

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

RECEIVED
CLERK OF SUPREME COURT
2017 DEC - 3 P 3:00

Bedford School District and William Foote

v.

State of New Hampshire, et al.

Case Number: 2017-0422

BRIEF OF APPELLEES
BEDFORD SCHOOL DISTRICT AND WILLIAM FOOTE

Michael J. Tierney – NHBA# 17173
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4140

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 7

ARGUMENT..... 8

 I. ARGUMENTS NOT BRIEFED HAVE BEEN WAIVED..... 8

 II. ARGUMENTS RAISED IN THE BRIEF NOT RAISED BELOW OR
 PRESERVED FOR APPELLATE REVIEW HAVE BEEN WAIVED..... 8

 III. THE SUPERIOR COURT PROPERLY EXERCISED ITS DISCRETION TO
 AWARD FEES..... 11

 A. Bad Faith Under *Harkeem* Was Shown By Forcing Litigation to Secure A Clearly
 Established Right 12

 B. Even if the *Harkeem* Standard was Not Met, the Superior Court’s Fee Award
 Should Still be Affirmed..... 13

 1. The Fee Award Can Be Affirmed Under General Equitable Principles 14

 2. The Fee Award Can Be Affirmed Under *Glick*..... 14

 3. The Fee Award Can Be Affirmed Under the Substantial Benefit Theory 15

 IV. PASSAGE OF HB 354 ON APRIL 27, 2016 DID NOT NULLIFY THE SUPERIOR
 COURT’S APRIL 6, 2017 AWARD OF ATTORNEYS’ FEES 16

CONCLUSION..... 18

STATEMENT REGARDING ORAL ARGUMENT..... 18

CERTIFICATE OF SERVICE 19

ADDENDUM 20

TABLE OF AUTHORITIES

Cases

| | |
|---|--------------------------------|
| <i>412 S. Broadway Realty, LLC v. Wolters</i> , 169 N.H. 304 (2016) | 8 |
| <i>Arcidi v. Town of Rye</i> , 150 N.H. 694 (2004) | 11 |
| <i>Bean v. Red Oak Prop. Mgmt., Inc.</i> , 151 N.H. 248 (2004) | 11 |
| <i>Bennett v. Town of Hampstead</i> , 157 N.H. 477 (2008) | 10 |
| <i>City of Dover v. State of New Hampshire</i> , Docket #219-2015-cv-312 | 3, 4, 5, 7, 15, 17 |
| <i>Claremont Sch. Dist. v. Governor</i> , 143 N.H. 154 (1998) | 2, 6 |
| <i>Claremont Sch. Dist. v. Governor</i> , 144 N.H. 590 (1999) | 14, 15, 16 |
| <i>Demers Agency v. Widney</i> , 155 N.H. 658 (2007) | 11 |
| <i>Doyle v. Comm'r, New Hampshire Dep't of Res. & Econ. Dev.</i> , 163 N.H. 215 (2012) | 13 |
| <i>Eby v. State</i> , 166 N.H. 321 (2014) | 14 |
| <i>Glick v. Naess</i> , 143 N.H. 172 (1998) | 14, 15 |
| <i>Harkeem v. Adams</i> , 117 N.H. 687 (1977) | 6, 7, 8, 9, 10, 11, 12, 13, 15 |
| <i>Indian Head Nat. Bank v. Corey</i> , 129 N.H. 83 (1986) | 12, 18 |
| <i>Londonderry Sch. Dist. SAU No. 12 v. State</i> , 154 N.H. 153 (2006) | 2 |
| <i>Opinion of the Justices (Reformed Public School Financing System)</i> , 145 N.H. 474 (2000) .. | 1, 16 |
| <i>Panas v. Harakis</i> , 129 N.H. 591 (1987) | 7, 8 |
| <i>Smith v. Shepard</i> , 144 N.H. 262 (1999) | 11 |
| <i>St. Germain v. Adams</i> , 117 N.H. 659 (1977) | 12 |
| <i>State v. Farnsworth</i> , 126 N.H. 656 (1985) | 10 |
| <i>State v. Lister</i> , 122 N.H. 603 (1982) | 10 |
| <i>State v. Nightingale</i> , 160 N.H. 569 (2010) | 13 |
| <i>State v. VanDerHeyden</i> , 136 N.H. 277 (1992) | 8 |
| <i>Town of Barrington v. Townsend</i> , 164 N.H. 241 (2012) | 11 |
| <i>Tsiatsios v. Tsiatsios</i> , 140 N.H. 173 (1995) | 8 |
| <i>York v. Misiak</i> , 95 N.H. 437 (1949) | 10 |

Statutes

| | |
|----------------------|---------|
| RSA 14:35-b(1) | 5 |
| RSA 198:40 | 1 |
| RSA 198:41 | 1, 2, 3 |
| RSA 198:42 | 1 |

Other Authorities

| | |
|--------------------------------|-----------|
| HB 354-A | 9, 16, 17 |
| N.H. Laws 276:140 (2015) | 1 |

Constitutional Provisions

| | |
|---|---|
| New Hampshire Constitution, Part II, Article 83 | 1 |
|---|---|

STATEMENT OF FACTS AND OF THE CASE

This case concerns RSA 198:41(III)(b) and the State's constitutional obligations under Part II, Article 83, of the New Hampshire Constitution to fund a constitutionally adequate education for both the 2016 and 2017 Fiscal Years.¹ After determining in RSA 198:40-a the amount of funding necessary to provide a constitutionally adequate education, RSA 198:41(III)(b) arbitrarily and unconstitutionally limited the funding provided to 108% of the previous year's amount for Fiscal Year 2016 and 160% of the previous year's amount for Fiscal Year 2017. As this Court has repeatedly recognized, "The State [has] the exclusive obligation to fund a constitutionally adequate education. The State may not shift any of the constitutional responsibility to local communities." *Opinion of the Justices (Reformed Public School Financing System)*, 145 N.H. 474, 476 (2000). Nevertheless, until the Cheshire Superior Court issued its April 6, 2017 Order, the State² applied RSA 198:41(III)(b) to arbitrarily limit the amount of aid the State provides to several school districts, including the Bedford School District, resulting in the State failing to meet its constitutional burden to fully fund an adequate education throughout the State of New Hampshire for both Fiscal Year 2016 and Fiscal Year 2017.

