THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0537

New England Backflow, Inc., et al.

v.

State of New Hampshire, Office of the Fire Marshal

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE DEPARTMENT OF SAFETY, OFFICE OF THE FIRE MARSHAL

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
OFFICE OF THE FIRE MARSHAL

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Did the trial court correctly conclude that Plaintiffs failed to state a claim of malicious prosecution and abuse of process, because Plaintiff Whittemore and Plaintiff New England Backflow lacked standing to assert such claims, and failed to allege essential elements of these claims?

2. Did the trial court correctly interpret the plain language of RSA 153:36 and RSA 485:11, utilize those plain meanings when analyzing the facts alleged, and determine Plaintiffs were not entitled to various declarations?

3. Did the trial court correctly conclude that Plaintiffs did not have a vested right to perform unrestricted backflow preventer work, therefore there could be no erosion of a right that did not exist?

4. Did the trial court correctly determine that the Fire Marshal's Office had statutory authority to issue a Cease and Desist Order, yet found the issue to be moot because the subject of the Cease and Desist Order had long since terminated?

COUNTERSTATEMENT OF FACTS[1]

On or about May 24, 2013, the Fire Marshal's Office received a citizen complaint from Daniel Gagne ("Gagne"). Complaint, AA at 6 ¶19[2]. The complaint was brought by a licensed plumber who believed Mr. Whittemore and/or New England Backflow were performing plumbing services without a license.[3] *Id*. at 6 ¶¶19, 20. As a result of this complaint, the Fire Marshal's Office dispatched Inspector Marc Prinderville, and subsequently Inspector Earl Middlemiss, to inquire about Plaintiffs' activities. *Id*. at 6 ¶¶ 20, 21.

On or about September 6, 2013, the Fire Marshal's Office received another complaint from Gagne. *Id*. at 7 ¶27. During this correspondence, Gagne requested the status of his prior complaint, and provided a new allegation that, after speaking with Plaintiffs directly, Gagne believed Plaintiffs were engaged in a variety of plumbing activities in a northern town. *Id*. The Fire Marshal's Office again dispatched Inspector Middlemiss, in addition to Chief Inspector Jeffrey Cyr, to investigate the new complaint. *Id*. at 7 ¶29. During that investigation, the inspectors identified what they believed to be a number of plumbing code violations where Plaintiffs were performing work on behalf of the Town of Pittsburg, New Hampshire. *Id.* at 6-7 ¶¶24, 29.

On or about September 9, 2013, Chief Inspector Cyr issued a Cease and Desist Order demanding that Plaintiffs cease plumbing without a

[1] The facts set forth herein are taken from Plaintiffs' Complaint.
[2] Appellants' Appendix is designated as AA; Appellants' Brief is designated as AB.
[3] Appellants Paul Whittemore and New England Backflow are herein collectively referred to as "Plaintiffs."

license. *Id*. at 8 ¶30. Following the issuance of the Cease and Desist Order, the Fire Marshal's Office and Plaintiffs met to discuss their conflicting views of whether or not Plaintiffs were required to hold a plumbing license. *Id*. at 8 ¶33. The parties agreed that, while they determined whether or not Plaintiffs were required to hold a plumbing license, Plaintiffs would have their work reviewed by a licensed plumber to ensure code compliance. *Id*. at 8 ¶35.

The Fire Marshal's Office continued to investigate Gagne's complaint. *Id*. at 10 ¶41. The investigation required the Fire Marshal's Office to seek additional information from town officials and a review of the work, which review was performed by a master plumber. *Id*. at 10-12 ¶¶41–50.

Gagne made complaints about Plaintiffs' unlicensed plumbing work again on October 9, 2014, as well as July 5 and 22, 2015. *Id*. at 12 ¶¶ 51–53. In his July 22, 2015 complaint, Gagne specifically mentioned the Plaintiffs' activities in Hillsborough and Peterborough. *Id*. at 12 ¶53. Chief Inspector Cyr contacted Plaintiff Whittemore to inquire about the complaints, and attempted a site visit to the Dollar Store in Hillsborough where he believed Plaintiffs were performing work. *Id.* at 13 ¶¶54, 57. When he arrived, however, Plaintiffs were not on site. *Id*. at 13 ¶57. Chief Inspector Cyr asked the Hillsborough building inspector to make a site visit to verify the identity of the contractor performing the work. *Id.* at 13 ¶58. The Hillsborough building inspector identified that Plaintiffs' employee, Thomas Birdsall ("Birdsall"), was performing the work. *Id*. at 13 ¶¶58, 59.

