State of New Hampshire
Supreme Court

NO. 2007-0291

2007 TERM

NOVEMBER SESSION

Jonathan McNeal & Paula McNeal

v.

Robert M Lebel d/b/a RML General Contractor
and
Pullman Modular Industries, Inc.

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS/APPELLANTS, JON AND PAULA MCNEAL

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

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   Preserved: DECLARATION (Jan. 17, 2005); Trial, *passim.*

2. Did Mr. Lebel materially breach the contract with the McNeals when he left the job without finishing it, and without any reasonable justification?
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3. Did the court err in finding Mr. Lebel and Pullman Modular Industries non-negligent, or in the alternative found them negligent but failed to make a commensurate award, when they manufactured and built a house that was of substandard quality, was not constructed in a timely and workmanlike manner, and which contains numerous defects?
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   Preserved: DECLARATION (Jan. 17, 2005); Trial, *passim.*

5. Did the court err in not holding Mr. Lebel and Pullman Modular Industries liable pursuant to New Hampshire's Consumer Protection Act – and make a commensurate award – when they, either individually or collectively, represented that they would manufacture and set a house of a certain quality within a certain time, but they did not do so?
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STATEMENT OF FACTS

Paula and Jon McNeal are professionals, 4 *Trn.* at 101-102, who lived for many years in a small aged house on a three-acre parcel in Salem, New Hampshire. In 2003 they decided to replace it with a five-bedroom colonial that could accommodate their family, 1 *Trn.* at 12, which now includes four young children. 1 *Trn.* at 6. They secured a conditional variance from the town, which temporarily allowed two houses on the same lot, but required that the old house be razed within 30 days after a certificate of occupancy (CO) issued for the new home.

Modular House

Understanding that buying a modular home would allow them to accomplish both construction and razing in one summer building season, they began working with a local builder, RML General Contractor, who had many years experience building, or "setting," modular homes. 3 *Trn.* at 81. Robert Lebel, RML's proprietor, worked with the McNeals for about a year helping them plan their house. 1 *Trn.* at 110; 3 *Trn.* at 81. The McNeals described the home they wanted, apprised Mr. Lebel that they would someday like to finish the attic, ORDER (Feb. 21, 2007), *appx.* at 221; 1 *Trn.* at 12, and discussed a myriad of details. Mr. Lebel helped design the colonial, assisted in getting a town building permit, 4 *Trn.* at 68, and apprised the Lebels that, unlike on-site construction, the decisions on all details had to be made before a modular home maker could begin manufacture in its factory. 3 *Trn.* at 81-2.

Although Mr. Lebel had before worked with house manufacturers, this would be his first experience with Pullman Modular Industries, *see* www.pullmanmodularindustries.com. Because there is a substantial amount of work to complete a prefabricated house that must be done by the builder at the delivery site, Pullman sells to general contractors, not direct to homeowners. ORDER, *appx.* at 212; 2 *Trn.* at 91-92 (Kosla: "[J]ust as General Motors sells to dealers, they do

not sell to Mr. and Mrs. Smith.")

Accordingly, in December 2003, Mr. Lebel traveled to Pullman's plant in Worcester, Massachusetts, inspected the plant, and met with its owner, Ken Kosla. It is undisputed that they discussed Pullman's "Purchase Agreement," 4 *Trn*. at 52-3, which although remained unsigned by either party, sets forth the respective duties of manufacturer and builder to complete the house. PURCHASE AGREEMENT, *appx*. at 181.

While they were together in Worcester in December, and based on information supplied by Mr. Lebel, Pullman initially generated what it calls its "Purchase Order," which is a 6-page list detailing each aspect, including color, type, price, etc., of each item comprising the specific house being ordered for the ultimate homeowner. PURCHASE ORDER (July 6, 2004), *appx*. at 18; PULLMAN FOF&ROL ¶16, *appx*. at 258.[1] Of note in this document are two things: under the "Kitchen" category, it specifies the make and model of the kitchen cabinets, PURCHASE ORDER (July 6, 2004), *appx*. at 19, but does not specify a finished attic.

Contract with Homeowners

The McNeals then began to seek financing for the construction project, and an appraisal of the ultimate building. 3 *Trn*. at 83; LEBEL FOF ¶3, *appx*. at 243. For that they needed a documented relationship with a general contractor. 1 *Trn.* at 109. Accordingly, on April 14, 2004, Mr. Lebel submitted to the McNeals a "Proposal" setting forth what Mr. Lebel would do for them, *i.e.* a house "completed in a substantial workmanlike manner." Attached was a list of materials and tasks, the costs for each, and a bottom-line dollar price. CONTRACT, *appx*. at 2, 4.

The document is not signed by either party. CONTRACT, *appx*. at 5. Both nonetheless

[1]In this brief, "FoF" refers to Requests for findings of fact. "RoL" refers to requests for rulings of law. Whether a particular paragraph has been granted or denied is indicated on the document.

agree it is binding on them (even Pullman agreed, PULLMAN FOF&ROL ¶17, *appx*. at 258, and the court found the existence of a contract. 1 *Trn*. at 7-8; 1 *Trn*. at 155; 2 *Trn*. at 87; MCNEAL FOF ¶1, *appx*. at 229; MCNEAL ROL ¶1, *appx*. at 229; LEBEL FOF ¶1, 3, *appx*. at 243; LEBEL ROL ¶1, *appx*. at 243. Shortly thereafter, the McNeals gave Mr. Lebel a $22,000 deposit from their own funds, *i.e.*, $2,000 for the cost of having Pullman turn the "Purchase Order" into engineered drawings, PLANS OF HOUSE (June 16, 2004)[2], plus $20,000 to reserve a slot in Pullman's manufacturing line. PULLMAN FOF&ROL ¶3, *appx*. at 258; MCNEAL SUPP. FOF&ROL ¶4, *appx*. at 240; 1 *Trn*. at 113-14; 3 *Trn*. at 82; 4 *Trn*. at 90-1.

The contract price was originally $368,422, later reduced to $359,042. The non-dollar provisions of the contract are that Mr. Lebel would do the site-work (though not landscaping or demolition of the existing house), construct the foundation, purchase and set on the foundation the house manufactured by Pullman, complete both the plumbing (not related to the well) and electrical (not including utility service to the house), finish the exterior trim, perform a variety of interior finishing projects, and build the garage and mudroom not being manufactured by Pullman. CONTRACT, *appx*. at 2.

The document, drawn by Mr. Lebel, says he will be responsible for the "completion of" the house "in a substantial workmanlike manner." The contract does contain a no-oral-modification clause, but is silent on many matters: it does not specify the final date on which changes had to be made to ensure the house could be completed, is not contingent upon financing, does not include a schedule of payments, does not provide for escrowing of funds, and does not allocate responsibility in the event of malfeasance or nonfeasance. Overall, the contract seems to

[2]These plans were full exhibits below, but the McNeals have not made them part of the appellate record, *see* SUP.CT.R. 13(4), due to their size and nominal appellate usefulness.

assume everything will go as planned, and does not attempt to deal with issues that often arise when relations sour. Regardless of the language of the contract, Mr. Lebel acknowledged that completion entails getting a certificate of occupancy and was his responsibility, 4 *Trn*. at 67; *see also* 2 *Trn*. at 14 (expert witness testified it is general contractor's obligation to get certificate of occupancy), and that at the inception of the contract he understood that September 30 was the McNeal's deadline for moving in. 3 *Trn.* at 83; 4 *Trn*. at 40.

Financing, Ordering, and Manufacturing

In May 2004, the McNeals changed their kitchen cabinet preference, and simultaneously made other changes to the color of siding, roofing, and shutters. 1 *Trn*. at 93, 129. In early May, Mr. Lebel claims he e-mailed Pullman the changes. 4 *Trn*. at 86; E-MAIL CHAIN (May 12, 13, Aug. 11), *appx*. at 45. Pullman said it never received the change to the kitchen cabinets, yet somehow received the changes made to the other items. 3 *Trn*. at 24. When the house was delivered it contained the wrong cabinets. The court resolved the dispute by finding both Pullman and Mr. Lebel 50 percent responsible for the problem. ORDER, *appx*. at 220.