¹ Pursuant to 2015 N.H. Laws 276:140, while certain provisions had an effective date of July 1, 2015, the repeal of RSA 198:41(III)(b) was not effective until July 1, 2017.

² "State" is used in this Brief to collectively refer to the State of New Hampshire; the New Hampshire Department of Education; Governor Hassan, both individually and in her official capacity as Governor of the State of New Hampshire; and Commissioner Barry, both individually and in her official capacity as Commissioner of the New Hampshire Department of Education. Pursuant to RSA 198:42(II), "the governor is authorized to draw a warrant from the education trust fund to satisfy the state's obligation under this section. . . ." Pursuant to RSA 198:42(III) "the department of education shall . . . direct the payment thereof to the school district."

RSA 198:41, III (b), as it existed from July 1, 2015 through June 30, 2017, was unconstitutional. This has never been disputed by any of the State defendants. The State conceded the statute was unconstitutional in 2015 and again in its Answer admitted that the statute was unconstitutional. See State's Answer, ¶ 46, at SA³ 85. Nevertheless, while conceding the statute's unconstitutionality, the State continued to apply the admittedly unconstitutional statute to withhold over \$10 million in education funding from approximately 20 school districts for the 2016 fiscal year and another \$1 million from four school districts for the first quarter of the 2017 fiscal year.⁴ S.A. 17 – 49; S.A. 217. The Bedford School District was unconstitutionally denied over \$4.5 million. The State repeatedly promised that this problem would be fixed but continually delayed resolution. See *Londonderry Sch. Dist. SAU No. 12 v. State*, 154 N.H. 153, 163 (2006)(lamenting the years given to the legislature to adopt a constitutionally adequate educational funding formula); *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 725 A.2d 648 (1998)(denying State's request for an additional two years to implement legislation). Finally, the Bedford Plaintiffs⁵ were forced to file suit on June 2, 2017. Appx. 1-49.

Long before suit was even filed, the State promised the Plaintiffs the State would eventually provide the constitutionally required funding. See Court's Order of April 6, 2017, p. 21-22 at S.A. 209-201. In particular, the State informed the Plaintiffs that there was no need for the Plaintiffs to file suit as an August 26, 2015 Stipulation filed in a case brought by the

³ S.A. refers to the State's Appendix.

⁴ The State withheld all of Fiscal Year 2016's funding prohibited by the unconstitutional cap as well as the first installment of Fiscal Year 2017's funding. The funds withheld from September 1, 2016's payment were paid on April 1, 2017. See Court's Order, p. 7, at S.A. 195.

⁵ The Bedford Plaintiffs include the Bedford School District as well as Mr. William Foote, an individual taxpayer of the Bedford School District. See S.A. 5, ¶¶ 1-2.

Dover School District provided that the State would provide any funds withheld on or after September 1, 2015 to any school district within 10 days of an order in the *Dover*⁶ case without the necessity of a separate action. See Stipulation S.A. 129-131. In particular, the Stipulation provided if Dover was “successful in obtaining a preliminary or permanent injunction against the cap required by R.S.A. 198:41, III (b), the parties agree that the State will make a supplemental payment equal to the sum total of all funds withheld in any educational adequacy payment made on or after September 1, 2015, because of application of the cap, within ten (10) business days after the time for a motion to stay the preliminary or the permanent injunction has expired . . . [and] the State agrees that it will be bound by any rulings issued in this matter regarding the constitutionality of the cap contained in R.S.A. 198:41, III (b) as it applies to all other school districts.” See Court’s Order, p. 3-4 at S.A. 191-192 and Stipulation, ¶¶ 4-5 at Appx. 130.

Unfortunately, several months went by and there was still no order in the *Dover* case. On June 2, 2016, the Plaintiffs filed their own case and asked that a preliminary injunction be issued before June 30, 2016. S.A. 1-49. On June 28, 2016, the State filed an Objection to the Motion for a Preliminary Injunction arguing that “[a]s a result of the Stipulation, Bedford has no need to request a preliminary injunction.” Objection, ¶ 3 at S.A. 51. The State attached a copy of the Stipulation to its Objection. S.A. 56-58. At the hearing held on the Motion for Preliminary Injunction, counsel for the State “doubled down on their argument by insisting that [the] Stipulation made the filing of the present suit unnecessary.” Court’s Order of April 6, 2017, at p. 4, fn 2 at S.A. 192. On June 30, 2016, the Superior Court denied the Plaintiffs’ motion for a preliminary injunction ruling that it was “persuaded that any short fall [Plaintiffs] experienced

⁶ *City of Dover v. State of New Hampshire*, Docket #219-2015-cv-312 (Sullivan Super. Ct. 2016) (Tucker, J.). Copies of two relevant orders in the *Dover* case are found at S.A. 132-147.

in FY 2016 will likely be remedied by the ruling on the similar issue in Dover.’ Order on Pls.’ Mot. For Prelim. Inj., Jun. 30, 2016, at 4-5.” Order of April 6, 2017, p. 4, at S.A. 192 quoting Order of June 30, 2016 at S.A. 70-71. “In sum, the State made representations tending to assure Plaintiffs and the Court of its intent to deliver the relief sought shortly following a favorabl[e] resolution in Dover.” Order of May 24, 2017 Denying Reconsideration at Addendum 9.⁷

The State’s Objection had predicted an Order in the *Dover* litigation by the end of June 2016. Appx. 50, ¶ 2. Unfortunately, there was no Order by the end of June. On September 2, 2016, the *Dover* Court held the statute unconstitutional. See S.A. 94-107. The Speaker of the House, who was granted intervenor status in the *Dover* case, moved for reconsideration arguing that the Attorney General’s Office could not lawfully enter into the Stipulation and the Stipulation should not be applied to provide funding to municipalities other than Dover. On September 29, 2016, the Court denied the motion for reconsideration and specifically held that the Stipulation applied to other municipalities. Appx. 108-109. The appeal period for filing an appeal with the New Hampshire Supreme Court expired on or before October 31, 2016 and no appeal was filed.

