THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0537

New England Backflow et al

v.

State of N.H., Office of the Fire Marshal

RULE 7 MANDATORY APPEAL FROM
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF APPELLANTS NEW ENGLAND BACKFLOW & PAUL WHITTEMORE

By Their Attorneys

ORR & RENO, P.A.

45 S. Main Street, Suite 400
P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318
jeggleton@orr-reno.com

Jeremy D. Eggleton, Esq.

To be argued by Jeremy D. Eggleton, Esq.

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NEW HAMPSHIRE CONSTITUTIONAL PROVISIONS AND NEW HAMPSHIRE STATUTES

New Hampshire Constitution, Part 1, [Art.] 14. [Legal Remedies to be Free, Complete, and Prompt.] Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.
June 2, 1784

153:36 Exceptions. –
IV. The license requirements of this subdivision shall not apply to employees of public drinking water systems and public water system operators certified by the department of environmental services for drinking water treatment plants and distribution systems, when performing plumbing tasks within their certifications, as defined in RSA 485:11 and RSA 332-E:3. This exception is specifically limited to the testing, maintenance, repair or replacement, and installation of the water meter, meter horn, and backflow prevention devices directly adjacent to and required as part of the protection of the drinking water distribution system.
Source. 2006, 206:3. 2010, 140:10. 2013, 275:8, eff. July 1, 2013. 2014, 106:1, 2, eff. June 11, 2014.

332-E:1 Definitions. –
In this chapter:
I. [Repealed.]
I-a. "Commissioner" means the commissioner of the department of environmental services.
II. "Certificate" means a certificate of competency issued by the department stating that the operator has met the particular requirements set by the department for certification at his level of operation.
III. "Department" means the department of environmental services.
IV. "Operator" means the individual who has full responsibility for the operation of a water treatment plant or water distribution system and any individual who normally has charge of an operating shift, or who performs important operating functions including analytical control.
V. "Water distribution system" means 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 the system users.
VI. "Water treatment plant" means the portion of the public water supply system which in some way alters the physical, chemical, or bacteriological quality of the water being treated.
Source. 1979, 487:1. 1986, 202:6, I(a), (c). 1996, 228:48, 49, 107. 2009, 210:1. 2010, 368:28, VII, eff. Dec. 31, 2010.

332-E:3 Regulation of Water Treatment and Distribution. –
I. No water treatment plant or water distribution system shall be operated unless such operation is supervised by a certified operator.
II. The department shall establish the criteria and conditions for the classification of public water systems and water treatment plants or water distribution systems.
III. The department shall establish by regulation pursuant to RSA 541-A the qualifications, conditions, licensing standards, and procedures for the certification of individuals to act as operators.
IV. The department shall provide for enforcement of such regulations. Such criteria, conditions, and regulations shall be considered as minimum standards and shall require as a minimum that every operator shall be certified in accordance with the provisions of this chapter. The department may classify operators in accordance with the type of water treatment plant or water distribution system they are qualified to operate.
Source. 1979, 487:1. 1986, 202:6, I(a), (c). 1996, 228:106. 2009, 210:2. 2010, 368:17, eff. Dec. 31, 2010.

485:11 Backflow Device Requirements and Tests, Installations, Repairs and Replacements. –
There shall be a backflow prevention device installed at every connection to a public water system if the facility connected may pose a hazard to the quality of water supplied by the public water system as determined by the department. Where applicable, the facility receiving water from a public water supply shall be responsible for having such drinking water distribution system protective backflow prevention devices inspected and tested by individuals certified by a third party who has been approved by the department to conduct backflow device inspection and testing certification. The facility shall also have backflow devices installed,

maintained, repaired, and replaced by individuals qualified by either a plumbers license or by certification by the department under RSA 332-E:3, III proving competency in distribution system operation. The activities to be conducted by qualified individuals shall be specifically limited to the inspection and testing, maintenance, repair or replacement, and installation of the water meters, meter horns, backflow preventers, and assembly devices directly adjacent to and required as part of the protection for the drinking water distribution system. Testing of drinking water distribution system protective backflow prevention devices, where applicable, shall occur after installation or repair to ensure that new and repaired devices are working properly. Testing shall also occur twice annually for existing devices unless the public water supplier determines that the facility poses a low hazard, in which case testing shall occur annually. A residential property shall not be considered a low hazard facility but may be considered a high hazard facility if it has an irrigation system, private well connection, or other feature that may cause a public health risk. If an outside irrigation system is the sole reason a residential property is considered a hazard to the public water supply distribution system, such irrigation system shall be tested annually during the period when the irrigation system is operated. The facility receiving water from a public water supplier is responsible for ensuring that the backflow prevention device is working properly to prevent backflow into the public water system.

Source. 1989, 339:1. 1996, 228:106, eff. July 1, 1996. 2013, 50:1, eff. Aug. 3, 2013. 2014, 304:4, eff. Sept. 30, 2014.

Questions on Appeal

1. The Superior Court dismissed the Plaintiffs' request for declaratory judgment despite ambiguities in the law and factual assertions that, when considered in the light most favorable to the Plaintiffs, required evidence and a hearing to resolve. Did the Superior Court err in dismissing the Plaintiffs' declaratory judgment claims?

Preserved at Objection to Motion to Dismiss and Motion for Reconsideration, Appendix 52-57, 77-79; Tr. at 10-13

2. The Superior Court denied Plaintiffs' Motion to Amend the Complaint with additional factual allegations that sharpened the ambiguities in the statutory framework that required a declaratory judgment. Had the Court granted the Motion to Amend the Complaint, allowing the insertion of specific factual allegations concerning the location of certain backflow device work that occurred in this case, and concerning the degree to which a backflow device is "adjacent to" a public water service entrance, then the Court would have been presented with factual allegations requiring resolution by the Court in order to rule on Plaintiffs' requests for damages and declaratory judgment. Did the Court err in denying the Plaintiffs' Motion to Amend?

Waived

3. The Superior Court dismissed Plaintiffs' claims for damages arising from the erosion of a vested right to perform backflow device work in any location, which right the Plaintiffs asserted they had enjoyed as a matter of law for more than 20 years. Did the Superior Court err in dismissing the Plaintiffs' claims when the evolution of the statute over time demonstrated that the limitations on where the Plaintiffs could perform their trade were newly enacted for the first time in 2014?

Preserved at Objection to Motion to Dismiss and Motion for Reconsideration, App. at 63-65, 79-81

4. The Fire Marshal's office issued a cease and desist order to Plaintiffs in 2013 relating to a contract for the replacement of water meters and backflow devices in the Town of Pittsburg. In their complaint, the

Plaintiffs alleged that the cease and desist order was unfounded and without legal authority, resulting in an abuse of process and damages to the Plaintiffs. Did the Superior Court err in dismissing claims relating to the issuance of a cease and desist order because the State conceded that the order had terminated of its own accord and was now moot?

Preserved at Objection to Motion to Dismiss, App. at 57-58.

