STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: West Bath
DOCKET NO. BCD-WB-RE-09-06

L&D BUILDING & REMODELING, INC.,

Plaintiff

v.

DECISION AND ORDER

JANE E. HUFFMAN,

Defendant

This matter was tried before the court without a jury on the claims of Plaintiff L&D Building & Remodeling, Inc. ("L&D") for breach of contract (Count II),[1] and on the counterclaims of Defendant Jane Huffman ("Ms. Huffman") for breach of contract (Count I), violation of Maine's Home Construction Contract Act ("HCCA"), 10 M.R.S. § 1486, et seq. ("HCCA") (Count II), breach of warranty (Count III), violation of Maine's Unfair Trade Practices Act ("UTPA"), 5 M.R.S. § 207 ("UTPA") (Count IV), recovery of attorney's fee pursuant to 10 M.R.S. § 1118(4) (Count V), and Abuse of Process (Count VI).

This dispute centers on the construction of a barn by L&D on premises owned by Ms. Huffman. The factual findings, below, are based on evidence that this court finds credible.

FINDINGS

L&D is a Maine corporation engaged in the business of building and remodeling small and large buildings and structures. James Driscoll is its president and sole shareholder.

[1] Count I (Mechanic's Lien) of the complaint was dismissed earlier in the case.

At the times relevant to this action, Ms. Huffman was the owner of 267 Fern Street, Turner, Maine ("Property"), which was her residence until March 15, 2008.[2] The Property included her house, a fenced-in horse corral and a small shed inside the corral.

In December 2006, Ms. Huffman contacted Mr. Driscoll to discuss the construction of a barn on the Property.[3] Ms. Huffman owned six horses, which she intended to stable in the barn. Some time after that date, the number of horses increased to seven with the birth of a foal. Ms. Huffman intended to use the barn for her horses. While she also considered the possibility of offering boarding service for other people's horses at some undefined future time, this possibility never materialized.[4]

Mr. Driscoll drafted a written agreement to construct a 30' x 40' barn, which was executed by the parties on January 12, 2007. *See* Trial Exh. 2. Under the express terms of the contract, L&D's duties included site work, moving an existing wood pile out of the way of the construction area, installing a 5.5" thick concrete pad ("bull float only") for the barn structure,[5] excavating a ditch for electric and water service to the barn, and constructing the barn itself. The contract also provided that L&D would broom finish the interior floor side of the concrete pad, if requested by Ms. Huffman; use hemlock boards for the underside of the trusses and the stall walls; use pine and shadow boards for the exterior fascia; install two gable vents; "frame an opening in the attic with a hatch"; and install a water pipe and faucet, which the parties referred

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[2] Ms. Huffman sold the Property on March 15, 2008. The events giving rise to this action occurred before that date.

[3] Initially, Ms. Huffman considered the construction of a riding stable in which to board horses and teach riding. However, the cost of such a stable far exceeded Ms. Huffman's budget, so she opted instead to build a barn for her own horses.

[4] There is evidence that she may have allowed someone else to briefly stable a horse in the barn. However, there is no evidence that it was part of a business enterprise.

to as a "hydrant", in the interior of the barn. Trial Exh. 2. The contract did not include painting or staining, installing circuit boxes or stall gates, or obtaining the building permit.[6] *Id.*

Ms. Huffman told Mr. Driscoll that using hemlock instead of pine inside the barn was important to her because pine was a softer wood and her horses could chew it quicker. She also wanted wood on the exterior fascia of the barn to that it would be compatible with and match the trim on her house.

The total contract price for labor and materials was $30,000, which Ms. Huffman agreed to pay in three installments: (a) a deposit of one-third at the time of signing the contract; (b) one-third when the trusses for the barn were installed; and (c) the final balance "upon completion of L&D's work." *Id.* There is no dispute that the first two installments totaling $20,000 were paid by her.

Mr. Driscoll also drafted a plan for the construction of the barn, which was to be a free-standing structure that included eight stalls and a hayloft. *See* Trial Exh. 1. The barn was to be located approximately 7,500 feet from the house on the Property. Among other things, the plan showed the location of the water hydrant in the interior of the barn. Mr. Driscoll and Ms. Huffman, together, chose the location of the hydrant. In addition, Mr. Driscoll recommended, and Ms. Huffman agreed, that the barn would be built on sloping land situated downhill and some distance from the house and the corral.[7]

L&D began the site preparation work during a stretch of mild weather in January 2007. On March 7, 2007, Ms. Huffman obtained a building permit from the Town.

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[5] At trial, Mr. Driscoll also used the term "floating slab" when describing the concrete pad.

[6] In order to keep within her budget, Ms. Huffman, rather than L&D, was to separately pay for and provide for these items.

