State of New Hampshire
Supreme Court

NO. 2013-0874

2014 TERM

JULY SESSION

James Conant, &a.

v.

Timothy O'Meara, &a.

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

BRIEF OF DEFENDANT/APPELLANT TIMOTHY O'MEARA

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Preserved: MOTION FOR RECONSIDERATION (Nov. 7, 2013), *Appx*. at 143.

STATEMENT OF FACTS

I. Collision, Lawsuit, Mediation, Settlement

In 2005 and 2006, Timothy O'Meara represented Anita and James Conant after Anita was severely injured in a car accident with a paving truck. It has never been disputed that, despite ethical shortcomings for which he was disbarred, O'Meara did a competent job representing the Conants. *See O'Meara's Case*, 164 N.H. 170 (2012). ARBITRATION DECISION, MAJORITY OPINION (Mar. 9, 2007) at 1, 3, *Appx*. at 171. At a mediation session in Philadelphia in February 2006, the Conants settled the lawsuit with the trucking company for $11.5 million, the maximum amount available without causing bankruptcy. *O'Meara's Case*, 164 N.H. at 175.

The next day, Attorney Ganz, with whom the Conants had consulted about the enforceability of O'Meara's fee contract, phoned O'Meara on the Conant's behalf, and informed him they were disputing his fee. Then, "[u]nhappy with O'Meara's conduct, the Conants terminated his services effective March 5." *O'Meara's Case*, 164 N.H. at 175.

A few days later, the parties consummated the mediated agreement with the trucking company, represented by separate counsel. Under the settlement, O'Meara was paid "an undisputed fee of $750,000," and another $1.25 million was put in escrow as disputed fees. *Id*.

II. Fee Dispute, Escrow, Arbitration

Several weeks later there was another agreement – this time just among the Conants, O'Meara, and Ganz – all with representation. SETTLEMENT AGREEMENT AND RELEASE ¶¶ 2, 9, 17, *Appx*. at 153. The agreement recited:

> [T]here is *now a dispute* between the Conants and O'Meara, involving the *payment of an additional fee* to O'Meara; Ganz has provided some legal counsel to the Conants; various issues have arisen between Ganz, the Conants, and O'Meara; and the Conants, Ganz, and O'Meara, desire to resolve all issues and disputes between them as set forth herein.

AGREEMENT & RELEASE at 1 (emphasis added, repeated whereases omitted, paragraphing altered).

Regarding the $1.25 million escrow, the agreement provided "the Conants and O'Meara shall submit their dispute with respect to this amount pursuant to arbitration." *See* SETTLEMENT AGREEMENT AND RELEASE ¶ 2 (May 2, 2006), *Appx*. at 153; ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Oct. 24, 2013) at 9, *Appx*. at 132. In the agreement, the Conants conceded they would not assert "any failure on the part of O'Meara to achieve a reasonable result" in the underlying collision case. AGREEMENT & RELEASE ¶ 12; *see also O'Meara's Case*, 164 N.H. at 175 ("They also agreed that the Conants could not claim in the arbitration that O'Meara failed to obtain a reasonable result in their personal injury case."); PETITION (FOR FEE FORFEITURE) ¶ 24 (Nov. 2, 2012), *Appx*. at 1 ("The agreement released the Conants' claims for malpractice and for any claim that O'Meara should have obtained a more suitable settlement."); ARBITRATION DECISION, MAJORITY OPINION at 9 ("[A]lthough the malpractice claims were reserved as defenses for the fee arbitration in paragraph 12 of the Settlement Agreement and Release, the Conants also agreed in paragraph 12 that they do not assert in the arbitration a claim of any failure on the part of Attorney O'Meara to achieve a reasonable result in the underlying litigation.").

In addition, the agreement provided:

- Disposition of the $1.25 million escrow would be determined by 3-member arbitration panel pursuant to RSA 542, "in whatever proportion the arbitrators decide." AGREEMENT & RELEASE ¶ 11;
- In the arbitration "the Conants may assert any and all defenses available to them with respect to O'Meara's claim to the disputed amount, including, but not limited to: duress, *breach of fiduciary duty* by O'Meara, the failure by O'Meara to provide the professional services necessary or required for the representation of the Conants, and

breach of the terms of any contingent fee agreement between O'Meara and the Conants." *Id.* at ¶ 12 (emphasis added, punctuation and capitalization altered);

- Either party could vacate the arbitrator's award in the superior court "*solely for fraud*, *corruption, or misconduct by the parties*," but "if neither party files a motion seeking such relief *within 30 days* of the date of the arbitrators' award, that award shall be final." *Id.* at ¶ 11 (emphasis added).

- Any amounts released from the escrow "shall be used for the purchase of a structured settlement annuity to fulfill the periodic payment obligation between O'Meara and the Conants." *Id.* at ¶ 2.

The agreement also settled liabilities among the Conants, O'Meara, and Ganz:

- Except as to the arbitration, the Conants released O'Meara "from all known and unknown, foreseen and unforeseen, claims, causes of action, suits, litigation, demands, breaches of duty, *breaches of fiduciary obligations*, claims of legal or *professional malpractice*, and any other claims, in law or *in equity*, which the Conants now have, ever had, or otherwise may have in the future against O'Meara, by means of any manner, cause or thing whatsoever from the beginning of time to the date of this [a]greement, including, but not limited to, claims arising out of, or relating in any way to the representation of [the Conants]." *Id.* at ¶ 3 (emphasis added, formal words shortened).

- The Conants could file a complaint with the attorney discipline system. *Id.* at ¶ 10;

- All three parties mutually released each other from whatever claims they might have had. *Id.* at ¶¶ 4-8.

Following their agreement, "[t]he parties engaged in extensive pre-arbitration discovery." FIRST LETTER FROM BASSETT TO MCCAFFERTY (Feb. 6, 2007) at 2, *Appx*. at 167; MOTION TO DISMISS (Mar. 6, 2013) at 2, *Appx*. at 20.

The Conants, O'Meara, and O'Meara's law firm were parties to the arbitration which took place over five consecutive days in November and December 2006.[1] At issue was how much

[1]The arbitration transcripts are not part of the record in this appeal, but are nonetheless in the possession of all parties. On the covers of all five volumes are listed the Conants and O'Meara as parties, both their lawyers' appearances, and each hearing date.

O'Meara should be paid, and whether the $2 million contingency fee discussed at various times was "unreasonable" or "clearly excessive" under the ethics rules. ARBITRATION DECISION, MAJORITY OPINION at 6. Testimony included Attorney Ganz, several members of the Conant family and their circle of friends, and their expert on what constitutes a reasonable fee. O'Meara testified over most of two days, including 190 pages of cross-examination by the Conant's lawyer, then Attorney (now Supreme Court Justice) Bassett.[2]

The arbitration panel split.

The majority opinion first reviewed O'Meara's representation and fee relationship with the Conants. Based on the percentage the majority calculated the Conants were willing to pay O'Meara, the arbitrators found that a total fee of $1,587,000 was justified. ARBITRATION DECISION, MAJORITY OPINION at 12. Noting O'Meara had already been paid the undisputed $750,000, the majority thus "awarded an additional $837,000 from the amount in escrow." *Id.*

The third arbitrator, Attorney Peter Beeson, filed a lengthy dissent. He first found, for a number of reasons, that the fee the majority awarded was excessive. ARBITRATION DECISION, DISSENTING OPINION (Mar. 12, 2007) at 6, *Appx*. at 183. The dissent calculated the time and money O'Meara likely spent on the case, lamented it had no authority to go below the "exceedingly generous" $750,000 already paid, and said it would award a total of just $400,000 in fees and costs. *Id.* at 7, 12 n. 5, 25.

