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NH SUPREME COURT

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0051

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Clifford E. Avery

V.

Helen Hanks, Commissioner,  
New Hampshire Department of Corrections

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
MERRIMACK COUNTY SUPERIOR COURT

AMICUS BRIEF

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### SUMMARY OF THE ARGUMENT

While I submit this brief and answer the Court's question in the affirmative, agreeing with the State, I also assert that sovereign immunity does not necessarily operate to the benefit of the State Prison, in that the immunity does not prevent the Appellant, nor any member of the Plaintiff-class, from obtaining relief through habeas corpus.

As to sovereign immunity, Appellant's arguments condense into three grounds, which I assemble and address:

1. Appellant contends that the settlement agreement must be enforceable, despite sovereign immunity, because the state would be dealing fraudulently if permitted to raise the immunity now.
2. Appellant also contends that the specific performance mechanism for other contracts must be available in this matter since the contract must be enforceable in state courts.
3. And then Appellant contends that sovereign immunity, if applied, leaves no adequate remedy.
4. A fourth matter is presented addressing some of the implications of any waiver of sovereign immunity in this matter.

While I address the Court's question with particular references to the parties' arguments, the relation to the Court's question is through the third and fourth "circumstances" (i.e., "c" and "d").

ESTOPPEL - FRAUD

Underlying Appellant's estoppel claims is the assertion -rephrased- that because the agreement was that the contract provisions would be enforceable, they must be enforceable. The assertion is misplaced under estoppel because the State is not now saying Appellant cannot "seek enforcement of any noncompliance issues." AB 5.

Comparably, the "fraud" claims by Appellant are misplaced. Appellant asserts that promissory fraud was committed because the State knew that it would raise sovereign immunity - presumably to thwart specific performance claims. AB 1-6 and 19-22. However, the assertion assumes that the purely civil procedure under RSA 491:8 was the available and contemplated enforcement mechanism in 2001. Viewing RSA 491:8 and other applicable laws of 2001, RSA 622:55, 56 specially, indicates that RSA 491:8 would not have served to any reasonable degree as an enforcement mechanism. In short, that is because the prisoner seeking relief would have availed himself (or herself) nothing of enduring worth since RSA 622 would have permitted the State to recoup any losses.

In this matter it seems prudent to assume that the parties in 2001 did not expect this Court to nullify sovereign immunity in relation to specific performance demand introduced through RSA 491:8.

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"AB" refers to Appellant's Brief

### ENFORCEABLE IN STATE COURTS

Appellant's pursuit of specific performance in-general, runs afoul of the logic underlying this Court's reasoning in Lambert v Lambert, 96 N.H. 376 (1950). While the relationship between a caregiver and the recipient discussed in Lambert is distinguishable as being more intense or familial, the logic need not fail to reach the same conclusion. The Court reasoned that concern-driven-caretaking (my words, not the Court's) could not effectively be compelled by an order for specific performance, but that remedy need not stop there. "While specific performance cannot be granted, any right to the other forms of equitable relief need not be foreclosed." Lambert, at 377.

Appellant's pursuit of specific performance as being of Constitutional necessity or a contractual obligation fails on two fronts. First, the contractual mandate that the agreement be "enforceable by the courts of the State of New Hampshire" (AB 1, and intimated throughout) does not necessarily make specific performance the enforcement mechanism. Indeed, since specific performance was not available in 2001 due to sovereign immunity, it could not legally nor logically be enforcement mechanism for the contract. Harper v Healthsource N.H., 140 N.H. 770, 775 (1996) states: "We will not enforce a contract or contract term that contravenes public policy."

Appellant fails on the second front due to the fact that in 2001, like now, Merrimack County only had one Superior court with jurisdiction to entertain claims under RSA 491:6, but the enforcement clause in the

agreement refers to courts in the plural. The proximity of all parties and their clients, including the plaintiff-class, makes it improbable that such people were ignorant of the singular Superior court available for RSA 491:3 claims. Under habeas corpus, each sentencing court could be an enforcing court.

