

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

### **In Case No. 2024-0530, RJH Builders, LLC v. Robert Thistle & a., the court on June 2, 2026, issued the following order:**

The court has reviewed the written arguments and the record submitted on appeal, has considered the oral arguments of the parties, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(3). The defendants, Robert Thistle and Priscilla Thistle (collectively, the Thistles), appeal an order of the Superior Court (Kissinger, J.) awarding damages to the plaintiff, RJH Builders, LLC (RJH), in connection with claims arising from RJH's construction of a custom home for the Thistles. The Thistles argue that the trial court erred when it: (1) accepted RJH's late-filed answer, which raised the affirmative defense of waiver to the Thistles' counterclaim; (2) found that the parties waived the change order provision of the construction contract; and (3) awarded damages to RJH. We affirm.

The following facts are taken from the trial court's order or are otherwise supported by the record. RJH is a general contractor with experience building homes and additions, including installing roofs and siding. Robert Harrison is the sole member of RJH.

In September 2018, the Thistles and RJH entered into a Construction Agreement whereby RJH agreed to build a custom home for the Thistles. The Construction Agreement was a fixed-price contract requiring the Thistles to pay \$510,000 to RJH to build a home in accordance with plans dated August 2018 and construction specifications dated September 2018. To finance the project, the Thistles acquired a construction loan from a bank, and the bank created a payment schedule for RJH's work. The payment schedule provided for the release of allocated funds for specific portions of the construction upon their completion by RJH, subject to inspection and approval by the bank and approval by the Thistles. The Construction Agreement included a "change order provision" that provided that any changes to the work, materials, or specifications be agreed upon in a writing signed by both parties, that the writing identify the associated costs and delays, and that any additional costs be paid for prior to commencement of the work.

After signing the Construction Agreement, the Thistles revised the house plans between November and December 2018. The parties did not execute written change orders for these revisions. Shortly after construction began, Mr. Thistle asked Mr. Harrison via text message how much it would cost to finish the home's bonus room, which the construction specifications described

as an unfinished room. Mr. Thistle told Mr. Harrison that he would pay him directly to finish the bonus room rather than involving the bank. Mr. Harrison replied that he would give Mr. Thistle an answer by the end of the week. At trial, Mr. Harrison testified that he later gave Mr. Thistle an oral estimate of \$20,000 to \$25,000 to finish the bonus room, and Mr. Thistle agreed. Mr. Thistle testified that he and Mr. Harrison never discussed any additional cost to finish the bonus room. The parties did not execute a written change order to finish the bonus room. Later, in August 2019, RJH provided the Thistles with Invoice #398 for extra work done at the Thistles' request, including adding windows and a dormer above the garage and finishing the bonus room. The Thistles paid Invoice #398.

Throughout the construction and after paying Invoice #398, the Thistles requested other modifications and additions, including custom-built curved stairs supported by a post, a sunroom beam, custom closets and shelving, extra crown molding, several doors, balusters and rail parts, custom kitchen paint, exterior decking, and other items. In November 2019, RJH issued Invoice #404 for charges relating to these items, as well as extra drilling and hydrofracking for a well. Mr. Thistle testified that he received no prior notice from RJH that these items would incur additional costs. Mr. Thistle disputed the price of particular items on Invoice #404 and whether the items were included under the Construction Agreement and whether the Thistles should have accordingly received a credit for these items. The Thistles did not pay Invoice #404.

In January 2020, RJH requested inspection and payment from the bank for certain work covered by the Construction Agreement (Inspection #4). The bank inspected and approved this work. The Thistles did not authorize payment to RJH following Inspection #4. RJH then stopped work on the project.

RJH brought a complaint against the Thistles alleging, among other things, breach of contract and unjust enrichment, and the Thistles counterclaimed for breach of contract. Nearly three years after the Thistles filed their counterclaim and with a scheduled trial date approaching, RJH moved to file a late answer to the Thistles' counterclaim. Over the Thistles' objection, the Superior Court (Tucker, J.) granted RJH's motion to file a late answer. In its answer, RJH asserted as an affirmative defense that the parties waived the change order provision of the Construction Agreement. The Thistles then moved to strike RJH's waiver defense, and RJH objected. The Superior Court (Kissinger, J.) deferred ruling on the Thistles' motion until trial, which was continued from December 2023 to May 2024.

