State of New Hampshire
Supreme Court

NO. 2016-0409

2017 TERM

MARCH SESSION

Deborah Cutler

v.

Daniel Knight and Samantha Knight

RULE 7 APPEAL OF FINAL DECISION OF THE
CANDIA DISTRICT COURT

BRIEF OF PLAINTIFF/APPELLEE, DEBORAH CUTLER

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QUESTIONS PRESENTED

I. Did the court correctly find that the landlord adequately listed her reasons for eviction in her notice of eviction, and that she sufficiently proved the reasons listed?

II. Did the court correctly find that the landlord overcame a presumption of retaliatory eviction, when the reasons for eviction existed long before the State alerted the landlord to the presence of lead hazards, the tenants had demonstrated they were incompetent to preform even simple renovations while the State's order required competent and timely lead abatement, and the landlord had otherwise permissible grounds for eviction?

STATEMENT OF FACTS

I. Purchase, Birth, Death, Tenancy

In 2015, Deborah Cutler and her husband were living in Massachusetts, on the verge of retirement.[1] Deborah's health was failing, having been hospitalized for Parkinson's Disease a half-dozen times. *Day 3* at 139.[2] Their son, Daniel Knight, had recently gotten married to Samantha Knight, who together had an infant daughter, Deborah's grandchild.

Daniel is a part-time firefighter in both Raymond and Epping, New Hampshire. *Day 3* at 125-26. Samantha is a stay-at-home mother. Together they had six children between ages 1 and 9; the infant granddaughter (born on April 4, 2015) was the seventh. *Day 1* at 19; *Day 2* at 55. They have not been prosperous. Deborah and her husband had been supporting Daniel and his family for many years, paying for a majority of their housing costs, and subsidizing living expenses. *Day 1* at 5-6; *Day 2* at 64; *Day 3* at 131-32.

In April 2015, using a private loan, Deborah and her husband bought a small house in Raymond, New Hampshire, which they planned initially as a weekend getaway, and hoped eventually to make their home near grandchildren. *Day 1* at 5, 34, 42; ORDER (June 30, 2016) at 1, *Appx*. at 84.[3] Unfortunately, just a week after the purchase, Deborah's husband died. *Day 1* at 5; ORDER at 1.

It made sense for Daniel and his family to occupy Deborah's now superfluous New

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[1]Because of shared last names, all parties are referred to herein by their first names. No disrespect is intended.

[2]Trial in this matter occurred over three days in April and May 2016. The April 13, 2016 transcript is cited herein as *Day 1*; the May 2, 2016 transcript is cited as *Day 2*; and the May 18, 2016 transcript is cited as *Day 3*.

[3]The order on appeal is dated June 30, 2016, and is contained in the addendum hereto and in the appendix at page 84. It is hereafter cited as ORDER without a date specified. Citations to other orders, briefly mentioned but of minor consequence to this appeal, contain a distinguishing date reference.

Hampshire house. In May they moved in, with the unwritten understanding that Daniel and Samantha would maintain the property in lieu of rent. *Day 1* at 5-6; ORDER at 1.

II. Beginning of Renovations and Tenants' Knowledge of Lead Hazards

Daniel and Samantha began renovations on the house immediately after occupancy. INSPECTION NOTES (Feb. 4, 2016) at 1, Exh. H, *Appx*. at 47. Daniel did some of the work himself, and also hired friends and acquaintances. *Day 1* at 12; *Day 2* at 60, 89, 102; *Day 3* at 128-29, 137; ORDER at 1. Deborah showed up only occasionally, *Day 2* at 62, and the court found Daniel was in charge: he "decided what repairs to do, either doing the repairs himself, or having friends or others whom he controlled do the work under his supervision." ORDER at 1-2.

In June during renovations, and for reasons not clear in the record, Daniel arranged to test the house for lead. TITAN LEAD RISK ASSESSMENT REPORT (June 6, 2015), Exh. 6, *Appx*. at 1; ORDER at 1. Lead hazards were found, *id*. at 1, in various places throughout the house. TITAN LEAD RISK ASSESSMENT REPORT at 5-20; ORDER at 1. Samantha acknowledged she and Daniel became aware of lead hazards as a result of the test. *Day 2* at 57, 67. Shortly thereafter – the record is not clear whether the events are coincidental – as part of a routine well-child checkup, the youngest child tested positive for lead. *Day 2* at 65; *Day 3* at 153; ORDER at 1.

