THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0616

THE NEW LONDON HOSPITAL ASSOCIATION, INC.
Petitioner/Appellant,

v.

TOWN OF NEWPORT,
Respondent/Appellee.

BRIEF OF RESPONDENT/APPELLEE, TOWN OF NEWPORT

MANDATORY APPEAL PURSUANT TO SUPREME COURT RULE 7 FROM FINAL ORDERS OF SULLIVAN COUNTY SUPERIOR COURT, CASE NO. 220-2017-CV-00082

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

The New London Hospital Association, Inc. ("NLH"), of which Dartmouth-Hitchcock is the sole member, filed this action to appeal the Town of Newport ("Newport")'s denial of its application for a charitable tax exemption for the 2016 tax year. Apx. 033. Newport denied NLH's application because NLH's BTLA Form A-9 for 2016 (the "A-9") was untimely and because the level of charity care was very small, and NLH operated the property as a fee for service operation. Apx. 029.

In response to NLH's appeal to the superior court, Newport filed a motion for summary judgment because there were no genuine issues of material fact in dispute that NLH failed to fulfill mandatory provisions of RSA 72:23-c when it: (1) untimely filed the required Form A-9 after the April 15, 2016 deadline, and (2) did not attempt to satisfy the selectmen that accident, mistake or misfortune caused the failure to file on time. Apx. 003-16.

The trial court granted summary judgment because it is undisputed that NLH untimely filed its A-9 and never offered an explanation of accident, mistake or misfortune until after Newport filed its motion for summary judgment. Add. 056-59. Since NLH failed to present an explanation to the selectmen as to circumstances that justified the untimely filing, NLH had waived that issue for purposes of its appeal to the superior court. *Id.* at 58-59. As a consequence of NLH's failure to comply with the statute, summary judgment was granted. NLH is now appealing that decision.

The second issue before this Court is the superior court's denial of NLH's motion to amend its complaint. NLH attempted to avoid summary judgment and revive its appeal by moving to add a constitutional equal protection claim to its complaint. Apx. 192-232. The trial court properly exercised its discretion and denied NLH's motion to amend because it sought to introduce an entirely new cause of action that called for substantially different evidence and because the requested amendment would not cure any defect in the original complaint. Add. 060-61. NLH filed a motion to reconsider, Apx. 254-260, which the trial court also denied. Add. 062.

STANDARD OF REVIEW

Order Granting Summary Judgment

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a. "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." *Dent v. Exeter Hosp., Inc.*, 155 N.H. 787, 792 (2007). The Court considers the affidavits and evidence, and all inferences properly drawn therefrom, in the light most favorable to the non-moving party. *Id.* at 791. The Court will review the trial court's application of law to the facts *de novo*. *Id*. at 792. If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the Court will affirm the grant of summary judgment. *Id*.

Orders Denying Motion to Amend Complaint

Pursuant to RSA 514:9, the trial court may permit a substantive amendment to pleadings "in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice ... ." The Court has interpreted this provision to permit liberal amendment of pleadings unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence. *Tessier v. Rockefeller,* 162 N.H. 324, 340 (2011). An amendment may also properly be denied if it would not cure a defect in the complaint. *Id.* Whether to allow a party to amend its pleadings rests in the sound discretion of the trial court, and the Supreme Court will not disturb the trial court's decision absent an unsustainable exercise of discretion. *Id.*

STATEMENT OF MATERIAL FACTS

NLH's stated facts are almost entirely immaterial and irrelevant to the instant appeal. Instead, many of those facts concern its application for exemption in the prior year. Newport disputes many of NLH's assertions of "fact" which include unsupported speculation as well as mischaracterization, but declines to respond specifically to all of them insofar as they are immaterial to this appeal.

By way of background, NLH paid taxes to Newport for its outpatient clinic for many years, and it filed a timely A-9 for the first time in 2015, Apx. 54, which Newport denied and NLH appealed. (An action on the merits is still pending in the superior court) NLH also began construction of a new, multi-million-dollar clinic in Newport in 2015. Apx. 152.

The following facts are undisputed and are the only facts material to this appeal:

1. NLH's application for a 2016 tax exemption (the Form A-9) was due on or before April 15 pursuant to RSA 72:23-c.

2. NLH submitted its A-9 to an administrative clerk for Newport on May 19, 2016. NLHB[1] at 20; Apx. 017, 020, 056. NLH did not then offer any explanation why it was untimely. Apx. 017-18, 133.

3. On or about September 7, 2016, NLH learned that, at the August 29, 2016 Board of Selectmen meeting , the selectmen "moved to deny [its] 2016 application for charitable exemption." NLHB at 21; Apx. 018, 029, 057, 089.

4. The meeting minutes for August 29, 2016 reflect the following rationale for the denial: "the Board voted to deny a charitable tax exemption for Map 11 Lot 129-001 for the 2016 tax year because the application for the exemption was untimely and because the level of charity care provided by the hospital is very small and it is a fee for service operation." NLHB at 21; Apx. 018, 029.

5. Newport's 2016 tax rate was approved by the New Hampshire Department of Revenue on November 10, 2016. Apx. 096.

6. Newport and NLH had no communications concerning the timeliness of NLH's 2016 tax exemption application between May 19, 2016 and November 10, 2016. Apx. 018, 133, 151.

7. Nowhere in NLH's submissions to the superior court (*see generally* Apx.) or in NLH's Brief to this Court has NLH ever claimed that

[1] NLH's Opening Brief is abbreviated as "NLHB".

it communicated with Newport concerning an accident, mistake or misfortune delaying the filing of its 2016 Form A-9 before the 2016 tax rate was approved. NLHB at 21-22. NLH claimed that an accident, mistake or misfortune caused its late filing for the first time in its objection to Newport's motion for summary judgment on or about July 12, 2018, nearly two years after the tax rate was approved. Apx. 051.