The trial court held a three-day bench trial and subsequently issued an order on RJH's claims and the Thistles' counterclaim. As to RJH's waiver defense, the trial court implicitly denied the motion to strike by concluding that

“the parties’ conduct demonstrate[d] that they waived both the written requirement and substantive terms of the Construction Agreement’s change order provision.” The trial court observed that “[b]oth parties failed to comply with these requirements throughout the project.” Given that the parties waived the change order provision, the trial court concluded that the Thistles had not proved their breach of contract counterclaim based upon RJH’s failure to abide by the change order provision. The trial court also determined that RJH had failed to demonstrate a breach of the Construction Agreement. Nevertheless, it concluded that RJH was entitled to relief on a theory of breach of an oral contract, unjust enrichment, or quantum meruit and determined that it need not decide upon which theory RJH prevailed because RJH’s remedy — recovery for labor and materials — would be the same under any of these theories. The trial court then awarded RJH equitable damages for its labor and materials related to the Inspection #4 work, which the Thistles acknowledged was substantially completed. The trial court also awarded damages to RJH for certain items in Invoice #404 based on the additional work it performed outside of the Construction Agreement at the Thistles’ request, as well as a payment RJH made for finish plumbing and fixture upgrades. This appeal followed.

We first address the Thistles’ argument that the trial court erred in allowing RJH’s late-asserted affirmative defense of waiver. Under Superior Court Rule 9(a), RJH was required to file its answer to the Thistles’ counterclaim within 30 days of receiving it. See Super. Ct. R. 9(a). The trial court, however, may waive the application of any rule “[a]s good cause appears and as justice may require.” Super. Ct. R. 1(d). The trial court has “broad discretion in determining whether to waive its rules,” and “we will not reverse its decision absent an unsustainable exercise of discretion.” Anna H. Cardone Revocable Trust v. Cardone, 160 N.H. 521, 525 (2010).

Here, the trial court found good cause to accept RJH’s late answer, noting that the parties agreed that they had “conducted the litigation in the expectation that the counterclaim would be litigated at trial” and that the Thistles never moved for a default judgment on their counterclaim. Under these circumstances, we cannot conclude that the trial court unsustainably exercised its discretion when it determined that, “[g]iven the history of the case and the way the parties have managed the litigation,” there existed good cause to accept RJH’s late answer. See id.; Super. Ct. R. 1(d).

The Thistles next contend that the trial court erred in allowing the late waiver defense because RJH’s answer, which merely stated that the “Thistles waived the contractual requirement for change orders,” was vague and provided insufficient factual support for the waiver defense, thereby providing insufficient notice to the Thistles. We disagree. The parties’ relevant filings — the Thistles’ counterclaim, RJH’s answer, and RJH’s objection to the Thistles’ motion to strike — demonstrate that the Thistles had adequate notice of the factual basis for RJH’s waiver defense. Cf. Walters v. Performant Recovery,

Inc., 124 F. Supp. 3d 75, 80-81 (D. Conn. 2015) (striking waiver affirmative defense where pleading was “devoid of any facts stating or identifying how [p]laintiff’s claims were waived” and without such facts, plaintiff suffered prejudice and was “left guessing how a waiver defense would apply” (quotations omitted)).

The Thistles argue that they were in fact prejudiced by the late disclosure of the waiver defense because, had they received earlier notice of the defense, it would have “changed the course of discovery.” We disagree. After the trial court permitted RJH to file its late answer and deferred ruling on the motion to strike, the trial date was continued from December 2023 to May 2024, and the Thistles did not request to reopen discovery during this period. Based on the record before us, we cannot agree with the Thistles that they were prejudiced by the late-asserted waiver defense. Cf. State v. Crooker, 139 N.H. 226, 228 (1994) (concluding late amendment of bill of particulars did not prejudice defendant when defendant could have prevented any prejudice by requesting a continuance). In conclusion, “[g]iven our emphasis upon justice over procedural technicalities,” we are unable to conclude that the trial court unsustainably exercised its discretion by accepting RJH’s late answer and waiver defense. Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 729 (2010).

We next address the Thistles’ argument that the trial court erred in finding that the parties waived the change order provision of the Construction Agreement. A waiver is the voluntary or intentional abandonment or relinquishment of a known right. Private Jet Servs. Grp. v. Tauck, Inc., 176 N.H. 553, 557-58 (2024), 2024 N.H. 20, ¶12. “A waiver may be based upon an intention expressed in explicit language or upon conduct under the circumstances justifying an inference of a relinquishment of a known right.” Id. at 558, 2024 N.H. 20, ¶12; see also Prime Financial Group v. Masters, 141 N.H. 33, 38 (1996) (recognizing waiver of contract terms “can be either express or implied and that the existence of a waiver . . . must be determined based on the facts of the case”). Whether an implied waiver occurred is a question of fact, and we will not overturn the trial judge’s determination that a waiver occurred unless such finding is clearly erroneous. See Renovest Co. v. Hodges Development Corp., 135 N.H. 72, 79 (1991).