On or about July 30, 2015, Birdsall completed the Hillsborough work by permanently removing a backflow preventer leading from the

building's water system outside to a landscaping sprinkler. *Id*. at 14 ¶60. In doing do, Birdsall capped an open pipe. *Id*. at 14 ¶61. The capping of the open pipe falls within the definition of plumbing, as a result it cannot be performed without a plumbing license. On July 30, 2015 Chief Inspector Cyr notified the Fire Marshal's Office's Chief Thomas Riley that the work performed by Birdsall was determined to be plumbing without a license, and he would seek a warrant for Birdsall's arrest. *Id*. at 14 ¶62. On August 29, 2015, Chief Inspector Cyr drafted, but did not sign or swear to, an affidavit alleging that Birdsall performed plumbing without a license. *Id*. at 15 ¶67. During the interim period between drafting the affidavit and executing it, the Fire Marshal's Office again met with Plaintiffs and worked to determine the requirements under RSA 485:11 and RSA 153. *Id*. at 15 ¶70. During that same interim period, the Fire Marshal's Office also received a complaint from Plaintiff Whittemore about Inspector Cyr, and then performed an internal review of his investigation and conduct. *Id.* at 16-17 ¶¶71-77. Subsequent to the initiation of the internal review, Chief Inspector Cyr forwarded the draft affidavit to Investigator Berube, the Fire Marshal's Office's prosecutor, for review. *Id*. at 17 ¶77. After his own review, Inspector Berube decided to execute the affidavit in support of a warrant to arrest Birdsall for plumbing without a license. *Id*. at 17 ¶77.

SUMMARY OF ARGUMENT

Plaintiffs have brought a multitude of claims under the faulty belief that the Fire Marshal's Office specifically targeted them with the intent of appeasing a particular plumber, while simultaneously preventing Plaintiffs from competing against licensed plumbers. But the Fire Marshal's Office had no prior relationship with the Plaintiffs, no prior relationship with the plumber who initiated the complaints against Plaintiffs, and nothing to gain by preventing competition in the plumbing marketplace. The Plaintiffs wholly disregard the fact that the Fire Marshal's Office is tasked with protecting public welfare and safety, and this matter arises out of a legitimate investigation prompted by a citizen complaint.

The trial court properly dismissed Plaintiffs' claims of malicious prosecution and abuse of process because neither the Plaintiff business, nor the Plaintiff individual, were ever the subject of prosecution or process. As the allegations establish, Plaintiffs were simply the subject of a routine investigation. The trial court properly concluded that Plaintiffs failed to allege essential elements of these claims and lacked standing to bring such claims. Furthermore, the mere fact that Plaintiffs employed an individual who was arrested for failing to obtain a plumbing license does not give Plaintiffs standing to assert claims on his behalf.

Plaintiffs requested a variety of declarations regarding the scope and location in which backflow work may be performed, all of which were properly dismissed. The trial court engaged in a thorough exercise of statutory interpretation, following the well-established procedure for doing so. Even when construing the alleged facts in the light most favorable to

Plaintiffs, the trial court was unable to make a single declaration that Plaintiffs were engaged in the proper scope of work, or performing work in the proper location. The trial court properly dismissed all declarations as a matter of law, negating any need for an evidentiary hearing to address factual issues.

The trial court properly construed the applicable statutes to conclude that Plaintiffs do not have an unrestricted right to perform unlimited backflow preventer activities irrespective of location, nor have they ever. Plaintiffs incorrectly assert they have a vested right to perform unbridled backflow preventer activities, which is unsupported and outright contradicted by statutory language.

Finally, the trial court properly concluded that it would not entertain a declaratory judgement claim when the matter had become moot. The trial court found that the Fire Marshal's Office had clear statutory authority to issue a Cease and Desist Order to protect public safety, but the subject of the Order had long since terminated. The trial court appropriately exercised its discretion to dismiss the claim because it no longer posed an adverse claim between the parties.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM, DUE TO PLAINTIFFS' LACK OF STANDING, AND FAILURE TO ALLEGE ESSENTIAL ELEMENTS TO BRING A CLAIM OF MALICIOUS PROSECUTION OR ABUSE OF PROCESS.

The trial court grounded its disposition of the claims on three bases: first, that Plaintiffs failed to allege essential elements of their claims; second, that they lacked standing to assert malicious prosecution; and third, that Plaintiffs lacked standing to assert abuse of process. As set forth below, the trial court committed no error and should be affirmed.

In reviewing a trial court's ruling on a motion to dismiss, the Court must consider whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery. *Pesaturo v. Kinne*, 161 N.H. 550, 552 (2011). The Court assumes the plaintiff's allegations to be true and construes all inferences in the light most favorable to the plaintiff. *See Id*. However, the Court need not assume the truth of statements in the complaint that are merely conclusions of law. *See Tessier v. Rockefeller*, 162 N.H. 324 (2011). The Court then engages in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, the Court must hold that it was improper to grant the motion to dismiss. *Id*.

"When a motion to dismiss challenges the [plaintiff's] standing to sue, the trial court must look beyond the [plaintiff's] unsubstantiated allegations and determine, based on the facts, whether the [plaintiff has] sufficiently demonstrated [its] right to claim relief." *Conduent State &*

Local Solutions, Inc. v. New Hampshire Dep't of Transp., 171 N.H. 414, 418 (2018). If the underlying facts are not in dispute, the Supreme Court will make the standing determination *de novo*. *Id*.

