State of New Hampshire
Supreme Court

NO. 2004-0253

2004 TERM

JULY SESSION

A&B LUMBER COMPANY, LLC

v.

BEVERLY & GEORGE VRUSHO

BRIEF OF DENISE BEVERLY & GEORGE VRUSHO

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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QUESTIONS PRESENTED

1. Did the court err in allowing a claim of unjust enrichment to go to trial when the plaintiff knew of its contract action against the defendants in 1997, more than three years before bringing suit, and when the actions of the defendants' son do not toll the limitations period as to the defendants?

2. Did the jury err in the amount of its verdict (or alternatively did the court err in not granting a remittitur) when the largest possible amount of damages the evidence can support is between $150,000 and $187,500, but the award was $234,000?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Beverly and George Vrusho purchased 28 acres on Northwood Lake in Northwood, New Hampshire in 1993. They initially intended the land for their own dwelling. *1/7/04 Trn.* at 86. But as illness took over the elderly Worcester, Massachusetts couple, they stopped visiting, and allowed their son, Paul Vrusho, to live in the existing house. Beverly and George gradually lost interest in the land, *1/7/04 Trn.* at 95-97, and Paul kept them largely ignorant of his personal and business activities there. *1/7/04 Trn.* at 98-101; *1/7/04 Trn.* at 109-119 (plaintiff alleging Paul forged George's signature on official documents associated with permitting improvements).

In 1995 Paul contracted with A&B Lumber to supply materials and services to build a barn and large horse riding arena. He signed a note calling for payment of $139,820 in principal and 9 percent interest, to be paid in six monthly installments, the last of which was due in May 1996. *See 1/7/04 Trn.* at 32-33.

The improvements were built, but Paul didn't pay. Thus in April 1997, A&B sued Paul on the note. *1/7/04 Trn.* at 35. In 1998, Paul and A&B stipulated to a judgment of $145,000 in principal and 8 percent interest, to be paid in ten installments. *See 1/7/04 Trn.* at 36-37. A&B did not name Beverly and George in the suit, and no judgment was entered against them.

Paul still didn't pay, and A&B again attempted collection. In June 2000, in exchange for A&B's promise to delay legal action for two years, Paul reaffirmed his debt and assigned some assets to A&B. *1/7/04 Trn.* at 38. Since that time, Paul made just one payment of $10,000, and failed to forward to A&B the proceeds of the assigned assets.

In short, A&B can be righteously angry at Paul.

Even though A&B admits it knew the land belonged to Beverly and George and could

have sued them as early as 1996, *1/7/04 Trn.* at 51, it never made any attempt to contact them, or to collect money from them. *1/7/04 Trn.* at 43. As owners, Beverly and George may have been unwittingly enriched by Paul's failure to pay debts he incurred. *See Pella Windows and Doors, Inc. v. Faraci*, 133 N.H. 585, 596 (1990).

Frustrated by Paul's duplicity, in May 2003 A&B sued Beverly and George. It is not disputed that the statute of limitations for this claim is three years. RSA 508:4, I. The limitations period began to run no later than A&B's discovery of the enrichment, RSA 508:4, I, which was in May 1996 when it became clear that Paul had defaulted on the original note. The Merrimack County Superior Court (*Kathleen A. McGuire*, J.) agreed that the "initial breach of contract . . . occurred sometime prior to April 10, 1997, the day A&B brought suit against Paul Vrusho." ORDER, *NOA* at 8.

The court, however, found that because *Paul* twice reaffirmed his obligation to pay, the limitations period began anew in June 2000, making A&B's suit against *Beverly and George* timely. ORDER, *NOA* at 9.

The case thus went to trial, resulting in a verdict for A&B.

The plaintiff's expert appraiser testified as to damages. Using a variety of methods, he estimated that the total value of the improvements upon the land were worth $250,000, *1/7/04 Trn.* at 166-168, and that A&B's contribution of materials and design services accounted for between 60 percent and 75 percent of the value of the improvements. *1/7/04 Trn.* at 169. Although the expert did not do the math, based on this testimony, the value of the A&B's contribution to the property's improvements was between $150,000 and $187,500.

