THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2020 TERM
CASE NO. 2020-0216

TEJASINHA SIVALINGAM
Plaintiff – Appellant / Cross-Appellee

v.

TOWN OF ASHLAND, BOARD OF SELECTMEN, FRANCES NEWTON AND LEIGH SHARPS
Defendants – Appellees / Cross-Appellants

MANDATORY APPEAL FROM FINAL DECISION OF
THE GRAFTON COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT–APPELLEES/ CROSS-APPELLANTS FRANCES NEWTON AND LEIGH SHARPS

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Oral Argument by Attorneys Bauer (Cross-Appeal) and Jenness (Response)

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Selectwomen's Cross-Appeal Issues

Denial of the Selectwomen's Motion for Attorneys' Fees and Expenses

I. Tejasinha Sivalingam ("Plaintiff"), a former member of the Board of Selectmen for the Town of Ashland (the "Board") who resigned after serving less than one year on the Board, targeted two duly elected Selectwomen, Ms. Frances Newton and Ms. Leigh Sharps (together, the "Selectwomen") with whom he had worked on the Board and politically disagreed, by filing and prolonging a baseless, bad faith petition to remove them from public office. In so doing, Plaintiff unreasonably and unjustly forced the Town of Ashland taxpayers to spend more than $70,000 of public funds to defend and defeat Plaintiff's groundless removal petition.

a. Did the Superior Court err in denying the Selectwomen's motion for attorneys' fees and expenses incurred in defending and defeating Plaintiff's bad faith removal petition? (Selectwomen's Cross-Appeal Issue I(a))

Preserved: App. I[2] at 29, 39, 110-11, 135; App. II at 10, 70-104, 132-170, 173-197.

b. Did the Superior Court err in denying the motion for attorneys' fees and expenses because the successful defense and defeat of Plaintiff's removal petition was a "substantial benefit to the community"

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[1] This matter involves both Plaintiff's appeal and the Selectwomen's cross-appeal. Given the interrelatedness of the issues in the direct and cross appeals, Newton and Sharps address both simultaneously in this brief.

[2] "App. I" and "App. II" refer to the Plaintiff's Appendices, Volumes I and II, respectively.

by: sustaining the voting will of the people who properly elected the Selectwomen; discouraging others like Plaintiff from filing baseless removal actions against elected officials; and reimbursing taxpayers' dollars needlessly spent on meritless removal claims? (Selectwomen's Cross-Appeal Issue (I)(b))

Preserved: App. I at 29, 39, 110-11, 135; App. II 75-76, 138-39.

Denial of the Selectwomen's Motion for Judgment on the Pleadings

II. RSA 42:1-a states, in relevant part, that the public divulgence of information sealed under RSA 91-A:3, III is grounds for removal if that information "would adversely affect the reputation of some person other than a member of the public body." RSA 42:1-a, II(a). The Selectwomen filed a Motion for Judgment on the Pleadings on the grounds that Plaintiff set forth no evidence capable of establishing that the Selectwomen divulged information that would adversely affect his reputation. The Superior Court did not squarely address the Motion; instead, the Superior Court granted the Selectwomen's Motion for Summary Judgment and summarily denied the Motion for Judgment on the Pleadings without analysis. Did the Superior Court err in denying the Selectwomen's Motion for Judgment on the Pleadings? (Newton and Sharps Cross-Appeal Issue II)

Preserved: App. I at 28-54, 104-111.

Plaintiff's Appeal Issues

Relating to the Superior Court's Grant of Summary Judgment[3]

I. The Superior Court held, as a matter of law based on the plain language of the statute, that RSA 91-A:3, III does not require a recorded vote of the Board, after a majority of the Board agreed to disclose limited information to the public from a nonpublic session. Did the Superior Court commit reversible error? (Plaintiff's Appeal Issues I and II)

II. The Superior Court granted the Selectwomen's Motion for Summary Judgment after finding no genuine issue of material fact in dispute that a majority of the Board agreed to disclose limited information to the public from a nonpublic session. Did the Superior Court commit reversible error? (Plaintiff's Appeal Issue III)

Preserved: Appx. Vol. I at 188-201 and Appx. Vol. II at 48-49, 51-52, and 67.

STATUTORY PROVISIONS

The applicable statutes and rules are as follows: RSA 42:1-a, RSA 91-A, RSA 91-A:3, Superior Court Rules 11(d) and 13A. These are set forth in full in the Selectwomen's Appendix, at Pages 3-5.

[3] The Selectwomen have rephrased Plaintiff's "Issues Presented" and present them in summary form. Plaintiff's original phrasing can be found in his Brief at 7-8.

STATEMENT OF THE CASE

On November 9, 2018, Plaintiff, a former Selectman[4] for the Town of Ashland (the "Town"), filed a Complaint against two elected Selectwomen, Ms. Frances Newton[5] and Ms. Leigh Sharps.[6] In his complaint, Plaintiff alleged that the Selectwomen breached their oaths of office in June of 2018 and should therefore be removed from their duly elected positions pursuant to RSA 42:1-a. App. I at 3-14.[7]

On February 15, 2019, the Selectwomen filed a Motion for Judgment on the Pleadings and Memorandum of Law with Attachments, which included a request for attorneys' fees. App. I at 28-54. On February 25, 2019, Plaintiff objected to the Motion (App. I at 55-103); the Selectwomen replied to the objection on March 13, 2019. App. I. at 104-111.

This matter was placed on an expedited docket, and the Superior Court did not rule on the Motion for Judgment on the Pleadings before the deadline to file a Motion for Summary Judgment (the Motion for Summary Judgment deadline was March 26, 2019). App. at 129 n. 2; Brief Ad.[8] at 54. The Selectwomen therefore filed their Motion for Summary Judgment on March 26, 2019 with sworn affidavits describing the personal knowledge of four individuals: a majority of the Board members and the Town

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[4] Plaintiff became a Selectman in March 2017 and resigned in January 2018.
[5] Selectwoman Newton, whose term ends in March 2021, was reelected for a three-year term in March 2018.
[6] Selectwoman Sharps, who is no longer on the Board, was reelected for a two-year term in March 2018.
[7] This Appeal and Brief are limited to Count II of the Complaint.
[8] The Selectwomen use "Brief Ad." to refer to Plaintiff's Addendum and "Opp. Ad." to refer to the Selectwomen's Addendum.

Administrator. App. I at 129-185. On April 24, 2019, Plaintiff objected to the Selectwomen's Motion for Summary Judgment (App. I at 186-360), and the Selectwomen filed a reply on May 6, 2019. App. II at 4-15. On July 26, 2020, the Superior Court heard oral argument on the Motion for Judgment on the Pleadings and the Motion for Summary Judgment.[9]

In its order of October 21, 2019, the Superior Court granted the Selectwomen's Motion for Summary Judgment, providing seven pages of analysis and rationale. Brief Ad. at 54-60. The court summarily denied the Motion for Judgment on the Pleadings. Brief Ad. at 54. The Superior Court's order did not address the request for attorneys' fees and costs. *See* Brief Ad. at 54-60.

On October 30, 2019, Plaintiff filed a Motion to Reconsider (App. II at 43-53), to which the Selectwomen objected on November 8, 2019. App. II at 54-61. On November 14, 2019, Plaintiff filed at reply (App. II at 62-69), and on December 11, 2019, the Superior Court denied Plaintiff's Motion to Reconsider. Brief Ad. at 61.

On December 13, 2019, the Selectwomen filed a Motion for Attorney's Fees and Expenses (App. II at 70-104), to which Plaintiff objected on December 20, 2019 (App. II at 105-131), and the Selectwomen filed a Reply on December 30, 2019. App. II at 132-170.

On January 14, 2020, the Superior Court denied the Selectwomen's Motion for Attorney's Fees and Expenses, "without prejudice pending

[9] To the extent that, in his Statement of the Case, Plaintiff suggests that the Selectwomen made concessions at oral argument regarding requirements under RSA 91-A:3, the Selectwomen dispute this inaccurate characterization of the record. This issue is addressed in greater detail in the Argument section. *See infra*.

resolution of the case on appeal." Opp. Ad. at 48. On January 21, 2020. The Selectwomen moved for reconsideration (App. at 173-197), and Plaintiff objected on January 28, 2020. App. at 198-201.

In an order dated March 3, 2020, the Superior Court granted the Motion to Reconsider, but denied the Motion for Attorney's Fees and Expenses. Opp. Ad. at 56.

On April 16, 2020, Plaintiff filed this appeal with this Court, and on April 23, 2020 the Selectwomen filed cross-appeal issues.

STATEMENT OF FACTS

Ms. Newton and Ms. Sharps were duly elected Selectwomen representing constituents in the Town of Ashland, New Hampshire when Plaintiff filed his petition to remove them. App. I at 31-32, 172 ¶¶ 1-2; 176 ¶ 1. For a time, Ms. Newton and Ms. Sharps served on the Board with Plaintiff. App. I at 30, n. 1-3, 31-32. However, Plaintiff resigned after serving on the Board for less than one year. App. I at 30, n. 3. Shortly after resigning, Plaintiff campaigned as a write-in candidate for a Board position, but was not reelected. App. I at 32. The Selectwomen's conduct about which Plaintiff complains occurred about six months after he resigned from the Board and was not reelected. App. I at 10 ¶ 36, 11 ¶ 39.