A. The Complaint failed to allege that Plaintiffs were subjected to any proceeding instituted by the Defendant, therefore failing to allege the first element of a malicious prosecution claim.

To prevail on a malicious prosecution claim, the plaintiff must prove: (1) that *he* was subjected to a civil proceeding instituted by the defendant; (2) without probable cause; (3) with malice; and (4) that the proceedings terminated in the plaintiff's favor. *Paul v. Sherburne*, 153 N.H. 747, 749 (2006) (emphasis added). In the present matter, Plaintiffs needed to allege that *they* were subjected to a proceeding instituted by the Fire Marshal's Office. On its face, the malicious prosecution claim fails because the Complaint does not allege that New England Backflow, Inc. or Paul Whittemore were ever subjected to any proceeding. The Complaint alleges only that Birdsall, an employee of New England Backflow, was subjected to a proceeding. Complaint, AA at 17 ¶77. The trial court properly dismissed the malicious prosecution claim because, even assuming all factual allegations to be true, the Plaintiffs failed to allege any facts to satisfy the first element of this cause of action.[4]

[4] In addition, Plaintiffs did not allege any facts to satisfy the fourth element of a malicious prosecution claim, "that the proceedings terminated in the plaintiff's favor." Given that Plaintiffs were never subjected to a proceeding, it logically follows that no proceeding terminated in their favor. "The law is well settled that a party may not sue for malicious prosecution until after the underlying proceeding has terminated in its favor." *ERG, Inc. v. Barnes*, 137 N.H. 186, 190 (1993).

B. The Complaint failed to allege that Plaintiffs were subjected to process initiated by the Defendant, therefore failing to allege an essential element of an abuse of process claim.

"A party claiming abuse of process must prove the following elements: (1) a person used (2) legal process, whether criminal or civil (3) against the party (4) primarily to accomplish a purpose for which it is not designed and (5) caused harm to the party (6) by the abuse of process." *Long v. Long*, 136 N.H. 25, 29 (1992). This Court has held that there is no basis for relief when a plaintiff does not allege that any legal process was used against the plaintiff. *See Tessier,* 162 N.H. at 335. Reviewing the Complaint, the trial court found that "there are no allegations to support a finding that this purported process was used 'against' the Plaintiffs." Order at 25. This is because nothing in the Complaint alleges that criminal or civil process was used against either Plaintiff, only that process was instituted against Birdsall. Complaint, AA at 17 ¶77. The trial court properly dismissed the abuse of process claim because, even assuming all factual allegations to be true, the Plaintiffs failed to allege any facts to satisfy the third element of this cause of action.

C. The trial court properly dismissed Plaintiffs' Complaint for failure to state a claim for abuse of process, because no abuse was alleged after process was initiated.

The trial court found that the Complaint might allege facts suggesting a wrongful initiation of an investigation and arrest, but the Complaint failed to suggest that the Fire Marshal's Office committed any

abuse after the arrest, therefore failing to allege any facts that could be construed to permit Plaintiffs' recovery. Order at 26.

"An action for abuse of process differs from an action for malicious prosecution in that the latter is concerned with maliciously causing process to issue, while the former is concerned with the improper use of process *after* it has been issued." *Long,* 163 N.H. at 30 (emphasis added). "The gravamen of the misconduct for which [liability for abuse of process] is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings…" *Id*. at 29-30. In analyzing the Complaint as favorably as possible, the trial court went so far as to assume Plaintiffs had standing and that the initiation of an arrest constituted process, yet the Plaintiffs still did not allege facts that would establish the Fire Marshal's Office abused process *after* it was obtained. Order at 25-26.

Plaintiffs argue that "there is nothing in the elements of the cause of action set forth in *Long* to support the trial court's conclusion that the abuse of process claim pertains to the use of the process *after procurement* for an improper purpose." AB at 32 (emphasis in original). However, this argument overlooks New Hampshire cases that illustrate it is well entrenched in law that abuse of process claims concern improper use of process after it has been issued. The Court in *Business Publications* stated, "the institution of an action is not a process of the court…The fact that the [defendants] may have had an ulterior purpose or bad motive in filing suit…cannot be construed as having any relation to a process of the court." *Business Publications v. Finnegan*, 140 N.H. 145, 148-49 (1995). In *Business Publications v. Finnegan*, the "initiation of [a] defamation suit by

the defendants and 'certain actions taken in connection' therewith" were insufficient allegations to establish that any process was abused after initiation. *Id*. at 146–49. In the case of *Clipper Affiliates v. Checovich*, a claim that a lawsuit was initiated to retaliate or harass another was not enough to support an abuse of process claim. *Clipper Affiliates, Inc. v. Checovich*, 138 N.H. 271, 277 (1994). The Court stated that "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, or properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and *it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort*." *Id.* at 276-77 (emphasis added). The *Bellevue Properties* Court held that, as a matter of law, a party cannot bring an abuse of process claim based solely upon the fact that a suit was initiated, even if it was initiated with an improper motive, and even if it is but one of several suits. *Bellevue Properties, Inc. v. Settlers' R1, Inc.*, Nos. 2014-0454, 2015-0501, 2017 WL 696092, at *6 (N.H. Jan. 12, 2017).[5] The cases clearly stand for the proposition that the initiation of process does not establish an abuse of process claim, rather, it is the subsequent misuse of process that gives rise to a claim. Plaintiffs failed to allege any facts that the Fire Marshal's Office engaged in any conduct, after the initiation of the arrest, in which they used court issued process to accomplish a purpose for which that process was not designed.

