No. 2020-0216

State of New Hampshire
Supreme Court

TEJASINHA SIVALINGAM,
Plaintiff – Appellant / Cross-Appellee
v.
FRANCES NEWTON AND LEIGH SHARPS,
Defendants – Appellees / Cross-Appellants

On Appeal from the Grafton County Superior Court
Civil Action No. 215-2018-CV-00396

OPENING BRIEF OF APPELLANT/CROSS-APPELLEE, TEJASINHA SIVALINGAM

Stephen T. Martin, Esq. (on the Brief and presenting oral argument)
The Law Offices of Martin & Hipple, PLLC
22 Bridge Street; Suite 3
Concord, NH 03301
603-856-0202 (Ext. 1)
NH Bar#: 19567

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ISSUES PRESENTED

I. This is an action pursuant to RSA 42:1-a, I to dismiss the Defendants, Frances Newton and Leigh Sharps[1] from their positions as Selectwomen for violating their oaths of office as defined in RSA 42:1-a, II (a) when they divulged information discussed during a sealed[2] non-public session.

In granting the Selectwomen's Motion for Summary Judgment, the Superior Court held, as a matter of law, that the phrase, "in the opinion of a majority of the members," as used in RSA 91-A:3, III, to unseal a non-public session, does not require the opinion be recorded. However, RSA 91-A:3, III requires that "all actions" taken in non-public session be recorded "in such a manner that the vote of each member is ascertained and recorded."

Did the Superior Court err in holding that the "opinion," need not be recorded?

Preserved: Appx. Vol. I at 197-200 and Appx. Vol. II at 49-51.

II. Did the Superior Court err when it held that the Board of Selectmen ("BOS") opined/agreed to disclose sealed, non-public

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[1] Collectively referred to as the "Selectwomen," and individually referred to as "Newton" or "Sharps," as appropriate.

[2] RSA 91-A:3, III refers to information being "withheld," rather than sealed. However, the Parties and Superior Court have used the colloquial term "sealed" in this litigation, so Tejasinha continues to use that term.

information, despite the BOS unanimously sealing the non-public session without qualification as its final act?

Preserved: Appx. Vol. I at 201 and Vol. II at 47-48 and 64-66.

III. Regardless of the answer to Issues I and II above, did the Superior Court err in failing to find a genuine issue of material fact as to whether there actually was such an agreement/opinion to disclose information discussed during the sealed non-public session?

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

STATUTORY PROVISIONS

42:1 Oath Required. – Every town officer shall make and subscribe the oath or declaration as prescribed by part 2, article 84 of the constitution of New Hampshire and any such person who violates said oath after taking the same shall be forthwith dismissed from the office involved.

Source. RS 35:1. CS 37:1. GS 38:1. GL 41:1. PS 44:1. PL 48:1. RL 60:1. RSA 42:1. 1969, 372:4, eff. Aug. 31, 1969.

42:1-a Manner of Dismissal; Breach of Confidentiality. –

I. The 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.

II. Without limiting other causes for such a dismissal, it shall be considered a violation of a town officer's oath for the officer 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) A public body properly voted to withhold that information from the public by a vote of 2/3, as required by RSA 91-A:3, III, and if divulgence of such information would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or would render proposed municipal action ineffective; or

(b) The officer knew or reasonably should have known that the information was exempt from disclosure pursuant to RSA 91-A:5, and

that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective.

III. No town officer who is required by an order of a court to divulge information outlined in paragraph II in a legal proceeding under oath shall be guilty of a violation under this section.

Source. 1994, 249:1. 2008, 303:7, eff. July 1, 2008.

91-A:3 Nonpublic Sessions. –

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III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. 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, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in

widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.

Source. 1967, 251:1. 1969, 482:2. 1971, 327:3. 1977, 540:4. 1983, 184:1. 1986, 83:4. 1991, 217:3. 1992, 34:1, 2. 1993, 46:1; 335:16. 2002, 222:2, 3. 2004, 42:1. 2008, 303:4. 2010, 206:1, eff. June 22, 2010. 2015, 19:1; 49:1; 105:1, eff. Jan. 1, 2016; 270:2, eff. Sept. 1, 2015. 2016, 30:1, eff. Jan. 1, 2017; 280:1, eff. June 21, 2016.

STATEMENT OF THE CASE

This matter arises from the Selectwomen violating their oath of office on June 4 and June 18, 2018 contrary to RSA 42:1-a, II (a). Appx. Vol. I at 197-209. Specifically, they divulged confidential information learned during a June 4 non-public session, which the BOS entered and then sealed, because the information discussed likely would affect adversely, Tejasinha's reputation. *Id*. On November 9, 2018, Tejasinha brought a Complaint in the Grafton County Superior Court requesting the Selectwomen's dismissal pursuant to RSA 42:1-a.[3] Appx. Vol. I at 3-14.

On March 26, 2019, the Selectwomen filed a Motion for Summary Judgment.[4] Appx. Vol. I at 129. The thrust of their argument was that the BOS agreed to divulge the information prior to concluding

[3] The Complaint includes two counts: Count I alleges a violation of RSA 91-A against the Town of Ashland, BOS. Appx. Vol. I at 9-13. That Count is not the subject of this appeal. Count II seeks the Selectwomen's dismissal from office. *Id*. at 12-13. That Count is the subject of this appeal. Upon Tejasinha's Motion, the Superior Court severed Count II. Ad. at 62. Therefore, the Order granting the Motion for Summary Judgment is a final order on the merits. *See* Super. Ct. Rule 46 (c).

[4] Prior to that, the Selectwomen filed a Motion for Judgment on the Pleadings. Appx. Vol. I at 28. Because that Motion is not relevant to the issues in Tejasinha's appeal, he does not summarize the related pleadings here. He reserves his right to do so in his brief answering the Selectwomen's opening brief.

the non-public session and prior to sealing the non-public session.[5] *Id*. at 132-135, *see also*, Appx. Vol. II at 7. They also requested attorneys' fees and costs but did not present an argument in support of their request. Appx. Vol. I at 135. Instead, they relied upon their Reply to the Motion for Judgment on the Pleadings, which they attached to their Motion for Summary Judgment as an exhibit. *Id*.

