THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2009-0356

BILLEWICZ TRUSTS, ET AL.

V.

JOHN C. RANSMEIER
AND
RANSMEIER & SPELLMAN PROFESSIONAL CORPORATION

BRIEF OF DEFENDANT-APPELLEES JOHN C. RANSMEIER AND RANSMEIER & SPELLMAN, PROFESSIONAL CORPORATION

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STATEMENT OF FACTS AND OF THE CASE

Appellant Lillian Billewicz is the daughter of Warren J. Billewicz, who died on November 6, 1989. Shortly after their father's death, her brother, Attorney Robert W. Billewicz, presented for probate a will and several trust instruments dated June 16, 1989. App. 44. Lillian Billewicz suspected the documents were forgeries, and hired a handwriting expert to examine them. App. 44-45. However, the analysis was inconclusive and she withdrew the challenge when her mother, Bernice Billewicz, assured her the documents were genuine. App. 35, 45.

The estate was administered and closed upon allowance of a final account. App. 44. Robert Billewicz continued to act as trustee of the original trusts, and of additional trusts his mother declared to hold and distribute investment assets. App. 45. Lillian Billewicz and her two sons were beneficiaries of five of the trusts (the "Five Trusts"). App. 40, 44. In 1995 she filed an action seeking an accounting from Robert Billewicz; that action was settled. App. 46.

In 1998 Bernice Billewicz told her daughter that Warren Billewicz had not in fact signed the 1989 will and trust documents. App. 41. Lillian Billewicz then brought a second action in the Probate Court on behalf of herself and her sons to force accountings from her brother, and to have him removed from his position as trustee. App. 33, 46. She retained a new handwriting expert who concluded that her father's signatures had been forged. App. 35. In the fall of 1999 her mother went further, telling Lillian Billewicz that Robert Billewicz had drafted the will and trust documents himself in September 1989 while his father was in a coma, pre-dated them to June 1989, and falsified the signatures. App. 41. In January 1999 the Probate Court removed Robert Billewicz as trustee, and appointed John Ransmeier to serve as interim trustee of the Five Trusts. App. 2.

In 2001 Lillian Billewicz brought a third action against Robert Billewicz on behalf of herself and her sons, asking the Probate Court to set aside some or all of the trusts as forgeries and to impose a constructive trust on her brother's assets. App. 3, 33. Ransmeier was not a party to the 2001 action, which Lillian Billewicz pursued with independent legal counsel.[1],[2] The Probate Court conducted evidentiary hearings in April 2002 on the appellants' petition. It excused Ransmeier from the hearings, and noted the parties' agreement that his lack of participation in the hearings "does not constitute a breach of any standard of conduct in fulfilling the trustee's fiduciary duties to the various beneficiaries." Addendum 55. In October 2002 the Probate Court dismissed the action against Robert Billewicz, ruling that it was barred by the doctrine of laches. App. 33. The Probate Court approved Ransmeier's resignation as interim trustee effective July 1, 2003. Appellants' Add. 34.

During and shortly after Ransmeier's tenure as interim trustee, Lillian Billewicz made several Probate Court filings objecting to Ransmeier's fee applications. She complained that Ransmeier had submitted improper charges, squandered trust assets, delayed filing tax returns, refused to join in the litigation against Robert Billewicz, acted negligently, and breached fiduciary duties, all resulting in losses to the Five Trusts. Addendum 20-21, 25-26, 29, 33, 39-41. Unpersuaded by the evidence she presented, the Probate Court approved Ransmeier's charges with minor exceptions. Addendum 41.

On August 11, 2005 the Probate Court vacated its October 2002 ruling dismissing the action against Robert Billewicz. It determined that it had erred by applying the equitable doctrine of laches in light of Robert Billewicz's fraud, and that it was not clear Lillian Billewicz

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[1] Lillian Billewicz has been represented in these matters by Attorneys Jackson Casey, David C. Engel, and Nancy S. Tierney. Addendum 21, 24, 35, 42-43.