In early 2018, the Board, which consisted of five members, sought to address concerns regarding a particular Ashland citizen complaint process: the "Citizen Inquiry Form." App. I at 32-33. Developed in about 2014, the Citizen Inquiry Form was intended to facilitate the citizen complaint process. App. I at 32. However, by early 2018, townspeople were using the form to make individualized attacks against citizens, the Board, and other

Town representatives. App. I at 33. Public discussion regarding the use and possible modification of the Citizen Inquiry Form occurred at Board meetings in January of 2018, and again in February of 2018. App. II at 9.

On May 12, 2018, Plaintiff submitted a Citizen Inquiry Form that targeted both Selectwomen Newton and Sharps, calling for their public censures and personal apologies to him. App. I at 8 ¶ 29. At the beginning of a regular Board meeting on June 4, 2018, the Board entered nonpublic session to further discuss the issue of complaints from Plaintiff and other individuals. [10] App. I at 33, 46.

During the nonpublic session, the entire Board considered "[h]ow to deal with complaints from [Plaintiff] and others." App. I at 33, 46. The Board agreed that it would no longer address "personal attacks" in public, though it would keep "complaints of a personal nature on file." App. I at 33, 46. Out of an abundance of caution, the Board voted to seal the minutes of the nonpublic session. App. I at 33, 46. In addition however, the Board identified certain information that it would not withhold from public disclosure under the right to know law, and agreed to disclose limited information to the public in the public session. App. I at 131 ¶ 6, 173 ¶ 7, 177 ¶ 6, 181 ¶ 4, 184 ¶ 5. In particular, the Board agreed to have the Town Administrator read in public session: (1) Plaintiff's May 12, 2018 Citizen Inquiry Form; (2) part of Town Counsel's responsive legal opinion on the topic of public censures; and (3) the Board's desire to change the Citizen

[10] To the extent that Plaintiff suggests in his Brief that the Selectwomen have conceded that his Citizen Inquiry was the exclusive topic of the nonpublic session, the Selectwomen dispute this inaccurate characterization. This issue is addressed more fully in the Argument section, *infra*.

Inquiry Form process. App. I at 131 ¶ 6.

The entire Board thereafter resumed in public session, and after addressing other business, turned to the Citizen Inquiry Form issue. App. I at 34, 49-50. As agreed by the Board, Town Administrator Smith read, without any objection from any Board members, Plaintiff's Citizen Complaint Form and a portion of Town Counsel's related legal opinion. App. I at 34-35.

On June 18, 2018, the Board expressed support for the idea of eliminating the Citizen Inquiry Form. App. I at 35, 43-44. The Board also discussed the possibility of replacing that form with a revised form. App. I at 35, 43-44. At no time during the June 18 meeting did any member of the Board reference Plaintiff by name or otherwise. *See* App I at 35, 43-44; App. II at 9.

In November 2019, Plaintiff filed his petition to remove from public office only the two Selectwomen, Ms. Newton and Ms. Sharps.

STANDARD OF REVIEW

A motion for judgment on the pleadings is a motion "in the nature of a motion to dismiss for failure to state a claim." *LaChance v. United States Smokeless Tobacco Co*., 156 N.H. 88, 93 (2007). In reviewing the Superior Court's decision regarding a motion to dismiss, the "standard of review is whether the allegations in the [petitioners'] pleadings are reasonably susceptible of a construction that would permit recovery." *McNamara v. Hersh,* 157 N.H. 72, 73 (2008) (quotation omitted). The Court assumes all pleadings to be true and construes all reasonable inferences in the light most favorable to the Plaintiff. *Id*. However, the Court need not accept as

true statements in the pleadings that "are merely conclusions of law." *Cluff-Landry v. Roman Catholic Bishop of Manchester*, 169 N.H. 670, 673 (2017) (citation omitted). With this framework in mind, "the court must vigorously scrutinize the complaint to determine whether, on its face, it asserts a cause of action." *Tessier v. Rockefeller*, 162 N.H. 324, 329-30 (2011) (quotation omitted).

In reviewing the Superior Court's grant of a motion for summary judgment, the Court considers "the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." *Weaver v. Stewart*, 169 N.H. 420, 425 (2016) (quotation and citation omitted). If the Court's review "discloses 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*. The Court will review the trial Court's application of law to the facts *de novo*. *Id*. Likewise, the Court reviews issues of statutory interpretation *de novo*. *Id.* at 427.

While the Selectwomen seek to clarify and extend New Hampshire common law as it relates to petitions to remove duly elected officials from public office, they recognize that the Court will review the Superior Court's decision regarding the common law bad faith exception and court rule for attorneys' fees with the standard of an "unsustainable exercise of discretion…giving deference to the trial court's decision" *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 259 (2006). Nonetheless, if warranted, this Court has the authority to identify previously unrecognized exceptions to the general rules regarding allocation of attorneys' fees, as it deems proper and just. *See Harkeem v. Adams*, 117 N.H. 687, 690 (1977)

("Exceptions to the general rule that parties pay their own counsel fees have been judicially fashioned in the past. These exceptions are flexible, not absolute, and have been extended on occasion." (citation omitted)).

SUMMARY OF THE ARGUMENT

I. The Superior Court correctly ruled that summary judgment was appropriate on these undisputed facts and the law.

The Superior Court properly held, based on the plain language and purpose of the statute, that the Board was not required to take a recorded vote to disclose certain nonpublic information. RSA 91-A:3, III (the right-to-know law) requires public disclosure when the majority of Board members are of the opinion that the circumstances justifying nondisclosure no longer apply. The intent of the right-to-know law is to promote openness in the conduct of public business. To require a Board to affirmatively vote and record each item of information to be publicly disclosed would undermine this legislative intent.

Likewise, the Superior Court properly found no material issue of fact in dispute. The Selectwomen filed undisputed affidavits that the majority of the Board was of the opinion that certain information should be disclosed in public: (1) Plaintiff's Citizen Inquiry Form; (2) a portion of Town Counsel's responsive legal opinion; and, (3) the Board's intent to change the citizen complaint process. This information is precisely what the Board disclosed to the public. Additionally, the limited discussion of the citizen complaint process on June 18, 2018 involved information that the Board had agreed to disclose on June 4, or information which the Board otherwise

never withheld. The Superior Court correctly granted summary judgment for the Selectwomen that they did not violate their oath of office.

II. Although the Superior Court correctly ruled that summary judgment was proper, the Superior Court erred in failing to first grant the Selectwomen's Motion for Judgment on the Pleadings.

RSA 42:1-a requires that Plaintiff allege and prove two elements: (1) that the Board voted to withhold certain information pursuant to RSA 91-A:3 III, and (2) that a Board member publically divulged withheld information that would adversely affect Plaintiff's reputation.

Like the determination as to whether a communication is capable of bearing a defamatory meaning, the question of whether a statement could adversely affect a person's reputation is a question of law. As a matter of law, nothing that was said or done in the June 4 or June 18, 2018 Board meetings was harmful to Plaintiff's reputation. Plaintiff has conceded that nothing said publically during either of the meetings was harmful to his reputation on its face. Nonetheless, Plaintiff attempted to invoke reputational harm based on an assortment of innuendos, including the timing of statements and unrelated alleged Board conduct at other meetings. Plaintiff's allegations are insufficient to state a claim under RSA 42:1-a. The Superior Court should have granted the Selectwomen's Motion for Judgment on the Pleadings.

III. The Superior Court erred in refusing to order Plaintiff to repay the expenditure of public funds of over $70,000 for attorneys' fees and expenses to successfully defend and dismiss Plaintiff's baseless petition to remove two elected officials from public office.

Plaintiff is a former Selectman who at one time served with Selectwomen Newton and Sharps. Rather than including the full Board in his lawsuit, Plaintiff singled out the two Selectwomen, with whom he had personal and political disagreements, subjecting them to needless litigation that has been costly and time-consuming to defend. Plaintiff's claim against the Selectwomen was frivolous and brought, and perpetuated, in bad faith. The Selectwomen are entitled to recover attorneys' fees under New Hampshire Court Rules and common law.

The Selectwomen are also entitled to recover attorneys' fees and expenses paid with public funds under the substantial benefit theory. Public officials who successfully defend themselves against a removal action are considered to be conferring a public benefit. The Selectwomen successfully contested Plaintiff's removal claim, and are entitled to recover attorneys' fees.

ARGUMENT

I. The Superior Court properly granted the Selectwomen's Motion for Summary Judgment.

A. The Superior Court correctly held as a matter of law that there is no requirement under the statute to record the Board's opinion that particular information should not be withheld from public disclosure.

