State of New Hampshire
Supreme Court

NO. 2002-0478

2003 TERM

JULY SESSION

LaMONTAGNE BUILDERS, INC.

v.

BANK OF NEW HAMPSHIRE,
BOWMAN BROOK PURCHASE GROUP,
BOWMAN GREEN DEVELOPMENT CORPORATION,
R. SCOTT BROOKS,
and
HABS/CDM, INC.

RULE 7 APPEAL FROM FINAL DECISION
OF HILLSBOROUGH COUNTY SUPERIOR COURT

BRIEF OF DEFENDANTS/APPELLANTS, R. SCOTT BROOKS,
BOWMAN BROOK PURCHASE GROUP, and BOWMAN BROOK DEVELOPMENT CORP.

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

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QUESTION PRESENTED

1. Did the court violate its own jurisdiction, and the defendant's right to an opportunity to persuade the court of its position, by *sua sponte* awarding damages when the plaintiff did not request them?

2. Was the court estopped from ruling on damages when during trial the parties and the court all continually shied away from litigating the matter because the plaintiff sued for a different remedy?

3. Did the court err in ordering Mr. Brooks to pay attorneys fees when he won the lawsuit, there was no statutory or contractual provision for them, he did not act in bad faith with regard to the plaintiff or the court, there was a prior court order in the case denying fees, and much of the litigation concerned issues that did not pertain to Mr. Brooks?

4. Did the court err in disregarding the corporate veil when there was no allegation or evidence that Mr. Brooks intended to or used the corporate form to harm anyone?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Scott Brooks is an international investor and developer based in Wolfeboro, New Hampshire. He is an experienced entrepreneur who often uses limited liability entities for his investments. In the 1980s Mr. Brooks was involved in a number of land deals, some of which ended up in the bank turmoil of the early 1990s. One of these involved the Bowman Brook Purchase Group ("the Partnership"), which owned a lot in Bedford that was approved for subdivision and development.

Robert LaMontagne is a large developer and builder based in Bedford, New Hampshire. 5 *Trn.* at 167. With nearly 40 years in his occupation, he is a sophisticated businessman who, like Mr. Brooks, frequently creates limited liability entities, such as LaMontagne Builders, Inc. ("LBI"), for his businesses and investments. *See* <http://www.lamontagnebuilders.com> (accessed June 27, 2003). LBI is not a small business: Mr. LaMontagne testified that in 1996 it was building homes at the rate of 120 to 140 per year. 5 *Trn.* at 167.

In 1996 LBI entered a contract with the Partnership to develop the roads and infrastructure in the Bedford subdivision. Attorney Charles Cleary, of Manchester, represented both LBI and the Partnership to create the joint venture. Working with Attorney Cleary, they determined that a new corporation should be

formed for the express purpose of taking title to the property and obtaining financing for the project.

Thus, Bowman Green Development Corporation ("the Corporation") was formed. It obtained an $840,000 revolving credit line, secured by the property, from what is now the Bank of New Hampshire.

Attorney Cleary closed the loan on April 30, 1997. Although he claims to have received an oral promise from Mr. Brooks that a portion of the loan proceeds would be used to pay LBI, there was never any signed agreement to that effect, nor did Attorney Cleary make any arrangements for LBI to be paid at the loan closing or thereafter. Mr. Brooks denies he promised to use the loan to pay LBI. 1 *Trn.* at 124, 136.

A few months before the loan closing, in December 1996, LBI had requested payment for its work. A dispute arose between LBI and the Partnership (as contracting party) and the Corporation (as assignee) as to the scope of the work LBI was required to complete in order to receive payment under the contract, and the Partnership and Corporation refused to pay LBI until additional work was done.

LBI sought and received a mechanic's lien attachment on the property in a separate action filed in Hillsborough County Superior Court. The lien, however,

was not perfected until August 1997, so that the Bank's mortgage from the April 1997 loan closing had priority.

Consequently, LBI sued the Partnership and the Corporation (but not Mr. Brooks personally) for payment under the contract. Because it contained an arbitration provision, the court ordered arbitration. Just before the arbitration began Mr. Brooks determined it would not be a prudent use of resources to contest the matter, and therefore offered no defenses. In May 2001, the arbitrator thus ruled that the Partnership and Corporation were jointly and severally liable to LBI in the amount of $465,292.85. The arbitrator's award was confirmed and reduced to judgment in accord with RSA 542:8.

While the arbitration was ongoing, the Bank began foreclosure proceedings on the property. In an attempt to block foreclosure, LBI brought this suit against the Bank, Mr. Brooks, and the various entities, under RSA 545-A. LBI alleged that the transfer of the property from the Partnership to the Corporation was fraudulent, and thus sought to set it aside. LBI also requested attorney's fees and interest. (The Bank was involved in this case because LBI also sought to remedy the priority issue, but that matter is not part of this appeal.)

The Hillsborough County (North) Superior Court (*David B. Sullivan*, J.) ruled against LBI, finding not only that the transfer of title was not fraudulent, but

that LBI was aware of and had "expressly consented to" the transfer. COURT ORDER, *Appx.* at 19, 43, 61. The court thus denied LBI's request to set aside the conveyance of title from the Partnership to the Corporation. *Id.* at 20.