Although the State’s Stipulation specifically stated that it “was applicable to all other school districts in the state” and “the State will make a supplemental payment equal to the sum total of all funds withheld in any educational adequacy payment made on or after September 1, 2015, because of application of the cap, within ten (10) business days after the time for a motion to stay the preliminary or the permanent injunction has expired . . .” the State did not make timely payment. See Appx. 148-149 (emphasis added). Therefore, the Plaintiffs filed a Motion

⁷ The State did not include the Court’s May 24, 2017 denying reconsideration in its Brief or in the State’s Appendix. A copy of the Court’s Order is included as an addendum to Bedford’s Brief.

for Summary Judgment on November 18, 2016 and asked the Court to enforce the State's Stipulation. Appx. 118-127.

On January 12, 2017, after previously arguing the Stipulation applied to Bedford, the State changed its argument. In objecting to summary judgment, the State now argued that through the Stipulation "the State agreed merely to pay the **City of Dover**." See S.A. 170 (emphasis by State in the original). In addition, the State argued that Attorney General did not have authority to enter into the Stipulation both on the basis of RSA 14:35-b(1) limited the Attorney General's settlement authority and sovereign immunity precluded the State from entering into the Stipulation. S.A. 170-171. This was a change in position from that taken in objection to a preliminary injunction. See S.A. 50-51; see also Order, p. 9 at S.A. 197 (characterizing the State's change in position to be "patently inconsistent" with position State maintained earlier in the litigation).⁸

On January 18, 2017, the Plaintiffs filed a Reply explaining (1) the State was authorized to enter into the Stipulation as it was an agreement as to timing of payments, not constitutionality or amount of payments, (2) the State should be judicially estopped from changing their argument as the State argued and the Court denied a preliminary injunction on the basis that the Stipulation was valid and applied to Bedford and (3) that sovereign immunity did not apply to bar the Stipulation as the Court had previously held in its June 30, 2016 Order. See S.A. 182-186

The Superior Court issued the Order under appeal on April 6, 2017. See S.A. 189-210. In its Order, the Superior Court granted the Plaintiffs summary judgment holding (1) the State is judicially estopped from arguing the Stipulation is not enforceable (2) sovereign immunity does

⁸ In addition, the *Dover* Court previously determined in its September 29, 2016 that the Stipulation lawfully applied to all school districts and the State did not appeal the September 29, 2016 Order. S.A. 108-109.

not bar the Court's enforcement of the Stipulation, (3) the amounts unconstitutionally withheld must be paid on or before May 1, 2017 and (4) the Plaintiffs were "forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention" and therefore entitled to an award of attorneys' fees under *Harkeem v. Adams*, 117 N.H. 687, 691 (1977).

On April 17, 2017, the State filed both a Motion to Stay and a Motion for Reconsideration of the Court's April 6, 2017 Order. S.A. 211-228. The State argued that legislation was being considered by the Senate that could potentially be resolved by May 31, 2017. S.A. 213. The State acknowledged, however, that "the Senate and the Governor's final actions will not be known until they occur." S.A. 225.⁹ The Court denied the Motion to Stay in a two word order. S.A. 237. On May 1, 2017, the State paid the \$4,287,533.00 due to the Plaintiffs. S.A. 238. On May 24, 2017 the Court denied the State's Motion for Reconsideration in a nine page order. See Bedford Addendum 1-9. The Court rejected each of the arguments made by the State. On June 19, 2017, the Court ordered the State to pay \$21,479.00 in attorneys' fees. S.A. 272-273. The Court stated the fees were being awarded "due to the State's schizophrenic representations and litigation strategy in this case." See Order of June 19, 2017 at S.A. 272. A Notice of Appeal was filed with this Court on July 19, 2017.

⁹ The Attorney General's Office cannot accurately predict the timeline of the legislative branch, especially when it comes to budgeting and school funding. See *Claremont Sch. Dist. v. Governor*, 143 N.H. 154 (1998)(denying State's request for an additional two years to implement legislation). It is worth noting, however, that the AGO was representing the Governor in this case. See S.A. 54.

SUMMARY OF ARGUMENT

The Superior Court applied judicial estoppel to preclude the State from denying the August 26, 2015 Stipulation required the State to pay Bedford the constitutionally required funds within 10 days of the finality of the *Dover* decision. Although the State raised the applicability of the Stipulation and whether the State had the authority to enter into the Stipulation as appellate issues in its Notice of Appeal, it has not briefed those issues and so these arguments have been waived. *Panas v. Harakis*, 129 N.H. 591, 617 (1987). The only issue in this appeal is whether the court abused its discretion in awarding attorneys' fees. The Superior Court properly awarded fees as it found the Plaintiffs were "forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention." *Harkeem v. Adams*, 117 N.H. 687, 691 (1977). The State should have complied with the Stipulation as it had promised both the Plaintiffs and the Court it would do. Nevertheless, even if the court erred in citing *Harkeem* as the basis for the fee award, the fee award should still be affirmed under one or more other theories. The reasonableness of the amount of fees is not challenged on appeal.

ARGUMENT

I. ARGUMENTS NOT BRIEFED HAVE BEEN WAIVED

The State raised several issues in its Notice of Appeal including (1) whether the Stipulation was applicable to the Bedford plaintiffs, (2) whether sovereign immunity barred this action (3) whether the Court properly applied judicial estoppel against the State and (4) whether the Court properly awarded attorneys' fees. In its Brief, the State limits its argument solely to the award of attorneys' fees. See State's Brief, p. 1. An argument not raised in an appellant's opening brief is deemed waived. *Panas v. Harakis*, 129 N.H. 591, 617 (1987). Therefore, the State has waived all arguments except whether the trial court abused its discretion in awarding attorneys' fees.

II. ARGUMENTS RAISED IN THE BRIEF NOT RAISED BELOW OR PRESERVED FOR APPELLATE REVIEW HAVE BEEN WAIVED

The State raises three arguments in its Brief why it alleges the Superior Court erred in awarding fees, but failed to preserve any of these arguments below. "[A] contemporaneous and specific objection is required to preserve an issue for appellate review in this court. If an issue is not properly preserved, the objection is deemed waived because the trial court is denied the opportunity to correct any error that it may have made." *State v. VanDerHeyden*, 136 N.H. 277, 282 (1992); *Tsiatsios v. Tsiatsios*, 140 N.H. 173, 179 (1995); see also *412 S. Broadway Realty, LLC v. Wolters*, 169 N.H. 304, 312 (2016). The State's arguments which were not presented and considered by the trial court are deemed waived.