RSA 91-A:3 states in relevant part that "information may be withheld until, in the opinion of a majority of members, the . . . circumstances [requiring that the information be withheld] no longer apply." RSA 91-A:3, III. Pursuant to the plain language of the statute and New Hampshire case law, information should be publicly disclosed when a majority of a public body is of the opinion that the information should not be withheld. *See id.*; *Orford Teachers Ass'n v. Watson*, 121 N.H. 118, 121 (1981) (noting that, although RSA 91-A:3, III permits a governmental body to withhold information in some circumstances, the statute requires disclosure of this information "when the circumstances compelling secrecy no longer apply"). Accordingly, the statute does not require a formal recorded vote to disclose information to the public, so long as the majority of Board members agrees that the information should be disclosed to the public.[11] *See* RSA 91-A:3, III. Had the legislature intended to require a

[11] Plaintiff alleges that, in oral argument, the Selectwomen conceded that RSA 91-A:3, III required that an agreement to divulge information be recorded. Brief at 15. Plaintiff's assertion is incorrect: the Selectwomen do not take this position. Accordingly, a fair interpretation of the statements at oral argument does not support Plaintiff's claim that the Selectwomen made such a concession. Tr. at 24:14-25.

public body to take a separate recorded vote to disclose information to the public, it would have explicitly said so, just as it did elsewhere in RSA 91-A:3, III. RSA 91-A:3, III (stating that a public body's decision to withhold information must be done "by [a] recorded vote of 2/3 of the members present"). Here, though the Board voted to seal the minutes of the nonpublic session, a majority of the Board were of the opinion that other information should be disclosed. App. I at 173 ¶¶ 7-8 (noting that the Board agreed to publicly release the information and that this agreement was considered an integral part of the Board's overall decision); *see also* 131 ¶ 6, 173 ¶7, 177 ¶ 6, 181 ¶ 4, 184 ¶5.

In his Brief, Plaintiff argues that "[t]he public can only obtain opinions if they are recorded." Brief at 35-36. Following that logic, he concludes that RSA 91-A:3 III requires a formal vote before information discussed in a nonpublic session may be disclosed to the public. Brief at 36-38. This argument, and its related arguments, are nonstarters. Plaintiff purportedly initiated this lawsuit because he objected to the public disclosure of particular information. App. I at 10 ¶ 36, 13 ¶¶ 49-50. The public, including Plaintiff, learned of the Board's opinion that information should be publicly disclosed despite the fact that no formal vote on the subject was recorded in the nonpublic minutes; the public learned this information because the information itself was public information and disclosed and recorded in the Town's public minutes. App. I, 34-35, 49-50. To the extent that Plaintiff believes that the New Hampshire legislature should require a formal, recorded vote in such circumstances, his argument is with that legislative branch, which did not see fit to include such a requirement in RSA 91-A:3, III.

B. The Superior Court correctly found there is no genuine issue of material fact as to whether a majority of the Board agreed and was of the opinion to disclose limited information discussed during a non-public session.

The Selectwomen submitted undisputed sworn affidavits that a majority of the Board agreed and was of the opinion that some information from the nonpublic session should be disclosed in the June 4, 2018 public session. App. I at 131 ¶ 6, 173 ¶7, 177 ¶ 6, 181 ¶ 4, 184 ¶5. The affiants all identified what information would be released. App. I at 131 ¶ 6, 173 ¶7, 177 ¶ 6, 181 ¶ 4, 184 ¶5. The affiants also explained the reasons that they adopted this approach: to be mindful of the reputations of Ashland citizens while also promoting government transparency and accountability. *See* App. I at 131 ¶ 6, 133 ¶ 11, 173 ¶7, 177 ¶ 6, 181 ¶ 4, 184 ¶5; *see also* RSA 91-A:1 (stating that the purpose of the chapter is to "ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people").

Despite the uncontradicted affidavits, Plaintiff attempts to create a dispute of material fact by emphasizing the absence of a written record of a vote to disclose information in public session. As noted above, the absence of a recorded vote does not negate the fact that a majority of the Board was of the opinion that disclosure could and should be made to the public of certain information from the nonpublic session, particularly given that no formal recorded vote was required under law. *See supra*. In short, the absence of a written record of the Board's opinion does not mean that an opinion was never formed, much like the absence of a recorded vote does not mean that such a vote never occurred. *See, e.g.*, *Cheshire County*

Convention v. Cheshire County Commissioners, 115 N.H. 585, 589 (1975) ("…the master properly found that the commissioners voted to select the Fuller Park site even though such action was not recorded in the official minutes of their meetings.")

As an alternative to his argument that a vote was required, Plaintiff argues that, even if a vote was not required, there are other disputed facts to support his position that the Board decided to withhold the relevant information. Brief at 44-48. None of these speculative arguments addresses central issue: that a majority of the Board was of the opinion and agreed to produce limited information to the public. A majority the people who were present in the nonpublic session have sworn, under oath, to that fact. App. I at 131 ¶ 6, 173 ¶7, 177 ¶ 6, 181 ¶ 4, 184 ¶5. Only Plaintiff, who was not present for the session, attempts to contradict the sworn affidavits through his own arguments and affidavit. Brief at 44-48, App. I at 214-222.

Plaintiff's arguments that the Board decided to withhold the relevant information have included assertions about body language, speculations about timing, and recitation of perceived slights by the Selectwomen and third parties on unrelated occasions. *See* Brief at 44-48, App. I at 5 ¶¶ 16-25, 65-67, 188-192, 214-360; App. II at 45-49. These arguments do not constitute affirmative evidence that the Board withheld information discussed in nonpublic session on June 4, 2018. *See generally* Brief. Because Plaintiff has not set forth "contradictory evidence under oath, sufficient to indicate that a genuine issue of fact exists," there is no material dispute of fact present. *See Phillips v. Verax*, 138 N.H. 240, 243 (1994).

In the face of this overwhelming evidence, Plaintiff argues that the Board reversed course by voting to seal the minutes of the nonpublic

session, because, Plaintiff posits, a vote to seal the minutes of a meeting "must be presumed to be a general seal without exception." Brief at 38. This arguments fails. First, Plaintiff's arguments do not establish that New Hampshire law recognizes such a presumption: *Orford Teachers Association* simply does not announce or support such a concept. *Compare* Brief at 38 *with Orford Teachers Ass'n*, 121 N.H. at 121 (*Orford Teachers Association* noting that, under RSA 91-A:3, III public bodies should disclose information "when the circumstances compelling secrecy no longer apply," and "[c]onstruing the provisions for withholding minutes narrowly"). Second, even if the law recognized a presumption of a "general seal without exception," such a presumption would be readily overcome by the wording of nonpublic minutes with regard to the information that the Board agreed to seal. App. I at 232-33. Specifically, the minutes, which are written into a pre-prepared template, state:

> *Motion made to seal these minutes? If so, motion made by H. Lamos, seconded by C. Barney, because it is determined that divulgence of this information likely would…[a]ffect adversely the reputation of any person other than a member of this board…*

App. I at 233. In the space below this language, each Board member's name is listed, with the heading "Roll Call Vote to seal minutes." App. I at 233. Each member's name is then checked. App. I at 233. Nowhere did the members vote to accept a "general seal without limitation" of all of the content or information discussed in the nonpublic session, whether or not such information could adversely affect a reputation and whether or not the Board had previously discussed the information in public. To argue

otherwise is untenable.

In an adjacent argument, and in presence of extrinsic evidence that is fatal to Plaintiff's claims, Plaintiff also argues that parol evidence cannot be used to establish that a "vote" occurred in this matter, and therefore the Selectwomen's affidavits should be considered. Brief at 40-44. As an initial matter, consistent with the Superior Court's ruling, Plaintiff's argument regarding parol evidence is inapposite: no "vote" was required pursuant to RSA 91-A:3, III. App. I at 58 n. 3. *See supra,* Section I (A). However, even if the Court were to find that a vote was necessary, the use of parol evidence would have been appropriate in this matter.[12]

In support of his argument against the use of parol evidence, Plaintiff relies on *Sawyer v. Manchester & Keene Railroad*. 62 N.H. 135 (1882). Plaintiff argues that *Sawyer* supports the proposition that the Selectwomen cannot rely on extrinsic evidence "to establish that a vote was taken." Brief at 40. This is not the current state of the law in New Hampshire. Long after *Sawyer* was decided, the New Hampshire Supreme Court held in *Cheshire County Convention* that extrinsic evidence may be considered to determine whether a vote or a consensus was reached. 115 N.H. at 589 ("If, however, there is an entire absence of a record of a certain vote on an issue or transaction, it is accepted law that parol or extrinsic evidence is admissible to establish that a vote was taken and its terms.")

[12] The decision of the Superior Court should be upheld if there are valid alternative grounds to support it. *See Handley v. Town of Hooksett*, 147 N.H. 184, 191 (2001). Similarly, the Court should not disturb judgment for error that does not affect the outcome of the lawsuit. *Kessler v. Gleich*, 156 N.H. 488, 494 (2007).

Accordingly, the Superior Court could have properly considered the affidavits of Selectwoman Newton, Selectwoman Sharps, Selectwoman Kathleen DeWolfe, and Town Administrator Smith to establish that the Board reached a consensus about permitting the public disclosure of certain limited information discussed in non-public session on June 4, 2018. *See id.*

II. The Superior Court erred in denying the Selectwomen's[13] Motion for Judgment on the Pleadings because the information made public by the full Board did not "adversely affect" Plaintiff's reputation as a matter of law.

To succeed on a claim under RSA 42:1-a, Plaintiff must prove two elements: (1) that the Board voted to withhold certain information pursuant to RSA 91-A:3 III, and (2) that a Board member publically divulged information that would adversely affect Plaintiff's reputation.[14] RSA 42:1-a (II)(a). While Plaintiff cannot establish either part of this two-part analysis, his failure to establish the second prong is fatal to his claim as a matter of law. As a result, the Superior Court should have granted the Selectwomen's Motion for Judgment on the Pleadings.