Roger Williams, the Codes Enforcement Officer for the Town of Turner, testified that on April 8, 2006, the 2003 edition of the "International Residential Code for One– and Two–Family Dwellings" ("Code") was adopted by the Town and remains its governing building code. *See* Trial Exh. 11. He also testified that, although the Code does not specifically refer to "barns," it is his view that, depending on the circumstances, a barn such as that constructed on the Property could be an "Accessory Structure"[8] within the meaning of the Code.[9]

In May 2007, L&D returned to the Property to finish the site work, install the concrete pad and construct the barn. Before installing the concrete pad, L&D staked out the footprint of the barn and the location of the interior water hydrant. Ms. Huffman wanted to be sure that, as built, the hydrant would not be in the doorway of the barn so that her horses would not kick it.

The concrete pad was designed to support the barn walls and to provide the flooring surface for the interior of the barn. The pad had a uniform thickness of 5.5 inches and contained both steel mesh and fiber mesh. 75% to 80% of the floor area of the pad rested on original or "virgin" soil and the remaining area was on compacted fill material. The pad did not contain any footers or haunches.[10]

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[7] The parties had discussed other locations for the barn, but Mr. Driscoll felt the chosen site was more level than the others.

[8] See the discussion, supra, for a discussion of the Code and the meaning of "accessory structure."

[9] Mr. Williams also testified that, if a barn is only used for livestock, then in his view it is not incidental to the main building (house) on the same lot and, therefore, is not an accessory structure.

[10] At trial, Ms. Huffman's expert, Jacques Dostie, described "footers" as concrete footings that are usually used with and support a concrete wall. Whether used with a concrete wall or a slab floor, footers are poured beneath and separately from the wall or slab. Typically, footers extend below the frost line, and are used to provide structural support for and evenly spread the load of the building. He described "haunches" as being like footers that are usually used with a concrete slab, except they are poured with and are part of the slab they support. Footers and haunches perform the same function. Mr. Dostie also testified that the Town's Code requires a steel footer.

In order to bring water and electricity to the barn, L&D tied into the lines providing those utilities to the house on the Property and, although Ms. Huffman was responsible for the installation of the circuit boxes, L&D actually hired and paid an electrician to do that work. During construction, L&D learned that hemlock boards, which were to be used for the underside of the trusses and stall walls, was not available and, without first consulting Ms. Huffman, substituted more expensive pine boards at no extra cost to Ms. Huffman. L&D mistakenly used rough cut pine for the exterior fascia of the barn and covered the fascia boards with aluminum coil stock. In addition, the contractor broom finished the concrete floor without Ms. Huffman's request or approval; installed only one gable vent; and did not install a hatch to the attic of the barn.

In June 2007, Ms. Huffman engaged the services of a real estate agent to list the Property for sale and, on June 11, 2007, she completed a Seller's Disclosure Statement. *See* Trial Exh. 37. The initial listing price for the Property was $299,000. At Ms. Huffman's request the listing price was later increased to $349,000.

On June 20, 2007, Mr. Driscoll presented Ms. Huffman with what he characterized as L&D's final bill for work on the barn. *See* Trial Exh. 5. It included the final installment of the contract price ($10,000) plus extras totaling $2,224.98. The extras identified on the bill included installation of the water pipe and hydrant, sand and gravel for installing the water lines, pressure testing the water line, use of a back-hoe to remove manure at Ms. Huffman's request, electrical work to install two spot lights, and excavation work for the water line. At the time this bill was presented to Ms. Huffman, L&D had not completed its work on the barn.

On July 2, 2007, Ms. Huffman spoke with Mr. Driscoll about L&D's bill and about work that she felt needed to be completed or corrected. She had prepared a written punch list of the

items that concerned her. The following were among the items on the list: the stall walls were improperly toe-nailed into supporting posts and would not adequately contain horses; a gable vent had not been installed; there was no hatchway leading to the hayloft;[11] exterior grading was not finished and caused water problems and erosion around the exterior of the barn[12]; there was insufficient lighting in the barn; the sliding door to the entrance of the barn and an upper door were bowed and warped and did not open or close; the hydrant was located partially in the doorway to the barn;[13] and aluminum coil stock was used on the exterior fascia. In addition, the walls of one or two of the stalls were not square to the point that one of the stall gates, which were to be installed by Ms. Huffman, would not fit. Some of the items on Ms. Huffman's list were not part of the contract or L&D's responsibility.

When Ms. Huffman attempted to offer the list to Mr. Driscoll and discuss the items with him, he said he would not take the list or fix any items or do any more work until the bill was paid. In turn, Ms. Huffman said that she would not pay L&D until the work, including the punch list items, was done. They talked heatedly several more times on the phone later that same day. It was at this time that Ms. Huffman first learned that pine was used in the interior of the barn instead of hemlock. She had already agreed to accept the exterior fascia material after Mr. Driscoll explained that it would be too costly to correct the mistake that had been made. Some time following their conversation, L&D completed, corrected or accommodated most of the punch list items. However, it did not fix the exterior drainage and erosion problem and, rather than moving the hydrant, installed a beam around it so the horses could not kick it.

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[11] Although Ms. Huffman claimed otherwise, the hatchway work did not include a ladder.

[12] Based on Ms. Huffman's testimony, it is apparent that her reference to grading also included "landscaping". However, the court finds that landscaping is not part of the parties' contract.

