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

REPLY BRIEF OF APPELLANTS NEW ENGLAND BACKFLOW & PAUL WHITTEMORE

By Their Attorneys

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ARGUMENT

I. The State failed to address direct authority for the proposition that a party not subject to process or arrest may still have a claim for malicious prosecution or abuse of process if its interests were the intended target of the action.

The Plaintiffs relied upon the broad rule, enunciated in 33 Causes of Action 2d. 435 §23 (2007), that "an action for abuse of process does not necessarily require that the process in question have been employed directly against the plaintiff." The rule was illustrated by *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). The State makes no effort to distinguish this case or the broader rule, nor to explain why these principles should not apply here.

In *Board of Ed. of Farmingdale*, the school district and its teachers' union were sharply at odds over teacher scheduling. *Id*. at 279-80. The union was charged by a state regulatory board with violating the New York Civil Service Act and a hearing was scheduled for October 5, 1972. *Id*. Between September 5 and October 3, 1972, the Defendant union issued 77 subpoenas requiring the attendance of classroom teachers as witnesses at the hearing, crippling the school district and forcing it to expend substantial funds on substitute teachers. *Id*. The Plaintiff school district asserted claims for abuse of process. The New York Court of Appeals ruled that the school district had that cause of action even though it was never subject to the process itself. *Id*. at 283 ("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.")(emphasis added). The court cautioned that a trial on the facts could result in a failure to meet the burden of proof but, for the purposes of a motion to dismiss, the only question was whether a cause of action was stated—and it was. *Id*. As to the fact that the school district was not a party in the action:

> While it is true that plaintiff was not a party to that proceeding, it is equally true that they were not disinterested bystanders. More important the deliberate premeditated infliction of economic injury without economic or social excuse or justification is an improper objective which will give rise to a cause of action for abuse of process… To 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.

Board of Ed. of Farmingdale could not be more apt to the facts of this case. For two and a half years prior to the arrest of Mr. Birdsall, the Fire Marshal's office pursued Plaintiffs through relentless investigations despite being told repeatedly by their own approved intermediaries that Plaintiffs had violated no plumbing codes. Appendix to Brief of Appellants ("App. ___"), Complaint at ¶¶42-49. The fact that state law permitted the Plaintiffs to do this work was viewed with naked contempt by the Fire Marshal's chief investigator Jeff Cyr. Complaint ¶¶65 ("I do not believe that having a pulse is even a requirement [for water operator certification]."). The Fire Marshal's office pursued this inquiry, discovery revealed, because *one licensed plumber* incessantly demeaned the Fire Marshal's office for "allowing" Plaintiffs to compete. *Id*. at ¶¶53, 66, 73-

74. The arrest of Mr. Birdsall is *directly tied* to a complaint by this plumber and a request by Plaintiff Mr. Whittemore to have the Department of Safety perform an internal review of the conduct of the Fire Marshal's lead investigator. Complaint at ¶¶73-76.

These and other facts in the Complaint describe a retributive motive and an anti-competitive motive for the pursuit and arrest of a New England Backflow employee with the intent of harming Plaintiffs.[1] "To hold that the party whom the defendants seek to injure and who has suffered economic injury lacks standing would be to defy reality." *Board of Ed. of Farmingdale*, 343 N.E.2d at 283. It was improper to dismiss the claims as a matter of law.[2]

II. The State misapprehended the law when it argued that mere commencement of a criminal action is not sufficient for an abuse of process claim, because it is the *purpose* of the suit, not the nature or timing of any specific action, which controls.

With regard to the State's argument that mere commencement of a civil or criminal suit alone is not sufficient for an abuse of process claim and that it is the subsequent conduct that gives rise to an abuse claim, the State is incorrect for two reasons.

First, the State (and the trial court) overemphasized the requirement that the action be subsequent to the commencement of a suit. "The subsequent misuse of the process" referenced in Restatement (Second) of

[1] Arresting Mr. Birdsall for capping a plumbing line with a copper cap after removing a backflow preventer is akin to the issuance of 77 subpoenas to teachers for the same day—a barely colorable justification for what amounts to a retributive and targeted act.

[2] The question of standing applies to both Counts II (Malicious Prosecution) and V (Abuse of Process).

Torts §682 and *Long v. Long*, 136 N.H. 25, 30 (1992) refers not to timing, but to the concept of using even lawfully obtained process for an improper purpose. *See*, e.g., *Zak v. Robertson*, 249 F.Supp.2d 203, 209 (D. Connecticut 2003); *Jones v. Brockton Pub. Markets, Inc.*, 340 N.E.2d 484, 486 (Mass. 1975). The essence of the claim is not when the process occurred (at the start or during a legal action) but *why* it was issued. Rest.2d Torts §682. As such, the Plaintiffs' argument is fully consistent with the New Hampshire case law relied upon by the State, including *Clipper Affiliates, Inc. v. Checovich*, 138 N.H. 271, 276 (1994) ("The improper purpose usually takes the form of coercion to obtain a collateral advantage … such as the surrender of property or the payment of money[.]"), because the purpose of the arrest of Mr. Birdsall was a retribution against Plaintiffs and to prevent them from competing with licensed plumbers.