In challenging the trial court’s waiver finding, the Thistles point to paragraph 17 of the Construction Agreement, which provides that “[n]o term or provision of this Agreement may be amended or waived except . . . in a document in writing signed by the Parties,” as well as paragraph 24(b), which provides that “[t]he failure of either party to insist upon strict compliance with any term or condition of this Agreement shall not constitute a waiver of any such term or condition.” Analyzing these provisions, the trial court concluded that “the parties’ conduct demonstrate[d] that they waived both the written requirement and substantive terms of the Construction Agreement’s change

order provision.” It further found that the parties’ waiver of the change order provision did not arise from their mere failure to insist upon strict compliance with the provision, but rather from their mutual conduct — namely, the Thistles’ informal requests to make changes during the construction of the home, and RJH’s subsequent issuance of invoices after completing the requested work.

We conclude that the trial court’s waiver finding was not clearly erroneous. The change order provision did not place the sole responsibility of initiating change orders on one party. Rather, it imposed duties on each party for the benefit of the other, including requiring that RJH give written notice to the Thistles of any cost changes so they would not be surprised by overruns, and requiring that the Thistles pay in full beforehand for any work performed by RJH in accordance with a change order. During construction, the Thistles requested multiple changes that were, based on the Construction Agreement and construction specifications, outside the scope of the contract, and to which the parties were, or should have been, aware the change order provision would apply. These changes included upgrades to materials and redesign of some features of the home.

Nonetheless, the record reflects that the parties chose to forgo the change order process repeatedly throughout the construction. On the multiple occasions that the Thistles asked RJH to make changes that were outside the scope of the Construction Agreement, they never requested written descriptions of the changes or the disclosure of the associated costs, or inquired whether any delays would result. Similarly, RJH never requested that the Thistles pay for the extra work before it began. Each request for additional work presented an opportunity for either party to invoke the change order provision, but neither did so.

Furthermore, in August 2019 — several months into the construction — RJH provided the Thistles with Invoice #398 for extra work completed at the Thistles’ request, and the Thistles paid it, irrespective of the change order provision of the Construction Agreement. See Prime Financial Group, 141 N.H. at 38 (affirming trial court’s instruction to jury that contract terms may be waived by implication and the existence of a waiver “must be determined under the facts of each case, including the conduct of the parties” (quotation omitted)). Neither party invoked the change order provision between the payment of Invoice #398 and the issuance of Invoice #404, despite the fact that there is evidence in the record that RJH and its subcontractors continued or began work during this time period that the Thistles requested and that was beyond the scope of the Construction Agreement. The trial court found that, like the changes for which RJH charged in Invoice #398, the changes reflected in Invoice #404 were largely for work requested by the Thistles that went beyond the contract specifications. We also note that, while paragraph 24(b) provides that the “failure of either party to insist upon strict compliance” with a

contract term does not constitute a waiver, the record reveals that the parties did not comply with any part of the change order provision. (Emphasis added.) Their mutual conduct therefore went beyond the failure to strictly comply with its terms. We further note that the Construction Agreement did not include a provision stating that waiver in one instance does not constitute waiver of the same provision in the future. See, e.g., Carpenter v. Southbay Homeowners Ass'n, 23 N.W.3d 118, 123 (N.D. 2025) (referencing “no waiver” contract provision of restrictive covenant which stated that “[a] waiver of a breach of any of the foregoing conditions or restrictions shall not be construed as a waiver of any succeeding breach [or] violation thereof or of any other restriction or obligation” (capitalization, bolding, and underlining omitted)).

In sum, the parties’ conduct, as contrasted with the change order process contemplated by the Construction Agreement, “justif[ies] an inference” that they intended to relinquish their rights to enforce paragraphs 17 and 24(b), and the change order provision, Private Jet Servs. Grp., 176 N.H. at 558, 2024 N.H. 20, ¶12, and therefore, the trial court’s waiver finding was not clearly erroneous, see Renovest, 135 N.H. at 79-80.

We now turn to the Thistles’ arguments that the trial court erred when it awarded damages to RJH based on a theory of quantum meruit or unjust enrichment. We review a trial court’s equitable award of damages for an unsustainable exercise of discretion. Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 210 (2009).

