State of New Hampshire
Supreme Court

NO. 2014-0498

2015 TERM

APRIL SESSION

Jayakumar Patil & Purnima Patil

v.

Thomas J. Roy & Kelly Construction Co., Inc.

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF THOMAS J. ROY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

QUESTIONS PRESENTED. 1

STATEMENT OF FACTS AND STATEMENT OF THE CASE. 2
- I. Superior Court Civil Rules Revised. 4
- II. Writ of Summons, Rejected. 5
- III. Defective Complaint. 6
- IV. March 2013 PAD Non-Compliance Hearing. 8
- V. Dialogue by Sticky. 10
- VI. July 10, 2013 Show-Cause Hearing. 11
- VII. Short Hearings and Default. 13
- VIII. Damages Hearing. 16

STATEMENT OF THE CASE. 18

SUMMARY OF ARGUMENT. 20

ARGUMENT. 21
- I. Accident, Mistake, Misfortune Defined. 21
- II. Mr. Roy Was Denied a Fair Trial Through Accident, Mistake or Misfortune. 24
- III. In Defaulting Mr. Roy and Awarding Damages, the Court Violated Rules of Civil Procedure. 26
- IV. No Effort to Pierce Corporate Veil. 27
- V. Damages Beyond Allegations. 28
- VI. Brief Summary of the Record With Regard to Liability and Damages. 29

CONCLUSION. 34

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION. 34

ADDENDUM. 34

TABLE OF AUTHORITIES

New Hampshire Cases

Appeal of Northern New England Telephone,
165 N.H. 267 (2013). 26

Armstrong v. Armstrong,
123 N.H. 291 (1983). 22

Arnold v. Hay,
95 N.H. 499 (1949). 22

Barron v. Jackson,
40 N.H. 365 (1860). 23

Carlin v. Drake,
89 N.H. 52 (1937). 23

Carroll Cnty. Elderly Housing Associates v. Merrimac Tile Co.,
127 N.H. 538 (1985). 24

Chase v. Brown,
32 N.H. 130 (1855). 21

Couillard v. Seaver,
64 N.H. 614 (1887). 23

Douglas v. Douglas,
143 N.H. 419 (1999). 26

Hackett v. Boston & Maine R. R.,
89 N.H. 514 (1938). 22, 29

Hopley v. Chronicle & Gazette Publishing Co.,
94 N.H. 171 (1946). 22

Lakeview Homeowners Association v. Moulton Const., Inc.,
141 N.H. 789 (1997). 21, 22

Lavoie v. Hollinracke,
127 N.H. 764 (1986). 28

Monroe v. Sterling,
92 N.H. 488 (1943). 22

N. E. Redlon Co. v. Franklin Square Corp.,
90 N.H. 519 (1940). 22

Nashua & Lowell R. R. v. Stimpson,
35 N.H. 286 (1857). 22, 29

New England Mutual Fire Insurance Co. v. Lisbon Manufacturing Co,
22 N.H. 170 (1850). 22, 29

Pelham Plaza v. Town of Pelham,
117 N.H. 178 (1977). 21

In re Proposed New Hampshire Rules of Civil Procedure,
139 N.H. 512 (1995).. 26

Shulinksky v. Boston & Maine R.R.,
83 N.H. 86 (1927). 22

State v. Settle,
129 N.H. 171 (1987). 6

Sullivan v. Indian Head National Bank,
99 N.H. 262 (1954). 21

Village Press, Inc. v. Stephen Edward Co.,
120 N.H. 469 (1980). 27

Welch v. Gonic Realty Trust Co.,
128 N.H. 532 (1986). 24

Weld v. Sabin,
20 N.H. 533 (1847). 21

Wright v. Clark Equipment Co.,
125 N.H. 299 (1984). 22

New Hampshire Statutes & Rules

RSA 508:4-c 28

RSA 526:1. 21

Superior Court Rules of Civil Procure, Rule 1. 26

Secondary Authority

PAD Pilot Rules Project, Report and Proposed Rule Changes (Feb. 15, 2010). 4

Supreme Court Order Adopting Pilot Rules (Apr. 6, 2010). 4

Hon. Robert Lynn and Philip R. Waystack, *Discovery and Civil Justice Rules Pilot Project Set for Launch,* BAR NEWS (Apr. 16, 2010). 4

Civil Rules Pilot Project to Expand in October, BAR NEWS (Apr. 13, 2012). 4

Supreme Court Order Adopting Rules (Sept. 24, 2013). 4

QUESTIONS PRESENTED

I. Was Thomas Roy denied a fair trial, and should he have been granted a new trial, based on statutory accident, mistake or misfortune, or based on the general justice provisions of court rules?

Preserved: THOMAS ROY'S POST HEARING MOTION (June 20, 2014); NOTICE OF APPEAL, questions I, II, & III.

II. Did the court err by awarding damages against Mr. Roy personally.

Preserved: THOMAS ROY'S POST HEARING MOTION (June 20, 2014); Notice of Appeal, question V.

III. Did the court err by awarding damages beyond the amount alleged in the plaintiffs' complaint.

Preserved: THOMAS ROY'S POST HEARING MOTION (June 20, 2014); Notice of Appeal, question IV.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

This is a dispute between a builder, Thomas Roy, and a couple who wanted a dream home, Dr. Jayakumar Patil and his wife Purnima. Mr. Roy was the sole owner of Kelly Construction, Co., Inc., an established commercial building contractor whose accomplishments included building such New Hampshire landmarks as the C.R. Sparks restaurant and the Best Western Yard Conference Center, and renovating the Hanover Street Chophouse, St. Mary's Bank, and Elliot Hospital, as well has home construction, additions, and renovations. AFFIDAVIT OF THOMAS ROY ¶ 3 (June 19, 2014), *Appx*. at 185. Mr. Roy was Dr. Patil's patient, and during medical visits they discussed the possibility of Mr. Roy building a home on land the Patils owned in Bedford, New Hampshire. COMPLAINT ¶ 2 (Oct. 25, 2012), *Appx*. at 12. The land had years before been improved with a foundation, but had been subject to a State cease-and-desist order stemming from wetlands violations. EMAIL FROM ROY TO PATIL (June 24, 2010), Atch.[1] 1, *Appx*. at 205; LETTER FROM ROY TO PATIL (Aug. 26, 2010), Atch. 5, *Appx*. at 214.

When that was resolved, Dr. Patil hired a Boston architect to design a home on the existing foundation. After Mr. Roy estimated the cost of the plan would be about $2 million, the Patil's diminished the extent of their dreams and appeared to arrive at a plan Mr. Roy estimated would cost about $1 million. AFFIDAVIT OF THOMAS ROY ¶¶ 5, 6, 27. Although Mr. Roy tendered a contract, LETTER FROM ROY TO PATIL (Sept. 1, 2010), Atch. 6, *Appx*. at 219, the Patils never signed it. But because Mr. Patil was his doctor, Mr. Roy in good faith began building in the Fall of 2010. AFFIDAVIT OF THOMAS ROY ¶ 7.