On April 24, 2019, Tejasinha responded that the BOS could not have reached an agreement as a matter of law, because there was no recorded vote, and the BOS could not retroactively create a record using parol evidence. Appx. Vol. I at 197-201. He further argued that as its last act in non-public session, the BOS unanimously and without qualification, sealed the minutes, thereby superseding any prior agreement to disclose. *Id*. at 201. Furthermore, Tejasinha asserted genuine issues of material fact as to whether the BOS had, in fact, reached an agreement.[6] Appx. Vol. I at 197-201. On April 29, 2019,

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[5] In addition to the Affidavits included with their Summary Judgment Motion, they also submitted a Motion to Supplement their Motion for Summary Judgment after the pleadings had closed. Appx. Vol. II at 29. Tejasinha objected, citing that the pleadings on the Motion for Summary Judgment were closed, deficiencies with the proposed additional Affidavit, that the Affiant's deposition had just been taken, which is more reliable than an Affidavit, and that allowing further pleadings would further unnecessarily delay the case. *Id*. at 36-38. The Superior Court did not rule on that Motion.

[6] Because the Selectwomen attached their Motion for Judgment on the Pleadings to the Motion for Summary Judgment, it appeared they had incorporated it by reference as part of their argument on Summary Judgment. Appx. Vol. I at 139. Therefore, Tejasinha also addressed the

Tejasinha submitted a Notice of Correction to Paragraph 2 of His Objection. Appx. Vol. I at 361. He clarified that Paragraph 2 should refer to divulging information in the relevant public sessions, not non-public sessions. *Id*.

In their May 6, 2019 Reply, the Selectwomen argued that parol evidence may be used to establish a vote was taken. Appx. Vol. II at 3-4. From there, they asserted that their affidavits reflected undisputed evidence that the BOS reached a consensus to divulge the information. *Id*. at 7-8. They further argued that information divulged on June 18, 2018 did not violate the Selectwomen's oath because it did not identify Tejasinha by name. *Id*. at 8-10. They further claimed that some of the statements had been made in the past, and therefore could not have been confidential information. *Id*. Finally, the Selectwomen argued that Tejasinha waived his argument that the June 18 divulgence violated the oath of office because he failed to allege it in his Complaint. *Id*.

In his May 8, 2019 Surreply,[7] Tejasinha responded to the parol evidence argument, illustrating that the Selectwomen are taking two

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arguments therein using the summary judgment standard. *Id*. at 201-211. However, in their Reply Memorandum, the Selectwomen indicated that that was not their intention. Appx. Vol. II at 5, n.1. Thus, the Selectwomen only raised the issue of whether there was an agreement/opinion, to divulge the information despite the unqualified seal. *Id*.

[7] The Selectwomen objected to Tejasinha's related Motion for Leave to file a Surreply. Appx. Vol. II at 21. In doing so, they also responded to

different positions. Appx. Vol. II at 18-19. On the one hand, they argued that there is a record, for which parol evidence cannot be used, on the other hand, they argued there is no record. *Id*. Finally, Tejasinha confirmed that he *did* claim that the June 18, 2018 divulgence constituted a violation of RSA 42:1-a in the Complaint, thereby preserving the claim without the need to amend the Complaint. *Id*. at 19-20.

On July 26, 2020, the Superior Court heard oral argument on both the Motion for Judgment on the Pleadings and the Motion for Summary Judgment. Tr. at 1. At oral argument, the Selectwomen conceded that RSA 91-A:3, III requires that actions be recorded, and that any agreement to divulge should have been recorded. Tr. at 24:14-18.

On October 21, 2019, the Superior Court denied the Motion for Judgment on the Pleadings but granted the Motion for Summary Judgment. Ad. at 54. In entering summary judgment, the Superior Court held that the BOS, "was of the opinion that the information [at issue] should be disclosed to the public." [8] Ad. at 59-60. The Superior Court relied upon the Selectwomen's affidavits asserting an

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the merits of Tejasinha's Surreply. *Id*. at 21-23. Because the Superior Court Rules do not contemplate any response to a Surreply, Tejasinha filed a Motion to Strike, to which the Selectwomen objected. *Id*. at 24.

[8] The Superior Court appears to have interpreted the Selectwomen's use of the word "agreement," to mean that they formed an "opinion," which is the word that the legislature chose in adopting RSA 91-A:3, III. *Compare* Ad. at 58-60 *with* Appx. Vol. I at 173, ¶7, 177 ¶6.

"agreement" to divulge the information. *Id*. The Superior Court rejected Tejasinha's argument that RSA 91-A:3, III requires that the opinion be recorded, reasoning that the statute does not explicitly require it and because RSA 91-A favors disclosure. *Id*. In explaining its decision, the Superior Court quoted RSA 91-A:3, III, "[m]inutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection." *Id*. at 58. However, it left out the remainder of that sentence, "except as provided in this section." *Id*. It further failed to consider the sentence, "[m]inutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded." *Id.*

On October 30, 2019, Tejasinha filed a Motion to Reconsider. Appx. Vol. II at 43. First, he pointed to the issue that there could be no presumption in favor of disclosure because the BOS unanimously voted to seal the record without qualification. *Id*. at 47-48. Because the BOS sealed the record as its last act, any prior agreement/opinion to divulge information would be superseded. *Id*. Furthermore, there was no need to agree or opine to divulge information *prior* to sealing the record, as there was no such requirement. *Id*.

Second, he identified the facts that the Superior Court overlooked establishing that there is a genuine issue of material fact as to whether an agreement/opinion was formed. Appx. Vol. II at 43-46 and 48-49.

Additionally, Tejasinha reminded the Superior Court that the Selectwomen asserted that the BOS reached an agreement, not that it

opined. Appx. Vol. II at 49-51. Reaching an agreement indicates an action occurred, and actions must be recorded. *Id*. However, even if the BOS "opined," that would have resulted in an action, which RSA 91-A:3, III requires to be recorded. *Id*.

Finally, he argued that even if the June 4, 2018 disclosure was proper, the June 18 disclosure was not, because the information divulged on June 18 was not previously discussed during the June 4 public session, but it was the same information that was discussed and then sealed in the June 4 non-public session. Appx. Vol. II at 51-52. Thus, there was no agreement/opinion to divulge that information. *Id*.