First, to the extent that the Thistles argue that the trial court erred in awarding damages to RJH because the Construction Agreement was a fixed-price contract based solely on the square footage of the home, we disagree. The Construction Agreement does not expressly state that the contract price was based on the square footage of the house alone. Rather, it incorporates the plans and specifications dated August and September 2018 and includes a comprehensive list of construction and design details.

The Thistles also suggest that the trial court erred in awarding damages to RJH based on its completion of the Thistles’ requested changes after signing the contract. We are unpersuaded. The trial court concluded that several of the changes requested by the Thistles after signing the Construction Agreement and reflected in Invoices #398 and #404 were outside the scope of the contract, such as adding windows, a sunroom beam, extra crown molding, building a dormer above the garage, finishing the bonus room, changing doors, and customizing the stairs, stair treads, and shelves. As to the changes challenged by the Thistles on appeal, the court’s conclusions are supported by the record, which shows that these changes generally required additional labor or materials. For example, Mr. Harrison testified that adding a dormer above the garage required restructuring the roof and adding three 24-inch laminated beams to carry the ridge. To finish the bonus room, RJH also added a double

window, insulation, sheetrock, wiring, paint, trim, and a heating system on the second floor of the home. Based on the additional work and materials required to accommodate the Thistles' extra-contractual requests, we cannot conclude that the trial court unsustainably exercised its discretion in awarding damages to RJH for its labor and materials associated with these changes. See id.; cf. Axenics, Inc. v. Turner Constr. Co., 164 N.H. 659, 669-70 (2013) (stating that equitable remedy of unjust enrichment may be available to contracting parties "if the benefit received is outside the scope of the contract").

Similarly, the Thistles contend that the trial court erred in calculating certain damages it awarded to RJH and failing to make certain credits to the Thistles related to the crown molding materials and labor, upgraded doors, the installation of the well, plumbing, piping for a wood stove, a basement window, custom shelving, the bonus room, the dormer, warping of the sunroom floor, and labor costs for the tile and wood flooring. Based on our review of the record, and given that the Thistles have not provided a complete record including all of the trial exhibits, we conclude that the Thistles have not demonstrated that the trial court's rulings were clearly unreasonable or untenable to the prejudice of their case. See Clapp, 159 N.H. at 210; Osman v. Lin, 169 N.H. 329, 334 (2016) (stating that plaintiffs, as appealing party, "have the burden of providing a record sufficient to decide their issues on appeal," and that "[a]bsent a complete record, we must assume that the record supports the trial court's factual findings").

Next, the Thistles argue that the trial court erred when it neglected to consider or otherwise credit them for payments they made directly to vendors for landscaping, flooring, heating, electrical work, a well pump, a fireplace, appliances, and carpentry work. We agree with RJH that the Thistles failed to sufficiently develop these arguments on appeal, and we therefore decline to consider them. See State v. Blackmer, 149 N.H. 47, 49 (2003) (stating that we will not address arguments that are not sufficiently developed for appellate review).

Finally, the Thistles argue that the trial court improperly awarded damages to RJH for certain work that the Thistles claim it failed to complete prior to Inspection #4 as required by the Construction Agreement. We disagree. The trial court did not award RJH any damages for Inspection #4 work under a breach of contract theory, but rather analyzed to what extent RJH was entitled to equitable damages for its labor and materials pertaining to the portions of Inspection #4 work for which it requested damages.

Regarding the relevant portions of the Inspection #4 work, Mr. Thistle testified that the siding needed repairs but agreed that these kinds of repairs are typically addressed at the end of the project as punch list items. He also stated he had "no problem" with the drywall. He testified that the porch deck and steps "weren't quite complete" because the "front porch had a piece of

wood with . . . a section cut right out of it,” and because the deck was missing screw coverings, one step, and a railing. Based on this and other evidence, we conclude that the record supports the trial court’s finding that the limited portions of the Inspection #4 work for which RJH sought damages were substantially completed. See McNeal v. Lebel, 157 N.H. 458, 461 (2008) (“We will uphold the trial court’s factual findings . . . unless they lack evidentiary support . . .”). Thus, the trial court did not unsustainably exercise its discretion in concluding that RJH was entitled to recovery for its labor and materials for the Inspection #4 work for which it requested damages. Clapp, 159 N.H. at 210; cf. McNeal, 157 N.H. at 466 (concluding that homeowner was liable to contractor for value of contractor’s work, even though contractor did not fully perform under contract and some work required correction).

We have considered the Thistles’ remaining arguments, and have concluded that they do not warrant further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993).

Affirmed.

DONOVAN, COUNTWAY, and GOULD, JJ., concurred.

**Timothy A. Gudas,  
Clerk**