Upon the jury's award of $280,000, Beverly and George requested a remittitur. The court

granted a minor reduction, but nonetheless allowed the award to remain at an amount substantially higher than the evidence can support.

This appeal followed.

SUMMARY OF ARGUMENT

Beverly and George Vrusho first argue that they are not liable to A&B Lumber because the time for a suit by A&B against them is barred by a three-year statute of limitations, which began to run in May 1996 and expired long before May 2003 when they were sued. They argue that although Paul twice acknowledged his debt to A&B, thereby extending *his* period of limitations, because Beverly and Paul were not parties to either A&B's suit against Paul nor to the acknowledgments, their period of limitations was not extended. They similarly argue that laches also bars such a late suit against them.

Second, Beverly and George note that the testimony as to damages allows a maximum award of $187,500, but that the jury erroneously awarded $280,000. They argue that because the award cannot be sustained by the evidence, it should be reduced.

ARGUMENT

I. Suit Against Beverly and George is Barred by the Statute of Limitations

When one acknowledges a debt, the law has long held that the statute of limitations is tolled. *Exeter Bank v. Sullivan*, 6 N.H. 124, 134 (1833) ("It is . . . well settled, that an acknowledgement of a subsisting debt, which the party is liable and willing to pay, does, in general, amount to evidence of a promise which may take an action of assumpsit out of the statute" of limitations.). The acknowledgment of a debt is essentially a contract to waive or extend the limitations period. *Id.* To toll the statute of limitations, there must be:

> a direct and unqualified admission by a debtor within the statutory period prior to the commencement of the action, of a subsisting debt which he is liable and willing to pay, [and that this promise] is sufficient evidence of a new promise which will prevent the statute from operating as a bar to a recovery of the debt.

Levensaler v. Batchelder, 84 N.H. 192, 194 (1929) *quoted in, Soper v. Purdy*, 144 N.H. 268 (1999) (statute of limitations tolled because acknowledgment contained both admission of debt and new promise to pay); *Engel v. Brown*, 69 N.H. 183 (1897); *but see Russell v. Copp*, 5 N.H. 154 (1830) (statement insufficient to toll limitations: "The defendant said he thought he had paid it. But if any thing was due he supposed he must pay it as his father was dead.").

The statute of limitations is tolled, however, only as to the person who made the acknowledgment. *See* 54 C.J.S. *Limitations of Actions* § 262 ("As a general rule, a promise or acknowledgment must be made by the party to be charged or someone duly authorized by him and not by a stranger.").

> There are certain fundamental principles relating to an acknowledgment of a debt that must exist before it is sufficient to extend the time for the filing of an action upon an indebtedness, among other things the acknowledgment of the indebtedness must be an unconditional promise to pay . . . and, secondly, the

> acknowledgment . . . to pay must be made by the parties from whom the debt is due to the parties to whom the debt is due, or to his or her authorized agent.

Root v. Thomas, 160 S.W.2d 46, 47 (Ark. 1942). As long ago as 1833, this Court wrote:

> If one . . . debtor admits that he owes the debt, and says nothing to the contrary, it may be inferred, from his silence, that he is willing to pay. But his silence can furnish no ground to presume that another, who is absent, is willing to pay.

Exeter Bank v. Sullivan, 6 N.H. 124, 137 (1833).

Recent New Hampshire law is likewise explicit on this issue. In *Premier Capital v. Gallagher*, 144 N.H. 284 (1999), Gallagher wore two hats. He was president of Gallagher's Sports Center, Inc., and was also the personal guarantor of a note made by the corporation. When the corporation didn't pay on the note, the creditor sued Gallagher, as guarantor, but only after the statute of limitations had run. This Court found that any actions of the corporation that might toll the limitations period did not apply to Gallagher personally:

> A *maker's* payments or acknowledgments of liability indicating a willingness to pay the debt will toll the statute of limitations for an action against the *maker*, assuming the circumstances give rise to an implied promise to renew the debt, but they will not, ordinarily, diminish a guarantor's defense of staleness.