Remaining facts NLH relies on are immaterial to the outcome, but Newport's response to some follows:

- NLH knew or should have known that the A-9 was due annually on or before April 15, as the form NLH submitted in 2016 was the same form it timely submitted for 2015, and the annual deadline is clearly stated in the instructions on the first page. Apx. 017, 020, 133, 153.
- Communications between NLH and Newport in the spring of 2016, which NLH claims raise a genuine issue of material fact, relate almost entirely to NLH's request to discuss its 2015 application for a charitable tax exemption and are immaterial. NLHB at 15-22; Apx. 055-57, Apx. 150-52.
- NLH complains Newport sent reminders in 2016 to other organizations to file A-9s but did not send one to NLH (and allegedly should have), but NLH fails to disclose that Newport had a practice of doing so only for organizations that were granted exemptions in a prior tax year, which did not apply to NLH since it had been taxed for many years. NLHB at 46; Apx. 151.

SUMMARY OF ARGUMENT

Because it is undisputed that NLH failed to timely file its Form A-9, without explanation, the Newport selectmen properly cited the untimeliness of the A-9 as an independent reason to deny NLH's charitable exemption application, consistent with the plain language of RSA 72:23-c, NLH cannot retroactively cure this defect by attempting to show accident, mistake or misfortune when those facts were not presented to the Newport selectmen prior to approval of the tax rate. There were no genuine issues of material fact, and Newport was entitled to summary judgment as a matter of law. Therefore, the trial court's grant of summary judgment should be affirmed.

The trial court also did not abuse its discretion in denying NLH's motion to amend its complaint to add an equal protection claim. Substantive amendments that introduce new causes of action or amendments that call for substantially different evidence are generally not permitted unless the amendment will cure a defect in the complaint. The trial court properly found that all three factors weighed against allowing the amendment; therefore, the trial court's exercise of discretion was sound. Thus, the trial court's denial of NLH's request to amend its complaint should be affirmed.

ARGUMENT

I. The Superior Court Correctly Granted Summary Judgment Because NLH Failed to Comply with RSA 72:23-c.

The plain language of RSA 72:23-c establishes the application requirements for all organizations seeking tax exemptions each year. The superior court granted summary judgment, because as a matter of undisputed fact and law, NLH failed to comply with those requirements.

The first sentence of the statute reads in relevant part: "Every religious, educational and charitable organization … shall annually, on or before April 15, file a list of all real estate and personal property owned by them on which exemption from taxation is claimed, upon a form prescribed and provided by the board of tax and land appeals, with the selectmen …." RSA 72:23-c, I (emphasis added). The A-9 is the required form referenced.

Because the legislature used the word "shall," the requirement to file Form A-9 is mandatory. *Anderson v. Robitaille*, 172 N.H. 20, 24 (2019)("The use of the word 'shall' indicates a legislative mandate.")(internal citations omitted). The statute also unambiguously contains a deadline of April 15 for filing the A-9, and a narrow, conditional exception to the April 15 deadline:

> If any organization, otherwise qualified to receive an exemption, shall satisfy the selectmen or assessors that they were prevented by accident, mistake or misfortune from filing an application on or before April 15, the officials may receive the application at a later date and grant an exemption thereunder for that year; but no such application shall be received or exemption granted after the local tax rate has been approved for that year.

RSA 72:23-c (emphasis added).

Therefore, Newport was authorized to receive a late application from NLH only if (1) the "organization… shall satisfy" (2) "the selectmen" (3) "that they were prevented by accident, mistake or misfortune from filing an application on or before April 15," (4) before "the local tax rate has been approved for that year." When this statutory prerequisite is not met, the selectmen must deny an application as untimely, and they have no authority, nor discretion, to receive the late application.

Case law relied upon in NLH's Brief (at 36-37) supports Newport's position. In *Union Congregational Church v. Town of Wakefield*, No. 28560-17EX, 2018 N.H. Tax LEXIS 14, at *6 (N.H. BTLA Feb. 23, 2018), the taxpayer failed to timely file the A-9, but the church's treasurer filed a letter with the selectmen explaining why it was late. The selectmen denied it. On appeal, the BTLA found the taxpayer had presented arguments constituting accident, mistake or misfortune: she was the sole, unpaid treasurer responsible for filing the A-9, the church was very small, and she was out of town dealing with significant family health issues when the form was due. *Id.* at *3-5. NLH, in contrast, never supplied any explanation for its untimely A-9.

Society for the Preservation of Rockwood Pond v. Fitzwilliam, 2003 N.H. Tax LEXIS 4, at *7-10 (N.H. BTLA April 7, 2003), also supports Newport's position. In *Rockwood Pond*, the town never considered the timeliness of the taxpayer's A-9 when it denied the application on the merits and raised the timeliness issue for the first time just before the merits hearing. *Id.* at *8. The BTLA chastised both applicant and town for failing to be aware of the import of filing an untimely A-9 but still considered the

issue because timeliness was a "jurisdictional prerequisite." *Id.* at *9 (emphasis added). In dicta, the BTLA considered the taxpayer's arguments that it was prevented from timely filing due to accident, mistake or misfortune (it blamed the town), found the taxpayer failed to sustain its burden, and the appeal was dismissed. *Id.* at *10-11, 12 (noting that "a mere intention to file, even with an awareness on the part of the town, is not sufficient to overcome the requirements of RSA 72:23-c").

Here, unlike in *Rockwood Pond*, the selectmen had knowledge of the requirements of RSA 72:23-c and did consider whether NLH's application was timely. NLH failed to provide any information about why the submission was late, and the selectmen were not required to speculate as to possible reasons or to seek that information out. Moreover, the selectmen could not excuse the late A-9 simply because NLH has alleged that it otherwise diligently pursued the exemption.

Because NLH failed to timely file the A-9, and it also failed to supply, let alone satisfy, the selectmen with an explanation that NLH was prevented by accident, mistake or misfortune from filing it on time, the selectmen appropriately denied the application.

A. Procedural requirements at the local level are to be applied consistently in light of the statute's purpose and are strictly construed

NLH attempts to persuade the Court to expand the conditions and plain terms of RSA 72:23-c so broadly that, if accepted, the statute would be rendered meaningless. One such argument, that the superior court's application of the statute was strained and over-technical, borrows from a

line of cases involving charitable organizations that were reviewed substantively on their merits under RSA 72:23, V and 23-l. NLHB at 30-31. NLH's argument misses the mark entirely. The law from those cases NLH urges the Court to apply is completely inapplicable here.