On July 3, 2007, L&D filed a mechanics lien on the Property. The lien alleged that the last day of work was July 2, 2007 and that Ms. Huffman owed $12,224.98.[14]

The complaint in this case was filed by L&D on October 23, 2007.

On March 25, 2008, Ms. Huffman entered into a purchase and sale agreement to sell the Property, including the barn, to Douglas Zimmerman for $275,000. This was the only purchase offer that she received.

In order to sell the Property, Ms. Huffman needed a release of L&D's mechanics lien. On May 2, 2008, the court ordered a release of the lien on condition that Ms. Huffman escrow the sum of $12,224.98 in a bank account as security for L&D's claims in this action. *See* Trial Exh. 18. The lien was released on May 13, 2008 and the Property was sold to Mr. Zimmerman two days later. Trial Exh. 17. Ms. Huffman did not identify any of her claimed defects regarding the barn on her Seller's Disclosure Statement at the time she listed or sold the Property, nor did she ever amend or supplement that statement to disclose any defects.

During Ms. Huffman's ownership of the Property, she did not use the barn to board other peoples' horses or otherwise use it for commercial purposes. In addition to stabling her own horses and storing hay and horse supplies, she also stored the following items in an empty stall: a lawn mower, yard tools and other tools. Although Ms. Huffman testified that she intended to store her tractor in the barn, too, there is no evidence that she actually did.

At trial, on August 18, 2009, Mr. Zimmerman testified that he still owns the Property, that there are no cracks in the concrete slab, that, even though he has animals in the barn, he does

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[13] Although there was testimony that the water line to the barn froze, there was insufficient credible evidence that it was the result of L&D's work.

[14] At some point in time, L&D amended its final bill (Trial Exh. 5) from $12,224.98 to $11,219.50 (Trial Exh. 16). In addition, the credible evidence establishes that July 2, 2007, was not the last day of work by L&D.

not find the broom finish of the floor difficult to clean and that he has not had any problems with the barn.

DISCUSSION

I. Breach of Contract

(a) L&D's Claims

L&D claims that Ms. Huffman breached the parties' contract by failing to pay the final installment of the contract price, plus an additional amount for extras. In addition, L&D seeks an award of penalties and attorney's fees under 10 M.R.S. §§ 1113 and 1118.

In defense, Ms. Huffman responds that L&D's contract claim is barred under a number of theories. First, she contends that the parties' contract is governed by the HCCA and, because the contract violates that law in a number of respects, L&D is precluded from recovering under the contract. *See Parker v. Ayre*, 612 A.2d 1283, 1284 (Me. 1992). Relatedly, Ms. Huffman maintains that L&D has failed to plead equitable claims and is therefore not entitled to any equitable remedies. In the alternative, Ms. Huffman asserts that L&D materially breached the contract between them thereby absolving her of any remaining payment obligations to L&D.

(b) Ms. Huffman's Claims

Ms. Huffman counterclaims against L&D for breach of contract alleging that the construction of the barn failed to conform to the building standards of the Code adopted by the Town of Turner, that L&D failed to complete the work in a workmanlike manner, and that it failed to complete all of the work required by the contract. Ms. Huffman also argues that, because she rightfully withheld payment pursuant to 10 M.R.S. § 1118(1), she is entitled to an award of her attorney's fees and expenses pursuant to Section 1118(4).

In defense, L&D argues both that it did not breach the contract or, even if it did, Ms. Huffman has failed to prove her damages.

(c) Maine's Home Construct Contracts Act ("HCCA")

Ms. Huffman contends that the parties' contract is governed by the HCCA and, because it did not contain a number of the written provisions required by that law, L&D may not recover on its breach of contract claim.

The HCCA applies to home construction contracts for more than $3,000 in labor and materials. 10 M.R.S. § 1487. Under the statute, conforming contracts must be in writing and must contain particular provisions relating to pricing, payment, and changes in the work to be performed. *Id.* A "home construction contract" is "a contract to build, remodel or repair a residence, including not only structural work but also electrical, plumbing and heating work; carpeting; window replacements; and other nonstructural work." 10 M.R.S. § 1486(4). A "residence," in turn, means "a dwelling with 3 or fewer living units and garages, if any. Buildings used for commercial or business purposes are not subject to this chapter." 10 M.R.S. § 1486(5).

As a preliminary matter, L&D argues that the HCCA does not apply because Ms. Huffman intended to use the barn for commercial or business purposes.[15] However, the credible evidence is that Ms. Huffman did not intend to use the barn to board other peoples' horses as part of a business pursuit and, in fact, stabled only her own horses there.[16] Accordingly, the court finds that the barn was not used for commercial or business purposes.

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[15] In Deposition testimony, Mr. Driscoll acknowledged his understanding that Ms. Huffman's horses were a hobby of hers.

[16] There is some evidence that Ms. Huffman may have allowed another person's horse to temporarily use a stall in the barn. However, there is no credible evidence that this was part of any commercial or business pursuit.