5. An employee of New England Backflow was arrested for performing work that, if Plaintiffs were correct in their interpretation of the law, was lawful and permitted. In addition, the arrest occurred in direct response to complaints by a third party plumber that New England Backflow represented business competition for the complainant, an improper purpose for the exercise of state authority. The Superior Court dismissed the Plaintiffs' claims for malicious prosecution and abuse of process because Plaintiffs had no standing to assert a claim for malicious prosecution or abuse of process on those facts, despite the costs and the chilling effect that the arrest of an employee had on its business. Did the Superior Court err in ruling that Plaintiffs had no standing to claim malicious prosecution and abuse of process?

Preserved at Objection to Motion to Dismiss, Appendix 58-62, 65-66; Tr. at 13-18.[1]

Statement of the Facts[2]

On September 9, 2013, Paul Whittemore, the owner and operator of New England Backflow, Inc. (the "Plaintiffs"), received a Cease and Desist Order from the Office of the State Fire Marshal instructing him not to plumb without a license. Complaint at ¶30 (Complaint attached in its entirety at Appendix at 3-26). For nearly twenty years prior to that day,

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[1] Includes subsidiary question whether dismissal of abuse of process claim was proper on ground that the summons and arrest of Thomas Birdsall was not "after" the service of process and so not qualifying.

[2] The facts set forth herein are taken from the Complaint. The trial court never held an evidentiary hearing.

Mr. Whittemore had run a business entirely focused on all aspects of backflow prevention, including installing, testing, repairing, replacing, and maintaining backflow prevention devices. *Id.* at ¶¶16-17. The Cease and Desist Order stopped Mr. Whittemore in the midst of a major project to upgrade the backflow devices and associated water meters and pressure tanks for more than 88 houses in the Pittsburg, N.H. village water district. *Id.* at ¶24.

Backflow prevention devices, sometimes called "check valves," ensure that water flows in one direction through a set of pipes. *Id.* at ¶¶11-12. As such, backflow preventers are essential to ensuring that water that goes into a house, or into a high hazard area such as a boiler feed, stays in that area and does not flow back into the water supply from which it came. *Id.* at ¶12. This keeps water that might be contaminated away from potable water, either inside a house, or in a larger public water supply network. *Id.* The safety of potable water falls under the jurisdiction of the New Hampshire Department of Environmental Services ("DES"). RSA 485:1 (the New Hampshire Safe Drinking Water Act).

For more than twenty years, the State required cross-connections with public water supplies to be protected by backflow prevention devices and had certified water system operators to perform the work of ensuring that these devices were in place, that they worked, and, when they needed care, that they could be repaired or replaced. *See* 1989 N.H. Laws c. 339:1 (vesting authority to correct the faulty condition of valves and gates preventing the inflow of "water of unapproved character" in the "individual, corporation or association furnishing water" under the advice and direction of the then-Division of Environmental Services)); RSA 332-

E:1 (enacted 1979). The work of backflow prevention, although it deals with pipes, valves and water, has always been exempted from a plumbing license under RSA 332-E. *See* 1989 N.H. Laws c. 339:1 (enacting RSA 485:11) (regulating backflow controls responsibility of water provider "under the advice and direction" of DES);[3] 2003 N.H. Laws c. 272:11 (formally recognizing exception to plumbing license rules in RSA 329-A for public water system operators); RSA 153:36, IV (formerly RSA 329-A per 2013 N.H. Laws c. 275:15).

Mr. Whittemore had held a DES certification as a "public water system operator" permitted to work on backflow prevention devices for twenty-one years when he received the Cease and Desist Order. *Id.* at ¶9. He had worked for more than a decade in the Town of Derry water system, and had been the superintendent of the Pembroke Water System from 2003 to 2007 in addition to his private work for the business that would, in 2007, come to be known as New England Backflow, Inc. *Id.* at ¶¶10-11, 16-18. He had immense experience lawfully doing the work that the State Fire Marshal was now telling him he and his company were prohibited from doing.

Mr. Whittemore's problems began when, unbeknownst to him, the State Fire Marshal received an emailed complaint earlier that spring from one Daniel Gagne, a licensed plumber, urging the Fire Marshal to investigate Mr. Whittemore and his business for plumbing without a license. *Id.* at ¶19. On May 24, 2013, Inspector Marc Prinderville

[3] Session laws showing evolution of statutes are excerpted in part at App. 84-86 (RSA 485:11), 82-83 (RSA 329-A), 87-90 (RSA 332-E).

contacted Mr. Whittemore about the complaint. *Id.* at ¶21. Mr. Whittemore provided Mr. Prinderville a copy of his DES Certification and the statutory authority that allowed him to do his work and Mr. Prinderville appeared satisfied. *Id.* at ¶¶22-23. Mr. Whittemore then performed the work in Pittsburg in June 2013, as he had been doing for nearly twenty years. *Id.* at ¶24.

On September 6, 2013, Mr. Gagne again complained to the Fire Marshal about Mr. Whittemore's work on backflow prevention devices, making it crystal clear that his concern was that Mr. Whittemore had a competitive advantage. *Id.* at ¶27. He wrote:

> Several months ago I filed a complaint regarding a person and his employees doing work as plumbers and having no license. I called your office to find out the results and have never heard back. Today I ran into this individual at a bid opening and he went on to tell me about how his company just finished a job in a northern town changing out every water meter, adding valve expansion tanks, cutting in new meter horns, shutting the water off at the street blah blah blah … So much for 25 years of education and renewal fees. Maybe the other guy has it right because it is obvious he is doing business as usual.

Id. Thus prompted, Chief Inspector Jeffrey Cyr and another inspector, Earl Middlemiss, were dispatched to Pittsburg to investigate Mr. Gagne's second complaint. *Id.* at ¶29. They identified a number of what they believed to be plumbing code violations in the buildings where New England Backflow performed its work installing new water meters for the Town of Pittsburg. *Id.* On September 9, 2013, the Fire Marshal's Office sent the Cease and Desist Order. *Id.* at ¶30.

Mr. Whittemore agreed to meet with Mr. Cyr and Supervisor Matthew Labonte, to discuss the scope of the backflow prevention statute, and the alleged code violations—the majority of which preexisted Mr. Whittemore's work or arose due to the actions of other contractors. *Id.* at ¶33. The Fire Marshal's office demanded that Mr. Whittemore engage a plumber to review the work to ensure code compliance, which Mr. Whittemore did. *Id.* at ¶35. The licensed plumber approved by the Fire Marshal's office, Mike Dupuis of Sturgeon Creek Enterprises, confirmed Mr. Whittemore's assessment that any code violations pre-existed his work and that there were *no* code violations created by New England Backflow. *Id.* at ¶43.

Unsatisfied with Mr. Dupuis' conclusions, the Fire Marshal's office engaged in an email campaign demanding additional information from Mr. Dupuis and from Michael Duffy, the engineer hired by the Town of Pittsburg to oversee the water system update. *Id.* at ¶45. Mr. Duffy noted the findings of the independent plumber and urged the Fire Marshal to approve the project so that it could be concluded. *Id.* at ¶46. Still, Mr. Cyr was not satisfied. He wrote threateningly to Inspector Middlemiss, "Let's refrain from any further email exchanges with Mr. Duffy going forward. His next comment can be made in person in Concord." *Id.* at ¶47.

