

STATE OF VERMONT

SUPERIOR COURT  
LAMOILLE UNIT

Civil Division  
Case No. 100-5-17 Lecv

ANTHONY SUTTON et al.

v.

THE VERMONT REGIONAL CENTER et al.

DECISION

MOTIONS FOR SUMMARY JUDGMENT of ACCD and JAMES CANDIDO AGAINST  
GROUP A PLAINTIFFS

(Motions 59 and 60)

Defendants State of Vermont Agency of Commerce and Development (“ACCD”), James Candido, and Brent Raymond (together, “Defendants”) each filed individual motions for summary judgment on April 17, 2023, on all outstanding claims. Based on Plaintiffs’ representations that the Group A Plaintiffs<sup>1</sup> invested between September 2010 and August 2012 and that Mr. Raymond’s alleged “grossly negligent conduct occurred predominantly between 2013 and 2015,” Plaintiffs’ Opposition at 1 n.1, the court defers ruling on Mr. Raymond’s motion at this time.

Parties moving for summary judgment must demonstrate that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. V.R.C.P. 56(a); *Tillson v. Lane*, 2015 VT 121, ¶ 7, 200 Vt. 534 (citing *Smith v. Parrott*, 2003 VT 64, ¶ 6, 175 Vt. 375). The court resolves all reasonable doubts and inferences in favor of the non-moving party. *Tillson*, 2015 VT 121, ¶ 7 (citing *Smith*, 2003 VT 64, ¶ 6).

In this case, Defendants claim that Plaintiffs have failed to set forth facts sufficient to meet the required legal elements of each of the causes of action alleged. The court has reviewed the necessary elements and the evidence Plaintiffs have identified and concludes, for the reasons set forth below, that Plaintiffs have shown sufficient evidence on each element for consideration by the jury as finder of fact; therefore, the court denies both ACCD’s and Mr. Candido’s motions for summary judgment.<sup>2</sup>

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<sup>1</sup> Group A Plaintiffs are scheduled for jury trial beginning June 19, 2023 and include the 8 persons who invested in Phases III, V, and VI of the Jay Peak projects. They include Charmaine Enslin, Martin Walsh, Richard Simon, George Bassily, Muzami Shaikhani, Stephen Webster, Felipe Accioly Vieira, and David Herring. There are 24 other Plaintiffs whose trials are scheduled for later dates.

<sup>2</sup> The court declines to address ACCD’s arguments that Plaintiffs’ contract and negligence claims are actually negligent misrepresentation claims and as such they are barred by sovereign immunity. See ACCD’s motion at 34–45. Plaintiffs contend that, contrary to ACCD’s representation otherwise, the Supreme Court considered ACCD’s

## Contract Claims Against ACCD

### 1. Breach of Contract

The Supreme Court reversed the dismissal of Plaintiffs' contract claims against ACCD in *Sutton v. Vermont Regional Center*, 2019 VT 71A, ¶¶ 59–62, 212 Vt. 612. The Court found that "Plaintiffs' allegations, if true, would establish formation of a unilateral contract between the investors and ACCD, which ACCD breached." *Sutton*, 2019 VT 71A, ¶ 61. A unilateral contract is formed when one party makes an offer that the other party accepts, not through agreement, but by performance in accordance with the terms of the offer. *Id.* ¶ 60 (citing *Ragosta v. Wilder*, 156 Vt. 390, 394 (1991)); see 2 Williston on Contracts § 6:2 (4<sup>th</sup> ed.) ("an offer for a unilateral contract generally requires an act on the part of the offeree to make a binding contract"). To constitute an offer of a unilateral contract, the terms of the offer must be "definite" so that the fact-finder can determine whether the contract has been breached. See, e.g., *Huffman v. Premis Corp.*, No. C9-97-2239, 1998 WL 373065, at \*1 (Minn. Ct. App. July 7, 1998); *Mulvey v. Guideone Mut. Ins. Co.*, 98 N.E.3d 926, 933 (Ohio Ct. App. 2017); *In re Marriage of Funk*, No. 25360-1-III, 2007 WL 4112210, at \*3 (Wash. Ct. App. Nov. 20, 2007).