Nonetheless, the trial court assessed attorney's fees and costs against Mr. Brooks, the Partnership, and the Corporation, and also held Mr. Brooks personally liable for the full amount of contract damages that had been already awarded to the plaintiff at arbitration. The total judgment amounts to about a million dollars. The court's apparent rationale in awarding damages to LBI was that it believed Mr. Brooks acted in bad faith with respect to the loan for which the Corporation applied after the conveyance was completed.

This appeal followed.

SUMMARY OF ARGUMENT

Scott Brooks first notes the trial court found that, contrary to the plaintiff's allegations that form the basis of this suit, there was no fraudulent conveyance. He then expresses his bewilderment that despite his victory, the court awarded damages to LBI, even when the plaintiff did not request them.

Mr. Brooks then argues that the award is void for lack of jurisdiction, that it is the result of an unlawful *sua sponte* amendment of the plaintiff's pleadings by the court, that he had no opportunity to defend against the *sua sponte* award, and that the parties were estopped from litigating the issue and the court was estopped from making orders regarding it.

Second, Mr. Brooks turns his attention to the court's award of attorneys fees. He notes that no relevant statute or agreement provide for fees in this case. He points out that all exceptions to the "American Rule" that each party bears their own fees, provide for payment by the loser to the winner, but that because he is the winner he cannot be liable. He then argues that the cases the court relied on provide no authority to award fees, and that even if they did there are no facts in the record supporting its finding of bad faith with regard to the plaintiff or the court. Mr. Brooks also suggests that the court's prior ruling in this case was "law of the case," and thus fees cannot be awarded for earlier phases of this litigation.

He then notes that even if he were liable for fees, much of the trial giving rise to this appeal was dedicated to issues that pertain to the other defendants, and not Mr. Brooks, and that therefore he should not be liable for the full measure of fees.

Finally, he argues that the court was in error in going behind the corporate veil to find Mr. Brooks personally liable.

ARGUMENT

I. Courts May Not Award Remedies Unrequested by the Parties

A. Judgment Beyond Remedies Requested

LBI sued Mr. Brooks and others pursuant to RSA 545-A, New Hampshire's Fraudulent Transfer Act.[1] LBI's complaint sought several remedies: setting aside the conveyance from the Partnership to the Corporation; an attachment against the property to secure payment for its work; and some method of securing payment from the foreclosing bank such as a lien, escrow, a bump up in payment priorities, or an injunction on foreclosure. LBI also sought interest, attorneys fees, and "such other and further relief as may be just." *Plaintiff's* VERIFIED EMERGENCY PETITION TO SET ASIDE FRAUDULENT CONVEYANCE AND IMPOSE CONSTRUCTIVE

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[1] RSA 545-A:4 Transfers Fraudulent as to Present and Future Creditors. –

I. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

RSA 545-A:5 Transfers Fraudulent as to Present Creditors. –

I. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

II. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

TRUST OR TO COMPEL PAYMENT OF FORECLOSURE PROCEEDS OF $355,805.15 INTO COURT, OR ALTERNATIVELY, TO ENJOIN FORECLOSURE SALE PURSUANT TO RSA 479:25, II AND REQUEST FOR EXPEDITED HEARING, AND DEMAND FOR ATTORNEY'S FEES, [hereinafter "Complaint"], *Appx. to N.O.A.* at 63, 75-76 (note that Complaint's caption accurately summarizes relief sought).

In order to prove a fraudulent transfer under the act, the plaintiff/creditor must establish that the defendant/debtor made a transfer of property "with actual intent to hinder, delay, or defraud" the creditor. *See* RSA 545-A:4, 5.

After a seven-day trial, the trial court found that LBI "was aware of [the Corporation's] creation and that the real estate was going to be transferred to it and consented to the transfer." DECREE, *Appx. to N.O.A.* at 11. It found that the "Corporation was not established and the transfer of the real estate to [it] was not accomplished for the purpose of avoiding payment to LBI or to any other creditor." *Id.* The court thus held that "LBI was aware of the transfer and bank mortgage loan. It expressly consented to both. The plaintiff cannot now seek to undo a transfer of which it was fully aware and consented to." *Id.* at 19; *see also id.* at 24, 43, 61.

Victory for defendants, and that should have been the end of the case.

The court went on, however, to award damages and attorneys fees, and

pierced the corporate veil to make Mr. Brooks personally liable to LBI. It awarded damages in the amount of $465,292.85. DECREE, *Appx. to N.O.A.* at 20. This figure is not coincidentally the same amount that LBI won in its arbitration pursuant to the parties' contract. 5 *Trn.* at 179; 10/24/01 ORDER, *Appx. to Br.* at 41. The court also awarded "all of the costs, expenses, and attorneys' fees [LBI] has incurred in pursuit of payment for its services." DECREE, *Appx. to N.O.A.* at 22. Both these awards were made personally against Mr. Brooks, as well as against the Partnership and the Corporation. *Id.* at 21-22.

This judgment went far beyond the remedies for which the plaintiff asked.

B. Court's *Sua Sponte* Orders Are Void for Lack of Jurisdiction

Judicial power "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911). When a court provides a "remedy" which no party has requested, it is operating beyond its jurisdiction.