Despite assertions from Mr. Whittemore that the work was within his statutory authority, from Mr. Dupuis that it was done correctly, and from Mr. Duffy that he was satisfied and needed to move forward with the completion of the project, the Fire Marshal's Office did not let the matter go. *Id.* at ¶48. On May 4, 2014, the Fire Marshal's Office demanded an executive session with the Pittsburg Board of Selectmen, asking the same

questions and raising the same issues with them. *Id.* Also in May, 2014, the Mechanical Licensing Board haled Mr. Dupuis in for an executive session about his report, during which he plainly and simply reconfirmed his findings. *Id.* at ¶44.

On June 11, 2014, the Legislature updated the statutory framework to describe the scope of Mr. Whittemore's exception, as a certified water system operator, to be "the testing, maintenance, repair or replacement and installation of the water meter, meter horn and backflow prevention devices directly adjacent to and required as part of the protection of the drinking water distribution system." N.H. 2014 L. c. 106 (modifying RSA 153:36, IV) and N.H. 2014 L. c. 304 (modifying RSA 485:11). Only after this did the Fire Marshal's Pittsburg investigation appear to subside. Complaint at ¶50. Mr. Whittemore went back, he thought, to operating his successful business, undecided about what to do about the new legislative constraints. *Id*.

Mr. Gagne, however, was not happy. *Id.* at ¶51. He renewed his complaints about Plaintiffs on October 9, 2014. *Id.* On July 5, 2015, Mr. Gagne complained overtly about Mr. Whittemore's success in doing what the law allowed him to do: "[E]very time I turn around I am loosing business to [New England Backflow] in every city, in every town … something has to be done." *Id.* at ¶52.[4] On July 22, 2015, Mr. Gagne continued the drumbeat, writing and referring to Inspector Cyr on a first-name basis:

> Over a year ago, I filed a complaint against NE Backflow Inc, Paul Whitmore for plumbing work without a lic. According to Jeff, the

[4] [sic].

> investigating is ongoing due to the state not being able to complete the investigation in Pittsburg NH. Today I lost a potential repair and replacement on a few backflow preventers to NEB in the town of Hillsborough in the Dollar General store. That is several hundred dollars out of my pocket. This is a repeating pattern. When I visit towns like Peterborough and they tell me that NEB does the testing for the town I mentioned I was interested in helping with the repairs, they tell me he handles that as well… I have the emails in my phone from the management company stating he got the repair job in Hillsborough… I thought the State was going to address this… If I have to file another complaint with the licensing board just let me know. Jeff told me he was suppose to be under investigation until Pittsburg is resolved.

Id. at ¶53.[5] The next day, Mr. Cyr telephoned New England Backflow and left a message for Mr. Whittemore that he had "received complaints from Hillsborough and Peterborough" and that New England Backflow was plumbing without a license. *Id.* at ¶54. Upon receiving the message, Mr. Whittemore called Mr. Cyr back and asked if there were any concerns. *Id.* at ¶56. Mr. Cyr said, "No, we're all set." *Id.*

Mr. Birdsall completed the project of testing the backflow preventers on July 30, 2015. *Id.* at ¶60. Because the backflow preventer for the external sprinkler system was defective, and the owner elected not to replace it, Mr. Birdsall removed the device and capped the pipe, as called for by the plumbing code to prevent dirt, insects, rodents and so forth from contaminating the building's drinking water system. *Id.* at ¶61. Mr. Cyr reviewed this work and confirmed, through the Hillsborough building inspector, that it had been performed by Plaintiffs.

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[5] [sic].

Mr. Cyr and Mr. Labonte exchanged emails about Mr. Gagne's complaints on August 17, 2015. *Id.* at ¶65. Mr. Labonte suggested explaining to Mr. Gagne that the statute permitted Mr. Whittemore to work on backflow preventers and asked Mr. Cyr if his recollection of the statute was correct. *Id.* Mr. Cyr responded: "[A]s long as you have completed the original training and continuing education, along with submitting the fee, you can renew. I do not believe having a pulse is even a requirement." *Id.*

Mr. Gagne did not like what Mr. Cyr had to say. *Id.* at 66. He emailed Mr. Cyr on August 20, 2015 and voiced his anger at the fact that Mr. Whittemore was competing with him:

> Every time I turn around, every town I go in I am following behind unlicensed work, I am continuously loosing work to an unlicensed contractor… I filed a complaint two years ago regarding Pittsburg and the state is still unable to complete this investigation, I spoke with Matt about a lost job in Hillsborough and the tone I got was he really would like it if I would just let it go. Today, more towns, more lost work. When your inspecting staff tells me you have been shut out off Pittsburg, I have to question how many other towns is the board going to bow down to. If a guy puts a water heater in without a license all you hear is "get a rope and find a tree!" Please take just a minute to clarify the state's position on this RSA 332. If the board failed to clarify this and its business as usual for unlicensed contractors, I may consider stopping financing your operation because it represents taxation without representation.

Id.[6] Again prompted, Mr. Cyr drafted *but did not sign or swear out* an affidavit alleging the Mr. Birdsall was plumbing without a license. *Id*. at ¶67.

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[6] [sic].

Unaware of any of this, but concerned about being investigated without just cause, Mr. Whittemore spoke with Mr. Labonte on October 5, 2015. *Id.* at ¶70. At no time during that meeting did the Fire Marshal's concerns—if any—about the work of Mr. Birdsall or the Hillsborough Dollar General arise in discussion. *Id.* After, Mr. Labonte confirmed in a written correspondence that certified water operators like Mr. Whittemore and his team were permitted to work privately, as he was doing, without a plumbing license provided he was working on backflow prevention devices as outlined in RSA 485:11. *Id.* Mr. Whittemore weighed Mr. Labonte's response and then, on October 23, 2015, asked the Deputy Commissioner of the Department of Safety, which oversees the Fire Marshal's Office, to look into Mr. Cyr's conduct in the investigation, which had gone on for two years despite the assurances of Mr. Labonte that the law permitted Mr. Whittemore's work. *Id.* at ¶71.

On November 9, 2015, Mr. Gagne fired off a caustic email to Mr. Cyr: "This sh*t is getting old. I will not be renewing my gas license, don't need it, I can't afford to finance this operation… It is taxation without representation. This plumbing board is not supporting the plumbers… As soon as I can figure out how, I probably will stop renewing my master's license. I don't seem to need it." *Id.* at ¶73. Then, on November 16, 2015, Mr. Gagne sent another email:

> I loose money every day to the wrong people… I am tired of hearing 'Live Free or Die' or 'we can't stop a guy from making a living' or my favorite 'home rule'. I have supported the board for so long with zero results. Please save everybody a lot of pain, stop making rules you can't enforce or don't support, just to try and enforce what you already have. Also, try to support the guys that finance your

> operation. You were run over by the DES, [the New Hampshire Water Works Association] and [the Granite State Rural Water Association], you probably should have been better prepared.

Id. at ¶74.[7] Investigator Danielle Cole of the Fire Marshal's Office commenced the Department's internal review of Mr. Cyr's investigation in December 2015. *Id*. at ¶¶75-76. At some point following this interview, Mr. Cyr became aware of the internal review. *Id*. at ¶77. He then sent his affidavit to another officer, Eric Berube, for review and signature to obtain a warrant for the summons of Mr. Birdsall for plumbing without a license. *Id*.

