THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0422

Bedford School District
and William Foote
v.

State of New Hampshire et al.

APPEAL FROM A JUDGMENT OF THE CHESHIRE COUNTY SUPERIOR COURT

REPLY BRIEF FOR APPELLANTS THE STATE OF NEW HAMPSHIRE, THE NEW HAMPSHIRE DEPARTMENT OF EDUCATION, MARGARET WOOD HASSAN, AND VIRGINIA M. BARRY

THE STATE OF NEW HAMPSHIRE, ET AL.

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(15 minutes)

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I. UNDER THE PLAIN TERMS OF HB 354-A, BEDFORD WAIVED ANY RIGHT TO RECOVER ATTORNEYS' FEES WHEN IT ACCEPTED PAYMENT IN FULL FOR FISCAL YEAR 2016

A. The State preserved its argument as to the effect of HB 354-A by presenting it to the trial court before it ordered the payment of fees

As argued in the State's opening brief, even if the trial court acted properly in recognizing Bedford's claim for attorneys' fees against the State, Bedford waived that claim by accepting payment from the State under HB 354-A. SB 25-26.[1] Bedford suggests that the State failed to preserve this argument for appellate review, pointing out that it "was not made in the State's objection to the motion for summary judgment," filed in January 2017, nor in "the State's April 17, 2017 motion for reconsideration." BB 9 (record citations and capitalization omitted). But Bedford's argument ignores the simple reality that HB 354-A did not become law until April 27, 2017—which was some three months after the State's deadline for filing its objection to Bedford's summary judgment motion, and ten days after the State's deadline for moving for reconsideration of the trial court's order granting that motion and ruling that Bedford was entitled to its reasonable attorneys' fees. Moreover, Bedford did not accept payment of the funds appropriated by HB 354-A until May 1, 2017, SA 238, which was itself 14 days after the State's deadline to move for reconsideration.

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[1] This brief uses the following abbreviations: "SB __," to refer, by page number, to the opening brief for appellants the State of New Hampshire, the New Hampshire Department of Education, Virginia M. Barry, and Margaret Wood Hassan (collectively, "the State"); "SA __," to refer, by page number, to the appendix submitted with the State's opening brief; "BB __," to refer, by page number, to the responsive brief for appellees the Bedford School District and William Foote (collectively, "Bedford"); and "BA" to refer, by page number, to the appendix submitted with Bedford's brief.

Until HB 354-A passed into law, and Bedford accepted the funds it provided, the State could not have argued that the effect of those events was a waiver of Bedford's claim for attorneys' fees in this action—based on the simple fact that those events had yet to occur. Instead, the State made that argument for the first time in its response to Bedford's application for attorneys' fees, which the State filed on May 17, 2017. SA 261-262. This was just two and a half weeks after Bedford had accepted the payment and, more importantly, more than a month before the trial court issued its final "Order on Attorney's Fees." SA 272-73.

As this Court has explained, its rules on the preservation of arguments "require issues to be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance." Sklar Realty, Inc. v. Town of Merrimack, 125 N.H. 321, 328 (1984). That is precisely what happened here. The State made its argument as to the effect of HB 354-A shortly after the legislation had taken effect, and well before the trial court had issued its final order awarding fees. This provided the trial court with an ample opportunity to avoid the error it made by ordering payment to Bedford on a claim that it had waived through its conduct just 17 days earlier. Bedford's position that the State nevertheless failed to preserve this argument by not raising it in its motion to reconsider the trial court's summary judgment order—which, again, was filed prior to the enactment of HB 354-A, the event which served as the very basis of the argument—is plainly incorrect.[2]

[2] Bedford is likewise incorrect that, "even if the argument was timely made but not considered, the State was obligated to move for reconsideration of the court's June 17, 2017 order in order to preserve this argument for appellate review." Again, the purpose