Ms. Huffman does not argue that the barn is a "dwelling." Rather, she contends that the barn is either a "garage" or is sufficiently analogous to a "garage" that it falls within the definition of "residence." The court does not agree.

Although "garage" is not defined in the HCCA, the Legislature has distinguished between "barns" and "garages" in the context of other statutes. *See e.g.* 32 M.R.S. § 226. Further, the common meaning of the word "garage" is "a shelter or repair shop for automotive vehicles", while the common meaning of the word "barn" is a "large building for the storage of farm products or feed and usually for the housing of farm animals or farm equipment." Merriam-Webster's Online Dictionary, available at: www.merriam-webster.com/dictionary/garage and www.merriam-webster.com/dictionary/barn.[17]

The barn was used by Ms. Huffman primarily for housing her horses, hay and other related items. One stall of the barn was also used to store a lawn mower and other similar tools. Ms. Huffman did not, however, store any "automotive vehicles" in the barn nor did she ever express an intention to do so in her negotiations with L&D prior to the formation of the contract. As such, rather than being a structure intended to shelter automobiles, the barn was intended and used for housing her animals.

In the court's view, the common meanings of "garage" and "barn" are distinct, and the meaning of the word "garage" as it is used in the HCCA is unambiguous. Therefore, given that "garages," particularly in the residential context, are commonly understood to be structures associated with the storage of personal motor vehicles, the court concludes that the barn at issue here does not constitute a "garage" and therefore the parties' contract does not fall within the scope of the HCCA.

[17] The court does note, however, that other definitions of the word "barn" include: "an unusually large and usually bare building," and "a large building for the housing of a fleet of vehicles." *Id.*

(d) The Code

Ms. Huffman's next argues that the L&D failed to build the barn in accordance with the Code. By its terms, the Code applies to:

> The construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal and demolition of detached one- and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories in height with a separate means of egress *and their accessory structures.*

International Residential Code of 2003 § R101.2 (emphasis added). An "accessory structure" is defined in the Code, as follows:

> In one- and two-family dwellings not more than three stories high with separate means of egress, a building, the use of which is *incidental* to that of the main building which is located on the same lot.

*Id.* (emphasis added).

Based on her claim that the barn is an "accessory structure," and therefore covered by the Code, Ms. Huffman contends that the barn had to be constructed in accordance with the following requirement:

> All exterior walls shall be supported on continuous or solid or fully grouted masonry or concrete footings, wood foundations, or other approved structural systems which shall be sufficient design to accommodate all loads according to Section R301 and to transmit the resulting loads to the soil within the limitations as determined from the character of the soil. Footings shall be supported on undistributed natural soils or engineered fill.

*Id.* at § R403.

L&D does not appear to dispute that the barn does not comport with the requirements of Section R403. Instead, it contends that the Code does not apply because the barn does not fall within the definition of an "accessory structure."

The primary issue here is whether the use of the barn "is incidental to that of the main building which is located on the same lot," thus rendering it an "accessory structure." *Id.* at R101-2. Although the parties both maintain that there is no Maine case law on point, the court

finds a number of cases, including several Law Court opinions, instructive on the question presented. For example, in *Town of Shapleigh v. Shikles*, 427 A.2d 460 (Me. 1981), the Law Court considered whether a building constructed pursuant to a permit that allowed the applicants to erect an "accessory guest house" was actually a "principal building." The Law Court cited with approval *Lawrence v. Zoning Bd. Of Appeals*, 158 Conn. 509, 264 A.2d 552 (1969) in which the Connecticut Supreme Court interpreted the meaning of "incidental" and "accessory" as those words were used in a local ordinance.

The ordinance at issue in *Lawrence* defined an "accessory building or use" to mean a use or building "which is subordinate and customarily incidental to the main building and use on the same lot." *Lawrence*, 264 A.2d at 554. In interpreting the meaning of the word "incidental," the court in *Lawrence* observed:

> The word "incidental" as employed in a definition of "accessory use" incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. Indeed, we find the word "subordinate" included in the definition in the ordinance under consideration. But "incidental," when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of "incidental" would be to permit any use which is not primary, no matter how unrelated it is to the primary use.

*Id.*

Based on the analysis outlined in *Lawrence*, the Law Court in *Shapleigh* as well as in other cases since, observed that "the essence of an accessory use or structure by definition admits to a use or structure which is dependent on or pertains to a principal use or main structure, having a reasonable relationship with the primary use or structure and by custom[18] being

[18] Although the court in *Lawrence*, and to some degree the Law Court in *Shapleigh*, also examined whether a particular "incidental" use is also "customary," the ordinance at issue in this case does not contain language to suggest that a use must be "customary." *See* the Code at § R101.2. Further, although some courts consider whether a use is "customary" when weighing whether that use is "incidental" to another use, the issue of

commonly, habitually, and by long practice established as reasonably associated with the primary use or structure." *Shapleigh*, 427 A.2d at 465. *See also Boivin v. Sanford,* 588 A.2d 1197, 1200 (Me. 1991); and *Lane Constr. Corp. v. Town of Washington*, 2008 ME 45, ¶ 21, 942 A.2d 1202, 1207 & n.4.

