the adoption of the rule. The plaintiff engaged two law firms after the deficiency notice to evaluate the deficiency and initiate the tax court proceeding. Thus, ``innocent reliance" on the defendants' professional services was no longer reasonably warranted.

[11] **[11]** The plaintiff's final argument is that the trial court erred in ruling that the statute of limitations precluded the assertion of his claims as an ``offset recoupment'' against Beane Co.'s claim in his bankruptcy case in Florida. In its dismissal order, however, the trial court did not address this argument. The plaintiff asserts that because his claims in this case arise out of the tax services which are the subject of Beane Co.'s claim in his bankruptcy case, he has a right of recoupment, and, therefore, even if the limitations period has expired, his claims remain ``viable.''

> Recoupment . . . refers to the defendant's right, *in the same action*, to reduce or eliminate the plaintiff's claim, either because the plaintiff has not complied with some cross-obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract.**{160 N.H. 716}** 20 Am. Jur. 2d *Counterclaim, Recoupment, Etc.* § 5 (2005) (emphasis added). Accordingly, any claim for recoupment was not properly before the trial court, and we express no opinion with respect to that issue.

*Affirmed.*

Broderick, C.J., and Dalianis, Duggan and Hicks, JJ., concurred.

ROSS T. HOBIN v. COLDWELL BANKER RESIDENTIAL AFFILIATES, INC.
SUPREME COURT OF NEW HAMPSHIRE
144 N.H. 626; 744 A.2d 1134; 2000 N.H. LEXIS 3
No. 97-877
January 31, 2000, Decided

**Editorial Information: Subsequent History**

Released for Publication February 14, 2000.

**Editorial Information: Prior History**

Rockingham.

**Disposition:**

Affirmed.

**Counsel** S. David Siff, of Concord, on the brief, and Ferriter, Scobbo, Caruso & Rodophele, P.C., of Boston, Massachusetts (Gerald J. Caruso on the brief and orally), for the plaintiff.

Devine, Millimet & Branch, of Manchester (Steven E. Grill on the brief), and Wiggin & Dana, of New Haven, Connecticut (Edward W. Dunham and Patrick J. Corcoran on the brief, and Mr. Dunham orally), for the defendant.

**Judges:** HORTON, J. BROCK, C.J., sat but did not participate in the decision; the others concurred.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff appealed from the Superior Court of Rockingham (New Hampshire), which dismissed plaintiff's claims against defendant for breach of the implied covenant of good faith and fair dealing, breach of contract, misrepresentation, and violation of N.H. Rev. Stat. Ann. § 358 (1995).Dismissal of plaintiff's claims was affirmed; plaintiff did not allege breach of implied term of agreement, thus, plaintiff failed to state breach of contract claim, relating to defendant's placement of franchises in area.

**OVERVIEW:** The court dismissed claims brought by plaintiff, a franchise, against defendant related to defendant's placement of additional franchises in plaintiff's territory. The parties agreed the franchise agreement expressly allowed defendant to place additional franchises in plaintiff's area, but disagreed as to whether the implied covenant of good faith and fair dealing limited the extent of its discretion to do so. The court dismissed the claims of breach of the implied covenant of good faith and fair dealing, breach of contract, misrepresentation, and violation of N.H. Rev. Stat. Ann. § 358 (1995) for failure to state a claim. The court affirmed, finding plaintiff failed to allege breach of the implied covenant of good faith and fair dealing, thus, plaintiff did not allege a breach of an implied term of the agreement. Therefore, plaintiff failed to state a claim for breach of contract. The court properly dismissed the § 358 claim.

**OUTCOME:** The court affirmed dismissal of plaintiff's claims, finding plaintiff did not allege a breach of an implied term of the agreement, thus, plaintiff failed to state a claim for breach of contract.

**LexisNexis Headnotes**

*Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss*

*Civil Procedure > Appeals > Reviewability > General Overview*
*Civil Procedure > Appeals > Dismissals of Appeals > General Overview*

Upon review of the rulings on this motion to dismiss, the court assumes the facts alleged by plaintiff to be true for purposes of appeal.

*Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss*

The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery.

*Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss*

In analyzing a motion to dismiss, the court assumes the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him.

*Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss*

If the facts pled do not constitute a basis for legal relief, the court will uphold the granting of the motion to dismiss.

*Contracts Law > Contract Conditions & Provisions*
*Civil Procedure > Jurisdiction > General Overview*

Where parties to a contract select the law of a particular jurisdiction to govern their affairs, that choice will be honored if the contract bears any significant relationship to that jurisdiction.

*Contracts Law > Types of Contracts > Implied-in-Law Contracts*
*Contracts Law > Types of Contracts > Covenants*

The proper implication of a covenant of good faith and fair dealing is to contradict an express contractual grant of discretion when necessary to protect an agreement which otherwise would be rendered illusory and unenforceable.

*Contracts Law > Types of Contracts > Implied-in-Law Contracts*
*Contracts Law > Consideration > General Overview*
*Contracts Law > Consideration > Adequate Consideration*
*Contracts Law > Types of Contracts > Covenants*

A court may not imply such a covenant of good faith and fair dealing when regardless of how the court's discretionary power is exercised, the agreement is supported by adequate consideration.

*Contracts Law > Consideration > Enforcement of Promises > General Overview*

The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably.

*Contracts Law > Contract Interpretation > Parol Evidence > General Overview*

Although denominated an evidentiary rule, the parol evidence rule is actually one of substantive law.

*Contracts Law > Contract Interpretation > Parol Evidence > General Overview*
*Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > Latent Ambiguities*

See Cal. Civ. Proc. Code § 1856 (1981).

*Contracts Law > Defenses > General Overview*

N.H. Rev. Stat. Ann. § 358 (1995) makes it unlawful for any person to use any unfair or deceptive act or practice in the conduct of any trade or commerce within the state.

**Opinion**

**Opinion by:** HORTON

**Opinion**

**{744 A.2d 1135} {144 N.H. 627}** HORTON, J. The plaintiff, Ross T. Hobin, the owner of a Coldwell Banker franchise, appeals from an order of the Superior Court (*Gray*, J.) dismissing his claims against the defendant, Coldwell Banker Residential Affiliates, Inc. (Coldwell Banker), relating to Coldwell Banker's alleged placement of additional franchises in Hobin's territory. The trial court dismissed the claims of breach of the implied covenant of good faith and fair dealing, breach of contract, misrepresentation, and violation of New Hampshire's Consumer Protection Act, RSA ch. 358-A (1995 & Supp. 1998), for failure to state a claim. We affirm.

Upon review of the rulings on this motion to dismiss, we assume the following facts alleged by Hobin to be true for purposes of this appeal. *See Buckingham v. R. J. Reynolds Tobacco Co.*, 142 N.H. 822, 825, **{744 A.2d 1136}** 713 A.2d 381, 383 (1998). In 1994, Hobin, who operated a real estate office in Rye, contacted Coldwell Banker about becoming one of its franchisees. At the time, the nearest Coldwell Banker office was Marple Associates (Marple), located 5.5 miles away in Portsmouth. Marple maintained a Rye telephone number, but no office in Rye.