The dissent then criticized the majority for confining its consideration to only the issue of fee-reasonableness. *Id.* at 12, 20-24. It went on to lengthily detail numerous other ethical allegations, presaging the conflicts of interest and breach of fiduciary duties that ultimately

[2]The arbitration transcripts indicate O'Meara was cross examined by Attorney Bassett on day 4 at pages 118-203, day 4 at pages 209-221, and day 5 at pages 4-97.

resulted in O'Meara's disbarment, *id.* at 12-24 (section II, entitled "Fiduciary Duty Breach and Its Impact on the Fee Dispute"), and concluded that "O'Meara ha[d] forfeited his right to compensation." *Id.* at 12. In a footnote, the dissent quoted a memorandum the Conants had filed with the arbitrators: "The Conants also argue that these fiduciary breaches 'favor a return to the Conants of *all* legal fees already received by Mr. O'Meara.'" *Id.* at 12 n. 5 (emphasis added).

Although this Court subsequently sanctioned O'Meara for lying to the arbitration panel, *O'Meara's Case*, 164 N.H. at 181, apparently none of the panel members believed O'Meara's testimony. The majority of the panel noted only that "Attorney O'Meara *believed* that the parties had agreed on a $2.0 million dollar [sic] fee on a recovery of the policy limit." ARBITRATION DECISION, MAJORITY OPINION at 7 (emphasis added). The dissent wrote: "Mr. O'Meara's claim that the parties agreed to a $2 [million] fee on February 25th is not persuasive. Nor does the majority make this finding." ARBITRATION DECISION, DISSENTING OPINION at 16. This Court likewise noted the panel's disbelief. *O'Meara's Case*, 164 N.H. at 178-79 ("The PCC found that O'Meara violated this rule by falsely testifying at the arbitration hearing that the Conants agreed to his $2 million fee at the February 25 meeting. The PCC reached this conclusion based upon its finding that every other witness contradicted O'Meara's account of the February 25 meeting. The PCC speculated, as well, that the arbitration panel likely concluded that O'Meara testified falsely about the February 25 meeting because it awarded him a total fee of $1,587,000, instead of the $2 million fee to which he claimed he was entitled.").

The Conants did not appeal the arbitrator's rulings to the superior court either pursuant to the 30-day period specified in the settlement agreement, AGREEMENT & RELEASE ¶ 11, or pursuant to the one-year period in RSA 542:8 ("At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the

award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers.").

III. Attorney Discipline Process

After the arbitration hearings, but before the arbitrators' reports were issued, the Conants' lawyer wrote a letter to the Attorney Discipline Office apprising it of O'Meara's then-alleged conflicts of interest, and requesting it open an investigation. FIRST LETTER FROM BASSETT TO MCCAFFERTY (Feb. 6, 2007), *Appx*. at 167. The ADO requested further details, prompting the Conants' lawyer to follow up with an 11-page letter more fully discussing the matter. SECOND LETTER FROM BASSETT TO MCCAFFERTY (May 11, 2007), *Appx*. at 208.

The second letter alleged O'Meara settled without authorization, had conflicts of interest when he discussed litigation over his fee, and behaved unethically by threatening to withdraw on the morning of mediation. *Id*. at 2, 7. It also detailed allegations of O'Meara having lied to the arbitration panel. The letter said "Mr. O'Meara engaged in dishonesty, deceit and misrepresentation during his representation of the Conants in the underlying personal injury action and again during the arbitration proceeding." *Id.* at 8. It went on to list several "examples of untruthful testimony," *id.* at 10, one of which made reference to arbitration panel-member Peter Beeson's dissenting opinion, and alleged:

> Mr. O'Meara provided doubtful testimony regarding the fact that the parties agreed to a $2 million fee during the meeting at the Conants' home on February 25th. Mr. Beeson states that the claim is not "persuasive" and notes that even the Majority Decision does not confirm this finding. Beeson Decision, p. 16.

SECOND LETTER FROM BASSETT TO MCCAFFERTY at 10. The letter noted the dissent also "found that Mr. O'Meara had breached his fiduciary duties," *id.* at 2, and closed by requesting the ADO order O'Meara to "make restitution to the Conants." *Id.* at 11.

The Conants repeatedly (albeit unsuccessfully) attempted to inject fee forfeiture into the attorney discipline process. In 2010 the ADO filed motions before the PCC "to recommend fee disgorgement" as part of its sanction for O'Meara having "testified falsely at the arbitration." Later the Conants attempted to intervene in this Court for the same purpose. DEFENDANT'S OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ¶¶ 24-29 (July 25, 2013), *Appx*. at 72.

On September 18, 2012 this Court decided *O'Meara's Case*, 164 N.H. 179 (2012), which disbarred O'Meara from the practice of law for conflicts of interest and lying in the arbitration proceeding. The Conants have never sued O'Meara for malpractice.

STATEMENT OF THE CASE

A month after this Court decided *O'Meara's Case,* the Conants filed in the superior court a petition "to return the fees paid" to O'Meara. PETITION (FOR FEE FORFEITURE) (Nov. 2, 2012) at 1, *Appx*. at 1.They sought "restitution and equitable recovery of fees" and "vacation of the arbitration award" for violation of fiduciary duties in "threatening to withdraw from representation on the morning of the mediation," and "lying to the arbitration panel in the parties' fee dispute." *Id.* ¶¶ 34-44. The Conants claimed the statute of limitations did not apply to them because "[t]he final findings[3] of Mr. O'Meara's fraud and perjury were made by the Supreme Court just one month ago." *Id.* ¶ 43.

The Rockingham County Superior Court (*Marguerite L. Wageling*, J.) heard argument and decided the matter on cross-motions for summary judgment.[4] It held that preclusion doctrines do not apply because "no forum has ever been directly presented with or considered the issue of disgorgement," ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Oct. 24, 2013) at 3, *Appx*. at 132, that statutes of limitations do not apply because O'Meara perpetrated a fraud on the court, *id.* at 4-9, and that O'Meara's fee should be forfeited because he "violated fiduciary duties he owed to the Conants." *Id.* at 10-11. The court then ordered forfeiture of the entire $1,587,000 fee – comprising the undisputed $750,000, and the $837,000 awarded in arbitration. *Id.* at 9-11.

[3]This Court in *O'Meara's Case* was not called on to make such findings. Rather it reviewed findings of the PCC and determined sanctions.

[4]A motion to dismiss was filed, but was deemed untimely, and the matter proceeded to summary judgment. ORDER ON MOTION TO DISMISS (June 24, 2013), *Appx.* at 46.

SUMMARY OF ARGUMENT

Mr. O'Meara first notes that both he and the Conants were parties to a prior fee dispute arbitration, that every issue pressed here was raised and disposed there, and that *res judicata* bars relitigation of the Conant's current claims.

If the case is not issue-barred, than it is time-barred. O'Meara scans the possible junctures at which the Conants were apprised of their cause of action, shows all of them were long before the expiration of the limitations periods, and argues they thus missed their limitations periods.