In this case, the evidence demonstrates that the barn is subordinate to, dependant on and has a reasonable relationship with the residential use of the house. First, it is beyond dispute that Ms. Huffman used the main house as her personal dwelling and that she used the barn to shelter her horses. In the court's view, utilizing a barn to shelter one's horses on one's own real property – particularly when they are kept for personal rather than commercial purposes – renders the barn sufficiently related to and dependent upon the residential use made of the home. *See Simmons v. Zoning Bd. of Appeals of Newburyport*, 60 Mass. App. Ct. 5, 798 N.E.2d 1025 (2003).[19] Accordingly, the court finds that Ms. Huffman's use of the barn to shelter her horses and their accessories, as well as her various garden tools, was sufficiently subordinate to her use of the home as her dwelling to render the barn "incidental" and therefore an "accessory

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"custom" in many of those cases largely relates to zoning and the extent to which a use is permitted under a particular ordinance. In those situations, whether a proposed use is "customary" may be critical to understanding whether it conforms to a particular land use zone. In this case, however, the question is not whether the barn is permitted under the ordinance or is a use consistent with neighboring properties. Rather, the issue of whether the barn in this case constitutes an "accessory structure" relates solely to the applicability of the Code and its building standards. Therefore, the court concludes that the issue of "custom" is less significant in this case than it might be in a typical land use case where the issue is conformity with a zoning ordinance.

[19] In *Simmons*, the court explained its conclusion that a horse stable is "incidental" to a dwelling as follows:

> The undisputed facts establish that the defendants' stable and three horses are subordinate and incidental to the primary use of the land. Their home is situated on the lot, and their horses are used by family members and guests for recreational purposes rather than financial benefit. The building inspector, with whom the board agreed and with whom we have no basis for disagreement, concluded that the three horses were pets. The keeping of pets is, of course, reasonably related to the primary residential use of the property.

*Simmons*, 798 N.E.2d at 1028.

structure," subject to the provisions of the Code.[20]

Having concluded that the Code applies to the barn, and recognizing L&D's concession that it did not install footers as required under the Code, the court must now determine the consequences of that Code violation. Ms. Huffman contends that the Code and its requirements are necessarily incorporated in the parties' contract and that L&D's failure to comply with the Code constitutes a breach. The court agrees. *See Sinclair v. Sinclair*, 654 A.2d 438, 441 (Me. 1995) (Lipez, J. dissenting) ("It is well settled that the law in effect at the time of the execution of the contract becomes part of that contract. There does not have to be proof that the party invoking the existing law specifically relied upon it.") (citations and internal quotation marks omitted); and *Clark v. Rust Engineering Co.*, 595 A.2d 416, 419 (Me. 1991). However, the court is not persuaded that L&D's failure to build the barn entirely to Code operated to completely absolve Ms. Huffman of her obligation to make all or any part of the final installment payment.

As the Law Court has previously explained:

> A total breach of a contract is a non-performance of duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end. If the breach is not sufficiently material and important for this, the breach is called a partial breach. . . . If a party elects to treat the breach as partial, however, it must still perform its obligations in order for it to avoid also breaching the

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[20] Plaintiff contends that the testimony of the Turner code enforcement officer to the effect that a barn may constitute an "accessory structure," only if it is not used exclusively for agricultural purposes is dispositive on this issue. The court disagrees. As the Law Court has previously explained:

> Whether a proposed use falls within the terms of a zoning ordinance is a question of law. Nevertheless, in certain factual situations, even though the terms of the zoning ordinance are . . . defined by the Court as a matter of law, whether or not the proposed structure or use meets the definition in the application thereof may be a matter of fact [for the fact finder].

*Lane Constr. Corp.*, 2008 ME 45, ¶ 13, 942 A.2d at 1207 (internal citations and quotation marks omitted). In this case, the court has concluded as a matter of law that the word "incidental" as used in the Code means that a structure's use is subordinate to and dependant upon the use made of the main building. The court has further found as a matter of fact that the use made of the barn in this case was sufficiently subordinate to and dependant upon the residential use of the house that it is appropriately deemed an "accessory structure."

> contract. . . . ("A partial breach by one party, however, does not justify the other party's subsequent failure to perform.").

*Down East Energy Corp. v. RMR, Inc.*, 1997 ME 148, P10, 697 A.2d 417, 421 (citations and internal punctuation omitted).

In the court's view, although the relevant standards of the Code were implicit in the contract, L&D's failure to fully comply with the Code in the circumstances of this case does not relieve Ms. Huffman from paying any portion of the remaining balance under the contract. Contrary to Ms. Huffman's suggestions, although the failure to build up to Code and to use the materials requested by Ms. Huffman constituted breaches of the contract, those breaches did not deprive Ms. Huffman of a functional barn or even deprive her of substantially all that she bargained for. Rather, L&D's failure to install footers and to use the materials specifically requested by Ms. Huffman represented partial breaches justifying a reduction in its recovery but will not serve as the basis for totally precluding its recovery.