Second, the summons and arrest of Mr. Birdsall was not the only aspect of process that he was required to endure. He was by definition subject to arraignments, procedures and hearings, and the threat of criminal liability. These are incidental to the initiation of the criminal action but arise under the compulsory power of the courts. *Long*, 136 N.H. at 31 (1992) ("Where a court's authority is used, the act constitutes 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 court process that Mr. Birdsall underwent[3] had a substantial chilling effect on New England Backflow's workforce and ability to operate and forced New England Backflow to incur additional costs for plumbing expertise. Complaint ¶¶95, 109. These are akin to a form of "coercion to obtain a collateral advantage," to wit, punishment for competing successfully with a licensed plumber for authorized work and for requesting a review of investigatory conduct. *Clipper Affiliates, Inc.*, 138 N.H. at 276-77.

The State concedes that the Complaint adequately pled facts showing that the Fire Marshal improperly initiated the arrest of Mr. Birdsall. Therefore, if the court-related steps that Mr. Birdsall was subsequently required to undergo during his criminal procedure are "process," then the Plaintiffs have stated a claim and the trial court's decision must be reversed. The foregoing case law and legal authorities require that result. The summons and arrest of Mr. Birdsall was not for legitimate public safety reasons but rather for the twin illegitimacies of helping a plumber compete for business and retribution against the Plaintiffs for having the temerity to complain about the heavy hand of the Fire Marshal's regulators.

This is an important public policy issue. Here a State regulatory agency allowed itself to be co-opted by the people it is meant to regulate. It

[3] At the time of the original Complaint the arrest had only just occurred. Plaintiffs moved to amend at the time of the motion to dismiss to update the Complaint with additional facts about Mr. Birdsall's arrest since that time, but the Court denied the Motion as futile. *See* App. at 68-71; Order at 2. The amendment was not necessary to establish further facts, however, as a criminal procedure necessarily follows summons and arrest. *See Wozniak v. Panella*, 862 A.2d at 549.

used its substantial investigative and punitive powers to harass and raise costs on a competing profession. The State's incredible authority was harnessed for private gain. This is an odious outcome and it would be even more distasteful if the Court permitted it to go unchecked.

III. The State reiterates the conclusions of the trial court about the interpretation of the statutory framework in this case without addressing the fact that the plain language of the statutes requires an absurd result or that removal of a backflow device is inherently part of replacement of a backflow device.

The State argues that the removal of a backflow device is not contemplated by the express language of RSA 485:11, which reads as follows: "The facility [receiving public water] 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*. (in part).

However, a device must be removed if it is to be replaced. Thus, the statute implicitly authorizes the removal of a device. The only question is whether it only allows the removal of a device if the device is not to be replaced. The answer to this question lies in the solution to the conflict between the two sentences of the statute, which together impose two conflicting mandates.

The first sentence requires that backflow devices in a facility must be installed, maintained, repaired or replaced by "individuals qualified by either a plumbers license or by certification by the department under RSA 332-E:3." RSA 485:11. This mandate is not restricted just to one device at the service entrance. By its plain terms it applies to all backflow devices in the building. That language not only *permits* certified water operators like Mr. Whittemore to work on backflow devices throughout a building, it *requires* it. But the second sentence limits what those "qualified individuals" can do 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*. This restriction plainly applies to both plumbers and certified water operators. No one can work on backflows anywhere in the building and no one can remove a backflow preventer without replacing it.

Absent a legislative fix, the only way this language can be construed to effect the objective of the statute that *all backflow devices* be worked on by a qualified individual is to read "directly adjacent to and required as part of the protection for the drinking water distribution system" broadly to effect the public purpose of protecting the water supply. *See State v. Wilson*, 169 N.H. 755, 766 (2017). If read broadly, whether a given backflow device is "adjacent to and required as part of the protection of the drinking water system" amounts to a factual inquiry. The Court dismissed the declaratory judgment claims without the establishment of a record and a means of weighing the specific devices in question against the language of the statute. That was improper.