O'Meara then demonstrates the Conants' excuse for filing late – that O'Meara perpetrated a fraud on the court – is not true. He notes that because of the important need for finality of judgments, the several Supreme Court precedents on the matter erect tall barriers to setting them aside. The law requires a tardy plaintiff to show the alleged fraud was concealed from the norms of litigation and not capable of cross-examination, was part of a concerted scheme, had a demonstrable effect on the outcome, and affected the very integrity of the judicial process – far more than merely O'Meara was an attorney who allegedly lied.

If the Conants are nonetheless allowed to proceed, O'Meara argues that the remedy they urge – automatic fee forfeiture for breach of ethical rules – creates more problems than it solves. It would displace the traditional remedy of malpractice, create uncertainty, interfere with successfully operating attorney-client fee dispute resolution systems, leave lawyers and clients without insurance coverage, pervert the purpose of ethical rules, involve the attorney discipline system in otherwise private fee disputes, and undermine attorney-client relationships by incentivizing clients to seek ethical breaches.

Finally O'Meara points out that if he is liable for forfeiture, there is insufficient data in the record to determine how much.

ARGUMENT

Statutes of limitation exist for good reason, but the plaintiffs here seek to avoid them by legal legerdemain. As dissatisfied litigants, they also seek to invent a new cause of action designed to sidestep the cost of their lawyer.

I. Forfeiture Was Litigated in Arbitration, and *Res Judicata* Bars Revisiting

For *res judicata* to apply, "three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action." *N. Country Envtl. Servs., Inc. v. Town of Bethlehem*, 150 N.H. 606, 620 (2004).

Although this Court has not reached the issue of whether an arbitration award has *res judicata* effect on subsequent litigation. *Tiberghein v. B.R. Jones Roofing Co.*, 156 N.H. 110, 113 (2007) (issue not preserved), it is a common proposition. *Miles v. Aetna Cas. & Sur. Co.*, 589 N.E.2d 314 (Mass. 1992) ("When arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has."); RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1982) ("[A] valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."); 4 AM. JUR. 2D *Alternative Dispute Resolution* § 194 ("[A] valid and final award by arbitration generally has the same effect under the rules of res judicata and collateral estoppel as a judgment of a court, and will bar relitigation of the same claim or issue.").

This is particularly true "[w]here the parties have invested considerable time and resources arbitrating an issue identical to that before a court." *B-S Steel Of Kansas, Inc. v. Texas Industries, Inc.*, 439 F.3d 653 (10th Cir. 2006). Arbitration of disputes regarding attorney's fees

follow the rule. *See, e.g., Kurtz & Perry, P.A. v. Emerson*, 8 A.3d 677, 678 (Me. 2010).

Here there was a five-day arbitration where both the Conants and O'Meara were parties, all the witnesses testified, there was "extensive" pre-arbitration discovery, and O'Meara was subject to lengthy cross-examination. Thus this suit is barred by *res judicata*.

The trial court, however, found it not barred on the grounds that the issue of forfeiture was not presented in the arbitration. But it was.

The arbitration dissenting opinion *quoted and cited* a pleading filed by the Conants in the arbitration proceeding specifically raising forfeiture. The dissent noted that "[t]he Conants also argue that these fiduciary breaches 'favor a return to the Conants of *all* legal fees already received by Mr. O'Meara.' (Conant memo at p. 38-39)." ARBITRATION DECISION, DISSENTING OPINION at 12 n. 5 (emphasis added). According to the dissent, in the Conants' memo at pages 38 and 39 they asked for "all" fees to be returned. This makes clear that the Conants plead forfeiture of not only the undisputed $750,000 already paid, but also requested no additional fee.

Thus the trial court erred in finding the Conants did not litigate forfeiture at arbitration.

This issue is dispositive. Because forfeiture was raised in the arbitration, because both parties here were parties there, and because arbitration awards have preclusive effect, the Conants cannot relitigate the matter, and this Court must reverse.

The Conants suggest that because the arbitration panel believed O'Meara's version of events, *res judicata* should not apply. PLAINTIFFS' OBJECTION TO DEFENDANT'S MOTION TO DISMISS (Apr. 8, 2013) at 9, *Appx*. at 33; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (July 22, 2013) at 15-16, *Appx*. at 50 ("[T]he arbitration panel's decision to award Attorney O'Meara additional fees was plainly premised on their belief in the credibility and good faith of his testimony."); PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY

JUDGMENT ¶ 30 (Aug. 22, 2013).

Although its relevance to the issue of *res judicata* is not clear, the record demonstrates that the arbitrators did not believe O'Meara's testimony. The majority reported only that the testimony encompassed what O'Meara "believed," and the dissent makes clear neither it nor the majority were persuaded. The panel made its award based on the testimony it heard and its calculation of what O'Meara earned.

Res judicata applies to the arbitrators' decision in any event, and this Court must reverse.

II. Conants Missed Their Limitations Period by Several Years

There are several limitations periods in this case. First, the agreement in which the parties committed to arbitration provides a 30-day limitations period:

> The Conants and O'Meara agree that their rights under RSA 542:8 are waived except to the extent that either may seek an order from the New Hampshire Superior Court vacating the arbitrators' award solely for fraud, corruption, or misconduct by the parties or the arbitrators. The Conants and O'Meara agree that if neither party files a motion seeking such relief within 30 days of the date of the arbitrators' award, that award shall be final; if such a motion is filed, the award of the arbitrators shall be final upon the entry of an order by the New Hampshire Superior Court, or if the Superior Court order is appealed … upon entry of judgment by the New Hampshire Supreme Court.

AGREEMENT & RELEASE ¶ 11. That period expired in 2007.

Second, the arbitration statute provides a one-year limitations period:

> At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers.

RSA 542:8; *Suwanchai v. Int'l Bhd. of Elec. Workers, Local 1973*, 528 F. Supp. 851, 861 (D.N.H. 1981) ("New Hampshire law provides a one-year statute of limitations for suits to vacate

arbitration awards."). That period expired in 2008.

Third, for most other actions, including legal malpractice, New Hampshire law provides a three-year limitations period:

> Except as otherwise provided by law, all personal actions … may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

RSA 508:4, I; *Furbush v. McKittrick*, 149 N.H. 426, 430 (2003) ("The statute of limitations for a malpractice action is three years."). Although the Conants waived a malpractice claim, that period expired in 2009 or 2010.

> The discovery rule is two-pronged, and both prongs must be satisfied before the statute of limitations begins to run. First, a plaintiff must know or reasonably should have known that she has been injured; second, a plaintiff must know or reasonably should have known that her injury was proximately caused by conduct of the defendant.

Lamprey v. Britton Const., Inc., 163 N.H. 252, 257 (2012) (citations omitted); *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 712 (2010).

The time runs if the evidence could have been known, *id.* (accountant malpractice unknown until taxpayer received notice from IRS), and was not fraudulently concealed. *See Furbush v. McKittrick*, 149 N.H. 426, 431 (2003) .

The "discovery rule" "is not intended," however, "to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself."

> Rather, once the plaintiff could reasonably discern that he or she suffered some harm caused by the defendant's conduct, the tolling ends. Further, the plaintiff need not be certain of the causal connection; the reasonable possibility that it existed will suffice to obviate the protections of the discovery rule."