On November 8, 2019, the Selectwomen objected. Appx. Vol. II at 54. The Selectwomen insinuated that Tejasinha filed his Complaint for improper purpose, and that removing the Selectwomen would be anti-democratic. *Id*. at 54-55. Mostly, however, their Objection alleged that Tejasinha did not identify any issue of law or fact overlooked or misapprehended by the Superior Court. *Id*. at 55-59. However, they also mistakenly believed that Tejasinha raised a new claim that the BOS violated RSA 91-A. *Id*. at 59. Finally, they argued that the June 18, 2018 discussion was also authorized on June 4. *Id*. at 60.

In his November 14, 2019 Reply, Tejasinha first addressed the improper purpose and anti-democratic claims. Appx. Vol. II at 63. First, he explained that RSA 42:1-a exists as a statutory check on town officials and is therefore integral to our system of government. *Id*. at 63-64. Second, he explained that he did not bring his claim for any improper purpose. *Id*. Instead, based upon the evidence, he pursued a

remedy available to him for the Selectwomen having violated RSA 42:1-a by divulging information sealed pursuant to RSA 91-A:3, III. *Id*.

In addressing the claim that he raised a new issue for the first time, he clarified that he was responding to a new issue the Superior Court raised. Appx. Vol. II at 64-66. He simply addressed the Superior Court's conclusion that openness favors disclosure here, by illustrating why disclosure is not presumed. *Id*.

Further, he responded that the Selectwomen's claim that their violation was "technical," underscores their disregard for the law. Appx. Vol. II at 66. He also explained, that the principles he set forth are not "technical," but rather central to determining whether the Selectwomen violated RSA 91-A:3, III and 42:1-a. *Id*.

Finally, addressing the Selectwomen's claim that the information divulged on June 18, 2018 was also discussed publicly prior to June 4, Tejasinha pointed the Court to its own Order, which concluded that the June 18 divulgence was related to the June 4 non-public session. Appx. Vol. II at 67.

Furthermore, to discredit their claim, Tejasinha cited to the video of the meeting the Selectwomen relied upon. Appx. Vol. II at 67.[9] In that video, Sharps advocates that the Citizen Inquiry be used, not that it was improper to do so, or that it should be eliminated, and she explained that emailing the BOS is improper. *Id*.

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[9] The relevant portion of the video can be seen at the following link, beginning at 24:58 https://youtu.be/wFiDCIK6xWI?t=1498 *See also* Appx. Vol. II at 67, n.4.

However, he also noted that even if the same information had been disclosed prior, the information was unconditionally sealed by the June 4 unanimous vote to seal the non-public session. *Id*. at 67-68. Thus, that information became confidential.[10] *Id*.

On December 11, 2019, the Superior Court denied the Motion to Reconsider.[11] Ad. at 61.

On January 20, 2020, Tejasinha filed a motion to sever Count II. Ad. at 62. On March 18, 2020, the Superior Court granted the Motion. *Id*. On April 16, 2020, Tejasinha filed this appeal, and on April 24, 2020, the Selectwomen cross-appealed. *See generally* Sup. Ct. Docket.

[10] Because the Superior Court treated the June 18 disclosure as being authorized by the June 4 opinion to disclose, it did not separately resolve the Selectwomen's argument that the disclosure was proper because they had discussed the issue prior to June 4. Ad. at 59-60. Therefore, that issue is not a part of this appeal.

[11] Following that Order, on December 13, 2019, the Selectwomen filed a Motion for Attorneys' Fees and Expenses. Appx. Vol. II at 70. Because that Motion is not relevant to the issues in Tejasinha's appeal, he does not summarize the related pleadings here. He reserves his right to do so in his brief answering the Selectwomen's opening brief.

STATEMENT OF FACTS

Background

Tejasinha is a former Ashland Selectman. Appx. Vol. I at 214, ¶2. He served from March 2017 through January 2018. *Id*. While serving as a Selectman, Tejasinha became familiar with the policies and procedures the BOS used to conduct its business. *Id*.

Tejasinha also learned how the BOS conducted its meetings. Appx. Vol. I at 214, ¶¶2-3-215, ¶¶5-6. Regarding non-public sessions, if the BOS decided that certain information discussed therein would be discussed publicly, the BOS would make an "announcement." *Id*. at 214, ¶4-215, ¶5. Such decisions would be reflected in the resulting public meeting minutes in chronological order. *Id*. at 214, ¶3-215, ¶5.

With the public meeting minutes drafted in chronological order, events described earlier in the minutes occurred earlier in the meeting. Appx. Vol. I at 214, ¶3. In the case where the BOS held a non-public session, and it authorized an "announcement," the resulting public meeting minutes would reflect the "announcement." *Id*. at 214, ¶4-215, ¶5. The "announcement" would immediately follow the description that a non-public session occurred, and the content of the authorized announcement would be recorded in the same section of the public minutes. *Id*. at 214, ¶4-215, ¶5. For example, the public minutes would generally read as follows:

> "The Board of Selectmen entered non-public session pursuant to RSA 91-A:3, II (a) at 6:00 P.M. and left at 6:07 P.M. with Selectmen Newton, Lamos, Barney, Sharps, and DeWolfe

> present. The Board of Selectmen *announced* the part-time hiring of Parks and Recreation personnel for summer camp: Colby Moore, Hannah Paquette, and Morgan Desmond. The public beach will be opening on 6/18/18."

Id. at 240:11-14 (emphasis added), *see also Id*. at 215, ¶5, *see also Id*. at 244-296.[12]

The BOS Rules of Procedure require that during meetings, all votes taken be recorded in a manner that identifies the vote of each member present. Appx. Vol. I at 348.

The June 4, 2018 Meeting

On May 12, 2018, Tejasinha submitted a form known as a "Citizen Inquiry" in which he asked for a public censure against, and an apology from, Newton and Sharps. Appx. Vol. I at 315. In that Citizen Inquiry, he explained that he was treated with derision for interviewing, as one of his duties as a Selectman, Kathleen DeWolfe, then candidate for the Ashland Zoning Board. *Id*. He explained that the Selectwomen treated him that way both during the meeting in which the interview occurred and after the interview. *Id*. He explained that Ms. DeWolfe expressed that she was also offended by the interview. *Id*.