The State first argues that an award of fees was unjustified as the Superior Court did not use the magic words of "bad faith" which it alleges is "essential to an award of fees under Harkeem." See State's Brief, 17-19. This argument is waived as it was never raised below. Although the State asked the Superior Court to reconsider its fee award on the basis that the State

did not believe the litigation was necessary, the State never argued to the Superior Court that a specific finding of bad faith was necessary to sustain a fee award under *Harkeem*. See State's Motion for Reconsideration at S.A. 224-226. The Superior Court did not address the State's argument that a specific finding of bad faith is necessary in its nine page order denying reconsideration. See May 24, 2017 Order in Bedford Addendum 1-9.¹⁰ Given the Superior Court's description of the State's "troubling" misrepresentations made both to the Court at the hearing on this matter and to the Plaintiffs in its April 6, 2017 Order, see S.A. 209, and its description of the "State's schizophrenic representations and litigation strategy" in its June 19, 2017 Order, see S.A. 272, it is likely the Court would have made a specific finding of bad faith had the State argued that such a finding was necessary. Nevertheless, the State's failure to raise the alleged necessity of a specific finding of bad faith first to the Superior Court precludes the State from raising it for the first time on appeal.

Second, the State argues that "Bedford waived its claim to fees when it accepted payment under HB 354-A." State's Brief, 25-26. This argument was not made in the State's Objection to the Motion for Summary Judgment. See S.A. 173-174. This argument was also not timely made in the State's April 17, 2017 Motion for Reconsideration. See S.A. 211 – 228. Therefore, this argument was never considered in the Court's Order Denying Reconsideration. See Bedford Addendum 1-9. In fact, the State did not raise this argument until a May 18, 2017 Response to Plaintiff's Fee Application, see S.A. 261-262. Therefore, this issue was only raised 42 days after the Court's April 6, 2017 Order.

¹⁰ It is unclear why the Superior Court's May 24, 2017 Order denying reconsideration was not included as an addendum to the State's Brief or even included in the State's Appendix. Nevertheless, it has been included as an Addendum to this Brief.

An untimely filed motion for reconsideration, never considered by the Superior Court, fails to preserve the issue for appellate review. *Bennett v. Town of Hampstead*, 157 N.H. 477, 486 (2008). Furthermore, even if the argument was timely made but not considered, the State was obligated to move for reconsideration of the Court's June 19, 2017 Order in order to preserve this argument for appellate review. As this Court has recognized, "just as a party must timely object and except to the trial court's failure to give certain instructions in order to preserve the issue for appeal, see *State v. Lister*, 122 N.H. 603, 607, 448 A.2d 395, 398 (1982), so too must a defendant timely object and except to the superior court's failure to rule on requests for findings and rulings. See *York v. Misiak*, 95 N.H. 437, 438, 65 A.2d 877, 878 (1949) (requiring parties to object, and to petition trial court for further clarification of the court's order, for this court to consider the effect of the failure to make findings and rulings)." *State v. Farnsworth*, 126 N.H. 656, 660 (1985). Where State waited until 42 days after the April 6, 2017 Order to first raise the argument and the Superior Court never considered this argument, that issue is waived.

Finally, the State argues that although *Harkeem* authorizes an award of fees when a plaintiff "is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention," that the facts of this case do not support the trial court's findings. State's Brief, 19-25. In short, the State argues that the Superior Court was wrong to find that the State's positions were inconsistent. This argument was directly addressed by the Superior Court's May 24, 2017 nine page order denying Reconsideration. See Bedford's Addendum, p. 1-9 (holding State's current position on the applicability of the Stipulation was "clearly inconsistent with its earlier position.") Nevertheless, the State does not include the May 24, 2017 Order in its Notice of Appeal, in the State's

Appendix or as an addendum to the State's Brief. Therefore, the State has waived this argument. *Bean v. Red Oak Prop. Mgmt., Inc.*, 151 N.H. 248, 250 (2004)(dismissing appeal where the moving party failed to provide court with a complete record.)

III. THE SUPERIOR COURT PROPERLY EXERCISED ITS DISCRETION TO AWARD FEES

“The decision to award attorney's fees is within the trial court's discretion and will not be disturbed unless it is clearly wrong or unsupported by the evidence.” *Smith v. Shepard*, 144 N.H. 262, 267 (1999). This Court will “review the trial court's award of attorney's fees under our unsustainable exercise of discretion standard[,] ... keep[ing] in mind the substantial deference accorded a trial court's decision on attorney's fees.’ ... ‘To be reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. If there is some support in the record for the trial court's determination, we will uphold it.’” *Town of Barrington v. Townsend*, 164 N.H. 241, 249 (2012) quoting *Demers Agency v. Widney*, 155 N.H. 658, 664–65 (2007) and *Arcidi v. Town of Rye*, 150 N.H. 694, 704 (2004). The Superior Court's decision to award fees was not untenable or clearly unreasonable but within its equitable discretion.

As this Court has long recognized “Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate.” *Harkeem v. Adams*, 117 N.H. 687, 691 (1977). “*Harkeem* makes it clear, moreover, that for purposes of justifying a fee award “bad faith” is not limited to its narrow sense of an intentional disregard of duty or an intent to injure . . . but may be said to exist whenever “an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention....” *Indian Head Nat.*

Bank v. Corey, 129 N.H. 83, 87(1986)(quoting *Harkeem v. Adams*, *supra* 117 N.H. at 691).

Furthermore, bad faith is only one of several bases for the Superior Court to exercise its equitable powers. On the same day it decided *Harkeem*, this Court recognized that “*Harkeem* held that where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious *or* bad faith conduct, an award of attorneys' fees to his opponent is within the court's power.” *St. Germain v. Adams*, 117 N.H. 659, 662 (1977)(emphasis added). The Superior Court's award of attorneys' fees was within its discretion.

A. Bad Faith Under *Harkeem* Was Shown By Forcing Litigation to Secure A Clearly Established Right

The State argues the Superior Court was required to find both (1) that the litigation was necessary to secure a clearly defined and established right and (2) that Superior Court must specifically find the State was acting in bad faith prior to awarding fees. State's Brief, p. 18. In particular, the State argues the Court erred in awarding fees “without making any ‘specific finding of bad faith’ on the part of the State.” *Id.* This argument was not properly preserved but even if it was is not an accurate statement of the law.