This appeal involves a procedural issue under RSA 72:23-c. The evident purpose of the April 15 deadline in that and other tax statutes is to provide local officials with sufficient time to review applications, obtain information, conduct inspections, and make determinations of exemptions, credits, and other matters before the tax rate for the year is set. To determine the tax rate, local officials must have established a reliable inventory of properties, properly classified and assessed in a timely manner. *See generally*, RSA 75:1; RSA 75:8. This explains why many statutes, including RSA 72:23-c, absolutely prohibit—with no exception—the receipt of tax exemption, tax credit, or special tax classification applications after the local tax rate has been approved for the year. *See*, *e.g.*, RSA 72:23-c ("no such application shall be received or exemption granted after the local tax rate has been approved for that year"); RSA 72:33, I-a; RSA 79-A:5, II.

Statutes with procedural requirements within the tax code are strictly construed. "New Hampshire follows the majority rule regarding compliance with statutory time requirements, and thus one day's delay may be fatal to a party's appeal." *Phetteplace v. Town of Lyme,* 144 N.H. 621, 625 (2000)(internal citation omitted). "Specifically, we have held that compliance with the procedural deadline for filing an appeal is a necessary prerequisite to establishing jurisdiction in the appellate body. Filing an

appeal in a timely manner vests the superior court with subject matter jurisdiction." *Id.*

When procedural requirements are not met at the local level, that failure may divest a court of subject matter jurisdiction to hear the appeal. *In re Estate of Van Lunen*, 145 N.H. 82, 86 (2000) (citations omitted) (where taxpayer failed to timely file an abatement application: "[t]he statutory deadlines for requesting a tax abatement under RSA chapter 76 and its predecessor have historically been strictly enforced, and failure to timely submit an appeal is fatal regardless of accident, mistake, or misfortune."); *Missionaries of La Salette Corp. v. Town of Enfield*, 116 N.H. 274 (1976) (where religious organization failed to timely apply to for an abatement, its appeal to the superior court was properly dismissed); *Rockwood Pond*, 2003 N.H. Tax LEXIS 4, at *9 (timeliness of filing the Form A-9 with the town was a "jurisdictional prerequisite."); *see also, generally, Appeal of Taylor Home (N.H. Bd. of Tax & Land Appeals),* 149 N.H. 96, 101 (2002)(affirming the BTLA dismissal of a petition where "regardless of the petitioner's intent, the record show[ed] that it did not appeal the exemption decisions by September 1, 2001, as required by RSA 72:34-a, thus depriving the BTLA of jurisdiction …").

Here, NLH failed to comply with all necessary elements of RSA 72:23-c: (1) it filed its A-9 late, (2) and failed to offer a satisfactory explanation (3) to the selectmen why it was late (4) before the tax rate was set. Based on these undisputed facts, the superior court had no choice but to grant summary judgment.

Though the superior court did not specifically rule that it lacked subject matter jurisdiction, the effect of its dismissal was the same: NLH

had failed to comply with the statute's requirements at the town level, and the superior court, sitting in an appellate capacity, could not review the merits of NLH's exemption application. When NLH failed to offer a satisfactory explanation to the selectmen of why its A-9 was untimely filed, NLH never activated the provision in the statute that enabled, under narrow conditional circumstances, receipt by the selectmen of a late-filed A-9. The consequence of that failure was equivalent to NLH never having filed an A-9 in 2016. Without the availability of the conditional grace period, an organization that fails to file an A-9 on or before April 15 is not entitled to any exemption, regardless of eligibility for the exemption otherwise. The corollary consequence is that the organization has no right to seek the exemption, and a superior court therefore lacks subject matter jurisdiction to hear any appeal of that organization on the merits of its exempt status.

By asking the Court to consider new evidence of accident, mistake or misfortune not presented to the selectmen, NLH is in effect asking the Court to dispose of an important statutory deadline and to relax its requirements for NLH's sole benefit. Doing so would eviscerate the plain meaning of RSA 72:23-c and the evident purpose of the statutory deadline.

B. The *de novo* standard of appellate review cannot cure NLH's defective procedural failures below.

NLH's arguments about *de novo* review conflates two very different issues. On the one hand, NLH appears to argue that the superior court erred by failing to apply a *de novo* review of facts related to the merits of NLH's charitable exemption under RSA 72:34-a. (NLHB at 26, 27-29). On the other hand, NLH argues that it was entitled to deferential *de novo* review of

facts about its late filing of the A-9 due to accident, mistake or misfortune although that argument was not made before the selectmen in the first instance (NLHB at 28).

The former argument is clearly misplaced and inapplicable to this appeal of the decision granting Newport's motion for summary judgment on procedural grounds. The trial court's order only considered whether NLH had met the procedural requirements of RSA 72:23-c and concluded that it had not. The trial court did not reach, nor could it reach, the merits of NLH's appeal due to NLH's failure to comply with RSA 72:23-c at the local level. *See* Section I, A. above.

NLH's latter argument that it was entitled to deferential *de novo* review of facts about its late filing of the A-9 due to accident, mistake or misfortune (NLHB at 28) is also flawed because it ignores the requirement to satisfy the selectmen, not the court reviewing an appeal. NLH's related argument that there is no deadline by which a taxpayer must raise whether accident, mistake or misfortune prevented it from timely filing the application (NLHB at 27) is also plainly incorrect. NLH attempts to use this as justification to consider a new issue. Under the statute's plain language, NLH was not entitled to create the explanation of accident, mistake or misfortune for the first time in its objection to Newport's motion for summary judgment. The opportunity NLH had to offer the explanation, in order to seek approval of the selectmen for an untimely application, was foreclosed once Newport's tax rate was set in November 2016. Apx. 096.

Newport does not disagree that the trial court had authority to conduct a *de novo* review of events at the local level. If, just for the sake of argument, NLH had given the selectmen an explanation of why the

application was late, and if the selectmen had rejected that explanation, the trial court could have reviewed that explanation *de novo* on appeal.