In *State ex rel. Houser v. Goodman*, 406 S.W.2d 121 (Mo. App. 1966), the trial court *sua sponte* ordered depositions and corresponding protective orders. The appellate court held:

> With few exceptions, the forte of any court is to relegate itself to limbo until presented proper pleadings to be employed as vehicles for judicial locomotion. Even in matters over which a court has general jurisdiction, it cannot, *ex mero motu*, set itself in motion nor have power to determine questions unless they are presented to it in the manner and form prescribed by law. Jurisdiction to decide concrete issues in a particular case is limited to those presented by the parties in the pleadings, and anything beyond is *coram non judice* and void. . . As there was no notice outstanding to take depositions at the time respondent's order was made, as plaintiff had not moved for a protective order on depositions nor shown cause why one should be given, and because the order was obviously made by the court *ex mero motu*, we hold that respondent's order is void and made beyond his jurisdiction."

Houser, 406 S.W.2d at 126. In a case especially close to the facts here, the Kentucky Supreme Court agreed. In *Helton v. Hubbs*, 129 S.W.2d 116 (Ky. 1939), the lower court awarded attorneys fees, ordered a lien on the land of a person who had sought the lawyers' help but had not paid them, and then caused the land to be sold to enforce the lien. Voiding the actions, the court said:

> "[H]ere the record appears to be barren of that necessary element to acquire jurisdiction of the subject matter, since we find no motion for the allowance of an attorney's fee, nor one made to give attorneys a lien upon the land to secure it, nor any motion or other step taken to enforce the lien after the court had decreed it in favor of attorneys."

Helton, 129 S.W.2d at 118. Similarly, in *State ex rel. Preissler v. Dostert*, 260 S.E.2d 279, (W.Va. 1979), a trial court recused a prosecutor from a case when no party had requested the remedy in a properly filed pleading. In voiding the action, the West Virginia court wrote:

> To permit a judge to invoke the jurisdiction of his court *sua sponte* would place him in a position of a complainant deciding the merits of his own complaint in violation of the ancient homily of the law that no man may be a judge in his own case."

Preissler, 260 S.E.2d at 285. *See also*, *Kent County Prosecuting Attorney v. Kent County Circuit Judges*, 313 N.W.2d 135 (Mich. App. 1981) (court had no jurisdiction to release certain inmates from overcrowded prison when no application for release had been made by any litigant); *Autry v. District Court of Muskogee County*, 459 P.2d 865 (Okla 1969) (court had no jurisdiction to grant a divorce because neither party requested it).

In Mr. Brooks's case, the court was without subject-matter jurisdiction to order damages when no party requested them. As such, the order is void.

C. Court May Not *Sua Sponte* Amend Pleadings

The law is not ambiguous with regard to when a trial court may allow amendments to causes of action.

In *Clinical Lab Products, Inc. v. Martina*, 121 N.H. 989 (1981), this Court reiterated the New Hampshire rule that pleadings may not be amended if "the changes surprise the opposite party, introduce an entirely new cause of action, or call for substantially different evidence." *Clinical Lab*, 121 N.H. at 991 (citations omitted). The Court cited *Smart v. Tetherly*, 58 N.H. 310, 310 (1878), in which it

set aside a verdict because "[t]he proposed amendment introduced a new cause of action, [and] destroyed the identity of the original cause."

In *Clinical Lab*, the plaintiff/landlord sued joint tenants for unpaid rent. The tenants, Moses and Martina, counterclaimed against the landlord and each other, but nobody alleged harassment nor requested damages. The trial court nonetheless awarded one tenant damages against the other, stating that "although the pleadings did not include such a claim, the case was tried as if it were also an action charging Moses with wrongful interference with Martina's right to occupy the premises peaceably and without interference." *Clinical Lab*, 121 N.H. at 990. This Court held that:

> "there was no indication that Moses knew that a different claim was being made. . . . We hold that it was error for the court to award damages on a claim not presented by the pleadings and not otherwise referred to by either party. . . . Martina neither pleaded harassment nor sought damages for harassment. In trying the case as though harassment damages were sought, the trial judge modified Martina's original cause of action to include a new and different count, which Moses was not prepared to defend."

Clinical Lab, 121 N.H. at 990-991. This Court thus set aside the damages verdict.

Similarly, in *Dandeneau v. Seymour*, 117 N.H. 455 (1977), the parties had a contract wherein the tenants/plaintiffs would live in and renovate the landlord/ defendant's house in eventual exchange for a separate parcel of land. When the

tenants abandoned the renovation, the landlord cancelled the contract, prompting the tenants to seek recovery in *quantum meruit* for improvements made to the separate parcel. The trial court denied recovery, but nonetheless ordered the tenants to perform on the contract. This Court wrote that the tenants "did not request this remedy and never volunteered that they were ready, willing and able to perform their contractual obligations. Under these circumstances, the court's sua sponte award of equitable relief is of doubtful propriety," *Dandeneau*, 117 N.H. at 461, and this Court reversed it.