RSA 42:1-a states, in relevant part, that publicly divulged information sealed under RSA 91-A:3, III is grounds for removal only if that information "would adversely affect the reputation of some person other than a member of the public body." RSA 42:1-a, II(a). This language has not previously been interpreted by the New Hampshire Supreme Court

[13] Ms. Sharps is no longer a Selectwoman. As such, she is no longer subject to Plaintiff's sole requested remedy: dismissal from office. Ms. Newton is a Selectwoman until March 2021.

[14] RSA 42:1-a (II)(a) also allows other bases for dismissal related to invasion of privacy and undermining municipal action; neither of these is at issue in this case.

in the context of RSA 42:1-a. However, the common law of defamation provides useful interpretive guidance as to the meaning of this phrase. The Court should adopt the common-law definition of "defamatory meaning" to determine whether something was "adverse" to Plaintiff's reputation under RSA 42:1-a.

Referring to the common law to define words not otherwise defined in a statute comports with New Hampshire precedent. *See, e.g.*, *In re Diana P.*, 120 N.H. 791, 794–95 (1980) ("Generally, courts interpret words and phrases that are defined in the common law according to their common-law meanings, unless defined by the statute in which they appear."); *Appeal of Geekie*, 157 N.H. 195, 203 (2008). Here, the Court should refer to the common-law definition for defamatory meaning because it is the most closely analogous legal definition available for interpreting RSA 42:1-a.

The following is a transcript of the June 4, 2018 discussion that forms the basis of Plaintiff's Complaint:

> *Selectwoman Newton: Selectboard items: Citizen inquiry. Charlie?*
>
> *Town Administrator Smith: Okay, this is to clarify some things, because we received some comments last time that some people recused themselves. And not everyone at home has the packet. So I will read the citizen inquiry that we received and the Board has asked me to subsequently read the legal opinion to it.*
>
> *As such, this was from Mr. Tejasinha Sivalingam. He wrote, as a citizen inquiry: "The policy on boards, committees, and commissions (4/30/2018) states 'Candidates*

will be interviewed by the Board of Selectmen the first time he/she applies for that Committee.' On November 6th, 2017, the then first ZBA candidate was interviewed by me as a member of the Board of Selectmen. Selectmen Newton and Sharps treated me with derision in response, and even the candidate indicated she was offended. Then knowing that I would be absent on November 20th, 2017, Sharps and Newton continued their tirade of derision. In light of this new policy, Newton and Sharps's response of derision must have been an act of prejudice because it was apparently not a policy disagreement about whether or not interviewing is acceptable. And the November 20th spectacle, planned with knowledge of my absence, was a premeditated act of derision. I request that the Board of Selectmen vote to formally censure Newton and Sharps for the derision they demonstrated toward me. Further, I request a public apology on television from both Newton and Sharps in which they acknowledge the derision with which they treated me, and also acknowledge that it interfered with my ability to direct my full attention towards matters of policy. Thank you kindly."

Okay, so we had, since there were some concerns in here about censorship, prejudice, among other things, we sent [this citizen inquiry form] to legal counsel for an opinion. And counsel just sort of reviewed all of this, but his main point was: "In disagreeing with Mr. Sivalingam, Members Newton and Sharps were particularly upset and voiced their

strong disagreement. I do not believe the conduct of Members Newton and Sharps warrant a formal censure or a public apology because I view this situation as Board members disagreeing about what is best for the town and those that serve on town boards. That can create some hard feelings on both sides and my hope is that this debate and others will be respectful of any opposing viewpoints."

So that was from [Town counsel] Steven Whitley. Hope that clarifies things.

Selectwoman Newton: Thank you Charlie. And I think that puts the matter to rest, but I can say that we as a Board have made the decision that in the future we will not address criticisms directly of the Board in public. Those can be handled in other ways and I think this matter has come to an end. Thank you Charlie.

Town Administrator Smith: Sure.

App. I, 34-35.

There was no further discussion of Plaintiff or Plaintiff's Citizen Inquiry Form at the June 4, 2018 meeting. App. I at 35, 47-50. At the next Board meeting on June 18, 2018, a majority of the Board voiced support to eliminate the Citizen Inquiry Form and for the potential to create a revised courtesy form. App. I at 35, 43-44.

Whether a communication is capable of bearing a defamatory meaning is an issue of law. *Boyle v. Dwyer*, 172 N.H. 548, 554 (2019); *Thomas v. Tel. Publ'g Co.,* 155 N.H. 314, 338 (2007) (citing *Catalfo v. Jensen*, 657 F. Supp. 463, 466 (D.N.H. 1987)). In ruling upon this issue of

law, the Court must determine: "(1) whether the [statement] was reasonably capable of conveying the particular meaning … ascribed to it by the plaintiff; and (2) whether that meaning is defamatory in character." *Boyle*, 172 N.H. at 554 (quoting the Restatement (Second) of Torts § 614 cmt. b at 311 (1977), further citation omitted). "Words may be found to be defamatory if they hold the plaintiff up to contempt, hatred, scorn or ridicule, or tend to impair [the plaintiff's] standing in the community." *Boyle*, 172 N.H. at 554 (quotation omitted). Defamatory language must tend "to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority." *Id.* (quotation omitted).

However, the defamatory meaning must also be one that "could be ascribed to the words by hearers of common and reasonable understanding." *Thomson v. Cash*, 119 N.H. 371, 373 (1979) (quotation omitted). As a result, a defamation action cannot succeed when it is based on "an artificial, unreasonable, or tortured construction imposed upon innocent words, nor when only supersensitive persons with morbid imaginations would consider the words defamatory." *Id.* (quotation omitted). "No mere claim of the plaintiff can add a defamatory meaning where none is apparent from the publication itself." *Id.* (quotation omitted).

Plaintiff's allegation of reputational harm is an "artificial, unreasonable, [and] tortured construction imposed upon innocent words;" it does not support removal under RSA 42:1-a as a matter of law. *See Thomson*, 119 N.H. at 373 (quotation omitted). The record does not demonstrate that the Selectwomen did or said anything that would "state or imply that the plaintiff is corrupt or committed any type of misconduct,

crime, or wrongdoing." *See Morrissette v. Cowette*, 122 N.H. 731, 734 (1982). It is plain that the Board's actions in public session were intended to address a sensitive political issue (Plaintiff's accusations and request for public rebuke of Selectwomen Newton and Sharps) in a balanced manner. To impute a defamatory meaning to the limited dialogue on June 4 or June 18, 2018 would place elected officials in an impossible bind: either agree with the individual raising the citizen complaint, or risk litigation for even the most innocuous comments addressing the matter.

Moreover, Plaintiff concedes that nothing in the above exchanges was facially harmful to his reputation. App. I at 10 ¶ 36, 13 ¶¶ 49-50. Indeed, the use of Plaintiff's name in the public session was in connection with a Citizen Inquiry Form he voluntarily authored, and in response to his request for public actions: the request that the Board publicly censure the Selectwomen, and the further request that the Selectwomen apologize to him on television and acknowledge "the derision with which they treated [Plaintiff]." App. I at 34-35, 49-50. Plaintiff's name was not mentioned on June 18. App. I at 35, 43-44; App. II at 9.

In the absence of facially adverse comments or actions, Plaintiff suggested the Superior Court adopt a dictionary definition of "adversely affect" (App. I at 69) and infer the possibility of reputational harm from the notion that members of the public might have linked the Board's decision to revise the citizen complaint process to Plaintiff's Citizen Inquiry Form. App. I at 70-71. Stretching even further, Plaintiff speculated that after the Board discussed his Citizen Inquiry Form in the meeting on June 4, members of the public might have linked his name to the subsequent discussion of the citizen complaint process on June 18, and therefore could

have associated Plaintiff with Selectwoman Sharps' June 18 statements about abuse of the Citizen Inquiry Form. App. I at 70-71. As a matter of law, Plaintiff's tortured logical chain is insufficient to demonstrate that the Selectwomen's statement or statements harmed his reputation.

Plaintiff also suggested to the Superior Court that any public divulgence of information under seal that "could" adversely affect his reputation is grounds for removal under RSA 42:1-a. App. I at 69-71. This interpretation is at odds with a plain reading of RSA 42:1-a, which refers to information that "would adversely affect the reputation of some person other than a member of the public body." RSA 42:1-a, II(a) (emphasis added). If the legislature had intended a broader application of RSA 42:1-a, one that included removal under circumstances that possibly could result in reputational harm, it would have written "could," or, as the legislature wrote in RSA 91-A:3, "likely would." RSA 91-A:3, III ("likely would affect adversely"); *see State v. Dor*, 165 N.H. 198, 200 (2013) ("We will not consider what the legislature might have said or add language that the legislature did not see fit to include."); *id*. ("We do not read words or phrases in isolation, but in the context of the entire statutory scheme."); *see also, e.g.*, RSA 91-A:3, II(c) ("would likely affect adversely"). Because RSA 42:1-a, II(a) says "would" without any modifying words, RSA 42:1-a must be interpreted to require that the information divulged actually would or did harm someone's reputation. *Dor*, 165 N.H. at 200 ("We aim to preserve the common and approved usage of a word unless from the statute it appears a different meaning was intended." (quotation omitted)).