Here, however, the trial court had no explanation to review when addressing the untimely A-9. The trial court's authority for *de novo* review did not extend to ignoring or overruling the procedural requirements of the statute, and the court correctly found as a matter of law that it could not consider that argument on appeal. Add. 058-59. NLH's failure to supply the selectmen with a satisfactory explanation for its untimely A-9 before the tax rate was set in 2016 was the legal equivalent of failing to file the A-9 entirely.

C. By failing to raise accident, mistake or misfortune with the selectmen, NLH waived the opportunity to do so on appeal.

The trial court correctly found as a matter of law that NLH waived any argument that its late filing was excused due to accident, mistake or misfortune when it failed to raise that issue first with the selectmen. Add. 058-59.

NLH's argument regarding waiver (NLHB at 32) distorts the trial court's decision. NLH discusses the doctrine of waiver in the context of an affirmative defense. *See, e.g., So. Willow Properties v. Burlington Coat Factory of N.H.*, 159 N.H. 434, 499 (2009)(discussing the affirmative defense of waiver in the context of an argument that a landlord waived the right to proceed with an eviction action after accepting rent). The affirmative defense of waiver applies only when a defendant argues that the plaintiff waived the right it is pursuing. *See Vill. Green Condo. Ass'n v.*

Hodges, 167 N.H. 497, 504 (2015). Neither Newport nor the court relied upon this application of the doctrine of waiver.

Instead, the trial court in its appellate capacity simply found it could not review new issues NLH raised on appeal that had not been raised below based on RSA 72:23-c, and it deemed any arguments in support of such issues "waived." App. 059. This aligns with similar language this Court has used when finding it cannot consider an issue that was not preserved below. *See, e.g., Appeal of A&J Beverage Distribution,* 163 N.H. 228 (2012)("[I]ssues not preserved are normally waived.")(emphasis added); *Dupont v. N.H. Real Estate*, 157 N.H. 658 (2008) ("As a result, the issues were not properly preserved and are deemed waived.")(emphasis added).

Newport asserted this argument in its motion for summary judgment, Apx. 132, 138-40, and the trial court correctly ruled that, as a matter of law, it could not consider an argument that was not preserved below.

D. The selectmen were not authorized by law to "receive" NLH's untimely Form A-9 when not accompanied by a satisfactory explanation.

Although employees at Newport's town office had physical possession of NLH's Form A-9 after NLH submitted it on May 19, 2016, they were not empowered by law to consider the timeliness of the application nor to "receive" it under the terms of RSA 72:23-c. Under the general laws of New Hampshire, only "selectmen or assessors" are statutorily empowered to make tax assessing or exemption decisions. RSA 72:23-c; *see also, e.g.,* RSA 74:1; 75:1, 8; 76:10, RSA 37:5 (excluding assessing of taxes from a town manager's authority and reserving it solely

to selectmen). NLH's argument that Newport, by virtue of its conduct, waived the statutory requirement for an explanation of the untimely filing (NLHB at 34-37) is faulty.

Firstly, NLH's assertion that Newport's implicit actions could be construed as a waiver of the untimely status of NLH's Form A-9 has no support in law. NLHB at 38. The statute reads: "If any organization … shall satisfy the selectmen … that they were prevented by accident, mistake or misfortune from filing an application on or before April 15, the officials may receive the application at a later date … ." RSA 72:23-c, I (emphasis added). The statute unambiguously imposes a condition precedent that a town can only "receive the application at a later date" than April 15 if the organization has already satisfied "the selectmen" that an accident, mistake or misfortune prevented it from timely filing the A-9. As the trial court correctly concluded, the plain language of the statute puts the burden on the taxpayer to satisfy the selectmen. Add. 058.

NLH's argument would nullify provisions in the statute. The selectmen would have no opportunity to be "satisfied" after review of a proffered explanation for an untimely-filed application if Newport's physical possession alone of the application constituted "receipt" under the statute. "An interpretation that renders statutory language superfluous and irrelevant is not a proper interpretation." *Carr,* 170 N.H. 10, 16 (2017) (internal citations and quotations omitted). *See also Green v. Sch. Admin. Unit #55*, 168 N.H. 796, 798 (2016) (when examining the language of a statute, court ascribes the plain and ordinary meaning to words used and interprets legislative intent from the statute as written).

The facts here show the selectmen addressed NLH's application when they met on August 29, 2016, and the minutes reflect they made decisions on several other pending tax exemption applications at the same time. Apx. 29. Between May 19, 2016, when NLH's A-9 was submitted, and the selectmen's meeting, NLH had plenty of time to submit an explanation to the selectmen about why its application was late, but it offered nothing.

Any argument from NLH that results in the selectmen "receiv[ing]" a late-filed A-9 without first being satisfied as to accident, mistake or misfortune would violate the plain language of the statute, because satisfaction is a mandatory condition precedent for receipt of a late-filed form.

Secondly, NLH's assertions that Newport's conduct implicitly "received" the A-9 (NLHB at 34-37) or "excuse[d] the late filing" (NLHB at 38) are immaterial and desperate attempts to deflect attention from its own failures below and to inappropriately shift the blame to Newport.

- NLH's assumptions about notes by a Town employee on internal assessing documents to support its argument that Newport was purportedly still seeking A-9s on May 19, 2016 are inaccurate and unsupported by affidavit. NLHB at 20, 22, 35; Apx 212.[2]
- Similarly, the meeting that took place in May 2016 between NLH and Town representatives (at which no selectman was present) to

[2] Tekoa Missions filed a timely A-9. Newport Youth Activities owned playing fields actively managed, used and maintained by the Town under a lease, for public benefit. When NYA became inactive as a nonprofit organization, attempts to find anyone who could make decisions for NYA were ongoing.

discuss NLH's 2015 exemption request at NLH's request (Apx. at 150-152) cannot be imputed to Newport as conduct showing the selectmen were "satisfied" by an explanation from NLH about its untimely 2016 A-9. NLH never brought up the subject of its 2016 application at that meeting, and the argument is red herring. *Id.*

- Likewise, the selectmen's review of the merits of NLH's application at the August 2016 meeting when they also decided, on a separate ground, that the application was untimely cannot be imputed to Newport as the selectmen having "received" the application after having been "satisfied" that NLH was prevented by accident, mistake or misfortune from filing a timely application. *See* RSA 72:23-c, I. Other than observing the A-9 was filed late, the minutes do not reflect any discussion about why it was filed late. Apx at 029. Since NLH had not provided an explanation before the meeting, the selectmen never addressed the subject.

