

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2019-0120

Balzotti Global Group, LLC & a.

v.

Shepherds Hill Proponents, LLC & a.

**APPEAL FROM THE ROCKINGHAM COUNTY SUPERIOR
COURT PURSUANT TO SUPREME COURT RULE 7**

**REPLY BRIEF OF APPELLANT BALZOTTI GLOBAL
GROUP, LLC & A.**

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ARGUMENT

Given the unique procedural and factual circumstances surrounding this case, the trial court erred when it determined that Balzotti Global Group, LLC and Caesar Balzotti, Sr. (collectively "BGG" unless otherwise indicated) suffered harm at a point earlier than April 2, 2015. The facts at hand are not remotely similar to those presented in *Pichowicz v. Watson Ins. Agency, Inc.*, 146 N.H. 166 (2001) and *Draper v. Brennan*, 142 N.H. 780 (1998), which are cases that Defendant Shepherds Hill Development Company, LLC ("SHDC") cites in its brief as supportive of its position as well as the trial court's underlying decision. BGG was a third-party bystander impacted by the unknown actions of others in 2013 which affected its future rights, not a party to or participant in the prior litigation. Understandably, BGG relied on a facially valid document recorded in the Registry of Deeds (although later declared invalid) that satisfied the statutory ten-year deadline to address convertible lands. Apx. IV at 172. Consequently, BGG, specifically, Mr. Balzotti, could not recognize his injury, nor the causal connection between the breach and the injury, because the injury did not become fixed until the Supreme Court's final Order on April 2, 2015. Apx. I at 258. For these reasons, in addition to the reasons in BGG's principal Brief, this Court should reverse the trial court and remand this case to the trial court.

I. **PICHOWICZ V. WATSON INS. AGENCY, INC. AND
DRAPER V. BRENNAN ARE DISTINGUISHABLE
FROM THE PRESENT CASE AND THEREFORE ARE
NOT CONTROLLING OR APPLICABLE.**

Defendant SHDC's reliance on *Pichowicz, Inc.*, 146 N.H. 166 and *Draper*, 142 N.H. 780 is misplaced. In *Pichowicz*, the Court's holding was based on damages, i.e. attorneys' fees, that had actually accrued to the plaintiff prior to the Court's ultimate dismissal of the negligence action. The plaintiffs in *Pichowicz* were developers of a condominium unit. *Pichowicz*, 146 N.H. at 167. At some point, the septic system failed because of faulty design and construction. *Id.* The condominium's homeowner association sued the plaintiffs in 1992, who in turn sought defense and indemnification under various insurance policies that the defendants had secured for them. *Id.* The plaintiffs' insurer denied coverage and the plaintiffs began incurring legal fees in April, 1993. *Id.* As a result of the denial of coverage, the plaintiffs brought a declaratory judgment against the insurers, which was resolved in favor of the insurers in 1995. *Id.* The plaintiffs filed their negligence action against the defendant in 1998. On appeal, the plaintiffs argued that their writ was timely filed but the Court disagreed. *Id.*

The Court explained that the alleged negligence was the defendant's failure to procure insurance that would cover the plaintiffs in the underlying lawsuit. *Id.* Importantly, the Court concluded that the alleged negligence first caused harm to the plaintiffs when they incurred legal fees in April, 1993. *Id.* Although the plaintiffs attempted to argue that the discovery rule applied and that they did not discover, nor could they have reasonably

discovered, that the defendant's negligence caused them harm until the trial Court ruled on their declaratory judgment action against the insurers, the Court disagreed. *Id.* at 168. The Court specifically indicated that, "[t]o the contrary, the plaintiffs should have discovered that there was a causal connection between their harm (incurring legal fees) and the defendant's alleged negligence (the failure to procure appropriate insurance) when the harm occurred." *Id.*

Similarlary in *Draper*, the plaintiff retained the attorney defendants to represent him in an action against a bank and its president. *Draper*, 142 N.H. at 781. The action was settled in 1986 in an agreement made on record before the Court but there were continued disputes between the plaintiff and the bank. *Id.* The defendants moved on the plaintiff's behalf to enforce the settlement agreement in 1990, but the trial court denied the motion and a subsequent motion for reconsideration. *Id.* at 782. The defendants filed a notice of appeal on the plaintiff's behalf one day later than required and the Court denied the defendants' motion to extend time for late entry. *Id.* The plaintiff commenced an action in 1994 alleging that the loss of insurance coverage under the settlement agreement was due to the defendants' negligence and the defendant's moved for summary judgment on the basis that the plaintiff's suit was barred by the statute of limitations. *Id.* The trial court granted the defendants' motion and the plaintiff appealed. *Id.*

In deciding when the plaintiff's harm occurred, the Court concluded that, "that the plaintiff suffered harm, in the form of being required to pay for his insurance, before February 15, 1991. Although the plaintiff may not then have known the full extent of the damages he would sustain as a result

of the defendants' breach, that some actual harm occurred is sufficient to bring his cause of action into existence.” *Id.* at 786.