Design changes ordered by the Patils during construction, special orders of unique and

[1]Citations denoted as "Atch." refer to numbered attachments appended to the affidavit Mr. Roy filed below. *See* AFFIDAVIT OF THOMAS ROY ¶ 7 (June 19, 2014), *Appx*. at 185.

imported materials of non-standard dimension, and unforeseen complications, including lagging structural approvals, a well that produced little water, and adverse winter weather conditions, caused delays and cost overruns. Simultaneously, the Patils had expectations that they could show the new home to their family who was planning to visit from overseas in May 2011. EMAIL FROM ARCHITECT TO ROY (Jan. 19, 2011), Atch. 16, *Appx*. at 236; LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 24, *Appx*. at 245; AFFIDAVIT OF THOMAS ROY ¶¶ 6-8.

Although Mr. Roy made some protestations about not guaranteeing a completion date, he was bashful about confronting his friend and personal doctor about delays. LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 24, *Appx*. at 245; LETTER FROM ROY TO PATIL (Mar. 1, 2011), Atch. 27, *Appx*. at 251; AFFIDAVIT OF THOMAS ROY ¶ 14. Just when the project was finished, the Patils fired Mr. Roy and Kelly Construction. AFFIDAVIT OF THOMAS ROY ¶ 13. By that time, the house cost more than expected, and this dispute jelled.

I. Superior Court Civil Rules Revised

Over the past few years, New Hampshire has updated its superior court rules of civil procedure. First drafted in 2009, the new rules, initially known as "PAD" for "proportional automatic disclosure" were rolled out county by county on a pilot basis, N.H. SUPREME COURT ORDER (Apr. 6, 2010) (ordering PAD Pilot Project), *Appx*. at 312, and now apply in all superior courts throughout the state. They were made effective in the Hillsborough County Superior Courts, where this case arose, as of October 1, 2012. *Civil Rules Pilot Project to Expand In October: Superior Courts in Nashua and Manchester Will Participate*, BAR NEWS (Apr. 13, 2012), <https://www.nhbar.org/publications/display-news-issue.asp?id=6366>, *Appx*. at 326; N.H. SUPREME COURT ORDER (Sept. 24, 2013) (adopting amendments to court rules), <http://www.courts.state.nh.us/supreme/orders/09-24-13-order.pdf>, *Appx*. at 327.

The salient features of the rules are:

> Notice pleading will be replaced by fact-based pleadings which set forth with particularity all the material facts that are known to the pleading party to establish the pleading party's claims or defenses.... Shortly after commencement of litigation, each party should produce all reasonably available non-privileged, non-work-product documents and things that may be used to support that party's claims, counterclaims or defenses.

Hon. Robert J. Lynn & Atty. Philip R. Waystack, *Discovery and Civil Justice Rules Pilot Project Set for Launch*, BAR NEWS (Apr. 16, 2010), *Appx*. at 323; *see also*, Joint Task Force Committee, PAD PILOT RULES PROJECT, REPORT AND PROPOSED RULE CHANGES (Feb. 15, 2010), <https://www.nhbar.org/uploads/pdf/NEWSROOM-PilotRulesReport-040810.pdf>, *Appx*. at 299 ("basic elements of the proposed pilot rules" are "fact-based pleadings" and "promptly disclos[ing] all facts ... relevant to the dispute").

II. Writ of Summons, Rejected

On October 17, 2012, two weeks after the new rules took effect, the Patils filed an old-fashioned Writ of Summons under the prior rules, alleging several causes of action and a total of $450,000 in damages. WRIT OF SUMMONS (Oct. 17, 2012), *Appx*. at 6. Noticing the error, the court issued a clerk's order alerting the Patils:

> This county has now adopted PAD rules and therefore you are required to file a Complaint rather than a Writ of Summons.… The Court will take no action on the Writ. We will retain the Writ … in order to allow you to file a Complaint within 14 days.… If you do not file a Complaint, the case will be dismissed without prejudice … and the case will be closed. Thereafter, you would be required to open a new case … if you wish to pursue litigation in this matter.

NOTICE OF REJECTED WRIT - UNSERVED (Oct. 19, 2012), *Appx*. at 11.

III. Defective Complaint

The following week, the Patils filed what they called a "Complaint," purportedly under the new rules. It is identical, however, in all respects to the original Writ of Summons, except for the addition of a few paragraph numbers. Specifically, paragraph 2 of the "Complaint" contains numerous factual allegations, but it runs on without any interrupting paragraphing or paragraph numbers for an entire page. COMPLAINT ¶ 2 (Oct. 25, 2012), *Appx*. at xx. The clerk's office accepted it as filed and issued an order of notice, which provided that, upon penalties of default, Mr. Roy's and Kelly Construction's appearances and answers were due 30 days after service. ORDER OF NOTICE ON COMPLAINT (Oct. 30, 2012), *Appx*. at 20.

The "Complaint" was served on Mr. Roy and Kelly Construction on November 13. RETURN OF SERVICE (Nov. 13, 2012), *Appx*. at 21, 21-22. Because "[t]hirty days hath September, April, June and November," MOTHER GOOSE (1786), thirty days after November 13 would have been December 13, 2012.

A day early, however, on December 12, the court issued a notice of conditional default against both defendants, warning them that their answers and appearances had not yet been received, but allowing a 10-day grace period. NOTICE OF CONDITIONAL DEFAULT (Dec. 12, 2012), *Appx*. at 31. The next day Mr. Roy filed an appearance as *pro se*, APPEARANCE (Dec. 14, 2012), *Appx*. at 33, and also within the period filed an appearance on behalf of the corporation.[2] APPEARANCE OWNER AFFIDAVIT (Dec. 20, 2012), *Appx*. at 75.

Also within the grace period, and signing his name as "President/CEO" of Kelly

[2]Although a non-attorney cannot normally represent a corporation, *State v. Settle*, 129 N.H. 171 (1987), Mr. Roy is the sole shareholder of Kelly Construction Co., Inc., and his appearance attested to authority on behalf of the corporation, which was not challenged below. Upon filing of an affidavit in this Court, he has been allowed to represent the corporation in this appeal. ORDER (Nov. 5, 2014).

Construction, Mr. Roy filed a "Motion for Plea Answer." MOTION FOR PLEA ANSWER (Dec. 13, 2012), *Appx*. at 35; MOTION FOR PLEA ANSWER (Dec. 14, 2012), *Appx*. at 37. Attached to it were 36 pages of documents. Collectively, but not presented in any summary form, these attachments offer facts in answer of the Patils' writ of summons, contesting both liability and damages: by date, caption, content, and nature of the attachments, the filing appears intended by Mr. Roy to constitute an answer, *id*., and its content is reviewed *infra*.

IV. March 2013 PAD Non-Compliance Hearing

Because neither party's filings were in conformance with PAD requirements of specific factual allegations and specific answers, the court scheduled a "PAD Compliance Hearing" in February 2013. NOTICE OF HEARING (Jan. 25, 2013), *Appx*. at 76. It was continued. MOTION FOR CONTINUANCE (Feb. 6, 2013), *Appx*. at 80; MOTION FOR PLEA ANSWER (Jan. 31, 2013), *Appx*. at 78; NOTICE OF DECISION (Feb. 21, 2013), *Appx*. at 81. When the "PAD Compliance Hearing" was rescheduled, the notice again called it a "Status/Compliance Hearing." NOTICE OF DECISION (Feb. 21, 2013), *Appx*. at 81; NOTICE OF HEARING (Feb. 21, 2013), *Appx*. at 82.