E. Even if NLH could still attempt to show for the first time in this appeal that it suffered accident, mistake or misfortune, NLH has not offered material facts to support it.

Assuming for the sake of argument that the Court determines that the statute does not prohibit NLH from providing a belated excuse in its appeal for the untimely filing of the A-9, NLH still has failed to establish any genuine issue of material fact that could satisfy the standard of "accident, mistake or misfortune" pursuant to RSA 72:23-c.

In order to satisfy that standard, NLH must allege some facts beyond ordinary negligence in support of its claim. "If judgment goes against a

litigant by reason of his neglect, he has not thereby suffered an injustice, but rather the natural consequences of his own neglect." *Pelham Plaza v. Town of Pelham*, 117 N.H. 178, 182-83 (1977). Ignorance of the law does not satisfy the legal standard for an "accident, mistake or misfortune," and NLH has only alleged facts that might support a claim that ordinary negligence prevented the timely filing of Form A-9. *See State v. Stratton*, 132 N.H. 451, 457–58 (1989) ("Ignorance of the law is no excuse."); *State v. W.J.T. Enterprises, Inc*., 136 N.H. 490, 495 (1992) (general rule is that ignorance of the law is no excuse).

1. NLH has failed to allege any material facts in support of an argument that it can demonstrate accident, mistake or misfortune caused the filing of the untimely A-9.

The term "accident, mistake or misfortune" has been consistently defined by this Court. It has always meant that something occurred "outside of one's control" or something that "a reasonably prudent person would not be expected to guard against or provide for." *See, e.g., Wong v. Ekberg*, 148 N.H. 369, 372-73 (2002)("[T]he plaintiff's failure to disclose his expert was due to his own neglect rather than accident, mistake, or misfortune" and the fact that "the plaintiff was representing himself throughout the discovery process does not excuse him from complying with the superior court's structuring order.")(citations omitted)); *Lakeview Homeowners Assoc. v. Moulton Constr.*, 141 N.H. 789, 791 (1997)("'[A]ccident, mistake or misfortune' has been defined as 'something outside of one's control, or something which a reasonably prudent [person] would not be expected to guard against or provide for.'"); *Pelham Plaza*, 117 N.H. at 182 ("The

words ‘accident, mistake or misfortune’ ordinarily import something outside of the petitioner’s own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for.”).

NLH makes five arguments to justify its untimely filing. NLHB at 38-39. None include factors outside of NLH’s control, and none address why NLH never attempted to “satisfy the selectmen” after it filed the untimely A-9 and waited until responding to the Town’s motion for summary judgment. RSA 72:23-c, I. Moreover, NLH’s allegations, to a large extent, do not pertain to the 2016 tax year or are otherwise immaterial, failing to create a genuine issue of material fact that could overcome the summary judgment granted to Newport.

a) NLH argues first that its late application should be excused because its controller, who was responsible for filing the A-9, bore many responsibilities. NLHB at 16, 38; Apx. 053.

Response: The 2016 A-9 was not the first application she had filed; she had also filed a timely 2015 Form A-9. She was additionally a CPA, the chief financial officer for NLH, vice president for financial services, and a full-time employee with significant responsibility for financial and regulatory filings. Apx. 053-54. Moreover, the instructions at the top of the A-9 she had submitted for 2015 clearly stated the annual filing deadline. Apx. 153. NLH nevertheless seeks to be excused from the late filing, because—after she had inquired about the procedure applicable in the 2015 tax year—the controller “assumed” she would not need to file it more than

once. NLHB at 16; Apx. 054. She apparently failed to inquire or research the matter for the 2016 tax year. Apx. 018, 151-52. Viewed in a light most favorable to NLH, these facts support nothing more than a finding that NLH's failure to file on a timely basis was due simply to ordinary negligence and not an accident, mistake or misfortune.

b) NLH also claims it had to switch legal counsel on March 24, 2016 when its counsel notified NLH it had a conflict of interest and new counsel was retained in early April 2016, with a "hand-off" on April 18, 2016. NLH claims it was effectively unrepresented when the A-9 was due. NLH further blames Newport "because it had refused to waive the conflict." NLHB at 19, 38; Apx 55-56.

Response: It is unreasonable for NLH to suggest Newport should have waived its right to unconflicted legal counsel for NLH's benefit, especially when that counsel was actively representing Newport in other litigation at the time. It was also not Newport's fault that NLH did not seek advice from its new counsel prior to April 15 nor from its prior counsel sometime before March 24, 2016. Note that NLH does not comment whether it sought counsel's advice when it filed the A-9 late without the explanation required by statute, but NLH is a sophisticated business entity with many employees, affiliated with Dartmouth-Hitchcock, and the assistance of two of New Hampshire's most prominent law firms was available during the relevant time.

c) NLH argues Newport "was aware" NLH intended to pursue the 2016 exemption based on its filing for the exemption in 2015, so it claims NLH's failure to timely file the A-9 was, again, Newport's fault. NLHB at 20, 38.

Response: NLH's third argument also fails to sustain its burden that it suffered from an accident, mistake or misfortune. Though Newport and NLH communicated about NLH's 2015 exemption application both before and after it was denied, the parties never discussed NLH's application for 2016. NLH never asked for assistance and never brought it up, and NLH has never alleged that it discussed the 2016 application with Newport during 2016, so there is no genuine issue as to these facts. Apx. 054-055, 151-52. Moreover, these circumstances are insufficient to excuse a late filing.

d) In a related claim, NLH alleges Newport had responded to a request from NLH about what was required to seek an exemption. NLHB at 38.

