STATE OF NEW HAMPSHIRE

SUPREME COURT

THE NEW LONDON HOSPITAL ASSOCIATION, INC.

v.

TOWN OF NEWPORT

No. 2019-0616

APPEAL FROM THE SULLIVAN COUNTY SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

BRIEF OF THE APPELLANT, THE NEW LONDON HOSPITAL ASSOCIATION, INC.

Matthew R. Johnson (No. 13076)
Lynnette V. Macomber (No. 271596)
DEVINE, MILLIMET & BRANCH, P.A.
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
mjohnson@devinemillimet.com
lmacomber@devinemillimet.com

March 23, 2020
Oral Argument by: Matthew Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

TEXT OF STATUTES AND RULES

RSA 71-B:11
In addition to where specifically provided by law, wherever the superior courts have jurisdiction to determine questions relating to taxation de novo, the taxpayer may elect to bring such questions before the board which shall determine the issue de novo. An election by a taxpayer to bring an action before the board shall be deemed a waiver of any right to bring an action in the superior court.

RSA 72:23
The following real estate and personal property shall, unless otherwise provided by statute, be exempt from taxation:
. . .

V. The buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established.

V-a. The real estate and personal property owned by any organization described in paragraphs I, II, III, IV or V of this section and occupied and used by another organization described in said paragraphs, but only to the extent that such real estate and personal property would be exempt from taxation under said paragraphs if such property were owned by the organization occupying and using the property, as long as any rental fee and repairs, charged by the owner, are not in clear excess of fair rental value.

VI. Every charitable organization or society, except those religious and educational organizations and societies whose real estate is exempt under the provisions of paragraphs III and IV, shall annually before June 1 file

with the municipality in which the property is located upon a form prescribed and provided by the board of tax and land appeals a statement of its financial condition for the preceding fiscal year and such other information as may be necessary to establish its status and eligibility for tax exemption.

VII. For the purposes of this section, the term "charitable" shall have the meaning set forth in RSA 72:23-l.

RSA 72:23-c

I. Every religious, educational and charitable organization, Grange, the Veterans of Foreign Wars, the American Legion, the Disabled American Veterans, the American National Red Cross and any other national veterans association 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 or assessors of the place where such real estate and personal property are taxable. If any such organization or corporation shall willfully neglect or refuse to file such list upon request therefor, the selectmen may deny the exemption. 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.

II. City assessors, boards of selectmen, and other officials having power to act under the provisions of this chapter to grant or deny tax exemptions to religious, educational, and charitable organizations shall have the authority to request such materials concerning the organization seeking exemption including its organizational documents, nature of membership, functions, property and the nature of that property, and such other information as shall be reasonably required to make

determinations of exemption of property under this chapter. Such information shall be provided within 30 days of a written request. Failure to provide information requested under this section shall result in a denial of exemption unless it is found that such requests were unreasonable.

RSA 72:34-a
Whenever the selectmen or assessors refuse to grant an applicant an exemption, deferral, or tax credit to which the applicant may be entitled under the provisions of RSA 72:23, 23-d, 23-e, 23-f, 23-g, 23-h, 23-i, 23-j, 23-k, 28, 28-b, 28-c, 29-a, 30, 31, 32, 35, 36-a, 37, 37-a, 37-b, 38-a, 38-b, 39-a, 39-b, 41, 42, 62, 66, or 70 the applicant may appeal in writing, on or before September 1 following the date of notice of tax under RSA 72:1-d, to the board of tax and land appeals or the superior court, which may order an exemption, deferral, or tax credit, or an abatement if a tax has been assessed.

RSA 514:9
Amendments in matters of substance may be permitted in any action, 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; but the rights of third persons shall not be affected thereby.

Super. Ct. R. 12
(a) *Motions to Amend.*

. . .

(3) Amendments in matters of substance may be made on such terms as justice may require.
(4) Amendments may be made to the Complaint or Answer upon the order of the court, at any time and on such terms as may be imposed.

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err as a matter of law when it granted the Town of Newport's Summary Judgment Motion regarding its denial of The New London Hospital Association, Inc.'s ("NLH") exemption application for Tax Year 2016?

Preserved by: NLH's Objection to Town of Newport's Motion for Summary Judgment, see Appendix to Appellant's Brief (hereinafter "Apx.") at 33-130; NLH's Motion to Supplement Objection, Apx. at 158-178.

2. Did the trial court err as a matter of law when it applied a deferential standard of review to NLH's charitable exemption application and held that the Town of Newport properly denied NLH's application for Tax Year 2016 because it was untimely?

Preserved by: NLH's Objection to Town of Newport's Motion for Summary Judgment, Apx. at 33-130; NLH's Motion to Supplement Objection, Apx. at 158-178.

3. Did the trial court err as a matter of law when it ruled that NLH waived its ability to argue on appeal that its late filing was due to "accident, mistake or misfortune" as allowed under RSA 72:23-c because NLH did not argue that its late

filing was due to "accident, mistake or misfortune" to the board of selectmen?

Preserved by: NLH's Objection to Town of Newport's Motion for Summary Judgment, Apx. at 33-130.

4. Did the trial court err as a matter of law when it denied NLH's Motion to Amend Complaint?

Preserved by: NLH's Motion to Amend Complaint (Sept. 28, 2018), Apx. at 192-198; NLH's Motion to Reconsider Order denying Motion to Amend, Apx. at 253-260.

5. Did the trial court err as a matter of law when it denied NLH's Motion to Reconsider Order on Motion to Amend Complaint?

Preserved by: NLH's Motion to Reconsider Order denying Motion to Amend, Apx. at 253-260; NLH's Reply to Town of Newport's Objection, Apx. at 269-273.

STANDARDS OF REVIEW

Summary Judgment

"We review the trial court's grant of summary judgment by considering the affidavits and other evidence, and the inferences properly drawn from them, in the light most favorable to the non-moving party." Beckles v. Madden, 160 N.H. 118, 122-131 (2010) (reversing trial court's grant of summary judgment). "Our task is to review de novo the summary judgment record in the light most favorable to the plaintiffs to determine whether genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id. at 125-26.

Motion to Amend Complaint

"Whether to allow a party to amend his or her pleadings rests in the sound discretion of the trial court, and we will not disturb the trial court's decision absent an unsustainable exercise of discretion." Sanguedolce v. Wolfe, 164 N.H. 644, 648-49 (2013) (reversing denial of motion to amend). The same standard is applied to a Motion for Reconsideration. See Riso v. Riso, 172 N.H. 173, 177 (2019).

"When we determine whether a ruling made by a judge is a proper exercise of judicial discretion, we are really deciding whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." In the Matter of Silva & Silva, 171 N.H. 1, 4 (2018).

STATEMENT OF THE CASE

This appeal arises from the Town of Newport's ("Town") denial of a charitable tax exemption for The New London Hospital Association, Inc. ("NLH"), for the 2016 Tax Year (April 1, 2016, to March 31, 2017) on the basis that NLH's exemption application to the Town was purportedly untimely and because of the Town's view that the level of charity care provided by NLH "is very small and it is a fee for service operation." Apx. at 4 (fn1). NLH timely appealed the Town's denial to the superior court pursuant to RSA 72:34-a. Apx. at 193, 217-232.

The Town moved for summary judgment on the technical basis that Town never "received" NLH's exemption application because NLH had submitted its BTLA A-9 form to the Town one month after the April 15 deadline prescribed by RSA 72:23-c, I. See Apx. at 3-32. NLH objected, arguing (i) that the Town had received the application and waived the untimeliness because the Town had ruled on the merits of NLH's application; (ii) its untimely filing was due to accident, mistake, or misfortune (see RSA 72:23-c, I); (iii) that regardless of the untimely BTLA A-9 form, other aspects of NLH's application were timely (such as the BTLA A-12, due June 1 pursuant to RSA 72:23, VI), and the trial court should have considered evidence of accident, mistake, or misfortune

in its de novo review of NLH's entitlement to the exemption pursuant to RSA 72:34-a. See Apx. at 33-130.