In order to finance construction, Mr. Lebel referred the McNeals to one Tom Henry, of THM Financials *Trn*. at 10;3 *Trn*. at 83, who had once been Mr. Lebel's business partner in a housing development. 4 *Trn*. at 36. On either May 31 or June 1, the McNeals signed a promissory note for $355,000 as a construction loan. 1 *Trn*. at 10, 16. The note was payable in full on September 30, 2004. MCNEAL FOF ¶4, *appx*. at 229; 1 *Trn*. at 10. The McNeal's plan was to pay off the construction loan note by having "permanent financing in place," 1 *Trn*. at 10, before the September 30 deadline. Mr. Lebel was aware of these terms because he helped secure the loan, because it was faxed to him, 1 *Trn.* at 10-11, and because he acknowledged knowing. 3 *Trn*. at 83, 4 *Trn*. at 40; LEBEL FOF ¶5, *appx*. at 243.

Mr. Lebel was paid in amounts and at times determined by him, directly from Mr. Henry – the McNeals were not in the payment loop. 1 *Trn*. at 14; 4 *Trn*. at 37. The first draw-down on the loan occurred almost immediately, 1 *Trn*. at 13, and there was a series of disbursements from the loan to Mr. Lebel throughout the summer. CONSTRUCTION LOAN DISBURSEMENTS AND TOTAL PAID TO LEBEL, *appx*. at 201, 202. Mr. Lebel was paid the full amount he requested whenever Mr. Lebel made a request by e-mail. 1 *Trn*. at 14-15. On the day he left the job, the loan still had $55,000 available to him had he requested it. 1 *Trn*. at 16; 4 *Trn*. at 38, 40. The McNeals got conventional financing in mid-October, and paid off Mr. Henry in full. 1 *Trn*. at 13.

With the last changes made in May, and financing secured on the first of June, Mr. Lebel then placed his order with Pullman, 4 *Trn*. at 50, who drew up final plans on June 16. PLANS OF HOUSE (June 16, 2004). On July 6, Mr. Lebel signed off on the plans, indicating his approval. PULLMAN FOF&ROL ¶24, 25, *appx*. at 258; PURCHASE ORDER (July 6, 2004), *appx*. at 18; 2 *Trn*. at 94; 3 *Trn*. at 20-24.

In his approval, Mr. Lebel was sloppy; the court noted that "he clearly did not review the July 6, 2004 contract he had with Pullman." ORDER, *appx*. at 217. The plans did not call for a finished attic, PULLMAN FOF&ROL ¶56, *appx*. at 258, and included the wrong kitchen cabinets. Mr. Lebel made no attempt to fix these errors. Within two or three days, Pullman began the manufacturing process, which generally takes three to four weeks. 2 *Trn*. at 188-190.

Pressure to Finish

The McNeal's project involved, for several reasons, a significant pressure to finish.

First, the McNeals faced unnerving financial pressure. The construction loan ended on September 30, and it was clear from a "threatening" e-mail that the Henrys would soon begin foreclosure. 1 *Trn*. at 14, 122; 3 *Trn*. at 93. To pay off the construction loan, the McNeals

needed to roll its debt into a conventional mortgage. To get bank financing, the house had to be complete enough to satisfy an appraiser. 1 *Trn*. at 69; 3 *Trn*. at 90-1. Second, as long as the old house remained standing, it needed to be maintained. Because winter was approaching, the McNeals were concerned they would have to heat both houses, and might have to repair critical or expensive systems in their old house which would shortly become obsolete. Third, the McNeal's building permit was conditional on razing the old house within a month of occupying the new one, and the McNeals were concerned this would not be practical after the summer building season. 1 *Trn*. at 139; 3 *Trn*. at 105-6. In addition, the McNeals and their small children and simply wanted to live in their new house, and for this reason had chosen, rather than a site-built home, one that was prefabricated because they were told by Mr. Lebel that it would take only about a month-and-a-half from delivery to completion. 1 *Trn.* at 12; 4 *Trn*. at 29.

Thus, the McNeals "were fairly desperate to get the house completed before our construction financing expired." 1 *Trn*. at 67-8. The deadline was important to Mr. Lebel as well. 4 *Trn*. at 29.

The Site

Before the house was delivered on August 3, Mr. Lebel and Pullman – unknown to the McNeals – wrangled about the suitability of the delivery site. In July Pullman sent a fax to Mr. Lebel warning him that Pullman had "delivery concerns." The fax noted that turning onto the McNeal's driveway was problematic, rocks needed to be removed and the access made wider, and some wires on the driveway hung too low. The fax suggested that brush be removed, that there be tarps available because of the site problems, that a staging area should be created, and that there should be an excavator during delivery to accomplish these things. Pullman's fax also warned of the problems that might result. FAX, PULLMAN TO LEBEL (July 19, 2004), *appx*. at 24.

Despite this, none of the recommended steps were taken by Mr. Lebel or Pullman.

The result of this was that several of the boxes containing the house were left in a neighbor's field overnight, 2 *Trn*. at 103, and others were left in the middle of town. 3 *Trn*. at 86; 4 *Trn*. at 61-2. Because the delivery truck could not maneuver down the driveway, 3 *Trn*. at 86, Mr. Lebel hired a loader 2 *Trn*. at 108, to move the house, which according to Mr. Kosla is a poor practice because the geometry of a loader magnifies small bumps, thus jolting the house three to four feet, 2 *Trn*. at 108, and risking damage to many things including leaks, 3 *Trn*. at 185, cracked walls, 2 *Trn*. at 102-3, 182, and unaligned doors. 3 *Trn*. at 71-73. The McNeals were not made aware of these risks at the time. The court found that Mr. Lebel "did not appreciate the difficulty with the deliver and set up given the site conditions." ORDER, *appx*. at 217.

Delivery and Discovery of Problems

The house was delivered on August 3, 1 *Trn.* at 11, 16, 108, and set on the foundation on August 6. *See* FOUR PICTURES OF HOUSE, *appx*. at 30; LEBEL ROL ¶9, *appx*. at 243. Mr. McNeal and Mr. Lebel walked through it, 1 *Trn*. at 108, and many problems were immediately apparent to both, 1 *Trn*. at 40; 4 *Trn*. at 14, prompting Mr McNeal to begin a list before he even completed the tour. 3 *Trn*. at 87.

The three problems (and the finger-pointing between Mr. Lebel and Pullman concerning them) that occupied the most trial time were that there were no stairs, the kitchen contained the wrong cabinets, and there was a beam in the attic that was raised such that a floor could not be installed. ORDER, *appx*. at 215-6.

Several sets of stairs that were supposed to be installed in the house, but none were included upon delivery. Later two sets of basement stairs were built by Mr. Lebel, and others were eventually built and delivered by Pullman. 4 *Trn.* at 70; 2 *Trn*. at 115. Unbeknownst to the

McNeals at the time, the Salem building inspector had conducted a site-visit and said the stairs did not meet code. 1 *Trn*. at 71. Neither Pullman nor Mr. Lebel told the McNeals about this, and neither ever fixed the problems.

As to the kitchen, the cabinets installed by Pullman were the ones called for in the July 6 contract between Pullman and Mr. Lebel, but not the ones the McNeals believed they ordered in May. Pullman and Mr. Lebel blamed each other for the error.