Lamprey, 163 N.H. at 257 (citations omitted); *Furbush v. McKittrick*, 149 N.H. at 426.

While such tolling clearly applies to the standard statute of limitations, RSA 508:4, I, it has never been held to apply to the arbitration statute, RSA 542:8, which lacks the language on which tolling is premised.

A. Conants Could Reasonably Discern Their Cause of Action a Long Time Ago

The question here is when the Conants became aware that they had a claim for restitution or forfeiture.

There are several moments at which the Conants knew, or reasonably should have known, both of their alleged injury, and its "causal connection" to O'Meara's alleged wrongful acts:

- March 5, 2006 - The day after the settlement of the underlying collision case

  Ganz phoned O'Meara and informed him the Conants had hired new counsel and that he was in a fee dispute with his former clients. A few days later the collision case was consummated for the Conants by the new attorney. At this time, the Conants had formed their opinion that O'Meara injured them – otherwise they would not have engaged new counsel or commenced a dispute over his fee.

- April 28, 2006 - Conants, O'Meara and Ganz enter settlement agreement and release

  By forgoing their potential malpractice action, putting money in escrow, channeling their fee dispute to an arbitration tribunal, and reserving the opportunity to complain to the attorney disciplinary system, the Conants made clear they knew they had three disputes with O'Meara – a malpractice claim, a fee forfeiture, and an ethics complaint.

- Between April and November 2006 - Pre-arbitration discovery

  None of the pre-arbitration discovery is in the record. According to Attorney Bassett, however, it was "extensive." While it is unknown what discovery revealed, presumably

it gave the Conants some insight regarding O'Meara acts and what injury they might have caused.

- November and December 2006 - Arbitration

  Even if before it could be said the Conants knew only of O'Meara's actions regarding unauthorized settlement and conflicts of interest about his fee during the underlying litigation, by the time they saw him testify and get cross-examined at arbitration, they could not be unaware of his version and whatever emotive effect it had on the panel. And filing a pleading requesting restitution clearly shows ripeness of a fee forfeiture action.

- March 12, 2007 - Arbitration dissent

  The arbitration dissent went into great detail regarding not only the fee dispute, but also (1) all the conflicts of interest and breaches of fiduciary duty that got O'Meara disbarred, (2) the alleged lie O'Meara told – whether or not it was believed, and (3) that there could be grounds for return of the entire fee. At that moment it is undeniable the Conants had requisite knowledge that a suit for damages or forfeiture accrued against O'Meara.

- February 6 and May 11, 2007 - Attorney Bassett's letters to the attorney discipline system

  Individually and collective these two letters apprised the attorney discipline system of all matters that resulted in O'Meara's disbarment – unauthorized settlement, conflicts at mediation, breach of fiduciary duty, and the arbitration testimony – and asked for return of the entire fee. At that moment not only did the Conants have complete knowledge of all causes of action, but the letters concede it.

B. Explanations for Tardiness are Not Lawful Grounds for Tolling

"[T]he primary purpose of a statute of limitations is to prevent plaintiffs from sleeping on their rights and to prohibit the prosecution of stale claims." *Edes v. Verizon Commc'ns, Inc.*,

417 F.3d 133, 142 (1st Cir. 2005) (quotation omitted).

If the Conants thought the arbitration award was unfair or unlawful, or tainted by O'Meara's testimony, they should have brought it to the attention of the superior court in 2007.

If they wanted forfeiture, as early as March 5, 2006 – but at the latest May 11, 2007 when Attorney Bassett sent his second letter – the Conants "could reasonably discern [they] suffered some harm caused by the defendant's conduct." *Lamprey*, 163 N.H. at 257; RESTATEMENT (SECOND) OF JUDGMENTS § 70 (1982) ("[A] judgment in a contested action may be avoided if the judgment … [r]esulted from corruption … upon the court. … A party seeking relief … must … [h]ave acted with due diligence in discovering the facts constituting the basis for relief [and] show that he had made a reasonable effort in the original action to ascertain the truth of the matter.").

The Conants' limitations deadline was a long time ago, but they delayed this suit until November 2012 – many years too late.

The Conants' excuse is that they were waiting for this Court to "conclusively and directly establish that Mr. O'Meara violated his fiduciary duties to the Conants," PETITION at 1, and to make a final "finding of perjury." *Hearing on Motion to Dismiss* (June 11, 2013) at 13. The superior court excused the tardiness on the grounds that had the Conants commenced this suit within the limitations period, "they would have had no additional or new information at that time to present to support this claim." ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT at 6.

But neither finality of findings, nor possessing positive proofs, are reasons for tolling under the law. Certainty of the causal connection is also no reason. *Lamprey*, 163 N.H. at 257. Thus the grounds the Conants' offered, and the grounds on which the court ruled, are both in error, and this Court should reverse.

III. O'Meara's Testimony is Not Fraud on the Court Giving Authority to Vacate Aged Judgment

The Conants seek to get around having missed their limitations period by invoking "fraud-on-the-court."

> A collateral attack upon a judgment is not ordinarily permitted. Finality of solemn adjudications of the courts requires that they be not set aside lightly or except for cogent reasons. If this were not so, there would be no end to litigation; and this is true even when the original judgment has been obtained by perjury or, generally, through other forms of fraud.

City of Chariton v. J. C. Blunk Const. Co., 112 N.W.2d 829, 835 (Iowa 1962).

Historically, the problem of how to set aside a fraudulently-procured judgment was via certain writs "whose names … sound like they were stripped from the pages of an ancient spell book." *See generally*, Dustin B. Benham, *Twombly and Iqbal Should (Finally!) Put the Distinction Between Intrinsic and Extrinsic Fraud Out of Its Misery*, 64 SMU L. REV. 649, 651-52 (2011); Hollee S. Temple, *Raining on the Litigation Parade: Is It Time to Stop Litigant Abuse of the Fraud on the Court Doctrine?*, 39 U.S.F. L. REV. 967 (2005); Jonathan M. Stern, *Untangling A Tangled Web Without Trial: Using the Court's Inherent Powers and Rules to Deny A Perjuring Litigant His Day in Court*, 66 J. AIR L. & COM. 1251 (2001) (focusing on remedies for fraud by plaintiffs in current litigation)[5]; Annotation, *Construction and Application of Provision of Rule 60(b) of Federal Rules of Civil Procedure That Rule Does Not Limit Power of Federal District Court to Set Aside Judgment for "Fraud upon the Court,"* 19 A.L.R. Fed. 761.

Several United States Supreme Court cases govern whether limitations periods may be eclipsed by fraud.

[5]In the mid-20th Century the federal system adopted Rule 60 of the Federal Rules of Civil Procedure to accommodate the issue.

A. *Throckmorton*

In *United States v. Throckmorton*, 98 U.S. 61 (1878), Richardson had applied to a board of commissioners for confirmation of a land grant made to him by the government of Mexico. When doubt was cast on his claim, he traveled to Mexico, met with the former political chief of California when it was under Mexican control, and had him sign and falsely backdate a grant in support of Richardson's claim. The fraudulent documents persuaded the commissioners, and the court confirmed the grant in 1856. Twenty years later the judgment was attacked as fraudulently procured. The Supreme Court held, however, that the judgment stood unless the fraud was "extrinsic or collateral… to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." *Throckmorton*, 98 U.S. at 68.