(e) L&D's Damages – Breach of Contract

Because L&D's breach was partial and not total, the court concludes that, under the circumstances of this case, L&D would ordinarily be entitled to recover the final installment payment due under the contract, less the amount likely saved by failing to fully perform under the contract. However, there is insufficient evidence of L&D's savings in this regard. Accordingly, the court concludes that it would be more appropriate to deduct from the contract price the amount of Ms. Huffman's reasonable damages, if any, related to L&D's breach.

(f) Ms. Huffman's Damages – Breach of Contract

L&D did not build the barn in a manner fully compliant with the requirements of the Code and, thereby, breached the parties' contract. Based on this breach, Ms. Huffman claims

that she is entitled to the cost of rebuilding the barn and cites the following articulation of the measure of damages in construction contract cases:

> [t]he measure of recovery for defective or incomplete performance of a construction contract is the difference in value between the value of the performance contracted for and the value of the performance actually rendered." This recovery may include the cost to complete the house and repair the defects. ("For a breach by defective construction, whether it is partial or total, and for a total breach by refusal and failure to complete the work, the injured party can usually get a judgment for damages measured by the reasonable cost of reconstruction and completion in accordance with the contract"). However, "as against the cost of completion the owner must deduct the part of the price that he has not yet paid."

*Treadwell v. J.D. Construction Co.*, 2007 ME 150, ¶ 26, 938 A.2d 794, 800 (internal citations omitted).

Another appropriate measure of damages is the extent to which any defects in L&D's work affected the market value of the Property. However, there is no credible evidence regarding the diminution in the value of the Property.

L&D contends that, because Ms. Huffman sold the house before any repairs or replacements were made and therefore has not and will not incur any related costs, her damages are limited to the diminution in the value of her property attributable to L&D's breach. However, because Ms. Huffman did not demonstrate any diminution in the value of the Property, L&D further contends that her recovery is barred. Although the court agrees that she presented no credible evidence regarding any diminution in the value of the Property, she has sufficiently established damages attributable to L&D's breach.

The Law Court has previously recognized that a party may recover repair or replacement value even when they themselves will not incur any repair or replacement costs. As the Law Court explained in *Paine v. Spottiswoode*, 612 A.2d 235 (Me. 1992):

> [i]t is settled Maine law that the measure of recovery for defective performance under a construction contract is the difference in value between the value of the performance contracted for and the value of the performance actually rendered. That difference may be proved by evidence of diminution in market value or of the amount reasonably required to remedy the defect.

*Id.* at 240. *See also* Restatement (Second) of Contracts § 348 (1981).

The fact that Ms. Huffman sold the property without making the repairs does not, in and of itself, affect the measure of her damages. *See id.* (upholding an award of repair costs notwithstanding that the L&Ds sold their home before repairing the defects).

Notwithstanding that the measure of damages may include either the difference in value or the cost of repair and the fact that courts may apply either standard, the Law Court has previously explained:

> Before a party is entitled to damages on the basis of the amount reasonably required to remedy the defect, however, it must be demonstrated that the performance was so defective that recovery of this possibly greater sum is justified.

*Smith v. Urethane Installations,* 492 A.2d 1266, 1269 (Me. 1985). Further, and as outlined in the Restatement, "[s]ometimes . . . such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that the cost to remedy the defects will be clearly disproportionate to the probable loss in value to the injured party." Restatement § 348 cmt. c.

In this case, despite Ms. Huffman's assertions to the contrary, the cost to tear down and rebuild the barn is not a reasonable measure of her damages. Rather, the more appropriate measure is the cost of repairing those portions of L&D's work that were materially defective – meaning, the costs associated with L&D's failure to install footings and for some erosion around the concrete pad attributable to the grading work by L&D.[21] In the court's view, those damages

[21] Although Ms. Huffman asserts otherwise, the court concludes that the parties' contract did not include landscaping around the barn.

total $7,000 and are sufficient to compensate Ms. Huffman for L&D's breach[22] and, as noted earlier in this decision, the court concludes that Ms. Huffman's payment obligation under the contract ($11,219.50) should be reduced by the amount of those damages.

Although she also seeks damages for the facia, the court regards those "defects" as "aesthetic or relatively minor," such that "the cost of correcting it [is] wholly disproportionate to its effect on the value of the contractor's performance." Horton & McGehee, *Maine Civil Remedies*, § 12-6(b)(2) at 262 (4th ed. 2004). And, Ms. Huffman actually accepted that deviation from the contract, albeit somewhat resignedly. Similarly, with respect to the use of pine wood rather than the hemlock requested by Ms. Huffman, the court concludes that the cost to remove the pine and replace it with hemlock is so disproportionate to the value of Ms. Huffman's loss in that regard that it declines to award her those replacement costs.