III. Parties Enter a Written Lease

In August, four months after they moved in and began renovations, Samantha demanded a written lease so she could prove eligibility for food stamps. Using information culled from the internet, Deborah drafted a three-year rental agreement. *Day 1* at 7-10, 29; *Day 2* at 71; *Day 3* at 126; HOME RENTAL AGREEMENT (Aug. 5, 2015), Exh. 3, *Appx*. at 26; ORDER at 1.

The lease called for $1,250 monthly rent, but the parties understood, and the court found, that the lease memorialized their prior unwritten agreement, ORDER at 1, twice repeating the

work-in-lieu-of-rent arrangement. RENTAL AGREEMENT ¶ 13 ("In lieu of rent the tenant will be required to do all maintenance duties and repairs as needed."); *id.* ¶17 ("I, Deborah Cutler, Daniel Knight's mother have been not charging rent. I am providing the housing for his family, in lieu of rent, he is responsible for the care of the property.").

The lease also twice repeated its requirement that the tenant seek permission for each renovation. *Id.* ¶ 13 ("Except in an emergency, all maintenance and repair requests must be made in writing."); *id.* ¶ 26 ("Tenant shall be allowed to conduct construction or remodeling (at Tenant's expense) only with the prior written consent of the Landlord which shall not be unreasonably withheld."). The lease sought to ensure renovations were lawfully performed. *Id.* ¶ 31 ("Tenant shall promptly comply with all laws, ordinances, requirements and regulations of the federal, state, county, municipal and other authorities….").

The court thus found Deborah "relied on the tenant to do the work properly and that reliance was reasonable based on the agreement of the parties." ORDER at 2. Other than utilities, Samantha testified the lease allotted her and Daniel "no cost outlay." *Day 2* at 56.

Appended to the lease was a separately-signed "disclosure of information on lead-based paint or lead-based paint hazards." RENTAL AGREEMENT at 10. Daniel testified that he and Samantha were aware of lead paint hazards at the time the lease was signed. However, the disclosure indicates, and Daniel acknowledged, that Deborah did not know of any lead paint at the time the lease was signed. *Day 3* at 127, 146.

IV. Tenants' Renovations: Slow, Substandard, Incomplete, Expensive, Unlicenced

Despite the lease requirements, there is no evidence Daniel or Samantha consulted Deborah on what renovation projects to undertake. Deborah testified that "[t]he agreement was to put windows in so we could open the windows, because we couldn't open the windows in the

house. And it ended up being walls and everything else.… He kept on going, and going, and going.… There was way too much done." *Day 1* at 43. In the year between occupancy and trial, Daniel and Samantha testified there was dismantlement and creation of walls in several locations, deconstruction and construction of structural floor joists, replacement of ceilings, plumbing and electrical work, installation of several closets, extension of a porch, replacement of windows and exterior siding, and sanding and painting in several locations. *Day 1* at 43-44; *Day 2* at 58-59, 70, 81; *Day 3* at 128.

The court thus held that "Ms. Cutler's involvement was limited to writing checks for labor and materials." ORDER at 2. Daniel made charges on Deborah's credit card, and Deborah contributed cash. *Day 2* at 81; INSPECTION NOTES (Feb. 4, 2016) at 2, Exh. H; *see, e.g.,* $1,800 CHECK FROM CUTLER TO KNIGHT (July 24, 2015), Exh. 7, *Appx*. at 21 (check memo: "painting/labor"). Samantha testified that Daniel would tell Deborah how much something would cost, and Deborah would pay it. *Day 2* at 60, 82. In this fashion payments were made to supply outlets, vendors, and individuals, for both materials and labor. *Day 1* at 20, 43-44; *Day 2* at 81; *Day 3* at 133; INSPECTION NOTES (Feb. 4, 2016) at 2, Exh. H; $1,800 CHECK FROM CUTLER TO KNIGHT (July 24, 2015), Exh. 7. Among these expenses was the June 2015 private lead test; while Deborah funded the inspection at Daniel's direction, she had no knowledge of it. *Day 1* at 30; *Day 3* at 155. Samantha estimated the total amount Deborah funded: "I've seen close to 18 grand maybe." *Day 2* at 81. There is no evidence Daniel and Samantha paid for anything beyond construction incidentals such as a dump fee. *Day 2* at 88-89; *Day 3* at 142.