The PAD Compliance hearing took place on March 25, 2013, attended by both parties. The court (*Kenneth C. Brown*, J.) chastised the Patils for failing to comply with the PAD rules. Turning its attention to the Patils' lawyer, Bruce Marshall, Judge Brown noted:

> First, the complaint came in after the effective date of the PAD rules. And, of course, and I'm not being critical, Attorney Marshall, when I say you sent it in under the old writ fashion. We sent it back to you, and then I think you probably had a paralegal simply put a number next to each paragraph and send it back. That's not how it works. It's really got to be just like a federal complaint. Allegation after allegation, and not a run-on paragraph that has five or six elements to each of those paragraphs. Your Number 2 paragraph is a page long.

PAD Compliance Trn. (Mar. 25, 2013) at 5. Then with its attention toward Mr. Roy, Judge Brown said:

> Attorney Marshall is going to redo his complaint so that it's a paragraph-by-paragraph allegation or assertion as to what they say you did wrong. It won't be a run-on paragraph as it is now. Your obligation within … 30 days is to answer. And you have to answer paragraph by paragraph so that, if he has a paragraph that says on X day the construction contract was entered into, you would admit or deny or state why not. But it has to be directly responsive to Attorney Marshall's paragraphs.

Id. at 6.

Mr. Roy asked whether he should wait until he receives the Patil's new complaint before

he files his answer, to which the court replied: "Right. … What's going to happen – we're basically going to start anew. … All the deadlines will start from here forward." *Id.* at 6-7.

The court repeated its instructions for both parties:

> So he's going to break down his elongated paragraphs. I'm saying this more to him than to you – like in a federal complaint, paragraph by paragraph. You, sir, will have 30 days to answer. And what that means is – I saw, I read over what you pled; I mean, you have a grasp of what the facts are and things like that – all you really have to do is just respond to each paragraph … [i]n writing.

Id. at 7. The court also informed both parties that shortly after Mr. Roy's answer, in accord with the new rules, they would meet and confer on case structuring issues, and have a telephone conference if necessary. *Id.* at 7-8.

> And then, … 30 days after the answer, you have to have complete disclosure to him, all of your – just basically everything that's discoverable, anything you're going to use at trial, has to be given to him. And 60 days after your answer, sir, you have to do the same thing. You have to give to Attorney Marshall and his clients everything that you're using to defend your case – witnesses, addresses – all right?

Id. at 8.

Later Attorney Marshall twice asserted he filed a proper PAD complaint, OBJECTION TO THOMAS ROY'S POST HEARING MOTION ¶ 5 (June 30, 2014), *Appx*. at 293; *Show Cause Hearing Trn*. (July 10, 2013) at 3, but despite the court's admonitions, there is no such document in the record. DOCKET CARD (Oct. 17, 2012 through Nov. 6, 2014), *Appx*. at 1. And because by both court pronouncement and court rules, the defendants' answers were due after the Patils' never-filed PAD-compliant complaint, the 30-day clock never began to run, and thus Mr. Roy was never due to file a PAD-compliant answer. DOCKET CARD, *Appx*. at 1.

V. Dialogue by Sticky

Over the next several months, and probably unbeknownst to any party at the time, the court clerk and the judge engaged in a dialog conducted by sticky-notes inserted in the court file.

The first was jotted by the clerk on March 25, 2013, the same day as the PAD compliance hearing: "per KCB[3] Plf. to re-file complaint + Δ to ans. in 20 ds." STICKY-NOTE (Mar. 25, 2013), *Appx*. at 203 (reproduced as in original).

A month later on April 26, 2013, there was a "memo to judge" from a clerk named Jane. It noted that "Plf was to re-file complaint in accordance w/ PAD. As of today, nothing has come in - please advise." Below that was the judge's reply: "Wait 10 Days." Beneath that, dated 20 days later on May 16, the clerk asked: Judge - held over 10 days, still no response. Pls advise. Status conf?" Following that, the judge's response was: "YES show cause." MEMO TO JUDGE (Apr. 26 & May 16, 2013), *Appx*. at 204 (reproduced as in original, emphasis in original).

[3]"KCB" appears to indicate Judge Kenneth C. Brown.

VI. July 10, 2013 Show-Cause Hearing

The "show cause" hearing the judge told the clerk to schedule was initially to be in June 2013, but was moved for a calendar conflict. NOTICE OF HEARING (May 17, 2013), *Appx*. at 83; MOTION TO CONTINUE (June 4, 2013), *Appx*. at 84; NOTICE OF DECISION (June 7, 2013), *Appx*. at 86. The "show cause" hearing was then scheduled for July 10, 2013. NOTICE OF HEARING (June 7, 2013), *Appx*. at 87 ("Show Cause Hearing"); *Show Cause Hearing Trn*. (July 10, 2013); *see also Motions Hearing Trn.* (Feb. 19, 2014) at 7.

Mr. Roy says he never got notice of the July 10 hearing, MOTION FOR ANSWER (Nov. 4, 2013), *Appx*. at 93; MOTION FOR OBJECTION OF DEFAULT (Nov. 18, 2013), *Appx*. at 98, while the Patils insisted he did. MOTION TO RECONSIDER AND/OR MOTION FOR DEFAULT ¶¶ 7-8 (Nov. 12, 2013), *Appx*. at 94; *Motions Hearing Trn.* (Feb. 26, 2014) at 5-6.

In any event, the hearing was held (*Kenneth C. Brown*, J.), though Mr. Roy was absent. *Show Cause Hearing Trn*. (July 10, 2013) at 3; *Status Conference Trn*. (Oct. 31, 2013) at 6-7; ORDER ON STATUS CONFERENCE (Oct. 31, 2013) at 1, *Appx*. at 91.

During the hearing, the Patils orally asked that Mr. Roy and Kelly Corporation be defaulted for not showing up. The court replied that a request for default should be filed in writing "so that there's a paper trail," "so that [Mr. Roy] sees it," and "so that he has some opportunity to respond," although the judge also said "I think you and I both know he's not going to." *Show Cause Hearing Trn*. (July 10, 2013) at 4-5. The court suggested to Attorney Marshall:

> [I]f you want to write it up here and do it right now, I'll approve it. Or if you want to go back to the office and send it in – whatever you want.

Id. at 5. *See also* ORDER ON STATUS CONFERENCE (Oct. 31, 2013) at 1, *Appx*. at 91; *Motions Hearing Trn.* (Feb. 19, 2014) at 1, 6.