II. Parties' Competing Claims Under The Prompt Payment Provisions of Maine's Construction Contracts Statute

L&D also seeks an award of penalties and attorney's fees under Sections 1113[23] and 1118[24] of the prompt payment provisions of the Construction Contracts law. 10 M.R.S. §§ 1111-

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[22] Ms. Huffman's expert, Jacques Dostie, testified that it might be sufficient to dig out around the perimeter of the concrete slab to install footers under the existing structure. He also testified that the estimated cost of corrective concrete work would be $5,971, plus site work totaling $4,608. The court concludes that this site work estimate is excessive. Accordingly, based on the available evidence, the court determines that $7,000 is an appropriate amount for the installation of footers and related site work.

[23] Section 1113 provides:

> Owner's payment obligations
>
> Payment to a contractor for work is subject to the following terms.
>
> 1. CONTRACTUAL AGREEMENTS. The owner shall pay the contractor strictly in accordance with the terms of the construction contract.
>
> 2. INVOICES. If the construction contract does not contain a provision governing the terms of payment, the contractor may invoice the owner for progress payments at the end of the billing

1120. Ms. Huffman argues that she rightfully withheld payment pursuant to Section 1118(1) and she also seeks an award of her attorneys' fees pursuant to Section 1118(4).

In this case, the parties' contract required Ms. Huffman to pay the final balance "upon completion of L&D's work." Trial Exh. 2. The court has concluded that L&D failed to build the

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period. The contractor may submit a final invoice for payment in full upon completion of the agreed upon work.

3. INVOICE PAYMENT TERMS. Except as otherwise agreed, payment of interim and final invoices is due from the owner 20 days after the end of the billing period or 20 days after delivery of the invoice, whichever is later.

4. DELAYED PAYMENTS. Except as otherwise agreed, if any progress or final payment to a contractor is delayed beyond the due date established in subsection 3, the owner shall pay the contractor interest on any unpaid balance due beginning on the 21st day, at an interest rate equal to that specified in Title 14, section 1602-C.

10 M.R.S. § 1113.

[24] Section 1118 provides:

Disputes; penalties; attorney's fees

1. WITHHOLDING PAYMENT. Nothing in this chapter prevents an owner, contractor or subcontractor from withholding payment in whole or in part under a construction contract in an amount equaling the value of any good faith claims against an invoicing contractor, subcontractor or material supplier, including claims arising from unsatisfactory job progress, defective construction or materials, disputed work or 3rd-party claims.

2. PENALTY. If arbitration or litigation is commenced to recover payment due under the terms of this chapter and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this chapter, the arbitrator or court shall award an amount equal to 1% per month of all sums for which payment has wrongfully been withheld, in addition to all other damages due and as a penalty.

3. WRONGFUL WITHHOLDING. A payment is not deemed to be wrongfully withheld if it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against which an invoicing contractor, subcontractor or material supplier is seeking to recover payment.

4. ATTORNEY'S FEES. Notwithstanding any contrary agreement, the substantially prevailing party in any proceeding to recover any payment within the scope of this chapter must be awarded reasonable attorney's fees in an amount to be determined by the court or arbitrator, together with expenses.

10 M.R.S. § 1118.

barn up to Code and for that reason has not completed all of the work called for under the contract. Accordingly, Ms. Huffman did not violate the prompt payment law when she withheld the final installment payment. 10 M.R.S. § 1113. Because Ms. Huffman is the substantially prevailing party with respect to L&D's claim for payment, she is entitled to recover her reasonable attorney's fees and expenses with respect to that claim. *See* 10 M.R.S. § 1118(4); and *Jenkins, Inc. v. Walsh Bros.*, 2001 ME 98, ¶¶ 31-32, 776 A.2d 1229, 1239-40. After review of the affidavit of Ms. Huffman's attorney in this case, the court determines that Ms. Huffman is entitled to an award of reasonable attorney's fees associated with her defense of Plaintiff's claims pursuant to 10 M.R.S. § 1118(4) in the amount of $12,000, together with expenses in the amount of $1,549.[25]

III. Ms. Huffman's Claim of Violation of the HCCA

As noted above, the court has concluded that the HCCA does not govern the contract at issue in this case. Accordingly, L&D is entitled to Judgment in his favor on Count II of Ms. Huffman's Counterclaim.

IV. Ms. Huffman's Claim of Breach of Warranty Under HCCA

Ms. Huffman also asserts that L&D breached the warranty requirements of the HCCA, which expressly requires that construction comply with applicable building codes, be completed in a skillful manner, and be fit for appropriate use. 10 M.R.S. § 1487(7). When applicable, the HCCA's warranty provisions incorporate the warranty rights and remedies set forth in the Maine Uniform Commercial Code. *Id.* As noted above, the HCCA does not apply to the contract at

[25] The relevant expenses allowed by the court are identified in the affidavit of Ms. Huffman's attorney and relate to expert fees transcripts, witness fees and deposition fees. Those items total $4,012.80 in the affidavit. However, the court finds that only $1,549 of that total is appropriately related to Ms. Huffman's claim under 10 M.R.S. § 1118(4).

issue in this case. Therefore, L&D is entitled to Judgment on Count III of Ms. Huffman's Counterclaim.