Summary of the Argument

The trial court dismissed Plaintiffs' claims for malicious prosecution and abuse of process for lack of standing and because there was no allegation that the process had been abused by the Fire Marshal's office *after* its service upon Mr. Birdsall. This was error. Both claims stem from the basic premise that the use of the tools of justice, including court process, for an improper purpose is a perversion. Here, the Fire Marshal's office arrested Tommy Birdsall with the intent of discouraging Plaintiffs from their successful business competition with licensed plumbers, which is not a permissible objective and it harmed Plaintiffs entitling them to a cause of action. Furthermore, the arrest of Mr. Birdsall was the invocation of process, with all it entailed for a criminal defendant, to the detriment not only of Mr. Birdsall but also of Plaintiffs. These claims were properly stated and the trial court erred in dismissing them.

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[7] [sic].

The trial court also erred in dismissing Plaintiffs' claims for declaratory judgment without an evidentiary hearing. The statutory framework that governs the protection of public drinking water contains numerous contradictions and ambiguities that required resolution through an evidentiary hearing. What is clear from the implicated statutes is that Plaintiffs have been lawfully performing the full scope of their backflow prevention work for more than twenty years and the trial court's reading of the statutes improperly limited the scope of work they are permitted to do.

The trial court erred in dismissing Plaintiffs' takings claims when it misinterpreted the statutory history of the Safe Drinking Water Act and associated statutes. For twenty or more years, the statutes at issue have provided public water system operators like Mr. Whittemore broad latitude to manage backflow prevention from the water source to the end user. If the trial court's reading of the current statute is correct in limiting the scope of Plaintiffs' work to backflow preventers physically "adjacent to" the water service entrance to a building, then the Legislature has effectively stripped Mr. Whittemore of his vested right to perform his professional work, constituting an unconstitutional taking.

Finally, the trial court erred in finding that the lapse in effect of the 2013 Cease and Desist Order mooted related claims. Plaintiffs have pled facts sufficient to demonstrate harm during the period in which the Cease and Desist Order was unlawfully in effect, and they should be entitled to pursue those claims before a New Hampshire jury.

Argument

I. The trial court erred in dismissing Plaintiffs' claims for malicious prosecution and abuse of process, particularly on standing grounds, because New England Backflow, Inc. was a true party in interest injured by the improper investigation and arrest of its employee Thomas Birdsall and the complaint properly alleged both claims.

The Plaintiffs alleged that the arrest of Tommy Birdsall after a relentless investigation lasting more than two years constituted a malicious prosecution and an abuse of process. The trial court dismissed these counts on the ground that neither New England Backflow nor Mr. Whittemore had standing to make these claims, which accrued solely to Mr. Birdsall, the arrested employee. Order at 15-16 ("Because no criminal proceedings were ever instituted against the Plaintiffs, the elements required to bring a malicious prosecution claim are not met."), 25 ("Even assuming the State's arrest of Birdsall constituted 'process,' there are no allegations to support a finding that this purported process was used 'against' the Plaintiffs."). The trial court also ruled that Mr. Birdsall's arrest was not abuse of process because that cause of action concerns itself with what happens after the service of a summons and the arrest alone was insufficient. *Id*.

With regard to whether the Plaintiffs had standing to make either claim, the situation posed by the Plaintiffs is sufficiently rare that a cause of action by an employer for the malicious arrest of an employee has not arisen in New Hampshire law and there is no direct precedent. However, the cause of action has been recognized as accruing to a party in interest, even when not personally arrested. 33 Causes of Action 2d. 435 §23

(2007) ("[A]n action for abuse of process does not necessarily require that the process in question have been employed directly against the plaintiff."). Moreover, to the extent that doing so requires a formal extension of the doctrine to a new category of plaintiff, there is ample support for the proposition that this Court can and should extend the scope of common law torts to effect sound public policy goals and objectives. *See Aranson v. Schroeder*, 140 N.H. 359, 364 (1995). In addition, the trial court misconstrued the law in finding that the arrest of Mr. Birdsall was not an abuse of process.

a. A cause of action for malicious prosecution or abuse of process includes the right of a party injured by the malicious arrest or process to obtain relief.

On July 30, 2015, New England Backflow's Tommy Birdsall tested a backflow preventer valve that was protecting the drinking water of the Hillsborough Dollar General from the pipes of the external sprinkler system. Complaint at ¶60. When the tests showed it needed replacing, he asked the owner whether the store wanted to replace the device—as required by law—or have it removed. *Id*. at ¶61. The law required the removal or replacement of the device. *Id*; *see* International Plumbing Code §§ 608.1 (mandating protection from contamination by non-potable substances); 608.2 (requiring the installation of backflow prevention); 704.4 (requiring capping unused end) The owner elected not to replace it, so Mr. Birdsall, a DES-certified public water systems operator trained and authorized to inspect, test, maintain, repair and replace backflow preventers, removed the backflow preventer and capped the line, as required by the plumbing code, to prevent dirt, germs and animals from

getting into the store's drinking water. *Id*.; *see* RSA 485:11 (referencing high hazard risk that arises from outside irrigation systems). Although Mr. Cyr reviewed this work after Daniel Gagne complained about the competition, months passed without action from the Fire Marshal's office. *Id*. at ¶¶ 62-77. It was only after disparaging emails from Gagne and an inquiry initiated by Mr. Whittemore that Mr. Cyr actually caused an officer to swear out an affidavit supporting the arrest of Mr. Birdsall. *Id*. at ¶¶77.

After being arrested for doing his proper job, Mr. Birdsall quit. *Id*. at ¶95. The loss of Mr. Birdsall required Mr. Whittemore to find a new employee; to train that employee and obtain a certification for that employee; to battle against the chilling effect on his workforce of a perpetual investigation that threatened them with arrest; and to hire a plumber as an employee simply to insulate him from law enforcement scrutiny—when the law clearly did not require him to do so. *Id*. Thus, New England Backflow was harmed as well.

As a party that has suffered a concrete injury, New England Backflow has a right of relief. N.H. Const., Pt. I, Art. 14 ("Every subject of this state is entitled to a certain remedy … without delay; conformably to the laws."); *see Aranson v. Schroeder*, 140 N.H. at 364 (recognizing new cause of action for malicious defense). Although rare, the common law contemplates that a party who has suffered harm through the arrest, prosecution or abuse of process of another is entitled to that cause of action. *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) (Teacher's Association entitled to abuse of process claim for subpoena of scores of teachers as witnesses in a court action).

The torts of malicious prosecution and abuse of process are close cousins sharing the essential element that the person pursuing the legal action be doing so with malice or for an improper purpose. *Id*. at 280-81. They both redress a perversion of justice. *Id*. "It is important to keep in mind that when a party abuses process his tortious conduct injures not only the intended target but offends the spirit of the legal procedure itself." *Id*. at 281. Conceptually, the roots of both actions are deep, reaching back to the writ of conspiracy in medieval England. *Id.* at 281 ("The use of process to serve the purposes of oppression or injustice was deemed punishable as contempt … and also as giving rise to an action for injury to reputation.") (citations omitted). "[C]ontriving to injure someone by pretense and color of legal process demanded redress because it resulted in a loss of reputation, anxiety and the expenditure of funds in defense." *Id.* (describing emergence of distinct malicious prosecution claim).