Like in *Clinical Lab* and *Dandeneau*, the plaintiff here did not request the remedies awarded. The court essentially amended the complaint, resulting in surprise to Mr. Brooks, the introduction of an entirely new cause of action, and calling for substantially different evidence. Accordingly, the *sua sponte* amendments were unlawful, and the award should be reversed.

D. Mr. Brooks Had No Notice or Opportunity to Defend Against the *Sua Sponte* Claim for Contract Damages

"The purpose of a notice requirement is to inform the recipient of the character of a proposed action so that he can prepare adequately for the hearing." *V.S.H. Realty, Inc. v. City of Rochester*, 118 N.H. 778, 780 (1978).

In Mr. Brooks's case, LBI's law suit requested a setting aside of the

conveyance, and some method of securing payment. The suit did not request damages, and its prayer for relief did not notify Mr. Brooks that the contract would be the subject of litigation. The trial was largely concerned with matters that did not involve Mr. Brooks – the order of priorities in relation to the bank's mortgage. Mr. Brooks was never put on notice that the plaintiff in the suit against him was seeking damages, that the terms of the contract were to be the subject of the litigation, or that he would have to defend against an allegation that LBI had performed the contract.

LBI alleged at trial that there was a conspiracy between LBI's own lawyer, Charles Cleary, and Mr. Brooks to defraud LBI out of payment for his work. 6 *Trn.* 17, 85-86. The contract was of course repeatedly mentioned at trial, but it came up in the context of the alleged conspiracy. LBI wanted to be paid under the terms of the contract, but he believed those around him had purposely muddled the terms in an effort to avoid payment.

Despite these mentions, the contract was far from fully litigated in the fraudulent conveyance trial. Although during the trial the contracting parties made clear that they disputed the amount of work needed to be performed in order to receive payment, the court had no complete listing of work done or not done; heard no expert testimony on what constitutes an adequate finished excavation,

road construction, or landscaping; got no evidence regarding state or town requirements for roads, drainage, and wetlands; saw no comprehensive collection of photos detailing curbs installed or shrubs planted; and considered no complete set of billing or subcontracting records. Because the contract claim had already been arbitrated and had reached final judgment in a separate matter, and because they were not relevant to a claim for fraudulent conveyance, these issues were not fully addressed in this fraudulent conveyance action.

In the defendants' motions for directed verdict after LBI put on its case, the Partnership, the Corporation, and Mr. Brooks made arguments regarding the allegations of a fraudulent conveyance and when the various liens attached. There was no mention of damages. 6 *Trn.* at 111, *et seq.* Likewise, the parties' requests for findings and rulings are nearly devoid of any mention of the terms of the contract. *See Clinical Lab*, 121 N.H. at 990. In their trial memorandum filed at the end of trial, the Partnership, the Corporation, and Mr. Brooks personally, discussed three claims: the request to set aside the transfer, attorneys fees and interest, and the personal liability of Mr. Brooks. They made no mention of damages because they didn't know damages were an issue in the case.

In short, while the contract was mentioned, it was not litigated.

Had LBI filed a motion to amend its Complaint to allege either nonpayment

of the arbitration judgment or damages under the contract, and thereby made the defendants aware of the new cause of action, *see Border Brook Terr. Condo Asso. v. Gladstone*, 137 N.H. 11, 19-20 (1993) (plaintiff filed motion to amend complaint, thus adequately informing opponent of additional claim), Mr. Brooks would have conducted his defense to take account of the claim.

Because the trial judge improperly amended the plaintiff's pleading, essentially adding claims that were not there and thereby denying Mr. Brooks the opportunity to defend against them, the damages must be set aside.

E. The Parties Were Estopped From Litigating the Contract, and the Court Was Estopped from Ruling on it

The purposes of collateral estoppel are to prevent multiple judgments and to economically use judicial resources by avoiding re-litigation of settled issues. *See e.g., Daigle v. City of Portsmouth*, 129 N.H. 561 (1987).

LBI claimed damages under the contract in arbitration. Its award was reduced to judgment against the Partnership and the Corporation when the trial court confirmed the arbitrator's award pursuant to RSA 542:8. As such, collateral estoppel attached, and the parties were barred from re-litigating the issue.

In several instances during the trial, however, various witnesses and parties attempted to raise issues concerning the contract. Each time some party objected

and the court ruled and re-ruled that the issue was barred.

For instance, during cross examination of Mr. LaMontagne, Mr. Brooks attempted to ask questions regarding one of the contract terms. LBI's lawyer objected:

> Your Honor, may I object at this time. It seems as though we are getting into – sliding into defenses which may have been and were, in fact asserted in the arbitration case.

6 *Trn.* at 48.

During Mr. Brooks's testimony, LBI's lawyer asked similar questions, which drew an objection by the Corporation's lawyer:

> I cannot see the relevance of the opportunity to – to arbitrate a claim that's been decided. He's got his arbitration award. We are here on a fraudulent conveyance, whether or not the property went from Bowman Brook to Bowman Green, and whether that was fraudulent. And we are here on an argument about priority between the Bank and LaMontagne on the mechanics lien.

2 *Trn.* at 67-68.

