

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0027, Thomas A. Mason v. Walter Henry Shaw, III & a., the court on March 14, 2006, issued the following order:

The plaintiff, Thomas Mason, appeals and the defendants, Walter Henry Shaw III and Andrew P. Shaw, cross-appeal a decision of the trial court: (1) finding that a contract existed between the parties but that the statute of limitations barred a portion of the defendants' request for damages; and (2) limiting the plaintiff's claim for damages based upon trespass. We affirm.

The trial court found that the plaintiff owned pro-stock racing cars. From September 1998 until September 2001, defendant Andrew Shaw drove the cars and defendant Walter Henry Shaw III maintained them. The record reflects that when the relationship ended, the plaintiff requested the return of the cars, the racing trailer and equipment. He subsequently sued seeking return of numerous items of personal property; the defendants filed a counterclaim alleging that they were due 10% of the purses won by the plaintiff's car under an unwritten agreement between the parties and that the plaintiff owed them \$3287.75 for certain parts. Following trial, the court ruled that the parties had reached an agreement entitling the defendants to 10% of the purses but that claims for any purses that predated October 27, 2000, were barred by the statute of limitations. With the exception of three items that the defendants admitted they had wrongfully retained, the trial court found against the plaintiff on his claim of trespass. The court also found the plaintiff liable for the \$3287.75; the plaintiff has not contested that portion of the court's ruling.

On appeal, the plaintiff argues that the trial court erred in finding that: (1) an agreement existed between the parties entitling the defendants to 10% of the purses; (2) the defendants had not wrongfully retained additional items belonging to the plaintiff; (3) the plaintiff was not entitled to compensation for a pump jack; and (4) certain items claimed as damages by the plaintiff had not been provided in discovery. In their cross-appeal, the defendants argue that the trial court erred in finding that any claim for a percentage of purses earned prior to October 27, 2000, was barred by the statute of limitations.

All of the issues raised on appeal require some finding of fact by the trial court. See, e.g., Chisholm v. Ultima Nashua Indus. Corp., 150 N.H. 141, 145 (2003) (disputed question of fact as to the existence and terms of a contract is to be determined by the trier of fact). We defer to the trial court's findings of fact, if

supported by the evidence. Greenhalgh v. Presstek, 152 N.H. ___, ___ (decided October 31, 2005).

In this case, the record contains testimony that: (1) the parties reached an agreement under which the defendants would earn 10% of the purses earned; (2) with the exception of three items that they conceded were the plaintiff's, the defendants had not wrongfully retained any of the other contested items; and (3) defendant Walter Shaw III had purchased the pumpjack as a gift for his brother. While there is also testimony to rebut these assertions, weighing the evidence is properly a function of the trial court and we defer to its judgment. See Bradley v. Patterson, 121 N.H. 802, 805 (1981).

The plaintiff also argues that the trial court erred in refusing to consider five items listed in his Exhibit A based upon its finding that he had failed to disclose these items in discovery, even though, after first objecting, the defendants subsequently conceded at trial that the items had been disclosed. The record before us indicates that the plaintiff first became aware of the alleged error when he received the trial court's order deciding the case. The plaintiff has provided no evidence that he filed a motion to reconsider or otherwise brought this alleged error to the attention of the trial court. Accordingly, we conclude that it has not been properly preserved for our review. See LaMontagne Builders v. Bowman Brook Purchase Group, 150 N.H. 270, 274 (2003) (supreme court will not consider issues on appeal not presented in trial court); N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002) (issues arising subsequent to trial may be raised before trial court in motion for reconsideration); Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (failure of moving party to demonstrate where question presented on appeal was raised below may be considered by court regardless of whether opposing party objects on those grounds).

In their cross-appeal, the defendants contend that the trial court erred in concluding that their claim for any earnings prior to October 27, 2000, was barred by the statute of limitations. Disputed questions of fact as to the existence and terms of a contract are to be resolved by the trier of fact. Chisholm v. Ultima Nashua Indus. Corp., 150 N.H. 141, 145 (2003). When the fact finder has looked to extrinsic evidence to determine the intent of the parties, our standard of review is more deferential than when we are asked to construe the express terms of a contract. Galloway v. Chicago-Soft, 142 N.H. 752, 756 (1998). Because there is some evidence in the record to support the trial court's conclusion that the percentage to be paid to the defendants was due when the purse was paid, we find no error in its ruling that the defendants' claim based on earnings prior to October 27, 2000, was barred by the statute of limitations.

Affirmed.

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

**Eileen Fox,
Clerk**