Although the real estate market was depressed and Coldwell Banker was having difficulty selling new franchises in the area, Hobin thought he could make a franchise successful if Marple did not expand into Rye. Hobin raised the issue of Marple's potential expansion in his discussions with a Coldwell Banker recruiter, who told him that Coldwell Banker treated Rye as a "small market" area for which it charged a reduced franchise fee, implying that it could not support a second franchise and that the probability of a second franchise in Rye would be unthinkable. Throughout discussions of other Coldwell Banker franchisees, including its largest, Hunneman Real Estate Corporation (Hunneman), the recruiter did not mention the possibility of any franchisee opening an office in Rye. The recruiter did, however, suggest that Coldwell Banker's internal policies and procedures for awarding franchises would not permit the placement of a second franchise in such proximity to an existing franchise as to jeopardize that franchisee's business. As a result of these representations, Hobin executed a franchise agreement effective July 25, 1994, and entered Coldwell Banker's Small Market Program.

Throughout the next two years, Hobin competed with the Joycelyn Caulfield Agency (Caulfield), which maintained two locations -- the first in Rye, within 300 feet of Hobin's office, and the second in North Hampton, 3.2 miles away. Sometime around January 1997, Hunneman, which had purchased Marple in late 1995, also **{144 N.H. 628}** purchased Caulfield, resulting in its ownership of three offices within 5.5 miles of Hobin.

As represented to Hobin by the recruiter, Coldwell Banker maintains procedures for approving the placement of one franchise near or in another franchisee's territory. During Hobin's discussions with Coldwell Banker executives regarding his dissatisfaction with the additional Coldwell Banker offices in his territory, he discovered that those procedures include review of the proposed placement by a committee of ten to fifteen individuals and an opportunity for the existing franchisee to comment upon the placement. He also learned that, as Coldwell Banker's largest franchisee, Hunneman is given

special preference and does not have to follow normal franchise-placement procedures. Coldwell Banker did not follow its procedures in permitting Hunneman to locate in Rye and North Hampton, but rather granted approval on a single telephone call from Hunneman's owner to Coldwell Banker's Franchise Development department.

Hobin brought a petition for injunctive relief against Coldwell Banker, Hunneman, and Caulfield. He later nonsuited his claims against Hunneman and Caulfield. He appeals the dismissal of his claims against Coldwell Banker for breach of implied covenant of good faith and fair dealing, breach of contract, misrepresentation, and violation of RSA chapter 358-A.

The standard of review in considering a motion to dismiss is "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Miami Subs Corp. v. Murray Family Trust and Kenneth Dash Partnership*, 142 N.H. 501, 516, 703 A.2d 1366, 1375 (1997) (quotation omitted). "We assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." *Buckingham*, 142 N.H. at 825, 713 A.2d at 383 (quotation omitted). "If the facts pled do not constitute a basis for legal relief, we will uphold the granting of the motion to dismiss." *Id.*

**{744 A.2d 1137}** As a preliminary matter, we note that in the franchise agreement, which was appended to the petition, the parties chose the law of California, the State of Coldwell Banker's incorporation, to govern the agreement and their "legal relationships." "Where parties to a contract select the law of a particular jurisdiction to govern their affairs, that choice will be honored if the contract bears any significant relationship to that jurisdiction." *Kentucky Fried Chicken Corp. v. Collectramatic, Inc.*, 130 N.H. 680, 684, 547 A.2d 245, 247 (1988) (brackets and quotation omitted). California bears a significant relationship to the controversy based on Coldwell Banker's **{144 N.H. 629}** incorporation therein. *See Ferrofluidics v. Advanced Vacuum Components*, 968 F.2d 1463, 1467-68 (1st Cir. 1992) (applying New Hampshire law). Accordingly, California law applies. *See id.* Hobin, relying on the *Restatement (Second) of Conflict of Laws*

§ 187(2)(b) (1971), argues that if we conclude that the application of California law favors Coldwell Banker, we should ignore the parties' choice of law as a matter of public policy. He fails, however, to articulate a fundamental policy of our State that would be so offended by the application of California law as to justify overruling the parties' choice of law. We will therefore honor the parties' selection of California law.

Hobin's first issue is whether the trial court erred in dismissing his claim of breach of the implied covenant of good faith and fair dealing. The court dismissed the claim because the action of which Hobin complains, the grant of another franchise in Hobin's marketing area, is expressly permitted in the franchise agreement.

Hobin argues that although the agreement expressly reserved Coldwell Banker's right to place additional franchisees in Hobin's territory, Coldwell Banker had the duty to exercise its discretion in accordance with the covenant of good faith and fair dealing implied in all contracts. According to Hobin, allowing Coldwell Banker's largest franchisee to open two locations in his small-market territory, one within 300 feet of his office, was a breach of that duty.

Coldwell Banker counters that, under California law, the express terms of a contract always limit any implied covenants, and a party may not pursue a cause of action for breach of an implied covenant where the supposed covenant contradicts the express term.

The franchise agreement provided, in pertinent part:

> 1.02 *Grant of Franchise* (a) Franchisor hereby grants to Franchisee, and Franchisee hereby accepts, a non-exclusive franchise . . . . Nothing contained herein shall be deemed to grant

> Franchisee an exclusive territory and Franchisor . . . may . . . franchise or license others to locate and operate additional residential real estate brokerage businesses within the market area within which Franchisee conducts and operates the Franchised Business.

Although the parties agree that the agreement expressly provided that Coldwell Banker may place additional franchises in Hobin's market area, they disagree as to whether the implied covenant of good faith and fair dealing implied in every contract, *see Carma* **{144 N.H. 630}** *Developers v. Marathon Dev. Cal.*, 2 Cal. 4th 342, 826 P.2d 710, 726 (Cal. 1992), operated to limit the extent of its discretion to do so.

In determining that a tenant had not breached the implied covenant of good faith and fair dealing against its landlord when the actions complained of were expressly allowed in the lease, the *Carma* court discussed two apparently inconsistent principles: that the covenant of good faith and fair dealing should be implied to limit the exercise of a discretionary power, and that express terms of a contract cannot be varied by an implied covenant. *Carma*, 826 P.2d at 726-28.

On one hand, as argued by Hobin, "the covenant of good faith finds particular application **{744 A.2d 1138}** in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." *Carma*, 826 P.2d at 726.

On the other hand, supporting Coldwell Banker's contentions, the court stated that it was

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> aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms. The general rule regarding the covenant of good faith is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing . . . . As to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct. And if defendants were given the right to do what they did by the express provisions of the contract there can be no breach.

*Carma*, 826 P.2d at 728 (quotation, citations, and brackets omitted).