Response: This claim also fails to sustain NLH's burden. In November 2014, NLH's controller contacted Newport's assessing office wanting to know what was required for tax exempt status, and that office responded with the information requested. Apx 060. In 2015, NLH timely filed its A-9. Newport had no affirmative duty to offer NLH assistance in 2016 in the absence of a request, and NLH never asked for assistance with that year's A-9. Apx 151-52. Moreover, the person functioning as NLH's

controller, CPA and CFO knew or should have known, based on instructions in the A-9 that NLH filed in 2015, what was required for 2016.

e) Finally, NLH claims that, because it did not receive a reminder from Newport to file the A-9 before the deadline, Newport was again at fault that NLH failed to file a timely application. NLHB at 19-20; 38-39.

Response: Failure to fulfill a duty the statute places solely upon the taxpayer cannot be excused by alleging lack of notice from Newport. *Appeal of Brady*, 145 N.H. 308, 310-11 (2000)(dismissal of abatement appeal by BTLA not error when taxpayer argued town failed to give notice that a predecessor owner failed to file the required inventory form, when statute did not require it). Yet NLH lays the blame for its untimely filing solely on Newport and takes no responsibility for its own actions (or lack thereof). There was nothing in law that required Newport to remind NLH of the requirement to submit an application by April 15 or to otherwise assist NLH with meeting the deadline. Though Newport issued courtesy reminders of the A-9 deadline to taxpayers that had been granted tax exemptions in the prior year, NLH was not one of them. NLH had been taxed for many years. Apx. 151. Newport did not affirmatively "choose" not to remind NLH of the 2016 application deadline, and NLH was treated in the same manner as all similarly-situated taxpayers.

Thus, even if the Court determines that it may consider whether NLH's late-filed Form A-9 was due to accident, mistake or misfortune which was raised for the first time on appeal, NLH does not assert a

genuine issue of material fact that might establish NLH suffered a legally-cognizable accident, mistake or misfortune as required in RSA 72:23-c. As a result, Newport is still entitled to summary judgment as a matter of law.

2. Newport had no affirmative duty to inquire about the timing of NLH's application, and NLH cannot shift its statutory burden to Newport

Although selectmen have authority to request additional information when considering a taxpayer's request for property exemption under RSA 72:23-c, nothing requires the selectmen to do so. Indeed, if a taxpayer misses the April 15 deadline and files its exemption application late, Newport is only required to consider whether the late filing was due to accident, mistake or misfortune if an explanation for the untimeliness is presented by the taxpayer. Nothing in RSA 72:23-c implies or suggests that selectmen have a duty to seek out such explanations from taxpayers.

It is the taxpayer's burden to establish it is entitled to an exemption, in addition to satisfying the selectmen that an accident, mistake or misfortune befell the organization and prevented the timely filing of the Form A-9. RSA 72:23-c, I; *see also* RSA 72:23-m ("The burden of demonstrating the applicability of any exemption shall be upon the claimant."); *Nature Conservancy v. Nelson*, 107 N.H. 316, 319 (1966).

Based on NLH's failure to offer any explanation for the untimely filing for 2016, Newport was entitled to presume that NLH did not have any accident, mistake or misfortune that could explain the untimely filing—otherwise, one could reasonably expect NLH would have volunteered such an explanation as a natural reaction to discovering that it had missed the

deadline. As a matter of law Newport was not required to affirmatively seek out the reasons for NLH's late-filed A-9 and NLH cannot establish any genuine issues of material fact as to this issue.

In sum, NLH indisputably failed to satisfy the requirements of RSA 72:23-c, and, as a result, the selectmen could not "receive" NLH's application for the exemption in 2016. Thus, the trial court's ruling that Newport was entitled to summary judgment as a matter of law should be affirmed.

II. It Was Not an Abuse of Discretion When the Superior Court Denied NLH's Motion to Amend Under Principles this Court Established

The trial court reasonably exercised its sound discretion in denying NLH's motion to amend its complaint to add an entirely new claim, and NLH fails to raise any ground for disturbing the trial court's exercise of discretion. "It is within the trial court's sound discretion to deny a motion to amend. While amendment of pleadings is liberally permitted, [the Supreme Court] will not overturn the denial of such a request absent an abuse of discretion." *Arsenault v. Scanlon*, 139 N.H. 592, 593-94 (1995).

The proposed amended complaint (Apx. 217-32) added a new count seeking declaratory judgment based on state and federal equal protection grounds and asking that Newport be "barred from asserting the timeliness of NLH's BTLA Form 9A [sic] filing to prevent its Tax Year 2016 exemption appeal." Apx, 230-31. NLH also claimed it was entitled to declaratory judgment that its untimely filing of the A-9 was due to "'accident, mistake, or misfortune' caused by Newport's inequitable

conduct," thereby seeking back-door judicial review of the merits of its appeal for the 2016 tax year. *Id.* In the alternative, it sought a remedy where taxes assessed by Newport and collected for the 2016 tax year would be refunded with interest and attorney's fees. *Id.*

On August 8, 2019, the trial court granted the Town's motion for summary judgment. Apx. 061. But for NLH's then-pending motion to amend, NLH's lawsuit would have been disposed of.

Although New Hampshire courts favor liberal amendments of pleadings, there are limits. Substantive amendments to pleadings are only permitted when it "it is necessary for the prevention of injustice." RSA 514:9. For instance, substantive amendments are not permitted when "the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence." *Coan v. N.H. Dep't of Env't Servs.*, 161 N.H. 1, 10 (2010); *see also Bennett v. ITT Hartford Grp., Inc.,* 150 N.H. 753, 760 (2004)("Generally, a court should allow amendments to pleadings to correct technical defects but need only allow substantive amendments when necessary to prevent injustice."). The motion to amend may also be denied if the amendment will not cure a defect in the writ. *Tessier*, 162 N.H. at 340.