[5] *Bellevue Properties, Inc. v. Settlers* is a non-precedential order included for informational purposes only pursuant to Sup. Ct. R. 20.

Plaintiffs disregard the language in *Long* and other cases which require a showing of abuse after process has issued, and instead focus on the language citing Restatement (Second) of Torts §682. AB at 31-32. Plaintiffs argue that the trial court misinterpreted this section, and a reading of the full section would support a broad construction of this cause of action. *Id*. However, this argument fails for two reasons: first, whatever the full language of the Restatement may say, this Court has delineated the tort narrowly; second, even when read in its entirety, and even construing the cause of action broadly, the Restatement section continues to support the trial court's proposition that misuse of process must occur after process has been issued:

> "The gravamen of the misconduct for which the liability stated in this Section is imposed is *not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings*; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The *subsequent misuse of the process*, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section."

Restatement (Second) of Torts, §682 (emphasis added).

Plaintiffs argue that the initiation of arrest documents constitutes process, yet, again, overlook the necessary requirement that some misuse must occur after issuance of the process. AB at 33-34. The trial court, moreover, accepted Plaintiffs argument for purposes of analysis. The trial court assumed that the initiation of arrest papers was process, but concluded

that, even when assuming that the initiation of an arrest is process, this would merely be the wrongful initiation of a proceeding, and the Complaint lacked any allegations of the subsequent misuse required to make a claim for abuse of process. Order at 25–26. The Plaintiffs do not, and cannot, dispute the contents of the Complaint.

D. An employer does not have standing to bring an action for allegedly tortious conduct committed against its employee.

Plaintiffs incorrectly argue that as the employer of Birdsall, they suffered a concrete injury when he was arrested, and therefore they have a right to relief under theories of malicious prosecution and abuse of process. AB at 23–28. Plaintiffs make two arguments: (1) Plaintiffs were the intended target and victim of the arrest, so an arrest of Birdsall was for all intents and purposes an arrest of New England Backflow; and (2) a principal and agent are one and the same for purposes of a complete legal identity. *Id*.

The Plaintiffs' first argument fails because the Plaintiffs have not alleged facts to support the conclusion that New England Backflow and Paul Whittemore were the intended target of Birdsall's arrest. Plaintiffs point to a narrow group of cases from other jurisdictions to argue that a party that has suffered harm through the arrest of another may have a cause of action for torts against third parties. However, these cases extend a cause of action for a tort against a third party *only* when the plaintiff is the intended target and victim. *Board of Education of Farmingdale Union Free*

School District v. Farmingdale Classroom Teacher's Association, Inc., 343 N.E.2d 278, 284 (N.Y. App. 1975) (emphasis added).

The Fire Marshal's Office initiated an arrest, specifically of Birdsall, for performing plumbing without a current valid plumbing license. Complaint, AA at 17 ¶77. Misdemeanor guilt for performing plumbing without a license extends to a person *or* a business entity. RSA 153:37, IV-a. The Fire Marshal's Office had statutory authority to initiate an arrest against New England Backflow or Paul Whittemore, and, if they had initiated such an arrest, Plaintiffs could claim to be the intended target. But, absent any specific allegations that the Fire Marshal's Office acted against Birdsall by way of targeting Plaintiffs, Birdsall is the only entity that can be considered the target.

The Plaintiffs' second argument fails because it misconstrues the relationship between a principal and agent. As the trial court succinctly stated "[the cases cited by Plaintiff] support the proposition that a principal is civilly liable for the tortious acts of its agent, and do not consider whether a principal may institute a legal action for damages arising from the tortious acts committed against its agent." Order at 16. While a principal and agent may have one legal identity for purposes of tort liability, they do not share one legal identity for purposes of bringing a claim. In the absence of any decisional law to the contrary, the general rule of New Hampshire applies, that the Plaintiffs do not have standing to bring a claim on behalf of a third party. *See Gen. Elec. Co., Inc., v. Commr., N.H. Dept. Rev. Admin*., 154 N.H. 457, 461 (2006).

E. This Court's articulation of the torts of malicious prosecution and abuse of process foreclose their extension to a broad class of third parties.