NLH's arguments as to accident, mistake, and misfortune were bolstered by the evidence it obtained in discovery: that the Town sends annual notices to charitable entities reminding them of the April 15 deadline for the BTLA A-9, yet, with knowledge that NLH was seeking the exemption, it skipped NLH. This disparate treatment of similarly-situated applicants caused NLH to file a motion to amend its complaint (Apx. at 192-232) to add a declaratory relief claim for violation of its equal protection rights. While NLH's motion to amend was pending, the trial court granted the Town's summary judgment motion. Addendum (hereinafter "Add.") at 56-59.

Although discovery had hardly begun, and it was NLH's first request to amend its Complaint, the trial court denied NLH's motion. Add. at 60-61. NLH moved for reconsideration, but the trial court upheld its ruling. Add. at 62.

NLH now appeals to this Court.

STATEMENT OF THE FACTS

The New London Hospital Association, Inc. ("NLH") was and is a New Hampshire non-profit corporation exempt from federal income taxation under 501(c)(3) of the Internal Revenue Code. Apx. at 34, 53. NLH was and is registered with the New Hampshire Charitable Trust Division. Id.

NLH owns and operates the Newport Health Center in Newport, NH, which is located in a former shopping center at 11 John Stark Highway in Newport. Apx. at 34, 54. NLH has operated the Newport Health Center since the Newport Hospital closed in 1991. Id. NLH leased the space for the Newport Health Center for many years. Id. It purchased the property in 2012. Id.

The Newport Health Center is classified pursuant to federal law as a Rural Health Clinic, making it part of a federal policy initiative to address a shortage of primary care and other physicians in rural areas. Id. As of April 1, 2016 (as well as prior tax years), NLH occupied and used the Newport Health Center for charitable purposes by providing a range of health care services without regard for patients' ability to pay, and other uses directly related to its charitable purpose. See Apx. at 20-23; 219-222.

In 2014, Lisa Cohen became employed as the controller and vice president of financial services at NLH. Apx. at 34, 53. That same year, she first contacted the Town of Newport

asking what is required for NLH to apply for a charitable tax exemption for the Newport Health Center. Apx. at 54, 59-60. Ms. Cohen was informed her application would need to include the "BTLA 9 and BTLA 12", as well as NLH's "Articles of Incorporation, by-laws, copies of all leases for the property, and a statement as to why they feel they qualify for the exemption." Id.

In Tax Year 2015 (April 1, 2015 – March 31, 2016), NLH first applied for a charitable tax exemption.[1] Apx. at 54. Ms. Cohen submitted the BTLA A-9 form to Newport on or about April 6, 2015. Id. Based on her experience with federal tax exemptions and the fact that the Town did not inform her that the filing requirement needed to be done annually, Ms. Cohen assumed the New Hampshire charitable exemption for real estate functions similar to federal income tax exemption filings, which an entity need only file once and which relates back to the original date of entity formation or filing once approved by the federal Internal Revenue Service. See id.

---

[1] Although this appeal pertains to the 2016 Tax Year, the circumstances of NLH's 2015 Tax Year application played a role in the 2016 Tax Year. The 2015, 2017, and 2018 tax year appeals were recently consolidated by the trial court and are still pending resolution. See 220-2016-CV-00108 (2015 Tax Year); 220-2018-CV-00111 (2017 Tax Year); and 220-2019-CV-00105 (2018 Tax Year).

In response to NLH's application for an exemption in Tax Year 2015, the Town sent a letter dated June 29, 2015, requesting a significant amount of additional information. Apx. at 54, 61-63. The letter noted a 30-day deadline for response, and although Ms. Cohen attempted to seek clarifying information, the Town was unresponsive until July 29, 2015, by which time NLH had answered the Town's requests as best it could with the assistance of NLH's longstanding general counsel, Attorney Mark McCue. Apx. at 54-55, 64-69. The Town acknowledged receipt of NLH's "information packet", apologized for not responding earlier, and stated "[w]e will begin reviewing your materials and let you know if we have any further questions." Apx. at 65.

However, on October 6, 2015, the Town sent a four-sentence letter stating that the Town's Board of Selectmen had denied NLH's 2015 charitable exemption application. Apx. at 55, 71. The letter did not explain the basis for the denial.[2] See id.

---

[2] NLH later learned through the parties' summary judgment briefings in the 2015 Tax Year appeal (220-2016-CV-00108) that the Town in fact applied none of the factors required for analysis of whether NLH is entitled to an exemption: "The selectmen who made the decision to tax are not lawyers or judges. They did not analyze NLH in light of the ElderTrust factors; they just knew there hadn't been much charity going on at the clinic in Newport and it didn't seem like NLH was at all charitable." Apx. at 185, 190 (fn10).

NLH CEO Bruce King wrote the new Newport Town Manager pointing out that the denial letter contained no rationale and the public meeting minutes "indicate[] there was no substantive discussion concerning the denial." Apx. at 55, 73. Mr. King wrote that NLH is confident that it "meet[s] or exceed[s]" all of the statutory and legal requirements for a charitable real estate exemption, that NLH intended to "pursue this further legally", but requested a meeting with the Town "as a first step." Id. That meeting eventually took place in May 2016, but only after NLH had been forced to retain new counsel. Apx at 57.

On March 24, 2016, NLH received notification from its general counsel that due to a conflict of interest that Newport would not waive, his firm could no longer represent NLH with respect to its exemption request. Apx. at 55. As such, just three weeks before the 2016 Tax Year BTLA Form A-9 came due (April 15, 2016), NLH was left without its longstanding legal counsel, whom it had worked with to date on the Newport exemption issue. Id. NLH retained new counsel in early April of 2016, who due to scheduling considerations, was unable to meet with Attorney McCue about the background of the dispute and "hand off" issues until Monday, April 18, 2016. Apx. at 55-56. Thus, from March 24, 2016, through the due date of the 2016 Tax Year BTLA A-

9, NLH was effectively unrepresented, and then, in a period of transition to new counsel.[3] Id.

NLH never received any advance notice or reminder prior to the April 15, 2016 deadline for filing the BTLA Form A-9. Apx. at 56. Had it received a reminder, it would have timely filed the BTLA A-9. Id. Although NLH was not aware of it at the time, on or about March 1-10 of each year, the Town of Newport sends reminder letters out to "all Town of Newport property owners who claim tax exempt status" reminding them of the BTLA A-9 and BTLA A-12 deadlines (April 15 and June 1, respectively). Apx. at 196-97, 201, 203-4. NLH did not receive this reminder, although Valley Regional Hospital, another medical provider in Newport, did. Apx. at 56. NLH only learned it was omitted from the Town's reminder list through discovery. Apx. at 193-95. NLH was omitted despite the Town's awareness that NLH intended to

---

[3] Compounding the effect of NLH losing its general counsel is the fact that NLH is a small, non-profit critical care access hospital, and each staff member has many responsibilities; Ms. Cohen's role involves oversight of numerous tasks including accounts payable, payroll, accounting, tax and bond-related issues, filing of the federal Form 990 each year, satisfying state Medicaid Enhancement Tax filing requirements, preparing NLH's annual budget, and handling financial and other issues related to the construction of the new Newport Health Center building, which was ongoing during the time period in question. Apx. at 53-54.

pursue the exemption.[4] Additionally, the Town's assessor made a visit to NLH's property on April 6, 2016 for assessing purposes, later more than doubling NLH's tax assessment for the Newport Health Center.[5] The assessor offered no reminder during his visit. Apx. at 56.