Just as Plaintiff fails to set forth any plausible interpretation of the Selectwomen's statements to support a claim of adverse reputational

effect(s), Plaintiff fails to establish that his reputation actually was harmed. Despite voluminous pleadings, Plaintiff's most specific allegation of reputational harm is the claim that at some point "after the [Selectwomen] divulged the sealed information" two members of Plaintiff's State Representative campaign committee "began to distance themselves from Plaintiff." App. I at 191. Outside of the brief references to his campaign committee contained in his own affidavit and his various arguments, Plaintiff provides no statements, affidavits, articles, letters, emails, social media posts, nor any other evidence capable of demonstrating that the perceived distancing (if found) was related to disclosures on June 4 or June 18. App. at 218 ¶ 18; *see generally* App. I 3-14, 55-103, 186-360; App. II 43-53.

III. This Court should reverse the Superior Court's decision and remand the Selectwomen's motion for attorneys' fees and expenses incurred in defending and defeating Plaintiff's removal petition.

As a matter of public policy, Plaintiff's bad faith lawsuit and prolonged legal actions against the Selectwomen should not be tolerated.

While it is true that, in general, each party to litigation must pay that party's own attorneys' fees (*see e.g.*, *Bedard v. Town of Alexandria*, 159 N.H. 740, 744 (2010)), the New Hampshire Supreme Court has recognized exceptions to this rule. *Id*. In the absence of a statutory authorization for such an award, an award of attorneys' fees must be grounded upon an agreement between the parties or a judicially-created exception to the general rule. *Id*. "As to judicially-created exceptions, attorney's fees have

been awarded in this State based upon two separate theories: bad faith litigation and substantial benefit." *Id*. (quotations and ellipsis omitted).

Under the bad faith litigation theory, a prevailing party's attorneys' fees are awarded "where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious, or bad faith conduct" or "where a party must litigate against an opponent whose position is patently unreasonable." *LaMontagne Builders, Inc.*, 154 N.H. at 259 (quotation omitted).

"Under the substantial benefit theory[,]. . . attorney's fees must be awarded when a litigant's actions confer a substantial benefit upon the general public." *LaMontagne Builders, Inc.*, 154 N.H. at 259 (quotation omitted).

A. Common Law and Court Rule: Bad Faith

Pursuant to Superior Court Rule 11(d), "[t]he court may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion." Super. Ct. R. 11(d). Under New Hampshire common law, the trial court is empowered to award reasonable attorneys' fees against "a party who has instituted or prolonged litigation through bad faith or obstinate, unjust, vexatious, wanton, or oppressive conduct . . . ." *Johnson v. Phenix Mut. Fire Ins. Co.*, 122 N.H. 389, 394 (1982) (quoting *Harkeem*, 117 N.H. at 690). "[T]he award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights." *Harkeem*, 117 N.H. at 690.

1. Plaintiff's claim was brought in bad faith.

Plaintiff's RSA 42:1-a removal claim was patently unreasonable and was not brought in good faith. Plaintiff did not bring this suit in order to hold the Selectwomen accountable to their oaths of office. Instead, Plaintiff intentionally singled out two Selectwomen with whom he had past personal and political disagreements, targeting them for protracted and costly removal litigation. *See* App. I 5-7, ¶¶ 16, 17, 19-25; App. II at 162:16 – 167:20.

Plaintiff has long sought to remove the Selectwomen from office by a variety of political means, including running for office on a platform of term limits for municipal officials. *See* App. II 143:17-155:22, 156:11-18 (deposition of Plaintiff)(describing Plaintiff's failed 2018 election bids for Ashland Board of Selectman, secretary of the N.H. Democratic Party, and N.H. State Representative), App. II 158:9-162:5 (describing Plaintiff's platform of term limits for municipal officials and other municipal government reform in his election bid to the N.H. House of Representatives).

After Plaintiff failed to remove the Selectwomen through election to municipal or state office, he resorted to bringing a petition for removal to pressure the Selectwomen to resign from office. Plaintiff's allegations implicate the entire Board, not just the Selectwomen. *See*, *e.g.*, App. I at 64 (alleging the Selectwomen acted wrongfully by directing the Town Administrator to publicly divulge information). Rather than bringing this action against the entire Board, Plaintiff chose to target the Selectwomen, who were his main adversaries when he was a sitting Board member. App. II at 162:16 – 167:20 (conceding that the Selectwomen were Plaintiff's

primary political adversaries).

Plaintiff's lawsuit is an improper attempt to achieve his personal political goals through litigation.

2. Plaintiff prolonged this litigation through obstinate, unjust, vexatious, wanton, or oppressive conduct.

Plaintiff maintained this removal action despite uncontroverted video evidence and affidavits that show there was no wrongdoing by the Selectwomen.

Plaintiff knew or should have known that Count II was unsubstantiated early in this litigation by virtue of the Selectwomen's motion for judgment on the pleadings and their motion for summary judgment, and given that Plaintiff's allegations are not supported by any material facts, and instead rely on innuendos, inferences, and even "body language." *See, e.g.*, App. I at 65. Nonetheless, Plaintiff proceeded with substantial discovery, including, *inter alia*, propounding lengthy interrogatories on the Selectwomen, extensive requests for production on the Selectwomen, and protracted depositions of Selectwoman Frances Newton, Selectwoman Leigh Sharps, Selectman Harold Lamos, Selectman Casey Barney, and Town Administrator Charles Smith. Further, Plaintiff's deposition unnecessarily spanned three days, largely due to Plaintiff's refusal and inability to answer basic questions and his propensity to ask for questions to be repeated, which required the Selectwomen to employ and pay for a live-stream deposition transcript device for Plaintiff. Plaintiff has also filed surreplies to a number of the Selectwomen's motions, which is disfavored in New Hampshire state courts and which has resulted in additional fees and expenses being incurred by the Selectwomen. *See* App.

I at 112-26; App. II at 16-20; Super. Ct. R. 13A (allowing surreplies only by permission of the court).

B. Common Law: Substantial Benefit

The Selectwomen should recover attorneys' fees and expenses based on the "substantial benefit" doctrine.

"[A]n elected town official . . . has assumed a special position as a public trustee." *Silva v. Botsch*, 121 N.H. 1041, 1043 (1981) (citing *Sherburne v. Portsmouth*, 72 N.H. 539, 542 (1904)). "A town official is elected by his fellow citizens to administer the affairs of the municipality…and assumes a special duty." *Id*. When a party's action confers a "substantial benefit" on a municipality, such as defending against removal, the party "should be able to recover his [or her] attorney's fees." *See id*. at 1044; 5 Wiebusch on New Hampshire Civil Practice and Procedure § 52.11 ("A party may be awarded attorneys fees when the party's action results not only in the establishment of the party's own rights but in conferring a 'substantial benefit' on others."). The ability to recover attorneys' fees also exists for situations when state and county officials are the prevailing parties against unsuccessful removal actions. *See*, *e.g.*, *Silva*, 121 N.H. at 1044.

Plaintiff has argued that "the substantial benefit theory cannot be applied against a private individual by a government entity." App. II at 116. Following this logic, Plaintiff emphasizes that he was a private citizen during the pendency of this action. App. II at 116. Nonetheless, contrary to Plaintiff's arguments, the facts of this case are readily distinguishable from other cases involving private parties. While Plaintiff was a private party by November of 2018 (when he filed his complaint) this was because he

resigned from the Board in January 2018 and lost his subsequent race for a Board seat shortly thereafter. App. I at 30, n. 1-3, 31-32. App. I at 30, n. 1-3, 31-32. Thus, Plaintiff had both been a public official sitting on the very body from which he sought the Selectwomen's removal, and had in the most recent election cycle run unsuccessfully for seats that the Selectwomen had been elected to fill. *See* App. II 143:17 – 146:21 (deposition of Plaintiff) (describing Plaintiff's 2018 resignation and failed reelection bid for the Ashland Board of Selectman). Additionally, while the Town paid public funds to defend the Selectwomen from Plaintiff's removal action, his action was nonetheless an attempt to remove the targeted Selectwomen from public office. *See Bedard v. Town of Alexandria*, 159 N.H. 740, 746 (2010) (noting that the substantial benefit "theory is based on promotion of a public interest either by a private party or a public official." (quotations omitted)).

Given the factual scenario at issue in this case, the Selectwomen's circumstances are analogous to those in *Silva*. *See* 121 N.H. at 1042. The circumstances in which a court may award attorneys' fees "are flexible, not absolute, and have been extended on occasion." See *Harkeem v. Adams*, 117 N.H. 687, 690 (1977). "[W]hen overriding considerations so indicate, the award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights." *Id*.

The substantial benefit theory is applicable here because the Selectwomen are public trustees who have successfully defended themselves against Plaintiff's removal action, which was taken in the context of his failed efforts to oust them using the political process. The Selectwomen could have chosen to resign form their elected positions, and

avoid protracted litigation and the associated costs. Instead, the Selectwomen mounted a defense not only for themselves, but also for the Ashland taxpayers who elected the Selectwomen. By contesting Plaintiff's removal action, they conferred a substantial benefit on the Ashland taxpayers, the Town of Ashland, and other New Hampshire municipalities.

If Plaintiff is not required to pay for the attorneys' fees and expenses incurred by the Selectwomen and the Town of Ashland, others like him will be emboldened to file removal lawsuits against duly elected officials for arbitrary and unjust reasons. This Court should not allow litigants with financial resources to pressure duly elected officials to resign from office through threats of baseless litigation. The Court should order that Plaintiff reimburse the Selectwomen and the Town of Ashland for attorneys' fees and costs associated with defending Count II.