B. HB 354-A effected a waiver of Bedford's claim for attorneys' fees

HB 354-A expressly states that "[a]cceptance of a disbursement by a municipality under this act shall constitute a waiver and full release of any and all claims it may have against the state of New Hampshire, its agencies, officers, employees, or agents arising out of the state's adequate education payments between September 1, 2008 and June 30, 2016." SA 369-370. In an attempt to escape from the effect of this provision, Bedford argues that the funds it acknowledges having received on May 1, 2017, either were not "accepted," because they "were provided by wire transfer," or were not disbursed "under this act," because the trial court had already ordered the State to make payment to Bedford prior to the bill's passage. BB 17. But the fact that the court ordered the State to pay Bedford the shortfall in adequacy aid it experienced in fiscal year 2016 does nothing to change the fact that the funds to make that payment were disbursed by HB 354-A. Bedford fails to explain how receiving those funds by wire transfer (without protest or reservation as far as the record indicates) differs from an "acceptance" of them. Under the plain terms of HB 354-A, it is the "acceptance of a disbursement by a municipality" that effects the waiver of that municipality's claim against the State; the statute makes no exception for cases where the payment was ordered by a court or sent by wire transfer.

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of the raise-or-waive rule is to ensure that the trial court has the opportunity to correct its own errors; here, the trial court was given that opportunity by virtue of the State's response to Bedford's fee application, which was filed well before the trial court ruled on the application. Bedford provides no authority in support of its view that, having raised an argument in a filing made before the trial court rules, a litigant is obligated to raise the same argument again by way of a motion for reconsider filed after the trial court rules (a view which would result only in a redundant motion practice).

Bedford also suggests that HB 354-A does not apply because its claim for attorneys' fees is not a claim "arising out of the state's adequate education payments between September 1, 2008 and June 30, 2016." BB 17. As argued in the State's opening brief, however, courts have recognized that "a party may express its intent to waive attorneys' fees by employing broad release language" in settling a potential claim, "regardless of whether that release explicitly mentions attorneys' fees." Valley Disposal v. Cent. Vt. Solid Waste Mgmt. Dist., 71 F.3d 1053, 1058 (2d Cir. 1995). The Legislature did so here, stipulating that a municipality's acceptance of payment amounted to the "waiver and full release any and all claims it may have against the state of New Hampshire, its agencies, officers, employees, or agents arising out of the state's adequate education payments between September 1, 2008 and June 30, 2016."

As decisions like Valley Disposal hold (and Bedford provides no authority to the contrary), such "broad release language" operates to waive not only the underlying claim, but also the attorneys' fees incurred in pursuit of that claim—which, here, are exactly those fees the trial court ruled Bedford could recover against the State. After that ruling, but before those fees were actually awarded, Bedford accepted the disbursement of funds under HB 354-A and, with it, the waiver of its still-outstanding claim for attorneys' fees.[3] Accordingly, even if the trial court correctly ruled that Bedford was entitled to its attorneys' fees, the final order awarding those fees should still be vacated because, by operation of the plain language of HB 354-A, Bedford has waived that claim.

[3] The record reveals that, prior to accepting the disbursement, Bedford was fully aware of the waiver provision in HB 354-A. SA 255 (billing record from Bedford's counsel, submitted in support of fee application, noting analysis of whether 354-A "can require Bedford to waive rights").

II. EVEN IF BEDFORD HAS NOT WAIVED ITS CLAIM FOR FEES UNDER HB 354-A, THE FEE AWARDED SHOULD STILL BE VACATED, BECAUSE THERE IS NO BASIS TO FIND THAT THE STATE ACTED IN BAD FAITH

A. The record does not support an award of fees under *Harkeem v. Adams*, 117 N.H. 687 (1977)

This Court has expressly held that "before a Harkeem exception may be carved out, it must be supported by a specific finding of bad faith, such as obstinate, unjust, vexatious, wanton or oppressive conduct." Pugliese v. Town of Northwood, 119 N.H. 743, 752 (1977) (emphasis added). Yet here, the trial court awarded attorneys' fees against the State without finding that it had acted in bad faith and, indeed, despite expressly declining to make such a finding. SA 209.

