THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0780, Kenneth McKenzie & a. v. Nancy Burns, the court on October 16, 2009, issued the following order:

The petitioners, Kenneth and Linda McKenzie, appeal orders of the superior court dismissing as time-barred their claims for restitution against the respondent, Nancy Burns, relative to certain improvements they made in 1999 and 2000 to develop a right-of-way, and ruling that they failed to establish their entitlement to restitution as to later improvements. We affirm.

We turn first to the petitioners' arguments that the trial court erred by dismissing some of their claims for restitution as time-barred. Under RSA 508:4, I (1997), a claim for unjust enrichment must be brought within three years of when the claim arose. See Coyle v. Battles, 147 N.H. 98, 100, 102 (2001) (RSA 508:4 governs unjust enrichment claims, and requires the claim to be brought within three years of when it arose). A claim "arises" when all the elements necessary to assert it are present. See id. at 100.

The trial court can require a party to make restitution for unjust enrichment if she has received a benefit which would be unconscionable for her to retain. See R. Zoppo Co., Inc. v. City of Manchester, 122 N.H. 1109, 1113 (1982). To establish their right to restitution, the petitioners must show "that there was unjust enrichment either through wrongful acts [by the respondent] or passive acceptance of a benefit that would be unconscionable to permit the [respondent] to retain." Id. The petitioners' claims for unjust enrichment "arose," therefore, at the moment the respondent received the benefit, through wrongful conduct or passive acceptance, for which the petitioners seek compensation.

The record reflects that the petitioners constructed, and paid for the construction of, the road at issue in 1999, and that the respondent had a preexisting right to use it. The record further reflects that the petitioners paid for improvements to the road in 2000 and in 2003. Under these circumstances, the respondent received the benefit of the improvements, and any claims for unjust enrichment arose, when the improvements were made, irrespective of whether the respondent actually used the road, granted an easement to another party, or realized a property tax consequence on some other date. Because the petitioners did not file suit against the respondent until January 2005, the trial court did not err by ruling that their unjust enrichment claims related to the 1999 and 2000 improvements were untimely.

The petitioners also argue that the statute of limitations should be tolled under the "continuing wrong" doctrine. "Under the 'continuing wrong' doctrine, when a tort is of a continuing nature, although the initial tortious act may have occurred longer than the statutory period prior to the filing of an action, an action will not be barred if it can be based upon the continuance of that tort within that period." Singer Asset Finance Co. v. Wyner, 156 N.H. 468, 478 (2007) (quotation and brackets omitted; emphasis added). Restitution does not, however, necessarily require proof of tortious or wrongful conduct. See R. Zoppo Co., 122 N.H. at 1113. Construing the pleadings in this case in the light most favorable to the petitioners, they did not allege any conduct of the respondent as a basis for restitution that could be deemed wrongful or tortious. Accordingly, the "continuing wrong" doctrine did not apply.

Nor did the petitioners establish that they could not reasonably have discovered their claims until they learned that deeds to two of the parcels over which they constructed the road required those entitled to use it to share in its costs, that the respondent had, at some point, granted an easement over the portion of her land containing the road to a third party, and that her property tax assessment had increased. Even assuming that the petitioners could not have discovered these facts until less than three years prior to filing suit, none of these facts establish that they could not reasonably have discovered that, by providing road access to the respondent's parcel that did not previously exist, they conferred a benefit upon her. We conclude that, as a matter of law, the petitioners should have, in the exercise of reasonable diligence, discovered that they had conferred a benefit upon the respondent by providing road access to her property no later than 1999, when they constructed the road. See Singer Asset Finance Co., 156 N.H. at 479. Because the petitioners have failed to carry their burden of establishing that the statute of limitations should be tolled in this case, see Glines v. Bruk, 140 N.H. 180, 181 (1995), the trial court did not err by ruling that their claims for unjust enrichment relative to the 1999 and 2000 improvements were untimely.

We next address whether the trial court erred by concluding that the petitioners failed to establish a claim for unjust enrichment relative to the 2003 improvements. At the outset, we note that the petitioners succeeded in their request to reform the respondent's deed to include a covenant requiring that she contribute to the cost of developing and maintaining the right-of-way. The sole basis for an award of compensation pleaded by the petitioners, however, was restitution. Accordingly, even assuming that the trial court's reformation of the deed created a contractual obligation to contribute to construction and maintenance of the road, we reject the petitioners' argument that the trial court erred by not considering such an obligation in ruling that the respondent was not unjustly enriched. Cf. Clinical Lab Prod's Inc. v. Martina, 121 N.H. 989, 990-91 (1981) (trial court erred by awarding damages upon a claim not pleaded); see R. Zoppo Co., 122 N.H. at 1113 (party entitled to restitution upon showing of unjust enrichment either through wrongful conduct, or through

passive acceptance of benefit that would be unconscionable for that party to retain). The determination of whether the facts and equities of a case warrant restitution is for the trial court, whose judgment we will uphold unless its findings and rulings are unsupported by the evidence or erroneous as a matter of law. See id.

In this case, the record supports the trial court's finding that, other than an operation to remove trees destroyed by a storm in 2003, the respondent does not use the road. Moreover, we agree with the respondent that where, as here, a party has no legal right to decline the benefit offered by the party seeking restitution, there can be no passive acceptance of it as a matter of law. See Dandeneau v. Seymour, 117 N.H. 455, 460 (1977) (if services rendered are such that the recipient has no choice but to accept them, the recipient cannot be said to have accepted them voluntarily, and the provider of the services is not entitled to restitution under quasi-contractual obligation). The petitioners have not alleged, and there is no evidence, that the respondent has been unjustly enriched through wrongful conduct. Under these circumstances, the trial court's denial of restitution for the 2003 road improvements was neither unsupported by the evidence nor erroneous as a matter of law.

Affirmed.

DUGGAN, HICKS and CONBOY, JJ., concurred.

Eileen Fox,
Clerk