The trial court properly denied NLH's motion to amend its complaint, because the amendment would not prevent an injustice where the proposed amendment alleged entirely new claims of constitutional violations that call for substantially different evidence compared to the appeal of a charitable tax exemption denial. The trial court also correctly determined that the amendment would not cure any defect in NLH's existing claims. Further, it was unnecessary for the court to consider

whether the alleged claims were viable. Therefore, it was not an abuse of discretion for the trial court to deny the motion to amend or NLH's motion to reconsider the denial, and the trial court's order should affirmed. *See Sanguedolce v. Wolfe*, 164 N.H. 644, 648 (2013).

A. The trial court had discretion to deny NLH's motion to amend its complaint, even when it was the first request and NLH alleged it just discovered the basis.

New Hampshire law does not support NLH's proposition that it should be permitted to amend its complaint simply because it had not previously requested an amendment. NLH's motion to amend was filed a year after it filed its complaint and almost four months after the Town filed its dispositive motion for summary judgment. Apx at 003-032. The decisions that NLH relies on are from other jurisdictions (NLH Brief at 44-46) and are not controlling on the trial court's decision-making. They also do not stand for the proposition that a court is required to permit an amendment to a complaint because it is the first request or because NLH alleges it discovered new evidence. *See Thompson v. New York Life Ins. Co.*, 644 F.2d 439, 444 (5th Cir. 1981)(applying the 5th Circuit's interpretation of Fed.R.Civ.P. 15(a) regarding amendments); *Baxter Int'l, Inc. v. Cobe Lab, Inc.,* No. 89 C 9460, 1991 U.S. Dist. LEXIS 19637, at *2-7 (N.D. Ill. Dec. 18, 1991)(applying the federal rules regarding permissible amendments); *Anderson v. Cigna Healthcare of Maine*, 2005 Me. Super. LEXIS. 139, at *5-9 (Cumberland Cnty. Super. Ct. Oct. 27, 2005)(considering whether to exercise discretion as the trial court to permit an amendment while litigation was ongoing). The number of times a party

has requested an amendment or the discovery of new facts could be matters that a court weighs, but they are not controlling factors when New Hampshire courts determine if a substantive amendment is necessary to prevent injustice. *See, e.g., Lamprey v. Britton Constr.*, 163 N.H. 252, 261-62 (2012)(finding that while "[p]laintiffs must be given leave to amend their writs to correct perceived deficiencies before a dismissal for failure to state a claim has preclusive effect," the ability to correct the original complaint "does not include the right to plead an entirely new cause of action").

NLH has not established that it was an abuse of discretion for the trial court to deny its request to amend the complaint in these circumstances.

B. The trial court did not abuse its discretion when it denied NLH's motion to amend because the amendment included an unrelated, new cause of action and did not cure a defect in the complaint.

The trial court correctly determined that NLH's proposed amendment raised an entirely new cause of action, so discretion weighed against allowing the amendment. *See Sanguedolce*, 164 N.H. at 647; *Tessier*, 162 N.H. at 340. NLH incorrectly argues that the test for whether an amendment states a new cause of action is whether the amendment is related to the claim originally asserted. NLH Brief at 46-52. The sole purpose of NLH's original complaint was to appeal a denial of a charitable tax exemption pursuant to RSA 72:23, V. NLH sought to amend its complaint to include a declaratory judgment claim predicated on a violation of the equal protection clauses of the federal and state constitutions.

There is only minimal overlap between the relevant laws, the evidence required, and the relief available under these claims. In *Coan*, the Court affirmed the trial court's denial of a motion to amend when the plaintiff sought to add an intentional tort claim to a complaint that originally sounded in negligence, although the claims were arguably related claims. 161 N.H. at 11. Here, as in *Coan*, NLH is seeking to add an entirely new cause of action. The Court's order denying NLH's motion to amend should be affirmed. *See also Sanguedolce*, 164 N.H. at 648 (reversing the trial court's finding that a defamation claim and a negligence claim arising from the same facts constituted the same cause of action). Unlike *Berlin Station, LLC v. Babcock & Wilcox Constr. Co.*, where the parties were going to be continuing to litigate some of the original claims when the motion to amend was granted, the case at bar was to conclude once Newport's motion for summary judgment was granted. No. 214-2014-CV-00014, 2015 N.H. Super. LEXIS 6., at *53 (N.H. Super. Ct. June 1, 2015). Further, one trial court's exercise of discretion is neither applicable nor controlling on another trial court's exercise of discretion.

If the merits of NLH's charitable tax exemption appeal could be considered, it would require evidence NLH satisfied the requirements of RSA 72:23, V and 72:23-*l*, including NLH's operations, financials, and use of its property. Newport's practices and procedures were not relevant to that claim, and other taxpayer's applications for exemption were irrelevant too. On the other hand, NLH's equal protection claim would have required examination of how Newport conducts its administrative and governmental functions, including allegations surrounding the conflict that Newport had with NLH's former attorney. NLH also alleged it is being treated

differently than other similarly situated taxpayers, so it would also be necessary to examine how other taxpayers are treated and the circumstances of their applications. These issues do not bear on whether NLH satisfies the requirements of RSA 72:23, V or 23-l.

This case is unlike *Kalil v. Town of Dummer Zoning Bd. of Adjustment*'s analysis of whether causes of action were the same for *res judicata* purposes, because in *Kalil,* there was only one factual difference between the inverse condemnation claim and the appeal from a zoning decision. 159 N.H. 725, 731 (2010). NLH's requested amendments will require many different factual issues to be considered and would change the scope of discovery, so the trial court properly found that the amendment contained new causes of action. *See Bennett,* 150 N.H. at 760 (affirming the denial of a motion to amend when the plaintiff sought to add allegations to existing claims that would require inquiry into evidence of things that happened prior to a fire that was the subject of the action, when the original complaint focused on evidence of what happened after the fire).

One of the primary purposes for allowing amendment is to "cure the defect in the writ." *Tessier*, 162 N.H. at 340. But where permitting an amendment would not cure the defect and save a claim from dismissal, amendment would be fruitless and may be properly denied. *Id*. at 340-41. When the trial court held that NLH's proposed amendment to add an equal protection claim would not cure a defect in the writ, it correctly found that adding an equal protection claim that calls for entirely different evidence and relief could not save the charitable tax exemption claim from dismissal. The effect of granting the amendment would be to substitute/replace a tax exemption appeal for a constitutional claim under the same case number.