> Thus, where "there has never been a real contest in the trial or hearing of the case" because of fraud, the fraud is extrinsic and relief will lie. But where a judgment is merely founded on a forged or falsified document or perjured testimony, the fraud is intrinsic to the matters tried, and relief is not available from the judgment by independent action.

Benham, *supra*, at 654-55 (quoting *Throckmorton*, 98 U.S. at 66).

> Many state courts permit relief from judgment on the basis of extrinsic fraud, but not intrinsic fraud, on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments. Fraud is extrinsic when it actually prevents an adversarial trial. It involves conduct which is collateral to the issues tried in a case. In other words, extrinsic fraud is a fraud on the court. Proof of extrinsic fraud necessarily requires evidence not found in [the] record, and a party does not have a claim for relief from a judgment on the basis of extrinsic fraud if he or she failed to exercise due diligence in discovering the existence of facts or documents during the underlying litigation. Intrinsic fraud occurs within the subject matter of the litigation, and it includes such things as falsified evidence, forged documents, or perjured testimony. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Accordingly, after the time for seeking a new trial has expired and any appeals have been exhausted, a final judgment may not be directly attacked and set aside on the ground that evidence has been suppressed, concealed, or falsified because such fraud is intrinsic rather than extrinsic.

47 AM. JUR. 2D *Judgments* § 696.

> This rule is based upon the underlying principles that there must be an end to litigation, and that an issue which has been tried and passed on by the first court should not be retried in an action for relief against the judgment, since otherwise litigation would be interminable; whereas in the case of extrinsic fraud, relief is granted on the theory that such fraud has prevented the unsuccessful party from fully presenting his case, and hence that there has never been a real contest before the court on the subject-matter of the suit.

Comment, *Criterion of Extrinsic Fraud as Distinguished from Intrinsic Fraud, as Regards Relief from Judgment on Ground of Fraud*, 88 A.L.R. 1201 (citing numerous cases); *cf.*, *Bussey v. Bussey*, 95 N.H. 349, 350 (1949) (denying dissolution of divorce decree).

Even if the *Throckmorton* ruling feels unfair, it preserves the finality of judgments where the standard tools of litigation are available to uncover unreliable documents. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."); *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (The constitution "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

In the Conants' suit against O'Meara, there is only intrinsic fraud. That is, to the extent the arbitrators ruled in reliance on O'Meara's testimony, there was "a real contest" comprising 190 pages of cross-examination regarding the reliability of his statements. *Bricker v. Sceva Speare Mem'l Hosp.*, 115 N.H. 709, 711 (1975) (no fraud on the court where the "matters were or could have been explored at the trial itself"). Accordingly, *Throckmorton* – as precedent and policy – prevents attack on the arbitrators' award.

B. *Hazel-Atlas*

The Conants and the superior court relied on the Supreme Court's seminal opinion on reopening old judgments. *Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238 (1944). In *Hazel-Atlas*, Hartford-Empire sought a patent on a glass-making machine. Its lawyers had a supposedly independent expert take authorship for a phony article lauding the machine, but actually written by the lawyers, which persuaded the court to uphold the patent in Hartford's favor. A decade later, unrelated litigation revealed the fraud, and Hazel-Atlas sued to set aside the judgment Hartford-Empire had won against it. The Supreme Court held:

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of *after-discovered evidence*, is *believed possibly to have been guilty of perjury*. Here … we find a deliberately planned and carefully executed scheme to defraud … the Circuit Court of Appeals.

Hazel-Atlas, 322 U.S. at 245 (emphasis added). In accord with the *Throckmorton* precedent, however, the holding applies only to "after-discovered evidence." *Id.* Moreover, it applies only to a "deliberately planned and carefully executed scheme to defraud," and not merely to "a judgment obtained with the aid of a witness who … is believed possibly to have been guilty of perjury."

> The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination.… Were mere perjury sufficient to override the considerable value of finality after the statutory time period … has expired, it would upend the [limitations period].

George P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995). Finally, *Hazel-Atlas* applies only when the fraud undermines the integrity of the judicial process itself:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas, 322 U.S. at 246. *See Bricker v. Sceva Speare Mem'l Hosp.*, 115 N.H. 709 at 711 ("[T]o warrant relief the fraud alleged must lead to the conclusion that the process of justice was thwarted or perverted."). *See also Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129, 133 (1st Cir. 2005) (fraud on the court is reserved for "the most egregious conduct involving a corruption of the judicial process itself"); *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998) ("A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as bribery of a judge or jury or fabrication of evidence by counsel."); *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960) (fraud must "show an unconscionable plan or scheme which is designed to improperly influence the court in its decision"); 11 Wright & Miller, FED. PRAC. & PROC. § 2870 (3d ed.) (fraud must "subvert the integrity of the court itself").

Thus, on five separate grounds *Hazel-Atlas* does not apply here.

First, O'Meara's belief about events was not "after-discovered," but was known and discernable during his arbitration testimony.

Second, there is nothing in the record to suggest O'Meara's rendition was "deliberately planned" or "carefully executed." To the contrary, the majority of the arbitration panel noted at most that O'Meara's testimony revealed he "believed" the parties had agreed on a $2 million fee. *Cf., Staples v. Dix & Staples Co.*, 85 N.H. 115 (1931) (receiver deliberately concealed he had

actively discouraged sale and had made no attempt to dispose of property).

Third, the record is clear that the judgment was not "obtained with the aid" of the testimony. *Aoude v. Mobil Oil Corp*., 892 F.2d 1115, 1120 (1st Cir. 1989) ("bogus agreement clearly had the capacity to influence the adjudication"); *State v. Moquin*, 105 N.H. 9 (1963) (fraud on the court where passenger assumed responsibility for actual driver's violations); *cf. Rasquin v. Cohen*, 92 N.H. 440 (1943) ("When a party is given a verdict and it later appears that he testified falsely on a *material* issue, and the evidence proves … the false testimony is dishonest, the verdict will be set aside.") (emphasis added); *Craft v. Thompson*, 51 N.H. 536, 540 (1872) (that fact finder "misled by false evidence" is not a "suggestion of fraud or misbehavior"). Indeed, the dissenting arbitrator wrote that O'Meara's testimony was "not persuasive" and emphasized that the majority did not believe it either, and this Court noted "the arbitration panel likely concluded that O'Meara testified falsely." *O'Meara's Case*, 164 N.H. at 179.

Fourth, even if O'Meara's story was not true, at most he was a "witness," from whom the Supreme Court in *Hazel-Atlas* explicitly limited its holding. *State ex rel. Rich v. Wolfe*, 335 P.2d 884, 887 (Idaho 1959) ("It is a general rule of law that a judgment may not be impeached in collateral proceedings, by a party or privy to it, for fraud, collusion, or false testimony."); *Fisher v. De Marr*, 174 A.2d 345, 350 (Md. 1961) ("Perjury is held to be fraud intrinsic and within the matters and issues tried and determined and not extrinsic and collateral fraud, as it would have to be to be a basis for relief.").

Fifth, although the Conants are a "single litigant," O'Meara's story – unlike the supposedly independent article about the glass machine – was not believed and therefore did not attack the integrity of the judicial system itself.

Hazel-Atlas is so disturbing because lawyers, acting in their representative capacity,

purposely mislead a court. But that does not turn every untruth leaving a lawyer's lips into a fraud on the court.