Finally, going across the attic is a beam that forms part of the structure of the house. The beam is 11¼ inches tall, while the surrounding floor joists are 9¼ inches tall, making it impossible to install a flat floor. 2 *Trn*. at 171-175. Mr. Lebel repeatedly asked Pullman if he could shave the beam flat, but Pullman refused saying it was a structural member and that if Mr. Lebel changed it, any problems would become his liability. Neither Pullman nor Mr. Lebel ever fixed it. 3 *Trn*. at 52; 4 *Trn*. at 76-7. That the attic flooring was shipped loose rather than installed by Pullman at its factory dumbfounded Mr. Lebel, and betrayed fundamental misunderstandings between them about both the structural basis of the house's roof and their contract with each other. 3 *Trn.* at 25-34.

Many other problems became apparent over the course of the next several days and weeks. These include: baseboard and trim missing or damages, leaks in the basement, the floor was missing in some bathrooms, the foyer and bedroom above it was framed but not wired or finished, doors were unaligned or could not open or close, the dormer had installation problems, there were numerous cracks and numerous blemishes in the drywall, electrical items were not wired and water-fed items were not plumbed, the flooring and walls around the fireplace were missing or incomplete, there was no flooring or carpeting in various areas in the house, the garage lacked doors, the garage floor had a large crack making it dangerous to walk, the heating system

was missing parts, the joints in the "marriage walls" where the boxes comprising the house were joined did not join creating gaps in the attic, the master bathroom was missing a deck around the bathtub leaving large holes, the door and window in the mudroom were installed wrong, roof shingles were missing or loose, and sections of the siding and soffits were missing or installed incorrectly, and many items supposed to be shipped lose for the builder to install were apparently missing. *See generally* LTR., LEBEL TO PULLMAN (Aug. 15, 2004), *appx.* at 32.

Pullman and Lebel Blame Each Other for Problems

These and other problems became the subject of a nearly daily series of letters, faxes, and e-mails among Mr. Lebel, Pullman, and the McNeals. *Appx*. 32-104.

As the court noted, Pullman "simply wanted these problems to go away," ORDER, *appx.* at 217, and blamed the problems in the house and the delays associated with repairing them on Mr. Lebel having allowed the house to be delivered to a substandard site, 2 *Trn*. at 182-6, not understanding his obligations under the contract between them, 3 *Trn*. at 38-39, and jamming himself into an impossible deadline. 2 *Trn*. at 199.

Mr. Lebel was aware of the time constraints. He seemed incapable, however, of effecting significant progress, in persuading Pullman to address problems for which he believed Pullman was responsible, or which he believed needed Pullman's attention before he could continue work.

Request to Prioritize

The McNeals cannot be sure who is a at fault for any particular problem. But they were frustrated at being caught in misunderstandings between Pullman and Mr. Lebel, and were less and less willing to rely on either one to solve them. 3 *Trn.* at 91. They felt that there was plenty of work Mr. Lebel could be doing that did not depend on Pullman, and that both Mr. Lebel and Pullman were unresponsive to their concerns. *Id.*; 1 *Trn.* at 126. They nonetheless were under

financial pressure, and believed that a bank financing appraiser would base a judgment of completion more by attention to the exterior than the interior of the house – a belief affirmed by Pullman during trial. 2 *Trn.* at 109.

Thus, on October 4, the McNeals had their attorney write a letter to Mr. Lebel requesting Mr. Lebel prioritize his work to focus on the outside: "Given the rather tight timeframe, we request that *your crew* does not do anymore interior work, except for electrical, but rather devote its efforts to the exterior work." LTR., SPRINGER TO LEBEL (Oct. 4, 2004), *appx.* at 79 (emphasis added).

The McNeals intended this request to apply to Mr. Lebel's work only. The McNeals (and Mr. Lebel) had worked hard to get other tradespeople to the site, they knew other tradespeople and Pullman had already been scheduled to hopefully complete work that was already underway inside, and meant only to prioritize construction efforts toward those things that would facilitate getting a mortgage. 1 *Trn*. at 69. The McNeals had no intent to part with Mr. Lebel; rather they were "fairly desperate to get the house completed before our construction financing expired." 1 *Trn.* at 67-8. Moreover, in the same letter, Attorney Springer made clear that the McNeals's intended to fully pay Mr. Lebel "[w]hen permanent financing is obtained," which Mr. Lebel knew was imminent.

Nonetheless Mr. Lebel somehow interpreted the letter as telling him, his crew, and all other workers that they were fired. "Basically, we were forced – they were forced off the job." 3 *Trn.* at 103. Mr. Lebel thus told all subcontractors on the job to cease working inside. He even faxed a letter to Pullman saying that "the homeowner through his attorney has requested that all interior work cease at this time." LTR., LEBEL TO PULLMAN (Oct. 66, 2004), *appx.* at 89. When Pullman workers came to address problems with flooring and stairs, Mr. Lebel sent them home. 2

Trn. at 117, 124; 3 *Trn*. at 48. When an electrician showed up to work in the house, Mr. Lebel likewise turned him away. 1 *Trn*. at 135.[3]

Mr. Lebel Stops Working

The day after the McNeal's letter to Mr. Lebel requesting that he prioritize exterior work, Mr. Lebel wrote back saying several things. LTR., LEBEL TO SPRINGER (Oct. 5, 2004), *appx*.at 87.

First, he claimed that he had placed a mechanic's lien on the property, although it is believed he never did.

Second, he quit. Mr. Lebel wrote, "as of the end of day Thursday 10/7/04 I will have no choice but to cease working at the McNeals."

Third, he attempted to alter the contract in two ways. First, he wrote: he would not work "until such time that am sure end financing is in place and that I have a guarantee that I will be paid for all work completed in a timely fashion." Second, he wrote: "To that point of being paid, I will require that any funds due to me be placed in an escrow account until such time that they are withdrawn to, in fact pay me for services rendered."

That this is a breach of contract by Mr. Lebel is undisputed. He conceded that the contract did not provide for escrowing of funds, that getting end-financing was not a condition of the contract, and that he knew from the beginning of the project that the September 30 deadline was critical due to the financing situation. 4 *Trn*. at 40; ORDER, *appx*. at 219.

When Mr. Lebel showed up on October 7, the day Mr. Lebel himself put in his letter as the day he would "cease working," he found his tools moved to the garage and the house locked. 3 *Trn*. at 93. Upon this, he and his crew departed. 3 *Trn*. at 94.

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[3]That Mr. Lebel simultaneously regarded Attorney Springer as the general contractor, but continued to treat other tradespeople as his subcontractors is an unexplained contradiction.

When he left, however, Mr. Lebel took not only his tools, but the materials – provided by Pullman and thus already paid for by the McNeals – intended for finishing the exterior work that was necessary for mortgage financing.[4] 1 *Trn.* at 117-8. He also left knowing there were undisclosed code violations. The McNeals immediately made arrangements to complete the un-done work, and got a bank loan the following week. 4 *Trn.* at 79.

Mr. Lebel and the McNeals, through their attorney, continued corresponding, with Mr. Lebel making repeated demands for the placement of money in escrow. LTR., LEBEL TO SPRINGER (Oct. 13, 2004), *appx.* at 93. The construction relationship was squarely over, however, on October 22 when the McNeals wrote to Mr. Lebel that conditioning continued work on an escrow arrangement was a breach on contract, that they declined to alter the contract in that manner, that they intended to pay Mr. Lebel for all work he did, and that given Mr. Lebel's unilateral termination of work, 1 *Trn.* at 89-90, "you should not return to the property." LTR., SPRINGER TO LEBEL (Oct. 22, 2004), *appx.* at 94.

McNeals Get Certificate of Occupancy

After Mr. Lebel left and the McNeals were forced to hire others to complete the job, they first learned, 1 *Trn.* at 71, that the stairs did not meet the building code, that Mr. Lebel and Pullman knew about these issues, and that the building inspector had already been to the site and had found code violations.

Finally being informed, they set to hire a contractor to evaluate the stairs and to address their problems. Although several contractors were unwilling to do the work, eventually they found one who would. 1 *Trn.* at 98, 164; RENNIE CONSTRUCTION PROPOSAL (Feb. 1, 2005),

[4]This removal blossomed into a dispute regarding the ownership of the materials and who should bear the cost of their replacement.

appx. at 125. The McNeals also hired other contractors to complete the house sufficient to get a certificate of occupancy.