V. Ms. Huffman's Claim of Violation of Unfair Trade Practices Act

Maine's Unfair Trade Practices Act (the "UTPA"), 5 M.R.S. §§ 205-A to 214, "provides protection for consumers against unfair and deceptive trade practices. It declares unlawful 'unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.'" *State v. Weinschenk*, 2005 ME 28, ¶ 11, 868 A.2d 200, 205 (quoting 5 M.R.S. § 207). The UTPA does not define the terms "unfair" or "deceptive." *Id.* 2005 ME 28, ¶ 15, 868 A.2d at 206. Therefore, "[i]n determining what constitutes an unfair or deceptive act pursuant to the UTPA," Maine courts "are guided by the interpretations given by the Federal Trade Commission (FTC) and the federal courts." *Id.* (citations omitted).

Under federal interpretation, "[t]o justify a finding of unfairness, the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition." *Id.* ¶ 16, 868 A.2d at 206 (citing *Tungate v. MacLean-Stevens Studios, Inc.*, 1998 ME 162, ¶ 9, 714 A.2d 792, 797; *FTC v. Crescent Publ'g Group, Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001); and 15 U.S.C.A. § 45(n) (West 1997)).

With respect to whether an act or practice is deceptive, the Law Court has adopted the following test:

> An act or practice is deceptive if it is a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances. A material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. An act or practice may be deceptive, within the meaning of Maine's UTPA, regardless of a defendant's good faith or lack of intent to deceive.

*Id.* ¶ 17, 868 A.2d at 206 (internal citations and quotation marks omitted).

In this case, Ms. Huffman's claim under the UTPA is based primarily on Section 1490(1) of the HCCA. Under Section 1490(1), violation of the HCCA is *prima facie* evidence of a violation of the UTPA. 10 M.R.S. § 1490(1). However, as outlined above, the court has concluded that the parties' contract in this case is not governed by the HCCA. Therefore, in order to be entitled to judgment on Count IV of her Counterclaim, Ms. Huffman must prove that L&D's conduct – i.e. failing to construct the barn according to the standards outlined in the Code, failing to complete his work in an otherwise workmanlike manner, and substituting pine wood for the hemlock expressly requested by Ms. Huffman – constituted unfair or deceptive acts violative of the UTPA. In addition, in order to recover damages under the UTPA, Ms. Huffman was required to demonstrate a loss of money or property as a result of the UTPA violation. 5 M.R.S.A. § 213; *Parker v. Ayre*, 612 A.2d 1283, 1284-85 (Me. 1992); and *VanVoorhees v. Dodge*, 679 A.2d 1077, 1082 (Me. 1986).

After considering the evidence adduced at trial, the court concludes that L&D's failure to construct the barn up to Code and his substitution of pine wood for the hemlock specifically requested by Ms. Huffman constituted deceptive acts. However, the court further concludes that Ms. Huffman has failed to demonstrate that she suffered "actual" and *substantial* damages as a result of the Code violations. *See* Bangor Publ'g Co. v. Union St. Mkt., 1998 ME 37, ¶ 7, 706 a.2d 595, 597. As noted above, Ms. Huffman has sold the property at issue in this case. She did so without having expended any money to rectify the deficient concrete pad, the use of pine wood, or the other allegedly shoddy work completed by L&D. Moreover, although Ms. Huffman contends that the value of her property was adversely affected by L&D's conduct, that claim was not borne out by the evidence presented at trial. In fact, the evidence shows that when

Ms. Huffman listed her property for sale she did not disclose any defects in the construction of the barn on her seller's disclosure statement provided to potential purchasers. Moreover, Ms. Huffman did not present any evidence demonstrating a reduction in the value of the home other than her own manipulation of the asking price. In the absence, therefore, of evidence demonstrating that the purportedly low sale price Ms. Huffman received had any relation whatever to L&D's conduct, or proof of other substantial damage, Ms. Huffman may not recover under the UTPA.

Accordingly, L&D is entitled to Judgment on Count III of Ms. Huffman's Counterclaim.

VI. Ms. Huffman's Claim of Abuse of Process

Although L&D's Counterclaim includes a claim for abuse of process, it would appear that she has not pursued that claim. In the absence of any argument or evidence relating to this claim, the court awards L&D judgment in his favor on Count VI of Ms. Huffman's Counterclaim.

## DECISION

Based upon the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Decision and Order on the Civil Docket by a notation incorporating it by reference, and the entry is

A. Judgment for Plaintiff on Count II of the Complaint and Judgment for Defendant on Count I of the Counterclaim such that Plaintiff is owed the net sum of $ 4219.50 determined as follows: the balance of the contract price claimed by Plaintiff ($11,219.50) reduced by Defendant's damages ($7,000);

B. Judgment for Plaintiff on Counts II, III, IV and VI of the Counterclaim;

C. Judgment for Defendant on Count V of the Counterclaim, as follows: Defendant is awarded her reasonable attorney's fees in the amount of $12,000, together with expenses

in the amount of $1,549, with respect to Defendant's claim pursuant to 10 M.R.S. § 1118(4); and

D. Except as provided in section C., above, neither party is awarded their costs in this action.

Dated: March 23, 2010

Chief Justice, Superior Court