> The design of the adversary process distinguishes between attorneys appearing in … various capacities. For example, an attorney appearing in court on behalf of a client owes the court a duty of candor that is paramount to his or her client's interests.… [W]hen they appear in a representative capacity, attorneys are officers of the court, and their conduct, if dishonest, would constitute fraud on the court.
>
> A different result occurs where an attorney testifies as a fact witness or participates as a party. The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination. … [W]hereas the involvement of an attorney in a representative capacity impairs the ordinarily adequate mechanisms of discovery and cross-examination, the involvement of attorneys as witnesses and parties does not.

Glenwood Farms, Inc. v. O'Connor, 666 F. Supp. 2d 154, 179-80 (D. Me. 2009) (quotations and citations omitted).

Although O'Meara was a lawyer, he was not acting as an officer of the court when he testified as a fact witness. Any untruth he might have uttered was not automatically converted into a "fraud on the court."

Because its several requirements were not met, the *Hazel-Atlas* doctrine does not apply.

C. *Beggerly*

The Supreme Court's most recent statement on the issue is *United States v. Beggerly*, 524 U.S. 38 (1998). There the federal government had bought land; but later, evidence was discovered at the National Archives questioning the validity of the sale. The seller sued to set aside the sale saying the government had failed to "thoroughly search its records and make full disclosure" of the archive documents. *Beggerly*, 524 U.S. at 47. The Supreme Court held that the period of limitations barred the action because the non-disclosure was peripheral to the central

issue, and because there was no "grave miscarriage of justice." *Id; see also Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998) (withheld psychological report).

O'Meara's testimony, like the government's non-disclosure in *Beggarly*, was at most peripheral to the arbitrators' award because nobody apparently believed it. In addition, the Conants were not the victim of a "grave miscarriage of justice," but rather the beneficiaries of O'Meara's competent work, even if they later wanted to claim it was overpriced or burdened with questionable ethics.

Thus, the *Hazel-Atlas* doctrine, as clarified or narrowed by *Beggarly* and *Throckmorton*, provides the Conants with no grounds on which to avoid the statute of limitations. O'Meara's testimony – serious enough to get him disbarred – was not after-discovered, was not denied the "crucible of cross-examination," was not material to the outcome, was not offered as an officer of the court, was not "deliberately planned and carefully executed," was not a "grave miscarriage of justice," and was not an attack on the integrity of the judicial process. Accordingly, his belief does not constitute a "fraud on the court" so as to set aside the arbitration judgment.

D. High Threshold of "Good Cause" to Set Aside Aged Judgments

The court below held that "[a]s a general proposition, New Hampshire courts have power to set aside, vacate, modify, or amend their judgments for good cause shown." ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Oct. 24, 2013) at 6, *Appx*. at 132. To support its authority, it cited to two decisions of this Court: *Adams v. Adams*, 51 N.H. 388, 396 (1872), and *Lamarre v. Lamarre*, 84 N.H. 441, 444 (1930).

Both cases set a high threshold for "good cause" however. In *Adams*, the wife sought to set aside a divorce after the husband, "knowing [wife's] residence, caused the notice to be published in a newspaper that he had every reason to believe neither she nor her friends would

see, for the purpose of concealing from her any notice of the proceedings, [such] that the divorce was obtained by fraud and perjury." *Adams*, 51 N.H. at 399-400.

In *Lamarre*, a wife was injured when her husband was driving the couple's car; she sued him for damages and won. While the decision does not give any indication of husband's behavior, his carrier cancelled his insurance "[i]n view of your failure to cooperate in the defense of this case and your conduct during the trial." *Lamarre*, 84 N.H. at 441. The company, a non-party, then sought to annul the judgment between husband and wife, and this Court addressed whether it had standing.

> The company's motion presupposes a judgment, valid until set aside, and seeks relief therefrom because of alleged fraud, mistake, collusion and conspiracy. A judgment may always be annulled for sufficient cause. Fraud to which the mover is not a party, or a mistake not due to his culpable negligence, may afford such a sufficient cause.

Lamarre, 84 N.H. at 444. Because the company's "motion present[ed] questions of fact, namely, whether (1) the judgment was procured by fraud or (2) resulted from a remediable mistake, and if either (3) whether, under the circumstances shown, justice requires that the judgment be set aside and the company be permitted to try the case upon its merits," this Court remanded for fact-finding.

Adams shows the sort of deliberate fraud on the integrity of the judicial system addressed in *Hazel-Atlas*, and not authority by New Hampshire courts to set aside judgments on some lower standard. *Lamarre* sets out the general rule that judgments may be set aside for fraud, and also does not suggest any lower standard. Thus, to the extent the court cited *Adams* and *Lamarre* for the proposition that it can set aside a judgment for something less, it was in in error.

E. Court Erred in Finding "Fraud on the Court"

O'Meara's arbitration testimony was intrinsic evidence, known at the time and not after-discovered, and subject to lengthy cross-examination. The record confirms that while perhaps untruthful, the story O'Meara told was merely his own belief, and not something "deliberately planned" or "carefully executed."

Because O'Meara was not acting in a representative capacity and his testimony had no apparent effect on either the majority or dissenting arbitration decisions, the judgment was not "obtained with the aid" of deceit. The testimony affected not even a "single litigant," and certainly not the entire judicial system.

The Conants had adequate remedies at law – they could have appealed the arbitration award to the superior court, and might have sued O'Meara for malpractice or restitution within the three-year statute of limitations. But at no time did O'Meara perpetrate the type and scope of fraud necessary to reopen a many-year-old judgment, and this Court should reverse.

IV. Fiduciary Fee Forfeiture is a Dangerous Route Around Traditional Remedies

A. Differing Standards of Proof Between Traditional Remedies and Fee Forfeiture

In a legal malpractice claim the plaintiff must prove that the lawyer was negligent, but also that the lawyer's breach caused the plaintiff harm. Even where causation appears obvious, an expert witness is necessary because "[t]he trier of fact must be able to determine what result should have occurred if the lawyer had not been negligent." *Carbone v. Tierney*, 151 N.H. 521, 528 (2004) (quotation omitted).

The Conants argued, and the arbitration dissent ruled, however, that in a breach of fiduciary claim, harm – and therefore causation – need not be plead or proved. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (July 22, 2013) at 12-14, *Appx*. at 50 (citing *Woods v. City*

Nat. Bank & Trust Co. of Chicago, 312 U.S. 262, 268 (1941); *Reinhold v. Mallery*, 135 N.H. 31 (1991); and *Estate of McCool*, 131 N.H. 340, 347 (1988)); RESTATEMENT (SECOND) OF AGENCY § 469); DECISION, DISSENTING OPINION (Mar. 12, 2007) at 22-23, *Appx*. at 183.

> Under Texas law … [w]hen only fee forfeiture is at issue, actual harm need not be proven because it is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's compensation is not only for specific results but also for loyalty.

Huber v. Taylor, 469 F.3d 67, 77 (3d Cir. 2006) (quotations and citations omitted).

B. Many Problems with Automatic Fiduciary Fee Forfeiture

Fee forfeiture[6] is sometimes justified under agency principles – the agent "is not entitled to be paid when he has not provided the loyalty bargained for and promised." *Burrow v. Arce*, 997 S.W.2d 229, 237-38 (Tex. 1999). It is also justified by deterrence – "the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust." *Id.* at 238.