In opposing ACCD's motion, Plaintiffs submitted marketing materials for the Jay Peak Projects that featured the moon over mountains Vermont logo, which the State of Vermont considers its "image" and "reputation." Plfs' Exhs. 255, 020, 296.<sup>3</sup> William Stenger, who was a principal of Jay Peak at all material times, stated in an affidavit that Jay Peak formed a partnership with the Vermont Regional Center<sup>4</sup> ("VRC") "so that we could leverage the advantage of a partner in government as a selling point to would-be investors." Plfs' Exh. 274, Stenger Aff. ¶ 3. According to Mr. Stenger, "[t]he VRC was intricately involved with th[e] sales and marketing strategy" of the Jay Peak Projects, and "VRC employees would regularly accompany me to overseas cities where we would directly engage EB-5 industry professionals, immigration attorneys, and individual investors." *Id.* ¶ 12. Mr. Stenger's role was to discuss the projects; the state employees, including Mr. Candido, "would explain the State's role in providing oversight and would lend the authoritative gravitas (as the only U.S. government personnel in attendance)

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current argument in reinstating Plaintiffs' negligence and contract claims. Plaintiffs' Opposition at 40–42. The record in this case does not provide sufficient information to resolve the parties' disagreement on that issue. In any event, it is beyond dispute that the Supreme Court analyzed Plaintiffs' factual allegations and determined that Plaintiffs had stated claims for negligence and breach of contract. *Sutton v. Vt. Reg'l Ctr.*, 2019 VT 71A, ¶¶ 25-33, 44-45, 52-58, 59-62, 212 Vt. 612. Thus, this court's role now is to determine whether Plaintiffs have evidence for each of the elements of those claims sufficient to survive Defendants' motions for summary judgment. As our Supreme Court has stated, "[W]hen this Court remands a case, our decision is the law of that case on the points presented throughout all the subsequent proceedings." *Kneebinding, Inc. v. Howell*, 2020 VT 99, ¶ 41, 213 Vt. 598 (quoting *In re Fitzgerald*, 2020 VT 14, ¶ 35, 212 Vt. 135).

<sup>3</sup> Plaintiffs' Opposition to the Motions for Summary Judgment was filed May 16, 2023. Exhibits 1-290 had been previously filed on January 30, 2023 in response to Defendants' prior Motion for Summary Judgment filed November 9, 2022. On May 16, 2023, Plaintiffs filed a Statement of Additional Facts (SAMF) and additional Exhibits 291-317. Defendants filed Exhibits 1-174 on April 17, 2023 with their Motions, and additional Exhibits 175-187 on May 22, 2023 with their Reply.

<sup>4</sup> ACCD was the principal administrator of the Vermont Regional Center. Seventh Amended Complaint ¶ 42. The parties use the terms "ACCD" and "VRC" interchangeably.

that won our projects—and our state—more investors than just about any other project or regional center in the United States.” *Id.*

Plaintiffs’ evidence shows that Mr. Candido traveled with Jay Peak principals worldwide and “solicited new investors with Vermont’s promised competitive advantage that they were much better than all other regional centers because they had this competent and independent state oversight that included formal and consistent accounting reports and financial oversight.” *Id.* ¶29. The marketing materials, at least some of which were available on the State’s website [www.eb5vermont.com](http://www.eb5vermont.com), included several statements and promises about ACCD’s and Mr. Candido’s oversight of the Jay Peak Projects. Plfs’ Exh. 296. These promises of oversight included the following:

- Formal written reports required by Vermont Agency of Commerce and Community Development every 90 days upon activities of the project.
- State officials visit the EB-5 projects on an almost monthly basis to monitor not only the progress of development but also to provide any kinds of help and support at both State and Federal level that an EB-5 project may need to further implement the program. The State audits each EB-5 Project on a quarterly basis, requiring the Project to provide written reports to the State covering issues such as investor activity, job creation, status of alien investor capital, compliance with regulatory requirements, progress of project pursuant to business plan and the expertise of personnel operating the project.
- James Candido is employed by the Vermont Agency of Commerce and Community Development to direct the day to day operations for the State of Vermont EB-5 Regional Center. Mr. Candido and his staff visit the individual approved EB-5 projects in the Regional Center on an almost monthly basis and conduct quarterly audits to report on the activities of those individual EB-5 projects.
- The Regional Center provides tremendous oversight over all Vermont EB-5 projects. The majority of applicant projects are rejected by the State because of the strict requirements the ACCD places on project integrity and promise of job creation. The Regional Center itself monitors and audits each project after it has received funds from investors.
- [F]ormal written reports required by ACCD every quarter detailing activities of the project—state government officials provide ongoing monitoring of EB-5 projects.