In October 2001, the trial court issued an order on a pending request for attorneys fees during earlier stages of the litigation. The court wrote:

> In order for the court to rule on the request for attorneys' fees, the court would have to try the case that by agreement was to go to arbitration. . . . The plaintiff is correct that the defendants cannot now raise the defenses in defense against the award. They are now barred from raising the defenses in defense of the award or the court's confirmation of the award.

10/24/01 ORDER, *Appx. to Br.* at 44.

During the final moments of the trial, the court made clear that the trial had not been about damages:

> [L]et me just point something out. The testimony came in, but the arbitration award, vis-a-vis [LBI's] entitlement to money now, I'm not ruling on whether your client is entitled to money today. That's resolved. When Mr. Craven was asking questions about entitlement to get paid under the contract, my assumption was he was asking about the situation back in April of 1997, and those questions weren't aimed at . . . a merits discussion right now of whether you're entitled to be paid under the contract. That's been resolved by arbitration, and it's res judicata vis-a-vis you and the Bowmans.

7 *Trn.* at 55-56.

In the very order giving rise to this appeal, in the pages before its decree, the trial court wrote:

> Bowman Brook Purchase Group owed LBI the money for the road and infrastructure construct, as was held in a related case, which has gone to judgment. Bowman Brook Purchase Group and Bowman Green Development Corporation are collaterally estopped by the judgment to take a contrary position in this case.

DECREE, *Appx. to N.O.A.* at 15.

It was thus clear to all the parties as well as the trial judge that matters involving the terms or performance of the contract were not the subject of this suit, and that because they had already reached judgment, they could not be lawfully be the subject of this suit. There was no dispute that there was an existing judgment

and that it had collateral estoppel effect, precluding both the plaintiff and defendant from re-litigating the issue. If a court in this situation can nonetheless make an order on a precluded issue, there is considerable violence done to the parties' rights to have an opportunity to persuade the court of their positions. The court's contract damages decree, therefore, is void.

If collateral estoppel somehow does not apply, any claim for damages was waived by LBI by the objections its own lawyer raised to testimony concerning contract defenses. *C.f., Warren v. Town of East Kingston*, 145 N.H. 249 (2000). When a party waives a claim, the claim is no longer before the court, and any order concerning it is likewise void.

II. The Court Erred in Awarding Attorneys Fees

A. No Basis for Attorneys Fees Alleged

In its suit, LBI requested attorneys fees for all proceedings from July 1997 to the present. COMPLAINT, *Appx. to N.O.A.* at 63-76.

The "American Rule" of attorneys fees is that each party pays its own. *Harkeem v. Adams*, 117 N.H. 687 (1977). "An award of attorney's fees . . . must be grounded upon statutory authorization, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees." *DePalantino v. DePalantino*, 139 N.H. 522, 525 (1995) (quotation omitted).

There is no known statutory authorization for an award of fees in this case, and LBI has not advanced one.

Before this transaction that resulted in litigation, Mr. LaMontagne and Mr. Brooks had done business together for years and had successfully completed a number of contracts. 3 *Trn.* at 28. Several of them contained attorneys fees provisions, but this one did not. 6 *Trn.* at 34. Thus, there is no applicable attorneys fees provision in the contract between the parties.

Consequently, if attorneys fees are to be awarded, they must be based on some other "established exception" to the American Rule.

B. The Loser Pays

The exceptions to the American Rule all require that the loser pay fees to the winner. *E.g., Dow v. Effingham*,148 N.H. 121, 133 (2002) ("In this case, the plaintiff is not entitled to attorney's fees because he is not the prevailing party."). Mr. Brooks won his case. The court said so: "The plaintiff LBI was aware of the transfer and bank mortgage loan. It expressly consented to both. The plaintiff cannot now seek to undo a transfer of which it was fully aware and consented to." DECREE, *Appx. to N.O.A.* at 12-13. Because LBI lost the case it pled, Mr. Brooks is the wrong party to pay attorneys' fees.

In fact, there probably is a sufficient basis for the court to have awarded fees to Mr. Brooks, as the prevailing party, had he requested them. LBI sued Mr. Brooks and the entities for fraudulent conveyance. On the sixth day of a seven-day trial brimming with technical details that led nowhere, Mr. LaMontagne testified. He boldly admitted that he knew and approved of the conveyance, that it made no difference to him, and that the purpose of the lawsuit was simply to get paid. *6 Trn. 6-43, 43.* He had no answer to the question of why, if he believed the conveyance was fraudulent, did he sit on the cause of action from 1997 when he sought the attachment to January 2000 when he filed this suit, especially given his admission that he learned no new information about the situation during the three-

year silence. 6 *Trn.* at 55-57. At the core of behavior that is regulated by this Court's bad-faith doctrine is the bringing of a cause of action which the plaintiff knows has no basis in any fact. *Treisman v. Town of Bedford*, 135 N.H. 573 (1992) (bad faith proved unless party's "legal position was not entirely without merit."); *Harkeem*, 117 N.H. at 668 ("obstinate, unjust, vexatious, wanton, or oppressive" litigation); *see Bruzga's Case*, 145 N.H. 62 (2000) (attorney suspended for fling pleadings containing fabricated "facts.").