The same ambiguity requires the Court to conduct fact-finding concerning the breadth of the activities described in these dual mandates, and determine whether some activities are so inherently part of "inspection and testing, maintenance, repair or replacement, and installation" that they are implied. In this case, as noted, Mr. Birdsall tested a backflow device and found it no longer to be functional. At that point, the plumbing code required that the device either be removed and replaced or removed and capped. The same action is required in both instances. In the first, the device is removed and a new device is either soldered or pressed into its place. In the second, the device is removed and a copper cap is either soldered or pressed into its place. To conclude that one is exempt from plumbing licensure requirements and the other not is to abandon reason.

As the statute is drafted, neither a plumber nor a certified water operator can remove a backflow device and cap it with a copper cap. Since the statute cannot reasonably be construed—under any circumstances—to allow plumbers to undertake the described activities but bar certified water operators from doing so, the Court is faced with a binary choice of either permitting both plumbers and water operators to do these activities, or permitting neither. The only reasonable way to effect the purpose of the statute is for both plumbers and certified water operators to be able remove a backflow preventer and cap the line as required by the code.

IV. The Plaintiffs preserved their takings argument at the trial court level and in their Notice of Appeal.

The State argues that Plaintiffs did not preserve the argument that the State's and trial court's interpretation of RSA 485:11 amounted to a taking of a vested right to perform backflow related activities as a certified

water operator. This is incorrect. The Plaintiffs argued in their objection to the State's Motion to Dismiss that the Plaintiffs' rights were vested because Mr. Whittemore had been performing the work in question unfettered for more than 20 years. Appendix to Brief of Appellants at 63-65 ("App. at ___"). The issue was also framed as part of Question 3 in their Notice of Appeal. The State appears to suggest that the addition of additional or supplemental authority in support of this position constitutes a failure to preserve the issue. That is not the law. "[A] litigant does not forfeit a position just by neglecting to cite its best authority; it suffices to make the substantive argument." *Dixon v. ATI Ladish LLC*, 667 F.3d 891, 895 (7th Cir. 2012) (citing *Elder v. Holloway,* 510 U.S. 510 (1994)).

Regarding the merits of the State's argument, the State does not dispute that the origins of the statutory language acknowledging the authority of certified water operators long predate the restrictions enacted in 2013 and 2014. *See* Appellants' Brief at 30-31. The only opposition the State registers to the Plaintiffs' argument is that this limitless authority only applies to the "public water system." *Id*. But the evolution of the authority of certified water operators from 1979 to the present demonstrates that the legislature did not observe such a distinction when it originally granted the authority. In 1979, certified water operators were given authority over "*all* measuring and control devices used to convey potable water to the system users." 1979 N.H. Laws c. 487:1. Furthermore, in 1989—still four years before Mr. Whittemore began this work—the legislature gave "water furnishers" blanket authority to establish and maintain valves to prevent "the inflow of water of such unapproved character" into the public water system. 1989 N.H. Laws c. 339:1. This broad authority reaches backflow

devices inside a building and is consistent with the Plaintiffs' argument that fact finding was necessary to determine whether a given backflow preventer was "adjacent to and required as part of the protection of the drinking water system." RSA 485:11; *see* Complaint at ¶¶14-18. The broad scope of the authority given to certified water operators even inside a building was recognized by the Fire Marshal's Chief Inspector Cyr himself, when he expressly acknowledged, in his own testimony to the Senate Committee at the hearing referenced by the State at page 28, note 6 of its Brief, that the statutory framework prior to 2013 "allows water purveyors and system operators to do plumbing inside the building." *Id*. at 48:15-22. Thus, to the extent the statutory "clarifications" of 2013 and 2014 restricted the authority of a certified water operator by location, device or activity, then they eroded vested rights under Mr. Whittemore's certification and resulted in a taking.

V. The State misconstrued Plaintiffs' argument concerning the trial court's failure to declare the September 9, 2013 Cease and Desist Order invalid.

The Fire Marshal's Office issued a Cease and Desist Order to Plaintiffs on September 9, 2013. The trial court ruled that the Cease and Desist Order was related to a water meter installation project in Pittsburg that was completed by early 2014 and therefore the Plaintiffs' argument that the Cease and Desist Order was moot. But the State did not address the argument that the Plaintiffs made in their actual brief, which was that, at the time of the Cease and Desist Order, plumbing licensure requirements did not extend to certified water operators *at all*.

CONCLUSION

The Court should reverse the trial court's decision and remand this case for further proceedings, up to and including trial.

RULE 16(11) CERTIFICATION

I certify that the foregoing reply brief complies with the word limitation of 3,000 words and that it contains 2,994 words.

Respectfully submitted,

NEW ENGLAND BACKFLOW

By its attorneys,

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Date: June 3, 2019 By: */s/ Jeremy D. Eggleton*

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CERTIFICATE OF SERVICE

I, Jeremy D. Eggleton, Esq., hereby certify that on this 3rd day of June, 2019, copies of the foregoing Reply 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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