State of New Hampshire
Supreme Court

NO. 2013-0874

2014 TERM

SEPTEMBER SESSION

James Conant, &a.

v.

Timothy O'Meara, &a.

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

REPLY BRIEF

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225 www.AppealsLawyer.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

Other State's Case

New Hampshire Statutes

ARGUMENT

I. O'Meara Has no Preservation Problem

Throughout their brief the Conants allege that O'Meara did not adequately preserve his arguments with regard to whether the statutes of limitations apply. There are two problems with the allegation.

A. Non-Moving Party has no Duty to Preserve

First, the Conants' preservation argument confuses the procedural posture of this case, and who has the duty to preserve. It must be recalled that here the Conants sued O'Meara, and O'Meara plead the statutes of limitations. The Conants then asserted that the limitations periods do not apply.

"Non-compliance with statutes of limitations is an affirmative defense to an action." *Donnelly v. Eastman*, 149 N.H. 631, 633 (2003). This means that once O'Meara demonstrated that the Conants' filed suit past the time specified in applicable statutes of limitation, the burden was on the Conants to explain how they might circumvent their tardiness problem.

> The statute of limitations constitutes an affirmative defense, and the defendant bears the burden of proving that it applies in a given case. That burden, however, is met by a showing that the action was not brought within 3 years of the act or omission complained of. Once the defendant has established that the statute of limitations would bar the action, the *plaintiff has the burden of raising and proving* that the discovery rule is applicable to an action otherwise barred by the statute of limitations.

Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 712-13 (2010) (quotations and citations omitted, emphasis added).

Like the defendants in *Beane*, with regard to circumvention of the limitations periods, the Conants are the moving party.

Only a moving party has preservation duties. *In re Canaway*, 161 N.H. 286, 291 (2010) ("[W]e may consider the failure of the *moving party* to comply with [preservation] requirement

regardless of whether the opposing party objected on these grounds.") (emphasis added). In every known preservation case, whether civil, criminal, administrative, or family law, it is a moving party who either succeeds or fails to preserve an argument for appellate review. *See e.g.*, *Milliken v. Dartmouth-Hitchcock Clinic*, 154 N.H. 662, 668 (2006) (motion to exclude testimony for failure to provide expert witness reports); *State v. Bruce*, 147 N.H. 37, 40 (2001) (motion to dismiss for failure to provide exculpatory evidence); *In re Pelleteri*, 152 N.H. 809, 811 (2005) (motion to reopen administrative proceeding); *In re Jack L.*, 161 N.H. 611, 615 (2011) (motion to appoint guardian *ad litem*).

Accordingly, once O'Meara uttered the phrase "statute of limitations" and demonstrated the relevant dates, the matter was preserved. The Conants concede O'Meara did that:

> In his motion to dismiss, Mr. O'Meara argued that Count One of the Conants' Petition was untimely under RSA 508:4, and that Count Two – the claim to vacate the arbitration award – was untimely under RSA 542:8. Mr. O'Meara contended that neither the discovery rule nor any theory of fraudulent concealment could extend the limitations period. He also argued that res judicata barred the Conants' challenges to the arbitration decision….
>
> In his summary judgment motion, Mr. O'Meara reprised the same arguments as appeared in the motion to dismiss. The only new argument he presented was that res judicata also barred any claim by the Conants that arose from the disciplinary proceedings before the PCC.

CONANTS' BRF. at 3 (citations to appendix omitted).

"When trial courts have an opportunity to rule on issues and to correct errors before they are presented to the appellate court, the preservation requirement is satisfied." *State v. Ayer*, 150 N.H. 14 (2003). Here, O'Meara gave the trial court plenty of opportunity to rule on the statute of limitations, and it ruled.

Because the Conants' preservation argument confuses the burdens, it must be ignored.

B. Contemporaneous Trial Court Objection Need Not Resemble an Appellate Brief

Even if O'Meara had the burden to preserve, the Conants make a second error.

They suggest throughout their brief that O'Meara did not explain the issues in sufficient detail. CONANTS' BRF. at 9-21. The Conants compare O'Meara's trial court motion with his appellate brief, note that his appellate brief contains more detail and further explanation than his trial court motion, and conclude that any detail or explanation contained in his appellate brief that was not also in his trial court motion violates the preservation doctrine. In effect, the Conants claim that trial court motions must resemble appellate briefs, or conversely, that appellate briefs can provide no further detail or explanation than trial court motions.

The claim makes three errors. It misconstrues the purpose and scope of the preservation rules, misunderstands the role of appellate briefing, and also misunderstands the day-to-day reality of trial court practice.

"The purpose underlying [the] preservation rule … is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review," *State v. Dowdle*, 148 N.H. 345, 347 (2002), and this Court has consistently ruled that matters are preserved as long as the movant apprised the lower court of the issue. *See e.g.*, *State v. Gordon*, 161 N.H. 410, 417-18 (2011) (discussing specificity of objection, and holding that appellate review of facts was preserved when defendant requested charges be dismissed "based on sufficiency of the evidence").