Accordingly, not only was LBI the losing party and therefore incapable of being awarded attorneys fees, but there are sufficient grounds for LBI to *pay* attorneys fees had Mr. Brooks requested them.

C. Trial Court's Thin Authority For Bad Faith Attorneys Fees

The lower court provided little guidance as to its justification for an award of fees. It cited *Harkeem*, but the *Harkeem* court allowed fees only where a litigant "instituted or prolonged litigation through bad faith or obstinate, unjust, vexatious, wanton, or oppressive conduct." *Harkeem*, 117 N.H. at 688. In Mr. Brooks's case, he was the defendant and thus did not institute the litigation. There has never been any allegation that Mr. Brooks or his entities were anything but gracious as litigants. The court cited no evidence that they prolonged the litigation or did anything "obstinate, unjust, vexatious, wanton, or oppressive" during the

litigation. Thus the *Harkeem* justification does not apply.

The lower court also cited *Rix v. Kinderworks*, 136 N.H. 548 (1992). *Rix* merely reiterated the exception this court noted in *Indian Head National Bank v. Corey*, 129 N.H. 83, 87 (1986), allowing fees "[w]here a party is forced to seek judicial assistance to secure a clearly defined right." *See also, Taber v. Town of Westmoreland*, 140 N.H. 613, 616 (1996).

Regardless of any alleged bad faith, this case does not involve the securing of any "clearly defined right." LBI sued Mr. Brooks, the two entities of which he is an officer, and several banks. The suit sought to set aside a conveyance that LBI (dishonestly) alleged was fraudulent, and which he admitted caused him no harm. 6 *Trn.* at 31-33. From his testimony it was clear, even to the trial court, that Mr. LaMontagne did not aim to set aside the transfer, but just wanted to get paid. 6 *Trn.* at 18, 29, 43. Had LBI brought a suit seeking to collect on the judgment already existing in his favor, *Rix v. Kinderworks* might apply. But this is not a collections action. It is an allegation of a fraudulent conveyance that nobody – not even the plaintiff – believed was fraudulent.

Finally, the court supported its award of attorneys fees by citing *Keenan v. Fearon*, 130 N.H. 494 (1988), perhaps this Court's most complete opinion to date on attorneys fees. The *Keenan* Court first noted that for any recovery of fees

outside of a statute or agreement, there must be an objective basis for a finding of bad faith. The Court listed some examples of bad faith, including (as in ***Rix***) forcing someone to go to court to get something that is already theirs, advancing a cause which is "patently unreasonable," bringing suit for the "specific purpose of causing injury to an opponent," or "prolonging unnecessary litigation." *See* ***Keenan***, 130 N.H. at 502. Each of the listed varieties of bad faith involve courthouses, lawyers, or behavior that increases the costs of otherwise legitimate litigation. ***Keenan*** does not mention "bad faith" generally, but is directed specifically to bad-faith abuse of the legal system. This is because the matter at hand is ***attorneys*** fees, not some other area of the law that might also use bad faith as an element of liability. This Court has applied this feature of the ***Keenan*** rationale in, for example, ***Taber v. Town of Westmoreland***, 140 N.H. 613, 616 (1996) ("For purposes of awarding attorney's fees in this case, the issue is not whether the ZBA improperly granted the variance, but rather whether the town exercised bad faith in the defense of the ZBA's decision.").

Mr. Brooks's business practices may be sharp and shrewd. But there is no evidence that Mr. Brooks has been anything but a gentleman in the courthouse. ***Keenan*** simply does not apply.

D. Trial Court's Thin Justification for Finding Bad Faith

It is not hard to guess that the trial court was not pleased with how Mr. Brooks conducts his business – its order is peppered with the word "sham." None of the various untoward allegations about Mr. Brooks, however, add up to bad faith.

For instance, the court found that Mr. Brooks may have controlled both sides of a transaction that established the price of the property at issue, and that the transaction was somehow a sham. DECREE, *Appx. to N.O.A.* at 8. No party has ever complained about it, however, and neither Mr. LaMontagne nor LBI have alleged any prejudice. The trial court even commended Mr. Brooks for his cleverness.

> The April 30, 1997 transfer and the related release of the FDIC attachment, improved LBI's position as to the real estate. Much of the transaction with Total [Financial Corporation] was a sham created by Brooks, but this much is true: The attachment was real and Brooks got it released. If someone else had purchased the judgment and levied on the attachment, LBI would never have been paid.

DECREE, *Appx. to N.O.A.* at 9.

In his testimony Mr. Brooks fluently described his transactions, and there is no doubt that Mr. Brooks was the most sophisticated businessperson in the courtroom. But even if the trial judge correctly believed something was amiss, no

bad faith prejudicing either the plaintiff or the judicial system was alleged or proved.

For instance, the court found that Mr. Brooks may have misrepresented the status of LBI's unpaid bill in his loan application to the bank. DECREE, *Appx. to N.O.A.* at 12-13. Even if true, his statements do not constitute bad faith as to either LBI or the judicial system. The "loan" was an $840,000 revolving credit line, secured by the property. 5 *Trn.* at 119. It was not an infrastructure or construction loan – the bank imposed no conditions as to how the money was to be spent. *Id.* One of the bankers testified, and the trial court agreed, that the bank understood the credit line was intended to repay investors. 5 *Trn.* at 101; DECREE, *Appx. to N.O.A.* at 5. There was no bad faith in the loan transaction, and if there were, it had no impact on LBI.