CONCLUSION

For the forgoing reasons, the Selectwomen respectfully request the following relief:

1. Affirm the Superior Court's grant of the Selectwomen's Motion for Summary Judgment;
2. Reverse the Superior Court's denial of the Selectwomen's Motion for Judgment on the Pleadings and grant judgment; and
3. Reverse the Superior Court's denial of attorneys' fees and costs and remand to the Superior Court to determine the amount of reasonable attorneys' fees to be awarded.

ORAL ARGUMENT

Oral argument is requested. Ms. Jenness will argue in response to Plaintiff's appeal issues. With the Court's permission, Mr. Bauer will argue the Selectwomen's cross-appeal issues.

Respectfully submitted,
Frances Newton and Leigh Sharps
By Their Attorneys,
Gallagher, Callahan & Gartrell, P.C.

Date: October 5, 2020

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Certificate of Compliance

I hereby certify that this Brief was produced using standard sized typewriter characters of size 13 font, and that excluding the Cover Page, Table of Contents, Table of Authority, Statutory Provisions, the Certificate of Compliance, Certificate of Service, Signature Block, and Addendum, this brief contains 8,489 words. Each appealed decision that is in writing is being submitted at the time of brief filing.

Date: October 5, 2020

By: /s/ Charles P. Bauer
Charles P. Bauer, NH Bar #208

Certificate of Service

I hereby certify that I have served this document on all counsel of record.

Date: October 5, 2020

By: /s/ Charles P. Bauer
Charles P. Bauer, NH Bar #208

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2020 TERM
CASE NO. 2020-0216

TEJASINHA SIVALINGAM
Plaintiff – Appellant / Cross-Appellee

v.

TOWN OF ASHLAND, BOARD OF SELECTMEN, FRANCES NEWTON AND LEIGH SHARPS
Defendants – Appellees / Cross-Appellants

MANDATORY APPEAL FROM FINAL DECISION OF
THE GRAFTON COUNTY SUPERIOR COURT

ADDENDUM TO BRIEF OF DEFENDANT–APPELLEES/ CROSS-APPELLANTS FRANCES NEWTON AND LEIGH SHARPS

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Oral Argument by Attorneys Bauer (Cross-Appeal) and Jenness (Response)

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STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 18-CV-396

Tejasinha Sivalingam

v.

Town of Ashland, Board of Selectmen, et al.

ORDER ON PENDING MOTIONS

The plaintiff, Tejasinha Sivalingam, has filed a two-count complaint against the defendants, Frances Newton, Leigh Sharps (collectively the "defendants"), and the Town of Ashland (the "Town") Board of Selectmen (the "Board"). (Index #1.) Count I asserts a claim against the Board for violation of RSA 91-A:3, and Count II seeks to remove the defendants from their positions on the Board pursuant to RSA 42:1-a, I. Presently before the court are the defendants' motions for judgment on the pleadings, (Index #15), and summary judgment, (Index #26), to which the plaintiff objects. (Index ##17, 36.) Because the court's ruling on the defendants' motion for summary judgment is dispositive of the issues raised in their motion for judgment on the pleadings, the court DENIES the defendants' motion for judgment on the pleadings and proceeds to rule on their motion for summary judgment. Based on the parties' pleadings and arguments, the relevant facts, and the applicable law, the court finds and rules as follows.

The following material facts are undisputed, except as otherwise noted. At all times relevant to these proceedings, the defendants served as members of the Board. (Newton Aff. ¶ 2; Sharps Aff. ¶ 1.) During its June 4, 2018 regular meeting, the Board unanimously voted to enter a nonpublic session for the stated purpose of considering "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person, other than

a member of [the] board . . . ." (Defs.' Mot. Summ. J. Ex. B.) The minutes from that nonpublic session provided in relevant part: "Description of matters discussed and final decisions made: How to deal with complaints from Tejasinha Sivalingam & others. Will keep complaints of a personal nature on file. We will not address personal attacks in public." (*Id.*) At the conclusion of the nonpublic session, the Board unanimously voted to seal the minutes from that session. (*See id.*)

However, a majority of the Board agreed on the same date, June 4, 2018, that certain information discussed during the nonpublic session should be disclosed to the public. (Newton Aff. ¶ 7; Sharps Aff. ¶ 6; DeWolfe Aff. ¶ 4.) That information included a reading of the plaintiff's March 12, 2018 citizen inquiry form (referred to as a "complaint" during the nonpublic session), a part of Town counsel's responsive legal opinion, and the Board's decision to change the citizen inquiry form process.[1] (*Id.*) Consistent with the Board members' agreement, the Board's June 4, 2018 public session minutes reflected:

> TA [Town Administrator] Smith read a Citizen Inquiry from former Selectman Tejasinha Sivalingam regarding perceived derision of Selectboard Chair Newton and Selectman Sharps towards Mr. Sivalingam in the matter of then ZBA candidate Kathleen DeWolfe. Mr. Sivalingam requested a public apology from the Selectmen in question. TA Smith sent the inquiry to legal counsel for an opinion and read Attorney Steven Whitley's response. Attorney Whitley's main point was that Selectman Sharps and Chair Newton strongly disagreed with Sivalingam which is not formal censure and therefore does not warrant a public apology. Chair Newton added that the Board of Selectmen have made a decision to no longer address criticisms of the Board of Selectmen in public and will handle any in another way.

(Defs.' Mot. Summ. J. Ex. C.)

During its June 18, 2018 public work session, the Board considered its citizen inquiry form. The minutes from that meeting provided in relevant part:

[1] Hereafter, the court refers to this information as the "June 4 disclosure."

> Selectman Sharps asked the Board for a consensus to eliminate the Citizen Inquiry form from the Town Office and the Town website. She suggested returning to the recourse which has always been available to the public. This recourse is to contact the Town Administrator, file a Right-to-Know request, or ask to be on the agenda and attend a meeting. She cited reasons for this change including no legal reason to respond to any inquiry by the Board of Selectmen and that the form is a courtesy form and not a legal town document or a legal town policy. Discussion followed regarding the pros and cons of this. A majority of the Selectboard voiced their agreement to eliminate the form. The Board agreed to work on a new revised courtesy form at the next work session.[2]

(Defs.' Mot. Summ. J. Ex. A.) During its August 6, 2018 regular meeting, the Board recorded a unanimous vote to unseal the minutes from its June 4, 2018 nonpublic session, which had not yet been disclosed to the public. (Defs.' Mot. Summ. J. Ex. D.) Prior to August 6, 2018, the Board did not formally vote on whether to unseal the June 4, 2018 nonpublic session minutes. (*See* Defs.' Mot. Summ. J. Exs. B, C, D.)

The plaintiff brought this action seeking the removal of the defendants from their positions as selectmen on the grounds that they disclosed nonpublic information in violation of RSA 42:1-a, II(a). The defendants move for summary judgment, arguing that they did not disclose any nonpublic information.

Summary judgment is proper "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, III; *see Super. Ct. R.* 12(g). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." *VanDeMark v. McDonald's Corp.*, 153 N.H. 753, 756 (2006) (citation omitted). The moving party bears the burden of proving its entitlement to summary judgment. *Concord Grp. Ins. Cos. v. Sleeper*, 135 N.H. 67, 69

[2] Hereafter, the court refers to this information as the "June 18 disclosure."

(1991). In evaluating a motion for summary judgment, the court considers "the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Id.*

RSA 42:1-a, I provides that "[t]he manner of dismissing a town officer who violates the oath as set forth in RSA 42:1 shall be by petition to the superior court for the county in which the town is located." The statute goes on to provide that it is a violation of a town officer's oath "to divulge to the public any information which that officer learned by virtue of his official position, or in the course of his official duties" if a "public body properly voted to withhold that information from the public by a vote of 2/3, . . . and if divulgence of such information would . . . adversely affect the reputation of some person other than a member of the public body . . . ." RSA 42:1-a, II(a). Thus, in order to remove a town officer from his or her position under RSA 42:1-a, II(a), the court's initial inquiry is whether the town officer divulged information that a public body properly voted to withhold.

The plaintiff contends that the Board properly voted to withhold the information contained in the June 4 and June 18 disclosures. (Pl.'s Obj. at 10–11.) He argues that in order to disclose that information to the public, the Board was required to take a recorded vote on the matter of disclosure. (*Id.*) Because the Board did not vote to unseal its June 4, 2018 nonpublic minutes prior to August 6, 2018, the plaintiff argues that the defendants were not permitted to make public the June 4 and June 18 disclosures. (*Id.*) The defendants, however, argue that the Board was not required to take a recorded vote to determine whether to disclose nonpublic information. (Defs.' Mot. Summ. J. ¶¶ 11–12.) The court agrees.

The purpose of New Hampshire's right-to-know law is "to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their

accountability to the people." RSA 91-A:1. In furtherance of that purpose, public bodies are not permitted to meet in nonpublic session unless one of twelve exceptions apply. RSA 91-A:3, I–II. The exception relied upon by the Board in this case was to consider or act upon "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself . . . ." RSA 91-A:3, II(c). Ordinarily, "[m]inutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection . . . ." RSA 91-A:3, III.

> Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself . . . .

Id. "[I]nformation may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply." *Id.*

This statutory framework "clearly permits governmental bodies to meet in private to deliberate and to discuss certain sensitive matters; it does not require minutes of such proceedings to be kept, except to record decisions." *Orford Teachers Ass'n v. Watson*, 121 N.H. 118, 121 (1981). "Although paragraph III permits a governmental body to withhold minutes in some circumstances, it does not allow the group to reserve that information indefinitely but requires disclosure when the circumstances compelling secrecy no longer apply." *Id.* Accordingly, the court finds that RSA 91-A:3, III does not require a recorded vote of a public body in order to disclose information that was discussed or decided upon during a nonpublic session.[3] [4] Rather, the statute requires public disclosure of such

[3] The court notes that the parties' arguments regarding the use of parol evidence to establish the existence of a vote are irrelevant in light of the court's determination that the Board was not required to vote on the disclosure of information that was discussed or decided upon during a nonpublic session.

[4] In the future, it would be advisable for the Board to contemporaneously record decisions to disclose nonpublic information, much as it did when it took a recorded vote to unseal minutes on August 6, 2018.

information when, in the opinion of a majority of the members of the public body, the circumstances justifying nondisclosure no longer apply.

The plaintiff argues that the court should interpret the statute as requiring a recorded vote of the public body in order to disclose nonpublic matters. (Pl.'s Obj. at 11–12.) He contends that the absence of such a requirement would render meaningless the voting provisions contained within RSA 91-A:3, III. (*See id.*) The court disagrees. The purpose of the right-to-know law is plainly to ensure public access to all discussions and records of public bodies, except in a limited number of circumstances. Furthermore, the plain language of RSA 91-A:3, III does not require a public body to vote regarding whether to disclose information that was discussed or decided upon during a nonpublic session. If the legislature had intended to impose such a requirement, it could have done so, as evidenced by the explicit voting requirements contained in the statute. The court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *State v. Bernard*, 158 N.H. 43, 44 (2008).

Applying these principles to the facts of the instant case, the court rules that the defendants did not divulge nonpublic information that the Board properly voted to withhold. It is plain from the defendants' supporting affidavits that on June 4, 2018, a majority of the Board was of the opinion that the following information should be disclosed to the public: the plaintiff's March 12, 2018 citizen inquiry form, Town counsel's responsive legal opinion, and the Board's decision to change the citizen inquiry form process. Based on the Board's June 4, 2018 public session minutes, the defendants' disclosure was limited to that information. Likewise, to the extent the June 18 disclosure contained information discussed during the June 4, 2018 nonpublic session, such

information was limited to matters the Board agreed to publicly disclose on June 4.

Because a majority of the Board was of the opinion that this information should be disclosed to the public, the defendants did not violate their oath of office when they made such disclosures. Accordingly, removal of the defendants from their positions on the Board is uncalled for under RSA 42:1-a. The court rules that there are no genuine issues of material fact, and the defendants are entitled to judgment as a matter of law. For the foregoing reasons, the defendants' motion for judgment on the pleadings is DENIED, and their motion for summary judgment is GRANTED.

SO ORDERED, this 19th day of October 2019.

Lawrence A. MacLeod, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/21/2019

Filed
File Date: 12/13/2019 3:25 PM
Grafton Superior Court
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THE STATE OF NEW HAMPSHIRE

GRAFTON, S.S. **SUPERIOR COURT**

Docket No. 215-2018-CV-00396

Tejasinha Sivalingam
v.
Selectwomen Frances Newton and Leigh Sharps,
Town of Ashland Board of Selectmen

MOTION FOR ATTORNEYS' FEES AND EXPENSES

NOW COME Selectwomen Frances Newton and Leigh Sharps (the "Selectwomen"), by their attorneys, Gallagher, Callahan & Gartrell, PC, and file this Motion for Attorneys' Fees and Expenses (collectively "attorneys' fees").

Introduction

Plaintiff's bad faith lawsuit and prolonged legal actions against these two Selectwomen should not be tolerated as a matter of public policy. These Selectwomen were unreasonably forced by Plaintiff to spend from the Town's public funds the incredible amount of $69,447.50 of attorneys' fees to defend themselves against Plaintiff's oppressive, vexatious, arbitrary, capricious, and prolonged bad faith litigation.

If Plaintiff is not required to pay attorneys' fees, other duly elected public officials in New Hampshire will be targeted by those who have the time, money, and other resources to file frivolous and prolonged litigation against public officials. Additionally, otherwise well-intentioned, dedicated public servants will be "chilled" from seeking duly elected positions and serve our communities. Moreover, other like Plaintiff will be incentivized to target political opponents who hold elected positions, burdening them with the high cost of a legal defense to pressure them to step down from public office.

Denied without prejudice pending resolution of the case on appeal.

Honorable Lawrence A. MacLeod, Jr.
January 10, 2020

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All duly elected officials who comply with the law should have the opportunity to serve, not just those who have the resources to contest baseless allegations of wrongdoing by their political opponents.

Procedural & Factual Background

On November 9, 2018, Plaintiff filed a complaint with 51 paragraphs over 12 pages. Count II was a petition for dismissal and removal of two Selectwomen, Frances Newton and Leigh Sharps, from their duly elected public offices from the Board of Selectmen for the Town of Ashland. The Court scheduled a Final Hearing for January 28, 2019 in the Summons dated November 16, 2018. On December 14, 2018, Plaintiff motioned the court for a trial with live testimony which would "benefit the fact-finder in weighing the facts and credibility of the witnesses." On December 26, 2018, the "Selectwomen notified the court that they would be filing dispositive motions. On January 18, 2019, the "Selectwomen filed an Answer, and on February 15, 2019 and March 26, 2019, the Selectwomen filed dispositive motions: a Motion for Judgment on the Pleadings and a Motion for Summary Judgment respectively. In February, March, April, and May 2019, Plaintiff responded by filing a series of Objections, Replies, Motions, and Sur-Replies to the Selectwomen's dispositive motions. Also in February, April, and May 2019, Plaintiff filed comprehensive interrogatories and documents requests on the Selectwomen, and undertook a series of lengthy depositions of the two Selectwomen and three other Town officials. On October 21, 2019, this Court issued an order granting the Selectwomen's dispositive motion regarding Count II without qualification. Order Pending Mots. 7. On October 30, 2019, Plaintiff filed a Motion to Reconsider. This Court denied Plaintiff's Motion to Reconsider on December 10, 2019.

Substantial attorneys' fees from public funds have been incurred on behalf of defending the duly elected Selectwomen from removal from public office, including:

a. Preparing and filing an answer to the removal petition (January 18, 2019);

b. reparing and filing a motion for judgment on the removal petition (February 15, 2019);

c. Reviewing nearly 500 pages of documents in Plaintiff's automatic disclosures (received on or around February 20, 2019);

d. Coordinating and submitting the Selectwomen's automatic disclosure (March 2019);

e. Preparing and filing a motion for summary judgment with affidavits from Ms. Newton, Ms. Sharps, fellow Ashland selectwoman Kathleen DeWolfe, fellow Ashland selectman Casey Barney, former Ashland selectman Harold Lamos, and Town Manager Charles Smith before the dispositive motion deadline (March 26, 2019);

f. Coordinating responses to interrogatories and requests for production propounded on Ms. Newton and Ms. Sharps (April 15, 2019);

g. Defending depositions called by Plaintiff for Ms. Newton, Ms. Sharps, Mr. Barney, Mr. Lamos, and Mr. Smith (April–May 2019) ;

h. Taking Plaintiff's deposition, which required three separate sessions due to Plaintiff's circuitous answers and propensity to ask for questions to be repeated and/or rephrased (May–July 2019);

i. Preparing for and arguing on behalf of the Selectwomen at a hearing at Grafton Superior Court (July 26, 2019);

j. Objecting to Plaintiff's Motion to Reconsider the Order on Pending Motions (October–November 2019); and

k. Filing various other motions, objections, and replies, including in response to Plaintiff's numerous motions, objections, replies, and surreplies.

The amount of attorneys' fees incurred by the Town on behalf of the Selectwomen regarding Plaintiff's removal petition of the two public officials has been due to Plaintiff's oppressive, vexatious, arbitrary, capricious, and prolonged bad faith litigation.

Plaintiff's litigation, conduct, and reasons for filing were unreasonably obdurate and obstinate. The Town, on behalf of its duly elected Selectwomen, should not have been unnecessarily forced to defend against the removal petition of the Selectwomen, as evidenced by this Court's Order against Plaintiff's removal efforts, dated October 19, 2019.

Standard of Review

Generally, each party to litigation must pay that party's own attorney's fees. See e.g., *Bedard v. Town of Alexandria*, 159 N.H. 740, 744 (2010). However, the New Hampshire Supreme Court has recognized exceptions to this rule. Id. Where a statute specifically authorizes it, a court may award attorney's fees. *Id.* Otherwise, an award of attorney's fees must be grounded upon an agreement between the parties or a judicially-created exception to the general rule. *Id.* "As to judicially-created exceptions, attorney's fees have been awarded in this State based upon two separate theories: bad faith litigation and substantial benefit." *Id.* (quotations and ellipsis omitted). Under the bad faith litigation theory, attorney's fees must be awarded "where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious, or bad faith conduct" or "where a party must litigate against an opponent whose position is patently unreasonable." *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 259, (2006) (quotation omitted). "Under the substantial benefit theory[,]. . . attorney's fees must be awarded when a litigant's actions confer a substantial benefit upon the general public." *Id.* (quotations omitted).