Plfs’ Exhs. 020 and 296.

Charmaine Enslin, a Group A Plaintiff, submitted an affidavit stating, *inter alia*, the following:

I saw numerous marketing materials for the Jay Peak EB-5 project prior to investing in the project. At the time, and judging by such materials themselves, I was under the distinct impression that the Vermont Regional Center created such materials. Not only did the materials include Vermont state logos and other insignia trademarked by the state of Vermont, but also the materials included direct contact

information for individuals within the Vermont Regional Center, who are state officials. Further, I read news media articles about the Jay Peak projects that, without exception, included statements from Vermont officials supporting the Jay Peak Projects. I sincerely believed the state of Vermont was heavily involved in the Jay Peak projects and such involvement is the reason that I chose to invest in the Jay Peak Penthouse Suites L.P. phase of the Jay Peak projects.

....

I can categorically state that I decided to invest with Jay Peak because of the state of Vermont's unambiguously proclaimed role in: (i) the initial approval of the Jay Peak Penthouse Suites L.P. phase of the Jay Peak projects; (ii) the oversight of the Jay Peak Penthouse Suites L.P. phase of the Jay Peak projects; (iii) the continued and regular monitoring of the Jay Peak Penthouse Suites L.P. phase of the Jay Peak projects; and (iv) the managing of the Jay Peak Penthouse Suites L.P. phase of the Jay Peak projects. To be sure, but for the state of Vermont's oversight offer, I never would have invested in the Jay Peak Penthouse Suites L.P. phase of the Jay Peak projects for that matter, over the numerous other EB-5 projects on the market.

Plfs' Exh. 307. Each of the other Group A Plaintiffs submitted the same or substantially similar statements in their affidavits. See Plfs' Exhs. 308–314. These affidavits demonstrate that Plaintiffs invested in the Jay Peak Projects based on their understanding, and expectation, that ACCD would protect their investment by following through with the promises it made in exchange for Plaintiffs' investments in the different phases of the Jay Peak Projects.

ACCD contends that the private placement memorandum ("PPM") each plaintiff received prior to investing "informed [them] that they should not rely on any representations besides those expressly set forth in the PPM itself." ACCD's Motion at 8–9. However, as Group A Plaintiff Stephen Webster stated in his affidavit,

After reviewing the various offering documents, and prior to making my investment, I understood the numerous disclosures and disclaimers to pertain solely to my specific investment into the Jay Peak Lodge and Townhouses L.P. and to be between myself and the general partner (the two signatories to the offering documents). I did not understand the numerous disclosures and disclaimers to be disclaiming my reliance on the Agency of Commerce and Community Development's oversight offers, which were wholly communicated outside of any offering document including the PPM and subscription agreement. I was under the impression that such oversight offers made by the ACCD were for all EB-5 projects being offered within the Vermont Regional Center. I maintain a steadfast conviction that no reasonable person would understand the offering documents or relationships between the parties any differently than I understood them.

Plfs' Exh. 313. The other Group A Plaintiffs' affidavits include identical, or nearly identical, statements. See Plfs' Exhs. 307–312, 314.

Based on this evidence, the court cannot rule as a matter of law that the disclaimers in the Jay Peak Projects' PPMs affected Plaintiffs' reliance on ACCD's promises. It will be a matter for the jurors to determine Plaintiffs' credibility and the effect, if any, of the PPM's disclaimers on Plaintiffs' claims of reasonable reliance on ACCD's promises set forth in the marketing materials. "At the summary judgment stage, there is no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails, no room for the judge to superimpose [their] own ideas of probability and likelihood." *Spinette v. Univ. of Vt.*, 2023 VT 12, ¶ 40 (quoting *Eastridge v. R.I. Coll.*, 996 F. Supp. 161, 165 (D.R.I. 1998)).