But there are many problems with automatic fiduciary fee forfeiture. First, the stakes may be very high, demonstrated well in this case where they are a $1.5 million issue.

Second, the duties of a fiduciary are fuzzy and not easily susceptible of definite delineation.

> A fiduciary relationship has been defined as a comprehensive term and exists wherever influence has been acquired and abused or confidence has been reposed and betrayed. In doubtful cases, whether the conduct of two parties was such that a fiduciary relationship existed between them is a question of fact for the trier of fact.

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[6]While the terms "disgorgement" and "forfeiture" are often used interchangeably in this context, as a technical matter one *disgorges* ill-gotten gains but *forfeits* an agreed-upon price, and thus the issue here is forfeiture and not disgorgement. George P. Roach, *Texas Remedies in Equity for Breach of Fiduciary Duty: Disgorgement, Forfeiture, and Fracturing*, 45 ST. MARY'S L.J. 367, 373-77 (2014)

Lash v. Cheshire Cnty. Sav. Bank, Inc., 124 N.H. 435, 438 (1984) (quotations and citation omitted). *See also* Sande Buhai, *Lawyers As Fiduciaries*, 53 ST. LOUIS U. L.J. 553 (2009) (arguing for expansive definition of lawyer fiduciary duty); Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach As Legal Malpractice*, 34 HOFSTRA L. REV. 689 (2006) (demonstrating difficulty of defining duty). Automatic forfeiture where the law is unclear may raise due process concerns.

Third, fiduciary fee forfeiture could largely displace legal malpractice. Because of the lower burdens and automatic disgorgement, fiduciary fee forfeiture may be a much faster and cheaper route to the lawyer's pocket than malpractice damages.[7] For the same reason, it may displace unjust enrichment actions.[8]

Fourth, it may interfere with the New Hampshire Bar Association's successful fee dispute resolution system. <http://www.nhbar.org/for-the-public/drc.asp> ("The NHBA Dispute Resolution Committee attempts to resolve disputes between NH attorneys and their clients that do not rise to the level of an ethical rule violation.").

Fifth, malpractice insurance policies may not cover, on a variety of grounds, breach of fiduciary duty. Annotation, *Lawyers' Professional Liability Insurance*, 92 A.L.R.5th 273 §§ 10(a)-10(c), 21 (2001). This would leave both lawyers and clients exposed despite New Hampshire's policy favoring lawyers having errors-and-omissions coverage. N.H. RULES PROF. COND. R. 1.19 ("A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not

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[7]Similarly, if the Consumer Protection Act, RSA 358-A, were held to apply to lawyers, *see Rousseau v. Eshleman*, 129 N.H. 306, 310 (1987) (*Thayer*, J., concurring), automatic fiduciary fee forfeiture might also displace such statutory causes of action.

[8]The Conants waived an unjust enrichment claim when they conceded O'Meara's representation achieved a reasonable result.

maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance ceases to be in effect.").

Sixth, automatic forfeiture perverts the purpose of the professional practice rules. New Hampshire's Rules of Professional Conduct state:

> The Rules are not designed to be a basis for civil liability. The purpose of the Rules can be subverted when the Rules are invoked by opposing parties as procedural weapons. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. Violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer from a position or from pending litigation. Nevertheless, as the Rules establish a standard of conduct for lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

N.H. RULES PROF. COND., *Statement of Purpose*. *See also O'Meara's Case*, 164 N.H. at 180 ("[T]he paramount injury here is injury to the profession."); *Conner's Case*, 158 N.H. 299, 303 (2009) ("When determining whether to impose the ultimate sanction of disbarment, we focus not on punishing the offender, but on protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future."); *Morgan's Case*, 143 N.H. 475, 477 (1999) ("[T]he purpose of the court's disciplinary power is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future.").

Seventh, the Conants suggest this fiduciary fee forfeiture litigation is not exactly a new action, but merely equity enforcing or implementing this Court's existing disbarment decision. PETITION (FOR FEE FORFEITURE) (Nov. 2, 2012) at 1, 7-8, *Appx*. at 1 ("This relief is occasioned and supported by" *O'Meara's Case*); PLAINTIFFS' OBJECTION TO DEFENDANT'S MOTION TO

DISMISS[9] (Apr. 8, 2013) at 5-6, *Appx*. at 33; *Hearing on Motion to Dismiss* (June 11, 2013) at 12-13 ("But we're not asking the court to decide it. The supreme court has decided it, and we're only asking the Court to take that result and lead to the next – the natural result.").

Equity generally steps in, however, only in the absence of adequate legal remedies. *Exeter Realty Corp. v. Buck*, 104 N.H. 199, 200-01 (1962) (discussing principle); *Craft v. Thompson*, 51 N.H. 536 (1872) (equity will set aside arbitration award procured by perjury if "injured party could not have availed himself in a court of law" of adequate remedy). The Conants had at least two remedies at law – appeal of the arbitration decision to the superior court within statutory or agreed-upon deadlines, and a (waived) malpractice action within the statute of limitations. This suit subverts that principle.

Eighth, automatic fiduciary fee forfeiture incentivizes incessant re-inspection:

> In any breach-of-fiduciary-duty action involving a complex representation, the parties and the court could find themselves combing through the most minute details of attorney work product and attorney-client communications for potential breaches. Few courts will relish having to decide the issue of whether a lawyer took too long to answer a client's phone call, whether the lawyer was as solicitous of the client's concerns as he or she should have been, or whether the lawyer's work in drafting a winning motion was, despite the win, not entirely competent.

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[9] In their pleading the Conants wrote:

"[T]he Conants are not asking this Court to rule that Mr. O'Meara breached his fiduciary duties or committed perjury at the arbitration hearing. That is, they are not bringing claims for breach of fiduciary duty or perjury in the first instance. Instead, the Conants are claiming that Mr. O'Meara has already been found liable for breach of fiduciary duty and perjury. This Court doesn't need to resolve those issues. They're already been decided by the Supreme Court. The Conants arc only asking this Court to follow the binding effects of the Supreme Court's ruling to their natural conclusion.

"This is a critical and dispositive difference. In the typical case involving a request to vacate an arbitration award for fraud, the claimant is seeking to establish the elements of perjury through clear and convincing evidence in the first instance. But here, the PCC has already found that Mr. O'Meara perjured himself during testimony to the Arbitration Panel, and the Supreme Court affirmed that finding over Mr. O'Meara's challenge on appeal.

"Mr. O'Meara was conclusively found to have committed perjury during the arbitration hearing. Thus, this Court, acting in equity, need only follow that outcome to its natural conclusion." PLAINTIFFS' OBJECTION TO DEFENDANT'S MOTION TO DISMISS (Apr. 8, 2013) at 5-6, *Appx*. at 33 (citations omitted).

> Under a regime in which any breach of a fiduciary duty would lead to the automatic disgorgement of all fees, however, a plaintiff would have every incentive to ask a court to perform this analysis.

Michele Hangley, *Fee Disgorgement in Attorney Breach-of-Fiduciary-Duty Cases*, 9 ABA COMMERICAL & BUSINESS LITIGATION (No. 4, Summer 2008) at n. 6; *cf., Burrow v. Arce*, 997 S.W.2d at 240 (noting argument that "forfeiture of an attorney's fee without a showing of actual damages encourages breach-of-fiduciary claims by clients to extort a renegotiation of legal fees after representation has been concluded, allowing them to obtain a windfall," but finding "that opportunistically motivated litigation to forfeit an agent's fee has [not] been a serious problem.").