[2] The documents at pages 19-36 of the appellees' Addendum were submitted to the Probate Court as exhibits to their motion to dismiss, but were omitted from the appellants' Appendix. *See* App. 15, 26, 66; *see also* 9/23/08 Tr. at 11. The additional items in the Addendum are also part of the Probate Court's file.

had reason to know about her brother's forgery before the fall of 1999. App. 35-37. The Probate Court permanently terminated Robert Billewicz's powers with respect to the trusts, and imposed a constructive trust on all his assets derived from his father's estate. App. 46.

On February 25, 2008, four and a half years after Ransmeier's resignation as interim trustee, the appellants brought this action for damages. App. 4-6. Ransmeier denies breaching any duty whatsoever toward the appellants, and is confident that a decision on the merits would absolve him of any misfeasance. However, given the costs of trial Ransmeier had no practical choice but to move for dismissal on the threshold issue of the timeliness of the appellants' action. The appellants brought their claims long after the statutory limitations periods of RSA 564-B:10-1005 and RSA 508:4 had lapsed. The Probate Court did not err when it granted dismissal.

SUMMARY OF THE ARGUMENT

Ransmeier served as interim trustee of the Five Trusts from January 1999 to July 2003. Any misfeasance on his part necessarily occurred during that period. The beneficiaries of the Five Trusts knew all the "facts" needed to bring an action against him while he was still serving as trustee. However, instead of filing their action against Ransmeier within three years of his court-approved resignation, they failed to act until well after the limitations periods of both potentially applicable statutes of limitations had elapsed.

Any misfeasance by Ransmeier also necessarily involved a breach of duties that arose under the Five Trusts. In an effort to avoid the statute of limitations, the appellants conflate rights and obligations under the Five Trusts he administered with irrelevant rights and obligations under a constructive trust granted over assets of Robert Billewicz. Robert Billewicz's assets were never part of the Five Trusts. Ransmeier was never trustee of the constructive trust, which the Probate Court created more than two years after his role had ended. The Probate Court properly declined to effectively hold Ransmeier liable for Robert Billewicz's actions simply because Ransmeier did not join in the appellants' successful action to obtain a constructive trust over Robert Billewicz's assets.

The history of the case is somewhat complicated, but the material facts are undisputed. The issue before the Court is a legal one: the date on which the statute of limitations began to run. The Probate Court applied RSA 564-B:10-1005 in accordance with its plain language. It ruled correctly that the appellants' 2001 action against Robert Billewicz alleging fraud and forgery did not toll the limitations period for an action against Ransmeier alleging breach of his fiduciary duties under the Five Trusts. It also ruled correctly that RSA 508:4, if applicable, would also bar the appellants' action. This Court should affirm the Probate Court's decision.

ARGUMENT

The issue in this appeal is the date on which the statute of limitations began to run for an action against Ransmeier and his law firm. The parties do not disagree about any facts that are material to that issue. They agree that Ransmeier served as interim trustee of the Five Trusts from January 13, 1999 through July 1, 2003. Appellants' Brief, p. 18. They agree that the appellants filed their petition against Ransmeier on February 25, 2008. App. 6.

The parties also agree that on August 11, 2005 the Probate Court issued an order in the appellants' action against Robert Billewicz, creating a constructive trust over certain assets of Robert Billewicz. App. 32-52. What they *disagree* about is the legal significance of that order. *See Coyle v. Battles*, 147 N.H. 98, 101-02 (2001) (no genuine issue of fact about when statute of limitations began to run where the parties did not dispute material facts, but only their legal significance). The appellants contend that an action against Ransmeier was not ripe until the creation of the constructive trust in August 2005, and that the statute of limitations should therefore run from that date. The Probate Court correctly ruled that the creation of a constructive trust over property of a third party has no bearing on a beneficiary's right to bring an action against the former trustee of a different trust. Appellants' Add. 37.