A subsequent California Court of Appeal opinion reconciled these seemingly inconsistent principles. *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 48 Cal. Rptr. 2d 747 (Ct. App. 1995) (holding that the plaintiff music company had not stated a claim for breach of implied covenant of good faith and fair dealing when its contract with the defendant, to which it had sold certain music rights, expressly allowed the defendant to refrain from marketing the music). The *Third Story Music* court distinguished between the proper implication of a covenant of good faith and fair dealing "to contradict an express contractual grant of discretion when necessary to protect an agreement which otherwise would be rendered illusory and unenforceable," **{144 N.H. 631}** and situations in which a court may not imply such a covenant because "regardless of how such [discretionary] power [is] exercised, the agreement [is] supported by adequate consideration." *Third Story Music*, 48 Cal. Rptr. 2d at 752-53.

The case before us is of the latter type. In consideration of Hobin's agreement to purchase and operate a Coldwell Banker franchise, his business accrued numerous benefits stemming from its association with a nationally recognized real estate marketing organization, including those resulting from chain identification, participation in a uniform system to promote and assist the business, training, and centralized programs for its use. Specifically, it received rights to the Coldwell Banker trademarks and trade names and the goodwill associated therewith, benefits accruing from Coldwell Banker's national and regional advertising, public relations and promotional campaigns, orientation and on-going training, operating advice and assistance, operational techniques and service concepts,

on-site visits by Coldwell Banker field representatives, business-planning tools, sales and informational material, and available staff-recruitment, training, and advertising materials. Hobin was also eligible for cash awards based on his franchise's performance. Regardless of the extent of Coldwell Banker's exercise of its discretion --whether it chose to place competing franchises next door to Hobin or to leave the territory free of competitors -- Hobin retained the right to the contractual benefits set forth above. Importantly, Coldwell Banker also incurred costs in providing its programs and assistance to Hobin. Even were we to adjudge the benefits accruing to Hobin to be worthless, the detriment Coldwell Banker incurred in providing its programs and assistance to Hobin was "sufficient to constitute consideration." *PMC, Inc. v. Porthole Yachts, Ltd.*, 65 Cal. App. 4th 882, 76 Cal. Rptr. 2d 832, 837 (Ct. App. 1998). In sum, the consideration provided was "more than the peppercorn of consideration the law requires" to save **{744 A.2d 1139}** the contract from unenforceability. *Third Story Music*, 48 Cal. Rptr. 2d at 753 n.5.

> The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably. It is not enough tc say that without the proposed implied covenant, the contract would be improvident or unwise or would operate unjustly. Parties have the right to make such agreements. The law refuses to read into contracts anything by way of implication except upon grounds of obvious necessity. **{144 N.H. 632}** *Walnut Creek Pipe Distrib. v. Gates Rubber Co. Sales Div.*, 228 Cal. App. 2d 810, 39 Cal. Rptr. 767, 771 (Ct. App. 1964).

The next issue presented is whether Hobin has stated a claim for breach of contract. Hobin concedes that Coldwell Banker did not breach an express term of the agreement. Given our holding that Hobin has not alleged a breach of the implied covenant of good faith and fair dealing, we conclude that Hobin has not alleged a breach of an implied term of the agreement. Therefore, we hold that he has failed to state a claim for breach of contract.

We next address Hobin's contention that the trial court erred in dismissing the misrepresentation claim. Hobin first argues that Coldwell Banker led him to believe that his territory could support only one franchise. He alleged that Coldwell Banker's recruiter "implied that the area could not support a second franchise," "clearly implied that the probability of a second franchise in Rye would be unthinkable," and "suggested that the company's internal procedures and policies for awarding franchises would not permit a placement of a second franchisee in such proximity to an existing franchisee's location so as to jeopardize that franchisee's business." Even were we to conclude that such vague assertions could be construed as promises that Coldwell Banker would not permit the placement of additional franchises in Hobin's territory, the promises would be inadmissible under California's parol evidence rule.

Although denominated an evidentiary rule, the parol evidence rule is actually one of substantive law. *See Steinfield v. Monadnock Mills*, 81 N.H. 152, 153, 123 A. 224, 225 (1923). Having held that the substantive law of California governs the parties' agreement, we apply its rules as to the treatment of parol evidence. *Cf. Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 13, 549 A.2d 1187, 1191 (1988). California's parol evidence rule provides, in pertinent part:

> (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.
>
> . . . .

(g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, . . . or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

i**{144 N.H. 633}** Cal. Civ. Proc. Code § 1856 (Deering 1981).

Hobin concedes that the parties' agreement is fully integrated, but contends that the fraud exception to the parol evidence rule permits the introduction of evidence of fraud. The exception does not apply, however, where "parol evidence is offered to show a fraudulent promise directly at variance with the terms of the written agreement." *Banco Do Brasil, S.A. v. Latian, Inc.*, 234 Cal. App. 3d 973, 285 Cal. Rptr. 870, 892 (Ct. App. 1991) (quotation omitted). Such is the case here where the purported promise, that Coldwell Banker would not permit additional franchises in Hobin's territory, is directly at variance with the written agreement's provision reserving Coldwell Banker's right to place additional franchises therein.

**{744 A.2d 1140}** Hobin argues that the parties had a separate agreement as to the specific approval process for the placement of franchises in close proximity to existing franchises. According to Hobin, the parties had reached an understanding, separate from the franchise agreement and prior to Hobin's execution thereof, that "whenever a Coldwell Banker franchisee was to be located within a 5-mile or so radius of an existing franchisee, an internal Committee at Coldwell Banker is convened to review and to approve the placement of the encroaching franchise" and that "before the decision on placement is made, . . . the existing franchisee is given the opportunity to comment upon the encroachment." Allegedly relying on this understanding, Hobin entered into the franchise agreement. According to the petition, Hobin discovered after Hunneman had established three nearby locations that Hunneman was not required to follow the standard procedures for franchise placement.

Critical to Hobin's argument is his assertion that he was apprised of the details of Coldwell Banker's franchise-placement approval procedures prior to signing the franchise agreement. Such can plainly not be elicited from the petition.

The chronology of events laid out in the petition includes a pre-contract discussion with a Coldwell Banker recruiter who

> suggested that the company's internal procedures and policies for awarding franchises would not permit a placement of a second franchisee in such proximity to an existing franchisee's location so as to jeopardize that franchisee's business.. . . Based upon these representations about the likelihood of placing a second franchise in Rye and other representations, Hobin entered Coldwell Banker's Small **{144 N.H. 634}** Market Program, paid his franchise fee, and executed a Franchise Agreement.

Pages later, the petition states that after Hobin discovered that Hunneman had purchased Caulfield, and therefore had three nearby locations, Hobin had numerous discussions and exchanges of correspondence with Coldwell Banker executives regarding his dissatisfaction with the situation. At least three of the executives

> told Hobin that the situation was handled poorly and that in this case Coldwell Banker had failed to follow its customary procedures in approving the placement of one franchise near or in an existing franchisee's territory.. . . Hobin was told that whenever a Coldwell Banker franchisee was to be located within a 5-mile or so radius of an existing franchisee, an internal Committee at Coldwell Banker is convened to review and to approve the placement of the encroaching franchise. The Committee apparently consists of 10 to 15 individuals, including an attorney, who decide upon the placement of the new franchise. Before the decision on placement is made, however, the existing

franchisee is given the opportunity to comment upon the encroachment.