The court concludes that Plaintiffs have enough evidence for a jury to find, if it finds the evidence meets the burden of proof, that ACCD's promises of physical visits to the sites "on an almost monthly basis" and "quarterly audits," which were to include written reports on "issues such as investor activity, job creation, status of alien investor capital, [and] progress of project pursuant to business plan" constituted ACCD's offers to perform in exchange for Plaintiffs' investments in the Jay Peak Projects and satisfy the "specific oversight obligations" the Supreme Court found sufficient to state a claim for a unilateral contract. *Sutton*, 2019 VT 71A, ¶ 59. As the Court wrote in reversing the trial court's dismissal of Plaintiffs' contract claims,

[ACCD] offered to plaintiffs that if they made the requisite investment, it would provide financial oversight over the Projects. Plaintiffs accepted ACCD's offer by performing: they invested in the Projects. At that point, a contract obligating ACCD to fulfill its promises formed.

*Id.* ¶ 61. "Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions." *Roberts v. Brunswick Corp.*, 783 N.W.2d 226, 230 (Minn. Ct. App. 2010) (quoting *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626 (Minn. 1983)).<sup>5</sup>

The court concludes that Plaintiffs have demonstrated that they have sufficient evidence to present to the jury to support ACCD's offer of a unilateral contract that Plaintiffs accepted by investing in the Jay Peak Projects. ACCD's motion for summary judgment on this issue is, therefore, denied.

## 2. Covenant of Good Faith and Fair Dealing

Having concluded that Plaintiffs have adduced enough evidence to survive ACCD's motion for summary judgment on the unilateral contract claim, the court reaches the same result on Plaintiffs' claim for breach of the covenant of good faith and fair dealing. In reversing the earlier dismissal of this cause of action, the Supreme Court wrote: "Plaintiffs' allegation that ACCD failed to provide the promised financial oversight establishes a failure by ACCD to act

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<sup>5</sup> The court rejects ACCD's argument that no ACCD employee had authority to contract with Plaintiffs. ACCD's motion at 29–34. ACCD put forth no evidence that its unilateral contract offer involved withdrawing money from the Treasury, *id.* at 30, or that the contract involved the purchase of supplies or property, *id.* at 31. Moreover, neither Agency of Administration Bulletin 3.3, which concerns the signature of documents, nor Agency of Administration Bulletin 3.5, which concerns "standards for soliciting services and products from vendors outside of state government, processing the related contract(s), and overseeing established contracts through their conclusion," is applicable to the facts of this case. See Defs' Exhs. 128 (Bulletin 3.3) and 129 (Bulletin 3.5).

consistently with plaintiffs' 'justified expectations' pursuant to their contract for oversight, and makes out a claim for breach of the covenant of good faith and fair dealing." *Sutton*, 2019 VT 71A, ¶ 62 (citing *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 36, 179 Vt. 167).

The court, thus, denies ACCD's motion for summary judgment on Plaintiffs' claim for breach of the covenant of good faith and fair dealing.

#### Negligence Claim Against ACCD

To prevail on their negligence claim, Plaintiffs must prove four elements: (1) a legal duty ACCD owed to Plaintiffs, (2) a breach of that duty, (3) injuries Plaintiffs suffered, and (4) a causal link between ACCD's breach and Plaintiffs' injuries. *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 14, 209 Vt. 514. In reversing the dismissal of Plaintiffs' negligence claims against ACCD, the Supreme Court stated that "Plaintiffs' allegations, if true, would . . . establish liability for negligent undertaking." *Sutton*, 2019 VT 71A, ¶ 29. Noting that "[l]ittle more than a gratuitous promise is necessary to find an undertaking," *id.* ¶ 27, the Court set forth the evidence as alleged by Plaintiffs that would prove such a claim:

When ACCD employees induced prospective investors, including plaintiffs, to invest in the Jay Peak Projects by representing that ACCD would provide an unusually high level of oversight over those projects, including quarterly reviews to ensure that projects complied with all applicable laws and regulations, ACCD knew that harm could come to plaintiffs if it failed to follow through on its promises. Plaintiffs reasonably relied on these representations in investing in the Jay Peak Projects. After inducing plaintiffs to invest in the Jay Peak Projects by promising to provide the "extra safeguard of state oversight," ACCD had a duty to provide that promised oversight. By allegedly failing to provide the promised oversight or compliance monitoring, ACCD increased the risk of harm to plaintiffs. Plaintiffs allege that this failure harmed them by leading them to "turn[ ] over their life savings to the fraud at the Jay Peak Projects," which they allege they lost as a result, and by causing them to be "displace[d] from their home countries by false promises of permanent residency in the United States." Accordingly, plaintiffs have made out a facial claim of negligence by ACCD.

*Id.* ¶ 29.

The Court addressed the economic loss rule and explained why it is not a bar to Plaintiffs' negligence claim. See *id.* ¶¶ 30–33. The Court noted that recoveries for economic losses may be permitted when a plaintiff sustains "purely economic damages" and when the plaintiff and defendant have a "special relationship" that is "sufficient to compel the conclusion that the [defendant] had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the [defendant]." *Id.* ¶ 31 (quoting *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 316 (2001)). According to the Restatement (Third) of Torts: Liability for Economic Harm, which the *Sutton* Court cited, "[a]n economic loss or injury, as the term is used here, means a financial loss not arising from injury to the plaintiff's person or from physical harm to the plaintiff's property." Restatement (Third) of Torts: Liab. for Econ. Harm § 1, cmt. c. In further

reliance on the Restatement, the Court stated that “those who, in the course of their business, profession, or employment, perform services for the benefit of a limited group of persons may be subject to liability for pecuniary loss caused to those who relied upon the service by a failure to exercise reasonable care in performing the service.” *Sutton*, 2019 VT 71A, ¶ 32 (citing Restatement (Third) of Torts: Liab. for Econ. Harm § 6). The Court concluded that Plaintiffs here “have alleged sufficient facts to make out a special relationship between defendants and plaintiffs such that they may recover for their purely economic losses.” *Id.* ¶ 33. The Court continued:

ACCD initiated a close relationship with plaintiffs by recruiting them to invest their life savings in the Jay Peak Projects by promising exceptional oversight and management of the investment. . . . ACCD demonstrated awareness of the risk that it was inducing plaintiffs to undertake—a risk it represented it would minimize—when it told plaintiffs it would provide a safeguard for their investments.

*Id.* ACCD’s intent “to influence a narrow class of identified people—prospective investors in the Jay Peak Projects,” and the investors’ resulting reliance on ACCD’s “representations and promised oversight” led the *Sutton* Court to conclude that “[t]his is the kind of relationship that can give rise to liability for purely economic harms.” *Id.*; see also *Duffin v. Idaho Crop Improvement Ass’n*, 895 P.2d 1195, 1201 (Idaho 1995) (special relationship existed between farmer and certifying association where association carried out marketing campaign to induce reliance by purchasers on certification of seeds); *Huynh v. Quora, Inc.*, 508 F.Supp.3d 633, 654 (N.D. Cal. 2020) (determining existence of special relationship includes consideration of extent to which transaction was intended to affect plaintiff, foreseeability of harm to plaintiff, certainty that plaintiff suffered injury, connection between plaintiff’s injury and defendant’s conduct, moral blame tied to defendant’s conduct, and policy of preventing future harm).