In considering a motion to dismiss, a trial court determines whether the allegations in the petitioner's pleadings are reasonably susceptible of a construction that would permit recovery. The court assumes the allegations contained in the petitioner's pleadings to be true, and construes all reasonable inferences in the petitioner's favor. However, it need not assume the truth of statements in the pleadings that are merely conclusions of law. *In re Kenick and Bailey*, 156 N.H. 356, 357 (2007). This Court will uphold the granting of a motion to dismiss if the facts pled do not constitute a basis for legal relief. *Dobe v. Commissioner, N.H. Dep't of Health and*

Human Services, 147 N.H. 458, 460 (2002). Review of a ruling on a statute of limitations defense is *de novo*. *State of New Hampshire v. Lake Winnipesaukee Resort*, 159 N.H. 42 (2009).

I. The Appellants Could Have Sued Ransmeier Within Three Years of His Resignation as Interim Trustee of the Five Trusts.

The appellants allege that Ransmeier breached his fiduciary duties as interim trustee of the Five Trusts in six ways: (1) improperly delegating his duties to others in his law firm; (2) failing to protect assets of the Five Trusts from Robert Billewicz's fraud; (3) performing unnecessary work; (4) failing to "enforce the claims" of the Five Trusts; (5) failing to file income taxes in a timely manner for 1996 and 1997 (he became trustee in 1999); and (6) failing to prevent spoliation of the appellants' trust assets "and other property." App. 4-5, ¶¶ 19-23.

Ransmeier denies all these allegations. In ruling on Ransmeier's fee applications, the Probate Court found insufficient evidence to support the claims about improper charges and faulty administration. *See* Addendum 40-41. The allegations that attempt to shift liability from Robert Billewicz to Ransmeier are illogical on their face, since Robert Billewicz did not control any Five Trust assets once Ransmeier replaced him as trustee. If the Court should find it useful to consider the substance of the allegations, the appellees attach a response Ransmeier filed when Lillian Billewicz made the allegations in opposing his fee applications. Addendum 46-50.

A. The Appellants Knew the Purported Facts Underlying their Claims Before the Limitations Period Lapsed.

The appellants made the same allegations long before August 2005. For example, in January 2003 Lillian Billewicz submitted a filing with the Probate Court claiming Ransmeier was responsible for a delay in filing trust tax returns for 1996 and 1997, and should be held liable for damages suffered by the Five Trusts as a result of his negligence. Addendum 20-21, ¶¶ 8, 11. In November 2003 she asserted that Ransmeier had submitted excessive bills and breached a

fiduciary duty to preserve trust assets. Addendum 25-26, ¶¶ 5-7. In June 2004 she asserted that Ransmeier's actions and omissions as interim trustee "resulted in various losses and undue expense to the trusts." Addendum 29, ¶ 1. In December 2004 she asserted that her own attorney, David Engel, had refused to "present the truth to the Court about the negligence of Atty. Ransmeier," and to raise the "issue of delay and the liability of Atty. Ransmeier." Addendum 33.

In its order of August 11, 2005 the Probate Court noted the beneficiaries' past assertions that Ransmeier was responsible for expenses arising from delays in trust accounting records. App. 49. Later that month, in its order on objections to Ransmeier's final statements, the Probate Court summarized the beneficiaries' allegations against him, including their claim that the role of interim trustee "required much more affirmative action in pursuing the rights and interests of the trusts in the litigation process." Addendum 39. The Probate Court concluded that the "references to potential negligence claims against Attorney Ransmeier for mismanagement of trust assets […] as well as claims of negligence by Attorney Ransmeier in failing to fulfill his fiduciary duty to the trusts as interim trustee […] are not properly before the Court at this time by way of prayers for relief in objections to pending motions. Therefore, no actions are being taken on those requests." App. 5, ¶ 27; Addendum 41. Thus, whether the appellants' complaints had any basis in fact or not, it is clear that all the elements of this action were present and known to the appellants well within the statutory limitations period.