Although Attorney Marshall later claimed he filed a motion for default at the clerk's office that very day, MOTION TO RECONSIDER AND/OR MOTION FOR DEFAULT ¶¶ 1-2 (Nov. 12, 2013), *Appx*. at 94; *Motions Hearing Trn.* (Feb. 19, 2014) at 5, and months later produced a copy of the purported pleading, MOTION TO RECONSIDER AND/OR MOTION FOR DEFAULT ¶ 2 (Nov. 12, 2013), *Appx*. at 94; (referencing attached "Proposed Order"), there is no mention in the court record of any such motion, and the court affirmatively found that there was no such document in its files. DOCKET CARD, *Appx*. at 1; ORDER ON STATUS CONFERENCE (Oct. 31, 2013) at 1, *Appx*. at 91 ("The court's file does not show that a motion for default has been filed."); *Status Conference Trn*. (Oct. 31, 2013) at 4, 8; *Motions Hearing Trn.* (Feb. 19, 2014) at 6-7 ("So apparently from what I understood of the reporting [sic], you were to file a motion and there was to be a paper trail. That's what they were waiting for"). The record also contains no order following the show-cause hearing, DOCKET CARD, *Appx*. at 1, resulting in Mr. Roy's ignorance of whatever occurred.

Later Mr. Roy argued that because the purpose of the hearing was to address the Patils' failure to file a PAD-compliant complaint, his absence was harmless, and should not have resulted in any sanction. THOMAS ROY'S POST HEARING MOTION ¶¶ 10, 12 (June 20, 2014), *Appx*. at 280; AFFIDAVIT OF THOMAS ROY ¶ 29.

VII. Short Hearings and Default

At the suggestion of the clerk, MEMO TO JUDGE (Aug. 9 & Sept. 26, 2013), *Appx*. at 204 ("Let it sit for 30 days - if nothing than status"); *Motions Hearing Trn.* (Feb. 19, 2014) at 6 (same), and because as the court noted "the file just froze somewhere," *Status Conference Trn.* (Oct. 31, 2013) at 4, the court scheduled a status conference on October 31, 2013, at which all parties appeared. NOTICE OF HEARING (Sept. 30, 2013), *Appx*. at 89.

Although all previous proceedings were before Judge Brown, due to a reassignment of judicial officers, Judge Mangones presided. *Status Conference Trn.* (Oct. 31, 2013).

With no basis in the record, Attorney Marshall represented to the new judge that the previous judge had already found Mr. Roy and Kelly Construction in default. *Status Conference Trn.* (Oct. 31, 2013) at 7 ("[T]he prior Judge said he was in default for not showing up."). Apparently not realizing the hearing was intended to address the Patils' failure to file a valid PAD complain, Judge Mangones instead focused on Mr. Roy's purported default following his absence from the July show-cause.

Judge Mangones reviewed the file and listened to the tape of the July hearing before Judge Brown which Mr. Roy had missed, and found no prior default. *Id.* at 4, 8; ORDER ON STATUS CONFERENCE (Oct. 31, 2013), *Appx*. at 91 ("The recording reflects that the Court had requested that plaintiffs file a motion concerning the requested entry of default so that a documentary trail of the request would exist and so that defendants would have notice and the opportunity to respond. The Court's file does not show that a motion for default has been filed. The Court will defer consideration of plaintiffs' request for default until the appropriate pleading has been filed."). Attorney Marshall then orally renewed the Patils' request for default and a hearing on damages. *Status Conference Trn.* (Oct. 31, 2013) at 4-5.

Mr. Roy thought the July show-cause hearing had been for the purpose of addressing the Patils' having never filed a PAD-compliant complaint. *Status Conference Trn.* (Oct. 31, 2013) at 5 (The Court: "May I ask the Defense, what do you understand is the present status of this matter?" Mr. Roy: "I understand, Your Honor, that it's been on hold."). Mr. Roy had missed the July show-cause hearing, however, when the new judge allowed Attorney Marshall to distract the focus from the Patils' not having filed a PAD-compliant complaint to the reasons for Mr. Roy's absence. And Mr. Roy was not otherwise alerted to events at the July hearing because the Patils did not file any post-hearing request for default, and the court did not issue any post-hearing order. Thus the talk during the October status conference, of default as though it were foregone, took Mr. Roy by surprise. *See* MOTION FOR ANSWER (Nov. 4, 2013), *Appx*. at 93; AFFIDAVIT OF THOMAS ROY ¶ 29.

A week after the October hearing, the Patils filed a "Motion to Reconsider and/or Motion for Default." Despite Judge Mangones's review of the file and the tape, Attorney Marshall restated that Judge Brown had already "granted the default" and argued "[i]t would be unconscionable, unjust and unfair for the Court not to uphold its prior verbal order of default." Attorney Marshall alleged that no appearance had ever been filed for the corporation, and again requested a default order and hearing on damages. MOTION TO RECONSIDER AND/OR MOTION FOR DEFAULT ¶¶ 4, 6, 10 (Nov. 12, 2013), *Appx*. at 94. Mr. Roy and Kelly Construction objected on the grounds they had no notice of the July show-cause hearing. MOTION FOR OBJECTION OF DEFAULT (Nov. 18, 2013), *Appx*. at 98.

There was a short follow-up hearing on February 19, 2014 regarding "pending motions," from which Mr. Roy appears to have been excused. MOTION FOR CONTINUANCE (Feb. 18, 2014), *Appx*. at 103 (citing weather-postponed meeting regarding UNH construction contract

requiring Mr. Roy's presence); *Motions Hearing Trn.* (Feb. 19, 2014) at 4; DOCKET CARD, *Appx*. at 1 (02/19/2014 entry: "agreement - no hearing necessary"). Before Judge Mangones advised him to not say too much, *Motions Hearing Trn.* (Feb. 19, 2014) at 7 (The court: "I'm kind of reluctant to talk too much about it today, because he's not here."), Attorney Marshall insisted *ex parte* that he had filed a motion for default that is otherwise non-existent in the record, and contrary to documents in the file, represented that the defendant corporation had not filed an appearance. *Id.* at 6, 9. Despite the court's review of the file and the audio tape, and its finding of no previous defaults, Attorney Marshall also told the court that Mr. Roy had "been defaulted in this case twice before." *Id.* at 5.

The "pending motions" hearing reconvened a week later on February 26 again before Judge Mangones. It again focused almost exclusively on Mr. Roy's absence from the July 2013 show-cause hearing. *Motions Hearing Trn.* (Feb. 26, 2014) *passim.* Thereafter, by written order, the court entered default based on Mr. Roy's "not attending hearing of July 10, 2013," and also ordered a hearing on damages. ORDER (Mar. 4, 2014), *Appx*. at 108.

VIII. Damages Hearing

A damages hearing was scheduled for June 10, 2014. Before the hearing, Mr. Roy filed a motion complaining he had not been provided any discovery regarding damages. MOTION TO ANSWER (June 6, 2014), *Appx*. at 116 ("I have not received any information from the Plaintiff council [sic] in regards to our scheduled hearing on Tuesday, June 10, 2014.").

The hearing was held nonetheless, with the judicial officer switching back to Judge Brown, who understood that "we're here on the damages hearing only." *Damages Hearing Trn.* (June 10, 2014) at 3.

At the hearing, for the first time, Mr. Roy was presented with the Patils' evidence on damages, *Id.* at 3-4, 11 (Mr. Roy: … "I don't understand why I did not get this before today."), and repeatedly told the court he could not effectively contest damages because he did not have discovery disclosures beforehand. *Id.* at 5, 10, 11 (Mr. Roy: "Well, at least if, Your Honor, if I would've had an opportunity to look at this before today, I would've prepared myself better.").