In December 2004 and into January and February 2005, they addressed the stair problems with both town and state officials, and continued to request that Pullman either fix the stairs or show the officials that they complied with the appropriate code. *See* Record of Correspondence, *appx*. at 100-148. But because Pullman repeatedly neglected to reply to the State Fire Marshall, who is responsible for stair code compliance in prefabricated homes, there were additional delays in addressing one of the stairs. The Fire Marshall finally inspected the stairs in June 2005, and again corresponded with Pullman regarding code violations and Pullmans' responsibility for them, in June and July. Pullman continued to blame the problem on Mr. Lebel. LTR., GORMLEY TO SPRINGER (July 25, 2005), *appx*. at 150.

These events caused delay, as did raising the money to pay for the additional contractors to do the work that had been the responsibility of Mr. Lebel and Pullman. By hiring others, the McNeals ultimately solved these matters, but it took time. 1 *Trn*. at 164. *See* CORRESPONDENCE, *appx*. at 100-157. It also meant that, even though getting a certificate of occupancy was clearly Mr. Lebel's duty, 4 *Trn*. at 67; *see also* 2 *Trn*. at 14, the McNeals couldn't get theirs until July 2005. 1 *Trn*. 164, 165.

STATEMENT OF THE CASE

The McNeals sued Mr. Lebel for his breach of contract. They sued both Mr. Lebel and Pullman for negligence, breach of prefabricated-home warranties provided in RSA 205-B, and for violations of the Consumer Protection Act. Mr. Lebel counterclaimed, alleging the McNeals breached the contract and that he was not paid for work done.

The Rockingham County Superior Court (*Kenneth McHugh*, J.) found that both Mr. Lebel and the McNeals Lebel breached the contract. It also found that both defendants Mr. Lebel and Pullman were negligent. Thus the court awarded the McNeals the amount it found it cost them to repair the various problems, split between the two defendants. It awarded Mr. Lebel the amount it found was owed for work he had completed. The court held that there was no "substantial defect" and thus awarded no damages under the Warranties on Presite Built and Prefabricated Homes statute, and found no violation of the Consumer Protection Act. The ultimate damages award was that the McNeals owe Mr. Lebel $5,271.64, and Pullman owes the McNeals $9,250.00. In other words, the court found that the McNeals were damaged by less than $4,000, and that they suffered little from Mr. Lebel's breach.

This appeal followed.

SUMMARY OF ARGUMENT

After laying out the factual background, the McNeals first argue that Mr. Lebel materially breached his contract with the McNeals by adding terms, quitting, and not completing the house. They then point out their request for Mr. Lebel to prioritize his work, and their later recognition that the relationship was ended, cannot be construed as a breach. They suggest that Mr. Lebel's breach was based on unfounded fears he would not get paid, which do not justify his breach.

The McNeals they list some of the problems with the house, show they were caught in squabbles between Mr. Lebel and Pullman of which they were not at the time aware, and point out that they don't care who is at fault – they simply wanted the house they bought.

The McNeals then argue they should have been awarded damages under New Hampshire's prefabricated home warranty statute, because the problems in the house are substantial defects which relate to its structure and essential systems.

They then argue they although the court found both Mr. Lebel and Pullman negligent, they were insufficiently awarded damages based on the negligence the lower court found, and based on numerous problems and failures to repair that the court ignored in its award.

The McNeals also argue they should have been awarded damages under New Hampshire's Consumer Protection Act because they were treated unfairly and deceptively by both Mr. Lebel and Pullman, who promised a house, but delivered a product which did not meet code and which contained problems that the McNeals had to repair and some that may be irreparable.

The McNeals then list a number of erroneous factual findings made by the court which they believe led it to its erroneous legal conclusions and insufficient damage award.

Finally, they note the lower court's misunderstanding of documents which led it to miscalculate damages, based even on the facts it found and the legal conclusions it reached.

ARGUMENT

I. Mr. Lebel Breached the Contract

A. Mr. Lebel Materially Breached

It is undisputed that Mr. Lebel breached the April 14, 2004 contract. First, Mr. Lebel conceded that he left the job after the McNeals refused to put money into an escrow account that was not contemplated by the contract. Second, he said he would not continue to work until he was "sure end-financing was in place," a condition also not contemplated by the contract. Third, the house was not completed within the six weeks Mr. Lebel had promised. Fourth, he quit. *Dandeneau v. Seymour*, 117 N.H. 455, 461 (1977) (abandoning a construction site is a material breach of contract). Fifth, on the day he quit, the house was not completed as required by the contract. *Marcou Const. Co., Inc. v. Tinkham Indus. & Development Corp.*, 117 N.H. 297, 299 (1977) (builder's failure to finish job constitutes breach of contract).

B. The McNeals Did Not Breach

The letter the McNeals's attorney wrote, in an attempt to prioritize Mr. Lebel's work toward the exterior where a mortgage appraisal would be focused, cannot be construed as firing Mr. Lebel, or a breach of the contract. *See e.g., Martin v. Phillips,* 122 N.H. 34 (1982) (homeowner clearly ordered building contractor off the site). The letter was merely an attempt to properly focus the work in the remaining weeks before the construction loan ended.

The McNeals do not contest that Mr. Lebel should be paid for work he did. To the extent that not paying him was the basis for the court's finding they breached their contract, however, there is no evidence. The McNeals consistently repeated the intent to pay for work done.

After threatening to leave unless the contract were altered, Mr. Lebel left the site, took his tools, and told other workers, including Pullman, to go home. His breach thus materially effected the continued existence of the contract, and left the McNeals under no further contractual duties.

The court found the McNeals were "unreasonable" in "their unwillingness to escrow sufficient funds." ORDER, *appx.* at 216. They declined escrow for several reasons. First, they didn't have any money in advance – the construction loan had ended and mortgage financing was two weeks away. Second, to the extent that Mr. Lebel was not paid for his work before the construction loan money ran out, that was Mr. Lebel's fault. He made no effort to get paid from those funds for several weeks before the loan ended. Mr. Lebel claims he did $16,500 of unpaid work, but concedes there was money left un-disbursed from the loan. The McNeals were never involved in the transactions between Mr. Henry and Mr. Lebel, and did nothing to prevent Mr. Lebel from being paid. Moreover, even if Mr. Lebel was not paid for a short time, it does not constitute a material breach of contract. *See Fitz v. Coutinho*, 136 N.H. 721 (1993); *c.f. Consolidation Coal Co. v. Twin State Gas & Elec. Co.*, 82 N.H. 91 (1925) (failure to pay for entire year was material breach). Third, the contract between Mr. Lebel and the McNeals did not call for escrowing of funds – Mr. Lebel's insistence on an escrow arrangement would have been a material modification of the contract into which the McNeals had no duty to enter.

Insofar as the McNeal's might have invited Mr. Lebel back to complete the job after he left, ORDER, *appx.* at 217, by that point it was clear that the parties relations had grown so sour that there was little point in trying to resurrect them. 1 *Trn.* at 90; LTR., SPRINGER TO LEBEL (Oct. 22, 2004), *appx.* at 94.

Though they may have been demanding customers, there is nothing in the record to support the court's finding that the McNeals breached their contract with Mr. Lebel. *See Bailey v. Sommovigo*, 137 N.H. 526, 529 (1993). Exercising its *de novo* review of contracts, *Czumak v. New Hampshire Div. of Developmental Services*, 155 N.H. 368 (2007), this Court should reverse the lower court's finding that they are liable to Mr. Lebel on his contract counterclaim.

C. Mr. Lebel's Unfounded Fears Do Not Justify His Breach

Mr. Lebel attempts to justify his breach on several unfounded theories or suspicions that he wouldn't get paid, 1 *Trn.* at 149; 3 *Trn.* at 94-5, even though he was consistently paid by Mr. Henry when requested, and knew a conventional mortgage was imminent. 4 *Trn.* at 83.

First, Mr. Lebel claims he saw the McNeals spending their money on what he viewed as items of low priority. 3 *Trn.* at 98. Mr. Lebel claims, for instance, that when Mr. McNeal's car broke, he replaced it. 1 *Trn.* at 148-9; 3 *Trn.* at 94. But this occurred several months before the house was being built, 1 *Trn.* at 148, and is a reasonable expense for a commuting professional. Mr. Lebel likewise claims that the McNeals replaced the kitchen cabinets with the ones they had ordered rather than keeping the ones that had been supplied by Pullman and incorrectly approved by Mr. Lebel. 1 *Trn.* at 165. But this was much later, after Mr. Lebel left and the McNeals had obtained mortgage financing. Moreover, there is nothing suspect about getting what you pay for. Similarly, Mr. Lebel claims that when the McNeals found that the existing driveway to the old house would not serve the new garage, they installed an extension. 3 *Trn.* at 94. But Mr. Lebel was fully paid for this work, out of the construction loan funds. Even if these events were relevant, they are not indicative of an intent to not pay Mr. Lebel for his work.

Second, Mr. Lebel claims the McNeals had begun to quibble over small items, whereas before they had not, and that this is somehow indicative of their intent to not pay him. As an example Mr. Lebel offered: "We had an occasion where Mr. Spinger asked me if I would waive the deposit for the change order, and I told Mr. Springer that I would not do that because if he couldn't afford to pay half down, he wouldn't be able to afford paying me later on.… One of the change orders was for $150. Then Mr. McNeal couldn't afford to pay 75 of that." 3 *Trn.* at 92. But that was October, after Mr. Lebel had quit. Even if relevant, it does not betray a bad intent.

Third, Mr. Lebel claims that he felt he was being treated less fairly than other tradespeople

on the job. He testified, "[t]here was a lot of delays because I was asked to waive the deposits, but when Mr. McNeal hired his own company to put in the underground utility, Mr. McNeal didn't seem to have an issue in giving them a 50 percent deposit of approximately $1750." 3 *Trn.* at 102. While this may be accurate, it appears Mr. Lebel did not factor in time for putting in an electric pole, he seemed to be blaming the McNeals for that, 3 *Trn.* at 102, and it was a job he then explicitly refused to take on. LTR., LEBEL TO MCNEAL (Sept. 8, 2004), *appx.* at 52. The McNeals were nonetheless concerned that the electric poll was a priority for two reasons: 1) although contractors were successfully using extension cords from the old house, they wanted to avoid any blame for Mr. Lebel not completing his work due to lack of power, and 2) it was mid-September, and the new-house heating system relied on electricity. 1 *Trn*. at 134. Mr. Lebel's claim of being treated unfairly does not comport with the evidence, is merely a suspicious theory, and does not indicate the McNeals intended to not pay Mr. Lebel for his work.

Finally, Mr. Lebel claims the McNeals were conspiring against him. "I believe I was pretty much forced, coerced, just to get them to end financing, and they went out of their ways, troubles, to ensure that I couldn't do any more work on the inside of the house and that I couldn't achieve anything else, and I believe they went out of their way to ensure that the house was in disarray so when they were putting all their facts and figures together, it would look more in their favor." 3 *Trn.* at 104. But Mr. Lebel conceded that he knew the construction loan was up on September 30, that there would be no more money available until a conventional mortgage was approved, that acquiring a mortgage would require an appraisal of the house, and that the McNeals would be likely to acquire a mortgage soon. Moreover, a short delay in payment is not a material breach of contract. *See Fitz v. Coutinho*, 136 N.H. 721 (1993).

The supposed justifications for Mr. Lebel's breach are not based in fact, and reflect nothing more than Mr. Lebel's unfounded fears

II. Problems With the House and Site

A. Partial List of Problems

The Site. Before the house was delivered, the site needed to be prepared to accept the house being set on the foundation. But the site was not properly prepared: delivery trucks could not make the turn into the McNeal's access road, boxes containing the house had to be left off-site – in the middle of town – while the site issues were addressed, and the poor site preparation lead to the need to set the house using a loader which Pullman claims is responsible for some of the problems in the house. Mr. Lebel testified that he had set prefabricated houses before. 3 *Trn.* at 81. Presumably he should have known how to properly prepare the site.[5]

Stairs. When the house was delivered, there weren't any stairs. Pullman finally supplied some, but they did not meet code because the length of the treads was insufficient, the height of the risers was insufficient or varied from step to step, or the headroom was not high enough, or some combination of these. After multiple reconstructions, and months of intervention by the Salem Building Inspector and the State Fire Marshall, the stairs were eventually made compliant. It became apparent, however, that there was a design defect at the outset that made necessary the lengthy process. *See e.g.*, "Modification Report" (Mar. 5, 2004), ***appx.*** at 1 ("Stair to Attic - Cannot be built to code"); LTR., BUILDING INSPECTOR TO MCNEAL (Dec. 20, 2004), ***appx.*** at 106 ("the only way to make [the stairs] comply completely is to remove and rebuild them").

Attic. The McNeals made clear to Mr. Lebel early that they intended to someday finish

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[5]Pullman's owner, Ken Kosla, testified that he visited the site several times before delivery, that the ½-mile-long road, was "very poor," "very narrow, had a lot of humps and bumps." 2 *Trn*. at 103. "It had a soft shoulder of which I was concerned about the tractor slipping into or the wheels on the trailer. It had an awful lot of overhanging branches." Mr. Kosla testified that he asked Mr. Lebel to "widen the road and to grade it." 3 *Trn.* at 67. He was concerned that the house would have to be moved across boulders. 2 *Trn*. at 104, 108. Mr. Kosla said that access road issues are generally solved long before delivery, and suggested that as general contractor, it was Mr. Lebel's job to address them. 3 *Trn*. at 79-80. None of this information was conveyed to the McNeals at the time.

the attic, perhaps adding a bedroom or playroom. 1 *Trn*. at 12. When the house was delivered, it was apparent that a flat floor could not be installed because a structural member was two inches higher than the surrounding joists. PICTURE, Exh. 13, *appx*. at 160; MCNEAL FOF ¶19, *appx*. at 229. Although it could have been designed to accept a flat floor, Pullman believed it was merely a storage space and therefore designed it with the tall beam. 2 *Trn.* at 171-5. Mr. Lebel conceded that he failed to catch the problem when he approved Pullman's plans. 2 *Trn*. at 24-5; 4 *Trn.* at 72-4; ORDER, *appx*. at 207. Having been built that way, however, it is now difficult to fix, in part because the house is modular, has a third-party engineering stamp on it, and no one is willing to alter the structural member without re-engineering. 1 *Trn*. at 37, 106, 156-7, 188-89; 2 *Trn*. at 27, 122-23; 3 *Trn*. at 52; 4 *Trn*. at 20. The problem persists because Mr. Lebel didn't fix it, 1 *Trn.* 38, because Mr. Lebel believed Pullman had to address it first, 4 *Trn*. at 76-7, and because it may be intractable or at least very expensive.

Electrical, Plumbing, and Heating. When Mr. Lebel left, he conceded the house was missing a portion of its electrical system, 4 *Trn.* at 44, and that its plumbing system was incomplete. 4 *Trn*. at 42; 1 *Trn.* at 137. Mr. Lebel also conceded that the heating system was incomplete, 4 *Trn.* at 44, as it was missing a furnace. 2 *Trn.* at 113.

Marriage Walls. When the several pieces of a modular house are attached, they are supposed to fit reasonably well, if not perfectly. When the house was set, however, there were gaping holes in the attic at the ridge beam where the halves came together. PICTURES, Exh. 16 & 28, *appx*. at 161 & 171. Mr. McNeal himself put some insulation in the hole, 1 *Trn.* at 38-9, 128, just to keep out the weather and animals. 2 *Trn.* at 71, 182.

Roof Shingles, Soffits, Siding. When the house was delivered, roof shingles were falling off because they were installed with the wrong fasteners. 1 *Trn.* at 50. When Mr. Lebel left, the

soffits were still incomplete, allowing the interior of the house to be exposed to the elements. 1 *Trn*. at 49. Mr. Lebel was upset at Pullman for poorly installing the siding such that he had to remove a substantial portion and re-install it. 3 *Trn.* at 89; 4 *Trn*. at 58-9, 108.

Garage Floor. Shortly after the concrete garage floor was poured in May, 2004, it not only cracked as is expected, but developed a large a fissure along its entire length about the height of a penny. PICTURES, Exh. 20 & 21, *appx.* at 162 & 163. The fissure probably betrays incorrect preparation underneath the floor, 2 *Trn*. at 51-4, and presents a safety hazard that is beyond the industry's normal tolerances. 2 *Trn.* at 50-1. Mr. Lebel conceded the problem still existed when he left the job. 4 *Trn.* at 48. Fixing the problem probably requires tearing up the concrete and starting anew. 1 *Trn*. at 181; 2 *Trn*. at 54-60

Basement Leaks. Not only are there many cracks in the concrete floor and walls of the basement, but the basement leaks. PICTURES, Exh. 24 & 25, *appx.* at 166 & 167. The McNeals attempted to fix it, but the problem persists. 1 *Trn.* at 48.

Fireplace. There are gaps in the walls around the fireplace because a part necessary to fasten the wall is missing. 1 *Trn*. at 46-7; PICTURE, Exh. 23, *appx.* at 165. When Mr. Lebel left, the problem still existed. 4 *Trn*. at 30.

Bathrooms. There are various issues with several bathrooms, including incomplete electrical and plumbing systems, and incomplete flooring. 1 *Trn*. at 51, 129, 133; 2 *Trn*. at 112-4.

Bumpout/Foyer. A portion of the house was not Pullman's to manufacture, rather Mr. Lebel contracted to build it on-site. When Mr. Lebel left, it was not done; there were studs, but no electrical outlets, and no walls. 1 *Trn*. at 49.

Wrong Kitchen Cabinets. This problem is not complex, but was expensive to fix. The house was delivered with the wrong cabinets, even though the McNeals tried to ensure in May,

before the house was ordered, that their preference would be installed. Although the evidence suggests that Mr. Lebel never alerted Pullman of the change, and then tried to cover his misstep by creating an e-mail to himself, the court below generously found that the problem arose because of mis-communication between Mr. Lebel and Pullman. ORDER, *appx.* at 220.

B. Squabbles Between Pullman and Mr. Lebel Cost McNeals Time and Money

It is not in dispute that all these problems, and more – *e.g.*, out-of-alignment doors and dings and blemishes everywhere – exist. Throughout trial, however, Mr. Lebel and Pullman repeatedly pointed fingers at each other regarding who was responsible for particular problems. For example, there was a lengthy debate between Mr. Lebel and Pullman over who was at fault for installing the floor decking in the attic. Mr. Lebel insisted it should have been done when the house was delivered; Pullman insisted that given the roof design that wasn't possible. 3 *Trn.* at 25-34. There was a dispute over whether Pullman or Mr. Lebel should bear the cost of installing the house's ridge cap. 4 *Trn.* at 65. Pullman and Lebel had a continuing debate throughout the trial over who was responsible for the "ship-loose" list – items that were included in the boxes containing the house, but not installed at the factory. *See e.g.*, 3 *Trn*. at 36-38.

Who is at fault for each of such items is of no moment to the McNeals. They just wanted a house, but became bystanders in seemingly intractable squabbles: between Lebel and Pullman over whose job it was to make sure some item was installed, between town and state officials over whose building code applied. These cost time – Mr. Lebel's record of correspondence to Pullman is replete with pleas to address issues he felt were delaying him. *See e.g.*, LTR., LEBEL TO PULLMAN (Sept. 8, 2004), *appx.* at 50; LTR., LEBEL TO PULLMAN (Sept. 13, 2004), *appx.* at 55; FAX, LEBEL TO PULLMAN (Sept. 21, 2004), *appx.* at 68. And they cost money – the McNeals had to independently complete jobs for which they already paid either Pullman or Mr. Lebel.

III. Pullman and Mr. Lebel Violated the Prefabricated Home Statute

New Hampshire's statute entitled, "Warranties on Presite Built and Prefabricated Homes," RSA 205-B,[6] provides that all prefabricated houses come with a warranty that "such home is free from any substantial defects in materials or workmanship in the structure, plumbing, heating, and electrical systems and in all appliances and other equipment installed or included in such home by the manufacturer." RSA 205-B:2.

The New Hampshire Building Code, RSA 155-A, in its definitions sections, provides that "'[s]tructure' means structure as defined and interpreted by the International Code Council's International Building Code 2006." RSA 155-A:1, VI. The International Building Code provides that "structure" means, "[t]hat which is built or constructed." INTERNATIONAL BUILDING CODE 2006, definitions p. 20, *appx*. at 264.[7]

Thus the prefabricated home warranty broadly covers all those items in prefabricated houses that are "built or constructed" in a substantially defective way. Presumably it does not apply, for instance, to roofing shingles, but it would apply to the roof generally, as it is "built or constructed" by the prefabricated home manufacturer. For the purposes of the McNeal's case, the warranty covers the stairs, the non-flat attic floor, the roof, soffits, siding, the garage floor, the leaky basement, and other items, which are substantially defective.

The warranty also independently covers "plumbing, heating, and electrical systems." Thus, in the McNeal's home, it applies to the plumbing and electrical problems in the bathrooms, the incomplete electrical system, the incomplete plumbing system, and the incomplete heating

[6]It is believed that New Hampshire does not have a general new-home warranty statute for site-built houses. There is a statute creating a warranty for mobile-homes, RSA 674:31& 31-a, and for condominiums. RSA356-B:41.

[7]Because of the bulk of the document, just the single relevant definition page is in the appendix, at page 264.

system, and other items, which are substantially defective.

When the prefabricated home warranty statute applies, it requires that the prefabricated house manufacturer must fix the defects. The statute also provides that if the homeowner must sue "for failure of a manufacturer to comply with the [statute's] provisions," the court "shall allow for the recovery of court costs and reasonable attorney's fees." RSA 205-B:4.

The prefabricated home warranty statute seeks to protect owners of new prefabricated homes by giving them an easy remedy in the McNeal's situation, where it is difficult to determine who – the builder or the manufacturer – created the problem, but where it is clear that something is wrong. *See e.g., Ittel v. Pietig*, 705 N.W.2d 203 (Minn.App. 2005). The manufacturer must first conduct the repairs, and *then* seek to recover from others who it might believe are responsible. But meanwhile the homeowner is not left with a house containing defective or unsafe structures or systems.

The statute gives new owners the must-fix remedy, as well as fees and costs, in order to facilitate repair without having to prove negligence, without having to enter a contingency-fee arrangement with a lawyer, and without having to forgo the necessary repairs based on a calculation that the cost to litigate exceeds the cost to fix. *See Carter v. Lachance*, 146 N.H. 11, 14 (2001) (construing similar provisions of landlord/tenant statute). Thus the statute places the cost of mis-manufacture on the manufacturer, and not on the safety or pocketbook of the purchaser.

The court below found that the various problems in the McNeals house were not "substantial defects" and thus refused to award costs and fees. The court erred, however, because the various problems are both defects and are substantial. For example, a set of stairs that do not meet code is a substantial defect. *See e.g., State v. Weinschenk* 868 A.2d 200 (Me. 2005) (action by State against builder for constructing houses with defects including non-code-compliant stairs);

Gilchrist v. Ozone Spring Water Co., 639 So.2d 489 (La.App. 1994) (varying risers and insufficient tread depth constitutes defective stair). A leaky basement is a substantial defect. *Tease v. Vandenbergh*, 495 N.W.2d 104 (Wis.App. 1992) (unpublished opinion); *Pickler v. Fisher*, 644 S.W.2d 644 (Ark.App. 1983). Cracks in the garage floor is a substantial defect. *Schulze v. C & H Builders, Inc.*, 761 S.W.2d 219 (Mo.Ct.App.1988). The inability of the McNeals to use their attic as they had planned is a substantial defect.

Exercising its *de novo* review, *Grand China, Inc. v. United Nat. Ins. Co.*, __ N.H. __ (decided Nov. 9, 2007), this court should reverse the lower court's ruling, order that either Pullman or Mr. Lebel repair the problems in accord with the prefabricated home warranty statute, and remand for calculation of damages, attorneys fees, and costs.

IV. Mr. Lebel and Pullman Were Negligent

Builders have a duty to construct houses in a non-negligent, timely, good, and workman-like manner. *See Boynton v. Figueroa*, 154 N.H. 592 (2006); *Lempke v. Dagenais*, 130 N.H. 782, 790 (1988); *Ellis v. Robert C. Morris, Inc.*, 128 N.H. 358 (1986).

Whoever is at fault and whatever the reason, the McNeals received a house that was not in accord with what they told Mr. Lebel they wanted, was not complete within the six weeks Mr. Lebel said, was not built to code nor to a standard of good workmanship. It has numerous problems, some rectifiable and some not. The court below found negligence and addressed several of the problems – the stairs, the attic, and kitchen cabinets – but did not address the myriad of additional problems, and failed to award damages based on them.

This Court should remand for a re-calculation of damages in accord with the magnitude of the problems, and the lack of workmanlike conduct that gave rise to them.

V. Pullman and Mr. Lebel Violated the Consumer Protection Act

The New Hampshire Consumer Protection Act provides it is unlawful to "use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce," such as "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." RSA 358-A:2.

A deceptive or unfair act is not less so because the consumer avoided damage. Thus, when the Act is violated, "recovery ***shall*** be in the amount of actual damages or $1,000, whichever is ***greater***." RSA 358-A:10 (emphasis added). To recover, the plaintiff need not show actual damages. *Carter v. Lachance*, 146 N.H. 11, 14 (2001).

Similarly, there is no requirement that the consumer relied on the misrepresentation. RSA 358-A:11 ("In order to prevail in any prosecution under this chapter, it is not necessary to prove actual confusion or misunderstanding."); ***see Mulligan v. Choice Mortgage Corp. USA***, 1998 WL 544431, 1998 US Dist. LEXIS 13248 (D.N.H.,1998) ("the plaintiff need not show that he or she actually relied on the deceptive acts or practices").

"An act or practice is deceptive if it is a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." To be unfair, "the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition." *State v. Weinschenk*, 868 A.2d 200, 206 (Me. 2005) (citing interpretation of Federal Trade Commission Act under same policy as ***Beckstead v.Nadeau***, __ N.H. __ (decided June 26, 2007) using as guidance federal courts' interpretation of FTCA).

Mr. Lebel and Pullman were deceptive in not disclosing problems with the stairs that would cause the house to fail its inspection, and in not disclosing issues with the driveway and

building site which may have caused of many of the house's problems. As the court noted, perhaps they "simply wanted these problems to go away." ORDER, *appx.* at 217.

Mr. Lebel and Pullman collectively promised the McNeals that they would deliver and within six weeks complete a house reasonably free from defects. *See McMullin v. Downing*, 135 N.H. 675 (1992). Not only did Mr. Lebel and Pullman not fulfill their promises, but they knew they couldn't, or were at least indifferent as to whether they could. Pullman wrote a letter to Mr. Lebel acknowledging the stairs were non-compliant, but minimizing the problem, and saying "[p]erhaps the inspector will let such a small imperfection slide." LTR., PULLMAN TO LEBEL (Sept. 20, 2004), *appx.* at 66.

In *Boynton v. Figueroa*, 154 N.H. 592 (2006), the homeowners contracted with a builder to set a modular home, who promised to do the job. Upon delivery and set, the homeowners noticed a variety of problems with the house, including not meeting building code requirements. The homeowners asked the builder and the manufacturer to remedy the problems, but they didn't. The jury in *Boynton* found liability for negligence and pursuant to the Consumer Protection Act, and this Court affirmed.

Of course the specific list of items that ailed the house in *Boynton* and in the McNeal's case are different. But otherwise the cases are similar – promise to set a modular house, problems, failure to address them, house not meeting building code. In both cases the builder and manufacturer were deceptive in not delivering what was promised, not addressing the problems, and not being straight-forward about them. Liability under the Consumer Protection Act is proper in both instances, and by denying it in the McNeal's case, the court below erred.

Accordingly, this Court should reverse the trial court's finding of no liability under the Consumer Protection Act.

VI. Erroneous Factual Findings

The court below made a number of erroneous factual findings that lead it to its inappropriately frugal damages award.

Deadline Pressure. The court found that "it was the lack of any real pressure in terms of the [McNeals] not having a firm deadline to move into their new house that allowed the dispute between the parties to go unresolved for far longer than it reasonably should have." ORDER, *appx*. at 214. Insofar as the court based its finding that the McNeals breached, that Mr. Lebel's breach is excused or mitigated by the court's view that McNeals had a squishy deadline, or that the McNeals were not damaged by Mr. Lebels' failure to meet the deadline, the finding is erroneous.

While the McNeals did not have to live in a camper during construction, *see Boynton*, 154 N.H. at 607, they had a clear deadline, which was arranged by Mr. Lebel and made known to Pullman. September 30 was the day they were to lose construction financing and risk losing their house.

Getting Financing. The court found that the McNeal's "delay in getting construction financing and ultimately converting that financing to a conventional mortgage created unreasonable deadlines for the completion of the construction that could not be met." ORDER, *appx*. at 214. Insofar as the court based its finding that the McNeals breached, that Mr. Lebel's breach is excused or mitigated by the court's view that McNeals delayed their financing, or that the McNeals were not damaged by Mr. Lebels' failure to timely complete his work, the finding is erroneous.

First, the McNeals did not delay getting construction financing. The loan was arranged by Mr. Lebel through his own business partner, and presumably Mr. Lebel was able to control its

schedule. Second, the financing was available as of June 1, in plenty of time to manufacture and set the house. The McNeals made their last change in May, but Mr. Lebel didn't place the order with Pullman until July 6; thus it was Mr. Lebel, not the McNeals, who created the time-squeeze.

Third, the McNeals did not delay converting the construction loan to a conventional mortgage. Mr. Lebel or Pullman did that. It was they who mis-communicated about kitchen cabinets, who did not properly prepare the site, who argued about which was responsible for what details, who waited for each other to complete their respective portions of the project, who constructed non-code-conforming stairs, and who made a myriad of other mistakes that lead to the debacle. A conventional mortgage could not be gotten by the McNeals until the house was substantially complete – on a schedule entirely determined by Pullman and Mr. Lebel.

Inviting Back. The court found that the McNeal's "complaint was never with the quality of [Mr. Lebel's] work, just the fact that the construction had not been completed, and therefore "wonder[ed] as to why the [McNeal's] did not invite him back to complete the job." ORDER, *appx.* at 217. Insofar as the court based its finding that the McNeals breached, *id.* at 222 ("they breached their contract with him by … not allowing him to complete his work"), that Mr. Lebel's breach is excused or mitigated by the court's view that McNeals approved of the quality of Mr. Lebel's work, or that the McNeals were not damaged by Mr. Lebels' failure to perform at an acceptable level of quality, the finding is erroneous.