NLH would not be entitled to a revival of its charitable tax exemption appeal even if it proved the constitutional claims. Instead, it would likely only be entitled to receive an application reminder.

C. NLH did not suffer injustice as a result of the denial of its motion to amend.

Although NLH argues that the trial court failed to consider whether the motion to amend should be granted to prevent injustice, the court did so when it applied the factors set forth in *Tessier* and considered whether the amendment would introduce a new cause of action, call for substantially different evidence, or cure a defect in the complaint. Add. 060-61. The Supreme Court developed the aforementioned factors for courts to consider when deciding whether an amendment is "necessary for the prevention of injustice" pursuant to RSA 514:9. *Tessier*, 162 N.H. at 340(listing the factors that courts consider when determining whether the amendment is necessary to prevent an injustice pursuant to RSA 514:9); *see also Clinical Lab Prods. v. Martina*, 121 N.H. 989 (1981)(stating factors courts consider when determining whether an amendment is necessary to prevent an injustice pursuant to RSA 514:9).

Although, NLH argued that it was unjustly treated differently than other similarly situated taxpayers when setting forth its arguments of why it had a viable cause of action, Apx. 271, this argument goes to whether NLH could state a viable claim, not whether an injustice would result if the request to amend was denied. *See, e.g., Mansfield v. Federal Sevs. Fin. Corp.*, 99 N.H. 352 (1955)(finding it permissible to allow an amendment when the plaintiff's complaint did not include an element of damages that

did not exist at the time the complaint was filed); *Morency v. Plourde*, 96 N.H. 344 (1950)(finding it permissible to allow an amendment when the complaint did not state the theory on which the plaintiff had relied on to prove his case).

This case is unlike *Sanguedolce*, where the Court reversed and remanded a denial of a motion to amend for further consideration by the superior court. 164 N.H. at 648. The superior court in *Sanguedolce* denied the request to amend the writ after finding that the amendment was futile because it would not cure a defect in the pleading since it was the same cause of action as the claim being dismissed. *Id.* On appeal, the Court found that the original defamation claim was different than the negligence claim in the requested amendment. *Id.* Because the Supreme Court disagreed with the legal reasoning of the superior court, it remanded the matter for further consideration of factors that the court had not considered when it decided whether the amendment was necessary to prevent an injustice. *Id.* But that is unnecessary here because NLH has not advanced any arguments that the superior court has not already considered when determining that the amendment is not necessary to prevent an injustice. Add. 061.

NLH would not suffer any injustice by the trial court's denial of the motion to amend. If NLH had a viable cause of action against Newport arising out of constitutional violations, for the reasons explained above, *res judicata* would not bar the claim (although there would likely be other reasons the claims would not be viable). Thus, NLH has not established that the trial court abused its discretion in denying its motion to amend.

It was unnecessary for the court to consider whether the requested amendment stated a viable cause of action after it already determined the

amendment was not necessary to prevent injustice. Courts may consider whether an amended claim is viable if it is not clear whether the plaintiff may otherwise suffer an injustice. *See Numerica Sav. Bank, F.S.B. v. Mountain Lodge Inn, Corp.*, 134 N.H. 505, 513 (1991) (affirming the denial of a motion to amend a complaint that included a count that did not assert a viable claim for relief). Although it was not necessary for the trial court to reach that issue, it could have also denied the motion to amend because the equal protection allegations failed to state a claim upon which relief could be granted.

NLH filed its claims of constitutional violation with a prayer for relief to resurrect its charitable tax exemption claim. Apx. 232, ¶ D. It is undisputed that NLH was never treated differently than similarly-situated taxpayers because NLH is part of a large class of taxpayers that has never previously been granted a charitable exemption by Newport. Valley Regional Hospital and other recognized charities received reminders to file the Form A-9 only because they had been granted a charitable tax exemption in the previous year. Apx. 205-15. NLH was not sent a reminder, and, as such, was treated the same as all other entities that had previously applied for an exemption but were denied. NLH did not allege Newport sent reminders to other entities that were denied an exemption in the prior year. Thus, NLH cannot show that it was treated differently than similarly-situated entities and, therefore could not state a viable claim for constitutional relief.

In order to assert a federal claim based on a so-called "class of one," NLH would have had to allege that it "ha[d] been intentionally treated differently from others similarly situated and that there [wa]s no rational

basis for the difference in treatment." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In order to state a claim for a "selective taxation" violation of the N.H. Constitution, NLH would have had to plead that Newport consciously and intentionally "select[ed] it out for discriminatory treatment by subjecting it to taxes not imposed on others of the same class" and that Newport had no rational basis for doing so. *See N. New Eng. Tel. Operations, LLC v. Concord*, 166 N.H. 653, 657 (2014). The fact that NLH did not allege (and cannot allege) these essential elements of a constitutional equal protection claim only reinforces the conclusion that the trial court did not abuse its discretion in denying NLH leave to amend its complaint.

CONCLUSION

As set forth above, there are no genuine issues of material fact and Newport is entitled to summary judgment as a matter of law. Further, it was not an abuse of discretion for the Superior Court to deny NLH's motion to amend its complaint. Therefore, this Court should affirm the Superior Court's decisions.

REQUEST FOR ORAL ARGUMENT

The Town of Newport respectfully requests fifteen minutes of oral argument before the full Court. Jamie N. Hage, Esq., will present oral argument for the appellee, Town of Newport.

DATED this 1st day of May 2020.

Respectfully submitted,

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Certification of Word Count

I hereby certify that in compliance with Rule 16(11) and according to a word count executed through the Microsoft Word software program, the foregoing Brief consists of 9,370 words, exclusive of pages containing the cover, table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.

/s/ Jamie N. Hage
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Certification of Service

I hereby certify that a copy of the foregoing Brief has on this 1st day of May 2020 been served on all counsel of record through the Court's electronic filing system.

/s/ Jamie N. Hage
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