The Plaintiffs argue that the existing torts of malicious prosecution and abuse of process should be extended to a new class of plaintiffs – those that were harmed even if they were not actually served. AB at 28–31. This Court has stated, however, that "malicious prosecution is a limited cause of action that will lie only in discrete circumstances." *Aranson v. Shroeder*, 140 N.H. 359, 367 (1995) (citing Barquis v. Merchants Collection Ass'n of Oakland, 7 Cal.3d 94, 101 (1972) ("characterizing malicious prosecution as a 'narrowly circumscribed' cause of action")). This Court has expressed the concern that widespread application of these two torts will result in the inadvertent chilling effect on those who suspect wrongdoing from reporting it. "Except in extreme cases, for which malicious prosecution or abuse of process are adequate remedies, person wrongfully accused of a crime must bear that risk, lest those who suspect wrongful activity be intimidated from speaking about it to the proper authorities for fear of becoming embroiled themselves in the hazards of interminable litigation." *McGranahan v. Dahar*, 119 N.H. 758, 769 (1979).

Generally, this Court exercises caution when asked to adopt or extend the common law. This Court has emphasized that it must be "mindful that fundamental changes in jurisprudence must be brought about sparingly and with deliberation." *Aranson,* 140 N.H. at 365. That is all the more the case with respect to the torts of abuse of process and malicious prosecution, overuse of which threatens to impede the reporting of wrongdoing. In light of the narrow scope of abuse of process and malicious

prosecution, and this Court's general caution in extending the common law, the Plaintiffs offer no credible reason for the extension they seek.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE ALLEGATIONS IN THE COMPLAINT WERE NOT REASONABLY SUSCEPTIBLE OF A CONSTRUCTION THAT WOULD PERMIT PLAINTIFFS TO OBTAIN DECLARATORY RELIEF.

The Plaintiffs sought declaratory relief that RSA 485:11 entitled them to perform backflow work which implicitly includes ancillary, collateral or coincidental work on pipes; that Plaintiffs' work at the Hillsborough Dollar General store, performed by Birdsall, was within the scope of RSA 485:11 and exempt from plumbing licensure requirements pursuant to RSA 153:36; and that Plaintiffs' work on backflow preventers falls within the scope of RSA 485:11 irrespective of the location of the backflow preventer. AB at 35-36; Complaint, AA at 18 ¶¶79, 81, 82, 83. The trial court concluded that the alleged facts, applied to a plain and ordinary meanings of RSA 153:36 and RSA 485:11, allowed for no reasonably susceptible construction that would permit recovery. Order at 8-15. The trial court did not err in its analysis and outcome.

In matters of statutory interpretation, the Supreme Court reviews the trial court's statutory interpretation *de novo*. *Conduent,* 171 N.H. at 419. "In matters of statutory interpretation, [the Court is] the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." *Id*. "[The Court] first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning. *Id.* at 420. "[The Court] interpret[s] legislative intent

from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id*. "[The Court] construe[s] all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result." *Id.* "Moreover, [the Court] do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Id.* "This enables [the Court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id*. "Absent an ambiguity, [the Court] will not look beyond the language of the statute to discern legislative intent." *Id*.

A. The trial court properly applied well established methods of statutory interpretation to determine the scope of activities permissible pursuant to RSA 153:36 and RSA 485:11, and properly determined that the statutory framework could not permit Plaintiffs' requests for declaratory relief.

It is well established that "the starting point for any statutory interpretation case is the language of the statute itself." *Smagula v. Town of Hooksett*, 149 N.H. 784, 787 (2003). Courts "will not consider what the legislature might have said or add words that the legislature did not include." *Id*. When examining a statute, the court should "ascribe the plain and ordinary meaning to the words used." *Frost v. Comm'r, N.H. Banking Dept*., 163 N.H. 365, 374 (2012).

As the trial court concluded, the plain language of RSA 485:11 "plainly limits the scope of work that may be performed to the 'inspection and testing, maintenance, repair or replacement, and installation' of backflow devices and related equipment." Order at 9-10; *see* RSA 485:11.

Plaintiffs sought a declaration that would include "ancillary, collateral or coincidental work…" Complaint, AA at 16 ¶79. But the statute does not provide for ancillary work. To the contrary, the statute expressly limits permissible activity in connection with backflow work, and does not include "ancillary, collateral or coincidental" work. Had the Legislature intended for ancillary, collateral or coincidental work to be performed, it would have included such activities when drafting this statute. The Legislature has routinely seen it fit to add language to broaden the scope of RSA 485:11. The statute originally allowed "inspection and testing," which was amended in 2013 to include "installing, servicing, and testing," and then amended again in 2014 to include "inspection and testing, maintenance, repair or replacement, and installation." Order at 23; State's Motion to Dismiss, AA at 30–32. The statutory history shows that the Legislature clearly is not shy in amending RSA 485:11 when it intends to broaden the scope of authorized activities.

The trial court correctly determined that Plaintiffs' request for a declaration sought language beyond what was specified in the statute, and the court "will not add language that the legislature did not see fit to include." Order at 10 (citing *State v. Exxon Mobil Corp*., 168 N.H. 211, 223 (2015)). Because the trial court could not add language that the Legislature did not see fit, and the statute provides only a specific list of activities, the trial court could make no reasonable construction to declare that an expanded scope of activities was lawful.