In defending the award of attorneys' fees nonetheless, Bedford asserts that the trial court "specifically held that this action was necessary to vindicate [Bedford's] clearly established rights," which, Bedford argues, amounts to a finding that the State acted in bad faith so as to justify awarding fees under Harkeem. BB 12-13. It is true that the trial court found that "the present lawsuit – especially the present motions [for summary judgment by Bedford] – was necessary to enforce a well-established right." SA 194. But the trial court neither identified what that "right" was, nor how it was "established." Moreover, the record contains no support—and, in fact, contradicts—the notion that Bedford had any "established right" to a court order compelling the State to pay Bedford what it did not receive in fiscal year 2016 as a result of RSA 198:41, III(b).

To start with, "statutes are presumed constitutional, and they will only be declared invalid upon inescapable grounds." Gen. Elec. Co. v. Comm'r, N.H. Dep't of Rev.

Admin., 457, 466 (2006) (quotation marks omitted). At the time Bedford brought suit, no court had yet ruled that RSA 198:41, III(b) was unconstitutional. Instead, the question had then been pending before a different justice of the superior court for several months in the case of Dover v. State, Strafford County Superior Court docket number 219-2015-CV-312, where, though the State itself had admitted that the statute was unconstitutional, the President of the New Hampshire Senate and the Speaker of the New Hampshire House of Representatives had intervened to defend the law. SA 94-95. It follows that Bedford's "right" to the educational adequacy payments it stood to receive but for RSA 198:41, III(b) was anything but "well-established" at the time Bedford commenced this action: it was the subject of an ongoing dispute in superior court which, even if it resulted in the statute's invalidation, could then have been appealed to this Court, which had never passed upon the validity of the law.

Nor was Bedford's "right" to those payments, insofar as they had become due during fiscal year 2016, "established" by the time Bedford filed its motion for summary judgment. At that point, the court in the Dover case had declared that RSA 198:41, III(b) was unconstitutional and had enjoined the State from applying it. SA 94-107. But, as discussed in the State's opening brief, that decision also did not "clearly establish" Bedford's "right" to the relief it sought and received through its summary judgment motion, namely, an order that the State pay the town what it would have received in adequacy funding during fiscal year 2016 but did not as a result of RSA 198:41, III(b). SB 7. The Dover court did not order the State to pay any money to any school district or any municipality. SA 106.

Although the trial court in this action ultimately disagreed with the State's position that such an order would be barred by sovereign immunity, the trial court never found that this position was contradicted by "clearly established" law. In fact, the trial court rejected the State's sovereign immunity arguments only by adopting novel theories that had not even been argued by Bedford (and which have certainly never been endorsed by this Court). SA 206-208. Furthermore, as the State pointed out in its opening brief—and Bedford does not dispute—the State was simply incapable of paying Bedford the nearly $4.3 million it would have received in adequacy funding during fiscal year 2016 but for RSA 198:41, III(b) unless and until the Legislature appropriated that money, which did not happen until April 2017. SB 13.

The trial court erred insofar as it found that, by resisting Bedford's request for an order compelling the State to pay money that had not been appropriated, the State was denying the town a "clearly defined and established right" so as to justify awarding attorneys' fees under Harkeem. On the contrary, the State was simply defending itself against a claim for relief which, in the State's entirely supportable view, could neither be ordered as a legal matter nor, at that point, provided as a practical matter. Because Bedford fails to identify any other grounds to support the trial court's decision to award fees under Harkeem—and, as argued in the State's opening brief, the record is devoid of any such support—the award of fees against the State should be vacated.

B. The State preserved its argument that fees could not be awarded under *Harkeem*

Bedford also asserts that the State failed to preserve its argument that "a specific finding of bad faith was necessary to sustain a fee award under Harkeem." BB 8-9. That is incorrect. In the State's motion to reconsider the trial court's ruling that Bedford was entitled to attorneys' fees, the State quoted the Harkeem standard, arguing that it "simply does not fit the State's handling of Bedford's claim." SA 226. Furthermore, in its objection to Bedford's fee application, the State argued that it did not "act in 'bad faith,' or with any [other] culpable state of mind (if any) that could justify a fee award under Harkeem." SA 259. Despite these arguments, the trial court never retreated from its original decision to "stop[] short of finding that bad faith exists in this case." SA 210.