The BOS decided to consider the Citizen Inquiry on June 4, 2018. Appx. Vol. I at 172, ¶5. In doing so, anticipating that it may discuss

[12] Appx. Vol. I at 245-296 is a collection of public meeting minutes as examples of how announcements are made following a non-public session. In every case, the announcement is stated immediately following the section indicating that a non-public session occurred.

information, which if divulged to the public would likely affect adversely, Tejasinha's reputation, the BOS entered non-public session pursuant to RSA 91-A:3, II (c). *Id*. at 220-221 ¶32, d-g and 307-360. Tejasinha was the subject of that June 4 non-public session, his Citizen Inquiry was the only Citizen Inquiry discussed during that session, and his name was the only name recorded in the non-public minutes, other than members of the public body and the Town Administrator, Charles Smith. *Id*., *see also Id*. at 232-233. Additionally, Tejasinha's name was the only name recorded in the related public minutes in connection with the same information. *Id*. at 242:42-46-243:1-3.

At the end of the non-public session, without qualification, and as its last act before voting to re-enter public session, the BOS unanimously voted to seal the non-public session. Appx. Vol. I at 233. The June 4, 2018 non-public session minutes, despite recording other votes and decisions taken and made during, and in relation to, that non-public session, do not reflect that the BOS reached any agreement, or otherwise voted, to release any of the sealed information. *Id*. The envelope which contained the sealed June 4 non-public minutes does not indicate that a vote was taken relative to divulging any of the sealed information. *Id*. at 216, ¶8 and 230.

After the BOS re-convened the public session, and approximately 50 minutes into the public session, at Newton's behest, the Town Administrator identified Tejasinha in connection to the decisions made

during the non-public session. Appx. Vol. I at 191 and 201-202.[13] The Town Administrator publicly divulged that Tejasinha's May 12 Citizen Inquiry had been sent to the Town's attorney, who had written an opinion specifically about it. *Id*. The Town Administrator then read a portion of that opinion publicly. *Id*.

Following that, Newton divulged that the BOS would no longer consider criticisms of the BOS in public. Appx. Vol. I at 191-192. The Selectwomen concede that the publicly discussed comments were the subject of the non-public session recorded in the sealed minutes, which included Tejasinha's name. Appx. Vol. I at 172, ¶4, 176, ¶3, 180, ¶2, and 232-233.

On June 11, 2018, Tejasinha submitted a Citizen Inquiry expressing concerns about the June 4 meeting. Appx. Vol. I at 219, ¶24. The BOS never responded. *Id*. To investigate further, Tejasinha also submitted various Right-to-Know Requests beginning on June 11. *Id*.

In his June 11, 2018 Right-to-Know request, he sought the legal opinion read during the June 4 public session and "the minutes for the meeting in which the BOS voted 'not to address criticisms of the BOS in public'" on June 4, 2018. Appx. Vol. I at 317. He also requested the attorney opinion that was read during the June 4 public session. *Id*. The Town Administrator responded, claiming that the BOS would need

[13]The relevant public meeting video can be viewed here: https://youtu.be/lsq-Z3rB1oo, and the relevant portion runs from approximately 50:35 to 53:55. *See also* Appx. Vol. I at 191, n.3.

to vote to release the opinion due to attorney-client privilege, despite a portion having been read publicly. *Id*. at 320.

On June 18, 2018, Sharps divulged additional sealed information when she referred to the Citizen Inquiry form as being "abused," in part by being used in a "defamatory" manner, she called for its elimination, and she asked for a consensus for its elimination. Appx. Vol. I at 192.[14] A discussion followed. *Id*. Newton soon after reiterated that sentiment, explaining that the form was "not being used as intended," and that it had been "used improperly." *See* n.14. That is the specific subject for which the BOS entered non-public session on June 4. Appx. Vol. I at 192, *see also* 172, ¶4, 176, ¶3, 180, ¶2 and 232-233. Sharps then instructed the public to use forms available for RSA 91-A requests if it seeks information from the Town. *See* n.14.

Also during the June 18, 2018 meeting, the BOS amended the June 4 public minutes for reasons unrelated to the June 4 non-public session. Appx. Vol. I at 150:23-29.

On July 2, 2018, the BOS again amended the June 4 public minutes to reflect that the non-public minutes were sealed without qualification. Appx. Vol. I at 220, ¶30, 240, and 249:4-5.

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[14] The relevant public meeting video can be viewed here: https://www.youtube.com/watch?v=vMrEyzdYTX0&feature=youtu.be&list=PLbPTWBdOlg4AMYauSq5-wBKhJqla6hTvQ . The relevant discussion begins at approximately 37:30 and ends at approximately 41:35. *See also* Appx. Vol. I at 192, n.4.

On July 3, 2018, Tejasinha submitted another Right-to-Know Request seeking, "the non-public minutes for June 4, 2018 regarding RSA 91-A:3, II (c); OR If the Minutes were sealed I would like the minutes indicating who made the motion to seal, who seconded, the purpose for sealing, and the record of the roll call vote to seal [sic]." Appx. Vol. I at 224. The Town denied Tejasinha's request for the June 4 non-public minutes without providing a redacted version, explaining that the BOS sealed them. Appx. Vol. I at 227. Furthermore, the Town Administrator confirmed that if the BOS agreed to make an announcement, it would be reflected in the public minutes. *Id*. at 215, ¶7 and 227-228.

Despite being amended multiple times, neither version, including the final version, of the June 4, 2018 public meeting minutes reflects that an announcement was made, that a vote was taken, or any other agreement reached, to release any of the sealed non-public information. Appx. Vol. I at 220, ¶¶29-30, 235-243. Instead, the only relevant amendment was to note that the non-public minutes were sealed following Tejasinha's June 11 Citizen Inquiry and Right to Know Request. *Id*.

The BOS did not vote to unseal the June 4, 2018 non-public session until August 6, 2018. Appx. Vol. I at 307. Because Tejasinha was the only person discussed and reflected in the June 4 non-public minutes, the BOS unsealed them and released them to Tejasinha upon his request. Appx. Vol. I at 300 and 307. The non-public minutes

contain no record, and nothing is appended to them, indicating that the BOS agreed/opined to make any announcement. *Id*. at 232-233.