NLH filed its 2016 Tax Year BTLA A-9 with the Town on May 19, 2016. Id. Although the Town would later deny NLH's exemption in part due to untimeliness, documents obtained in discovery reflect that the Town was still contacting entities on its reminder list to follow up on the BTLA A-9 "as of 5/19/16". See Apx. at 212 (reflecting that the Town contacted Tekoa Missions by letter, and left a message with Newport Youth Activities). To be clear: the Town was affirmatively contacting entities that it favored to obtain documents at the time it claims NLH's BTLA A-9 was filed untimely.

On May 23, 2016, NLH timely filed its BTLA A-12 with the Town. Apx. at 18. The BTLA A-12 is not due until June 1st. See RSA 72:23, VI; Apx. at 204.

---

[4] The Town knew that (i) NLH had filed for the exemption in 2015; (ii) had written the Town that it intended to continue to pursue the exemption "further legally"; and (iii) Bruce King (CEO of NLH) had requested a meeting with the Town to discuss the exemption. See Apx. at 54-57.

[5] Presumably due to the ongoing construction of a new replacement facility, see Apx. at 56.

On May 26, 2016, NLH's CEO Bruce King, Lisa Cohen, and counsel met with representatives of the Town and its counsel. Apx at 57. The meeting lasted several hours during which NLH answered wide-ranging questions from the Town. Id. The Town made additional document requests at the meeting, in response to which NLH produced a large batch of documents on July 20, 2016. Id. NLH heard nothing further from the Town, and filed suit in the superior court in August 2016, appealing the 2015 Tax Year denial. Id. Meanwhile, the Town's board of selectmen held near-weekly meetings without rejecting NLH's 2016 Tax Year exemption application or raising alleged timeliness concerns. Id. At the August 1, 2016 meeting, the Town Manager reported on three taxpayers that had filed for charitable exemptions, including NLH, and that the Town's attorney and tax assessor had reviewed each. Apx. at 57, 86.

On September 7, 2016, NLH learned that at the Board meeting of August 29, 2016, the selectmen had "moved to deny [its] 2016 application for charitable exemption." Apx. at 57, 89. 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."

Apx. at 29. No mention was made of Tekoa Missions' application being untimely. Apx. at 29, 212.

The Town did not receive its final tax rate from the New Hampshire Department of Revenue until November 10, 2016. See RSA 72:23-c (allowing selectmen to receive an untimely application until the local tax rate has been set for the year); Apx. at 57, 96. NLH timely appealed the Town's denial. Apx. at 193. Pursuant to the Structuring Order, discovery closed on March 15, 2019, and the parties requested a May 2019 trial. Id.

The Town moved for summary judgment on June 5, 2018. Apx. at 3, 16. NLH filed its objection to the Town's motion and propounded an interrogatory and document request asking the Town to describe its practice of providing reminders to applicants seeking charitable exemptions and to produce relevant documents. Apx. at 194. On August 23, 2018, the Town answered NLH's interrogatory and produced documents including the lists associated with the annual reminders. See Apx. at 194, 200-215. In light of this information, NLH moved to amend its complaint for the first time in the case. Apx. at 192-232.

The trial court granted the Town's motion for summary judgment on April 16, 2019, and denied NLH's motion to amend on August 8, 2019. Add. at 59, 61.

NLH respectfully appeals.

SUMMARY OF THE ARGUMENT

The trial court's refusal to consider NLH's argument that its untimely filing of the BTLA A-9 was (i) waived by the Town when it ruled on the merits of NLH's application, and (ii) due to accident, mistake, or misfortune, was error because NLH's appeal to the trial court under RSA 72:34-a requires a de novo review of NLH's entitlement to the exemption. In ruling on the Town's motion for summary judgment, the court failed to view the facts in the light most favorable to NLH, and failed to draw reasonable inferences in NLH's favor. Instead, it ruled as a matter of law that because NLH had not raised accident, mistake, or misfortune to the selectmen, the selectmen "properly" denied its exemption application and NLH "waived" its right to make this argument before the trial court.

This Court should reverse the trial court for several reasons: (i) it gave deference to the findings and rulings of the selectmen, which is not the proper standard of review under RSA 72:34-a (requiring de novo review); (ii) it made a finding unsupported by the evidence: that NLH had waived the accident, mistake, or misfortune argument; and (iii) it rejected NLH's argument – supported by both facts and inferences that must be viewed in the light most favorable to NLH – that the Town had received NLH's application and ruled on its merits, thereby waiving the untimeliness of the BTLA A-9.

The trial court compounded this error by refusing to allow NLH to amend its complaint for the first time, in light of new information obtained through discovery. New Hampshire law provides for liberal amendment of pleadings, and the trial court's refusal to allow NLH to amend its Complaint under these circumstances constitutes an unsustainable exercise of discretion.

This Court should reverse both of the erroneous decisions made by the trial court, and remand for a determination of NLH's claims on their merits.

ARGUMENT

I. The Trial Court Erred in Granting Summary Judgment.

NLH should not be foreclosed from seeking a charitable tax exemption solely on the technical basis that it filed a BTLA A-9 form one month late – but prior to other deadlines required for the exemption application – where it can readily establish that the insignificant delay was due to accident, mistake, or misfortune, and the Town of Newport nevertheless ruled on the merits of NLH's application months later. This Court should reverse the trial court's grant of summary judgment to the Town and permit NLH to proceed with its appeal.

RSA 72:23, V exempts from taxation:

> The buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established.

In evaluating whether an institution should be granted an exemption under RSA 72:23, V, the court must apply the four-factor test articulated in ElderTrust of Fla. v. Town of Epsom, 154 N.H. 693, 697-98 (2007) ("the ElderTrust

factors."). Marist Bros. of N.H. v. Town of Effingham, 171 N.H. 305, 310-311 (2018). The taxpayer bears the burden of establishing entitlement to a charitable tax exemption. Id. at 311. However, in this case, NLH was deprived of the opportunity to show that it meets all four ElderTrust factors: instead, the trial court improperly granted the Town of Newport's motion for summary judgment by finding that NLH had waived its ability to make certain arguments[6] that were not made to the Town prior to NLH filing its appeal pursuant to RSA 72:34-a. This was error.

The trial court erred by: (i) failing to apply a de novo standard of review of NLH's entitlement to the charitable exemption under RSA 72:34-a; (ii) finding that the Town had never "received" NLH's application for exemption where only one aspect of the multi-part filing was untimely, despite the Town ruling on the merits months later; (iii) holding that it lacked jurisdiction to decide whether the untimely filing was a result of accident, mistake, or misfortune where the issue had not been considered by the selectmen; and (iv) finding that NLH had "waived" the argument of accident, mistake, or misfortune by not raising it with the selectmen.

---

6 Specifically, that the one-month delay in its filing of the BTLA A-9 form was due to accident, mistake, or misfortune.

This Court should reverse the trial court's grant of summary judgment because it was based on an improper analysis of the applicable law and facts, and a genuine dispute of material fact remains as to whether NLH is entitled to a charitable tax exemption.

A. The Trial Court Erred in Holding that the Town of Newport "properly denied" NLH's Charitable Tax Exemption Based on "untimely filing" Because the Court's Review is De Novo.