Bad faith, in the context of awards for attorneys' fees, is shown whenever a party's actions make litigation necessary to secure a right that should not have required litigation. “[F]or purposes of justifying a fee award ‘bad faith’ is not limited to its narrow sense of an intentional disregard of duty or an intent to injure . . . but may be said to exist whenever “an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention....” *Indian Head Nat. Bank v. Corey*, 129 N.H. 83, 87(1986)(quoting *Harkeem v. Adams*, *supra* 117 N.H. at 691). The necessity of the litigation and bad faith are not separate elements but are the same criteria.

In this case, the Superior Court specifically held that this action was necessary to vindicate plaintiff's clearly established rights. In particular, the Court twice stated the reasons for its award of attorneys' fees in its April 6, 2017 Order. On page 6 of its April 6, 2017 Order, the Court specifically stated "Plaintiffs are entitled to attorneys' fees because the present lawsuit – especially the present motions – was necessary to enforce a well-established right." SA. 194. Again, on the final page of the Court's April 6, 2017 Order, the Superior Court specifically found that "This lawsuit was necessary to enforce compliance with the statute and to compel the State to comply with promises and representations it made both to the Court at the hearing on this matter and Plaintiffs prior to filing suit." S.A. 210. Therefore, the Superior Court's specific finding that litigation was necessary to enforce the Stipulation justified an award of fees under *Harkeem*.

B. Even if the *Harkeem* Standard was Not Met, the Superior Court's Fee Award Should Still be Affirmed

"[W]here the trial court reaches the correct result on mistaken grounds, [this Court] will affirm if valid alternative grounds support the decision." *Doyle v. Comm'r, New Hampshire Dep't of Res. & Econ. Dev.*, 163 N.H. 215, 222 (2012) quoting *State v. Nightingale*, 160 N.H. 569, 575–76 (2010). The *Harkeem* decision held the "exceptions [to award fees] are flexible, not absolute, and have been extended on occasion." *Harkeem v. Adams*, 117 N.H. 687, 690 (1977). The Court went on to note that "when overriding considerations so indicate, the award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights." *Id.* Even if the Superior Court erred in awarding fees under the *Harkeem* standard, the decision can be affirmed on alternative grounds.

1. The Fee Award Can Be Affirmed Under General Equitable Principles

The trial court has “broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation.” *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 594 (1999). In this particular case, the Superior Court applied judicial estoppel due to the State’s misrepresentation both to the Plaintiffs and to the Court. S.A. 189-210. The Court specifically held that had the State not represented in June 2016 that Bedford’s claim for the 2016 fiscal year was protected by the Stipulation, the Court would have granted a preliminary injunction in June 2016. “[T]he State prevailed at the preliminary injunction stage only because it represented that the Stipulation was applicable to the Plaintiffs.” April 6, 2017 Order, p. 18 at S.A. 206(emphasis in original court order). The purpose “of judicial estoppel is to prevent abuse of the judicial process, resulting in an affront to the integrity of the courts.” *Eby v. State*, 166 N.H. 321, 338 (2014)(quotation omitted). An award of fees in cases of judicial estoppel¹¹ is appropriate and within the Court’s equitable power.

2. The Fee Award Can Be Affirmed Under *Glick*

In addition, this Court has affirmed an award of attorneys’ fees “when a litigant’s position is patently unreasonable [resulting in] ‘the unnecessary character of the judicial proceeding.’” *Glick v. Naess*, 143 N.H. 172, 177 (1998). In denying the State’s Motion for Reconsideration, the Superior Court held that the State’s inconsistent positions, first arguing that the Stipulation was applicable to Bedford and then arguing that the Stipulation was barred by sovereign immunity, resulted in more prolonged, complicated and costly litigation. See Court’s May 24, 2017 Order at Bedford Addendum, p. 9. Therefore, even if the Superior Court could not award

¹¹ The Court is reminded that the Superior Court’s application of judicial estoppel is not challenged in the State’s Brief.

fees under *Harkeem*, the award should be affirmed under the Court's broad equitable powers or under *Glick*.

3. The Fee Award Can Be Affirmed Under the Substantial Benefit Theory

Finally, this Court could also affirm the award of fees under the substantial benefit theory. "An award of attorney's fees to the prevailing party [is warranted] where the action conferred a substantial benefit on not only the plaintiffs who initiated the action, but on the public as well." *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 595 (1999). It is not necessary that the litigation be the sole and only cause of the benefit to the public but is appropriate whenever "plaintiffs have contributed to the vindication of important constitutional rights." *Id.* at 598. In this case, the Superior Court analyzed the substantial benefit theory and determined that the public benefit was accomplished by the *Dover* plaintiffs and the ruling in this case did not go beyond the Plaintiffs. April 6, 2017 Decision, p. 21 at S.A. 209.

First, while the public benefit should have been accomplished by the *Dover* case, and Bedford and the other 23 school districts should have received their funding within 10 days of the *Dover* decision, the *Dover* case did not have the intended broad effect. Although the Stipulation filed in the *Dover* case clearly stated that it was applicable to all school districts and payments would be made within 10 days of a decision in the *Dover* case, the State did not follow the Stipulation and only paid Dover the amounts due. See Court's April 6, 2017 Order at S.A. 189-210 and State's Objection at S.A. 163-181 (arguing that Stipulation was only applicable to Dover and could not be applied to the other school districts.) Nevertheless, as a result of the Superior Court's Order of April 6, 2017, where the Court ordered the State to pay Bedford on or before May 1, 2017, the State paid the amounts unconstitutionally withheld to Bedford as well as 23 other communities on May 1, 2017, the date ordered by the Court in this case. The State had argued that legislation was being considered which, if passed, would result

in the 24 school districts being paid after July 1, 2017. See S.A. 180. Even after the Superior Court ordered the State to pay, the State filed a Motion to Stay on April 17, 2017 arguing that the deadline needed to be extended to May 31, 2017 to give the legislation a chance to be considered. S.A. 213. When the Motion to Stay was denied, the State made the payments to Bedford and the other 23 districts, conferring a substantial public benefit.¹²

Second, even if there was no benefit outside of the thousands of students and thousands of taxpayers of the Bedford School District, an award of fees would still be proper under the public benefit theory. “The public interest in preserving constitutional rights against governmental infringement is paramount.” *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 598 (1999). “The State [has] the exclusive obligation to fund a constitutionally adequate education. The State may not shift any of the constitutional responsibility to local communities.” *Opinion of the Justices (Reformed Public School Financing System)*, 145 N.H. 474, 476 (2000). Mr. Foote and the Bedford School District, in forcing the State to meet its obligations, provided a substantial benefit to thousands of members of the public in Bedford.