Due to lack of control and open spending, Deborah began to run out of money. INSPECTION NOTES (Feb. 4, 2016) at 2, Exh. H. She testified that as a result of Daniel's renovation expenditures, "my credit cards were maxed." *Day 1* at 20. And even projects Deborah

paid for, Daniel often did not complete. *Day 1* at 42-44. SANTANDER BANK APPRAISAL (Aug. 24, 2015) at 2, Exh. C, *Appx*. at 37; TEXT MESSAGES (Aug. 3, 2015) at 1-4, Exh. G, *Appx*. at 22; EMAIL FROM DEBORAH TO VARIOUS (Aug. 24, 2015), Exh. C ("They don't know what the word complete is."). Even when work was completed, it was often substandard quality. EMAIL FROM DEBORAH TO VARIOUS (Aug. 24, 2015), Exh. C, ("Girls room just got finished looks like shit"). Deborah repeatedly expressed her frustration with these matters to Daniel. *Id.*; *Day 1* at 43 ("And I'm like, 'Enough, enough, enough.'").

Moreover, and again despite the lease requirements, neither Daniel, nor any of the people he hired, had any certifications or licenses (including for plumbing, electrical, or lead paint remediation), and no town permits for any renovations. *Day 2* at 89; *Day 3* at 129-34, 137; ORDER at 1, 2. Even after a lead paint expert told him to take a lead abatement course, Daniel explained he did not because "I was not able to." *Day 3* at 143. Even after being warned to not undertake "any more work … to the house" without accounting for lead hazards, Daniel acknowledged he persisted. *Day 3* at 146, 151; ORDER at 1, 2. Samantha acknowledged that the work conducted by unlicensed people included the windows and involved sanding. *Day 2* at 59, 70.

Even after Daniel and Samantha demonstrated awareness of both the presence of lead hazards and their child's exposure – having commissioned the June 2015 private lead inspection, TITAN LEAD RISK ASSESSMENT REPORT (June 6, 2015), Exh. 6 – it is not clear they took recommended precautions for the health and safety of their children. *Day 2* at 66, 69, 113; *Day 3* at 153-54; EMAIL FROM DEBORAH TO VARIOUS (Aug. 24, 2015), Exh. C ("Pigs pen, always dirty."); EPA, PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME (Sept. 2013), Exh. A, *Appx*. at 66. As of trial, Daniel had not arranged for a lead abatement contractor, and was aware remediation had not yet begun. *Day 1* at 21; *Day 3* at 159. The inspector from the State Division

of Public Health, testifying as an expert, observed ongoing renovations, declared Daniel violated lead abatement rules, and said there could be significant fines and penalties. *Day 2* at 95, 99-102.

V. Landlord Finding a Way to Remedy the Damage

Deborah needed to find a way to remedy the damage done to the house by the tenants. She hoped or intended to hire her own contractors, to repair or finish the jobs which Daniel had mishandled or not completed, and to remediate the lead hazard. *Day 2* at 83; *Day 3* at 128; EMAIL FROM DEBORAH TO SAMANTHA (Aug. 24, 2015), Exh. D, *Appx*. at 44; EMAIL FROM DEBORAH TO DANIEL & SAMANTHA (Aug. 25, 2015), Exh. E, *Appx*. at 46. Deborah knew the job was big, and that children could not be living in the house while lead hazards were being remedied. *Day 1* at 22.

But, as noted, Deborah and her husband had purchased the house with a private loan, which had then come due. *Day 1* at 42. Daniel having spent her money on renovations, Deborah applied for a line of credit to finance completion of the jobs Daniel had started, and to repay her lender. *Day 1* at 39, 41-42; EMAIL FROM DEBORAH TO VARIOUS (Aug. 24, 2015), Exh. C ("This is the shit I have to put up with can not get the loan.… Have to pay the guy that lent the money."). The bank, however, after conducting as many as five inspections, *Day 1* at 39, 41, refused credit because the house had been disassembled. The bank's fifth appraisal noted it was for the purpose of determining whether previous "conditions … have been met" regarding completion of jobs, and found the answer was "no." SANTANDER BANK APPRAISAL (Aug. 24, 2015) at 2, Exh. C; *Day 1* at 38-39, 41; *Day 2* at 78-79. The appraiser explained: "The upper level hall way and main level hall ways still need completion. Upper level has ceiling exposed, wiring and fixtures dangling and does poses [sic] safety issue. The main level hallway needs drywall repair - see photos attached." SANTANDER BANK APPRAISAL at 3-5.

