State of New Hampshire
Supreme Court

NO. 2005-0674

2006 TERM

APRIL SESSION

Matter of Alexandra Claudia Echavez

and

Marcelo Alberto Echavez

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

BRIEF OF PETITIONER/APPELLEE, CLAUDIA ECHAVEZ

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

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QUESTION PRESENTED

I. Did the court make a well-supported finding regarding the value of real property when a timely appraisal was not adequately objected-to at trial and no law bars its admission, and other evidence of value was also considered by the court?

Preservation: The issue was not preserved by appellee.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Claudia Echavez hereby adopts the statement of the case contained on page 1 of Marcelo Echavez's brief.

Claudia hereby also adopts that portion of the statement of facts contained on page 1, but not page 2, of Marcelo's brief.

SUMMARY OF ARGUMENT

Claudia Echavez first points out that in his trial court objections to the use of an appraisal, Marcelo Echavez failed to specify the legal basis, and that the issues he raises on appeal are therefore not adequately preserved.

Ms. Echavez then lists the possible legal bases, notes that each of them were not preserved, and argues that even if they were none of them apply to this case.

Ms. Echavez notes that even though Marcelo knew about the appraisal, he failed to ask for a copy, to get his own appraisal done, or to take any other action. He argues that he should not be rewarded for sitting on his rights.

Finally, Ms. Echavez lists the evidence used by the trial court in determining the value of the marital property, and argues out that the trial court's ruling was well-founded.

ARGUMENT

It appears that Marcelo Echavez is complaining about two things: that an appraisal of the parties' marital home was not disclosed, and that the appraiser was not disclosed.

I. Issues on Appeal Were Not Preserved

The issues pressed by Mr. Echavez in his appeal were not preserved.

This court has repeatedly held that a party must not only object to the admission of a piece of evidence, but that the objection cannot be overly general.

> It has been long recognized in this jurisdiction that a specific, contemporaneous objection is required to preserve an issue for appellate review. This requirement is grounded in both judicial economy and common sense, affording the trial court the opportunity to correct an error it may have made, or clearly explain why it did not make an error. . . . The requirement applies equally to civil and criminal matters.

State v. Blomquist, __ N.H. __ (decided Feb. 14, 2006) (*Broderick*, C. J., concurring). If the objection is not specific, this court must find the issue un-preserved. In *Broughton v. Proulx*, 152 N.H. 549 (2005), for example, this court declined to consider the merits when a party made an unspecific objection to an opening argument:

> Here, the trial court was not afforded an opportunity to correct the error the defendant now claims it made with respect to certain comments by plaintiff's counsel. Although defense counsel objected, he did so only on the basis that he did not think that opposing counsel was making "a proper opening statement." The defendant's current contention – that the comments enhanced the possibility of jury bias based upon the parties' divergent backgrounds – was never presented to the trial court for its consideration. It is not enough to simply assert that some portion of an opening statement is not proper and save for appeal the specific nature of the claimed impropriety. Moreover, when the trial court responded to counsel's objection by stating that it agreed, but would allow the comments "just for background," no request was made for a curative instruction and no further objection was advanced. Accordingly, we decline to consider the merits of the defendant's arguments because they were not preserved.

Broughton v. Proulx, 152 N.H. at 552 (citations omitted).

In Claudia Echavez's case, when she sought to introduce the appraisals, Marcelo's attorney stated a bare objection, without any reasoning or citation to authority, stating merely, "And I'm going to object to this, Your Honor, we've never been given any copies of any appraisals." *Trn.* at 77. Later when Claudia sought to testify as to the value of the house, Marcelo's attorney said, again without reference to any authority, "And, Your Honor, I'm going to object again. Unless Mrs. Echavez is an appraiser, I think that she can't testify as to what these appraisals are and the appraiser, I don't know whether he's coming today to testify as to what the fair market value is."