As branches of the same tree, the gravamen of both actions is the same: "[L]egal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party." *Id*. at 283. All of the injuries that flow from malicious prosecution and abuse of process are injuries that may also be suffered by third parties as a direct and proximate result of the prosecutor's action. For this reason, "[t]o hold that the party whom the defendants seek to injure and who has suffered economic injury lacks standing would be to defy reality. Accordingly, the tort of abuse of process

will be available to nonrecipients of process *provided they are the target and victim of the perversion of that process*." *Id.* at 284 (emphasis added).

In this case, the Plaintiffs pled facts that, if proven, were sufficient to show that Mr. Cyr's arrest of Mr. Birdsall was motivated not by a desire to enforce the plumbing code and protect public safety, but to restrict competition with plumbers by impacting Plaintiffs' business. The complaints that prompted Mr. Cyr's ceaseless investigation and the arrest of Mr. Birdsall were about New England Backflow being allowed to compete with local plumbers, Mr. Gagne specifically. *Id*. at ¶¶52 ("[E]very time I turn around I am loosing business to [NEB] … something has to be done."), 53 ("I have the emails in my phone from the management company saying he got the repair job in Hillsborough… I thought the state was going to address this."). Mr. Cyr's arrest of Mr. Birdsall was not to stop Mr. Birdsall from doing his work. It was to stop New England Backflow from doing its work.

Moreover, if Mr. Cyr had probable cause to arrest Mr. Birdsall in July of 2015, he did not reveal it or take action then. Complaint at ¶¶62-77. In fact, he apparently did not consider making any arrests or pursuing any further action until after he learned that Mr. Whittemore had requested an internal review of Mr. Cyr's investigation by the department. *Id*. at ¶76. This fact demonstrates not only that the arrest of Mr. Birdsall was for a retaliatory purpose, but also that the target was not Mr. Birdsall, but Plaintiffs themselves.

Under agency principles, agent and principal are one and the same when the agent is acting within the scope of his authority, as was the case here. *Citizen's Bank v. Heyward*, 133 S.E. 709, 719 (S.C. 1925) ("[A]s to

the thing which the agent is doing the agent is in law the principal, and the principal is in law the agent. Their legal identity is complete.") (quoting *Machine Co. v. Furniture Co.*, 56 So. 726 (Ala. 1911)). The Fire Marshal's arrest of Mr. Birdsall was, for all intents and purposes, an arrest of New England Backflow. New England Backflow was the "target and victim" of the Fire Marshal's arrest of Mr. Birdsall. *Farmingdale*, 343 N.E.2d at 284. Consequently, the Plaintiffs in this matter have standing for a cause of action for malicious prosecution and abuse of process.

b. The extension of the cause of action to the Plaintiffs in this case is warranted by the facts of this case and the public policy objectives advanced by the common law tort action.

The torts of malicious prosecution and abuse of process have adapted historically to serve the ends of justice as varying facts presented themselves. In *Grainger v. Hill*, 4 Bing (.N.C.) 212, 132 Eng. Rep. 769 (Ch. Exch. 1838), which limned the distinct tort of abuse of process by clarifying that it did *not* require an express showing of malice, probable cause, or termination in favor of the plaintiff, Justice Park observed, "But this is a case primae impressionis, in which the Defendants are charged with having abused the process of the law… and *if an action of the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances*. I admit the authority of the cases which have been cited [relating to malicious prosecution], but they do not apply to the present." *Id*. at 773. Thus, the abuse of process claim has been historically flexible, adapted by the courts as necessary to address clear wrongs. This Court is part of that tradition. In *Aranson*, 140 N.H. at 365, the Court recognized that the principles of the abuse of process

and malicious prosecution causes of action rationally extended to the defense of a claim that was not litigated in good faith. The real circumstances of the case before the Court compelled the advent of the new tort. *Id*. at 365 (quoting O.W. Holmes, *The Common Law* 1 (1981) ("The life of the law has not been logic: it has been experience.")).

Here, of course, the Appellants are not seeking recognition of a new tort. They are seeking the acknowledgement that the existing torts of malicious prosecution and abuse of process may properly be asserted by plaintiffs who were harmed even if they were not actually served. Still, the principles described in *Aranson* for analyzing a new legal development are appropriate guideposts here. "In any case in which we are asked to recognize a new cause of action, it is a question of policy whether it would be wise to provide the relief that the plaintiffs seek. Reaching an answer to this question requires two quite separate steps, for we must determine whether the interest that the plaintiffs assert should receive any legal recognition and, if so, whether the relief that the plaintiffs request would be an appropriate way to recognize it." 140 N.H. at 363-64.

Here, the interest that the Plaintiffs assert should receive legal recognition because to hold otherwise would leave corporate parties utterly at the mercy of prosecutors seeking to obtain objectives through the arrest of company employees. The focus of the multi-year investigation, repeated interviews, cease and desist orders, and complaints by a competing plumber was New England Backflow (and Paul Whittemore, its principal). Mr. Cyr could have charged New England Backflow directly because Mr. Birdsall was working for and at the express direction of his employer. Thus, Mr. Birdsall's alleged violation was that of New England Backflow as well.

See State v. Zeta Chi Fraternity, 142 N.H. 26, 25 (1997) (corporation not insulated from criminal liability for acts of its employee); *State v. Wiggin*, 20 N.H. 449, 454 (1846) (principal criminally liable for acts of servant selling spirits). Yet by deciding to arrest only an employee and not New England Backflow itself, the Fire Marshal was able to avoid the defense of the case by a corporate party far better suited to argue the legal issues concerning the scope of RSA 485:11 and the authority of certified water operators to do the work in question.

Instead, the burden of the Fire Marshal's single-minded pursuit of New England Backflow fell on one man who was just trying to do his job. It goes without saying that few employees want to accept a job or keep a job that exposes them daily to law enforcement scrutiny and the possibility of arrest. The result is that employees put in that position quit—as Mr. Birdsall did—a significant blow to New England Backflow's ability to operate. This is a very effective way of undercutting New England Backflow's ability to compete with the licensed plumbers who, in Mr. Gagne's terminology, "finance [the Fire Marshal's] operation." Complaint at ¶66. If the Plaintiffs do not have recourse to sue for abuse of process or malicious prosecution when the engines of state law enforcement have been set upon them simply to assist a competitor in the marketplace, then they are being denied their basic right to a remedy guaranteed them by the New Hampshire Constitution. N.H. Const. Pt. I, Art. 14.

Regarding whether the recognition of Plaintiffs' standing to make these claims "is an appropriate way to recognize" the Plaintiffs' interest, the case is even more clear cut than *Aranson*. *See* 140 N.H. at 364. In *Aranson*, the Court found that a new cause of action was an appropriate

way to recognize the plaintiff's interest in a malicious defense cause of action because without that tort, the breadth of damages available to a wronged plaintiff was limited to attorneys' fees and costs for vexatious or bad faith conduct. *Id*. at 366. Here, Plaintiffs cannot get damages *at all* for their injuries, and they are not asking for the Court to create a new cause of action out of whole cloth. They are asking only to have an ancient cause of action be available to them, as parties injured by Defendants' conduct, as well. This case meets the two part test the Court described in *Aranson* and the Court should recognize that third parties injured by malicious prosecution or abuse of process have standing to assert those claims in a court of law.

c. <u>The arrest of Tommy Birdsall was an abuse of process</u>.