Accordingly, Deborah applied for aid from a government program directed at lead remediation. *Day 1* at 15-19. The grant application required basic data from Daniel and Samantha: contact information, a list of household residents, names of children younger than six, certification of having reviewed lead prevention information pamphlets, etc. NEW HAMPSHIRE HOUSING LEAD HAZARD CONTROL PROGRAM - TENANT APPLICATION PACKET (Mar. 26, 2016), Exh. 5, *Appx*. at 60. Even though Daniel was aware of Deborah's predicament, but complaining she was unreasonably hurrying him, *Day 3* at 128, 131, Daniel would not cooperate with the grant application – he crossed out sections of the application form, *Day 1* at 17, admitted he delayed filling out the information for "well over a month," *Day 3* at 159-60, and police became involved when somebody from the program attempted to take exterior photos of the property. INSPECTION NOTES (Feb. 4, 2016) at 1, Exh. H.

VI. If You Don't Like It, Move

Squeezed by these concurrent pressures – dwindling resources, outstanding loan due, lack of project control, work with no permits or licenses, escalating costs, no completion in sight, denial of bank credit, and potentially poisoned grandchildren – Deborah repeatedly expressed her displeasure and frustration to Daniel and Samantha in sometimes colorful language. TEXT MESSAGES (Aug. 3, 2015) at 1-4, Exh. G; EMAIL FROM DEBORAH TO SAMANTHA (Aug. 24, 2015), Exh. D; EMAIL FROM DEBORAH TO DANIEL AND SAMANTHA (Aug. 24, 2015), Exh. F, *Appx*. at 45; EMAIL FROM DEBORAH TO VARIOUS (Aug. 24, 2015), Exh. C; *Day 2* at 68.

Moreover, Deborah repeatedly told Daniel and Samantha she wanted their tenancy to terminate. In August 2015, two days before the lease was signed, Deborah texted Samantha, "You need to move free ride over.… If you don't like it Move." TEXT MESSAGES (Aug. 3, 2015) at 1-4, Exh. G; *Day 2* at 87 (text messages read into the record). Also in August 2015, about three weeks

after the lease was signed, Deborah emailed Daniel and Samantha, "You are in default of the lease.… Find an appt, or maybe it would be better if all of you go back with Samantha's family." EMAIL FROM DEBORAH TO DANIEL AND SAMANTHA (Aug. 24, 2015), Exh. F. There is no dispute that these texts and emails were received by Daniel and Samantha.

VII. Government Inspection and Order to Abate Lead Hazard

Because a child had tested positive for lead, the State's public health system was notified, and in February 2016 it conducted an inspection. *Day 2* at 95, 104, 111; INSPECTION NOTES (Feb. 4, 2016) at 1, Exh. H; ORDER at 2. The State's inspector, qualified at trial as an expert in lead paint, described his tools and methodology. *Day 2* at 92-116; INSPECTION NOTES (Feb. 4, 2016) at 1, Exh. H. He testified that the purpose of his inspection was not to comprehensively identify all the lead in the house, but to determine whether there were lead hazards present in places a child is likely to encounter. *Day 2* at 104-06.

Lead hazards were found throughout the house. *Day 2* at 96-98, 104 (window frames and sashes, stairs, doors – in various rooms). The State thus issued an order requiring lead abatement, ORDER OF LEAD HAZARD REDUCTION (Feb. 18, 2016) at 8, Exh. 4, *Appx*. at 50, and notified the child's pediatrician. LETTER FROM DHHS TO DR. KLUNK (Feb. 23, 2016) (document sealed to protect child's health information; not contained in appendix).

The abatement order was addressed to Deborah as owner, and the State's inspection was the first she learned of lead on her property. *Day 1* at 11, 14-15, 24; *Day 2* at 103-04, 115-116; INSPECTION NOTES (Feb. 4, 2016) at 1, Exh. H. The abatement order detailed the inspector's findings, listed actions required to comply, established a deadline for compliance, and threatened

penalties for non-compliance.[4] Deborah estimated remediation compliance would cost $50,000, which she did not have. *Day 1* at 22.

The inspector informed Deborah that if the property were sold, the lead must be disclosed. INSPECTION NOTES (Feb. 4, 2016) at 2, Exh. H. He testified that it might be permissible to continue living in the house, provided occupants take certain precautions, which included "keep the house clean, … [and] keep up with any of the lead hazards that are creating the dust." *Day 2* at 109, 113 (other recommended precautions were "providing the children with the proper diet and behavior, washing hands … [k]eeping up with hand washing before the children eat, before they go to bed, making sure they have the correct … diet to keep their iron and calcium levels up, making sure they have sporadic snacks so they don't have excess stomach acid in their stomach.").

When Deborah learned about the presence of lead from the government inspector in February 2016, she realized Daniel and Samantha had known about it since the previous June. She also realized they had continued un-permitted renovations dispersing lead, thus knowingly exposing the infant and the six other children to lead hazards. ORDER at 2; INSPECTION NOTES (Feb. 4, 2016) at 1, Exh. H; *Day 1* at 21, 30; *Day 2* at 108.

[4] Within 90 days, the owner must "[o]btain the services of a licensed lead inspector or risk assessor to conduct a full inspection," prepare and submit a "lead exposure hazard reduction plan," and conduct all lead abatement by a "licensed lead abatement contractor" taking specified precautions. After abatement is completed, and before the premises can be re-occupied, "a licensed risk assessor must conduct a clearance inspection," and the State must issue a "discharge letter." Penalties for non-compliance are fines of $1,000 for each infraction, penalties of $2,000, and potential additional fees and costs for enforcement. ORDER OF LEAD HAZARD REDUCTION (Feb. 18, 2016) at 1-4, Exh. 4, *Appx*. at 50; ORDER at 2.

STATEMENT OF THE CASE

On February 18, 2016, the State issued an "Order of Lead Hazard Reduction," received by Deborah a few days later. *Day 1* at 25. On February 29, 2016, Deborah pinned notices of eviction on Daniel's and Samantha's door. *Day 1* at 6-7, 25. Although Deborah's notices of eviction were served just a few days after the State's lead hazard abatement order, Samantha acknowledged that "It's coincidental that we got an eviction notice after the findings of everything." *Day 2* at 69. Deborah's notices of eviction specified they were being served because:

> 1. You or members of your household have caused substantial damages to the … dwelling unit … by making repairs to the premises which have caused lead paint to be dispersed within the dwelling unit and thus have put your minor children at risk of lead paint poisoning.
>
> 2. You … and your agents who made the aforementioned repairs to the dwelling unit … are not certified to do lead paint substance abatement and thus you are in violation of [the lead paint statute].

EVICTION NOTICES (Feb. 29, 2016), *Appx*. at 58 & 59. The notices specified they were pursuant to RSA 540:2, II(b) (landlord may terminate tenancy for "[s]ubstantial damage to the premises by the tenant"). When her tenants did not quit the premises, Deborah filed a writ of possession in the Candia District Court. LANDLORD AND TENANT WRIT (Mar. 11, 2016), *Appx*. at 78.

A six-hour trial occurred over three days in April and May 2016.

Daniel and Samantha denied they did unauthorized or improper work, ORDER at 1, alleged that the eviction was retaliatory because it occurred shortly after a notice of lead paint, and argued that Deborah must prove their actions caused the child's elevated lead levels in order to defeat a presumption of retaliation. *Day 3* at 161-63; ORDER at 1.

Deborah argued that the eviction was justified and not retaliatory because Daniel and Samantha damaged her house, and did renovations without permission, certification, or permits;

because she needs to fix and clean up the house, but cannot with the family living there; and because she was protecting her grandchild from lead poisoning. *Day 1* at 21-22; *Day 3* at 163-64; ORDER at 1.

The Candia District Court (*David G. LeFrancois*, J.), found that Daniel and Samantha caused the lead paint hazard, which resulted from actions done or controlled by them. It further found they conducted renovations, "knowing that there was lead paint in the premises," but nonetheless caused "sanding and flaking of paint" which "result[ed] in their infant daughter having unsafe levels of lead in her blood." ORDER at 2.