STANDARD OF REVIEW

When reviewing a trial court's order granting summary judgment, this Court must consider "the affidavits and other evidence, and all inferences properly drawn therefrom, in the light most favorable to the non-moving party." *Skinny Pancake-Hanover v. Crotix*, 172 N.H. 372, 376 (2019) (internal citations omitted). This Court may affirm only if its review of the evidence, "discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law." *Id*.

Even if there are no disputed material facts, the Court need not affirm the judgment in favor of the moving party. *Signal Aviation Services, Inc. v. City of Lebanon*, 169 N.H. 162, 166 (2016) (internal citations omitted). Instead, the court should apply the law to the undisputed facts and reverse if the moving party is not entitled to judgment as a matter of law. *Id*.

This Court reviews a trial court's interpretation of statutes, and other issues of law *de novo*. *Bedard v. Town of Alexandria*, 159 N.H. 740, 742 (2010). It also reviews the application of the law to the facts, *de novo*. *Skinny Pancake-Hanover v. Crotix*, 172 N.H. at 376 (internal citation omitted).

SUMMARY OF THE ARGUMENT

Though the Superior Court held that the Selectwomen did not violate the oath of office, its holding and reasoning were error. As a matter of law, the BOS could not have opined or agreed to divulge the information because the BOS did not record the agreement/opinion. Furthermore, the BOS overturned any such agreement/opinion by its unqualified and unanimous seal. Even if it could have agreed/opined, there is a genuine issue of material fact as to whether the BOS, in fact, formulated such an agreement/opinion.

RSA 91-A:3, III requires that all actions taken during non-public session be recorded. Applying the statute's plain reading, requires that the act of reaching an agreement or forming an opinion to divulge the information must be recorded. Furthermore, if the statute is read in context of its purpose of government accountability, then it must be construed to require that any agreement/opinion to divulge sealed information be recorded. The BOS did not record its agreement or opinion. Therefore, the Superior Court erred by holding that the BOS formed an opinion to divulge the information.

Even if the opinion need not be recorded, the BOS could not have formed the opinion during the non-public session as the Selectwomen claim. If it did, then the unanimous vote to seal without qualification as its last act would have overruled that opinion. The BOS did not revisit whether the session should be unsealed, to any degree, until two months later. Thus, the timeline indicates that even if the BOS *was* of the opinion to release the information, it *changed* that opinion by

subsequently voting to seal the session without qualification. Thus, as a matter of law, if a majority formed any opinion during that session, it was superseded and rendered void when the BOS unanimously voted to seal the session without qualification. Therefore, the Superior Court erred by holding that the BOS opined as such, and it was error to grant the Motion for Summary Judgment.

The Selectwomen fare no better attempting to establish a record via their affidavits, because they constitute improper parol evidence. Parol evidence can only be used to establish a vote in an action brought for that purpose. Further, parol evidence cannot be used to show that a vote occurred where it would contradict a prior record. Although the Superior Court did not address this issue, this Court necessarily must, if it finds that a record was required to establish the opinion/agreement.

Even if a record is not required, there is a genuine issue of material fact as to whether the BOS actually agreed/opined to divulge the information. The record evidence suggests that the BOS did *not* formulate an opinion during the non-public session, as its explanation does not align with the BOS' normal practices, which are overwhelmingly supported by Tejasinha's affidavit, record public documents, and other record evidence. Furthermore, it took nine months and the initiation of this case before the BOS suggested that it had agreed or opined to release the information. Thus, the Superior Court improperly weighed the competing affidavits and other evidence, and improperly resolved the disputed evidence in the Selectwomen's favor.

Because the Superior Court erred in finding that there was an agreement/opinion, either as a matter of law, or because it improperly resolved disputed evidence, this Court should REVERSE the Order granting summary judgment.

ARGUMENT

Statutes at Issue

Public officials are required to take an oath of office pursuant to RSA 42:1. A selectwoman must be dismissed if she violates her oath of office. RSA 42:1-a. A selectwoman violates her oath of office when, (1) she publicly divulges information, (2) which she learned "by virtue of [her] official position, or in the course of [her] official duties," (3) if a public body properly voted to withhold the information pursuant to RSA 91-A:3, III, and (4) if divulging the information would constitute an invasion of privacy, or would adversely affect a person's reputation, other than a member of the public body. RSA 42:1-a, II (a). The Superior Court's holding relates solely to whether the BOS intended to withhold the divulged information. That is the only element that is the subject of this appeal.

The minutes and other information of non-public session may be sealed if two-thirds of the members present properly vote to seal the minutes and if the minutes, among other reasons, reflect information that likely would affect adversely the reputation of a person. RSA 91-A:3, III. "The information may be withheld until, in the *opinion* of a majority of members, the aforesaid circumstances no longer apply." *Id*. (emphasis added).

As such, this Court must consider whether RSA 91-A:3, III's requirement that actions be recorded in an ascertainable manner, applies to "opinion" as used in RSA 91-A:3, III.

Applicable Rules

A public body is required to record all acts taken or done in non-public session, which means that any "opinion" formulated to unseal a non-public session must be recorded, and without such a recording, there can be no opinion. RSA 91-A:3, III; *see also* RSA 91-A:2, II (mandating that the minutes shall be treated as the permanent records of the public body without exception), *see also Sawyer v. Manchester and Keene R.R.*, 62 N.H. 135, 153 (1882) (explaining that the record created during the meeting is conclusive of the facts in the record).

Where a public body records a vote to seal a non-public session as its final act without qualification, any prior decision limiting the seal must be ineffective, as the final act is the controlling act. *See Byron v. Timberlane Reg. Sch. Dist.*, 113 N.H. 449, 453 (1973) (internal citations omitted).

Where, as here, there is a reasonable basis to dispute a defendant's assertion of an undisputed material fact, and where that fact is overwhelmingly contradicted by other evidence in the record, summary judgment must be denied. *See Iannelli v. Burger King Corp.*, 145 N.H. 190, 193 (2000).

Applying these rules requires reversing the Superior Court's Order entering summary judgment.

I. AS A MATTER OF LAW, THE BOS COULD NOT HAVE AGREED OR OPINED TO RELEASE THE INFORMATION BECAUSE THE OPINION/AGREEMENT WAS NOT RECORDED AS REQUIRED BY RSA 91-A:3, III's PLAIN MEANING OR RSA 91-A's POLICY REQUIRING ACCESS AND ACCOUNTABILITY.