This reality gives the lie to Bedford's suggestion that "it is likely that the court would have made a specific finding of bad faith had the State argued that such a finding was necessary." PB 9. The trial court was squarely presented with the argument that there was no basis to award fees under Harkeem, yet failed to make the findings necessary to support such an award.[4] This was error. The award should be vacated.

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[4] Importantly, the trial court made no such findings in its order of May 24, 2017, denying the State's motion for reconsideration, BA 1-9, and Bedford does not argue otherwise. Instead, Bedford faults the State for failing to include a copy of this order in its submissions to this Court. BB 10. But, until receiving Bedford's brief to this Court in this matter, which includes the trial court's May 24, 2017, order as an attachment, neither of the attorneys from the Department of Justice who served as counsel of record for the State in this action in the trial court had ever seen that order before. They were not served with it by email from the court, as they had been with all the other orders in this case, nor did they receive it by any other means. Indeed, until receiving Bedford's brief to this Court, counsel for the State believed that the trial court had simply never ruled on the State's motion for reconsideration—hence the assertion to that effect in the State's opening brief. SB 14. So the State's "failure" to provide this Court with a copy of an

III. BEDFORD'S OTHER ARGUMENTS TO UPHOLD THE AWARD ARE WITHOUT MERIT

Although Bedford attempts to salvage the fee award by invoking theories on which the trial court did not rely—and, in one case, a theory that the trial court expressly rejected—those attempts fall short.

First, Bedford argues that the award can be affirmed as a permissible exercise of the trial court's "general equitable principles," specifically, as a means of applying the doctrine of judicial estoppel. BB 14. But the courts of this state cannot simply assess attorneys' fees as a matter of "general equitable principles": on the contrary, such an award "must be grounded upon statutory authorization, a court rule, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees." In re Hampers & Hampers, 154 N.H. 275, 289 (2006). And the doctrine of judicial estoppel, even had it been properly applied by the trial court here, does not constitute a "recognized exception" to this rule. Indeed, Bedford provides no authority for its view that the mere application of judicial estoppel carries with it an assessment of attorneys' fees against the estopped party.[5]

Second, Bedford argues that the trial court could have awarded fees on the theory that the State's position in the lawsuit was "patently unreasonable," citing Glick v. Naess, 143 N.H. 172 (1998). BB 14-15. Glick itself makes clear that awarding fees on this basis is appropriate only "when a party presents a claim that lacks a reasonable basis

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order that its attorneys had never received is entirely justified and, in any event, has no effect on the merits of its appeal as either a substantive or procedural matter.

[5] On the contrary, judicial estoppel may apply even against a party who acts in good faith. See Guay v. Burack, 677 F.3d 10, 16 (1st Cir. 2012).

either in law or in the facts provable by evidence." 143 N.H. at 176 (quotation marks omitted). As discussed supra, however, the State's invocation of sovereign immunity in response to a request for a court order that it pay money, particularly money that had not yet been appropriated, was well-supported in fact and law—and reasonable.

Third, and finally, Bedford argues that the fee award is supported by the "substantial benefit" theory, BB 16, which applies when a lawsuit "conferred a substantial benefit not only on the plaintiffs who initiated the action, but on the public as well," Claremont Sch. Dist. v. Governor, 144 N.H. 590, 595 (1999). This theory was rejected by the trial court, which correctly observed that the only relief Bedford obtained in this action—the court order for the State to pay Bedford for fiscal year 2016—had "no foreseeable legal impact beyond" Bedford. SA 209. Bedford's suggestion that this order served a broader public purpose by motivating the Legislature to appropriate the funds necessary to pay Bedford and the other affected municipalities is belied by the fact that this legislation was publicly promised, and introduced, several months before the court issued the order, as detailed in the State's opening brief. SB 10-11.

CONCLUSION

For these reasons, and those reasons stated in full in the State's opening brief, the trial court's award of attorneys' fees should be vacated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this 28th day of December 2017, postage prepaid, to Michael J. Tierney, Esq., Richard Lehmann, Esquire, and Charles Douglas, Esquire.

Anne M. Edwards