In both *Pichowicz* and *Draper*, on which SHDC heavily relies, the Supreme Court identified tangible damages that the respective plaintiffs had suffered that definitively pertained to a date that had already occurred. *Pichowicz*, 146 N.H. at 167; *Draper*, 142 N.H. at 786. In *Pichowicz*, the Court identified a particular date in which the plaintiff’s harm, i.e., attorneys’ fees, started to accrue. *Pichowicz*, 146 N.H. at 167. Likewise, in *Draper*, the Court was able to pinpoint the plaintiff’s actual harm suffered in terms of payments that the plaintiff made contrary to his understanding of an additional settlement agreement on specific dates. *Draper*, 142 N.H. at 786. BGG did not suffer any materialized harm of any kind, as defined by this Court in *Draper* and *Pichowicz*, until this Court’s April 2, 2015 Order (issued on April 16, 2015). Apx. I at 258. This Order determined finally that SHDC had lost its development rights to the condominium, which would result in BGG’s inability to collect on the promissory note (the “Note”) in the future. Before that final Order, it was a mere possibility that BGG would be unable to collect on the Note. The mere possibility that BGG could suffer harm in the distant future is not enough to be considered harm under RSA 508:4, or under this Court’s interpretation of harm sustained in *Draper* or *Pichowicz*. BGG’s harm is the inability to receive payments on its Note from the sale of the condominium units, which would have occurred in the future.

Here, as opposed to the plaintiffs in *Draper* or *Pichowicz*, BGG was a third-party bystander ultimately impacted by the preliminary 2014 trial court decision deciding its future rights, not a party to the prior litigation.

Apx. V at 406-407. BGG reasonably relied on the Twenty-Fourth Amendment (“Amendment”) to the Declaration of the Association dated February 22, 2013 and recorded in the Registry of Deeds that, on its face, satisfied the statutory ten-year deadline to address convertible lands. Apx. IV at 172. Although this Amendment was later declared invalid, this Amendment contained no notation or other reference indicating that it had been expunged or overruled by a subsequent court order. Apx. IV at 172. Thus, since there was no other contrary information giving reason to Mr. Balzotti to doubt the validity of the Amendment, he rightfully should have, and did, rely on it. Likewise, due to the existence of this facially valid Amendment, the trial court’s argument that BGG is presumed to know the law actually favors BGG, because the law required an Amendment within ten years, which occurred. Only later did this Court finally decide that the recorded Amendment was invalid. Apx. V at 406-407.

Although BGG’s specific date of harm in this unique case coincides with the finality of all legal proceedings, specifically the Supreme Court’s Order on April 2, 2015 affirming the trial’s court’s granting of the Defendant’s motion to dismiss, BGG is not arguing that in every case the harm only occurs or accrues upon a final legal proceeding, judgment, or at the end of an appeal. The circumstances surrounding this case, and the particularly unique facts regarding the harm to be suffered (i.e., BGG’s inability in the future to collect on the Note) warrant that this Court determine that the harm was suffered no earlier than April 2, 2015. BGG, specifically, Mr. Balzotti, could not recognize his injury, nor the causal connection between the breach and the injury, i.e., his inability to collect on the Note, because the injury had not yet occurred and would not occur until

this Court's final Order. Logically, the only realistic date for Mr. Balzotti to have knowledge of the injury and the causal connection is the date of the April 2, 2015 Order. Only on this date did the harm manifest itself because there was a final order invalidating a recording in the Registry of Deeds, which on its face satisfied the ten-year deadline to address convertible lands. This set of unique circumstances is readily distinguishable from *Draper* and *Pichowicz*, in which the harm suffered had concretely materialized and the Court could assign a specific date as to when the plaintiffs had suffered harm. Furthermore, in both instances the plaintiffs were parties to the underlying litigation, unlike in the present case. Thus, the trial court erred in determining that BGG's harm was the loss of development rights on the condominium in 2013. Rather, BGG's harm, i.e., its inability to collect on the Note, had not been finally determined until April 2, 2015.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

The trial court erred when it dismissed BGG's Complaint based on statute of limitations grounds. The trial court's legal analysis was flawed because it applied the discovery rule and relied on cases that are not applicable to the unique facts at hand. For the reasons stated above and for the reasons stated in BGG's principal Brief, this Court should reverse the decision of the trial court and remand this case to the trial court.

BGG respectfully requests fifteen minutes of oral argument before the full Court. Matthew R. Johnson will present oral argument for the appellants, Balzotti Global Group, LLC and Caesar Balzotti, Sr.

Respectfully submitted,
BALZOTTI GLOBAL GROUP, LLC
and CAESAR BALZOTTI, SR.

By his Attorneys
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Dated: October 21, 2019

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Rule 16(3)(i) because copies of the appealed decisions are appended to this brief; Rule 16(11) because this brief contains 1,668 words exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes, and addendum; and Rule 26(7) because, on this 21 day of October, 2019, copies of this brief were forwarded to John M. Sullivan, Esq., Emile R. Bussiere, Jr., Esq., Jeremy T. Walker, Esq., Joseph A. Foster, Esq., Steven Dutton, Esq., and Thomas W. Aylesworth, Esq., counsel of record for the defendants, via the Court's electronic filing system's electronic services.

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