IV. PASSAGE OF HB 354 ON APRIL 27, 2016 DID NOT NULLIFY THE SUPERIOR COURT’S APRIL 6, 2017 AWARD OF ATTORNEYS’ FEES

The State concludes its Brief by arguing that passage of HB 354 on April 27, 2017 resulted in a waiver of Bedford’s entitlement to fees because Bedford “accepted the payment offered by HB 354-A.” State’s Brief, 25-26. Although this argument need not be considered, as the State failed to preserve it by making the argument in a timely filed motion for reconsideration, the argument would fail even if it was timely made.

¹² The Court awarded \$21,479.00 in fees or roughly 50% of the amount requested. See S.A. 242, 273. The fee award is 0.5% of the amounts recovered by Bedford in this case and 0.2% of the total amounts recovered by the 24 school districts.

First, the State was ordered by the Superior Court's April 6, 2017 Order to make payment to Bedford on or before May 1, 2017. S.A. 208. On May 1, 2017, the State wired the funds ordered in compliance with the Superior Court's Order. S.A. 238. There was no "acceptance of payment offered by HB 354." The funds, which the Superior Court held needed to be provided by May 1 were provided via wire transfer on the day required by the Court's Order.

Second, HB 354 was passed on April 27, 2017. S.A. 270. The State does not explain how passage of HB 354 on April 27, 2017 could change the Superior Court's April 6, 2017 Order awarding fees. HB 354 was only effective after April 27, 2017 or three weeks after the Superior Court already awarded fees and pay the amounts due to Bedford.

Finally, the language of HB 354 does not support the State's position. The language is applicable only to claims "arising out of the state's adequate education payments between September 1, 2008 and June 30, 2016." S.A. 269. As the Superior Court explained in both in April 6, 2017 Order as well as its May 24, 2017 Denial of Reconsideration, the fees were not being awarded for the State's failure to make the constitutionally required funding payments during the 2016 fiscal year, rather the fees were awarded as a result of the State's contradictory representations regarding the applicability of the Stipulation. S.A. 189-210; Bedford Addendum 1-9. Had the State complied with the Stipulation, as it had promised both the Plaintiffs and the Court it would do, and provided Bedford with the funding within 10 days after end of the appeal period from the September 2, 2017 *Dover* decision, there would have been no award of fees. See Bedford Addendum 8-9. Fees were not awarded on the basis of the State's actions or inactions from September 1, 2008 to June 30, 2016. Instead, the fees were awarded because the State did not provide the constitutionally required funding in early November 2017, in compliance with the Stipulation. Therefore, HB 354 simply does not apply.

CONCLUSION

This Court should affirm the decision of the Superior Court and award the Plaintiffs its costs, interest and reasonable appellate fees pursuant to Supreme Court Rule 23 and RSA 490:14-a. See *Indian Head Nat. Bank v. Corey*, 129 N.H. 83, 89 (1986)(awarding appellate fees after affirming trial court's award fees below).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case as it involves the application of settled law including the waiver of arguments not timely raised as well as equitable principles within the discretion of the trial court.

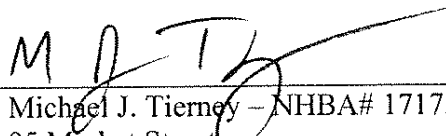
Respectfully submitted,

**BEDFORD SCHOOL DISTRICT AND
WILLIAM FOOTE**

By their Attorneys,
Wadleigh, Starr & Peters, P.L.L.C.

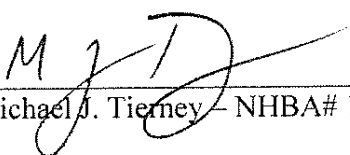
Date: December 8, 2017

By: _____


Michael J. Tierney – NHBA# 17173
95 Market Street
Manchester, NH 03101
(603) 669-4140
mtierney@wadleighlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 8th day of December, 2017, by U.S. mail, postage prepaid, to Anne M. Edwards and Kenneth A. Sansone at 33 Capitol Street, Concord, NH 03301, and Richard J. Lehmann and Charles G. Douglas, III, at 14 South Street, Suite 5, Concord, NH 03301.

By: 
Michael J. Tierney - NHBA# 17173

ADDENDUM

Order of May 24, 2017 Denying Reconsideration 1-9

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

No. 213-2016-CV-00396

Bedford School District and William Foote

v.

The State of New Hampshire, New Hampshire Department of Education, Margaret Wood Hassan, individually and in her capacity as Governor of the State of New Hampshire, and Virginia M. Barry, individually and in her capacity as Commissioner of the New Hampshire Department of Education

ORDER

The above-named defendants (collectively, the "State") move for reconsideration of the Court's April 6, 2017 order granting plaintiffs Bedford School District and William Foote's (collectively, "Plaintiffs") motion for summary judgment. Plaintiffs object. For the following reasons, the State's motion for reconsideration is DENIED.

"A motion for reconsideration allows a party to present points of law or facts that the Court has overlooked or misapprehended." Barrows v. Boles, 141 N.H. 382, 397 (1996) (quotation removed). "Whether to receive further evidence on a motion for reconsideration rests in the sound discretion of the trial court." Lillie-Putz Trust v. Downeast Energy Corp., 160 N.H. 716, 726 (2010). The State raises several arguments in support of its motion for reconsideration. The Court addresses each argument in turn.