The court found that Mr. Brooks somehow tricked LBI into foregoing its right to timely seek a mechanic's lien by telling him his check would soon be in the mail. DECREE, *Appx. to N.O.A.* at 20-21. But Mr. LaMontagne is an experienced businessman. It was his imprudence in failing to simply file a mechanics lien within 120 days – a procedure every tradesman learns early, *see Shapley v. Bellows*, 4 N.H. 347 (1828) – that got Mr. LaMontagne into second place with respect to the bank's lien. Even if Mr. Brooks misrepresented when

payment would be made, his conduct does not come to the "level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Barrows v. Boles*, 141 N.H. 382, 390 (1996), *quoting Levings v. Forbes & Wallace Inc.*, 396 N.E.2d 149, 153 (Mass. App. Ct. 1979). In any event, the alleged trickery occurred in the world of commerce, not the world of litigation, and therefore cannot form the basis for an award of attorneys fees.

E. Earlier Order Denying Fees Was Law of the Case

The court awarded LBI "costs, expenses and attorneys' fees it has incurred in pursuit of payment for its services at the Bowman Green subdivision." DECREE, *Appx. to N.O.A.* at 22. Mr. Brooks understands this to mean the costs associated with the arbitration on the contract, as well as the current litigation.

In October 2001, the court issued an order on Mr. LaMontagne's earlier request for attorneys fees associated with the arbitration. What irked Mr. LaMontagne at that point was Mr. Brooks's last-minute decision to have the Partnership and the Corporation forego defending LBI's claim for payment under the contract. They had legitimate defenses, but as an officer of the entities, Mr. Brooks made a business determination (cited approvingly by the court) that "there would be no equity left in the property for them to fight over after the bank foreclosure and therefore contesting the matter was no longer financially

practical." 10/24/01 ORDER, *Appx. to Br.* at 42, 43. Although the default of course resulted in a finding of liability in favor of LBI, Mr. Brooks's decision was made on the eve of arbitration. That prompted Mr. LaMontagne to claim bad faith despite his victory.

In denying fees, the court said it:

> cannot base a finding that the defendants acted in bad faith in initially raising defenses in the arbitration case with plaintiff's counsel on the fact that they elected not to contest the plaintiff's claim before the arbitrator shortly before the arbitration hearing. Just because a party defaults does not mean that the court can automatically find, as the plaintiff appears to imply or argue, that they acted in bad faith.

10/24/01 ORDER, *Appx. to Br.* at 43. The court went on to say that "[t]he defendants' default at the last moment and failure to object to the motion to confirm the award saved the plaintiff time and money." *Id., Appx. to Br.* at 44.

The court noted that it would not be appropriate to award attorneys' fees for earlier "work done on matters unrelated to the arbitration matter," some of which had not yet resulted in judgment. *Id. Appx. to Br.* at 44-45. The court also noted that its denial of fees should not prejudice a party from requesting them for the other matters when they reached fruition. *Id.* at 45.

Thus, the court had already decided it would not award attorneys fees for the arbitration. Directly contrary is the order now on appeal, in which the court

gave LBI fees all the way back to July 1997 when it first filed its attachment.

The October 2001 order denying fees, however, is "law of the case." Like *res judicata*, law of the case means that the issue is determined and precludes the parties from re-litigating it. *Taylor v. Nutting*, 133 N.H. 451 (1990). Law of the case promotes efficiency, saves litigants and courts from duplication of effort, prevents tenacious litigants from endlessly raising the same issue over and over again in effort to wear down the judge into changing a ruling, and prevents litigants from judge shopping. *See UniGroup, Inc. v. Winokur*, 45 F.3d 1208, 1211 (8th Cir. 1995). When a party relies on a trial court's ruling, it becomes law of the case. *See Bailey v. Sommovigo*, 137 N.H. 526, 529 (1993).

Mr. Brooks, the Partnership, and the Corporation relied on the court's earlier order. During trial they did not put on evidence or question witnesses regarding their conduct surrounding arbitration or their forgone defenses to payment on the contract. While law of the case does not limit the court's reconsideration of an issue, mere doubt as to the correctness of a prior decision is not a sufficient reason to alter it; there must be a clear conviction of error. *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940); *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3rd Cir. 1994) (law of case doctrine recognizes that successor judge should not lightly overturn decision of predecessor judge in same case).

Here, the trial court summarily awarded fees in contradiction of its earlier order, relying on cases and scant evidence which, as noted, do not provide authority or grounds for an award of fees even if there were no existing law of the case.

F. Mr. Brooks Shouldn't Pay Fees For Which He Was Not Responsible

Moreover, even if LBI won his fraudulent conveyance claim and therefore were justified in receiving an award, costs were taxed against the wrong parties. At least half, if not most, of the seven-day trial, and virtually all of the technical details exhaustively tweezered by LBI's attorney, concerned the issue of LBI's priority vis-a-vis the bank's mortgage lien. Mr. Brooks, the Partnership, nor the Corporation had any interest in these matters, and should not be liable for any expenses associated with them.