Having lost involvement with the case during the time when the default was brought about, Judge Brown blamed Mr. Roy's lack of preparation on Mr. Roy, rather than the failure of the Patils' to make required disclosures or the court to enforce the PAD rules. *Id.* at 10 (The Court: "What I'm really hearing is you're not prepared at all today."). Either misunderstanding Mr. Roy's protest, or assuming the PAD rules had been enforced long ago, the court vilipended Mr. Roy's objection on the grounds that Attorney Marshall had no obligation to provide documents at this stage of litigation. *Id.* at 12 (The Court: "He didn't have to submit … any affidavit. He could've just put his witness on the stand and had him go through each of the exhibits. And you'd be in exactly the same place as you are right now. Okay?").

Although Mr. Roy asked, the court refused to delay the hearing, or to hold the record

open. *Id.* at 10-11. Accordingly, having an opportunity to only glance at it, the most Mr. Roy could offer was: "I disagree with a lot of the information that's in here." *Id.* at 10, 11.

By order after the hearing, the court noted Mr. Roy had orally sought a continuance, which had been denied, and also awarded the Patils damages in the amount of $1,048,591.69. ORDER RE: DAMAGES (June 10, 2014), *Appx*. at 118.

In its order, while the court identified only "[t]he defendant, Thomas Roy," it repeatedly referenced both "the defendant" in the singular and "the defendants" in the plural. Thus it appears damages were assessed against Mr. Roy personally. *Id.*

STATEMENT OF THE CASE

Within the period for a timely motion for reconsideration, Mr. Roy hired a lawyer and filed a "post hearing motion," requesting the court strike the default order, strike the damages order, establish a discovery schedule, and set the matter either for trial or an evidentiary hearing on damages. THOMAS ROY'S POST HEARING MOTION ¶¶ I-V (June 20, 2014), *Appx*. at 280.

The motion reminded the court that the Patils had begun the case with an old-fashioned writ of summons, that the court had made clear to Attorney Marshall the case would not proceed without a proper complaint, *id.* ¶ 7, that none had ever been filed, *id.* ¶ 8, that the purpose of the July 2013 hearing was to enforce the PAD rules, *id.* ¶ 8, and that when Mr. Roy did not show for whatever reason, the case became about that. *Id.* ¶ 10. Mr. Roy noted that because no valid complaint had ever been filed, the case had never properly begun, *id.* ¶ 11, the Patils' had never made "proportional automatic disclosures" until the moment of the damages hearing and, as the court had previously instructed him, he was still waiting for a valid complaint on which to offer an answer. *Id.* ¶ 13, 15. Mr. Roy pointed out that despite the Patils failure to reciprocate, he had given both them and the court his discovery package, *id.* ¶ 15; and lamented that because he had missed the July 2013 hearing when the court's focus changed, *id.* ¶ 12-13, the resulting default had so surprised and so flustered him that he did not comprehend what was occurring and thus was unable to offer an explanation. *Id.* ¶ 15. Finally, Mr. Roy complained that never having been given discovery, he was unprepared to contest damages, and unapprised of the amount the Patils sought. *Id.* ¶ 16. He thus alleged that he had twice been subject to trial-by-surprise – once on default and again on damages – resulting in a million-dollar verdict through procedural error. *Id.* ¶¶ 12, 17-23.

Filed along with Mr. Roy's post-hearing motion were an affidavit showing the case's

procedural problems, and also the same set of 36 documents constituting the discovery package Mr. Roy had disclosed to the Patils over a year before. These clearly contest, and possibly defeat, the Patils' damages claim. *Id.* The Kelly Construction Company joined Mr. Roy's motion. MOTION OF KELLY CONSTRUCTION (June 20, 2014), *Appx*. at 278.

The Patils objected to both pleadings on the grounds that their filings conformed to the rules, and that Mr. Roy's post-hearing motion was untimely and frivolous; they also objected to the corporation's joinder. OBJECTION TO THOMAS ROY'S POST HEARING MOTION (June 30, 2014), *Appx*. at 293; OBJECTION TO KELLY CONSTRUCTION'S MOTION (June 30, 2014), *Appx*. at 291.

The court denied the relief requested in Mr. Roy's post-hearing motion, without explanation. NOTICE OF DECISION (July 1, 2014), *Appx*. at 298.

SUMMARY OF ARGUMENT

This case illustrates the confusion in superior court practice when the PAD rules first took effect in October 2010. Although they were given specific directions about how to initiate their case, the Patils never filed a proper complaint, and never produced mandatory disclosures. Attention to this then fell through the cracks of judicial reassignment, resulting in a default judgment against Mr. Roy and Kelly Construction in excess of $1 million. The judgment was unfairly got, and damages unfairly assessed.

ARGUMENT

At two points in these proceedings Mr. Roy was treated unjustly. The first was when he was defaulted for not showing up at a hearing whose purpose was to enforce the failure of the Patils to file a rules-compliant complaint. The second was when he was unable to contest damages because he was never given discovery disclosures.

I. Accident, Mistake, Misfortune Defined

New Hampshire law provides: "A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." RSA 526:1.[4]

"'Accident, mistake or misfortune' [is] something outside of one's control, or something which a reasonably prudent person would not be expected to guard against or provide for. The words import something that is outside the expectation or control of a party or its attorney." *Lakeview Homeowners Ass'n v. Moulton Const., Inc.*, 141 N.H. 789, 791 (1997) (quotations and citations omitted); *Pelham Plaza v. Town of Pelham*, 117 N.H. 178, 182 (1977).

A new trial for accident, mistake or misfortune must be based on facts in the record, is "not for dispensation of grace," *Sullivan v. Indian Head Nat. Bank*, 99 N.H. 262, 263 (1954), and must arise from an injustice. *Chase v. Brown*, 32 N.H. 130 (1855); *Weld v. Sabin*, 20 N.H. 533 (1847).

Although "[t]he question [of] whether accident, mistake or misfortune occurred is for the trier of fact, and its finding will be conclusive unless it is unsupported by the evidence,"

[4]The statute has remained essentially unchanged for over 170 years. When first enacted, it provided: "The superior court may grant a review where it shall appear that justice has not been done through any accident, mistake or misfortune, and that a further hearing would be just and equitable." RS 192:2 (1843). Because the elements and the operative language are abiding, old cases remain precedent.

Lakeview Homeowners Ass'n, 141 N.H. at 791; *Wright v. Clark Equip. Co.*, 125 N.H. 299, 303 (1984); *Armstrong v. Armstrong,* 123 N.H. 291 (1983); *Monroe v. Sterling*, 92 N.H. 488 (1943), when it is either clear that a proceeding was not fair, or even if there is doubt about the matter, a new trial will be ordered. *Shulinksky v. Boston & Maine R.R.*, 83 N.H. 86 (1927) ("[W]hen only one conclusion can reasonably be drawn, the law relative thereto is not a discretionary matter."); *Hopley v. Chronicle & Gazette Publishing Co.*, 94 N.H. 171 (1946) ("[W]hatever doubt may exist as to whether plaintiff did have a fair trial must be resolved in favor of the plaintiff, and a new trial ordered.").

If there is accident, mistake, or misfortune, this Court remands without inquiry into the "merits of the controversy." *New England Mutual Fire Insurance Co. v. Lisbon Mfg. Co*, 22 N.H. 170 (1850) ("The general rule is, that when it appears that a trial has not been had, by reason of accident and misfortune, the Court will give the party an opportunity for a trial without inquiring into the merits of the controversy. That matter is to be investigated before another tribunal."); *Nashua & Lowell R. R. v. Stimpson*, 35 N.H. 286, 288 (1857) (no "inquir[y] farther than is necessary in order to ascertain whether the party, by reason of some accident or misfortune, has been deprived of the opportunity of being heard"). Rather, "[w]here it appears that the error may have affected all the issues, the conclusion of law that there must be a complete new trial follows." *Hackett v. Boston & Maine R. R.*, 89 N.H. 514 (1938).

Where a party's inaction is caused by its own neglect, there is no "accident, mistake or misfortune." *See, e.g., Lakeview Homeowners Ass'n*, 141 N.H. at 789 (party's own lack of diligence in ensuring regular receipt of mail by relying on delivery through elderly mother whose memory was failing); *Arnold v. Hay*, 95 N.H. 499 (1949) (missed deadline by entrusting timely filing to an agent who was not a member of the bar); *N. E. Redlon Co. v. Franklin Square Corp.*, 90 N.H.

519 (1940) (party's own failure to examine witness); *Couillard v. Seaver*, 64 N.H. 614 (1887) (lack of preparation for trial is cause for a request for continuance, not new trial).

But "accident, mistake or misfortune" includes prejudicial misstatements by an opponent's lawyer, *Carlin v. Drake*, 89 N.H. 52 (1937), and an opponent's procedural error which prevents a party from acting. *Barron v. Jackson*, 40 N.H. 365, 366 (1860) (where plaintiff interfered with ability of defendant to obtain testimony of a witness, new trial was necessary).

II. Mr. Roy Was Denied a Fair Trial Through Accident, Mistake or Misfortune

Whatever the reason, Mr. Roy's absence from the July 10, 2013 show-cause hearing is not relevant, because the purpose of the hearing was to compel compliance with the PAD rules, which required the *Patils* to file a proper complaint. Whether Mr. Roy appeared or not, the court's job on that day was to ensure conformity with its earlier order requiring the Patils' complaint to be formatted with individually-numbered allegations to which Mr. Roy could respond with individually-numbered answers. Not only was Mr. Roy's non-appearance harmless, *Welch v. Gonic Realty Trust Co.*, 128 N.H. 532, 536 (1986) ("A harmless error is an error which is trivial, or formal, or merely academic, and … not prejudicial to the substantial rights of the party assigning it."), but because the hearing resulted in no pleading or court order, he was never apprised that the focus of the hearing had switched to his absence rather than the Patils' PAD-rules non-compliance.

The result was that while Mr. Roy was still awaiting a complaint to which he could file an answer, the court was on the cusp of making a finding of liability. By the time he learned what occurred, he was defaulted.

And it happened to Mr. Roy a second time.

Because the court forgot about PAD enforcement due to judicial re-assignment, being mislead by Attorney Marshall, or some other reason, it apparently thought or assumed that the case had been properly initiated under the PAD rules. Thus when Mr. Roy complained at the damages hearing that he could not proceed because he had never received discovery, it appeared to the court that the fault was Mr. Roy's lack of preparation rather than its own lack of attention.

This is not a matter of Mr. Roy lacking diligence, or standing behind an inconsequential procedural formality. *Carroll Cnty. Elderly Housing Associates v. Merrimac Tile Co.*, 127 N.H. 538,

540 (1985) (refusal to file answer based on "obvious typographical error in the date" on the complaint). Rather, Mr. Roy was defaulted by prejudicial events out of his control affecting his substantial rights of due process. He is not asking for grace, but for the Patils (if they wish to sue him) to file a complaint to which he can appropriately answer, and for the Patils (if they intend to allege damages) to timely disclose the evidence on which they intend to rely.

III. In Defaulting Mr. Roy and Awarding Damages, the Court Violated Rules of Civil Procedure

This Court has repeatedly made clear that due process means "the right to be heard at a meaningful time and in a meaningful manner," *Appeal of Northern New England Telephone*, 165 N.H. 267, 274 (2013), that lawsuits should be decided on their merits, and that rules of practice must aid justice:

> It is important that cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial. It is likewise important that litigation be concluded finally and with reasonable dispatch and that the dilatory shall not be rewarded at the expense of the diligent.

Douglas v. Douglas, 143 N.H. 419, 425 (1999) (*quoting Lewellyn v. Follansbee*, 94 N.H. 111, 114 (1946)); *see also In re Proposed New Hampshire Rules of Civil Procedure*, 139 N.H. 512, 515-16 (1995).

The new Superior Court Rules of Civil Procedure advance and implement this mandate. Thus Rule 1 provides:

- "The rules shall be construed and administered to secure the just, speedy, and cost-effective determination of every action." SUPER. CT.R. 1(b).
- "As good cause appears and as justice may require, the court may waive the application of any rule." SUPER. CT.R. 1(d).
- "A plain error that affects substantial rights may be considered and corrected by the court of its own initiative or on the motion of any party." SUPER. CT.R. 1(3).

Here the Patils failed to file a rules-compliant complaint, and failed to disclose rules-compliant discovery, thereby preventing Mr. Roy from answering and preparing. By defaulting Mr. Roy, the court put rules ahead of justice, prevented a meaningful hearing, avoided deciding the case on its merits, rewarded the dilatory Patils at the expense of the diligent Mr. Roy, and committed plain error.

Accordingly, by both due process and the superior court rules, Mr. Roy should be afforded a new trial on both liability and damages.

IV. No Effort to Pierce Corporate Veil

In New Hampshire, for a plaintiff to recover from an individual rather than a corporation, "thereby piercing the corporate veil, the plaintiff must establish that the corporate entity was used to promote an injustice or fraud." *Village Press, Inc. v. Stephen Edward Co.*, 120 N.H. 469, 471 (1980). And "piercing the corporate veil is not permitted solely because a corporation is a one-man operation." *Id.*

Here the Patils made no effort and offered no evidence suggesting Mr. Roy used Kelly Construction to "promote an injustice or fraud." Moreover, the court made no findings – whether explicit or *sub silentio* – on individual versus corporate liability. Indeed, the record appears devoid of any cognizance of the matter.

Mr. Roy was nonetheless found personally liable for over a million dollars.[5] While this Court is "not hesitant to disregard the corporate fiction," *id*. at 471-71, it will not when the plaintiff offers no evidence of fraud. *Id.*

Accordingly, this Court should reverse both the finding of liability and the award of damages against Mr. Roy personally.

[5]If Mr. Roy is mistaken in understanding that the court intended to impose personal liability, he does not waive the corporate shield.