I. The Court's apprehension of the State's position as to the effect of the stipulation in Dover v. State

The State first avers that the Court misapprehended the State's position as to the effect of the Stipulated Agreement (the "Stipulation") in Dover v. State, Strafford

Superior County Superior Court, No. 219-2015-CR-00312 (Tucker, J.), in finding that the State's current position was "clearly inconsistent with its earlier position." The State notes that that even though it argued that Bedford School District ("Bedford") did not "need[] to bring any claim [for FY 2016] during the hearing for the preliminary injunction, because that's what the stipulation in the Dover case is about," it also clearly argued that regardless of the result in Dover, the legislature would need to appropriate money due to sovereign immunity and separation of powers issues. (Def's.' Mot. for Recons. at. 3)

Since the above two arguments contradict each other, the Court disagrees that the State's current and earlier positions were consistent. The State presented alternative, mutually exclusive arguments, meaning that that the nature of the arguments was such that if one was valid the other was necessarily erroneous. If the Court had determined that it could not grant to Plaintiffs the monetary award they requested without the legislature appropriating the necessary funds, then it could not have logically concluded that the Stipulation had the capacity to protect Plaintiffs from irreparable harm. For this very reason, the Court explicitly rejected the State's argument that sovereign immunity prohibited the Court from granting Plaintiffs monetary relief. (Order on Pls.' Mot. for Prelim. Inj., Jun. 30, 2016, at 5-6.) In sum, the State could not have rationally presumed that, in endorsing the argument that the Stipulation protected Plaintiffs from irreparable harm, the Court would also conclude that the Stipulation was unenforceable. The policies underlying the doctrine of judicial estoppel would be substantially undermined if a party could present two non-complementary arguments in support of a given legal outcome, persuade a court to accept one of those

arguments, and then avoid judicial estoppel in a subsequent proceeding by asserting that its current position is consistent with the previously rejected argument.

II. The Court's application of judicial estoppel

The State next argues that the Court erred by failing to recognize that sovereign immunity cannot be undermined by judicial estoppel. The Court agrees with the State that "[s]overeign immunity is a jurisdictional question not to be waived by conduct or undermined by estoppel." LaRoche v. Doe, 134 N.H. 562, 566 (1991). In this case, however, the Court denied the preliminary injunction on the basis of the State's representations of the Stipulation, not on the sovereign immunity argument. The Court found that "[s]overeign immunity is not a defense to a request for declaratory judgment" and that "where a petitioner seeks a declaratory judgment that actions taken by the State are unconstitutional, the Court also has jurisdiction to grant equitable relief." (Order on Pls.' Mot. for Prelim. Inj., Jun. 30, 2016, at 5–6.)

In granting Plaintiffs' motion for summary judgment, the Court's application of judicial estoppel did not undermine the State's sovereign immunity. Sovereign immunity did not bar the Court from granting Plaintiffs' motion for preliminary injunction. Only the State's representations about the Stipulation persuaded the Court to deny that motion. The Court found in its orders for *both* motions that sovereign immunity did not apply in this case. The State has not been estopped from arguing sovereign immunity; it has only been estopped from arguing that the Stipulation does not entitle Plaintiffs to withheld funds from FY 2016. The State's sovereign immunity argument fails on its merits, not because of judicial estoppel.

III. The Court's determination that Plaintiffs sought prospective relief

The State next argues that in finding that the relief sought by Plaintiffs was prospective in nature, the Court overlooked "the undisputed fact that—in accordance with the statutory command for making adequacy payments to municipalities in four installments on specified dates—Bedford had, by June 2016, already received the entirety of its adequacy payment for fiscal year 2016, in the amount reduced by operation of the statutory cap, before it filed suit." (Defs.' Mot. for Recons. at 5.) The State avers that this statutory mandate necessarily made the relief sought retrospective. The State also objects to the Court's reasoning that the "the withheld funds¹ would have operated prospectively by mitigating the ongoing harm caused by the State's failure to provide a constitutionally adequate education during FY 2016." (Order on Pls.' Mot. for Summ. J., Apr. 6, 2017, at 18.)

The State essentially proposes the Court adopt an arbitrary approach to determining whether Plaintiffs sought retroactive relief in lieu of the careful analysis it underwent in its order on the motion for summary judgment. The State, however,

¹ Noting the Court's use of the word "withheld", the State points out that no funds existed that had been appropriated but not yet disbursed. Insofar as the Court's finding that it had the authority to grant a monetary award to Plaintiffs relief rested on the premise that appropriated funds existed, the State argues that the Court's finding was erroneous. First, the Court used the word "withheld" to refer to the difference between what the State should have disbursed to Bedford and what it actually disbursed, not whether the funds had actually been appropriated. Second, the Court notes that RSA 198:42, II authorizes the governor to:

draw a warrant from the education trust fund to satisfy the state's obligation under this section. Such warrant for payment shall be issued regardless of the balance of funds available in the education trust fund. If the balance in the education trust fund, after the issuance of any such warrant, is less than zero, the commissioner of the department of administrative services shall inform the fiscal committee and the governor and council of such balance. This reporting shall not in any way prohibit or delay the distribution of adequate education grants.

RSA 198:42. Since the statutory cap was unconstitutional and the governor is authorized to "satisfy the state's obligation" to distribute the entirety of the funds deemed necessary for an adequate education even if "the balance in the education trust fund, after the issuance of any such warrant, is less than zero," whether or not the education trust fund had sufficient funds would not have affected the Court's finding that it had the authority to order the State to disburse to Bedford the withheld funds.

provides no persuasive or mandatory authority to support its contention that whether Plaintiffs filed before or after April 1, 2016 should be solely determinative of the lawsuit's viability. The Court was careful to note in its order on Plaintiffs' motion for summary judgment that "the distinction between prospective and retrospective remedies has proved to be quite difficult to draw and rationalize in practice." *Id.* at 17 (quoting Greabe, Constitutional Remedies and Public Interest Balancing, 21 Wm. & Mary Bill Rts. J. 857, 864, n. 42 (2013)). It also elucidated its reasons for finding that Plaintiffs' suffered from an ongoing constitutional violation despite the fact that the date of the last adequacy payment had passed. *Id.* at 17–18. The State has provided the Court with no reason why the April 1 deadline should be solely determinative of whether or not Plaintiffs sought retroactive relief, especially where Plaintiffs filed their lawsuit during FY 2016. The Court therefore maintains that "[t]he line between prospective and retrospective remedies is neither self-evident nor self-executing." Murphy, Money As A "Specific" Remedy, 58 Ala. L. Rev. 119, 134–35 (2006) (quoting D. Laycock, Modern American Remedies: Cases and Materials 483 (3d ed. 2002)).