Based on the chronology set forth in the petition, we find no merit in Hobin's argument that Coldwell Banker represented any details of its franchise-approval process prior to the execution of the agreement. We agree with the trial court's determination that Hobin failed to state a claim for misrepresentation.

Hobin's final issue is whether the trial court properly dismissed his claim of violation of New Hampshire's Consumer Protection Act. Although some courts have concluded that the parties' contractual choice of a foreign law to govern their agreement militates against an application of the forum's statutory protections, *see*, *e.g.*, *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1412-14 (N.D. Ill. 1996), we do not address the issue here because both parties argue the merits under the New Hampshire statute. *Cf. Mundaca Inv. Corp. v. Febba*, 143 N.H. 499, 727 A.2d 990, 991 (1999).

Hobin contends that his allegations of breach of contract, breach of the implied **{744 A.2d 1141}** covenant of good faith and fair dealing, and misrepresentation also make out a claim under the terms of RSA 358-A:2 (1995) (amended 1996, 1997), which make it "unlawful for any person to use . . . any unfair or deceptive act or practice in the **{144 N.H. 635}** conduct of any trade or commerce within this state." The parties agree that in order for conduct to run afoul of the statute, it "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 v. Boles*, 141 N.H. 382, 390, 687 A.2d 979, 986 (1996) (quotation omitted). As we have held, Hobin has alleged no actions on the part of Coldwell Banker that could be construed as conflicting with the express or implied terms of the agreement. Moreover, Hobin's allegations of Coldwell Banker's "implications" and "suggestions" that the territory was too small to support an additional franchise simply do not rise to the level of rascality -- particularly in light of the express agreement granting Coldwell Banker the discretion to place additional franchises in Hobin's territory. The trial court properly dismissed Hobin's Consumer Protection Act claim.

*Affirmed.*

BROCK, C.J., sat but did not participate in the decision; the others concurred.

**PETITION OF GRANT KILTON**
**SUPREME COURT OF NEW HAMPSHIRE**
**156 N.H. 632; 939 A.2d 198; 2007 N.H. LEXIS 237**
**No. 2007-245**
**November 13, 2007, Argued**
**December 31, 2007, Opinion Issued**

**Editorial Information: Subsequent History**

Released for Publication December 31, 2007.

**Disposition:**

Affirmed.

**Counsel** New Hampshire Legal Assistance, of Claremont and Concord (Jonathan P. Baird & a. on the brief, and Mr. Baird orally), for the petitioner.

Kelly A. Ayotte, attorney general (Jill A. Desrochers, attorney, on the brief, and Rosemary Wiant, attorney, orally), for the respondent.

**Judges:** BRODERICK, C.J. DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Petitioner claimant sought a writ of certiorari from the court, pursuant to N.H. Sup. Ct. R. 11, challenging the denial by respondent, the New Hampshire Department of Health and Human Services (Department), of his application for benefits under the Aid to the Permanently and Totally Disabled (APTD) program, RSA 167:6(VI). Petitioner had requested and received a hearing before the Department with regard to his appeal of the denial.The denial of petitioner's application for Aid to the Permanently and Totally Disabled benefits, pursuant to RSA 167:6(VI), was upheld on appeal as he was adequately notified of his right to seek legal counsel by being provided a list of organizations providing legal counsel and by being notified of his right to seek such counsel at his expense.

**OVERVIEW:** Petitioner's claimed disability involved a generalized anxiety disorder and depression. The Department denied petitioner's application for APTD benefits because his impairment failed to meet the severity required and would not prevent him from performing substantial gainful activity for 48 consecutive months. The Department's decision indicated that petitioner's conditions should remit with counseling and medication and that no cognitive impairment existed that prevented him from working in his prior job as a machine operator or assembler. At his appeal hearing, petitioner represented himself, although a case manager accompanied him for support. Petitioner's primary contention on appeal was that the Department failed to notify him adequately of his right to seek free legal counsel. The court's review of the record revealed that petitioner received all of the notice that he was constitutionally due, which more than satisfied due process. The court noted that petitioner was notified numerous times of his right to have counsel present at his own expense and he was given the names and contact information for community organizations that provided legal counsel.

**OUTCOME:** The court affirmed the Department's decision.

**LexisNexis Headnotes**

***Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > Eligibility > Disability Determinations > Disability Standards***

*Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Agency Actions & Procedures > General Overview*

Pursuant to RSA 167:6(VI), a person is eligible for Aid to the Permanently and Totally Disabled benefits who is between the ages of 18 and 64 years of age inclusive; is a resident of the State of New Hampshire; and is disabled as defined in the federal Social Security Act, except that the minimum required duration of the impairment shall be 48 months. Disability is determined by reference to the standards for substantial gainful activity as used in the Social Security Act.

*Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue*
*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

The only judicial review of a fair hearings decision issued by the New Hampshire Department of Health and Human Services is by petition for a writ of certiorari. Review on certiorari is an extraordinary remedy, usually available only in the absence of a right to appeal, and only at the discretion of the court. The Supreme Court of New Hampshire's review of an administrative agency's decision on a petition for certiorari is limited to determining whether the agency has acted illegally with respect to jurisdiction, authority or observance of the law or has unsustainably exercised its discretion or acted arbitrarily, unreasonably or capriciously. The Supreme Court exercises its power to grant such writs sparingly and only where to do otherwise would result in substantial injustice.

*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*
*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*
*Constitutional Law > Substantive Due Process > Scope of Protection*

The Supreme Court of New Jersey is the final arbiter of the due process requirements of the New Hampshire Constitution.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*
*Constitutional Law > Substantive Due Process > Scope of Protection*

N.H. Const. pt. I, art. 15 provides, in part, that no person shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. The law of the land is synonymous with due process of law.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*
*Constitutional Law > Substantive Due Process > Scope of Protection*

To determine whether particular procedures satisfy the requirements of due process, the Supreme Court of New Hampshire typically employs a two-prong analysis. Initially, the Supreme Court ascertains whether a legally protected interest has been implicated. The Supreme Court then determines whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*
*Constitutional Law > Substantive Due Process > Scope of Protection*

Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. The purpose of notice under the Due Process Clause is to apprise the affected

individual of, and permit adequate preparation for, an impending hearing. To satisfy due process, the notice must be of such nature as reasonably to convey the required information and must be more than a mere gesture. When notice is a person's due the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. Due process, however, does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. A court's inquiry focuses upon whether notice was fair and reasonable under the particular facts and circumstances of each case.

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***
***Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Agency Actions & Procedures > Appeals & Reviews***
***Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Agency Actions & Procedures > Negative Actions***

With respect to terminating or reducing welfare benefits, a timely and adequate notice stating the reasons for the proposed action must be given to the recipients of the benefits. To be considered adequate, the notice must give a reasonably complete statement of the information upon which the proposed action is based, the full reasons for that action, and any other data the recipients might need to figure out their eligibility. The Supreme Court of New Hampshire assumes, without deciding, that those rules apply to denials of an application for Aid to the Permanently and Totally Disabled benefits.