B. <u>There Was No Legal Impediment to Bringing Suit Within the Limitations Period.</u>

A beneficiary may sue a trustee for breach of trust, and can be awarded a wide variety of money damages and equitable relief. *See, e.g.*, RSA 564-B:10-1001; RSA 564-B:10-1002; *In re Guardianship of Dorson*, 156 N.H. 382, 386-388 (2007). As beneficiaries of the Five Trusts, the

appellants could have brought this action while Ransmeier was interim trustee, or up to three years after his resignation on July 1, 2003. RSA 564-B:10-1005. They attribute their failure to do so to the lack of a "justiciable controversy" necessary to bring suit. They contend that they had no enforceable rights until the Probate Court created the constructive trust over Robert Billewicz's assets in August 2005, and fault the Probate Court for failing to perceive the difference between their rights as beneficiaries of the Five Trusts and their rights as beneficiaries of the constructive trust. Appellants' Brief, pp. 13, 17, 27.

In fact, the Probate Court recognized very clearly that the appellants' standing to sue as beneficiaries of the Five Trusts "existed quite separately" from their rights under the constructive trust granted in August 2005. App. 35. It is the appellants, not the Probate Court, that have attempted to blur that distinction. Ransmeier never administered the constructive trust; it was not even created until two years after his resignation as interim trustee of the Five Trusts. The appellants sensibly do not claim that Ransmeier owed them a fiduciary duty under the constructive trust itself. The allegations in their petition concern only his administration of the Five Trusts. App. 4-5. Instead, they argue that institution of the constructive trust in 2005 first gave rise to a cause of action against Ransmeier for his actions as interim trustee of the Five Trusts from 1999 to 2003. Appellants' Brief, pp. 21-22.

C. Ransmeier Had No Duty to Pursue a Constructive Trust Over Assets of Robert Billewicz.

The core of the appellants' claim seems to be that Ransmeier either had or assumed a duty as interim trustee of the Five Trusts to help the beneficiaries obtain a constructive trust over Robert Billewicz's assets. They assert that the Five Trusts' beneficiaries had no property rights in Robert Billewicz's assets until the Probate Court granted the constructive trust, so they could

not have sued Ransmeier until then for failing to help them obtain those rights. Appellants' Brief, pp. 10, 21-22, 27. This circular argument does not withstand scrutiny.

Whether a duty exists in a particular case is a question of law. *Ahrendt v. Granite Bank*, 144 N.H. 308, 314 (1999). The Probate Court appointed Ransmeier to act as *trustee* of the Five Trusts, not as their attorney. Addendum 39. It is true, as the appellants state, that a trustee has a duty to "take such steps as are reasonable to secure control of the trust property and to keep control of it." *American Fidelity Co. v. Barnard*, 104 N.H. 146, 152 (1962) (citation omitted). However, there is no allegation that Ransmeier failed to secure any property described in the Five Trust instruments. Those instruments did not create any interest in the assets of Robert Billewicz.

The duties of a trustee do not include an obligation to undertake every legal action that might conceivably benefit the beneficiaries, regardless of whether the potential action arises under the trusts he administers. The justification for imposing a high standard of care on a fiduciary is that the beneficiary is dependent, and has no choice but to rely on the fiduciary for a particular service. *Schneider v. Plymouth State College*, 144 N.H. 458, 462 (1999). Here, there was no such dependence. The appellants pursued their action against Robert Billewicz with independent legal counsel.