The trial court failed to apply a de novo standard of review to NLH's appeal. This is apparent from the court's holding that the Town "properly denied NLHA's exemption application for Tax Year 2016 because it was untimely." Add. at 56-59. It is also clear from the court's wholesale refusal to consider whether "accident, mistake, or misfortune" caused NLH's one-month delay in submitting its BTLA A-9 form to the Town, finding that NLH "waived that issue" for purposes of its RSA 72:34-a appeal because it had not affirmatively tried to argue accident, mistake, or misfortune to the board of selectmen.[7] Add. at 58-59. These findings improperly

---

[7] Notably, RSA 72:23-c, I, does not require a specific mechanism or process – or timeframe - by which an entity must raise "accident, mistake, or misfortune" with the selectmen. On the other hand, RSA 72:23-c, II grants the selectmen "authority to request such materials concerning

applied a deferential standard to the Town's review of NLH's exemption application, and improperly shifted the burden to NLH on the Town's Motion for Summary Judgment by not construing the facts in the light most favorable to NLH as the non-moving party. Had the trial court applied the correct standard, it would have found that a genuine dispute of material fact exists as to whether NLH's one-month-late filing of the BTLA A-9 was, or should be excused due to accident, mistake, or misfortune.

Instead, the trial court entirely refused to consider NLH's argument that its one-month-late submission of the BTLA A-9 form was due to accident, mistake, or misfortune. In doing so, the trial court ignored its obligation to conduct a de novo review of NLH's exemption application.

RSA 72:34-a provides:

> Whenever the selectmen or assessors refuse to grant an applicant an exemption . . . to which the applicant may be entitled under the provisions of RSA 72:23, . . . the applicant may appeal in writing, on or before September 1 following the date of notice of tax under RSA 72:1-d, to the board of tax and land appeals or the superior court, which may

---

the organization seeking exemption including its organizational documents, nature of membership, functions, property and the nature of that property, and such other information as shall be reasonably required to make determinations of exemption of property under this chapter."

> order an exemption, deferral, or tax credit, or an abatement if a tax has been assessed.

This Court has said that "[i]n property tax appeals, the board [of tax and land appeals] has original concurrent jurisdiction with the superior court to determine questions relating to taxation de novo." In re Land Acquisition, LLC, 145 N.H. 492, 494 (2000) (superseded on other grounds by statute as recognized in In re Hardy, 154 N.H. 805, 818 (2007)).

At least one superior court has interpreted this statute as providing for de novo review conferring discretion on superior courts to order an exemption. See 319 Vaughan Street Center, LLC v. City of Portsmouth, 218-2014-CV-00924 (Delker, J.) (Rockingham Super. Ct. Oct. 5, 2014), pp. 6-7 ("Like the BTLA, the superior court may receive additional evidence and weigh the evidence without deference to other authorities"), Apx. at 106-08. As identified by the court in 319 Vaughan Street, the BTLA interprets the statute to allow for de novo review. Id., p.6 (Apx. at 107); RSA 71-B:11 ("wherever the superior courts have jurisdiction to determine questions relating to taxation de novo, the taxpayer may elect to bring such questions before the board which shall determine the issue de novo.").

Thus, the trial court's review of an exemption application under RSA 72:34-a is de novo, and the trial court in this case applied the incorrect standard when it refused to

consider NLH's evidence of accident, mistake, and/or misfortune.

This was error, because the trial court had an obligation to consider that evidence as part of its de novo review, as well as an obligation to construe all facts and inferences in the light most favorable to NLH in ruling on the Town's Motion for Summary Judgment. NLH provided ample evidence that the delayed filing of the BTLA A-9 was a result of accident, mistake, and/or misfortune, but the trial court refused to consider this evidence and instead made a finding of waiver against NLH. In so ruling, it improperly constrained itself to only considering evidence that was presented to the Town's selectmen. See, e.g., 319 Vaughan Street at p.7 (Apx. at 108) (The trial court "need not defer to the tax assessor's factual findings or confine its review to a particular record.").

In interpreting the charitable tax exemption statutes, this Court has repeatedly stated that "the legislative purpose to encourage charitable institutions is not to be thwarted by a strained, over-technical and unnecessary construction." Marist Bros. of N.H. v. Town of Effingham, 171 N.H. 305, 310 (2018) (quoting Town of Peterborough v. MacDowell Colony, 157 N.H. 1, 5 (2008)); Young Women's Christian Ass'n v. Portsmouth, 89 N.H. 40, 42 (1937). The trial court's task in deciding whether an institution should be granted an exemption under RSA 72:23, V, is to apply the four-factor test

articulated in ElderTrust of Fla. V. Town of Epsom, 154 N.H. 693, 697-98 (2007) (the "ElderTrust factors").

The trial court had jurisdiction to decide – and therefore an obligation to decide – whether NLH is entitled to the exemption under RSA 72:23, V, including a determination of whether the one-month-late filing of the BTLA A-9 forecloses any appeal where NLH offered credible evidence of accident, mistake, and/or misfortune, and utter lack of prejudice to the Town of Newport. The Town's, and the trial court's, construction of the charitable tax exemption statutes is exactly the type of "strained, over-technical and unnecessary construction" that thwarts the legislative purpose of the charitable tax exemption.

B. The Trial Court Granted Summary Judgment Based on an Incorrect Legal and Factual Premise.

The Town argued below that NLH's application "could not be received" due to the late filing of the BTLA A-9, and thus, the trial court lacked jurisdiction. Apx. at 4. Erroneously, the trial court not only adopted this position, but further held that NLH had "waived" its accident, mistake, or misfortune argument (see Add. at 59), even though the Town did not argue waiver; it merely argued NLH's delay meant that the Town could not have "received" NLH's application. Apx. at 4. There is no factual or legal support for the trial court's finding that NLH waived its right to assert

that its one-month late filing of the BTLA A-9 was or should be excused due to accident, mistake, or misfortune.

i. The Trial Court Improperly Found that NLH Waived its Right to Argue Accident, Mistake, or Misfortune.

"A finding of waiver must be based upon an intention expressed in explicit language to forego a right, or upon conduct under the circumstances justifying an inference of a relinquishment of it." So. Willow Properties v. Burlington Coat Factory of N.H., 159 N.H. 494, 499 (2009); N. Country Envtl. Servs. v. Town of Bethlehem, 146 N.H. 348, 354 (2001).

The trial court's decision was clearly erroneous because NLH neither (i) used express language to relinquish an opportunity to explain its late filing, nor (ii) exhibited conduct consistent with a finding that NLH was relinquishing any arguments related to why it is entitled to an exemption. The facts demonstrate the opposite: that NLH intended to continue pursuit of the exemption, and reasonably believed the Town "received" its exemption application. The Town received NLH's BTLA A-9 on May 19, 2016, met with NLH at the Town offices on May 26, 2016, and then waited over three months before notifying NLH that the board of selectmen "moved to deny" the 2016 application. Apx. at 56-57. There is no dispute that NLH timely submitted its BTLA A-12. Apx. at 18; see RSA 72:23, VI (requiring same before June 1st).

NLH's conduct was consistent with NLH's understanding the Town received NLH's application and would contact NLH if it required further information, as it had in Tax Year 2015. Apx. at 54-55. See RSA 72:23-c, II.

Furthermore, the trial court based its ruling on the statutory language of RSA 72:23-c. In matters of statutory interpretation, this Court is "the final arbiter of legislative intent as expressed in the words of the statute considered as a whole." Town of Peterborough v. MacDowell Colony, Inc., 157 N.H. 1, 5 (2008). Accordingly, the trial court's decision must be overturned if the court "misapprehended or misapplied the law." Id. Not only did the trial court misapply RSA 72:34-a in finding that NLH waived its right to argue accident, mistake, or misfortune, but it also misapplied RSA 72:23-c to the facts of this case. RSA 72:23-c states that the selectmen "may deny" an exemption if the organization "shall willfully neglect or refuse to file such list [the BTLA A-9] upon request therefor". It does not state that the selectmen *shall* deny an exemption under these circumstances, and no construction of the relevant facts, particularly at the summary judgment phase, could lead to the conclusion that NLH "willfully" neglected or refused to file its BTLA A-9 "upon request".