When interpreting a statute, this Court must "look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *Langevin v. Travco Ins.*, 170 N.H. 660, 664 (2018) (citing *Petition of Carrier*, 165 N.H. 719, 721 (2013)). This Court applies the same rules of statutory interpretation to RSA 91-A as it does other statutes. *Green v. School Administrative Unit #55*, 168 N.H. 796, 798 (2016). Though the Court will not add language that the legislature did not include, it construes "all parts of the statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Langevin v. Travco Ins.*, 170 N.H. at 664.

Public officials, "at all times are accountable to the people." N.H. Const. Part First, Article 8. In furtherance of that principle, "[t]he purpose of [RSA 91-A] 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 (emphasis added). Thus, RSA 91-A has been construed in favor of providing "the utmost information to the public about what its government is up to." *Green v. School Administrative Unit #55*, 168 N.H. at 801.

When this Court reviews the plain language of RSA 91-A:3, III, and considers that with RSA 91-A's overall policy on accountability,

then the necessary outcome is that, as a matter of law, the BOS could not have reached an agreement/opinion without recording it.

A. The Unambiguous Plain Reading of RSA 91-A:3, III Requires the Opinion/Agreement to Have Been Recorded Because it is An Action.

This Court only looks beyond the statutory language to discern intent if the language is ambiguous. *Langevin v. Travco Ins. Co.*, 170 N.H. at 664. RSA 91-A:3, III states that the minutes of non-public sessions *shall* record all actions in such a way that the corresponding votes can be ascertained. "The general rule of statutory construction is that 'shall' is a command which requires mandatory enforcement." *In re Robyn W.*, 124 N.H. 377, 379 (1983) citing *Town of Nottingham v. Harvey*, 120 N.H. 889, 895 (1980) and *In re Russell C.*, 120 N.H. 260, 264 (1980)). That "'rule is particularly forceful when the command is addressed to a public official.'" *Id*. (quoting *Silva v. Botsch*, 120 N.H. 600, 602 (1980)). The plain reading of RSA 91-A:3, III then, is that all actions *must* be recorded.

However, the term "action" is not defined in RSA 91-A. *See generally* RSA 91-A:1-a. Its legal definition is, "the process of doing something; conduct or behavior," or "a thing done." BLACK'S LAW DICTIONARY 35 (Deluxe 10th ed. 2014). The word is commonly defined as, "the manner or method of performing," an "act of will," or "a thing done." MERRIAM -WEBSTER'S DELUXE DICTIONARY 17 (10th collegiate ed. 1998).

The Selectwomen assert that the BOS reached an "agreement," which is "the *act* or fact of agreeing." MERRIAM-WEBSTER'S DELUXE

DICTIONARY at 37 (emphasis added). Thus, by forming an "agreement," the BOS necessarily took an action.

Additionally, the Selectwomen contend that a majority reached the agreement; it was not unanimous. Appx. Vol. I at 173, ¶7, 177, ¶6. The only way the BOS could determine that, is if some form of polling occurred to ascertain who specifically constituted the majority. Such a polling would be a vote or an act, which must be recorded. In fact, there is no way to determine which information was supposed to be disclosed, versus which was supposed to remain sealed. There is simply no contrast and no clear partition.

Even if the BOS' opinion/agreement itself was not an action, the decision to release the information nevertheless had to be recorded. RSA 91-A:3, III requires that decisions be disclosed. Common sense requires then, that decisions be recorded, otherwise, they cannot be disclosed. There was no decision to divulge information because such decision was not recorded in the non-public (or public) minutes.

In contrast, the BOS properly and unanimously voted to enter non-public session. Appx. Vol. I at 232-233. As its last act prior to re-entering public session, the BOS properly and unanimously voted to withhold the non-public session minutes, decisions, and information by sealing the session without qualification. *Id*. Those acts are easily ascertainable because there is a record describing the action and reflecting who voted for the action. *Id*. However, any claimed agreement or opinion was not recorded in a manner that is ascertainable as required by RSA 91-A:3, III. *Id*.

Thus, because RSA 91-A requires that all actions and votes be recorded so as to be easily ascertained, and because that was not done here, it was error for the Superior Court find that there was such an agreement/opinion.

B. Because "Opinions" are "Information," RSA 91-A's Purpose of Accountability is Served by Requiring Opinions to be Recorded.

This Court interprets statutory language in accordance with the "purpose or policy sought to be advanced by the statutory scheme." *Langevin v. Travco Ins. Co.*, 170 N.H. at 664. Thus, RSA 91-A:3, III's "words and phrases" must be considered in "the context of the statute as a whole," rather than in isolation. *Id.* When interpreting RSA 91-A, and considering its purpose of ensuring accountability to the people, this Court disfavors government secrecy. *See Lambert v. Belknap Cty. Convention*, 157 N.H. 375, 381-382 (2008). In *Lambert*, this Court held that voting by secret ballot not only violated RSA 91-A's specific prohibition against such voting, but that it also "contravene[d] … [RSA 91-A's] fundamental purpose 'to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.'" *Id*. (quoting RSA 91-A:1). Thus, it implied that even if a secret vote or decision was not explicitly prohibited by RSA 91-A, it would nevertheless be improper due to RSA 91-A's policy favoring government accountability. *See Id*.

Furthermore, each time RSA 91-A is amended, the legislature expands the intended government accountability. *See Orford Teachers Ass'n v. Watson*, 121 N.H. 118, 121 (1981) (explaining that the

legislature has broadened RSA 91-A's scope and application each time it amended the statute). For example, the former RSA 91-A:3, III, provided for less accountability, only requiring that *decisions* be recorded. *See e.g. Id.* Furthermore, at the time of the *Orford* decision, RSA 91-A:2, II required only that the decisions made during the non-public session be recorded. *Id*. That is significantly less information than what RSA 91-A:2, II now requires: recording the names of members, persons appearing before the body, and a description of the subject matter discussed and final decisions made, be recorded in the minutes. Thus, narrowing accountability by not requiring public bodies to record opinions would be an absurd result, one this Court cannot allow. *See Great Traditions Home Builders, Inc. v. O'Connor*, 157 N.H. 387, 388 (2008).