The court found that Deborah established a legitimate basis for eviction pursuant to the statute and the notice of eviction. *Id.* It acknowledged the statutory presumption of retaliation when eviction occurs soon after discovery of a lead hazard, RSA 540:13-b, but held that the presumption was rebutted in this case. The court found:

> The landlord has an obligation to reduce the lead exposure hazards, she needs to have the proper work done which the tenants failed to do, despite [the tenants'] obligation under the lease agreement to do so, and she is rightfully concerned about continued exposure of her grandchildren to lead paint hazards in the premises, based on the inability of [Daniel] to properly do the work in the premises.

ORDER at 2. The court thus held Daniel "cannot now use work he controlled and mismanaged as a defense to the eviction action." It found Deborah "did not bring the eviction action to retaliate against the tenants, but quite the opposite, brought the action in order to resolve the lead exposure hazards caused by the tenants' improper work." "Accordingly," the court held, "the presumption is rebutted." *Id.*

The court thus awarded to Deborah possession and court costs, although it allowed Daniel and Samantha continued possession pending appeal upon weekly payment of rent. ORDER (July 11, 2016), *Appx*. at 88; ORDER (July 27, 2016), *Appx*. at 91.

SUMMARY OF ARGUMENT

Deborah Cutler is an accidental landlord. She and her husband bought a property in New Hampshire as a second home, with hopes to make it their permanent home in the future. When her husband died just a few days later, she allowed her son's large family, clearly in need of assistance, to live in the home in exchange for maintaining it. But rather than preserving the property, Daniel and Samantha Knight took the house apart, both causing lead dust to poison Deborah's grandchildren, and making it impossible for Deborah to fund and accomplish competent abatement.

Deborah grew increasingly angry at her tenants for their actions, repeatedly asking them to leave. When the State, through mandatory reporting of child lead poisoning, conducted an inspection and thus informed Deborah of the presence of lead, it was a final affront. As the district court recognized, it would be inequitable to allow tenants to use their own detrimental actions as a defense to eviction.

Deborah proved that Daniel and Samantha caused damage to her house, and that their conduct was in violation of the law. She proved a long history of incompetence and mismanagement, which caused the damage. As noted by the district court, the eviction, although close in time to the State's notice of a lead hazard, was prompted by other concerns.

Accordingly, the eviction was lawful, and not retaliatory, and this court should affirm.

ARGUMENT

I. Landlord Alleged and Proved Statutory Grounds for Eviction

New Hampshire landlord-tenant law allows a landlord to terminate a tenancy for enumerated reasons, including "[s]ubstantial damage to the premises by the tenant," and "[f]ailure of the tenant to comply with a material term of the lease." RSA 540:2, II(b) & (c).[5] An eviction must be for at least one statutorily enumerated reason, which must be stated in the notice of eviction, and which the landlord must prove by a preponderance of the evidence. *Nashua Housing Auth. v. Wilson*, 162 N.H. 358 (2011); *AIMCO Properties, LLC v. Dziewisz*, 152 N.H. 587 (2005).

In her notices of eviction, Deborah alleged that "[y]ou … have caused substantial damages to the dwelling unit," and specified that the damage was "making repairs … which have caused lead paint to be dispersed within the dwelling unit and thus have put … minor children at risk of lead paint poisoning." Deborah proved, and the court found, that the tenants caused substantial damage. Daniel and Samantha took apart a livable structure, to such an extent that the bank considered it unacceptable as security for a mortgage. Further, they conducted activities that dispersed lead, causing harm to a child. Accordingly, the landlord proved the tenants "caused substantial damage."

In her notices of eviction, Deborah also alleged that "the aforementioned repairs" were conducted by people who "are not certified to do lead paint substance abatement," which violates the law. The parties' lease required the tenants to "comply with all laws, ordinances, requirements

[5]The landlord-tenant statute contains other permissible reasons for eviction, which are arguably applicable here, but were not asserted as separate grounds for eviction. These include "[o]ther good cause," and when the "dwelling unit contains a lead exposure-hazard which the owner will abate" in specified manners making it impractical for the tenancy to continue. RSA 540:2, II(e) & (f). In addition, upon detection of lead hazards, a separate statute, not applicable here nor preserved below, governs when landlords may offer tenants relocation during lead paint abatement. RSA 130-A:8-a; *see Day 3* at 162.

and regulations of … federal, state, county, municipal and other authorities." The tenants admitted, the landlord proved, and the court accordingly found, that renovations were conducted by the tenants without permits, and that the tenants and their agents – after they were aware of lead paint hazards – were not licensed as required by law.