The Town never requested the form from NLH, through a reminder notice or otherwise, and NLH nevertheless filed

the form prior to the June 1st deadline for the BTLA A-12. Apx. at 17-18. The only unassailable deadline in RSA 72:23-c is that "no such application shall be received or exemption granted after the local tax rate has been approved for that year". Newport's tax rate for 2016 was approved on November 10, 2016 – more than five months after NLH completed its application by submitting the BTLA A-12 on May 23, 2016. Apx. at 18, 57, 96.

The trial court's sua sponte finding that NLH waived its ability to argue accident, mistake, or misfortune is even more improper because summary judgment should rarely issue on questions involving state of mind or intent; courts "must be exceptionally cautious in granting *brevis* disposition in such cases[.]" Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 764 (1st Cir. 1994); see also Concord Group Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991).

No construction of RSA 72:23-c, or the facts in this case, support the trial court's conclusion that NLH waived its ability to argue accident, mistake, or misfortune as a matter of law with respect to the untimely BTLA A-9, and the grant of summary judgment on this basis must be reversed.

ii. The Town "Received" NLH's Exemption Application and Voted on its Merits.

Moreover, the Town's conduct created a reasonable impression that it had, in fact, "received" NLH's exemption

application and voted on its merits. Viewing the facts in the light most favorable to NLH, it is the Town's conduct – not NLH's – that demonstrates facts consistent with waiver.

First, the Town itself noted NLH's BTLA A-9 was "received" on May 19, 2016, on the reminder notice checklist from which NLH was omitted. Apx. at 212. Notations on that document indicate that the Town was still contacting entities to obtain the same information "as of 5/19/16". See id. The undisputed factual record demonstrates that the Town physically received NLH's application without qualification or reservation for several months. See, e.g., In re Momenta, Inc., 455 B.R. 353, 358 (Bankr. NH 2011) (defining "received" as "taking physical possession.").

Second, the Town met with NLH at its offices on May 26, 2016 - one week after receiving the 2016 BTLA A-9, and three days after receiving the 2016 BTLA A-12. Apx. at 18, 56-57. It asked multiple questions of NLH at the meeting relating to the charitable tax exemption issue, yet never notified NLH that it had rejected or would not be "receiving" the 2016 A9. Apx. at 57. More importantly, the Town's questions were consistent with a review of NLH's application on the merits. It also requested production of several documents, which NLH submitted to the Town on July 20, 2016. Id.

Third, the Town's selectmen unequivocally voted on the merits of NLH's application when they stated in the record that "the level of charity care provided by the hospital is very small and it is a fee for service operation." Apx. at 29.

The Town never sought information as to why NLH's BTLA A-9 was one month delayed, although RSA 72:23-c specifically permits it to request such information "as shall be reasonably required to make determinations of exemption of property under this chapter." RSA 72:23-c, II. Where a town fails "to explore or decide [the issue of accident, mistake or misfortune]," the reviewing authority "must base its own decision on whether the [taxpayer's] failure to file its exemption request with the Town by the April 15 deadline prescribed by the statute should have been excused under this test." Society for the Preservation of Rockwood Pond, 2003 N.H. Tax LEXIS 4, *11 (N.H. BTLA April 7, 2003).

The Town's argument that the selectmen could not "receive" NLH's application as a matter of law, because NLH did not affirmatively mention accident, mistake, or misfortune when submitting either the BTLA A-9 or BTLA A-12, is based on an overly strained reading of RSA 72:23-c that is exactly what this Court has cautioned against. Marist Bros. of N.H., 171 N.H. at 310; Young Women's Christian Ass'n v. Portsmouth, 89 N.H. at 42; see also Union Congregational Church v. Town of Wakefield, 2018 N.H. Tax LEXIS 14, *5-*6

(N.H. BTLA Feb. 23, 2018) (recognizing non-technical construction of statute in course of a decision excusing a late A9 filing) (Apx. at 127-30).

The selectmen could have found that NLH's one-month-late submission was due to accident, mistake, or misfortune simply based on the late filing itself in light of NLH's otherwise diligent pursuit of the exemption. Their apparent failure to consider whether NLH "willfully neglect[ed] or refused" to file its BTLA A-9, or whether the slight delay was a result of accident, mistake, or misfortune (while nevertheless ruling on the merits of NLH's application), should not foreclose the trial court's ability to consider that evidence in the context of NLH's appeal. If the legislature intended to limit the parameters of an RSA 72:34-a appeal by way of 72:23-c, it would have created a different legislative scheme. Instead, this Court has repeatedly interpreted these statutes consistent with the legislative purpose of encouraging charitable institutions. Marist Bros. of N.H., 171 N.H. at 310.

C. NLH Offered Significant, Credible Evidence that its Late Filing of the BTLA A-9 was Due to Accident, Mistake, and/or Misfortune.

In its objection to the Town's motion for summary judgment, and in a subsequent supplemental filing based on the Town's discovery responses, NLH raised substantial, credible evidence that its BTLA A-9 was filed late due to

accident, mistake, and/or misfortune, based on circumstances outside of NLH's control. See Apx. at 43-49, 158-60. At a minimum, NLH demonstrated that a genuine dispute of material fact exists as to whether the Town did excuse the late filing by ruling on the merits or that the late filing was due to accident, mistake, or misfortune.

Specifically, at the time when the BTLA A-9 was coming due on April 15, 2016: (i) NLH was a small non-profit and its controller (Ms. Cohen) bore many responsibilities[8]; (ii) NLH had just lost its longstanding general counsel which the Town knew because it had refused to waive the conflict; (iii) the Town was aware that NLH intended to pursue the exemption issue further; (iv) the Town and its assessor had fielded and responded to a request from NLH about "what was required" to seek the exemption, and (v) the Town did not notify or

---

[8] See, e.g., Sanbornville United Methodist Church v. Town of Wakefield, 2018 N.H. Tax LEXIS 12, *4-5 (N.H. BTLA Feb. 23, 2018) (Apx. at 123-26) (excusing untimely-filed BTLA A-9 due to non-technical nature of exemption statute and the fact that "the church is very small", that earlier in the year the treasurer "had a broken hip and needed multiple surgeries," and the taxpayer's "positions were filled by unpaid volunteers who were wearing 'many hats'"); Union Congregational Church v. Town of Wakefield, 2018 N.H. Tax LEXIS 14, *5-*6 (Feb. 23, 2018) (Apx. at 127-30) (excusing untimely-filed BTLA A-9 because the treasurer of the church had to travel for family health issues and did not "willfully neglect" to file the A9).

remind NLH of the annual A9 filing requirement, even though the Town had given advance notice of the annual A9 filing requirement to at least one other similarly situated hospital. See Apx. at 55-57.

Additionally, representatives of NLH met with the Town at the Town offices on May 26, 2016 in relation to the exemption. Because the Town had already denied NLH's 2015 Tax Year application at that time, the Town's conduct of May 26, 2016 is consistent with a finding that it received NLH's 2016 Tax Year application despite the untimely BTLA A-9, and was considering it on the merits.

It would be inequitable to affirm summary judgment in the Town's favor on untimeliness grounds when the Town administers the filing deadline in a way that favored certain applicants, but excluded NLH. The fact that the Town interrupted NLH's attorney relationship on the eve of the April 15 filing deadline only compounds the inequity. Moreover, it is suspect that the Town claims it never "received" NLH's charitable exemption application when it continued to request documents related to the exemption. Apx. at 57.

The Town then failed to have any further contact with NLH despite NLH's clear intent to work with the Town. Eventually the Town moved to deny the exemption, in part due to untimeliness (due to circumstances beyond NLH's control, of which the Town was aware and helped create) and

because of the selectmen's determination that "the level of charity care provided by the hospital is very small and it is a fee for service operation." Apx. at 29. That is a ruling on the merits.

