

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0782, Financial Resources and Assistance of the Lakes Region v. National Inspection and Repair Co., Inc. & a., the court on March 3, 2006, issued the following order:

The defendants, National Inspection & Repair Company, Inc. (NIR) and David Price (Price), appeal a \$300,000 jury verdict for the plaintiffs, Financial Resources and Assistance of the Lakes Region (Financial Resources). They argue that the trial court erred in denying their motions for judgment notwithstanding the verdict and in excluding the out of court statement of Ron Provart. We affirm.

A party is entitled to judgment notwithstanding the verdict only when the sole reasonable inference that may be drawn from the evidence when viewed in the light most favorable to the nonmoving party is so overwhelmingly in favor of the moving party that no contrary verdict can stand. Porter v. City of Manchester, 151 N.H. 30, 41 (2004). If the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the trial court must deny the motion. Id. Our review of this issue is extremely narrow; absent an unsustainable exercise of discretion, we will not overturn the trial court's decision. Id.

The defendants concede that the plaintiff loaned them \$300,000. They argue, however, that because the plaintiff obtained the funds through unlawful means, the plaintiff is barred from recovering them. We need not assess the plaintiff's conduct toward third parties in this case. Under New Hampshire law, "[t]he party to a suit, complaining that his opponent is in court with unclean hands because of the latter's conduct must show that he himself has been injured by such conduct, to justify application of the principle to the case. The wrong must have been done to the defendant himself and not to some third party." Cornwell v. Cornwell, 116 N.H. 205, 210 (1976) (quotations and ellipsis omitted).

A trial court may require a party to make restitution for unjust enrichment if he has received a benefit that would be unconscionable for him to retain. Kowalski v. Cedars of Portsmouth Condo. Assoc., 146 N.H. 130, 133 (2001). To recover under a claim of restitution, the party must show that there was unjust enrichment either through wrongful acts or passive acceptance of a benefit that would be unconscionable to retain. Id. "Direct review of a damages award is the responsibility of the trial judge, who may disturb a verdict as excessive or inadequate if its amount is conclusively against the weight of the evidence and if

the benefit is manifestly exorbitant.” Bennett v. Lembo, 145 N.H. 276, 281-82 (2000) (quotations omitted). We note that although we have not been provided with a complete record on appeal, it is sufficient for us to conclude that, despite its conflicting nature, the record contains evidence to support the jury award; we therefore find no error in the trial court’s ruling. See id. (“Our task on review is not to attempt to ascertain or divine the one and only correct verdict.”).

The defendants also contend that the plaintiff’s discovery violations should bar recovery. We review a trial court’s sanctions on discovery violations under an unsustainable exercise of discretion standard. In re Jones, 146 N.H. 119, 121 (2001); see State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard). In this case, the trial court held a pretrial hearing at which plaintiff’s counsel represented that it had provided all the documents required under the court’s discovery orders. The court ruled that if the plaintiff had failed to produce documents, those documents could not be introduced at trial in support of its claims. The defendants did not object to that ruling. At the close of trial, the defendants argued that the case should be dismissed based in part upon discovery violations. Although the defendants argue on appeal that the plaintiff’s failure to comply with their discovery requests affected their ability to establish the agency relationship of Ron Provart, it was not an argument that they presented in support of their motion to dismiss before the trial court. See State v. Blackmer, 149 N.H. 47, 48 (2003) (appellate review limited to issues raised before trial court). Accordingly, we confine our review to the arguments they presented at the close of evidence: that the discovery violations affected their ability to address issues of standing and equity. Because under Cornwell, these issues were not relevant to the claims in this case, we find no error in the trial court’s ruling. In doing so, we do not minimize the obligations of all members of the bar to comply with discovery requests; our case law is replete with the sanctions imposed and penalties paid as a result of noncompliance with our court rules.

For the reasons we have already articulated, we also reject the defendants’ arguments that the verdict should be set aside and a new trial ordered on the plaintiff’s claims and that the trial court erred in denying their motion for judgment notwithstanding the verdict or new trial on their counterclaims.

The defendants’ final claim of error is that the trial court erred in excluding the out of court statements of Ron Provart; they argue that his testimony was admissible as an admission of a party opponent, see N.H. R. Ev. 801(d). We review a trial court’s decision on the admissibility of evidence under an unsustainable exercise of discretion standard. See Moreau v. Figlioli, 151 N.H. 618, 628 (2005). The defendants concede that to introduce his statements, they bore the burden of proving that an agency relationship existed between Scott Farah and Ron Provart. Given the conflicting evidence on this issue in the record, we find no error in the trial court’s ruling that the defendants failed to sustain their burden.

Affirmed.

Dalianis, Duggan and Galway, JJ., concurred.

**Eileen Fox,
Clerk**