The exhibits show the McNeals repeatedly complained to Mr. Lebel about the quality of his work. The McNeals complained that he had not made correct arrangements with the electric company, had incorrectly designed the kitchen so it could not accept the oven the McNeals had chosen, had not scheduled delivery of an oil tank and boiler nor the arrival of an electrician, EMAIL, MCNEAL TO LEBEL (Aug. 23, 2004), *appx.* at 37, had installed the utility meter in the wrong place, EMAIL, MCNEAL TO LEBEL (Aug. 30, 2004), *appx.* at 41, had ordered and accepted

the wrong kitchen cabinets, LTR., SPRINGER TO LEBEL (Oct. 22, 2004), *appx.* at 94, had poured a garage floor that had a crack to trip over, and had made a basement that leaks. Later, after the McNeals learned of the matters, they were also unhappy that Mr. Lebel had not properly prepared the site, and had not ensured that the house was capable of having stairs that met code. Even the court found the McNeals were “”dissatisfied with … some of his work.” *ORDER*, appx. at 4.

In short, the McNeals had many justifiable complaints about the quality of Mr. Lebel’s workmanship, and it should be no wonder that they did not invite him back.

July 2005 Certificate of Occupancy. The court found that, “Waiting to obtain a Certificate of Occupancy until July 2005 appears at least partially to have been calculated” by the McNeals, and that the McNeals “elected not to get the stairs corrected, which was an item necessary for occupancy, until the following July.” ORDER, *appx.* at 217. Insofar as the court based its finding that the McNeals breached, that Mr. Lebel’s breach is excused or mitigated by the court’s view that the McNeals calculatingly delayed, or that the McNeals were damaged by their own deeds and not Mr. Lebels or Pullman’s, the finding is erroneous.

Over and over the McNeals stressed to Mr. Lebel and then to Pullman that they wanted a CO before winter so wouldn’t have to spend money heating and maintaining two houses, and could raze the old house during the building season. They could not get a CO until the stairs met code. The record shows that as soon as the McNeals learned of the stair-code problem shortly after Mr. Lebel left, they diligently and repeatedly asked Pullman to fix it, *see* LETTERS, *appx.* 99-104, and after it did not, they diligently pursued it with Town and State officials, *see* EXHIBITS, *appx.* 104-150, in finding workable solution, in hiring a contractor who was willing to undertake the work, RENNIE CONSTRUCTION PROPOSAL (Feb. 1, 2005), *appx.* at 125, and finally in procuring the certificate.

VII. Damages Miscalculated When Court Conflated Value of Work With Amount Paid

The court below made an error in its calculation of damages, essentially conflating the *value* of Mr. Lebel's work with the amount he got *paid* for it. (For the purposes of this discussion, the liabilities as found by the court are assumed.) The difference is $21,000, which is the amount of the court's error.

A. Two Relevant Documents

There are two documents relevant to the court's conflation.

1. Residential Construction Advance Schedule

The first is entitled "Residential Construction Advance Schedule." PLAINTIFF'S EXHIBIT 49, *appx*. at 208. It is a record of the *value* of Mr. Lebel's work, as appraised by the funder Mr. Henry's inspector, over the course of six inspections. The date of the document is September 17.

The first column shows that Mr. Henry broke down Mr. Lebel's work into 18 categories, such as "site work," "ledge removal," "new drive way," etc. The second column shows the amount budgeted for each category. The next six columns show the *value* of work done in each category at each of six inspection times. The ninth column (entitled "to date") shows the total *value* of work done in each category. The last column shows the remaining amount of money budgeted for each category, indicating (presumably) either there was money still available to Mr. Lebel to complete the work in that category, or the work in that category might be done but Mr. Lebel was under-budget.

For example, the first budget item, "site work," is budgeted by Mr. Henry at $10,000. At the first inspection, it was appraised that Mr. Lebel had done half the site work, and therefore the value of the site work done at that time was $5,000. At the third inspection, it was appraised that the additional value of site work done at that time was $4,500. The ninth ("to date") column

totals those two amounts, thus showing that on September 17, Mr. Lebel had done site work valued at $9,500. The last column shows there was $500 still available for site work.

The "total" row at the bottom of each column shows the value of work completed at each inspection time in all categories. The critical number is in the ninth ("to date") column. It shows that as of September 17, Mr. Lebel had completed work which was *valued* at $299,404.

2. Construction Loan Disbursements

The second document is entitled "Construction Loan Disbursements and Total Paid to Lebel." PLAINTIFF'S EXHIBIT 2, *appx*. at 201. It is a day-by-day list, between August 1 and September 30, of the running total of how much was *paid* to Mr. Lebel as disbursements from Mr. Henry's construction loan. It shows that as of the last disbursement on September 17, Mr. Henry had disbursed to Mr. Lebel $298,404. The small chart at the end of the document summarizes the total amount *paid* to Mr. Lebel. It includes both the $298,404 disbursed from Mr. Henry, and the $22,000 deposit the McNeals initially gave Mr. Lebel in April (plus a change order not relevant here) for a total of $320,404 (not including the $1, 978.36 change order which was fixed by the court upon motion for reconsideration).

B. Conflation of *Value* of Work Done With Amount *Paid*

There is no dispute among the McNeals, Mr. Lebel, and the court's finding, that the total amount *paid* to Mr. Lebel for work done through September 17 was $320,404 (not including the change order).

The court, however, mistakenly uses this number to represent the *value* of work done through that date. As can be seen in the chart below, the court calculated the value of work done was $336,904, when in fact it actually was just $315,904. The court thus concluded that the McNeals owed Mr. Lebel $16,500; whereas Mr. Lebel actually owed the McNeals $4,500. The

court's conflation of *value* with amount *paid* created an error of $21,000 against the McNeals.

	Court Order	Exhibits 2 and 49
Value of Mr.Lebel's Work	$298,404 (loan disbursement amount) 22,000 (deposit) 16,500 (subsequent work) $**336,904**	 $299,404 (actual work done) 16,500 (subsequent work) $**315,904**
Amount Mr. Lebel Was *Paid*	$298,404 (loan disbursement amount) 22,000 (deposit) $**320,404**	$298,404 (loan disbursement amount) 22,000 (deposit $**320,404**
Status of Account	$336,904 - 320,404 **$ 16,500**	$315,904 - 320,404 **($ 4,500)**

Because of the lower court's conflation of *value* of work with amount *paid*,[8] this Court must remand for a correction its calculation. *Bailey v. Sommovigo*, 137 N.H. 526 (1993).

CONCLUSION

Jon and Paula McNeal contracted with Mr. Lebel for a house. They got something less than that. It is not clear to them who is at fault, but it is clear that they want it fixed, they should not bear the costs of repairs that are the fault of others, they should be made whole in their contract, and should get reimbursed for having to resort to court intervention. Accordingly, this court should find that either Pullman or Mr. Lebel are at fault, release the McNeals from any finding of fault, and remand for recalculation of damages in accord with the law of contract, the Prefabricated Home Statute, the Consumer Protection Statute, and the evidence in the record.

[8]The court's error may be explained by several coincidental numbers. First, the amount the Henrys *paid* to Mr. Lebel was *exactly* $1,000 different from the *value* of work Mr. Lebel actually completed. Second, taking that $1,000 into account, the amount in dispute is *exactly* the amount of the $22,000 deposit. Third, the discussion among the parties in the record is confusing. 4 *Trn.* at 91-101. The documents, however, make the situation understandable.

Respectfully submitted,

Paula McNeal and Jon McNeal
By their Attorney,

Law Office of Joshua L. Gordon

Dated: November 19, 2007

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Paula and Jon McNeal requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because this court has never had the opportunity to address the Prefabricated Home Statute, and because the McNeals wish to have the opportunity to answer questions about their lack of responsibility for an incomplete house.

I hereby certify that on November 19, 2007, copies of the foregoing will be forwarded to Arthur O. Gormley, III, Esq., and to Mr. Robert Lebel.

Dated: November 19, 2007

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225