Based on all of these facts, summary judgment should have been denied: it is clear NLH's marginally late filing of the BTLA A-9 was not "willful[] neglect" or "refus[al]", see RSA 72:23-c, I, and in any event, its application was complete before June 1st, when the BTLA A-12 came due, see RSA 72:23, VI. Nothing in the language of RSA 72:23-c prohibits the trial court from considering NLH's credible evidence of accident, mistake, or misfortune, and given the legislative purpose of the charitable tax exemption statute – to encourage charitable institutions – NLH's appeal should not be "thwarted by a strained, over-technical and unnecessary construction", such as the trial court applied in this case. Marist Bros. of N.H., 171 N.H. at 310.

The decision should be reversed.

II. The Trial Court Erred in Denying NLH's Motion to Amend its Complaint.

In New Hampshire, the well-established rule is that amendment of pleadings is liberally permitted. Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 729 (2010). The decision to grant or deny a motion to amend is

within the discretion of the trial court. Sanguedolce v. Wolfe, 164 N.H. 644, 648 (2013); Kalil, 725 N.H. at 729. The standard of review on appeal is whether the trial court unsustainably exercised its discretion.[9] Sanguedolce, 164 N.H. at 648. This Court has repeatedly emphasized the importance of justice over procedural technicalities. Kalil, 725 N.H. at 729; Whitaker v. L.A. Drew, 149 N.H. 55, 59 (2003).

NLH was denied justice when the trial court denied its motion to amend its complaint, for the first time, based on new information NLH obtained from the Town through discovery. The trial court's decision is contrary to New Hampshire law allowing liberal amendment, is an unsustainable exercise of discretion, and should be reversed.

A. New Hampshire Law Favors Liberal Amendment.

RSA 514:9 provides:

> Amendments in matters of substance may be permitted in any action, 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; but the rights of third persons shall not be affected thereby.

---

[9] The Court applies the same standard in reviewing the denial of a Motion to Reconsider. Riso v. Riso, 172 N.H. 173, 177 (2019).

It has long been the law of New Hampshire that "when no injustice will be done by an amendment, and great injustice will be done without it, the court cannot refuse to administer the law enacted by the legislature for such a case." Stebbins v. Lancashire Ins. Co., 59 N.H. 143, 148 (1879).

The New Hampshire Superior Court Rules similarly provide that "[a]mendments in matters of substance may be made on such terms as justice may require." Super Ct. R. 12(a)(3). "Amendments may be made to the Complaint . . . upon order of the Court, at any time and on such terms as may be imposed." Super. Ct. R. 12(a)(4). "As a general rule, New Hampshire permits liberal amendments of pleading." Berlin Station, LLC v. Babcock & Wilcox Constr. Co., 2015 N.H. Super. LEXIS 6, *53 (Merrimack Super. June 1, 2015) (McNamara, J.) (granting motion to amend, in part because "[t]he proposed allegations relate to the same claims which have been joined by the parties already . . . [t]he parties have yet to take a deposition . . . and the Court believes that the interest of justice requires that the Amendment be allowed.").

Similar to Berlin Station, NLH's proposed allegations relate to the same claim it already brought – that the Town improperly prevented it from receiving a charitable tax exemption – and the parties had conducted minimal discovery. Unlike in Berlin Station, the trial court in this case

did not consider whether the interest of justice required amendment. See Add. at 60-62.

This Court has consistently held that "liberal amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence." Sanguedolce v. Wolfe, 164 N.H. 644, 647-48 (2013); Tessier v. Rockefeller, 162 N.H. 324, 340 (2011). This Court has also held "that a party may seek to amend even after a jury's verdict has been entered." Kravitz v. Beech Hill Hosp., 148 N.H. 383, 392 (2002) (citing Sleeper v. World of Mirth Show, Inc., 100 N.H. 158, 160 (1956)). The trial court's decision lacks sufficient objective basis to be sustained – see RSA 514:9; In the Matter of Silva & Silva, 171 N.H. 1, 4 (2018) – and should be reversed.

B. The Trial Court Unreasonably Denied NLH's Motion to Amend its Complaint.

NLH should have been permitted to amend its complaint because: (i) it was NLH's first motion seeking to do so; (ii) the motion was filed in light of new evidence NLH obtained in discovery; (iii) the cause of action asserted in NLH's amended complaint is viable (a fact the trial court entirely failed to consider) and intertwined with NLH's 2016 Tax Year appeal; (iv) amendment was necessary to prevent great injustice, as the trial court's order resulted in dismissal of NLH's claim to

the charitable exemption[10]; (v) at the time NLH filed the motion, discovery did not close for over five months; and (vi) no trial date had been set.[11]

Moreover, the Town would suffer no prejudice because the parties' summary judgment briefing involved nearly identical facts and issues that comprised the new count, and the Town had already responded to an interrogatory from NLH pertaining to the Town's practice of sending reminder notices to entities the Town knows are seeking a charitable tax exemption. Apx. at 200-202. This is exactly the case where "no injustice [would] be done by an amendment, and great injustice [would] be done without it." Stebbins, 159 N.H. at 148. The trial court's decision was unreasonable, and should not be upheld, as it is contrary to the fundamental principle that justice should prevail over procedural technicalities. Kalil, 159 N.H. at 729.

i. NLH Was Seeking To Amend Its Complaint For The First Time.

Parties are typically afforded at least one opportunity to amend the complaint. See Baxter Int'l Inc. v. Cobe

---

10 NLH was assessed $139,642 in taxes for tax year 2016. Apx. at 223.

11 Recently, the trial court consolidated NLH's 2015, 2017, and 2018 Tax Year appeals over NLH's objection, resulting in even further continuance of trial on NLH's claims.

Laboratories, Inc., 1991 U.S. Dist. LEXIS 19637, *5 (N.D. Ill. December 18, 1991). "The notion of freely allowing amendments to the pleadings is strongest when the party is attempting to amend for the first time . . . ." Id. See also Thompson v. New York Life Ins. Co., 644 F.2d 439, 444 (5th Cir. 1981) (observing policy of liberal amendment of pleadings is "strongest where the motion challenged is the first motion to amend").

This is not a case where NLH had previously amended its complaint. It obtained discovery from the Town on or about August 23, 2018, that led to it moving to amend for the first time on September 28, 2018. Apx. at 194, 198.

ii. NLH Should Have Been Permitted to Amend in Light of New Evidence Obtained in Discovery.

The discovery of new information constitutes classic amendment grounds. See, e.g., Anderson v. Cigna Healthcare of Maine, 2005 Me. Super. LEXIS 139, *6-*9 (Cumberland Cnty. Super. Oct. 27, 2005) (granting plaintiff leave to add a count of fraudulent misrepresentation and concealment based on newly discovered evidence , and because three months of discovery remained); Baxter Int'l Inc., 1991 U.S. Dist. LEXIS 19637 at *5 (finding excusable delay in requested amendment where the party discovered new facts through depositions and document requests).

In this case, new discovery obtained by NLH had revealed that the Town sends its annual exemption reminders "on or about March 1 – March 10 each year". This is the same time when the Town asserted a conflict of interest causing the withdrawal of NLH's longstanding counsel – just before NLH's BTLA A-9 came due in April. The Town omitted NLH from that reminder with knowledge NLH was continuing to seek the exemption, thereby treating it differently than similarly situated taxpayers. Apx. at 193-94. Based on the newly discovered evidence, NLH should have been permitted to amend its complaint.

iii. NLH Asserted a Viable, and Not "New", Cause of Action.