The trial court ruled that even if they had standing, the arrest of Mr. Birdsall was not an abuse of process because "[the facts] allege wrongful initiation of the investigation and the arrest, but do not allege the State abused 'process' after it was purportedly obtained." Order at 26 (citing *Long v. Long*, 136 N.H. 25, 30 (1992) (quoting from the Second Restatement of Torts sec. 682)). With due respect, the trial court misinterpreted the language in question. Where the trial court wrote: "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…. The subsequent misuse of the process, through property obtained, constitutes the misconduct for which liability [for abuse of process is imposed.]" *Id*.

The trial court read this as implying that an abuse of process claim is restrictive and narrowly construed. However, the Restatement section in its totality suggests otherwise:

> 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; *see Long*, 136 N.H. at 30 (characterizing the cause of action as "broad").

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 only pertains to the use of the process *after procurement* for an improper purpose. *See* Order at 26 (plaintiff must prove that "(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"). These elements were pled in the Complaint. The Plaintiffs alleged that (1) the Fire Marshal's office (via its officers Mr. Cyr and Eric Berube) used (2) a warrant and subsequent arrest and defense of criminal proceedings (3) against Mr. Birdsall and by operation of law, New England Backflow (4) primarily to accomplish a

retaliation against New England Backflow and Mr. Whittemore and punish them for successfully competing with licensed plumbers and thereby (5) caused harm to New England Backflow and Mr. Whittemore (6) by the abuse of process. Complaint at ¶¶77, 108, 109.

"[I]n the context of abuse of process, 'process' refers to the papers issued by a court to bring a party or property within its jurisdiction. *Jones v. Brockton Pub. Markets, Inc.*, 340 N.E.2d 484, 486 (Mass. 1975). Here, an affidavit was sworn out and a warrant obtained from the court for Mr. Birdsall's arrest. Complaint at ¶77. This brought Mr. Birdsall within the jurisdiction of the court. Initiation of criminal proceedings through the procurement and execution of a warrant or summons can constitute "process" if the officer "intended to achieve some end result that is distinct from criminal punishment (i.e. fine and/or imprisonment)." *Zak v. Robertson*, 249 F.Supp.2d 203, 209 (D. Connecticut 2003). As alleged by the Plaintiffs, the Fire Marshall intended to prevent New England Backflow from performing its statutorily authorized work in order to protect the plumbing industry, and Daniel Gagne in particular, from business competition. Complaint at ¶ 108. In addition, Mr. Cyr personally used the process to retaliate against New England Backflow and Mr. Whittemore for insisting that the Department of Safety conduct an internal review of the investigation. *Id*. at ¶ 109. Furthermore, to the extent that the process was issued against Mr. Birdsall with the intention of harming or punishing New England Backflow, as alleged, this is by definition an "end result that is distinct from criminal punishment." *Zak*, 249 F.Supp. at 209. These improper purposes render the procurement of court-endorsed papers initiating criminal proceedings "process" for an abuse of process claim.

See Jones, 340 N.E.2d at 486 (initiation papers for criminal process can constitute process for abuse of process claims); *Vodfrey v. Golden*, 864 F.2d 28, 31 (4th Cir. 1988) (criminal warrants used for collateral purpose of affecting civil litigation are abuse of process); *Wozniak v. Panella*, 862 A.2d 539, 549 (N.J. App. 2005) ("The abuse of process which occurred here is defendant's filing of the criminal complaint against plaintiff …. Trigger[ing] a chain of events that summoned plaintiff to appear in court under threat of arrest, to appear before a Superior Court judge to be referred for processing at the Passaic County jail for fingerprinting and photographing for a mug shot, and then to await the determination of a grand jury after presentation of the complaint to that body.").

The trial court's interpretation was antithetical to the description of the cause of action under the Restatement, which characterized the abuse of process action as less restrictive and less formalistic than the malicious prosecution charge. *Long*, 136 N.H. at 30 ("The tort of abuse of process apparently developed over time to compensate plaintiffs unable to win redress under the limited scope of a malicious prosecution action."). Consequently, the trial court erred.

II. The trial court erred in dismissing Plaintiffs' declaratory judgment claims without an evidentiary hearing.

a. RSA 485:11 relies upon internally conflicting language whose ordinary meaning makes no sense in the mechanical context, requiring an evidentiary hearing on the facts alleged in order for the trial court to understand and rule upon the meaning of the statute.

The Plaintiffs asked the trial court for several declaratory rulings on the meaning of RSA 485:11, governing backflow prevention, and its plumbing licensing analog, RSA 153:36. RSA 485:11 reads, in relevant part:

> There shall be a backflow prevention device installed at every connection to a public water system if the facility connected may pose a hazard to the quality of water supplied by the public water system as determined by the department. Where applicable, the facility receiving water from a public water supply shall be responsible for having such drinking water distribution system protective backflow prevention devices inspected and tested by individuals certified by a third party who has been approved by the department to conduct backflow device inspection and testing certification. The facility shall also have backflow devices installed, maintained, repaired, and replaced by individuals qualified by either a plumbers license or by certification by the department under RSA 332-E:3, III proving competency in distribution system operation. The activities to be conducted by qualified individuals shall be specifically limited to the inspection and testing, maintenance, repair or replacement, and installation of the water meters, meter horns, backflow preventers, and assembly devices directly adjacent to and required as part of the protection for the drinking water distribution system.

Id.

Specifically, the Complaint asked the trial court to declare that:

- Plaintiffs are entitled by RSA 485:11 to perform backflow related work which implicitly includes ancillary, collateral or coincidental work on pipes necessary to complete the backflow work and restore the system to working order and code compliance, and that work is exempt from the State's plumbing licensure requirements. Complaint ¶ 79, 81.

- Plaintiffs' work at the Hillsborough Dollar General store, performed by Tommy Birdsall, was within the scope of RSA 485:11 and exempt from plumbing licensure requirements. Complaint ¶ 82.

- Plaintiffs' work on backflow preventers falls within the scope of RSA 485:11 irrespective of the location of the backflow preventer because, as a matter of fact in the context of pipes and water movement, backflow preventers "*are 'adjacent to and required as part of the protection of the drinking water distribution system'*" and "*universally serve the purposes of RSA 485's policy goal of securing potable water supplies from potential contamination*." Complaint ¶ 83 (emphasis added to assertions of fact).

These questions are interrelated. Mr. Birdsall was arrested for performing work on an irrigation system backflow preventer that stopped water from flowing back into the drinking water distribution system within the Hillsborough Dollar General. RSA 485:11 recognizes that "irrigation systems, private well connections and other features" can present a high hazard to the public drinking water system. *Id*. The trial court erred in applying the ordinary definition of "adjacent to" when determining whether backflow prevention devices in any location would be subject to the authority given to certified operators by RSA 485:11. Order at 11-12; Tr. at 10-12. This is because when dealing with water quality, a "cross connection" where the water in one system has an opportunity to become contaminated by another is not an solely determined by physical location. Under RSA 485:11 the mere existence of an irrigation system on a household water system will designate that entire building a "high hazard"

system requiring a different variety of backflow device. Thus, irrespective of its physical location, a backflow preventer may still be "adjacent" to the system connection in the proximate sense that contamination through the backflow device will directly and immediately threaten the public water system. Tr. at 10-12.