Plaintiffs sought an additional declaration that their "ancillary, collateral or coincidental work…" be exempted from the plumbing license requirements pursuant to RSA 153:36. Complaint, AA at 16 ¶81. Looking

again to the statute itself, RSA 153:36 plainly states that "license requirements of this subdivision shall not apply…when performing plumbing tasks within their certifications, as defined in RSA 485:11…" *See* RSA 153:36. The statute allows for an exemption to plumbing licensure only when an individual is performing tasks defined in RSA 485:11, and RSA 485:11 does not provide for ancillary, collateral, or coincidental work. Having already determined the scope of activities the Legislature authorized under RSA 485:11 (inspection and testing, maintenance, repair or replacement, and installation of backflow devices), the trial court correctly concluded that an exemption to the license requirement, pursuant to RSA 153:35, was permitted only when an individual was performing those enumerated activities. Order at 11. Because the statue provides an exemption to licensure to a specific group of activities, and makes no allowance for unlicensed work outside of that specific group of activities, no reasonable construction would allow the court to declare that Plaintiffs' work was exempt from the licensure requirement.

Finally, Plaintiffs sought a declaration that employee Birdsall's work fell within the scope of RSA 485:11. Complaint, AA at 18 ¶82. On appeal, Plaintiffs incorrectly characterize the issue surrounding Birdsall's work as a factual inquiry. The trial court properly disposed of this issue as a matter of law. AB at 40; Order at 13–14. Plaintiffs argue that RSA 485:11 implicitly allows for the removal of a backflow device, so an evidentiary hearing should have been held to determine if copper capping is incidental to removal of the device. AB at 40-41. Contrary to Plaintiffs' assertion, RSA 485:11 specifically allows for the repair and replacement of a device, but notably omits any language authorizing an operator or facility to

permanently remove a device. The statute makes clear that repair and replacement are allowed, but the statute makes no allowance for permanent removal. Plaintiffs' own assertion that the device was permanently removed is an admission that Birdsall performed work beyond the scope of RSA 485:11. Complaint, AA at 14 ¶61. The facts alleged in the Complaint establish that Birdsall permanently removed a device, which is an activity outside the clear scope of RSA 485:11. No reasonable construction of RSA 485:11 would allow for a declaration that Birdsall's work fell within the statute's scope.

Plaintiffs argue that "[i]t was not for the trial court to determine, at the stage of a motion to dismiss, the factual question of whether capping a copper pipe was incidental to removal of a backflow device." AB at 40. The trial court never needed to reach the factual question of whether or not copper capping was incidental to removal of a device, because, as a matter of law, Birdsall performed work beyond the scope of RSA 485:11 when he permanently removed the device.

B. The trial court properly applied well established methods of statutory interpretation to determine the location in which Plaintiffs could perform backflow prevention work pursuant to RSA 485:11, and properly determined that an evidentiary hearing was not required to interpret the statute or dismiss this claim.

The Court need not look further than the plain language of RSA 485:11 to determine the location in which an individual can perform backflow preventer work. The statute specifically provides for work to be conducted "directly adjacent to and required as part of the protection for the

drinking water distribution system." *See* RSA 485:11. "Directly" is defined as "without any intervening space or time." *See Websters Third New International Dictionary*, (unabridged ed. 2002). "Adjacent" is defined as "not distant" or "having a common border." *Id*.. The statutory language establishes that the Legislature plainly intended RSA 485:11 to apply only to backflow preventer devices connected to the public water system. Plaintiffs' argue on appeal that the trial court erred in applying the ordinary definition of "adjacent to." AB at 36. Yet Plaintiffs themselves contend that "adjacent to" is "not precisely a term of art in the statute or in the field…" *Id*. at 38. It is contradictory for the Plaintiffs to argue that the locational words are not terms of art, yet that the court should somehow decline to apply their ordinary meaning.

A facial reading of RSA 485:11 clearly limits the location of backflow preventer work, but to the extent the Court is not persuaded by the plain meaning, the legislative history supports the same conclusion. A long line of cases in New Hampshire dictate that statutory interpretation starts with the words themselves, and absent an ambiguity, the court will look no further to discern legislative intent. *Conduent*, 171 N.H. at 420. "In the event that the statutory language is ambiguous, [the Court] will resolve the ambiguity by determining the legislature's intent in light of legislative history." *United States v. Howe*, 167 N.H. 143, 148-49 (2014). In pertinent part, the legislative history supports the conclusion that the work of certified water operators is limited. Steve Del Deo, the Executive Director of NH Water Works Association, testified in support of the bill, describing in detail the location of the authority of water suppliers regarding backflow prevention devices as limited to the area between the shutoff connected to

the public water supply, where the meter horn, check valve or backflow preventer, and expansion tank are located, and the next shutoff *prior* to the line leading to the plumbing system of the residence or business. With regard to that area, Mr. Del Deo testified as follows: "Those two shutoffs isolate what we call the containment device, that is the last and most important, most critical device that protects the public water system from a potential contamination from a backflow. So water suppliers have to have access to that containment device, and that's all we are asking is that we have access to that device…HB 1383 clarifies what we can do, where our jurisdiction ends, and it ends in that area, the containment device, between those two shutoffs, we need access to that area…" (testimony of Steve Del Deo at 29:50).[6]

Both the plain language of the statute, and the legislative history, conclusively define the limited region in which backflow preventer work may be conducted. Plaintiffs have produced no authority to support their contention that the trial court should have disregarded the plain meaning of the statute, and the legislative history, to decide a matter of statutory interpretation on an evidentiary hearing. Because the statute clearly defines the location in which backflow preventer work may be conducted, the trial court could make no reasonable construction that Plaintiffs were entitled to a declaration that backflow work may be performed irrespective of location. Order at 12.