ACCD contends that Plaintiffs must prove they had one-on-one communication with either Mr. Candido, Mr. Raymond, or another ACCD employee before investing to demonstrate a special relationship with ACCD. ACCD’s Motion at 14–16. The *Sutton* Court included a sentence in its opinion that “ACCD did not simply endorse the Jay Peak Projects to members of the public generally; it personally solicited individual investors, and entered into individualized relationships with each plaintiff, who paid substantial fees directly to the VRC in connection with that relationship.” *Sutton*, 2019 VT 71A, ¶ 33. Defendants argue that this means that each Plaintiff must have had individual personal communication with an ACCD official. This court concludes that while each individual plaintiff must be in the category of persons with whom ACCD formed a special relationship, interpersonal exchange of words by conversation or email is not necessary for each Plaintiff. Rather, the essence of the formation of a special relationship is conduct which creates the duty of care reasonably relied on by a limited and definable target group of individuals to whom the duty is owed. Thus, each Plaintiff is not required to prove specific interpersonal communication as long as they individually show that they were in the definable target group to whom the duty was owed.

Nevertheless, some Plaintiffs have provided evidence of communication of an interpersonal nature. First, the marketing materials discussed above included Mr. Candido’s name and phone number as the contact person for the VRC. Plfs’ Exh. 020. Plaintiff Vieira communicated by email with Mr. Candido in March 2010, before he invested in the Jay Peak

Projects, asking for “more detailed information on the Vermont Agency of Community Development EB-5 RC.” Mr. Candido responded by passing along contacts for four EB-5 projects in Vermont and encouraged Mr. Vieira to “feel free to call me personally with any further questions.” Plfs’ Exh. 014.<sup>6</sup> In his affidavit, Mr. Vieira stated that he “had multiple telephone conversations with James Candido, traded multiple emails with him, and had at least one in-person meeting with him.” Plfs’ Exh. 311.

Second, many of the foreign investors who are Plaintiffs in this case are not native English speakers, and some may not speak English at all but they were nonetheless in the target group of potential investors in the projects. In a letter dated April 2011 to Secretary Spaulding, Mr. Candido referenced “a Chinese Marketing trip to promote the Vermont EB-5 Regional Center and EB-5 approved Vermont companies with key Chinese brokers.” Mr. Candido wrote that the trip would include meetings with “major Immigration brokers who source investors for EB-5 projects” and stated that “it is critical that ACCD markets our process and oversight for our Vermont EB-5 projects to successfully market their product in the marketplace.” Plfs’ Exh. 023; see also Plfs’ Exh. 024 (regarding marketing materials for the trip that had been presented to “agents and investors”) and Plfs’ Exh. 030 (Robin Young, who was the CEO of AFCell in 2012, told a *Seven Days* reporter that she “traveled to China last month with Candido to court potential investors”).

Third, in response to ACCD’s discovery requests, the Group A Plaintiffs stated that they or their agents communicated with Mr. Candido before investing in the Jay Peak Projects. See, e.g., Defs’ Exhs. 57, 69, 73, 74, 77, 81, and 84. The court finds that Plaintiffs have provided sufficient evidence of ACCD’s solicitation of them as investors in projects specifically promoted by ACCD to demonstrate a special relationship between ACCD and Plaintiffs such that, under the Court’s analysis, the economic loss doctrine is not a bar to Plaintiffs’ negligence claim against ACCD.<sup>7</sup>

Having offered sufficient evidence on the element of a special relationship with ACCD and that ACCD owed Plaintiffs a duty to provide oversight of the Jay Peak Projects, Plaintiffs have also provided sufficient evidence that ACCD breached its duty of oversight as promised in the marketing materials. When Mr. Candido was deposed and asked whether he inspected Jay Peak’s financial records at least four times a year, Mr. Candido acknowledged that he did not. Plfs’ Exh. 268 at 208–09. This evidence is sufficient to support Plaintiffs’ claim of ACCD’s breach of its duty. Plaintiffs have also presented sufficient evidence on the element of causation. As the Group A Plaintiffs stated in their affidavits, they would not have invested in the Jay Peak Projects “but for the state of Vermont’s oversight offer.” Plfs’ Exhs. 307–314. It will be up to the jury to determine whether all elements have been proven and whether ACCD’s breach of its duty, in fact,

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<sup>6</sup> Plaintiff David Herring also stated in his affidavit that he “had at least one telephone conversation with James Candido and traded subsequent email with him.” Plfs’ Exh. 308.