This point was addressed to the trial court in the Plaintiffs' Objection and at the oral argument on the State's Motion to Dismiss. App. at 52-57; Tr. at 10-12. In essence, the trial court's error was in failing to accept the allegations set forth in the Complaint as true or even "reasonably susceptible of a construction that would permit recovery." *Ojo v. Lorenzo*, 164 N.H. 717, 721 (2013). At ¶83 of the Complaint, Plaintiffs' asserted that backflow preventers "*are 'adjacent to and required as part of the protection of the drinking water distribution system'*" and "*universally serve the purposes of RSA 485's policy goal of securing potable water supplies from potential contamination*." Those are facts that the Plaintiffs should have been entitled to prove through the submission of evidence, either at trial or through affidavits in a motion for summary judgment.

The need for evidence to clarify the meaning of these terms is made clear when one scrutinizes RSA 485:11 and sees that it contains internal contradictions that, if accepted at face value as interpreted by the trial court, allow *no person* to perform work on backflow preventers inside the building. Regarding backflow prevention devices generally, RSA 485:11 first imposes a requirement that they be "installed at every connection to a public water system if the facility connected may pose a hazard to the quality of water supplied by the public water system." Next, RSA 485:11 has a second and independent requirement that "[t]he facility shall also

have backflow devices installed, maintained, repaired and replaced by individuals qualified by either a plumber's license or by certification by the [DES} under RSA 332-E:3, III."[8] RSA 485:11. Third, RSA 485:11 limits the work that these qualified individuals, *including plumbers*, can do to "backflow devices 'adjacent to and required as part of the protection for the drinking water system." *Id*.

The second mandate of RSA 485:11 permits "backflow devices"—without limitation by location—to be serviced by "qualified individuals." The third mandate bars anyone from working on backflow preventers that are not "adjacent to and required as part of the protection of the drinking water system." *Id*. The resolution to this conflict lies not in proscribing the work of certified water operators, but in analyzing the words "adjacent to and required as part of the protection of the drinking water system" in light of their water supply context. While these were not precisely terms of art, either in the statute or in the field, they were meaningless without considering the mechanical context in which they existed. Tr. at 10-12.

What constituted "adjacent to and required as part of…" in the context of the Complaint was not a question of law, to be ruled upon, but one of fact, requiring evidence before a determinative ruling could be made. *See, e.g., City of Keene v. Cleaveland*, 167 N.H. 731, 743 (2015) (error to dismiss request for injunctive relief on legal grounds before considering all the factual circumstances of the case); *Chaisson v. Adams*, 114 N.H. 219, 221-22 (1974) (error to dismiss employment action when determinative

[8] RSA 332-E:3, III is the statutory authority enabling DES to certify water operators, which is the certification carried by Mr. Whittemore and Mr. Birdsall, and relied upon by New England Backflow for its employees to do their work.

issue was a question of fact). For these reasons the trial court should not have dismissed the Plaintiffs' declaratory judgment requests for rulings that RSA 485:11 entitled Plaintiffs to work on backflow prevention devices irrespective of location and that the removal of a backflow preventer by Mr. Birdsall fell within the scope of RSA 485:11.

b. Certified water operators are empowered by RSA 485:11 with all powers and authorities reasonably necessary to effect the express grant of authority given to them by the statute, and facts were alleged that required an evidentiary hearing on the question of what tasks a "qualified individual" may perform under RSA 485:11.

With regard to Plaintiffs' request for a ruling that RSA 485:11 permitted "ancillary, collateral or coincidental work on pipes necessary to complete the backflow work and restore the system to working order and code compliance," the trial court also failed to account for the general principal that a grant of authority implies all powers reasonably necessary or required to effect the express grant of authority. Complaint ¶79; *see Bouffard v. State Farm Fire and Cas. Co.*, 162 N.H. 305, 311 (2011) (implied authority expressed in contractual context). With specific regard to the circumstances of Mr. Birdsall's work, the removal of a backflow prevention device is incidental to—by definition—the replacement of an existing device. The removal of a backflow prevention device is also incidental to an array of powers that allows for "inspection, testing, maintenance, repair or replacement and installation." RSA 485:11. To hold otherwise, as the trial court did, is a nonsensical interpretation of the statute. As interpreted by the Court, RSA 485:11 enables a certified water operator to cut a pipe to remove an older device and solder in a replacement

device, or cut a pipe to solder in a newly installed device, while apparently requiring a licensed plumber to come in to place a two penny copper cap over the pipe if the owner chose simply to remove it and not replace it. This cumbersome interpretation of the statute defies reason. Implicit in the grant of authority to replace a backflow prevention device is the authority to remove the old one. As RSA 485:11 implicitly permits the removal of backflow devices,[9] it must permit the steps that are incidental to removal, *i.e.*, capping the copper line to prevent infiltration of contaminants into the system, as required by the plumbing code, if the owner of the property in question elects not to replace the device. *See* International Plumbing Code §§202 General Definitions ("Dead End" as terminating at a developed length of 2 feet or more by means of a plug, cap or other closed fitting), 608.1, 608.15, 608.16.5, 704.4 (piping for future fixtures shall terminate with an approved cap or plug).

In any event, the allegations of the Complaint on this issue should have been accepted as true and all reasonable inferences drawn from them. *Bel Air Assoc. v. N.H. Dep't of Health and Human Services*, 154 N.H. 228, 231 (2006). It 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, or whether removal of a

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[9] It would be the height of absurdity to suggest that a statutory framework acknowledges the capacity of a certified water operator to remove a device for the purposes of putting in a new one, but withholds that acknowledgment as to the removal of the device without replacement. The removal action is precisely the same whether the device is replaced with a new one or not replaced—the pipe is cut and the device taken off. In either case, something is soldered back on to the pipe- either a new backflow preventer or a copper cap. To suggest that the law allows Mr. Whittemore and his certified water operators to do one, and not the other, is the definition of pointless bureaucratic sclerosis.

backflow device was incidental to the express power to replace that device. These are questions that should have been determined at an evidentiary hearing or through a summary judgment procedure. Therefore, the trial court erred in dismissing the Plaintiffs' declaratory judgment claims.

III. **The trial court erred in dismissing Plaintiffs' takings claims because the statutory limitations on the manner and authority of Plaintiffs' to conduct their work that the trial court relied upon were newly enacted in 2014 and did not exist prior to that date.**

The Plaintiffs argued that statutory changes in 2014 imposed limitations on the scope of work that a certified water system operator was permitted to do, divesting Mr. Whittemore of a vested right in his certification after more than twenty years of performing the work in question, and resulting in a taking of his property. Specifically, 2014 N.H. Laws c. 106 (SB 116) changed RSA 153:36, IV, which exempted certified water system operators from the State's plumbing licensure requirements, from this formulation:

> The license requirements of this subdivision shall not apply to employees of public drinking water systems and public water system operators certified by the department of environmental services for drinking water treatment.