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***
***Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Advocacy & Protection > General Overview***
***Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Agency Actions & Procedures > Negative Actions***

N.H. Code Admin. R. Ann. He.-C 203.04 provides that a notice of hearing must include information required by RSA 541-A:31(III) and a list of the organizations in the State of New Hampshire which provide free or reduced cost legal services.

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***
***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***
***Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Agency Actions & Procedures > Negative Actions***

Notice of reductions and terminations in welfare benefits satisfies due process when they contained: (1) a detailed statement of the intended action; (2) the reason for the change in status; (3) citation to specific statutory authority; and (4) specific notice of the recipient's right to appeal. The regulations entitling the recipient of aid to the disabled to notice of any action affecting right to assistance, of the right to fair hearing, of the method of obtaining a fair hearing, that the recipient may represent their self or may be represented by counsel, a relative or a friend or other spokesman, and of the availability of community legal services amply safeguard the recipient's interest. The Due Process Clause of the State Constitution does not require that a recipient receive any additional notice, including notice of his ability to seek free legal counsel.

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***
***Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Advocacy & Protection > General Overview***
***Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Agency Actions & Procedures > Negative Actions***

A recipient of welfare benefits has neither a statutory nor a regulatory right to seek free legal counsel. Rather, by RSA 541-A:31(III), he has a right to be notified that he could have an attorney present at the fair hearing, and pursuant to regulation, he has a right to receive a list of organizations in the State of New Hampshire that provides free or reduced cost legal services. N.H. Admin. Rules, He-C 203.04.

***Evidence > Procedural Considerations > Burdens of Proof > Allocation***
***Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > Eligibility > Disability Determinations > Sequential Evaluation Process > Substantial Gainful Activity***
***Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > Judicial Review > General Overview***

To be eligible for social security disability benefits, a worker must demonstrate that he is unable to engage in any substantial gainful activity, as defined by the social security administration act. The United States Supreme Court first looks to the interest of a social security disability benefits recipient in continued and uninterrupted receipt of benefits pending final determination of his claim. A disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below subsistence level. Because of those potential sources of temporary income, there is less reason than in other case law to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

***Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process***
***Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > Eligibility > Disability Determinations > Disability Standards***
***Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > Judicial Review > Standards of Review***

The United States Supreme Court examines the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards with regard to a determination of one's eligibility for social security disability benefits. The decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists. The risk of error is lower than in proceedings to determine welfare eligibility where a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. The potential value of an evidentiary hearing is substantially less where the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. A pretermination evidentiary hearing is not required, as that type of judicial procedure need not be imposed to assure that the administrative process is fair.

**Opinion**

**Opinion by:** BRODERICK

**Opinion**

Original

**{939 A.2d 200} {156 N.H. 634}** BRODERICK, C.J. The petitioner, Grant Kilton, has petitioned for a

writ of certiorari, see Sup. Ct. R. 11, challenging the denial by the respondent, the New Hampshire Department of Health and Human Services (department), of his application for benefits under the Aid to the Permanently and Totally Disabled (APTD) program. See RSA 167:6, VI (2002). We affirm.

I

The record supports the following facts. In April 2005, the petitioner applied for benefits under the APTD program, which is one of various public assistance programs administered by the department. See Baker v. City of Concord, 916 F.2d 744, 745 (1st Cir. 1990). Pursuant to RSA 167:6, VI, a person is eligible for APTD benefits "who is between the ages of 18 and 64 years of age inclusive; is a resident of the state; and is disabled as defined in the federal Social Security Act, . . . except that the minimum required duration of the impairment shall be 48 months." Disability is **{156 N.H. 635}** determined by reference to "the standards for 'substantial gainful activity' as used in the Social Security Act." RSA 167:6, VI.

The department denied the petitioner's application for APTD benefits in mid-October because his impairment failed to meet "the severity required" and would not prevent him "from performing substantial gainful activity for 48 consecutive months." Specifically, the notice of denial informed the petitioner:

> You have been denied the medical eligibility for Aid to the Permanently & Totally Disabled (APTD) category of eligibility for NH Medicaid. NH Medicaid requires that you have an impairment that meets or equals the same level of severity as that established for SSI/SSDI **{939 A.2d 201}** eligibility and that the impairment(s) prevent substantial gainful activity for 48 consecutive months. (RSA 167:6, VI) You do not have an impairment that meets the severity required nor will your impairment prevent you from performing substantial gainful activity for 48 consecutive months.The notice also referred to medical records, which indicated that, while the petitioner suffers from generalized anxiety disorder and depression, these conditions should remit with counseling and medication, and that he had no cognitive impairment that would prevent him from working in his prior job as a machine operator or assembler. Moreover, the notice of denial noted that the petitioner's prognosis for returning to work was within a year or less, thus, falling short of the forty-eight-month durational requirement for APTD benefits. Further, the notice stated, in pertinent part: "If you disagree with this decision, you have the right to appeal and ask for a fair hearing. You may represent yourself or be represented by others including legal counsel, at the appeal hearing."

The petitioner timely requested a fair hearing. The form on which he did so stated:

> You may represent yourself or be represented by others, including legal counsel. If you need free legal counsel, consult your telephone directory or District Office for the New Hampshire Legal Assistance office nearest you. Contact your representative as quickly as possible to avoid unnecessary delay. **THE DIVISION WILL NOT PAY YOUR LEGAL FEES.**

In November, the department sent the petitioner a notice of hearing, scheduling the hearing for February 16, 2006. This notice provided, in pertinent part: "Each party has the right to be represented by an attorney, however, the cost of representation shall be at the party's **{156 N.H. 636}** expense. Whether you have an attorney or not, each party **must** comply with the mandatory pre-hearing disclosure requirements. (*See* attached Frequently Asked Questions)."

The "Frequently Asked Questions" material included the following information about a claimant's right to an attorney: "You may represent yourself, be represented by a friend, relative, or other person, or may be represented by an attorney at your own expense[;]" and "You do not need an attorney, however, you may want one to protect your interests and rights. The laws and rules are the same whether or not you have an attorney." The "Frequently Asked Questions" attachment also included a list of organizations to assist individuals or to provide them with a referral for legal counsel. This list

included numerous offices of New Hampshire Legal Assistance (NHLA). See N.H. Admin. Rules, He-C 203.04(a)(2).

The petitioner represented himself at the February hearing, although his case manager accompanied him for support. The department was also not represented by counsel. A registered nurse, testifying for the department as a medical witness, explained the process by which the petitioner's application was denied. Specifically, she testified that a medical review team examined his application to determine: (1) whether he was currently engaged in substantial gainful activity; (2) whether he had alleged a severe impairment; (3) whether there was documentation to support such an allegation; and (4) whether his impairments met the forty-eight-month durational requirement. She further testified that based upon documents in the file, the review team determined that the petitioner's impairments (anxiety and depression) did not meet the durational requirement because, with antipsychotic **{939 A.2d 202}** medication, his impairments "immediately [a]meliorate[ ]."