V. Damages Beyond Allegations

The Patils' original writ of summons and their subsequently-filed non-compliant complaint alleged damages in the amount of $450,000, comprised of $300,000 for repair and $150,000 to complete the project. WRIT OF SUMMONS (Oct. 17, 2012), *Appx*. at 6; COMPLAINT ¶ 2 (Oct. 25, 2012), *Appx*. at 12.

At the damages hearing however, for the first time, the Patils claimed damages in excess of $1 million, plus a multiplier under a consumer protection statute. AFFIDAVIT OF JAYAKUMAR PATIL (June 10, 2014), *Appx*. at 121; *Damages Hearing Trn.* (June 10, 2014) at 8-9. The court awarded total damages of $1,048,591.69. ORDER RE: DAMAGES (June 10, 2014), *Appx*. at 118.

Although the Legislature has eliminated the need for a specific *ad damnum* clause in complaints, RSA 508:4-c, both the PAD pilot rules and the current superior court rules require the plaintiff disclose "a computation of each category of damages claimed … together with all documents or other evidentiary materials on which each computation is based." SUPER.CT. R. 22(a)(3); N.H. SUPREME COURT ORDER (Apr. 6, 2010), Pilot Rule 3(a)(3), *Appx*. at 312. The Patils never disclosed this.

Moreover, there was prejudice here in that Mr. Roy had no way of knowing the extent of the Patils' claims, there was no insurance coverage, and he had no "full and fair opportunity to litigate the liability and damages." *Lavoie v. Hollinracke*, 127 N.H. 764, 771 (1986).

Because of the failure to disclose, even if there is liability, the Patils should be allowed no damages. To the extent an award of damages is warranted, it should be limited to the amount stated in the plaintiffs' writ.

VI. Brief Summary of the Record With Regard to Liability and Damages

As noted, when there is accident, mistake, or misfortune, this Court remands for a new trial of the case *in toto* without inquiry into the "merits of the controversy." *Hackett*, 89 N.H. at 514; *Nashua & Lowell R. R.*, 35 N.H. at 288; *New England Mutual Fire Insurance*, 22 N.H. at 170.

Nonetheless, to satisfy this Court's inquiry into whether Mr. Roy had a viable claim regarding both liability and damages, and to demonstrate the existence of injustice, provided here is a short summary of the evidence he offered, which is contained in the record below and was disclosed to the Patils in answer to their allegations. The purpose is not to re-create what should have occurred at a liability trial or a damages hearing. Rather, it is to point out that there should have been a meaningful opportunity to contest both, and that had their been, Mr. Roy possessed competent evidence to address each with specificity such that the court's award is unsubstantiated.

Because there was never a written contract, what the parties committed to was ambiguous and mutable. LETTER FROM ROY TO PATIL (Sept. 15, 2011), Atch. 34, *Appx*. at 264. The lack of clarity includes mid-construction design changes to various structures and features of the house, accounting for some or all of the Patils' allegations. LETTER FROM ROY TO PATIL (July 8, 2010), Atch. 3, *Appx*. at 208; LETTER FROM ROY TO PATIL (Aug. 26, 2010), Atch. 5, *Appx*. at 214; LETTER FROM ROY TO PATIL (Sept. 1, 2010), Atch. 6, *Appx*. at 219. While the extent and value of these "change orders" is in dispute, they were demonstrably numerous, and contributed to costs and delays. AIA DOCUMENT G703 (Aug. 8, 2011), Exh.[6] A, *Appx*. at 125; AFFIDAVIT OF THOMAS ROY ¶¶ 8, 13.

[6]Citations denoted as "Exh." refer to lettered attachments appended to the affidavit the Patils filed below. *See* AFFIDAVIT OF JAYAKUMAR PATIL (June 10, 2014), *Appx*. at 121.

As a for-instance, the Patils insisted on ordering tile from India. It arrived after the Patils had intended to move in, and much of it was damaged in transit. The Patils required Mr. Roy to itemize the breakage in order to make an insurance claim, which imposed several weeks additional work. Moreover, the tile was of non-standard dimension, such that installation required extra effort. Mid-construction design changes made for material shortages and necessitated additional fabrication. EMAIL FROM TILE CARRIER TO ROY (June 6, 2011), Atch. 30, *Appx*. at 256; EMAIL FROM TILE CARRIER TO ROY (June 6, 2011), Atch. 31, *Appx*. at 258 (showing pictures of pallets of tiles on flat-bed trailer); EMAIL FROM STONE INSTALLER TO ROY (June 13, 2011), Atch. 32, *Appx*. at 261; LETTER FROM ROY TO PATIL (Jan. 31, 2011), Atch. 22, *Appx*. at 242; AFFIDAVIT OF THOMAS ROY ¶ 9.

This pattern – design changes, materials alterations, and resulting labor ramifications – was repeated with numerous features throughout the house, causing cost increases and delays, and making it increasingly uncertain whether the fixes were within Mr. Roy's scope of work. These included expansions to the master bedroom affecting the height of roofs and number of windows, EMAIL FROM ARCHITECT TO ROY (Sept. 8, 2010), Atch. 7, *Appx*. at 220; LETTER FROM ROY TO PATIL (Sept. 1, 2010), Atch. 6, *Appx*. at 219; LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 25, *Appx*. at 247, addition of columns and arches affecting labor estimates, LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 24, *Appx*. at 245, changes to bathrooms affecting amounts of tiling and plumbing, EMAIL FROM STONE INSTALLER TO ROY (June 13, 2011), Atch. 32, *Appx*. at 261; LETTER FROM ROY TO PATIL (Mar. 3, 2011), Atch. 28, *Appx*. at 253, redesign of the kitchen affecting appliances and counter-top fabrication, EMAIL FROM KITCHEN FABRICATOR TO ROY (June 13, 2011), Atch. 32, *Appx*. at 261; RECEIPTS (various dates), Exh. C, *Appx*. at 137; LETTER FROM ROY TO PATIL (Jan. 31, 2011), Atch. 22, *Appx*. at

242, and a decision to move a retaining wall Mr. Roy had already built. QM EQUIPMENT ESTIMATE (June 3, 2014), Exh. E, *Appx*. at 183; AFFIDAVIT OF JAYAKUMAR PATIL ¶ 13 (June 10, 2014), *Appx*. at 121; AFFIDAVIT OF THOMAS ROY ¶ 9. Some of these changes implicated basic structural issues, and others required demolishing what had just been built. EMAIL FROM ARCHITECT TO ROY (Jan. 24, 2011), Atch. 18, *Appx*. at 238; LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 25, *Appx*. at 247.