Ninth, it creates perverse incentives. If violation of ethics rules result in automatic fee forfeiture, clients may be inclined to file disciplinary grievances not necessarily to protect the profession, but with an eye toward pecuniary payoff. Such abuse would burden the attorney disciplinary system, and put it in the middle of what are otherwise private disputes.

Tenth, automatic fiduciary fee forfeiture may open doors to manipulative clients. "The client has a right to terminate the attorney-client relationship at any time, but there are clients who do this in a manipulative manner in order to attempt to beat the fee." Bruce W. Felmly, Esq., *Representing the Plaintiff in the Wrongful Death Case: Ten Practical Considerations for Maximizing Recovery* (NH Bar Assoc. CLE 1999) at 102 (available at UNH School of Law Library); *Zaklama v. Mount Sinai Med. Ctr.*, 906 F.2d 650, 653 (11th Cir. 1990) (Zaklama's attempt to renege on a valid contingency fee agreement is reprehensible.… A client may not accept the benefits of a valid contingency fee contract and subsequently contest his obligations thereunder."); *Goodrich v. McDonald*, 19 N.E. 649, 651 (N.Y. 1889) (lien on judgments are "a device invented by the courts for the protection of attorneys against the knavery of their clients

by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained."); *see generally*, Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed under Contingent-fee Contract Is Discharged Without Cause*, 56 A.L.R.5th 1.

C. Forfeiture Only from the Time and to the Extent of the Breach

For these reasons, most jurisdictions visiting this issue have employed a flexible rule, reflected in the approach taken by the Restatement of the Law Governing Lawyers. Hangley, *supra*, at n. 17 (collecting cases).

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 37 (2000).

> [A]utomatic and complete forfeiture [is not] necessary for the remedy to serve its purpose. On the contrary, to require an agent to forfeit all compensation for every breach of fiduciary duty, or even every serious breach, would deprive the remedy of its equitable nature and would disserve its purpose of protecting relationships of trust.
> …
> It would be inequitable for an agent who had performed extensive services faithfully to be denied all compensation for some slight, inadvertent misconduct that left the principal unharmed, and the threat of so drastic a result would unnecessarily and perhaps detrimentally burden the agent's exercise of judgment in conducting the principal's affairs.

Burrow v. Arce, 997 S.W.2d at 241, 244 (adding additional element to Restatement test – "the public interest in maintaining the integrity of attorney-client relationships").

This Court's precedents do not support an automatic forfeiture rule. Rather, in every known case in which there has been complete forfeiture, the breach of duty occurred at the

beginning of the fiduciary relationship, with that timing causing forfeiture of the entire fee. *See, e.g., Doherty's Case*, 142 N.H. 446, 447-48 (1997) ("*At the outset of his representation*, the [lawyer] accepted a nonrefundable … retainer…. The [lawyer] did not deposit this initial payment into a separate client trust account, but instead deposited the money directly into his general office account and expended the funds for his own purposes.") (emphasis added); *Reinhold v. Mallery*, 135 N.H. 31 (1991) (fiduciary duty compromised at inception because real estate broker owned land adjacent to his client's at time relationship was established); *Estate of McCool*, 131 N.H. 340 (1988) ("Because [the] representation … was fraught with conflicts of interest *from its inception*, we reverse the … court's award of partial … fees.") (emphasis added).

In *Guardianship of Dorson*, 156 N.H. 382, 387 (2007), this Court wrote, "*When* a breach of trust occurs, the beneficiary of the trust is entitled to be put in the position he would have been if no breach of fiduciary duty had been committed." (emphasis added).

Thus New Hampshire's approach to forfeiture, like the Restatement's, allows a court to order forfeiture only after the time, and only to the extent, of the breach. Automatic fee forfeiture, urged by the Conants here, sweeps too broadly, and creates more problems than it solves.

V. If There is Forfeiture, Remand is Necessary to Determine Amount

The Conants argue that O'Meara should be made to automatically forfeit every dollar involved in his representation of the Conants, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT at 12-132, and the court agreed. But that position does not comport with *Dorson*, *McCool*, *Doherty*, or *Reinhold,* sensible administration of justice, nor the facts of this case.

First, costs advanced on behalf of the client do not get given back. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 37 cmt. e. The arbitration dissent estimated this

amount was "approximately $37,000." ARBITRATION DECISION, DISSENTING OPINION at 7.

Second, although he did not keep time records, O'Meara spent ten months and considerable effort on the case, and did a commendable job preparing for trial. The arbitration dissent estimated that amount at around $400,000. ARBITRATION DECISION, DISSENTING OPINION (Mar. 12, 2007) at 25.

Third, even if the arbitration dissent found it excessive, nobody disputes that the Conants agreed $750,000 was a reasonable fee.

Fourth, when a lawyer performs valuable services before the misconduct began, "to the extent it has conferred a benefit on the client," the lawyer should be compensated. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 37 cmt. e. *See also Cal Pak Delivery, Inc. v. United Parcel Serv., Inc.*, 60 Cal. Rptr. 2d 207, 216 (1997) (even where egregious misconduct, partial fee recovery appropriate to avoid client's unjust enrichment); *Fairfax Sav., F.S.B. v. Weinberg & Green*, 685 A.2d 1189, 1209 (Md. App. 1996) (even where conflict, lawyer provided valuable service); *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller*, 629 So. 2d 947, 954 (Fla. App. 1993) ("The lawyer's services were … substantial by any measure.").

Fifth, courts generally limit forfeiture only to the period of fiduciary disloyalty, and take into account the actual harm suffered. *Guardianship of Dorson*, 156 N.H. at 382; *Musico v. Champion Credit Corp.*, 764 F.2d 102, 112-13 (2d Cir. 1985) (forfeiture limited to specific services that agent performed wrongfully); *In re Life Ins. Trust Agreement of Julius F. Seeman*, 841 P.2d 403, 405 (Colo. App. 1992) (denial only of fees for services directly affected by conflict); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 16 Misc. 3d 1051, 1067, 843 N.Y.S.2d 749, 764 (Sup. Ct. 2007) ("Forfeiture of compensation will, however, be limited to the period of the disloyalty.").

Here, the breach of O'Meara's fiduciary duty came after he proficiently prepared for trial, and took place only in the days leading up to the ultimate settlement. His arbitration testimony was not until after the representation ended. The Conants acknowledged O'Meara's work produced reasonable results and a $11.5 million settlement, and thus they got value from his efforts. Complete forfeiture would unjustly deprive O'Meara of fees actually earned, and unjustly enrich the Conants for value already received.

If this Court determines that O'Meara should suffer forfeiture in some amount, there are insufficient facts in the record on which to base the amount of forfeiture. Remand is thus necessary.

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the court below.

Respectfully submitted,

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By his Attorney,

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Dated: July 15, 2014

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Timothy O'Meara requests that Attorney Joshua L. Gordon be allowed oral argument because the issue involved in this matter are novel in New Hampshire.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on July 15, 2014, copies of the foregoing will be forwarded to Jeffrey C. Spear, Esq.; Ralph F. Holmes, Esq.; and William D. Pandolph, Esq.

Dated: July 15, 2014

Joshua L. Gordon, Esq.

ADDENDUM