The petitioner questioned the nurse briefly. The presiding officer then asked the petitioner a number of questions "to help [him] tell [his] story." The petitioner testified that since the department had denied his application, he had been hospitalized for anxiety and depression "three or four times." Because the petitioner had identified, but did not have possession of records that the presiding officer believed might be relevant, she indicated that she would hold the record open for sixty days to permit the petitioner to submit additional information and to allow the department to submit further information in response, if any.

On April 26, 2006, soon after the sixty days expired, NHLA informed the department by letter that it now represented the petitioner and asked the department to reconvene the hearing so that NHLA could represent him. In early May, the department denied the request, stating that the record was now closed and that granting the request "would only further delay the already too lengthy appeal process.

**{156 N.H. 637}** Approximately three months later, on August 10, 2006, the presiding officer issued her final decision affirming the initial decision to deny the petitioner's application for benefits. The petitioner, through counsel, moved for reconsideration, asserting, among other things, that the department had failed to notify him adequately of his right to seek free legal counsel. On March 9, 2007, the presiding officer denied the petitioner's motion for reconsideration, and this petition for writ of certiorari followed.

II

"The only judicial review of a fair hearings decision issued by the [department] is by petition for a writ of certiorari." Petition of Walker, 138 N.H. 471, 473, 641 A.2d 1021 (1994). Review on certiorari is an extraordinary remedy, usually available only in the absence of a right to appeal, and only at the discretion of the court. Petition of Chase Home for Children, 155 N.H. 528, 532, 926 A.2d 287 (2007). Our review of an administrative agency's decision on a petition for certiorari is limited to determining whether the agency has acted illegally with respect to jurisdiction, authority or observance of the law or has unsustainably exercised its discretion or acted arbitrarily, unreasonably or capriciously. Id. We exercise our power to grant such writs sparingly and only where to do otherwise would result in substantial injustice. Id.

III

The petitioner argues that his federal and state constitutional rights to due process were violated because he received inadequate oral and written notice of his right to seek free legal representation. See U.S. CONST. amend. XIV; N.H. CONST. pt. I, art. 15. We first address the petitioner's claims under the State Constitution, citing federal opinions for guidance only. See State v. Ball, 124 N.H. 226, 231-33, 471 A.2d 347 (1983). "This court is the final arbiter of the due process requirements of the State Constitution." In re Father 2006-360, 155 N.H. 93, 95, 921 A.2d 409 (2007) (quotation omitted).

Part I, Article 15 of the State Constitution provides, in pertinent part: "No [person] shall be arrested,

imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." "[T]he law of the land is synonymous with **{939 A.2d 203}** due process of law." Bragg v. Director, N.H. Div. of Motor Vehicles, 141 N.H. 677, 678, 690 A.2d 571 (1997) (quotations omitted).

To determine whether particular procedures satisfy the requirements of due process, we typically employ a two-prong analysis. **{156 N.H. 638}** Appeal of Town of Bethlehem, 154 N.H. 314, 328, 911 A.2d 1 (2006). Initially, we ascertain whether a legally protected interest has been implicated. See id.; see also Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). We then determine whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest. Appeal of Town of Bethlehem, 154 N.H. at 328.

A

The department contends that the petitioner is not entitled to due process protection because he has no legally protected property interest in obtaining APTD benefits. We will assume, without deciding, that the petitioner had a property interest entitled to due process protection. We turn then to deciding whether the procedures at issue complied with due process. See id.

B

Without citing to any direct authority, the petitioner asserts that "due process require[s] clear and understandable written notice about the right to seek free legal counsel, followed by an oral inquiry from the Hearing Officer at the administrative hearing about whether [the petitioner] understood he had the right to seek free legal representation." This notice, he asserts, should include "essential information about the value of an attorney in helping to protect an appellant's interests." He notes that these kinds of procedures are statutorily required in social security administration appeals and, in effect, asks the court to hold that they are constitutionally mandated in appeals from the denial of an application for APTD benefits. See Evangelista v. Secretary of H.H.S., 826 F.2d 136, 142-43 (1st Cir. 1987); cf. Simmons v. Traughber, 791 S.W.2d 21, 24-25 (Tenn. 1990) (ruling that these kinds of procedures are required by state unemployment compensation statute). He cites no direct authority to support his assertion that due process requires the notice to which he claims entitlement, and we have found none. Our review of the record reveals that, contrary to his assertions, the petitioner received all of the notice that he was constitutionally due.

"For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Berube v. Belhumeur, 139 N.H. 562, 567, 663 A.2d 598 (1995) (quotation omitted). "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14, **{156 N.H. 639}** 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978). To satisfy due process, "[t]he notice must be of such nature as reasonably to convey the required information" and must be more than "a mere gesture." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950). "[W]hen notice is a person's due the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Jones v. Flowers, 547 U.S. 220, 229, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (quotation, ellipsis and brackets omitted). "Due process, however, does not require perfect **{939 A.2d 204}** notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Appeal of Hiscoe, 147 N.H. 223, 227, 786 A.2d 96 (2001) (quotation omitted). "Thus, our inquiry focuses upon whether notice was fair and reasonable under the particular facts and circumstances of each case." Id.

With respect to terminating or reducing welfare benefits, we have held that "a timely and adequate notice stating the reasons for the proposed action must be given to the recipients of the benefits." Petition of Clark, 122 N.H. 888, 891, 451 A.2d 1303 (1982); see Goldberg v. Kelly, 397 U.S. 254,

267-68, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). "To be considered adequate, the notice must give a reasonably complete statement of the information upon which the proposed action is based, the full reasons for that action, and any other data the recipients might need to figure out their eligibility." Petition of Clark, 122 N.H. at 891. We assume, without deciding, that these rules apply to denials of an application for APTD benefits.

The record shows that, when the department denied the petitioner's application for APTD benefits, he was notified: (1) of the full reasons for the denial; (2) how the department reached its decision; (3) the statutory basis for the denial; (4) the standards by which his eligibility for APTD benefits was determined; (5) that he had the right to appeal the denial and ask for a fair hearing; (6) that he had the right to represent himself or be represented by others, including legal counsel; and (7) if he wished to appeal, that he had thirty days to contact his case worker and tell him or her that he wished to appeal the denial.

In addition, the petitioner received notice on the form requesting a fair hearing that: (1) if he needed help completing the form or wished to request a hearing verbally, he could contact his district office; (2) he had the right to represent himself or be represented by others, including legal counsel, at the hearing; and (3) if he needed free legal counsel, he could consult the telephone directory or NHLA; and (4) the department would not pay his legal fees.

Further, the notice of hearing notified the petitioner of the date, time and location of the hearing, the applicable statutes and rules, that a presiding officer would hold the hearing, that failure to attend the hearing **{156 N.H. 640}** without good cause could result in the appeal being dismissed, and that he had a right to be represented by an attorney at his own expense. See RSA 541-A:31, III (2007); N.H. Admin. Rules, He-C 203.04 (notice of hearing must include information required by RSA 541-A:31, III and "[a] list of the organizations in New Hampshire which provide free or reduced cost legal services").