As to the State's argument that the Court's reasoning could be applied to interpret *any* monetary award as prospective, the State fails to appreciate that this case involved a constitutional violation. This case does not just present a question of whether Plaintiffs would merely have been "in a better position" had they received the withheld education adequacy funds; it presents the more grave question of whether residents of the State of New Hampshire are suffering from an ongoing violation of their constitutional rights. A housing voucher beneficiary might lose his housing if the government fails to provide to him with payments to which he is entitled, but his

homelessness does not amount to an ongoing constitutional violation since there is no constitutional guarantee to housing. On the other hand, New Hampshire residents have an absolute right to a constitutionally adequate education. The legislature has determined what it costs to fund an adequate education. When the State failed to deliver the entirety of those funds to Plaintiffs on April 1, 2016, one could reasonably conclude that the ability of Bedford to provide its students a constitutionally adequate education might be impeded for months, or even years, to come. The Court's analysis of whether the relief sought was prospective or retrospective hinged on whether there was an ongoing constitutional violation and not merely on whether Plaintiffs would have been in a better position with more funds.

IV. The Court's determination that the contractual nature of the Stipulation led to a waiver of sovereign immunity

The State next argues that the Court erred in concluding that even if the relief sought by Plaintiffs was actually retroactive relief, the State's sovereign immunity was waived under RSA 491:8 because the Stipulation was contractual in nature. In support of this argument, the State asserts that the "New Hampshire Supreme Court has expressly held that, by virtue of sovereign immunity, a contractual 'promise is not enforceable in equity by specific performance or injunctive relief.'" (Defs.' Mot. for Recons. at 7 (quoting Lorenz v. N.H. Admin Office of the Courts, 152 N.H. 632, 636 (2005).) The State also asserts that the New Hampshire Supreme Court has held that RSA 491:9 does not waive sovereign immunity for third-party beneficiaries of a contractual agreement.

The State erroneously paraphrases Lorenz. The full quote that the State partially paraphrases reads:

Regardless of how the petitioners have styled their suit in equity they are effectively proceeding upon the theory that they are entitled to specific performance of promised employment for life. Such a promise is not enforceable in equity by specific performance or injunctive relief, or, may we add, by declaratory judgment.

Lorenz, 152 N.H. at 636 (brackets, ellipses and quotations omitted). The Lorenz Court did not hold that, by virtue of sovereign immunity, a contract is not enforceable against the State in equity. Rather, the Lorenz court narrowly held that the petitioners' claim that they were entitled to employment for life was not enforceable in equity.

The State also misunderstands the holdings in Orff v. U.S., 545 U.S. 596 (2005) and Newell v. NH. Dep't of Welfare, 131 N.H. 91 (1988), the cases it relies on in support of its argument that RSA 491:8 does not waive sovereign immunity for third-party beneficiaries of a contractual agreement. Orff involved a statutory interpretation of a California statute quite dissimilar to RSA 491:8. 545 U.S. at 601–02. Moreover, the Supreme Court did not espouse any general principles about third-party beneficiaries and sovereign immunity. See id. The Newell court did not consider whether RSA 491:8 waived sovereign immunity for third-party beneficiaries, instead holding that under the contractual terms, the plaintiff had no cause of action. 131 N.H. at 90–91.

Under a plain reading of RSA 491:8, a party's status as a third-party beneficiary does not preclude the Court from having the "jurisdiction to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state." RSA 491:8. The State has provided the Court with no reason to ignore this plain meaning interpretation of the statute. The Court therefore finds no error in its determination that the State's sovereign immunity was waived under RSA 491:8 because the Stipulation was contractual in nature.

V. The Court's decision to award attorney's fees to Plaintiffs

Finally, the State argues that the Court erred in awarding attorney's fees to Plaintiffs because it overlooked the State's efforts to disburse to Bedford the withheld funds from FY 2016. This argument fails for the same reason that the Court finds that it correctly apprehended the State's position as to the effect of the Stipulation, see supra Part I. Throughout, and even before, this lawsuit, the State has argued that the Stipulation would entitle Bedford to the withheld funds from FY 2016 and FY 2017. Even though the State also argued that such funds would need to be appropriated from the legislature, this argument conflicted with the force of the State's representations as to the nature of the Stipulation. The tenor of these representations was such that both Plaintiffs and the Court were led to believe that the State would disburse to Bedford the withheld funds shortly following a favorable decision in Dover. For example, at the hearing for Plaintiffs' motion for preliminary injunction, the State remarked:

"When Dover brought that lawsuit before the first payment went out in [FY] 2016 . . . we had significant concerns that twenty-plus school districts would be filing litigation against the State in every different county in which they're located, and so we entered in [the Stipulation] with [the Dover plaintiff's attorney] That Stipulation would be the remedy for Bedford for [FY 2016] . . . [Plaintiff's counsel] is well aware of our arguments, we've been having this discussion since early May or late April between counsel regarding these issues. So with respect to that we don't believe there's any need for an injunction to be issued for [FY 2016] because of protections under the Dover stipulation. And if you consider that, we would then argue they are too late because they accepted all of the payments for [FY 2016] without bringing a specific claim and so they are in a situation where they are looking for money damages from the State not injunctive relief because it's too late to issue injunctive relief since those payments were made that way, but for the Stipulation."

(Hr'g Record at 10:12:00.) The State should have therefore presumed that if the Court relied on its representations about the Stipulation, it would reject its appropriations

argument. Since the State argued both that the Stipulation bound the State to pay the relief sought and that the State could not pay the relief sought, the Court was left to choose only one of these contradictory positions. Moreover, in objecting to Plaintiffs' motion for summary judgment, the State argued vehemently that the Stipulation did not require the State to provide relief to Plaintiffs regardless of whether the legislature appropriated the necessary funds or sovereign immunity applied. These arguments, which contradict their previous representations about the Stipulation, assuredly caused Plaintiffs' counsel to engage in a non-trivial amount of legal research and writing.


In sum, the State made representations tending to assure Plaintiffs and the Court of its intent to deliver the relief sought shortly following a favorable resolution in Dover. Absent the State's consistent proclamations that this litigation was unnecessary for Plaintiffs to receive the withheld funds from FY 2016 and the first adequacy payment of FY 2017, the lawsuit likely would have been less prolonged, less complicated and less costly to the Plaintiffs.

Conclusion

For the foregoing reasons, the State's motion for reconsideration is DENIED.

SO ORDERED.

5-24-17
Date



David W. Ruoff
Presiding Justice