Moreover, the Probate Court's trial structuring order of March 22, 2002 expressly limited Ransmeier's duties with respect to the action against Robert Billewicz. It excused Ransmeier from the April 2002 evidentiary hearings, which the order refers to as addressing the petition to set aside probate of the Warren Billewicz estate, but which also addressed the appellants' requests for a constructive trust, and Robert Billewicz's motion to dismiss. Addendum 51-52, 54-56; App. 34, 44. Specifically, the Probate Court stated that Ransmeier:

> need not actively participate in the hearings on the merits and motions relating to the petition […] in order to be deemed to have adequately fulfilled [his] general fiduciary duties to the beneficiaries. This limiting of participation will also have the beneficial effect for the beneficiaries of minimizing trust expenses and preserving, to the extent possible, trust assets. Further […] the *petitioner's counsel*, on behalf of the petitioner in her individual capacity […] and as the legal custodial authority for her minor children […] [*has] agreed to a factual and legal conclusion that the interim trustees not further participating in the hearings on the merits of the petition […] does not constitute a breach of any standard of conduct in fulfilling the trustee's fiduciary duty to the various beneficiaries*.

Addendum 55 (emphasis added). Thus, the appellants brought this action against Ransmeier despite their express agreement that his lack of participation was not a breach of any fiduciary duty.

Even if Ransmeier had and breached a duty to join in the action against Robert Billewicz, nothing required the appellants to wait until the Probate Court agreed with them before suing Ransmeier. In *Pichowicz v. Watson Ins. Agency*, 146 N.H. 166 (2001) (applying RSA 508:4), the plaintiffs brought a declaratory judgment action against their insurer seeking liability coverage for a lawsuit brought against them. When the court found there was no coverage, they brought a facially untimely claim against their insurance agency, alleging that it had negligently failed to procure them an adequate policy.

This Court held that the statute of limitations began to run as soon as the plaintiffs should have discovered that the agent's alleged negligence had caused them some harm – that is, when they incurred legal fees to defend the underlying lawsuit. It rejected the plaintiffs' argument that the elements of a claim against the agent arose only when the court ruled against them in their declaratory judgment action. *Id.* at 167-68. As discussed in Section I (A) above, the appellants' Probate Court filings make clear that by January 2003 they believed Ransmeier had caused them

harm by breaching his duties as interim trustee. Addendum 19-23 (mistakenly dated as 1/8/02 instead of 1/8/03). That belief was sufficient to trigger their duty to act in a timely manner.

D. **There Is No Well-Pled Allegation that Ransmeier Caused the Appellants Harm by "Actively Opposing" Their Efforts to Obtain a Constructive Trust.**

The appellants repeatedly assert that Ransmeier "actively opposed" their efforts to obtain a constructive trust over Robert Billewicz's assets, and "urged" the Probate Court to deny that relief. Appellants' Brief, pp. 9, 11-12, 18-19, 23-24. However, they do not state when or how he did so. They support this claim only with citations to their own arguments. They do not identify any filing Ransmeier ever submitted attempting to influence the Probate Court on this issue. They do not allege, nor could they allege, that Ransmeier participated in any hearing on their petition for a constructive trust.[3] Their assertion does not even qualify as an "allegation" for purposes of ruling on a motion to dismiss. Nowhere in their petition did the appellants allege that Ransmeier actively opposed the creation of a constructive trust. They alleged only that he refused to consider pursuing that remedy. App. 5, ¶ 24.

Even if Ransmeier had for some inexplicable reason opposed the imposition of a constructive trust, the appellants would still have to allege that they were harmed by his opposition. The Probate Court *granted* the remedy they sought; it created a constructive trust in August 2005. App. 48. In the appellants' view, that relief came too late. However, they do not claim that Ransmeier was somehow responsible for the Probate Court's delay in ruling on their motion for reconsideration.[4] Their argument for tolling the statute of limitations is thus even less reasonable than the one asserted in *Pichowicz*, where the plaintiffs argued that an *unfavorable*

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[3] At oral argument on the motion to dismiss, Ransmeier's counsel noted the absence of record references showing Ransmeier's purported opposition to a constructive trust. 9/23/08 Tr. 41.

[4] The Probate Court granted Robert Billewicz's motion to dismiss in October 2002. Both sides filed motions for reconsideration and clarification. The Probate Court held evidentiary hearings that were concluded in December 2004. App. 3, 34. It issued its order on reconsideration in August 2005.

ruling was needed to establish that they had suffered compensable harm. The Probate Court's August 11, 2005 order gave the appellants what they wanted, made no findings of fact or rulings of law about Ransmeier's conduct, and was in no way a prerequisite for an action against Ransmeier.