With the above context in mind, the legislature must have intended the term "opinion" to be recorded. RSA 91-A defines "Governmental records" as, "any *information* created, accepted, or obtained by, or on behalf of, any public body … in furtherance of its official function." RSA 91-A:1-a, III (emphasis added). "Information" is defined as, "knowledge, *opinions*, facts, or data of any kind …" *Id*. at IV (emphasis added). Thus, if the public is entitled to governmental records, then the public is entitled to opinions. The public can only obtain opinions if they are recorded.

Furthermore, the BOS must comply with its own rules. *See Daniel v. B&J Realty*, 134 N.H. 174, 175-176 (1991). The BOS' Rules of Procedure, require that every vote be taken by a show of hands or by

roll call. Appx. Vol. I at 348. Thus, the public, looking back on any particular vote, would know what the vote was for, and who voted and how.

Allowing public bodies to form opinions without recording them eliminates accountability, accessibility, and transparency. The public will not know whether the public body, (a) formed such an opinion, or (b) made a decision regarding that opinion, or (c) took an action premised on that opinion. Here, it is not at all clear how the BOS reached its agreement. It could have been done by ballot, by a show of hands, orally, or something as vague as a wink-and-a-nod. The BOS' own Rules require either a show of hands or roll call, and the legislature could not have intended that opinions formed in non-public session be formed in other vague, unaccountable methods.

If transparency is the goal, then public body "opinions" should be treated no differently than any other action or decision, especially if done in non-public session. Otherwise public bodies could make things up as they go. This case is a prime example of that result.

The BOS did not once mention an opinion or agreement to disclose information until well after Tejasinha filed suit. Instead, it consistently took the position that the minutes were sealed, that it could not release information to Tejasinha absent a vote, and that if there were any announcement, it would be noted in the public minutes. Appx. Vol. I at 224, 227-228 317, 320. However, nine months later, and only after Tejasinha filed his Complaint to hold the Selectwomen accountable, after the Selectwomen Answered the Complaint, after

they filed their Motion for Judgment on the Pleadings, and only upon filing their Motion for Summary Judgment, did the Selectwomen (or any BOS member) suddenly, for the first time, indicate that the BOS had reached an agreement to divulge the information. *See generally* Appx. Vol. I at 15-27, 28-40, 104-111.

Thus, to avoid situations like this, and to promote RSA 91-A's purpose of government accountability, RSA 91-A:3, III must require that "opinions" or "agreements" be recorded. Therefore, the Superior Court erred in concluding that RSA 91-A:3, III does not require opinions to be recorded.

II. THERE IS NO PRESUMPTION OF DISCLOSURE, BECAUSE THE BOS' UNANIMOUS DECISION TO SEAL THE JUNE 4 NON-PUBLIC SESSION MUST BE PRESUMED TO BE A GENERAL SEAL WITHOUT EXCEPTION.

If a public body enters non-public session, then the non-public minutes and decisions must be disclosed within 72 hours unless sealed. RSA 91-A:3, III. If the session is not sealed, the statute mandates the information's release. *Id*. Thus, unless sealed, non-public minutes are available to the public for inspection – there is no automatic withholding. *See Orford Teachers Ass'n v. Watson*, 121 N.H. at 121-122. However, the public body need not provide the full content of the minutes to the public if an exception applies. *Id.* That implies, then, that if the public body withholds the entire contents, then the body intended to seal the minutes in their entirety without exception. *See Id.*

Although the public body has a right to reconsider a decision to seal a non-public session without qualification, the "final result" must

be "regarded as the thing done." *Byron v. Timberlane Reg. Sch. Dist.*, 113 N.H. at 453 (internal citations omitted). That is accomplished by recorded vote. *See Id.*

Allowing the reconsideration of a vote without a subsequent vote would render RSA 91-A:3, III ineffective. If two-thirds of a public body voted to seal minutes in their entirety, but then the dissatisfied simple majority or minority were permitted to divulge the same information without a vote reflecting that decision, it would render RSA 91-A:3, III meaningless, as it would not protect confidential information. It would also render RSA 42:1-a meaningless, as that remedy would be unenforceable if RSA 91-A:3, III could be so easily circumvented.

The BOS unanimously, immediately, and properly, without qualification voted to seal the June 4, 2018 non-public session before re-commencing public session. Appx. Vol. I at 233. Yet, the Selectwomen claim that the agreement was reached in the non-public session. Appx. Vol. II at 7. Any decision to limit the information to be sealed would have been reconsidered by the unanimous and unqualified decision to seal, which was the BOS' last act before recommencing public session. Appx. Vol. I at 233.

There is absolutely *no* evidence that the BOS reconsidered its decision regarding the sealed information until August 6, 2018. In fact, after Tejasinha began inquiring about the June 4 non-public session, the BOS responded by amending the June 4 public minutes to reflect that the non-public session was sealed. Appx. Vol. I at 219, ¶24, 317,

and 150, 23:29. As a result, the BOS would not provide any information to Tejasinha without a vote, or until August 6 when the BOS voted to unseal the session. *Id*.

Because the BOS sealed the June 4, 2018 non-public session, unanimously, and without qualification as its last act prior to re-entering public session, as a matter of law, it could not have agreed/opined to divulge information. Thus, it was error for the Superior Court to find that it did.

III. THE SELECTWOMEN'S AFFIDAVITS CONSTITUTE PAROL EVIDENCE, WHICH CANNOT BE USED TO ESTABLISH A VOTE OCCURRED.

Parol evidence may not be used to establish that a vote was taken. *Sawyer v. Manchester and Keene R.R.*, 62 N.H. at 153. There are only two exceptions to that rule, neither of which apply here: (1) when a proceeding is brought for the purpose of determining whether a vote was taken and what the votes were for purposes of correcting the record; and (2) when a record is lost or destroyed. *Id*. Even in the second case, the extrinsic evidence cannot be used to prove that the vote was taken or what the vote was, except if necessary to establish the contents of the record. *Id*. Thus, the record made of the meeting by the person charged with making the record is conclusive of the facts in the record. *Id*.