The trial court failed to address the viability of NLH's claim, which goes to the heart of whether injustice would be done by refusing to grant the amendment.[12] In what amounts to a one-page order, the trial court simply stated that NLH's proposed amendment "realizes all three factors that weigh against granting it", without further explanation. Add. at 60-61. The trial court overlooked NLH's legally sound

---

12 Even the Town acknowledged that the trial court did not address whether NLH's claim was viable, but argued it was unnecessary for the court to consider that given the "new causes of action" that "would call for substantially different evidence" – which is not the case. Apx. at 265.

basis for its Federal and State equal protection claim. See Apx. at 195-97, 238-42, 247-51.

The trial court's order appears to rest solely on its incorrect view that NLH's equal protection claim was a "new cause of action entirely". Add. at 62. Its additional statement that the amendment "would require the presentation of substantially different evidence" is contradicted by the record, and it is also unclear why the trial court concluded the amendment "would not cure the defect in the underlying complaint that led to the grant of summary judgment." Id. The proposed amendment was never intended to cure an alleged defect in the underlying complaint, because there was no underlying defect and NLH never argued that its equal protection claim would operate to prevent summary judgment; merely that the same underlying facts were pertinent to NLH's accident, mistake, or misfortune argument. NLH's equal protection claim should have been permitted to proceed on an independent basis.

This Court has embraced the modern trend "to define cause of action collectively to refer to all theories on which relief could be claimed on the basis of the factual transaction in question," and "reject[ed] the view that the term is synonymous with the particular legal theory in which a party's claim for relief is framed." Kalil, 159 N.H. at 730 (quoting Sleeper v. Hoban Family P'ship, 157 N.H. 530, 534

(2008)); Eastern Marine Construction Corp. v. First Southern Leasing, 129 N.H. 270, 274 (1987) (addressing "cause of action" for res judicata purposes). Here, there is no question that NLH's exemption denial and its equal protection claim arise from the same factual transaction – the process and substance of NLH's charitable tax exemption for the Newport Health Center in 2016. If this Court affirms the court's decision below, NLH could be foreclosed from asserting its claims separately under a res judicata analysis.

The proposed amendment would not "call for substantially different evidence" because the proposed amendment deals with a timeframe and conduct that overlaps with the claim raised in NLH's initial complaint. See Apx. at 216-32. Both claims are specifically related to the 2016 Tax Year, and the Town had already produced documents pertinent to the claims asserted in NLH's amended complaint. While equal protection may call for different proof than an RSA 72:34-a appeal, the underlying evidence sought, in this case, would not be "substantially different."

iv. The Trial Court Failed to Consider Whether Amendment Would be Necessary to Prevent Injustice.

As NLH argued to the trial court, it would be incredibly unjust to allow the Town to treat a charitable organization differently from others, and then benefit from the result of that differential treatment. In this case, the Town was well

aware NLH was pursuing the exemption – and had requested a meeting with the Town regarding same – but intentionally and arbitrarily excluded NLH when it sent out reminder notices to other entities the Town knew were seeking the exemption.

Inexplicably, the trial court's order contains no analysis of whether amendment would be necessary to prevent injustice. For NLH, the order – which came out nearly a year after NLH moved to amend[13] – resulted in NLH's case being dismissed entirely, as the trial court had already granted the Town's summary judgment motion. The trial court appeared to view NLH's proposed amendment as a litigation tactic, as it characterized NLH's motion as follows: "Anticipating the ruling on the [Town's motion for summary judgment], NLHA moved to amend its complaint by adding a claim that the Town violated the state and federal equal protection rights of NLHA . . . ." Add. at 60. The court later clarified that NLH's "motive in moving to amend is irrelevant and the order did not present it as a ground for rejecting it." Add. at 62.

Respectfully, NLH disagrees: the fact that NLH moved to amend <u>because</u> it discovered new evidence relevant to the

---

13 NLH moved to amend its Complaint, attaching the proposed First Amended Complaint, on September 28, 2018 (<u>see</u> Apx. at 198); the trial court denied the motion on August 8, 2019. Add. at 60-61.

same factual transaction is a motive that is entirely relevant to whether it should have been permitted to do so. The fact that the trial court viewed NLH's motive as "anticipating the ruling" on summary judgment, further demonstrates that it failed to consider whether justice would be better served by allowing the amendment. NLH certainly did not view the Town's summary judgment motion as a foregone conclusion.

This case is similar to Sanguedolce v. Wolfe, 164 N.H. 644 (2013). In that case, the trial court had denied the plaintiff's motion to amend where the plaintiff sought to add a negligence claim after the defendant filed a motion to dismiss the plaintiff's defamation claim. Sanguedolce, 164 N.H. at 645. The trial court denied the motion to amend because it found the negligence-only claim to be the same cause of action as the defamation claim, which it dismissed, and therefore the negligence count would not cure the defect in the writ. Id. at 648. On appeal, this Court found the negligence-only count to state a separate claim from the defamation claim, and vacated the trial court's denial of the motion to amend. Id. at 648-49. The Court remanded the issue of whether allowing the plaintiff to amend would be necessary for the prevention of injustice. Id. at 648.

Thus, even where a plaintiff sought to add a new claim in response to a motion to dismiss, that factor alone was a legally insufficient basis to deny amendment. Amendment is

necessary in this case to prevent the injustice of allowing the Town to benefit from its own differential treatment of taxpayers, where the Town accomplished its goal of denying NLH's charitable tax exemption, thereby obtaining undue taxes from NLH.

v. There Was No Reasonable Basis for Denying NLH's Motion Given the Lack of Prejudice to the Town.

At the time NLH filed its motion to amend the complaint, the only discovery milestones that had passed were the parties' automatic disclosures and one interrogatory propounded by NLH, which directly related to the Town's exemption reminder practices and to which the Town responded without objection. Apx. at 197, 200-202. NLH moved to amend on September 28, 2018. Apx. at 198. Discovery was set to close on March 15, 2019. Apx. at 193. The parties had requested a trial date in May 2019. Id.

The trial court did not, and could not have, found that the Town would be unfairly prejudiced by allowing NLH to amend its complaint. "When we determine whether a ruling made by a judge is a proper exercise of judicial discretion, we are really deciding whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." In the Matter of Silva & Silva, 171 N.H. 1, 4 (2018). In this case, the trial court subjectively viewed NLH's proposed amendment through the lens that NLH was "anticipating the

ruling" on summary judgment, and failed to consider whether amendment was necessary to prevent injustice. It favored a technicality – that equal protection is a different cause of action from a 72:34-a appeal – and ignored the viability and interrelatedness of NLH's claims. The fact that there would have been no prejudice to the Town[14] demonstrates there is no objective basis sufficient to sustain the trial court's decision, particularly given the resulting prejudice to NLH.

Based on all of the foregoing, and in the furtherance of justice, this Court should reverse the decision below.

---

[14] And there would not be, should the Court reverse and remand, given the trial court's recent consolidation of the pending tax year appeals for 2015, 2017, and 2018 (over NLH's objection). No scheduling order addressing discovery in the newly-consolidated cases has been set as of the date of this filing, and the Town has recently asserted that it is entitled to, and will be seeking, substantial discovery relating to the 2016 Tax Year.

CONCLUSION

NLH respectfully requests that the Court reverse the trial court's Orders below.

REQUEST FOR ORAL ARGUMENT

NLH respectfully requests fifteen minutes of oral argument before the full Court. Matthew Johnson, Esquire, will present oral argument for the appellant, NLH.

Respectfully submitted,

THE NEW LONDON HOSPITAL ASSOCIATION, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: March 23, 2020 By: /s/ Matthew R. Johnson

Matthew R. Johnson (No. 13076)
Lynnette V. Macomber (No. 271596)
111 Amherst Street
Manchester, NH 03101
Telephone: 603.669.1000
mjohnson@devinemillimet.com
lmacomber@devinemillimet.com

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with the 9,500 word limit established by Rule 16(11) and this Court's Order dated January 17, 2020. This brief contains 9,492 words in the indicated sections of Rule 16(11), exclusive of pages containing the table of contents, table of citations, and any addendum.