An objection must be made with enough detail so that the trial court is apprised, but an issue is not waived for failure to use magic words. There is no known opinion of any court holding that to adequately preserve an issue, a litigant must submit full briefing. In *State v. Bruce*, 147 N.H. 37, 40 (2001), for example, "[t]he State argue[d] that the due process issue was not raised by the defendant below, and therefore was not preserved for appeal.… The record

shows that the defendant specifically argued that exculpatory evidence had been lost and stated that this loss violated his 'right to a fair trial.' While it is true that defense counsel did not use the term 'due process,' the fact that counsel specifically used the term 'exculpatory evidence' and invoked the right to a fair trial was sufficient to alert the trial judge to the legal basis for his argument. Thus, the issue was adequately preserved for appeal."

Indeed, preservation itself is a prudential doctrine. *Camire v. Gunstock Area Comm'n,* Slip op. 2013-0258 __ N.H. __ (decided N.H. June 18, 2014) ("Ordinarily, we will not review arguments that were not timely raised before the trial court, because trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court. This rule, however, is not absolute. As we have previously recognized, preservation is a limitation on the parties to an appeal and not the reviewing court. …Accordingly, in the interest of judicial economy, and because both parties addressed the issue … we will consider it.").

Here, as noted, the Conants concede that O'Meara apprised the trial court of all the issues he raised in his appellate brief.

The second error the Conants make in their assertion is that preservation rules require lower court pleadings to resemble appellate briefs:

> [A]ppellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product. Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value.

In re Marriage of Shaban, 88 Cal. App. 4th 398, 410, 105 Cal. Rptr. 2d 863 (2001). Because lower courts do not create precedent, such matters as tracing the history of doctrines, comparing the law of differing jurisdictions, or exposing implications of policy choices, are not expected in trial court practice. That does not eliminate them from appellate concern, however.

Third, adopting a preservation rule as the Conants envisage would have enormous ramifications for all trial practice in New Hampshire. It would put the burden on trial lawyers (and *pro se* litigants) of not just contemporaneously apprising a trial judge of the basis for an objection, but in effect submitting an appellate brief at each juncture.

Accordingly, the Conants' preservation argument must be ignored.

II. Creating a New Cause of Action is Not Merely a Matter of Discretion to a Trial Court

The Conants assert that the matters here are reviewed by this Court on an unsustainable exercise of discretion. CONANTS' BRF. at 8-9, 21, 26. That assertion appears to be a misunderstanding of the nature and magnitude of the remedy they request.

The Conants base their forfeiture claim on *Estate of McCool*, 131 N.H. 340 (1988). There, the lawyer represented multiple sides in a probate case, creating conflicts of interest. Immediately following the probate proceeding, the lawyer sought payment from the estate for his work, which the probate court allowed, and this Court reversed. Because a request for disbursement from the estate regularly comes at the end a probate proceeding, RSA 564-B:10-1004, no new lawsuit was necessary.

Here however, there was an existing representation agreement – only its amount was in dispute. There was also a post-settlement agreement between the Conants and O'Meara which called for a $750,000 payment regardless of the outcome of the arbitration, and which enumerated and waived lawsuits against O'Meara. *See* SETTLEMENT AGREEMENT AND RELEASE, *Appx*. at 153-166, discussed in O'MEARA'S BRF. at 2-4. Then, years after the representation closed, the Conants instituted this separate suit against O'Meara as a substitute for negligence damages, an appeal of the arbitration award to the Superior Court, or other cause of action which they might have had.

This is a distinction with a difference. By allowing a separate suit to avoid both 1) the bargain and 2) the failure to seek redress a long time ago, this Court would be fashioning a new forfeiture cause of action.[1]

---

[1]The Conants also purport to base their claim on *Craft v. Thompson*, 51 N.H. 536 (1872). In *Craft*, this Court approved a bill in equity to undo an arbitration award where there was evidence of chicanery. *Craft* was decided in 1872, and was superseded by New Hampshire's arbitration statute, RSA 542, circa 1929. As noted in O'Meara's opening brief, the Conants missed their RSA 542:8 deadline.

Creating a new cause of action, particularly with regard to the regulation of attorneys over which this Court has plenary authority, *In re Petition of New Hampshire Bar Ass'n*, 151 N.H. 112 (2004), is not a matter of discretion to a trial court. Rather, new causes of action are generally invented by the legislature, *see e.g., Davis v. Herbert*, 78 N.H. 179 (1916) (legislative creation of wrongful death action), or – with great caution – this Court. *Aranson v. Schroeder*, 140 N.H. 359, 365 (1995) (recognizing malicious defense cause of action:"[W]e are mindful that fundamental changes in our jurisprudence must be brought about sparingly and with deliberation."); *J & M Lumber & Const. Co. v. Smyjunas*, 161 N.H. 714, 724 (2011) (declining to "create … a new cause of action" based on "breach of the implied covenant of good faith and fair dealing outside of the contractual context.").

As detailed in his opening brief, creation of the cause of action urged by the Conants here would upend as many as ten settled areas of law and public policy. O'MEARA'S BRF. at 28-33.

Accordingly, the Conants' cannot successfully portray a new forfeiture cause of action as a mere discretionary application of fact to law.

Respectfully submitted,

Timothy O'Meara
By his Attorney,

Law Office of Joshua L. Gordon

Dated: September 3, 2014

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

CERTIFICATION

I hereby certify that on September 3, 2014, copies of the foregoing will be forwarded to Jeffrey C. Spear, Esq.; Ralph F. Holmes, Esq.; and William D. Pandolph, Esq.

Dated: September 3, 2014

Joshua L. Gordon, Esq.