Additionally, the petitioner received information from the department's "Frequently Asked Questions" regarding his rights at the hearing, including his right to: be represented by an attorney at his own expense; examine his case file; testify at the hearing; have witnesses testify at the hearing; introduce evidence; present relevant arguments; cross-examine the other party's witnesses; and question or refute any testimony or evidence. The "Frequently Asked Questions" also informed the petitioner about how to identify his exhibits, what to do if he could not attend the hearing, when to arrive at the hearing, the procedures that would be used at the hearing, and who to contact if he had additional questions. Moreover, the "Frequently Asked Questions" included a list of organizations in New Hampshire **{939 A.2d 205}** that could assist the petitioner or provide him with a referral for legal counsel.

We hold that the notice the petitioner received more than satisfied due process. See Garrett v. Puett, 707 F.2d 930, 931 (6th Cir. 1983) (notice of reductions and terminations in welfare benefits satisfied due process when they contained: (1) a detailed statement of the intended action; (2) the reason for the change in status; (3) citation to specific statutory authority; and (4) specific notice of the recipient's right to appeal); Brown v. Lavine, 37 N.Y.2d 317, 333 N.E.2d 374, 376, 372 N.Y.S.2d 75 (N.Y. 1975) (regulations entitling recipient of aid to the disabled to notice of any action affecting right to assistance, of right to fair hearing, of method of obtaining fair hearing, that recipient may represent self or may be represented by counsel, relative or friend or other spokesman, and of availability of community legal services "amply safeguard" recipient's interest). The notice given to the petitioner gave him a "reasonably complete statement" of the information upon which the denial of his application was based, "the full reasons" for the denial, and data regarding what he might need to figure out his eligibility. Petition of Clark, 122 N.H. at 891. Moreover, we hold that the notice was fair and reasonable under the particular facts of this case. See Appeal of Hiscoe, 147 N.H. at 227. The petitioner, thus, received all of the notice to which due process entitled him. The Due Process Clause of the State Constitution does not require that he receive any additional notice, including notice of his ability to seek free legal counsel.

**{156 N.H. 641}** The petitioner also contends that the notice he received was insufficient because it was misleading with respect to his right to seek free legal counsel. We observe, first, that the petitioner had neither a statutory nor a regulatory "right" to seek free legal counsel. Rather, by statute, he had a right to be notified that he could have an attorney present at the fair hearing, see RSA 541-A:31, III, and pursuant to regulation, he had a right to receive a list of organizations in New Hampshire that provide free or reduced cost legal services, see N.H. Admin. Rules, He-C 203.04.

The record demonstrates that the notice the petitioner received of these rights was neither confusing nor misleading. The petitioner was notified numerous times of his right to have counsel present at his own expense and he was given the names and contact information for community organizations that provide legal counsel. Several NHLA offices were included in that list and the fair hearing request form specifically identified NHLA as an organization that provides free legal services.

The petitioner also contends that the notice he received was constitutionally infirm because it was not tailored to "the needs of [a] vulnerable population, of which [the petitioner] is an example." We hold that the "practicalities and peculiarities" of this case do not require a different kind of notice than that which the petitioner received. Jones, 547 U.S. at 230 (quotation omitted).

The petitioner does not argue that his physical or mental condition prevented him from understanding the notice that his application was denied or from complying with the administrative review process. See Udd v. Massanari, 245 F.3d 1096, 1100-01 (9th Cir. 2001). Nor was there any evidence that the petitioner was unable to challenge the decision to deny him benefits. See id. at 1102. Indeed, the record shows that he timely submitted a request for fair hearing.

While the petitioner relies upon Covey v. Town of Somers, 351 U.S. 141, 146-47, 76 **{939 A.2d 206}** S. Ct. 724, 100 L. Ed. 1021 (1956), Vargas v. Trainor, 508 F.2d 485, 489-90 (7th Cir. 1974), cert. denied, 420 U.S. 1008, 95 S. Ct. 1454, 43 L. Ed. 2d 767 (1975), and Tripp v. Coler, 640 F. Supp. 848, 850 (N.D. Ill. 1986), these cases are distinguishable from the instant matter.

In Covey, the recipient of the notice had no guardian, was known to be an incompetent and was "wholly unable to understand the nature of the proceedings against her." Covey, 351 U.S. at 146-47. By contrast, there is no evidence that, and the petitioner does not allege that, he was unable to understand the nature of the proceedings against him or unable to appeal the denial of his application for benefits.

Nor is this case similar to Vargas. That case involved notice addressed to the "aged, blind or disabled, many of whom . . . [it] could have [been] anticipated, would be unable or disinclined, because of physical [or mental] **{156 N.H. 642}** handicaps . . . to take the necessary affirmative action." Vargas, 508 F.2d at 489. The notice in Vargas informed the recipients that they had only ten days to meet with their caseworkers to learn why their benefits had been reduced or terminated and then to appeal. Id. at 489-90. By contrast, here, the petitioner was: afforded written notice of the reasons that the department denied his application; given thirty days to meet with his case worker to notify him or her that he intended to appeal; and given the option of requesting a fair hearing by filing a form or by making the request verbally.

The notice the petitioner received here was also superior to that at issue in Tripp. The appellants in Tripp were a class of people whose continued use of Medicaid had been restricted or terminated by the Illinois Department of Public Aid for overuse of medical services. Tripp, 640 F. Supp. at 849. The notices of these decisions, however, failed to inform the class adequately of the agency's reasons for its decisions. Id. at 858-59. Rather, the notices gave ultimate reasons, did not identify the legal standard by which a recipient's medical usage was judged, failed to identify the precise medical items or services at issue, and even failed to identify which person in the recipient's family was determined to have overused medical care. Id. The notice the petitioner received of the reasons the department denied his application has none of these deficiencies.

The petitioner asserts that without additional notice of his "right" to seek free legal counsel, the process he received was fundamentally unfair. The parties argue that to determine whether due process requires the additional safeguards the petitioner seeks in this appeal, we must balance the following three factors:

> (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.In re Father 2006-360, 155 N.H. at 95; see Mathews, 424 U.S. at 335. Because both parties rely upon it, we assume, without deciding, that this three-part test applies. But see Dusenbery v. United States, 534 U.S. 161, 168, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002) ("We have never viewed Mathews as announcing an all-embracing test for deciding due process claims."); Grayden v. Rhodes, 345 F.3d 1225, 1242 (11th Cir. 2003) (under Mathews, tenants entitled to **{156 N.H. 643}** contemporaneous notice, but court declines to apply Mathews to decide what type of notice is **{939 A.2d 207}** adequate to meet the contemporaneous notice requirement).

We find the United States Supreme Court's decision in Mathews instructive. In Mathews, the court evaluated whether due process required an evidentiary hearing before an individual's social security disability benefits could be terminated. Mathews, 424 U.S. at 323. To be eligible for such benefits, "a worker must demonstrate that he is unable to engage in any substantial gainful activity," as defined by the social security administration act. Id. at 336 (quotation omitted).