II. The Claims Are Barred by RSA 564-B:10-1005.

RSA 564-B:10-1005(c) provides that a beneficiary may not commence a proceeding against a trustee more than three years after the trustee's removal or resignation. It includes no "discovery rule" or other tolling provision that could extend the limitations period. The Probate Court approved Ransmeier's resignation effective July 1, 2003. Appellants' Add. 34. The petition is dated February 25, 2008, four and a half years later. App. 6. The appellants' action is therefore facially barred.

A. The Probate Court Did Not Apply RSA 564-B:10-1005 in an Impermissible Retrospective Manner.

The appellants assert that the Probate Court ignored a general presumption that statutes are to be applied prospectively. Appellants' Brief, pp. 15, 29-30. However, that presumption applies to statutes that affect substantive rights. *In re Estate of Sharek*, 156 N.H. 28, 30 (2007). Statutes of limitations ordinarily affect only *procedural* rights. *Martin v. Pat's Peak*, 158 N.H. 735, 741 (2009). Additionally, the presumption applies only when the legislature is silent as to whether the statute should apply prospectively or retrospectively. *Estate of Sharek*, 156 N.H. at 30. RSA chapter 564-B expressly applies to "all judicial proceedings concerning trusts commenced on or after its effective date." RSA 564-B:11-1104(a)(2). The chapter became effective in October 2004. The appellants brought this action almost three and a half years later. The Probate Court therefore applied RSA 564-B prospectively.

In any event, retrospective application of a law is only impermissible if it deprives a person of a vested property right acquired under existing law. *Estate of Sharek*, 156 N.H. at 30-31. The appellants insist that they had "no vested legal right in any of the property under Robert W. Billewicz' control" before August 2005, almost a year after RSA 564-B:10-1005 became effective. Appellants' Brief, pp. 21-22. The legislature may change a statute of limitations at its pleasure, even if the limitation period has already partly expired, provided a sufficient time remains to allow a reasonably diligent plaintiff to assert a claim. *Martin v. Pat's Peak*, 158 N.H. at 742. The appellants had more than a year and a half after RSA 564-B became effective to bring suit against Ransmeier within the time period prescribed by the statute. Moreover, as discussed in Section IV below, the appellants had a *shorter* limitations period under the predecessor statute, not a longer one. For all these reasons, the appellants fail to show that the Probate Court erred in its application of RSA 564-B:10-1005.[5]

III. RSA 564-B:11-1104 Did Not Require or Permit the Probate Court to Ignore the Limitations Period.

The appellants contend that RSA 564-B:11-1104(a)(3) required the Probate Court to ignore the three-year limitations period, and that its failure to do so was plain error. Appellants' Brief, pp. 13-14, 21, 26-28. Section 1104(a)(3) creates a limited exception for judicial proceedings commenced *before* October 2004. If a trial court finds that application of the chapter would "substantially interfere with the effective conduct" of such a proceeding, or would "prejudice the rights of the parties," then the superseded law applies instead. Because the present action was commenced *after* October 2004, section 1104(a)(3) does not apply.

Even if the section applied, the Probate Court correctly determined that application of the three-year limitations period would not prejudice the appellants' rights. The appellants counter

[5] The Probate Court correctly ruled that the alternative statute of limitations, RSA 508:4, would also bar the action. Appellants' Add. 35. *See* Section IV below.

that the "underlying facts" took place before the effective date of RSA 564-B. Appellants' Brief, p. 29. The appellants did not raise that argument with the Probate Court, and may not properly raise it for the first time on appeal. *See Tiberghein v. B.R. Jones Roofing Company*, 156 N.H. 110, 113 (2007). In any event, the date of the underlying facts is not a material element in the application of RSA 564-B. The pertinent factors are the date of the trustee's resignation, the date of suit, and the statute's effective date. RSA 564-B:10-1005(c); RSA 564-B:11-1104(a).