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[6] The legislative history has been abridged to reflect only those portions related to the location of backflow work. A more detailed excerpt was included in the State's Motion to Dismiss. AA at 32. The entirety of audio may be found at http://www.gencourt.state.nh.us/bill_status/BillStatus_Media.aspx?lsr=2309&sy=2014&sortoption=billnumber&txtsessionyear=2014&txtbillnumber=hb1383.

III. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A TAKINGS CLAIM.

The trial court properly found that Plaintiffs failed to plead sufficient facts to establish a distinct property interest, and further, that statutory changes to RSA 153:36 and RSA 485:11 have not limited any rights granted to Plaintiffs. Order at 21–22.

A. Plaintiffs have failed to properly preserve the argument that RSA 329-A conferred a vested right to perform unrestricted backflow preventer work.

As a threshold matter, Plaintiffs have not properly preserved the argument they now raise on appeal. "This court has consistently held that [it] will not consider issues raised on appeal that were not presented in the lower court." *LaMontagne Builders v. Bowman Brook Purchase Group*, 150 N.H. 270, 274 (2003). "This requirement is designed to discourage parties unhappy with the trial result [from] comb[ing] the record, endeavoring to find some alleged error never addressed by the trial judge that could be used to set aside the verdict." *Id*. "To satisfy this preservation requirement, any issues which could not have been presented to the trial court prior to its decision must be presented to it in a motion for reconsideration. *Id*.

Plaintiffs have consistently, albeit confusingly, argued that their right to perform backflow device work in any location arises from RSA 332-E, which they contend has subsequently been eroded by statutory changes to RSA 485:11 and RSA 153:36. Complaint, AA at 4 ¶9 (Paul J.

Whittemore has been a certified water system operator pursuant to RSA 332-E for 24 years); *Id*. at 21 ¶102 (In the event the Court declares that the statutory authority set forth in RSA 485:11 and 153:36…should not encompass any aspect of [Plaintiffs'] work…); Objection to Motion to Dismiss, AA at 64 ¶30 (the limitations imposed by the legislature in RSA 153:36 and RSA 485:11…constitute an erosion of the authority); Motion for Reconsideration, AA at 79 ¶5 (Regarding the Court's rulings on...RSA 485:11 and 153:36). Now, for the first time on appeal, Plaintiffs argue that the trial court should have considered that the now-repealed RSA 329-A conferred a broad exemption to the plumbing licensure requirement from which the Plaintiffs derived their "vested right." AB at 42. This argument has not been preserved because the Plaintiffs never argued below that RSA 329-A conferred rights to them. *See State v. Cass*, 121 N.H. 81, 83 (1981) (errors discovered by combing the record after trial and never properly presented to the trail judge should not be utilized to set aside a verdict.).

B. To the extent the takings argument has been preserved, the trial court properly dismissed Plaintiffs' Complaint for failure to state a claim because Plaintiffs had no right to perform unrestricted backflow work, therefore that right could not be eroded.

The trial court found "that there was no support for the contention that Whittemore's certification under RSA 332-E granted the Plaintiffs a right to perform unrestricted backflow work." Order at 22. The trial court reasoned that the definitions of "operator" and "water distribution system," as included in RSA 332-E:1, have remained unchanged since at least 1992, when Plaintiff Whittemore became certified. *Id*. at 22-23. The term

"operator" has consistently been defined as "the individual who has full responsibility for the operation…of a water distribution system." *See* RSA 332-E:1, IV (2011). The term "water distribution system" has consistently been defined as "that portion of the public water system which includes sources, pipes, storage facilities, pressure booster facilities, and all measuring and control devices used to convey potable water to system users." *See* RSA 332-E:1, V (2011). These definitions make it clear that certified operators, such as Plaintiff Whittemore, have been limited to work only on the "public water system" since at least 1992. Plaintiff argues that RSA 485:11 has limited the authority conferred by RSA 332-E, yet RSA 485:11 and all amendments thereto have consistently discussed work on the "public supply pipe system." Both RSA 332-E and RSA 485:11 limit the location of work to the public water system, and have done so for the duration of Plaintiff Whittemore's certification, which is quite different than a vested right to perform *unrestricted* work.