In balancing the three factors set forth above, the Court first looked to the interest of a social security disability benefits recipient in continued and uninterrupted receipt of benefits pending final determination of his claim. Id. at 340. The Court noted that although it had previously held that due process required an evidentiary hearing before a welfare recipient could be temporarily deprived of welfare benefits, see Goldberg, 397 U.S. at 264, the private interest at stake in Goldberg differed from that at stake in Mathews. Mathews, 424 U.S. at 340-41. "[T]he disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below subsistence level." Id. at 342. Because of "these potential sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action." Id. at 343.

**{156 N.H. 644}** The Court then examined "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards." Id. The Court observed that "the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists." Id. at 344 (quotation omitted). The risk of error, the Court ruled, was lower than in proceedings to determine welfare eligibility where "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process." Id. at 343-44. Thus, the Court reasoned, "[t]he potential value of an evidentiary hearing . . . [was] substantially less . . . than in Goldberg," particularly "where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final." Id. at 344-45, 349.

The Court finally examined "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits." Id. at 347. The Court recognized that the financial

cost and administrative burden "would not be insubstantial." Id. Ultimately, the Court ruled that a pretermination evidentiary hearing was not required, observing that this type of judicial procedure need not be imposed to assure that the administrative process at issue was fair. Id. at 348-49.

The petitioner's private interest in obtaining APTD benefits is similar to the **{939 A.2d 208}** private interest at stake in Mathews. Like the recipient in Mathews, to be entitled to benefits, the petitioner must demonstrate that he is unable to engage in any "substantial gainful activity," as defined by the social security administration act. RSA 167:6, VI; see Mathews, 424 U.S. at 336. Moreover, because the petitioner must meet an eligibility standard that is similar to that in Mathews, determining the petitioner's eligibility for APTD benefits "will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists." Mathews, 424 U.S. at 344 (quotation omitted).

Further, the process by which the petitioner's eligibility for APTD benefits is determined already includes the following safeguards: (1) assistance from department personnel in completing an application for benefits, see RSA 167:8 (Supp. 2007); (2) written notification of whether the application has been accepted or denied, see RSA 167:10 (2002); (3) if the application has been denied, a statement of the specific reasons therefor, see id.; (4) if an application has been denied, notice that the person is entitled to request a hearing, see N.H. Admin. Rules, He-C 203.02; (5) a hearing notice that includes a statement of the time, place, and nature of the hearing, a statement of the legal authority under which the hearing is to be held, a reference to the particular sections of the statutes and rules involved, a short and plain statement of the issues involved, a statement that each party has the right to have an attorney present to represent the party at the party's expense, and a list of the organizations in New Hampshire that provide free or reduced cost legal services, see RSA 541-A:31, III; N.H. Admin. Rules, He-C 203.04; (6) an evidentiary hearing held before a presiding officer, see RSA 541-A:33 (2007); N.H. Admin. Rules, He-C 201.05, of which a record is made, and at which the rules of evidence do not apply, see RSA 541-A:33; N.H. Admin. Rules, He-C 203.15 to He-C 203.18; (7) the right to have an attorney present at the hearing at the applicant's expense; see RSA 541-A:31, III; N.H. Admin. Rules, He-C 203.04; (8) the opportunity to present **{156 N.H. 645}** witnesses and cross-examine the other party's witnesses at the hearing, as well as to submit proposed findings of fact and rulings of law to the presiding officer, see RSA 541-A:31, IV (2007); RSA 541-A:33; N.H. Admin. Rules, He-C 203.19; (9) a written decision on the merits or a decision stated on the record that includes findings of fact and conclusions of law, see RSA 541-A:35 (2007); N.H. Admin. Rules, He-C 203.19(c), He-C 203.22; (10) an opportunity to file a motion for reconsideration, see N.H. Admin. Rules, He-C 204; (11) a written decision on the motion for reconsideration, see N.H. Admin. Rules, He-C 203.22; and (12) the opportunity to seek judicial review by filing a petition for writ of certiorari, see Petition of Walker, 138 N.H. at 473.

We hold that these procedures adequately ensure that the process for reviewing APTD eligibility determinations is fair. See Brown, 333 N.E.2d at 376. The potential value of additional notice that an applicant may seek free legal representation is relatively minimal. See id. at 376-77. The procedure described above "as a whole would appear designed to minimize inaccuracies and to assure quality and fairness in adjudication." Id. at 376.

Finally, requiring the department to issue additional notices to the applicant of his ability to seek free legal counsel would impose some financial and administrative burden on the department, as would requiring the presiding officer to notify the applicant verbally of this right. **{939 A.2d 209}** In balancing the three factors, we conclude that given the petitioner's property interest, the low risk of erroneous deprivation of that interest, and the government's interest in avoiding a fiscal and administrative burden, due process does not require the additional safeguards the petitioner identifies in this appeal. "We cannot say that fairness can only be achieved" with the additional safeguards the petitioner seeks in this appeal. Id. at 376. If these safeguards are to be provided, "it is for the Legislature to say so, for constitutional due process does not command it." Id. To the extent that the petitioner argues that, as a matter of policy, applicants appealing the denial of their applications for APTD benefits should have

the same procedural protections as are provided to claimants in federal social security administration act appeals, see Evangelista, 826 F.2d at 142-43, he makes his argument in the wrong forum. Matters of public policy are reserved for the legislature, and we therefore leave to it the task of addressing the petitioner's concerns. Cloutier v. City of Berlin, 154 N.H. 13, 22, 907 A.2d 955 (2006).

While at oral argument, the petitioner asserted, in effect, that he had a due process right to counsel, in his brief he contended that he was "not asking the Court to establish a new right to counsel in civil cases," but **{156 N.H. 646}** rather was "asking [it] to mandate meaningful notice." Because the petitioner has not briefed the argument that he had a due process right to counsel, we decline to address it. See In the Matter of Bazemore & Jack, 153 N.H. 351, 356, 899 A.2d 225 (2006).

The petitioner also argues that notice of his "right" to seek free legal counsel was "essential information" that Part I, Article 1 of the State Constitution required the department to give him. He relies upon Carbonneau v. Town of Rye, 120 N.H. 96, 99, 411 A.2d 1110 (1980), and Savage v. Town of Rye, 120 N.H. 409, 411, 415 A.2d 873 (1980), for this proposition. Both Carbonneau and Savage concern a town's obligation under Part I, Article 1 to assist its citizens. In Carbonneau, we reminded the town of its obligation under Part I, Article 1 to assist its citizens in applying for certain permits and approvals. See Carbonneau, 120 N.H. at 99. In Savage, we ruled that such assistance includes informing applicants for subdivision approval "not only whether their applications are substantively acceptable but also whether they are technically in order." Savage, 120 N.H. at 411. In neither case did we adopt the broad rule the petitioner advocates in this appeal.

Because the Federal Constitution offers the petitioner no greater protection under these circumstances, we reach the same conclusion under both constitutions. See Douglas v. Douglas, 143 N.H. 419, 424, 728 A.2d 215 (1999).

Affirmed.

DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.