Gallagher, 144 N.H. at 286-87 (emphasis added); *Holt v. Gage*, 60 N.H. 536, 542 (1881) (limitations not tolled as to defendant where: "The defendant took no part in the conversation when [another] told the plaintiff to wait, and he should have his pay.").

Gallagher is on point. In Beverly and George's case, they stand in the same position as Gallagher personally. They neither acknowledged the debt nor ever expressed a willingness to pay it. Even if they were aware of the improvements to their land – an issue well contested during trial – awareness "is of no consequence . . . because . . . awareness does not constitute an acknowledgment of an existing debt and a willingness to pay." *Gallagher*, 144 N.H. at 287,

citing Newell v. Clark, 73 N.H. 289, 292 (1905) and *Holt v. Gage*, 60 N.H. 536, 542 (1881).

Gallagher and *Soper* concern, as does Beverly's and George's situation, a note. The point of law that an acknowledgment tolls the statute of limitations only as to the person who made it, however, spans the law generally. *See e.g.*, 54 C.J.S. *Limitations of Actions* § 262; 51 AM. JUR. 2D *Limitations of Actions* §§ 332-335; *Titus v. Annis*, 77 N.H. 478, 480 (1915) (in absence of evidence of agency relationship between defendants, one defendant's promise to pay real estate broker's commission did not bind the other defendant); *Judge of Probate v. Ellis*, 63 N.H. 366 (1885) (promise by administrator to pay a claim against estate not bind either estate or sureties on his bond so as to avoid statute of limitations).

The law makes sense. If it were otherwise, the statute of limitations would be made meaningless whenever a stranger might wish.

Here, Paul entered a "stipulation," which operated as a contract to toll the limitations period. Paul's parents, however, were not parties, and there is nothing in the record to indicate that Paul had authority to bind Beverly and George. It is undisputed that Paul is Beverly and George's son, and that he had permission to live on the land. But as far as the law of acknowledgment is concerned, they are strangers. Although Paul's acknowledgment may have extended *his* limitations period, it could have no effect on Beverly's and George's.

Accordingly, because their three-year statute of limitations began to run in 1996, and A&B Lumber didn't sue the defendants here until 2003, this action was untimely. This Court should thus grant summary judgment in favor of Beverly and George Vrusho.

II. Suit Against Beverly and George is Barred by Laches

"Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." *Town of Seabrook v. Vachon Management,* 144 N.H. 660, 668 (2000) (quotation omitted). " In determining whether to apply laches, courts in this jurisdiction will turn to the analogous statute of limitations for guidance." *Jenot v. White Mt. Acceptance Corp.*, 124 N.H. 701, 710 (1984). Laches begins to run when the delinquent plaintiff is aware of the factual basis of the suit. *Healey v. Town of New Durham*, 140 N.H. 232, 242 (1995); *Appeal of Plantier*, 126 N.H. 500, 508 (1985).

As the statute of limitations in this case began and expired years ago, so too has laches.

There are four factors to determine whether laches applies: "(1) the knowledge of the plaintiffs; (2) the conduct of the defendants; (3) the interests to be vindicated; and (4) the resulting prejudice." *Appeal of City of Laconia*, 150 N.H. 91, 93 (2003) (quotations and citations omitted).

Here, A&B "slept on [its] rights" for many years; it knew in 1996 that Beverly and George owned the land. Beverly and George, due to sickness and age, abandoned their land to Paul, who kept them ignorant of his activities. Concerning Paul's improvements, Beverly and George were thus bystanders . While A&B is justified in wanting to recover from Paul, A&B's lax policies regarding those to whom it lends material and labor, how it collects its debts, and the timing and conduct of its collections suits, are not the business of Beverly and George, and they should not have to fund them. Had A&B approached Beverly and George years ago when they had a more personal interest in the land, some liquid assets not depleted by age and disease, and time to seek repayment from Paul for the debts his activities caused them, the prejudice against them might not

have been so great. But A&B's delinquency in bringing suit renders it nearly impossible for them to now cover the cost of A&B's poor judgment in doing business with Paul. *Pleakas v. Juris,* 107 N.H. 393, 397 (1966) (laches inapplicable when enrichment claim was asserted "as soon as he heard rumors that his position might not be that of owner").