Also, a claim is patently unreasonable when it is commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any unreasonable claim in the law as it is, or as it might arguably be held to be." *Glick v. Naess*, 143 N.H. 172, 175 (1998) (quotation and internal quotation marks omitted). "A party's unreasonableness is

treated on an objective basis as a variety of bad faith, and made just as amenable to redress through an award of counsel fees as would be the commencement of litigation for the sole and specific purpose of causing injury to an opponent." *Id.* (quotation and internal quotation marks omitted).

Argument

The Selectwomen Are Prevailing Parties in this Litigation and Are Entitled to Reimbursement of Reasonable Attorneys' Fees

"A prevailing party may be awarded attorney's fees when that recovery is ... an established judicial exception to the general rule that precludes recovery of such fees." *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 377 (2012) (quotation omitted). As argued in the Selectwomen's Motion for Summary Judgment, Judgment on the Pleadings, and Reply to Plaintiff's Objection to the Judgment on the Pleadings, the Selectwomen are entitled to attorneys' fees pursuant to Superior Court Rule 11(d) and New Hampshire common law.

First, the Selectwomen are entitled to attorneys' fees because Plaintiff targeted the Selectwomen in bad faith. Pursuant to Superior Court Rule 11(d), "[t]he court may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion." Super. Ct. R. 11(d). Under New Hampshire common law, the trial court is empowered to award reasonable attorneys' fees against "a party who has instituted or prolonged litigation through bad faith or obstinate, unjust, vexatious, wanton, or oppressive conduct . . . ." *Johnson v. Phenix Mut. Fire Ins. Co.*, 122 N.H. 389, 394 (1982) (quoting *Harkeem v. Adams*, 117 N.H. 687, 668. (1977)). "[T]he award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights." *Harkeem*, 117 N.H. at 690.

Plaintiff's RSA 42:1-a removal claim was frivolous and was not brought in good faith. Plaintiff's allegations are not supported by any material facts, and instead are reliant on innuendos, strained inferences, and even "body language." *See, e.g.*, Obj. Mem. 8. Plaintiff has continued to maintain this action even when the uncontroverted video evidence shows there was no wrongdoing by the Selectwomen.

Plaintiff did not bring this suit in order to "hold Newton and Sharps accountable to the[ir] oaths of office." *Id.* at 1. Plaintiff's allegations implicate the entire Board of Selectpersons for the Town, not just the Selectwomen. *See, e.g.*, Obj. Mem. 7 (i.e. Board acted wrongfully by directing the Town Administrator to publicly divulge sealed information). Plaintiff purposefully singled out the Selectwomen because he has had professional disagreements with them in the past. Plaintiff's lawsuit amounts to a "SLAPP"—a strategic lawsuit against public participation—intended to retaliate, censor, intimidate, and silence Plaintiff's political opponents by burdening them with the cost of a legal defense or forcing them to resign from public office. The Selectwomen are entitled to attorneys' fees because Plaintiff targeted them in bad faith.

Second, the Selectwomen are entitled to attorneys' fees under the substantial benefit theory. Under this common law doctrine, the court "award[s] attorney's fees to the prevailing party where the action conferred a substantial benefit on not only the plaintiffs who initiated the action, but on the public as well." *Jesurum v. WBTSCC Ltd. P'ship*, 169 N.H. 469, 482 (2016). The good faith or bad faith of the Plaintiff is not considered under the substantial benefit analysis. *Silva v. Botsch*, 121 N.H. 1041, 1044 (1981). Public officials who successfully defend themselves from a removal action are considered to be conferring a public benefit. *See, e.g.*, *id.* at 1045.

The Selectwomen successfully contested Plaintiff's allegations and are entitled to attorneys' fees under the substantial benefit theory because as elected town officials, the Selectwomen have assumed special positions as public trustees. *See id.* at 1043. The Selectwomen contested Plaintiff's allegations not only to preserve their elected positions, but also to protect the voters who elected them, as well as other public officials throughout the state who serve in similar capacities from unwarranted attacks and bad faith litigation. *See id.* at 1045. The Selectwomen are entitled to attorneys' fees under the substantial benefit theory.

Plaintiff may argue that because he is a private litigant, he is not required to pay the Selectwomen's attorneys' fees under the substantial benefit theory. *See Bedard v. Town of Alexandria*, 159 N.H. 740, 746 (2010). However, this would be an unduly narrow interpretation. At its core, the substantial benefit theory concerns the "promotion of a public interest either by a private party or a public official." *Id.* Here, the Selectwomen served the public and other public officials by contesting Plaintiff's claims.

The Selectwomen attorneys' fees, paid with public funds, are set forth in the attached Affidavit of Charles P. Bauer. *See* Ex. A. The attorneys' fees are correct and were necessarily incurred in defense of Court II.

WHEREFORE, the Selectwoman request the following relief:

A. Award the Selectwomen their reasonable attorneys' fees; and

B. Grant such other relief as may be just.

Respectfully submitted,
FRANCES NEWTON, IN HER OFFICIAL CAPACITY AS SELECTWOMAN; AND LEIGH SHARPS, IN HER OFFICIAL CAPACITY AS SELECTWOMAN
By Their Attorneys,
GALLAGHER, CALLAHAN & GARTRELL, PC

Date: December 13, 2019

By: /s/ Charles P. Bauer
Charles P. Bauer, Esquire (NH Bar #208)
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RULES 11 (c) CERTIFICATE

I, Charles P. Bauer, certify that Attorney Stephen T. Martin, counsel for Plaintiff, has not assented to this motion.

Dated: December 13, 2019

/s/ Charles P. Bauer
Charles P. Bauer, Esq. (Bar # 208)

CERTIFICATE OF SERVICE

I, Charles P. Bauer, Esquire, hereby certify that I have this date served this objection to Stephen T. Martin, Esquire, counsel for Plaintiff; and Walter Mitchell, Esquire, counsel for Town of Ashland, Board of Selectmen, through the Court's electronic filing system.

Date: December 13, 2019

By: /s/ Charles P. Bauer
Charles P. Bauer, Esquire (NH Bar #208)

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 215-2018-CV-396

Tejasinha Sivalingam

v.

Town of Ashland

ORDER ON MOTIONS TO RECONSIDER AND FOR ATTORNEY'S FEES

Before the court is defendants Frances Newton and Leigh Sharps' Motion to Reconsider the court's order of January 10, 2020, denying without prejudice said defendants' Motion for Attorney's Fees and Expenses. The plaintiff objects. Upon consideration of the parties' pleadings, arguments, and the applicable law, and subsequent to a full review of the court's file and prior orders, the defendants' Motion to Reconsider is GRANTED, and defendants' Motion for Attorney's Fees and Expenses is DENIED for the reasons articulated in-part in the plaintiff's objection and as hereinafter set forth.

Absent a contractual provision, statutory authority, or some other clearly defined right, the established law in this jurisdiction relative to an award of attorney's fees is that "the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser" based on "the principal that no person should be penalized for merely defending or prosecuting a lawsuit" and "that the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits." *Harkeem v. Adams*, 117 N.H. 687, 690 (1977)(citations omitted).

Although the defendants were duly elected as selectmen by the voters of Ashland, the General Court has promulgated a statutory procedure for the dismissal of a town officer via petition to the superior court in the event that he or she violates his or her oath of office by

divulging confidential information under the circumstances set forth in RSA 42:1-a.

While the defendants prevailed in their motion for summary judgment relative to Count II of the plaintiff's writ, a determination the plaintiff intends to appeal, the court also denied the defendants' motion for judgment on the pleadings, which was in effect a motion to dismiss, as the court found implicitly, and now states explicitly, that the plaintiff had sufficient information before him to plead in good faith a prima facie cause of action against the defendants pursuant to RSA 42:1-a. Additionally, a dispassionate review of the evidence does not convince the court that the plaintiff's litigation of this case has been undertaken vexatiously, wantonly or for an illegitimate or oppressive purpose. All of the parties have litigated this case vigorously which is to be expected, and the court finds that there are insufficient grounds for an award of attorney's fees to the defendants on the basis of bad faith by the plaintiff nor is an order for attorney's fees statutorily permitted.

Similarly, an award of attorney's fees to the defendants cannot be sustained under the common law doctrine or theory of "substantial benefit to the community." While the origin of the parties' dispute may stem from a disagreement between them when the plaintiff was also a selectman, the plaintiff brought suit against the defendants as a private citizen upon leaving office and against the defendants in their capacities as selectmen. The New Hampshire Supreme Court has "not applied th[e] [substantial benefit] theory to support an award in favor of a government entity against a private litigant." *Bedard v. Town of Alexandria*, 159 N.H. 740, 746 (2010). "Rather, the theory is based on the promotion of public interest either by a private party or a public official" as "[a] government entity's responsibilities include protection of the public interest, and therefore, an award of attorney's fees for successfully meeting this responsibility is neither necessary nor warranted." *Id.* (citation omitted).

Finally, and for substantially similar reasons, the court does not find that the defendants' request for attorney's fees has been taken in bad faith, and the plaintiff's request for the same is denied as well.

SO ORDERED, this 3rd day of March 2020.

Lawrence A. MacLeod, Jr.
Presiding Justice

Clerk's Notice of Decision
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on 03/09/2020