<sup>7</sup> Based on the Supreme Court’s analysis of Plaintiffs’ allegations and discussion of the economic loss rule, the law-of-the-case doctrine, and this court’s determination that Plaintiffs have submitted sufficient evidence to satisfy the “special relationship” exception to the economic loss rule as interpreted by the Supreme Court in this case, the court need not dwell further on exceptions to the economic loss rule. See *Fabiano v. Cotton*, 2020 VT 85, ¶ 19, 213 Vt. 236 (“law-of-the-case doctrine ‘expresses the practice of courts generally to refuse to reopen what has been decided.’”) (quoting *Kneebinding, Inc.*, 2018 VT 101, ¶ 30).

caused Plaintiffs' damages. See *Bernasconi v. City of Barre*, 2019 VT 6, ¶ 12, 209 Vt. 419 (when plaintiff presents evidence of causation, ultimate determination is question for jury).

Plaintiffs have presented sufficient evidence in response to ACCD's motion for summary judgment to move forward and present their claim for negligence to a jury.

#### Gross Negligence Claim Against Mr. Candido

In addressing Plaintiffs' claims for gross negligence against Mr. Candido, the *Sutton* Court stated: "Gross negligence is negligence that is more than an error of judgment; it is the failure to exercise even a slight degree of care, owed to another." *Sutton*, 2019 VT 71A, ¶ 56 (quoting *Kennery v. State*, 2011 VT 121, ¶ 41, 191 Vt. 44). To prevail on this cause of action, Plaintiffs must show that Mr. Candido "heedlessly and palpably violated a legal duty owed." *Id.* (quoting *Amy's Enters. v. Sorrell*, 174 Vt. 623, 624 (2002)). According to the *Sutton* Court, Plaintiffs can establish gross negligence by proving that Mr. Candido:

intentionally misrepresented to plaintiffs that the State provided financial oversight of the Jay Peak Projects in order to induce them to invest, and then, knowing that the investors were relying on [him] to conduct such oversight, failed to ensure that any was actually conducted, which contributed to plaintiffs' injuries, including losing their investments in the Projects and having their residency in the United States endangered. But beyond simply failing to ensure that any real oversight was conducted, plaintiffs also allege that . . . Candido actively worked to protect the Jay Peak Projects from oversight and investigation and covered up fraud within the Projects.

*Sutton*, 2019 VT 71A, ¶ 57.

The parties dispute whether Plaintiffs must prove one-on-one communications between the individual investors and Mr. Candido to prevail on their gross negligence claims. Candido's Motion at 10–11; Plaintiffs' Opposition at 72–73. The Group A Plaintiffs have alleged and presented evidence that they were within the target audience to whom the representation of responsible State oversight was pitched and that they relied on it, which is sufficient evidence to show a special relationship. Moreover, Plaintiffs have presented evidence in opposition to Defendants' motions that, during his tenure as executive director of the VRC, Mr. Candido traveled with Mr. Stenger to international trade shows in an effort to market the EB-5 projects in Vermont, including the Jay Peak Projects, and that he made promises of State oversight in person and through the marketing materials to potential investors and to their agents. Plaintiffs have also presented evidence of individualized communications between Mr. Candido and Mr. Vieira and between Mr. Candido and Mr. Herring. In addition to the evidence discussed *supra*, Mr. Vieira testified during his deposition that he read an article about Rapid Visas' "break with Jay Peak" and that he contacted Mr. Candido for a "quick update" on the issue. Plfs' Exh. 287 (Vieira Depo., pp. 42–43). Mr. Vieira testified that Mr. Candido phoned him back and told him that the split was just a "business dispute" between Mr. Stenger and Rapid Visas. *Id.*

Plaintiffs have produced evidence that as late as March 15, 2012, Mr. Candido was willing to state that “[t]he VT ACCD EB-5 regional center conducts oversight of its projects on a quarterly basis; [t]his oversight includes reviewing financial information, job creation, marketing materials, and building schedule and progress (if applicable).” Plfs’ Exh. 298. In April 2012, Plaintiffs’ documents show that Mr. Stenger provided Mr. Candido with a report on Jay Peak that an immigration attorney, John Roth, wrote after a visit to Jay Peak the previous month. Plfs’ Exh. 029. In his report, Attorney Roth wrote:

On Sunday morning, I met with James Candido, Economic Development Specialist, Vermont Department of Economic Development, and a principal overseer of EB-5 projects for the State of Vermont.