Accordingly, in addition to the statute of limitations, laches bars recovery of Paul's debt from Beverly and George.

III. Damages Award is Much Greater Than the Evidence Supports

The law does "not require mathematical certainty in the computation of [damage] awards. *Petrie-Clemons v. Butterfield*, 122 N.H. 120, 126 (1982). But "[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." *Clipper Affiliates v. Checovich*, 138 N.H. 271, 274 (1994) (quotation omitted); *see Grant v. Town of Newton*, 117 N.H. 159, 162 (1977) (plaintiff "must show the extent and amount of such damages").

In assessing damages in unjust enrichment cases, "the focus is not upon the cost . . . , but rather it is upon the value of what was actually received." *Moore v. Knight Foundations, Inc*, 122 N.H. 334, 335 (1982). "The appropriate basis for determining the amount of the defendant's benefit is the difference between the market value of the realty before and after the improvements." *Petrie-Clemons*, 122 N.H. at 128. "Nevertheless, in some cases, it may be difficult to ascertain the value received by a defendant. . . . In these cases, the evidence of the plaintiff's expenditures may be considered as circumstantial evidence of the value of the benefit conferred upon a defendant." *R. Zoppo Co., Inc. v. City of Manchester*, 122 N.H. 1109, 1113-14 (1982).

In this case, the evidence of damages came from the plaintiff's expert appraiser. He testified that, using variety of methods, the total value of the improvements upon the land were worth $250,000. *1/7/04 Trn.* at 166, 168. Understanding that A&B Lumber contributed materials and design services, but did not perform the construction, *1/7/04 Trn.* at 29, the expert then estimated that materials and design services accounted for between 60 percent and 75 percent of the value of the improvements. *1/7/04 Trn.* at 169. Although the expert did not do the

math, based on this testimony, the value of the A&B's contribution to the property's improvements was between $150,000 and $187,500.

Thus, in accord with *Moore v. Knight Foundations*, the most the jury could reasonably award for "what was actually received" was $187,500. Further, in accord with *Zoppo v. Manchester*, A&B Lumber's original $139,920 bill for materials and design, *1/7/04 Trn.* at 31-32, as "evidence of the plaintiff's expenditures," is circumstantial evidence of the value of enrichment.

The jury's award, however, was $280,000. ORDER, *NOA* at 10. Although juries are free to pick from a variety of values in estimating damages, *see e.g., Stratton v. Jaffrey*, 102 N.H. 514 (1960), the most generous reading of the evidence supports damages of $187,500. The jury's award was greater than the evidence can support by between $92,500 and $130,000.

Finally, Beverly and George were neither alleged nor proved to have acted in bad faith; but there is no known law suggesting it would be a valid factor in estimating restitution damages.

The court below recognized some of the problems with the jury's award, and partially granted Beverly and George's request for remittitur. The court found that the "maximum damages award justified by the evidence is $250,000 . . . reduced by actual payments by defendants" of $16,000, ORDER, *NOA* at 10, resulting in a total award of $234,000. *Id.* As noted, however, even in granting the reduction, the court mistakenly found that the evidence justified an award of $250,000; but the only facts before the court placed the value of A&B's contribution to the property's improvements between $150,000 and $187,500. Thus, accounting for the $16,000 payment, the award should have been between $134,000 and $171,500.

This court should grant a remittitur in accord with the evidence.

CONCLUSION

Based on the foregoing, Beverly and George Vrusho respectfully request that this honorable Court grant summary judgment in favor of them because this suit was brought beyond the period of limitations, or, in the alternative, order damages remitted in accord with the evidence.

Respectfully submitted,
Beverly & George Vrusho
By their Attorney,

Law Office of Joshua L. Gordon

Dated: July 13, 2004

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

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Beverly and George Vrusho requests that their counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on June 22, 2004, copies of the foregoing will be forwarded to Christopher Carter, Esq.; William S. Gannon, Esq., and Mark Sullivan, Esq.

Dated: July 13, 2004

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