The appellants also raise for the first time the argument that the limitations period should be tolled because Johnathan Billewicz and Michael Billewicz did not turn eighteen until after this action was filed. Appellants' Brief, p. 29. Even if this issue had been preserved for appeal, Lillian Billewicz and/or guardian *ad litem* Michael Chubrich represented the interests of Michael and Johnathan Billewicz at all relevant times. In addition, Attorney L. Bradley Helfer represented them in the action against Robert Billewicz. App. 1, 3, 33; Addendum 19, 32-36, 39, 42, 44, 51-55; Appellants' Add. 49. A parent or guardian may represent and bind a minor with respect to the minor's interest in a trust. *See* RSA 564-B:3-303(7); RSA 564-B:3-304.

Certainly, application of the limitations period was prejudicial to the appellants' *interests*. Application of a statute of limitations is always prejudicial to a plaintiff's interests. That is not the same as being prejudicial to *rights*. The appellants had no right to sue Ransmeier after the statutory limitation period had lapsed. Under their broad interpretation of RSA 564-B:11-1104(a)(3) the exception would swallow the rule, rendering the chapter's limitation period meaningless. The Probate Court did not err when it rejected that interpretation.

A. <u>The 2001 Action Against Robert Billewicz Did Not Toll the Limitations Period for an Action Against Ransmeier.</u>

The appellants also argue that their 2001 action against Robert Billewicz tolled the limitations period for an action against Ransmeier. They refer to a "line of cases" holding that

when a party has diligently begun litigation to preserve its rights, the statute of limitations is tolled pending the outcome of the first litigation. Appellants' Brief, pp. 15, 30. The New Hampshire case they cite is *New Hampshire Div. of Human Services v. Allard*, 138 N.H. 604 (1994). The issue in that case was whether a statute of limitations is tolled while a plaintiff exhausts administrative remedies before bringing suit. No administrative agency is involved in the present case. No exhaustion of administrative remedies was required or even possible.

Similarly, in *Butler v. Glen Oak's Turf*, 395 S.E.2d 277 (Ga.App. 1990), a Georgia appeals court held that the statute of limitations for a personal injury action was tolled while the plaintiff pursued relief under the state's Workers' Compensation Act, since she was legally barred from bringing suit until workers' compensation coverage was resolved. *See McCabe v. Garrett*, 440 S.E.2d 734, 735 (Ga.App. 1994) (*Butler* applied where plaintiff was legally barred from bringing suit, and where defendant was the same in both actions).

The appellants also cite *Tu-Vu Drive-In Corp. v. Davies*, 426 P.2d 505 (Cal. 1967), in which a California court held "without explanation or analysis" that the limitations period for bringing an action for damages was tolled pending resolution of an action for injunctive relief. *See Garabedian v. Skochko*, 283 Cal.Rptr. 802, 805 (Cal.App. 1991). *Tu-Vu* is inapposite for at least one of the same reasons as *Butler*. The common thread in California's application of its "several remedies" rule is that the plaintiff must have sought preliminary relief against the same party named in the later action. *Garabedian*, 283 Cal.Rptr. at 806.

The appellants asserted their 2001 claims against Robert Billewicz, not against Ransmeier. Furthermore, the claims were entirely different from those asserted in the present action. *Compare* App. 3, ¶ 11 (Robert Billewicz engaged in fraud and forgery) and App. 4-5, ¶ 23 (Ransmeier breached fiduciary duties by failing to make proper accountings and to protect the

assets of the Five Trusts from Robert Billewicz).[6] There is no reason why the claims against Robert Billewicz had to be resolved before the appellants could bring this action.

