State of New Hampshire
Supreme Court

NO. 2004-0253

2004 TERM

OCTOBER SESSION

A&B LUMBER COMPANY, LLC

v.

BEVERLY & GEORGE VRUSHO

REPLY BRIEF OF BEVERLY & GEORGE VRUSHO

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I. Paul's Acknowledgment of Debt to A&B Lumber Had No Effect on Beverly and George's Statute of Limitations Rights

As noted in A&B's brief, what Beverly and George Vrusho knew, and when they knew it, is a matter of dispute.

For instance, Beverly testified that she was not aware of the extent of the improvements Paul made to her properly. Her ignorance was corroborated by testimony of the Northwood Town Administrator, who acknowledged that signatures on permitting documents purporting to be George's may have been forged. *1/7/04 Trn.* at 80-82. On the other hand, A&B alleges that the improvements were unmistakable, and that Beverly and George had to have known.

Regardless of what Beverly and George knew, A&B concedes that they did not participate in creating Paul's debt to A&B, and had no role in Paul's acknowledgment of it. A&B nonetheless seems to suggest that there is some identity of interest between Paul and his parents such that Paul's acknowledgment should bind Beverly and George.

As noted in Beverly and George's initial brief, in order for an acknowledgment to effectively waive a person's statute of limitations rights, it must be made by the person whose rights are being waived. *Premier Capital v. Gallagher*, 144 N.H. 284, 286-87 (1999) ("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*.") (emphasis added); *Merrimack Loan Co v. Theodorou*, 91 N.H. 487 (1941) (party relying on partial payment as acknowledgment to toll limitations period must show payment authorized by debtor); *Levensaler v. Batchelder*, 84 N.H. 192, 194 (1929) ("a direct and unqualified admission by a *debtor* . . . of a subsisting debt . . .

is sufficient evidence of a new promise which will prevent the statute from operating") (emphasis added); *Holt v. Gage*, 60 N.H. 536, 542 (1881) (limitations not tolled as to defendant where "[t]he defendant took no part in the conversation when [another] told the plaintiff to wait, and he should have his pay"); *Exeter Bank v. Sullivan*, 6 N.H. 124, 137 (1833) ("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.").

Although A&B cites no law so holding, the only imaginable way for an acknowledgment by someone other than Beverly and George to operate against them is if that other someone is an agent authorized to take such action on their behalf.

The general law of principal and agent provides that for an agent's acts to bind a principal, three elements must be present: (1) authorization from the principal that the agent shall act on the principal's behalf, (2) the agent's consent to act on the principal's behalf, and (3) an understanding that the principal exerts control over the agent's actions. *Herman v. Monadnock PR-24 Training Council*, 147 N.H. 754, 758-59 (2002). Moreover, an agent cannot act on behalf of the principal on matters outside the scope of his authority, *see e.g., Castonguay v. Acme Knitting Machine & Needle Company,* 83 N.H.1 (1927), nor bind the principal for payment of the agent's own debt. *Holton v. Smith*, 7 N.H. 446 (1835); *Batchelder v. Libbey*, 66 N.H. 175 (1889).

A&B has made no allegation nor effort to prove that Paul was the agent of Beverly and George such that Paul's acknowledgment can bind them. There was no express or implied permission given to Paul by Beverly and George that Paul could take on or acknowledge debts in

their name. Similarly, there was no express or implied consent by Paul. While A&B argues that Beverly and George knew of Paul's improvements, there appears in the record no evidence that they had any control over Paul's actions, that they authorized Paul to act for them, or that they intended Paul's partial payment and acknowledgment to bind them.

Paul was not Beverly and George's agent; at most he was their commercial tenant at will enjoying favorable rental terms.

Accordingly, Paul's acknowledgment of debt to A&B may operate against him, but it has no effect on Beverly and George's statute of limitations rights.

II. The Jury Did Not Take Into Account A&B Lumber's Limited Contribution to the Value of Paul's Horse Arena

As noted in A&B's brief, its appraiser determined that the value of the arena for which it provided materials and services was $250,000. A&B's argument goes no further, and merely relies on this Court's deference to the jury.

But the appraiser's testimony did go further. He went on to note that A&B's contribution to the arena was only in supplying materials and design services, but not construction. The appraiser calculated that A&B's contribution accounted for between 60 percent and 75 percent of the value of the horse arena, but not its entirety.

The testimony was in accord with New Hampshire law. Damages in *quantum meruit* are for the value of the benefit received by the person unjustly enriched. *See e.g., R. Zoppo Co., Inc. v. City of Manchester*, 122 N.H. 1109, 1113 (1982). But the plaintiff is not rewarded for value it did not create. Thus, *quantum meruit* damages for building projects are limited by "the work and materials [the plaintiff] had done and furnished." *Anderson v. Shattuck*, 76 N.H. 240, 244 (1911). In *Parem Contracting Corp. v. Welch Const. Co., Inc.*, 128 N.H. 254 (1986), for example, Parem delivered gravel to the defendant's construction site. The parties' relations then soured, and Parem sought damages for unjust enrichment. This Court held that because Parem did not pay for the gravel it delivered, its *quantum meruit* damages were limited to the work it did – the value of the delivery – and not the value of the materials themselves.

There is no basis for awarding A&B damages for the entire value of the arena for which it provided only materials and design, but not construction. Because the court failed to take into account A&B's limited contribution to the arena's value, and (as noted in Beverly and George's initial brief) because damages must bear a reasonable relation to the evidence, the award should be reduced.

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,

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Dated: October 4, 2004

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CERTIFICATION

I hereby certify that on October 4, 2004, copies of the foregoing will be forwarded to Christopher Carter, Esq.; William S. Gannon, Esq., and Mark Sullivan, Esq.

Dated: October 4, 2004

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