To this:

> The license requirements of this subdivision shall not apply to employees of public drinking water systems and public water system operators certified by the department of environmental services for drinking water treatment *plants and distribution systems, when performing plumbing tasks within their certifications, as defined in RSA 485:11 and RSA 332-E:3. This exception is specifically limited to the testing,*

> *maintenance, repair or replacement, and installation of the water meter, meter horn, and backflow prevention devices directly adjacent to and required as part of the protection of the drinking water distribution system*.

2014 N.H. Laws c. 106 (italicized text added in bill). Mr. Whittemore was thus subjected to the plumbing license requirement for tasks he had previously been permitted to do under his public water operator certification.

The trial court dismissed Mr. Whittemore's takings claim because "RSA 153:36 was not enacted until 2006 and the language cited in Plaintiff's objection was not added to RSA 153:36 until 2013." Order at 22. But while the trial court was correct that the pre-2014 language referenced above was added to RSA 153:36 in 2013, *see* 2013 N.H. Laws c. 275:8, that law merely *migrated* that broad exemption provision from RSA 329-A:13 as part of an organizational change to the way that plumbing would be regulated. Repealed in 2013, RSA 329-A described the various categories of individuals who were exempt from the application of the plumbing licensure requirement. The less restrictive exemption language was part of RSA 329-A from 2003 on; and, prior to that, from 1989 onward, RSA 485:11 had conferred the authority to manage *all* aspects of valve maintenance and operation on certified public water operators. *See* 2003 N.H. Laws c. 272:11 (specifically exempting certified public water system operators by name); 1989 N.H. Laws c. 339:1 (authorizing and requiring water furnisher with plenary authority to establish and maintain valves to prevent "the inflow of water of such unapproved character"); 1979 N.H. Laws c. 487:1 (giving certified water operators jurisdiction over

"*all* measuring and control devices used to convey potable water to the *system users*")(emphasis added).

Thus, since at least 1989—for more than the duration of Mr. Whittemore's career as a certified public water system operator, which began in 1992, he was operating under statutory authority authorizing water furnishers to handle *all* aspects of backflow prevention under the regulation and supervision of DES. 1989 N.H. Laws c. 339:1 (enacting then RSA 485:11). And in 2003, the statutory scheme was updated to clarify that the plumbing licensure statute "shall not apply to employees of public drinking water systems and public water system operators certified by the department of environmental services for drinking water treatment." RSA 329-A:13, VI (repealed 2013); RSA 153:36, IV; Complaint at ¶¶9, 11, 14. For more than twenty years, this language imposed no limitations or restrictions on the authority of a certified water system operator to work with backflow devices, including an express exemption from the plumbing license requirement from 2003 onward. Consequently, a certified water system operator did not need a plumbing license to work on "pipes, storage facilities, pressure booster facilities, and *all measuring and control devices* used to convey potable water to system users." RSA 332-E:1, V (emphasis added). A backflow preventer controls the conveyance of potable water to system users—even inside a building. Complaint at ¶¶12-14.

The statutory circumscription of Mr. Whittemore's vested right to perform work under his certification infringes his tangible property interest. *Charry v. Hall*, 709 F.2d 139, 145 (2nd Cir. 1983) ("[T]he right to take an examination, while important enough to be classified as a constitutionally protectable property interest, hardly approximates the importance of a

vested property right such as a license itself.") (emphasis added); *Yu v. Alcoholic Bev. Etc. Appeals Bd.*, 4 Cal.Rptr.2d 280, 297 (Cal. App., 6th Dist. 1992) ("[A] license to practice a trade is generally considered a vested property right[.]"). The amendments to RSA 153:36 that limited Mr. Whittemore to "testing, maintenance, repair or replacement, and installation of the water meter, meter horn, and backflow prevention devices directly adjacent to and required as part of the protection of the drinking water distribution system" amounted to a taking requiring just compensation. *Id.*; *Kingston Place LLC v. New Hampshire Dep't. of Transp.,* 167 N.H. 694, 697 (2015).

IV. <u>The trial court erred in dismissing Plaintiffs' claim for a declaration that the Cease and Desist order served by mail upon the Plaintiffs in September 2013 as moot because it does not alleviate damages suffered by the Plaintiffs at the time of its issuance.</u>

The Plaintiffs asked the trial court to declare that the September 2013 Cease and Desist Order was issued without authority and had no force and effect. In dismissing this claim, the trial court noted that the Cease and Desist Order was tied to Plaintiffs' work on the Pittsburg water system project, long completed, and had expired by its own terms. Order at 14-15. However, pursuant to the Cease and Desist Order, the Fire Marshal's office pressured Mr. Whittemore to hire a licensed plumber to review and approve Plaintiffs' work—something Mr. Whittemore agreed to do to finish the project. Complaint at ¶¶30-35. Thus, if the Fire Marshal's office had no authority to issue the Cease and Desist Order, Plaintiffs' claims for damages due to the knowing issuance of an order of this nature remain ripe.

The language of the exemption licensure for certified public water system operators *on the date of the Cease and Desist Order*, September 9, 2013, was: "The license requirements of this subdivision shall not apply to employees of public drinking water systems and public water system operators certified by the department of environmental services for drinking water treatment." *See* 2013 N.H. Laws 275:8, IV (eff. July 1, 2013). Under the plain terms of the statute, Plaintiffs needed no license to do their work—the license requirement *did not apply*. This is something that the Fire Marshal's office must have known at the time, yet it issued a Cease and Desist Order anyway. This constitutes oppressive conduct justifying Plaintiffs' request for damages, enhanced compensatory damages and attorney's fees and costs for the harms suffered during the interim period when the Cease and Desist Order remained in effect. *See* Complaint at ¶¶120-24.

CONCLUSION

The Plaintiffs brought this action to remedy a fundamental injustice. The Fire Marshal's Office improperly investigated the Plaintiffs, not for health, safety and welfare reasons, but to protect a specific licensed plumber from business competition. The Plaintiffs have performed the work in question successfully and without issue for more than twenty years. They provide quality service on a cost-effective basis and further the legislature's goal ensuring safe drinking water for all New Hampshire citizens. For the foregoing reasons, the Plaintiffs request that the Court reverse the decision of the trial court and remand this matter for further proceedings, including a jury trial.

REQUEST FOR ORAL ARGUMENT

New England Backflow requests oral argument. Oral argument will be presented by Jeremy D. Eggleton.

RULE 16(3)(i) CERTIFICATION

I certify that the appealed decision is in writing and is appended to the brief.

Respectfully submitted,

NEW ENGLAND BACKFLOW

By its attorneys,

ORR & RENO, P.A.

Date: March 19, 2019 By: *__/s/ Jeremy D. Eggleton______________*

Jeremy D. Eggleton, Esq. (BNH #18170)
45 S. Main Street, Suite 400
P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318
jeggleton@orr-reno.com

CERTIFICATE OF SERVICE

I, Jeremy D. Eggleton, Esq., hereby certify that on this 19th day of March, 2019, copies of the foregoing Brief of the Appellant, New England Backflow, has been served electronically through the Supreme Court e-file system or, conventionally, via first class mail.

___/s/ Jeremy D. Eggleton_____________

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