Because Marcelo's objections were overly general, did not refer the trial court to whatever law the attorney believed supported his position, and did not give the court an opportunity to fashion a remedy with regard to the law, the issues on appeal were not adequately raised below. Accordingly this court need go no further.

II. Law Governing Discovery and Disclosure of Experts Does Not Apply in This Case

As noted by Marcelo in his brief, this Court has

> long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information. A party is thus entitled to disclosure of an opposing party's experts, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions. A party's failure to supply this information should result in the exclusion of expert opinion testimony unless good cause is shown to excuse the failure to disclose.

Figoli v. R.J. Moreau Companies, Inc., 151 N.H. 618, 626 (2005). Thus,

> [e]xcept in unusual cases, a party may obtain discovery of the facts known to and opinions held by an expert retained by another party who has acquired that information or developed those opinions in anticipation of litigation or for trial only if the expert is expected to be called as a witness at trial.

4 R. Weibusch, NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE & PROCEDURE, § 22.18 at 526 (1998), citing *Fenlon v. Thayer*, 127 N.H. 702 (1986); *Wheeler v. School Administrative Unit 21*, 130 N.H. 666 (1988).

A. RSA 516 Was Not Preserved and Does Not Apply to This Case

RSA 516 regulates the testimony of experts in non-criminal cases. RSA 516:29-a provides that a court shall not allow an expert to testify unless the court makes findings regarding the reliability of the expert's data and methods. RSA 516:29-b mandates disclosure of "the identity of any person who may be used at trial to present [expert] evidence," and the report containing the expert's qualifications, data, methods, opinions, compensation, and other details. RSA 516:29-b also provides that the disclosures must be made 90 days before trial or when either the parties agree or the court directs.

In his objections at trial, Marcelo did not cite the statute; it is therefore not preserved. In his brief, Marcelo repeatedly cites RSA 516:29-a regarding the court making findings about the

reliability of experts, but nowhere cites RSA 516:29-b, on which he nonetheless appears to rely. For this reason also, the statute is not preserved.

Even if it were preserved, the statute is limited to disclosure of those "who may be used at trial to present [expert] evidence." RSA 516:29-b, I. Claudia never intended to call any expert, and did not offer the testimony of any expert at trial. *Trn.* at 80 (Attorney Stodolski:[1] "I don't know whether [the appraiser's] coming to testify as to what the fair market value is." The Court: "My understanding is that you don't have anybody coming to testify." Attorney Hall:[2] "I don't.").

Accordingly, the statute does not apply to this case.

B. Rules of Evidence Regarding Expert Witnesses and Admission of Appraisal Were Not Preserved and Do Not Apply to This Case

The rules of evidence also regulate the testimony of expert witnesses. Rule 701 provides that lay witnesses can testify as to perception; Rule 702 provides that experts can give opinion evidence when it is based on scientific, technical, or specialized knowledge, skill, experience, training, or education; Rule 703 provides that experts may form opinions based on admissible or non-admissible data; Rule 704 provides that an expert may offer an opinion the ultimate issue, and Rule 705 provides that need not disclose the underlying data unless the court orders otherwise. *See* N.H. R. EVID. 701-705.

Marcelo did not mention the rules of evidence at trial or in his brief. In any event, "[t]he rules [of evidence] . . . do not apply [in] . . . divorce cases." N.H. R. EVID. 1101(d)(3). Accordingly the rules do not provide Marcelo any remedy.

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[1]Attorney Janina Stodolski is Marcelo's attorney both here and below.

[2]Attorney Margaret Hall was Claudia's attorney below.

The rules of evidence may also regulate the admission into evidence of such items as the appraisal of the parties house. Marcelo did object on any grounds based in the rules of evidence, and did not cite the rules in his objection. Thus the matter was not preserved.

Because the rules of evidence do not apply to divorce cases, N.H. R. EVID. 1101(d)(3), any objection regarding hearsay, Rules 801-806, authentication, Rules 901-903, the contents of writings, Rules 1001-1008, or any other matter, is immaterial to this proceeding.