As required, the landlord adequately informed the tenants of the reasons for eviction, and then proved those reasons. This court should uphold the eviction.

II. Eviction Was For Permissible Reasons, And Not Retaliatory

A. Retaliatory Evictions

A retaliatory eviction is when a landlord terminates a tenancy for reasons that are seen as being in response to lawful actions by the tenant; for example, a tenant alerting authorities to alleged housing code violations. *See* RSA 540:13-a. An eviction is presumed to be retaliatory if it occurs within six months after certain lawful actions that a tenant might take. *See* RSA 540:13-b. A claim of retaliatory eviction is a tenant defense to an allegedly unlawful eviction. *White Cliffs at Dover v. Busman*, 151 N.H. 251 (2004). This court's "inquiry is whether the evidence presented to the trial court reasonably supports the court's findings." *Id.* at 255.

In 1995, the legislature added notification of lead paint hazards to the list of things from which retaliatory eviction can be presumed if initiated within a six-month period:

> Eviction of a tenant based on the presence in the dwelling … of a child who has tested positive for the presence of lead … shall be unlawful. There shall be a *rebuttable presumption* that any eviction action, instituted by the owner within 6 months of receipt of notice of a child's elevated blood lead level … is based on the child's elevated blood level.

RSA 130-A:6-a, II(a) (emphasis added). The purpose of the amendment (which appears in the public health code, RSA Title X) is to promote tenants' ability to reduce a public health hazard without having to worry about repercussions from landlords hoping to avoid abatement costs.

B. Presumptions in New Hampshire Law

The lead hazard retaliatory eviction statute contains a "rebuttable presumption."[6]

A "presumption" is a device that allows a conclusion of one fact from proof of another. *Manchester v. Dugan*, 247 A.2d 827, 829 (Me. 1968) ("A presumption is a conclusion which a rule of law directs shall be made from proof of certain facts."); *People v. Watts*, 692 N.E.2d 315, 320 (Ill. 1998) ("A presumption is a legal device which permits or requires the fact finder to assume the existence of a presumed or ultimate fact, after certain predicate or basic facts have been established."); *Larmay v. VanEtten*, 278 A.2d 736, 740 (Vt. 1971) ("A presumption is a deduction which the law requires a trier to make."). Presumptions may be based on the cumulative wisdom of experience, the necessity of making arbitrary rules when no logical decision can be made, public policy, or other reasons. Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 924-31 (1931); *Lisbon v. Lyman*, 49 N.H. 553, 563 (1870) (presumptions may be drawn from "a reasonable principle, or an arbitrary dogma").

There have generally been two views on what it takes to rebut a presumption. *See Geils v. Baltimore Transit Co*., 329 F.2d 738 (4th Cir. 1964) (construing Maryland law). One is that the presumption merely shifts the burden of persuasion; the presumption has status as evidence and thus some evidentiary value that the trier of fact weighs against other evidence. The more traditional view is that once evidence is offered to rebut a presumption, the presumption disappears; the presumption does not operate as evidence, but reflects the rule of law in the absence of other evidence.

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[6] A conclusive, or irrebuttable presumption, not relevant here, is essentially a rule of law. *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 377 (1998) (noting that NLRB's "irrebuttable presumption of majority support for the union during the year following certification" is one of those "evidentiary presumptions" "which are in effect substantive rules of law").

New Hampshire law is solidly in the traditional category.

> [I]n this state a presumption is not evidence – its sole function is to take the place of evidence. When the latter appears, if only to the extent that an inference may be drawn from it, the presumption vanishes.

Jodoin v. Baroody, 95 N.H. 154, 156-57 (1948); *see also Heffenger v. Heffenger*, 89 N.H. 530, 530 (1938) (A presumption "is not evidence nor has it any evidentiary value. It is a rule of law based upon 'a conception of the conduct of men in general' whose sole function is to take the place of evidence. When there is either evidence, or an inference from evidence, bearing upon the issue … the presumption … disappears."); *Lisbon v. Lyman*, 49 N.H. 553, 563 (1870)[7]; *In re Ann Miles Builder, Inc.*, 150 N.H. 315 (2003); *Estate of King*, 149 N.H. 226, 232 (2003); *Estate of Fuller*, 119 N.H. 132, 135 (1979); *New Hampshire Savings Bank v. McMullen*, 88 N.H. 123 (1936); *Caswell v. Maplewood Garage*, 84 N.H. 241 (1930); *Wright v. Boston & M.R.R.*, 74 N.H. 128 (1907); *Hardy v. Merrill*, 56 N.H. 227 (1875).