In their newfound argument, Plaintiffs' claim that RSA 153:36 merely migrated the broad exemption to licensure found in RSA 329-A. AB at 42. This new argument appears to address the trial court's determination that RSA 153:36 was only enacted in 2006, so it "does not support the argument that the Plaintiffs have been permitted to perform backflow work without limitation since 1992." Order at 22. This new argument fails for the same reason that the arguments the Plaintiffs actually made to the trial court failed. The exemption to licensure contained in RSA 329-A:13 applies to "employees of public drinking water systems and public water system operators certified by the department of environmental services for drinking water treatment." The Department of Environmental Services is authorized

to certify public water system operators pursuant to RSA 332-E:3. At all relevant times, RSA 332-E has defined "operator" and "water distribution system" as an individual performing work on a public water system. The Plaintiffs' new argument, including RSA 329-A, fails because Plaintiffs have always been limited to the public water system, and at no time did they have the right to perform *unrestricted* work.

As established, RSA 485:11 has not eroded the scope of work that Plaintiffs can perform; to the contrary, it has expanded the scope of Plaintiffs' work. While RSA 485:11 originally only exempted the "inspection and testing" of backflow devices, it now includes "inspection and testing, maintenance, repair or replacement, and installation" of backflow devices. *See* RSA 485:11 (eff. 1990-20145); AA at 30-32. Although the relevant statutes have been amended throughout Plaintiffs' career, neither the location in which they could install devices, nor the scope of work they could perform on those devices, has been diminished. Because the right to perform backflow device work has not been diminished, the government has not substantially interfered with or deprived Plaintiffs of their intangible property, and no taking has occurred. *Kingston Place, LLC. v. New Hampshire Dep't. of Transp*. 167 N.H. 694, 697 (2015).

IV. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' CLAIM FOR A DECLARATION REGARDING THE CEASE AND DESIST ORDER, BECAUSE THE FIRE MARSHAL'S OFFICE HAD AUTHORITY TO ISSUE SUCH AN ORDER AND THE CLAIM WAS MOOT.

The trial court found that the Fire Marshall's Office acted within its statutory authority to issue a Cease and Desist Order, but, by the time Plaintiffs' brought their claim, the Cease and Desist Order had already terminated by its own terms, rendering the issue moot. Order at 14-15.

As the trial court observed, RSA 153:34, I authorizes the Fire Marshal's Office to appoint inspectors to insure compliance in regard to public safety and welfare, and RSA 153:34, III authorizes such an inspector to order the removal or correction of any violation of the mechanical licensing statutes. Order at 14. The Fire Marshal's Office, via its properly appointed inspectors, had clear statutory authority to issue a Cease and Desist Order to remedy a violation of the mechanical licensing statutes.

The trial court concluded that matters surrounding the Cease and Desist Order were moot because the Order related to Plaintiffs' work on a particular project, which had since been completed. *Id*. at 15. The trial court correctly reasoned that the remedy of declaratory judgment is not available in the absence of an adverse claim between the parties. *See Real Estate Planners v. Newmarket*, 134 N.H. 696, 701 (1991) (a petition for declaratory judgment must seek to resolve an adverse claim and that the adverse claim must be definite and concrete); *Salem Coalition for Caution v. Town of Salem*, 121 N.H. 694, 697 (1981) (declaratory judgment actions should be confined to justiciable controversies of sufficient immediacy and reality). "Once a petition for declaratory judgment is moot, the trial court

may, in its discretion, dismiss the petition." *Real Estate Planners*, 134 N.H. at 81. Having found that the Fire Marshal's Office had clear statutory authority to issue the Cease and Desist Order, and having found that the remedy of declaratory judgment is improper in matters that have become moot, the trial court properly exercised its discretion to dismiss the claim. Order at 15.

Plaintiffs appear to argue that the Fire Marshal's Office must have known the license requirement did not apply to Plaintiffs, making the issuance of the Cease and Desist Order oppressive conduct. AB at 45. To the extent Plaintiffs make a bad faith argument, fees are only appropriate when a party has acted vexatiously, wantonly, or for oppressive reasons. *See Frost*, 163 N.H. at 378. The Fire Marshal's Office has consistently maintained that the license requirements *did* apply to Plaintiffs and they issued the Cease and Desist Order to protect public safety. On its face, the allegations in the Complaint constitute nothing more than a State agency lawfully investigating a complaint from a member of the public as it is required by law to do.

CONCLUSION

The Fire Marshal's Office has consistently maintained that it appropriately conducted an investigation within its statutory authority, prompted by a valid citizen complaint, and motivated only to protect the public welfare. The trial court properly found that Plaintiffs were unable to establish any viable claims against the Fire Marshal's Office. For the

foregoing reasons, the Defendant respectfully requests that this Honorable Court affirm the judgment below.

REQUEST FOR ORAL ARGUMENT

The Fire Marshal's Office requests oral argument and expects that Emily C. Goering will present the argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
OFFICE OF THE FIRE MARSHAL

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CERTIFICATE OF SERVICE

I, Emily C. Goering, Esq., hereby certify that on this 3rd day of May, 2019, copies of the foregoing Brief for the State of New Hampshire has been served electronically through the Supreme Court e-file system or, conventionally, via first class mail.

/s/ Emily C. Goering
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