There were delays not attributable to Mr. Roy: a permit was held up when a structural engineer was concerned with building on a languished foundation, EMAIL FROM ARCHITECT TO ROY (June 25, 2010), Atch. 2, *Appx*. at 207; LETTER FROM STRUCTURAL ENGINEER TO ROY (Sept. 22, 2010), Atch. 9, *Appx*. at 222; EMAIL FROM STRUCTURAL ENGINEER TO ROY (Oct. 14, 2010), Atch. 11, *Appx*. at 229; EMAIL FROM PATIL TO ROY (Sept. 24, 2010), Atch. 10, *Appx*. at 228; EMAIL FROM ROY TO PATIL (June 24, 2010), Atch. 1, *Appx*. at 205; LETTER FROM ROY TO PATIL (Aug. 26, 2010), Atch. 5, *Appx*. at 214; LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 24, *Appx*. at 245, the architect was late with plans, EMAIL FROM ARCHITECT TO ROY (Jan. 19, 2011), Atch. 16, *Appx*. at 236, certain roofing shingles were unavailable, EMAIL FROM LUMBER SUPPLIER TO ROY (Jan. 25, 2011), Atch. 19, *Appx*. at 239, and there was an unexplained delay from the factory supplying the "wall and roof systems." LETTER FROM ROY TO PATIL (Dec. 1, 2010), Atch. 13, *Appx*. at 232. Likewise there were costs not attributable to Mr. Roy, including the unexpected expense of drilling a well which, despite great effort and depth, did not supply water enough for both the home and its geothermal heating system. EMAIL FROM WELL DRILLER TO ROY (Jan. 20, 2011), Atch. 17, *Appx*. at 237; EMAIL FROM WELL DRILLER TO ROY (Jan 25, 2011), Atch. 20, *Appx*. at 240; EMAIL FROM WELL DRILLER TO ROY (Jan. 27, 2011), Atch. 21, *Appx*. at 241; EMAIL FROM WELL DRILLER TO ROY (June 20, 2011), Atch. 33,

Appx. at 262; LETTER FROM ROY TO PATIL (Dec. 1, 2010), Atch. 13, *Appx*. at 232.

And then there was the weather. The winter of 2010-2011 had lots of snow, ice, and cold weather, which delayed some work, and prevented operations which require sustained warm temperatures. AFFIDAVIT OF THOMAS ROY ¶ 8; LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 24, *Appx*. at 245; LETTER FROM ROY TO PATIL (Mar. 1, 2011), Atch. 27, *Appx*. at 251.

Mr. Roy noted that the Patils' banker routinely visited and continued paying Mr. Roy, AFFIDAVIT OF THOMAS ROY ¶¶ 7, 8, 14, that contractors' invoices were resolved, and that any liens were the Patils' fault. AFFIDAVIT OF THOMAS ROY ¶¶ 15-16; EMAIL FROM ROY TO CONTRACTORS (Sept. 24, 2011), Atch. 36, *Appx*. at 272. Based on this, Mr. Roy asserted that the Patils' allegations of damages were "puffing." AFFIDAVIT OF THOMAS ROY ¶¶ 12, 27. Rather than defraud anyone, Mr. Roy lost over $44,000 on the job. MOTION TO ANSWER (June 6, 2014), *Appx*. at 116; AFFIDAVIT OF THOMAS ROY ¶ 13.

Mr. Roy, who was the Patils' friend before he was their contractor, explains the situation as a couple who wanted to build a dream beyond their means. AFFIDAVIT OF THOMAS ROY ¶¶ 5, 6, 12. Mr. Roy came to understand, and Mr. Patil acknowledged, that the Patils had not studied the plans until the house was already under construction, LETTER FROM ROY TO PATIL (Sept. 15, 2011), Atch. 34, *Appx*. at 264; AFFIDAVIT OF THOMAS ROY ¶ 13. Mr. Roy further believes that the Patils were pressured by the timetable of their family's spring visit, and that Mr. Patil did not know how to manage his wife's expectations – regarding both timing and level of luxury. LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 24, *Appx*. at 245; LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 25, *Appx*. at 247. Mr. Roy took some personal responsibility for the situation in that he regretted not being more forceful in confronting his friend and personal doctor about obstacles. LETTER FROM ROY TO PATIL (Feb. 3, 2011), Atch. 24, *Appx*.

at 245; LETTER FROM ROY TO PATIL (Mar. 1, 2011), Atch. 27, *Appx*. at 251; AFFIDAVIT OF THOMAS ROY ¶ 14. Rather than being liable, Mr. Roy contends that the Patils breached by demanding a different product than they bargained for. AFFIDAVIT OF THOMAS ROY ¶¶ 22, 27.

CONCLUSION

For the foregoing reasons, this Court should reverse the finding of liability and the award of damages against Mr. Roy, or grant a new proceeding on both.

Respectfully submitted,

Thomas J. Roy
By his Attorney,

Law Office of Joshua L. Gordon

Dated: April 6, 2015

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Thomas Roy requests that Attorney Joshua L. Gordon be allowed oral argument because this case is important to jurisprudence regarding complaints and discovery under now permanent PAD rules.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on April 6, 2015, copies of the foregoing will be forwarded to Bruce J. Marshall, Esq.

Dated: April 6, 2015

Joshua L. Gordon, Esq.

ADDENDUM

ORDER (Mar. 4, 2014). 35

ORDER RE DAMAGES (June 10, 2014). 36

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

216-2012-CV-00943

JAYAKUMAR AND PURNIMA PATIL

v.

KELLY CONSTRUCTION COMPANY, INC.
AND
THOMAS ROY

ORDER

Default is entered. The Court is not persuaded concerning defendants' asserted reasons for not attending hearing of July 10, 2013. Hearing is to be held on issues of damages. At that hearing, the parties shall have the opportunity to present or contest evidence concerning damages.

SO ORDERED.

3-14-14
Date

Philip P. Mangones
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. NORTHERN DISTRICT

SUPERIOR COURT

Jayakumar Patil and Purnima Patil

v.

Kelly Construction Company, Inc. and Thomas Roy

Docket No. 216-2012-CV-00943

ORDER RE: DAMAGES

On June 10, 2014, a Damages only hearing was calendared, the defendants being in default as found by this Court on March 4, 2014.

The plaintiffs were present and represented by counsel. The defendant, Thomas Roy, was *Pro Se.*

The parties agreed to proceed by way of offers of proof. The plaintiffs submitted a four-page affidavit with numerous attachments/exhibits which supported their claim for damages arising out of the construction of the plaintiffs' home by the defendants.

At the conclusion of the plaintiffs' offer of proof, the Court provided the defendant an opportunity to respond. Other than a general denial, the defendant brought forward no evidence questioning the validity of the plaintiffs' claims.

The defendant orally sought a continuance and/or time to respond to the offer of proof presented by the plaintiffs. Said request was denied. The Damages only hearing was previously calendared for April 9, 2014. Both parties sought a continuance from that date with the defendant specifically requesting that the hearing be rescheduled after June 2, 2014 due to employment conflicts. This Court purposely extended the hearing date to accommodate the defendant with the expectation that he would be

prepared to proceed to counter the offer of proof and/or present testimony in his defense.

Having reflected upon the offers of proof presented by the plaintiffs, the general denial by the defendants, and the plaintiffs' affidavit with supporting documentation, this Court awards damages in the amount of $1,048,591.69. Said sum reflects overpayment to the defendants and for funds expended or to be expended to complete the construction and prosecute and defend claims arising from the defendants' negligence. The Court, in its discretion, declines to award additional damages for the alleged breach of RSA 358-A.

SO ORDERED.

Date: June 10, 2014

Kenneth C. Brown
Presiding Justice