C. Superior Court Rule 35 Was Not Preserved and Does Not Apply to This Case

Superior Court Rule 35 requires that "[w]ithin thirty . . . days of a request by the opposing party, or in accordance with an order of the Court . . . , a party shall be required to supply a Disclosure of Expert Witness(es) . . . as defined [by] the Rules of Evidence . . . , which document shall . . . identify each person . . . whom the party expects to call as an expert witness at trial," a summary of the expert's education, experience, and facts on which the expert's opinion is based, and the subject on which the expert will testify. SUPER.CT. R. 35(f).

Marcelo did not mention Rule 35 at trial or in his brief; the rule is thus unpreserved.

By its terms Rule 35 requires disclosure of expert witnesses as defined by the rules of evidence. Because the rules of evidence do not apply in marital cases, N.H. R. EVID. 1101(d)(3), the definition of expert does not apply here.

Most important, however, Rule 35 applies only when there has been "a request by the opposing party" or when there has been "an order of the Court." Here there was neither.

The Court: "Did opposing Counsel ask you for copies?"

Attorney Hall: "No."

Trn. at 77. Marcelo's attorney conceded that expert reports were not requested. *Trn.* 78, 80.

In *Wong v. Ekberg*, 148 N.H. 369 (2002), cited by Marcelo in his brief, the defendant party had clearly requested disclosure of plaintiff's expert, and the trial court had found that its own order directed the disclosure. When the expert was nonetheless not disclosed, this Court ruled that pursuant to Rule 35, the sanction of disallowing the testimony of the proposed expert was appropriate. *Wong* does not apply here because Marcelo never requested disclosure, the court had never ordered it, and no expert was slated to appear. *See also Porter v. City of Manchester*, 151 N.H. 30, 54 (2004) (parties had agreed to a timetable for expert disclosure).

Finally, as noted in *Wong*, the remedy for failing to disclose an expert is that the expert will not be allowed to testify. *See also Figoli v. R.J. Moreau*, 151 N.H. 618, 626 (2005) (party's failure to disclose expert "should result in the exclusion of expert opinion testimony unless good cause is shown to excuse the failure to disclose"); *McLaughlin v. Fisher Eng'g*, 150 N.H. 195, 202 (2003) (expert allowed to testify because adequate disclosure had been made).

Here, the remedy is illogical because Claudia did not intend to call the expert, and made no effort to have him testify. In his brief Marcelo nonetheless claims that Claudia "had a reasonable expectation that she intended to use a member of [the appraisal] corporation to offer testimony as to the value of the house. MARCELO'S BRIEF at 3. As evidence he points to the appraiser's invoice for services. ADDENDUM TO MARCELO'S BRIEF at 7. It is worth noting, however, that nothing on the invoice indicates that it is a billing for expert testimony. *Id.* Later in his brief, moreover, Marcelo concedes that "the appraiser was not present and therefore offered no testimony on either direct or cross examination." MARCELO'S BRIEF at 4.

Thus Rule 35 does not apply to this case. To the extent that it does, Marcelo already got the remedy it provides.

D. Superior Court Rule 192 Was Not Preserved and Does Not Apply to This Case

Superior Court Rule 192 provides that:

> At the pretrial conference, the parties are required to file . . . pretrial statements which shall include . . . [a] [l]ist of property (including pensions or property interests) in dispute, the values thereof, and whether or not appraisals will be submitted.

SUPER CT. R. 192 B.

Marcelo did not mention Rule 192 during trial nor in his brief. Accordingly the matter is not preserved.

The rule does not help Marcelo, however.

In Marcelo's answers to Claudia's interrogatory questions, Marcelo made clear that he was aware of the appraisals, but he never asked for them. Although the appraisals were not mentioned in her pre-trial statement, she corrected the mistake in the immediately-contemporaneous pre-trial conference. Marcelo's attorney conceded this:

> Ms. Stodolski: Your Honor, when we were here in, I believe it was January, Attorney Hall said to you in front of both parties, that she was going to have updated appraisals done. She's never done that, Your Honor.
>
> Ms. Hall: No, I haven't. These are appraisals I thought he had.

Trn. at 77. Recognizing the disclosure, the court told Marcelo's attorney in its ruling: "I'm going to overrule your objection under these circumstances." *Trn*. at 78-79.

Because the disclosure was timely-made, the rule provides no relief.

E. Confrontation Was Not Preserved and Does Not Apply to This Case

In his objections, Marcelo did not mention any constitutional rights to confrontation, the federal sixth amendment, state or federal due process, or New Hampshire's article 15. Thus any objection based on an alleged right to confront was not preserved.

Marcelo has cited no authority that confrontation rights apply in the divorce context.

To the extent these sorts of rights apply in a marital case, Marcelo was able to fully exercise his right to confront on the issue of the value of the house.

Each party testified as to the value of the house, the method of establishing the value, and the reliability of their beliefs as to value. Each of the party examined the other on these matters. Thus any confrontation rights that might be claimed have been satisfied.

III. Marcelo Got Adequate Notice of the Appraisal But Did Nothing

A. Marcelo Knew About the Appraisal Documents

As noted, one goal of discovery is to avoid trial by surprise. *Figlioli v. R.J. Moreau Companies, Inc.*, 151 N.H. 618, 626 (2005). For that reason, the various rules regarding discovery all provide for notice by the opposing party of discoverable items.

Virtually any disclosure of the existence of the item constitutes notice. In *Gulf Ins. Co. v. AMSCO, Inc.*, __ N.H. __, 889 A.2d 1040 (decided Dec. 28, 2005), for example, the defendant failed to list its expert in its pre-trial statement. But the defendant had given to the plaintiff the expert's curriculum vitae a year before trial. During trial the judge "recalled that during a pretrial conference it had discussed with the parties [the defendant's] intended reliance upon expert testimony as well as the subject area of the expected testimony." This Court thus concluded that the defendant's "late disclosure of its intent to present expert testimony . . . came as no surprise to" plaintiff, and allowed the expert's testimony.

In Claudia and Marcelos's case, the trial court made a finding of fact that Marcelo "was aware that the houses were being appraised." *Trn.* at 80. The finding was based on the court's recollection of the pre-trial proceedings, and its understanding of what had transpired regarding interrogatory questions and answers.

In interrogatories propounded by Claudia, *Claudia asked Marcelo*:

> Real Estate. If you now own, or have owned at any time any interest in any real property, whether individually, jointly, in the entirety, or in common, or as trustee for any person or as beneficiary under any trust, please state:
>
> . . .
>
> b. The last appraisal value. Attach copy of appraisal.
>
> . . .

INTERROGATORY NUMBER 16, *Appendix to Brief* at 31. Marcelo's written answer was: "The appraisals are in my wife's possession." ANSWER TO INTERROGATORY NUMBER 16, *Appendix to Brief* at 34. In a separate interrogatory question, *Claudia asked Marcelo* to provide:

> A copy of each and every current written appraisal pertaining to each and every parcel of real estate in which you have an interest.

INTERROGATORY NUMBER 40, *Appendix to Brief* at 32. Marcelo's written answer was: "My wife has the appraisals." ANSWER TO INTERROGATORY NUMBER 40, *Appendix to Brief* at 35.

As in *Gulf Ins. Co. v. AMSCO*, the trial court also took cognizance of what occurred during the pre-trial conference, during which the appraisals were discussed. *Trn.* at 77.

Thus the trial court's factual finding that Marcelo knew about the appraisals is well founded and cannot be disturbed by this court. *Wong v. Ekberg*, 148 N.H. at 372.

B. Marcelo Did Nothing With His Knowledge of the Appraisal Documents

"The procedure for discovering documents is to ask for it in some clear way." 4 R. Weibusch, NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE & PROCEDURE, § 25.08 at 582 (1998).

Even though Marcelo was aware of the appraisal, he failed to ask for the documents, *Trn.* at 77, and also failed to get his own appraisal done.

He seeks to blame this on Claudia. In his brief he writes: "If [Marcelo] knew that [Claudia] hired an appraiser he would have the opportunity to do so." MARCELO'S BRIEF at 4. But Marcelo's knew that the value of the house would be an issue. His "opportunity" to hire an appraiser existed during the entire litigation, completely independent of Claudia's. It appears that he began the process of getting his own appraisal, *Trn.* at 81, but that he abandoned the effort either because he didn't want to spend the money, *id.*, or because he wanted to have the house

sold. *Trn.* at 78.

For whatever reason, Marcelo sat on his rights, and now seeks to be rewarded. *See State v. Yates*, 137 N.H. 495, 503 (1993) (*Thayer*, J., dissenting) ("I cannot support setting a precedent that allows defendants to sit on their rights and then claim they were somehow wronged by the judicial system.").

IV. Court Made Reasonable Findings Regarding Valuation of the House

The court below was reasonable in its determination that discovery had been fairly conducted and that the appraisal was admissible evidence.

> We review a trial court's decision on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard. To meet this standard, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case.

Figoli v. R.J. Moreau, 151 N.H. 618, 626 (2005).

The appraisal was conducted in August 2004. The libel for divorce was filed in 2003 and the trial occurred in May 2005. To the extent there was some time between the appraisal and trial, it was due to the trial being repeatedly continued at Marcelo's request. But a nine-month period between appraisal and trial is perfectly acceptable. *Hillebrand v. Hillebrand*, 130 N.H. 520 (1988) (filing of divorce libel was possible date, but not only date, for valuing marital assets). In any event Marcelo has shown no prejudice regarding the timing of the appraisal.

Even without the appraisal, the court heard evidence as to the value of the house. The parties both testified that the appraisal was conducted after some improvements were made to the residence, and before others were made. *Trn.* at 87 (Claudia); *Trn.* at 160-62 (Marcelo). They agreed in their testimony that the valuation of the house should take into account the work that had been done after the appraisal. *Trn.* at 85-87, 139-144 (Claudia); *Trn.* at 163, 203-07 (Marcelo).

This Court has held that parties may testify as to their opinions on the value of property. *Joslin v. Pine River*, 116 N.H. 814, 818 (1976) ("We find no error in the trial court's admission of the plaintiffs' opinions as to the value of their property."). Accordingly, both Claudia and

Marcelo testified as to the value of the house.

The appraisal valued the house at $190,000. Claudia's opinion was that the house was worth either $170,000 or $190,000. *Trn*. at 139-40. Marcelo's opinion was that the house was "probably worth close to a half a million dollars." *Trn.* at 168.

Both parties confronted the other on this issue. Marcelo questioned Claudia her on her view of whether the houses used as comparable sales in the appraisal were in fact comparable, the dates the comparable sales were sold, and other matters regarding the weight that should be given to the appraisal. *Trn*. at 129-132. In his testimony Marcelo commented on similar issues, alleging that the comparable sales were not comparable, and the relative desirability of the marital house as compared to others used by the appraisal to establish market value. *Trn.* at 163-69.

The court found that the value of the house was worth $190,000, DECREE ¶ 16, based on the evidence. Accordingly, this court must affirm.

CONCLUSION

For the foregoing reasons, Claudia Echavez requests this Court to affirm the judgment of the court below.

Respectfully submitted,

Claudia Echavez
By her Attorney,

Law Office of Joshua L. Gordon

Dated: April 7, 2006

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

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Claudia Echavez requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on April 7, 2006, copies of the foregoing will be forwarded to Janina Stodolski, Esq.

Dated: April 7, 2006

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

APPENDIX