....

James Candido, the principal overseer of State of Vermont EB-5 projects, stated to me that he inspects Jay Peak’s financial records at least four times per year and that he has not seen any financial irregularities or problems in Jay Peak’s finances. . . . He emphasized that the State of Vermont is particularly careful in overseeing Jay Peak projects because it is hoping to leverage Jay Peak Resort’s success with development and job creation into promoting additional EB-5 projects in Vermont

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Plfs’ Exh. 029. Despite his knowledge about the statements Attorney Roth attributed to him, Mr. Candido testified during his deposition that he never reviewed Jay Peak’s financial records:

Q: From the time you started in 2007, some time in 2007, until April or May of 2012, did you ever collect a formal quarterly report?

A: No.

Plfs’ Exh. 268, p. 53 (Candido Depo.). Not only did Mr. Candido not collect any formal quarterly reports, he testified that he failed to inspect Jay Peak’s finances, in any format, four times a year, as he promised investors. Plfs’ Exh. 268, pp. 208–09. A writer for *Seven Days* who was reporting on Rapid Visas’ public severance of ties with Jay Peak and Rapid Visas’ questions around Jay Peaks’ financial health reported on April 4, 2012, that “State officials . . . have confidence in Jay Peak’s financials.” Mr. Candido was quoted as saying: “We, of course, wanted to take a closer look, [and t]here was absolutely nothing out of the ordinary [at Jay Peak].” Plfs’ Exh. 030.<sup>8</sup>

“Gross negligence is ordinarily a question of fact for the jury, and an allegation of gross negligence may be dismissed by the court only if reasonable minds cannot differ.” *Sutton*, 2019 VT 71A, ¶ 56 (quoting *Kennerly*, 2011 VT 121, ¶ 41). The court finds that, viewed in the light most favorable to the nonmoving Plaintiffs, a jury could reasonably find that Mr. Candido intentionally represented to Plaintiffs that he/ACCD provided/would provide financial oversight

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<sup>8</sup> Defendants object on hearsay grounds to the court’s reliance on this newspaper article. Defendants’ Response to Plfs’ SAMF ¶ 226. The court notes Defendants’ objection while also acknowledging that Plaintiffs may introduce this information into evidence another way or as an exception to the rule against hearsay.

of the Jay Peak Projects to induce them to invest and then, knowing Plaintiffs were relying on them to conduct such oversight, failed to make sure that the oversight was actually carried out, which contributed to Plaintiffs' injuries. See *Sutton*, 2019 VT 71A, ¶ 57; *Garcia v. Alpine Glen Farm/Broadspire*, No. 2010-310, 2011 WL 4977712, at \*1 (Vt. Mar. 4, 2011) (unpub. mem.) (when ruling on summary judgment motion, "facts are viewed in light most favorable to nonmoving party") (citing *Samplid Enters., Inc. v. First Vt. Bank*, 165 Vt. 22, 25 (1996)). In addition, the jury could reasonably find that Mr. Candido was put on notice of financial irregularities at Jay Peak and that, instead of investigating Jay Peak's financial health and the use of investors' funds to find out what was really happening there, he was grossly negligent in assuring Plaintiffs and the public that all was well at Jay Peak and that the concerns that were raised were nothing more than a "business dispute" between Rapid Visas and Mr. Stenger.

Mr. Candido's motion for summary judgment is, accordingly, denied.

#### Conclusion

Because the court concludes that the Group A Plaintiffs have shown sufficient evidence to present to a jury on the necessary elements of the causes of action that the Vermont Supreme Court determined had a valid basis to proceed in the case, ACCD's and Mr. Candido's Motions for Summary Judgment, Motions #59 and #60, are both *denied* in their entireties.

Electronically signed June 1, 2023 pursuant to V.R.E.F. 9 (d).

A handwritten signature in black ink that reads "Mary Miles Teachout". The signature is written in a cursive, flowing style.

Mary Miles Teachout  
Superior Judge (Ret.), Specially Assigned