I have forwarded copies of the foregoing brief to Adele Fulton, Esq.; Matthew C. Decker, Esq.; Jamie Hage, Esq.; and Katherine Hedges, Esq. via the Court's electronic filing system's electronic services.

/s/ Matthew R. Johnson
Matthew R. Johnson, Esq.

Rule 16(3)(i) Certification

NLH hereby certifies that each appealed decision that is in writing is being submitted herewith in the Addendum at pages 56-62, and are identified as such in accordance with Rule 16(3)(i).

/s/ Matthew R. Johnson
Matthew R. Johnson, Esq.

THE NEW LONDON HOSPITAL ASSOCIATION, INC.

v.

TOWN OF NEWPORT

No. 2019-0616

ADDENDUM TO APPELLANT'S BRIEF

TABLE OF CONTENTS

The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

NO. 220-2017-CV-82

THE NEW LONDON HOSPITAL ASSOCIATION, INC.

V.

TOWN OF NEWPORT

ORDER

Charitable organizations seeking a tax exemption must "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 or assessors of the place where such real estate and personal property are taxable." RSA 72:23–c, I. The form, known as BTLA Form A–9, "shall" be filed "on or before April 15." *Id.*

The New London Hospital Association, Inc. ("NLHA") owns property in Newport. It filed Form A–9 with the Town in pursuit of a charitable tax exemption for tax year 2016, but not until May 19, 2016. Town's Answer, ¶ 27; Town's Mot. Summ. J., Affidavit of Kaara Gonyo ("Gonyo Aff."), ¶ 3. On September 7, 2016, the Town responded by letter, writing,

> Your application has been reviewed by the Town's assessor and decided upon by the Board of Selectmen. At the August 29, 2016 board of Selectmen meeting, the Board has moved to deny your 2016 application for charitable exemption.

Complaint, Exhibit C. The minutes from the August 29 meeting say

> the Board voted to deny a charitable tax exemption . . . 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.

Town Mot. Summ. J., Town of Newport, New Hampshire Board of Selectmen, Minutes for Meeting of August 29, 2016, p. 6.

The present case is NLHA's appeal from the decision to deny the exemption. The Town moves for summary judgment based NLHA's late submission of its exemption request. Summary judgment is granted only if the record evidence shows "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, III. A material fact is one that "affects the outcome of the litigation under the applicable substantive law." *Vandemark v. McDonald's Corp.*, 153 N.H. 753, 756 (2006). "All evidence presented in the record, as well as any inferences reasonably drawn therefrom, must be considered in the light most favorable to the party opposing summary judgment." *Concord General Mutual Ins. Co. v. Green & Co. Bldg. & Dev. Corp.*, 160 N.H. 690, 692 (2010) (quotation omitted).

RSA 72:23–c, I establishes a deadline for making the exemption claim. Its use of the word "shall" indicates the filing date is mandatory. *McCarthy v. Wheeler*, 152 N.H. 643, 645 (2005). But the statute also allows organizations to have their late exemption applications granted, if they "satisfy the selectmen or assessors that they were prevented by accident, mistake or misfortune from filing an application on or before April 15." If convinced, "the officials may receive the application at a later date and grant an exemption thereunder for

that year." RSA 72:23–c, I. "The words 'accident, mistake or misfortune' import something outside the control of the petitioner or his attorney, and will not generally excuse neglect . . ." *Ryan v. Perini Power Constructors, Inc.*, 126 N.H. 171, 173 (1985). See *Lakeview Homeowners Ass'n v. Moulton Construction, Inc.*, 141 N.H. 789, 791 (1997). Whether there was "accident, mistake, or misfortune" "is a factual determination." *Ryan*, 126 N.H. at 173.

The statute puts the burden on the taxpayer to convince the board that the specified circumstances caused it to file late. There is no evidence that NLHA explained or attempted to explain the reason for its late filing. In fact, it argues it was the board's responsibility to initiate the inquiry into why it filed late, and whether "accident, mistake, or misfortune" and not neglect was the cause. But that puts the burden on the wrong party. Without an explanation from NLHA on why the application was late, the board properly cited the untimeliness of its submission as an independent reason to deny it.

NLHA contends the board, in essence, waived the late filing because it "received" the application without requiring NLHA to explain why it was late. In the context of the statute, the board does not "receive" a late application for purposes of granting the exemption, until the taxpayer convinces the board that "accident, mistake, or misfortune" caused the delay. Here the board based the denial on the separate ground that the application was untimely. NLHA did not argue "accident, mistake, or misfortune" to the board, so there was no reason for the board to address it. Since NLHA did not present the

board with circumstances that justified the delay, it waived that issue for purposes of appeal.

The Town properly denied NLHA's exemption application for Tax Year 2016 because it was untimely. Therefore, the Town's motion for summary judgment (doc. no. 9) on this issue is GRANTED. The Town's request for attorney's fees is denied. Whether NLHA may amend its complaint will be considered at a hearing to be scheduled.

SO ORDERED.

DATE: APRIL 16, 2019

BRIAN T. TUCKER
PRESIDING JUSTICE

The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

NO. 220-2017-CV-82

THE NEW LONDON HOSPITAL ASSOCIATION, INC.

V.

TOWN OF NEWPORT

ORDER

Re: New London Hospital's Motion to Amend Complaint (doc. no. 19)

The New London Hospital Association (NLHA) appealed a decision by the Town of Newport to deny it a charitable tax exemption for tax year 2016. The Town moved for and I granted summary judgment, because NLHA missed the mandatory deadline for submitting its application and didn't give the Town a reason to excuse the late filing. See Order (Apr. 16, 2019) (doc. no. 28). Anticipating the ruling on the motion, NLHA moved to amend its complaint by adding a claim that the Town violated the state and federal equal protection rights of NLHA when it sent a different healthcare provider, Valley Regional Hospital, Inc., a letter reminding it of the deadline for seeking tax year 2016 exemptions, without extending the same courtesy to NLHA.

The complaint NLHA seeks to amend asks to reverse the Town's rejection of a tax exemption. Though "liberal amendment of pleadings is permitted," this is not the rule for

substantive amendments that "introduce an entirely new cause of action, or call for substantially different evidence[,]" or "would not cure the defect in the writ." *Tessier v. Rockefeller*, 162 N.H. 324, 340 (2011) (citations and quotation omitted). The decision on the motion is discretionary, but the proposed amendment realizes all three factors that weigh against granting it.

The motion to amend is DENIED.

SO ORDERED.

DATE: AUGUST 8, 2019

BRIAN T. TUCKER
PRESIDING JUSTICE

The State of New Hampshire

SULLIVAN, SS. SUPERIOR COURT

NO. 220–2017–CV–82

THE NEW LONDON HOSPITAL ASSOCIATION, INC.

v.

TOWN OF NEWPORT

ORDER

Re: New London Hospital's Motion to Reconsider Order on Motion to Amend Complaint (doc. no 33)

Ruling: *Denied.*

I adhere to my findings that the proposed amendment presents a new cause of action entirely, would require the presentation of substantially different evidence, and would not cure the defect in the underlying complaint that led to the grant of summary judgment. Whether or not the Hospital anticipated the ruling on the Town's summary judgment motion, its motive in moving to amend is irrelevant and the order did not present it as a ground for rejecting it.

The Hospital's request for a hearing on the motion to reconsider is *denied*. There was a hearing on the motion to amend and the pleadings on reconsideration address the issue thoroughly.

SO ORDERED.

DATE: SEPTEMBER 20, 2019

BRIAN T. TUCKER
PRESIDING JUSTICE