Thus, if the party against whom the presumption operates offers some evidence, the effect

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[7]In *Lisbon v. Lyman*, this court wrote:

> A legal presumption is a rule of law – a reasonable principle, or an arbitrary dogma.… There may be a difficulty in weighing such a rule of law as evidence of a fact, or in weighing law on one side, against fact on the other. And if the weight of a rule of law as evidence of a fact, or as counterbalancing the evidence of a fact, can be comprehended; there are objections to such a use of it.… [I]f the scales holding all the evidence on both sides, were even, did the presumption when added to the defendant's side, incline them in his favor? If it did, it had no effect on the case, because it was not necessary for the defendant to produce a preponderance of the evidence; if it did not, the jury were instructed to weigh as evidence, that which had no weight. If the scales holding all the evidence on both sides, preponderated in favor of the plaintiff, did the presumption, when added to the defendant's side, restore the equilibrium? If it did, the plaintiff was required to produce something more than a preponderance of the evidence; if it did not, it was useless.
>
> A legal presumption is not evidence. In civil cases, it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative. When this is the case, the assignment of the burden of proof to one party, and the benefit of the legal presumption to the other, is a double and unjust use of one and the same thing.

of the presumption "vanishes," and the court's job is to employ its discretion and weigh the preponderance of the evidence as in any eviction case, to which this court defers. *See, e.g.*, *Evans v. J Four Realty, LLC*, 164 N.H. 570, 572 (2013).

C. Landlord Rebutted Presumption of Retaliatory Eviction

In August 2015, six months before the State inspected, and notified the landlord of lead paint, Deborah had grown so frustrated with Daniel and Samantha that she told them to leave. They had violated the lease, and they had put her in a circular situation where she could not finance completion of repairs because the repairs had not been completed. While Deborah did not then issue the tenants a notice of eviction, it is apparent she would have welcomed their exit.

In February 2016, when Deborah learned of the presence of lead, the matter of completion increased in complexity. Given the State's abatement order, the repairs would require hiring licenced workers, preparation of a hazard reduction plan, and implementation of precautionary procedures. It also added urgency: a 90-day time frame, upon risk of penalties, fines, and costs.

But it had become clear to Deborah, long before the State's abatement order, that Daniel did not have the skill, diligence, competence, or capacity to be responsible for completion of even standard renovation jobs. It was obvious he was not capable of the much more complex task of abating lead to the State's satisfaction on the State's timeline, and also that he was not much concerned about it, given that he had for eight months knowingly disregarded the presence of lead hazards to his children. It was also clear that even if Deborah were to hire qualified licensees to oversee and accomplish abatement, such contractors would not be able to work around nine people – including seven young children susceptible to poisoning by lead dust dispersal – living in the place being abated.

Deborah did not terminate the tenancy "based on the child's elevated blood level," nor to

avoid abatement costs contrary to the purpose of the 1995 lead paint retaliatory eviction amendment. RSA 130-A:6-a, II(a). Rather, she evicted so that she could remedy in a timely and competent manner the damage caused by the tenants, and because of the impossibility of doing so with them living there. Even Samantha understood the timing of the eviction was not precipitated by the issuance of the abatement order: "It's coincidental that we got an eviction notice after the findings of everything." The court easily found, based on the record facts, that Deborah's reasons for eviction were justified and not for retaliation. The court also noted the equities weighing against Daniel: "He cannot … use work he controlled and mismanaged as a defense to the eviction action."

This court should thus uphold the landlord's lawful eviction.

CONCLUSION

Although the eviction was shortly after the State's inspection, it was not retaliatory. This court should uphold the discretion of the trial court, and affirm the eviction.

REQUEST FOR ORAL ARGUMENT

Deborah Cutler requests her attorney, Joshua L. Gordon, be allowed oral argument because the retaliatory eviction and lead paint statutes have not before been construed together.

Respectfully submitted,

Deborah Cutler
By her Attorney,
Law Office of Joshua L. Gordon

Dated: March 22, 2017

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on March 21, 2017, copies of the foregoing will be forwarded to Christopher J. Seufert, Esq.

Dated: March 22, 2017

Joshua L. Gordon, Esq.

ADDENDUM