III. Court Had No Grounds to Disregard the Corporate Entity

"Certainly one of the desirable and legitimate attributes of the corporate form of doing business is the limitation of the liability of the owners to the extent of their investment." *Peter R. Previte, Inc. v. McAllister Florists, Inc.*, 113 N.H. 579, 582 (1973). The corporate veil may be pierced, however, in a limited number of circumstances. There will be personal liability if stockholders or officers are "diverting corporate assets to their benefit when substantial notice of claims were outstanding," *Terren v. Butler*, 134 N.H. 635, 638 (1991), when a person hides the fact of incorporation, *Ashland Lumber Co., Inc., v. Hayes*, 119 N.H. 440 (1979); *Gautschi v. Auto Body Discount Center, Inc*, 139 N.H. 457 (1995), or misleads creditors regarding corporate assets. *Id.* But the veil cannot be pierced just because the corporation is a one-person entity. *Village Press, Inc. v. Stephen Edward Co., Inc.*, 120 N.H. 469 (1980).

Using a corporation as a cover for a fraudulent conveyance may be a sufficient reason to find personal liability. *Previte v. McAllister* is instructive because, like in Mr. Brooks's case, there was no evidence of a fraudulent conveyance or any corporate malfeasance, thus prompting this Court to keep the entity's liability shield intact. *Previte*, 113 N.H. at 579

The corporate form can also be disregarded when the corporation "intend[s]

to promote injustice or fraud with respect to the plaintiffs." *Druding v. Allen*, 122 N.H. 823, 828 (1982). In *Druding*, this Court found no personal liability because there was no fraudulent conveyance, and although it was displeased about the lack of some corporate formalities, it could find no fraudulent intent.

Although not precisely veil piercing, corporate officers or stockholders may make themselves personally liable for corporate debts, if it is done in writing. *See Ashland Lumber Co., Inc., v. Hayes*, 119 N.H. 440 (1979); *Connare, Inc. v. Gray*, 113 N.H. 125 (1973) (construing RSA 506:2, the statute of frauds: "No action shall be brought to charge . . . any person upon a special promise to answer for the debt, default or miscarriage of another."). In this case, LBI conceded and the lower court agreed that Mr. Brooks signed the contract, the loan documents, and other papers as a *corporate officer*, and not personally, and that he at all times purported to be acting in his corporate capacity. 6 *Trn.* 38; DECREE, *Appx. to N.O.A.* at 38, 54. He made no written promise to be personally liable.

There was no evidence that Mr. Brooks suppressed the fact that he was operating behind a corporate entity, and no allegation that the Corporation's inception or structure were somehow deficient. LBI was at all times aware of the assets held by the Corporation.

Despite the lower court's disregard of the corporate entity, it pointed to no

evidence of corporate abuse. There was no allegation that Mr. Brooks did anything untoward with corporate assets such as convert them to his own use. In fact, he used the proceeds of the loan to repay investors, just as the bank understood he would.

The court found that "Mr. Brooks breached an express promise to Mr. LaMontagne and LBI to pay LBI out of the . . . loan proceeds." DECREE, *Appx. to N.O.A.* at 20. Even if true, however, there is nothing about the promise or its breach that implicates the corporate form or suggests abuse of the corporate entity. And the court understood this:

> The creation of Bowman Green Development Corporation and the transfer of the subdivision property to it had been contemplated since the loan was applied for in November of 1996. Bowman Green Development Corporation was not established and the transfer of the real estate to Bowman green Development Corporation was not accomplished for the purpose of avoiding payment to LBI or to any other creditor."

DECREE, *Appx. to N.O.A.* at 11. Although the trial court clearly did not approve of Mr. Brooks's business practices, and its order is full of distaste, nowhere does it point to evidence of corporate abuse that would authorize disregarding the corporate form. The court wrote that Mr. Brooks "used the corporate entity to promote injustice and fraud and acted in a fraudulent manner." DECREE, *Appx. to N.O.A.* at 20. But it found no fraudulent conveyance, and has no enumeration of

what *corporate* actions constitute the basis for its opinion. Rather, the court noted that the conveyance to the corporation "improved LBI's position as to the real estate." DECREE, *Appx. to N.O.A.* at 9.

In short, the court cited no grounds on which to find personal liability. And could not, because the evidence it found is contrary to its holding. Accordingly, this Court should reverse.

CONCLUSION

Mr. R. Scott Brooks, the Bowman Brook Purchase Group, and Bowman Green Development Corp., request that this Court reverse the decree of liability for contract damages, reverse the award of attorneys fees, and reverse the finding of personal liability.

Respectfully submitted,

R. Scott Brooks,
Bowman Brook Purchase Group, and
Bowman Green Development Corp.,
By their Attorney,

Law Office of Joshua L. Gordon

Dated: July 7, 2003

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

R. Scott Brooks, Bowman Brook Purchase Group, and Bowman Green Development Corp. request that their counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on July 7, 2003, copies of the foregoing will be forwarded to Rodney L. Stark, Esq.; Jason M. Craven, Esq.; and Richard McNamara, Esq.

Dated: July 7, 2003

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX