NH Supreme Court 3JX Panel Orders - January 2004

THE FOLLOWING ARE Orders issued by the Court in January, 2004 of cases that were heard by the three-judge panels in the expedited appeals process known as "3JX" (3-judge panel expedited).

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"Orders issued by the 3JX panels of the New Hampshire Supreme Court are without precedential effect and may not be cited for any proposition of law or as an example of the proper resolution of any issue."

2003-0100
Cheryl Kerr v. John Miller & a.

The court on January 14, 2004, issued the following order:

The plaintiff, Cheryl Kerr, sought damages from the defendants, John Miller and Donna Miller, based on misrepresentation and breach of contract. Finding a breach of contract, the trial court awarded damages. The defendants appeal, contending that the court erred in: (1) awarding damages in the absence of expert testimony; (2) admitting certain documents into evidence; and (3) awarding damages based on the doctrine of *res ipsa loquitur*. We affirm.

The trial court found that the defendants had breached their duty to repair the septic system in the house they sold to the plaintiff. Because it is ultimately a question of law, we review the interpretation of the sales agreement *de novo*. *See Lawyers Title Ins. Corp. v. Groff*, 148 N.H. 333, 336 (2002). Based upon our review of the record, we find no error in the trial court's finding that the defendants breached their duty under the sales agreement to repair the septic system "to good working order prior to closing." The defendants argue that, absent expert testimony concerning the nature and extent of the plaintiff's damages, the trial court erred in awarding them. We disagree.

"Expert testimony is required only where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." *Transmedia Restaurant Co. v. Devereaux*, 149 N.H. 454, 460 (2003) (quotations omitted). We conclude that under the facts of this case, the trial court properly admitted the plaintiff's testimony about the costs she incurred to obtain a functioning septic system. *See id*. at 461 ("New Hampshire does not require that damages be calculated with mathematical certainty, and the method used to compute damages need not be more than an approximation."). We note that the trial court found insufficient evidence to award damages for other alleged related costs.

The defendants next contend that the trial court erred in admitting the plaintiff's testimony about the damages she incurred and in permitting introduction of "records of repairs, design and replacement of the septic system." Absent an unsustainable exercise of discretion, we will not reverse a trial court's decision on the admissibility of evidence or the imposition of discovery sanctions. *See State v. Cromlish*, 146 N.H. 277, 280 (2001); *cf. State v. Lambert*, 147 N.H. 295, 296 (2001). Based on the record before us, we find no error in the trial court's decision to admit bills incurred by the plaintiff in order to obtain a working septic system.

The defendants also argue that the trial court erred in basing its award of damages on the doctrine of *res ipsa loquitur*. Having reviewed the trial transcript and the trial court's decision, we find no evidence that the trial court based its award on that doctrine; rather, the comment at issue was directed at whether the plaintiff was required to present expert testimony to establish that the contract had been breached. The trial court found both that the defendants had breached their duty under the amended sales contract and that the plaintiff had incurred certain expenses in remedying that breach. Because the record contains sufficient evidence to support both findings, we affirm.

Affirmed.

BRODERICK, C.J., and DUGGAN, J., concurred; BROCK, C.J., retired, specially assigned under RSA 490:3, concurred.
Eileen Fox, Clerk

2003-0214
State of New Hampshire v. Scott Batchelder

The court on January 28, 2004, issued the following order:

Following a jury trial, the defendant, Scott A. Batchelder, was convicted of felonious sexual assault. *See* RSA 632-A:3 (Supp. 2003). On appeal, he contends that the trial court erred in limiting his cross-examination of a police officer. We affirm.

Defense counsel sought to cross-examine the police officer about whether he had advised the defendant that if he were convicted he would have to register as a sex offender. In support of his question, counsel argued that the information was necessary to determine whether the defendant's waiver of rights had been voluntary, informed and knowing.

Even if we assume that the trial court erred, we agree with the State that any error was harmless. In addition to testimony by several witnesses, including the victim, defense counsel admitted in both his opening and closing statements that the defendant had intercourse with the victim. Accordingly, we conclude that the State has demonstrated beyond a reasonable doubt that the alleged error did not affect the verdict. *See State v. Pelkey*, 145 N.H. 133, 136 (2000).

Affirmed.
NADEAU, DALIANIS and DUGGAN, JJ., concurred.
Eileen Fox, Clerk

2003-0302
In the Matter of Thomas F. DeSteph & Tracy A. DeSteph

The court on January 16, 2004, issued the following order:

The petitioner, Thomas F. DeSteph, appeals the order of the Superior Court (*Brennan, J.*) modifying his child support obligation effective January 1, 2003. We reverse and remand.

On February 4, 2002, the petitioner moved to modify his child support obligations. For a variety of reasons, the petitioner's motion was not heard until approximately one year after he filed it. In its order, the court denied the petitioner's request to modify his support obligation for the year 2001. The court ruled that the petitioner's 2002 income made him eligible for a reduction in his support obligation. The court found that based upon the petitioner's 2002 income of $13,659, his monthly obligation should have been $312, and his weekly obligation should have been $72. The court ruled that in light of the petitioner's "low income," his support obligation would be $50 a week plus $10 a week on the arrears. The court ordered the reduction in the petitioner's support obligation based upon his 2002 income to take effect on January 1, 2003.

Because we have not been provided with a transcript of the trial court's proceedings, we must assume that the record supports the trial court's findings. *See In the Matter of Rohdenburg & Rohdenburg*, 149 N.H. 276, 278 (2003). We thus review the trial court's order for errors of law only. *See id*.

The court has previously ruled that trial courts have discretion to make modified support orders retroactive to the date on which a petition to modify was filed. *See In the Matter of Fedderson & Cannon*, 149 N.H. 194, 200 (2003); *see also* RSA 458:17, VIII (Supp. 2003). In this case, in light of the delay in hearing the petitioner's motion, we determine that the trial court's failure to make its modification order retroactive to February 4, 2002, the date on which the petitioner's motion for modification of child support was filed, was error.

Reversed and remanded.
BRODERICK, C.J., and DALIANIS and DUGGAN, JJ., concurred.
Eileen Fox, Clerk

2003-0306
State of New Hampshire v. Carl Graf a/k/a Karl H. Graf

The court on January 20, 2004, issued the following order:

The defendant, Carl Graf, appeals an order of the superior court amending the sentences he received following his conviction on three counts of aggravated felonious sexual assault. *See State v. Graf*, 143 N.H. 294 (1999). He contends that the revised sentences violate his right to due process under the State and Federal Constitutions. We vacate and remand.

"Due process requires a sentencing court to make clear at the time of sentencing in plain and certain terms what punishment it is exacting as well as the extent to which the court retains discretion to impose punishment at a later date and under what conditions the sentence may be modified." *State v. Burgess*, 141 N.H. 51, 52 (1996) (quotations, emphasis, ellipsis and brackets omitted).

The defendant's original sentences consisted of one sentence of 7½-15 years, stand committed and two sentences of 6-12 years suspended, concurrent with each other but consecutive to the stand committed sentence, not to be brought forward after ten years from the date of sentencing. In response to the defendant's motion to suspend the balance of his sentences, the trial court suspended the maximum term of his stand committed sentence and also imposed a call forward period of twenty years from the date of its 2002 order. The defendant contends that because the "original sentencing order retained no discretion to impose any punishment beyond 2010," the revised call forward period constitutes an illegal augmentation of his sentence.

"[T]he decision to suspend a sentence is a decision to forego complete denial of liberty by incarceration in favor of a judicially-supervised period of restricted liberty." *State v. Oppelt*, 601 P.2d 394, 397 (Mont. 1979) (quotation and ellipsis omitted). Thus, a suspended sentence continues to restrict a defendant's liberty. "[U]nless the terms of a sentence at the time it is imposed specifically allow augmentation at a later date, the court may not increase a defendant's penalty at a probation revocation hearing or a hearing on whether to impose a deferred or suspended sentence." *State v. Burgess*, 141 N.H. 51, 52 (1996). In this case, because the newly imposed call forward period exceeded the original sentence, we cannot sustain the trial court's exercise of discretion. Because we vacate the order of suspension in its entirety and remand, we need not address the defendant's assertion that the trial court could not impose the complete suspended term if he violates the terms of his suspended sentence prior to 2010. Nor need we address whether the trial court could have issued the order on appeal with the defendant's consent.

The defendant also contends that the trial court erred in extending the call forward period of the two sentences which were suspended at the time of his original sentencing. The State concedes that if the court's order extended the suspension period from 2005 to 2022, it was error. Because we cannot determine from the court's order whether the suspension period was extended, we vacate and remand these sentences also.

Vacated and remanded.

BRODERICK, C.J., and DUGGAN, J., concurred; BROCK, C.J., retired, specially assigned under RSA 490:3, concurred.

Eileen Fox, Clerk

2003-0355

In the Matter of the State of New Hampshire & Charles M. Novak

The court on January 16, 2004, issued the following order:

The respondent, Charles M. Novak, appeals an order of the trial court finding that his claim for reimbursement of overpayment of his child support debt was barred because he did not come to court with clean hands. We affirm.

We note at the outset that we have not been provided with a transcript of the trial court's proceedings. We will therefore assume that the record supports the trial court's findings and review the trial court's order for errors of law only. *See In the Matter of Rohdenburg & Rohdenburg*, 149 N.H. 276, 278 (2003).

The court did not commit an error of law by denying the respondent's claim for reimbursement. A court may deny equitable relief to a party who comes to court with unclean hands. *See Noddin v. Noddin*, 123 N.H. 73, 76 (1983). The court's factual findings fully support its determination that the respondent had unclean hands. The overpayment for which the respondent now seeks recovery was caused by his own failure to cure a default judgment entered against him in 1995. *See* 27A Am. Jur. 2d *Equity* § 130 (2d ed. 1996).

The court found that the defendant did not seek to vacate the 1995 default judgment until after the State intercepted his federal income tax return in 1999 to pay his child support arrearage. The court further found that the defendant "had full notice of the State's interest in obtaining support from him and the existing Court orders" by 1996 and, thus, could have moved to vacate the default judgment earlier and, if successful, have avoided the overpayment. Under the doctrine of unclean hands, he is therefore not entitled to be reimbursed for the overpayment.

We do not address the respondent's argument that the tax intercept violated his constitutional rights to due process because he did not argue this before the trial court, and, thus, has not preserved this argument for our review. *See Transmedia Restaurant Co. v. Devereaux*, 149 N.H. 454, 458 (2003). Contrary to the respondent's assertions, we do not relax rules regarding preservation of issues for *pro se* litigants. *See State v. Porter*, 144 N.H. 96, 100-01 (1999).

In light of the result we reach, the respondent's arguments regarding the accuracy of the trial court's calculations are moot.

Affirmed.

BRODERICK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

Eileen Fox, Clerk