In any event, where RSA 564-B:10-1005 does not apply, the "superseded law" applies. RSA 564-B:11-1104(b). Here the superseded law is RSA 508:4 – the general, "catch-all" statute of limitations that applies to personal actions unless a different limitations period is provided by statute. RSA 508:1; *Martin v. Pat's Peak*, 158 N.H. 735, 741 (2009). Indeed, the appellants assert that if any statute of limitations applies it is RSA 508:4 – and they do not state why *no* statute of limitations would apply. Appellants' Brief, p. 13. However, they fare no better under that statute.

IV. <u>The Claims Are Also Barred by RSA 508:4.</u>

Like RSA 564-B:10-1005, RSA 508:4 has a three-year limitation period. In fact, RSA 508:4 is the stricter of the two statutes. Instead of running from Ransmeier's resignation date, it would run from the date the appellants should reasonably have discovered that Ransmeier's alleged misfeasance had caused some harm. *Coyle v. Battles*, 147 N.H. 98, 100-01 (2001); *Pichowicz v. Watson Ins. Agency*, 146 N.H. 166, 168 (2001). The right to bring suit would therefore have been extinguished as early as January 2006 instead of July 2006. Addendum 19-23. The appellants do not assert in either their petition or their brief that they were unable to discover their injury or its purported relationship to Ransmeier's alleged conduct until after February 25, 2005, nor could they meet their burden of proving such a contention. *Id.* at 167. Consequently, the Probate Court committed no error in applying either of the statutes of limitations.

[6] The appellants do not actually allege that Robert Billewicz exercised any control over assets in the Five Trusts after Ransmeier replaced him as trustee in 1999. It is therefore unclear how they believe Ransmeier allowed Robert Billewicz to squander trust assets. In its final ruling on Ransmeier's fee applications, the Probate Court found insufficient evidence to support Lillian Billewicz's claims of improper accountings and billings (apart from a $240.00 charge resulting from a clerical error). *See* Addendum 40-41, 46-50.

CONCLUSION

For the reasons stated above, the Court should affirm the Probate Court's order dismissing all claims. In light of the fact that the appellants brought this untimely action despite clear knowledge of all pertinent facts within the statutory limitations period, and despite the March 22, 2002 court order expressly noting the appellants' agreement that Ransmeier had no duty to participate in the action seeking a constructive trust, the appellees ask the Court to grant them their reasonable attorney fees incurred in defending this appeal.

Respectfully submitted,

John C. Ransmeier and
Ransmeier & Spellman Professional Corporation

By Their Attorneys,

RANSMEIER & SPELLMAN
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Dated: January 19, 2010 By: _____

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ORAL ARGUMENT

The appellees believe the Court can and should resolve this matter on the briefs. If the Court orders oral argument, the appellees request the same amount of time granted to the appellants. Argument will be presented by John T. Alexander.

CERTIFICATE OF SERVICE

I certify that two copies of this brief have been forwarded this day by First Class U.S. Mail to Lillian E. Billewicz, Johnathan J. Billewicz, Michael Billewicz, and John P. Kalled, Esq.

Dated: January 19, 2010 _____

John T. Alexander

ADDENDUM

A.	Plaintiffs' Objection to Defendant's Motion for Extended Relief, 1/8/03 (excerpts)	19-23
B.	Objection to Motion of John C. Ransmeier, Former Interim Trustee, for Payment of Statement for Legal Services Dated November 7, 2003, 11/18/03 (exhibits omitted)	24-28
C.	Objection to Motion for Allowance of Additional Compensation, 6/25/04	29-31
D.	Replication to Objection to Motion for Reduction of Bill and Itemization of Duplicative Billing by Atty. David C. Engel, 12/7/04 (exhibits omitted)	32-36
E.	Order on Objections to Professional Services Statements, 8/30/05	37-45
F.	Reply by the Interim Trustee to the Post November 12, 2004 Hearing Brief Filed by Lillian E. Billewicz (exhibit omitted), 12/14/04	46-50
G.	Memorandum in Support of Motion to Reconsider (excerpts), 11/4/04	51-53
H.	Trial Structuring Order, 3/22/02	54-56

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