### ADEQUATE REMEDY

The State contends that Appellant may bring a new 42 USCS §1983 action to vindicate constitutional violations, and therefore the application of sovereign immunity to the specific performance action does not leave Appellant without adequate remedy. The contention ignores the fact that Appellant's central issue is the violation of a contract. Read in the context of an action for specific performance, Appellant's claims need not be seen as claims of unlitigated constitutional violations.

Since the State's argument is not likely to survive this Court's scrutiny, I present what I believe is the correct - limited though it is - view of Appellant's claim that constitutional violations require adequate remedy, and specific performance under RSA 491:3 in particular. From the outset, Dow v Northern R.R., 67 N.H. 1 (1886) and similar cases makes it clear that adequate remedy is required. The proper avenue is the issue.

Heck v Humphrey, 512 U.S. 477 (1994) bars 42 USCS §1983 actions which call into question the validity of underlying sentence. Laaman v Helgenoe, 437 F.Supp 269 (1977), the civil rights action underlying the settlement agreement here, was founded on state and federal constitutional provisions addressing cruel punishment. The settlement agreement set forth corrective steps necessary to end those constitutional violations, to rephrase this Court's Amicus Announcement, pg. 2. New Hampshire Const. Part I, Art. 33 states: "No Magistrate, or Court of Law, shall...inflict cruel or unusual punishments." Thus, short of significantly - bordering on magical - acrobatic argument, Appellant's claims would run afoul of Heck, supra.



Appellant would be even more pressed to avoid running afoul of Heck in a state court action where the Court would be aware of the distinction between the state and federal constitutions on the point. That is, while the federal constitution's prohibition is of general application, the state constitution places the onus of responsibility for cruel punishment squarely upon the imposing court. Thus, the proper and straight-forward presentation of Appellant's claims, factual and contractual, would place the matters at the heart of this specific-performance litigation within the jurisprudence of habeas corpus. And consequently, Appellant is not left without adequate remedy.

OBLIGATION OF CONTRACTS / RETROSPECTIVE LAWS

The State's proclivity for awaiting, permitting, and necessitating judicial intervention in matters that are predominantly legislative, as in, e.g., Merrill v Manchester, 114 N.H. 722 (1974), Duquette v Warden, 154 N.H. 737 (2007), and the current case -- which entails both the enforcement of a contract to which the State is a party and the possible modification of sovereign immunity -- should not be permitted to act as a bypass of the prohibition against legislative interference in the obligation of contracts (U.S. Const. art. 1 § 10, cl. 1), and retrospective laws (N.H. Const. Part 1, art. 23). Put another way, the legislature should not be able/allowed to have this Court do so in the legislatures stead.

While not asserting any perceived legal wrongs based upon established precedent, Kent v Gray, 53 N.H. 576 (1873) is offered as a guide of reasoning. Kent, at 578, condemned application of a law that would "operate as a substantial creation of a new suit that could be maintained, in place of an old one that could not." Of course, there is a large difference between the Court removing an impediment and the legislature doing so. But that difference thins when the Court is acting as proxy (even if a proxy from necessity), and it disappears when the legislature permits "necessity" to arise repeatedly.

"The test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong." Kent, at 580. If this Court allows specific performance claims against the State under RSA 491:8, the restrictions of Springer v Hungerford, 100 N.H. 503 (1957), would make this "new suit" (Kent, supra) another hurdle for prospective litigants. (Habeas is only available when "other remedies are inadequate or ineffective." Springer, at 506)

CONCLUSION

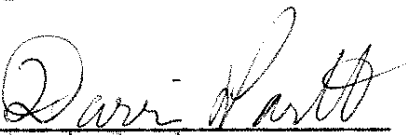
I answer the question presented by this Court in its solicitation for amicus briefs in the affirmative, and hope I have done this right.

AND CLOSING

I, Darrin Partlow, hereby certify that the word count for this brief is substantially below the number permitted by this Court's solicitation, and further certify that a copy of this brief will be mailed, postage prepaid, to counsel for the State at:

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April 2, 2020

  
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