The Selectwomen are likely to rely upon *Cheshire County Convention v. Cheshire County Commissioners*, 115 N.H. 585 (1975), as overruling or limiting *Sawyer*, but their interpretation is incorrect, and *Cheshire County Convention* is distinguishable from this case. In

Cheshire County Convention, this Court held only that in the absence of a record, extrinsic evidence may be used to create the record. *Id.* at 589. That holding does not contradict the *Sawyer* holding.

The facts in *Cheshire County Convention* are distinguishable from the facts here. First, before any litigation commenced, the chairman prepared a report explaining that a vote, in fact, occurred. 115 N.H. at 587. Second, the litigation was a declaratory judgment action specifically brought to determine if a vote was taken. *See generally Id.* Finally, nothing in the record that did exist, contradicted the chairman's report. *Id.* This case, in addition to not having been brought to determine a vote, is distinguishable for other reasons as well.

There is a record that a non-public session occurred and that the Selectwomen subsequently divulged information. Appx. Vol. I at 232-233, 191-192, 201-202, 172, ¶4, 176, ¶3, 180, ¶2, and 192, *see also* n.13 and n.14. The record reflects a vote to enter non-public session. *Id*. at 232-233. The record reflects a vote to seal the minutes without qualification. *Id*. The record reflects the BOS voting to re-enter public session. *Id*. The record shows that the non-public minutes are devoid of any such recorded agreement/opinion, despite the care to record other information. *See generally Id*. The record reflects that on July 2, 2018, the BOS amended the June 4 public minutes to reflect that the June 4 non-public minutes were sealed without qualification. *Id*. at 220, ¶30, 240, and 249:4-5.

The record includes multiple drafts of the June 4 public minutes which do not reflect any announcement disclosing information.

Compare Appx. Vol. I at 235:14-16 *with* 240:14-16. The record reflects that the Town Administrator told Tejasinha that if an announcement were agreed upon, it would be reflected in the public minutes. *Id*. at 215, ¶7 and 227-228. The record further reflects that the BOS took no further action to change the record until nine months after the non-public session and four months after Tejasinha filed his Complaint. *See generally* Appx. Vol. I at 15-27, 28-40, 104-111, 224, 227-228 317, 320.

The record reflects that Tejasinha requested the legal opinion that was read and discussed during the June 4, 2018 non-public, and partially read during the June 4 public session. Appx. Vol. I at 317. It further reflects that the Town Administrator explained that the BOS would need to vote to release it, implying that it was sealed along with the rest of the information. *Id*. at 320. The record reflects that the envelope in which the sealed non-public minutes were kept, contains no indication of any vote to divulge information. *Id*. at 216, ¶8 and 230. Instead, the only vote noted on the envelope is the unanimous, unqualified vote to seal the minutes. *Id*.

The BOS had ample opportunity to correct the record at the time if it indeed transpired the way the Selectwomen now allege it transpired. When Tejasinha submitted a Citizen Inquiry about the June 4 non-public session, and a Right to Know Request on June 11 for the minutes thereof, the BOS, chose to amend the public minutes on July 2, 2018, to reflect that the relevant June 4 non-public session meeting minutes were sealed. Appx. Vol. I at 220, ¶30, 240, and 249:4-5. It made no other relevant changes to reflect any additional votes or

announcements taken about any other issue discussed during that non-public session. *Id*.

Finally, the record reflects that the BOS did not vote to unseal the June 4 non-public session until August 6, 2018. Appx. Vol. I at 307. That was the first time that a majority of the BOS was of the opinion/agreed that the circumstances leading to sealing the session no longer applied. *Id*.

Simply put, the Selectwomen are using parol evidence to *contradict* an existing record, not to correct a record of a vote or re-create a lost or destroyed record. That does not conform to RSA 91-A's accountability requirements, or more specifically, RSA 91-A:3, III's recording requirements.

Allowing such evidence permits the public body to fail to mention the agreement/opinion in the non-public record, then seal the minutes so nobody can uncover what transpired – or, as what the Selectwomen are doing here – retroactively create a record that is contrary to all other evidence pertaining to what occurred during that closed-door, non-public session.

If RSA 91-A:3, III requires that information discussed in non-public session remain confidential if sealed, then allowing the divulgence of information or announcement of decisions that are part and parcel of sealed information by retroactively creating a record, would render the statute ineffective. In such a case, parties who would be adversely affected by a violation would have no recourse under RSA

42:1-a because the violating party would simply assert by affidavit, that an agreement was reached or opinion formed, which is the case here.

Thus, not only is there no support in the law for using parol evidence to contradict a record, using it here would defy RSA 91-A's policy of accountability and transparency, and it sets bad precedent for circumventing RSA 91-A:3, III to avoid RSA 42:1-a's consequences. Therefore, this Court should hold that parol evidence may not be used to establish the opinion/agreement.

IV. EVEN IF THE AGREEMENT OR OPINION COULD BE VALID DESPITE NOT BEING RECORDED, AND DESPITE THE SUBSEQUENT UNANIMOUS, UNQUALIFIED SEAL, THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER THE BOS ACTUALLY AGREED OR OPINED THAT THE INFORMATION SHOULD BE DIVULGED.

This Court must consider all the evidence in the record, and construe all reasonable inferences drawn therefrom, in the light most favorable to the party opposing summary judgment. *Progressive N. Ins. Co. v. Concord Gen. Mut. Ins. Co.*, 151 N.H. 649, 652 (2005). A fact is "material" if it affects the outcome of the litigation when applied to the substantive law. *Palmer v. Nan King Rest.*, 147 N.H. 681, 683 (2002).

There is no reasonable basis to believe that the BOS reached an agreement or opined to divulge the information, and the disputed facts on the same issue must be resolved in Tejasinha's favor.

A. The Timeline and the Nature of the Defendants' Affidavits Illustrate a Reasonable Basis to Dispute the Selectwomen's Assertion That the BOS Formed an Agreement/Opinion to Divulge the Information.

Part of this Court's analysis includes "whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial." *Iannelli v. Burger King Corp*., 145 N.H. at 193.

As discussed earlier, non-public session minutes are automatically publicly available within 72 hours unless the session is sealed. RSA 91-A:3, III. The session remains sealed until a majority of the public body opines that the information should no longer be withheld. *Id.* The agreement/opinion to divulge need not have been made *prior* to voting to seal the minutes because, (a) information that is not yet sealed need not be held confidential, and (b) there would be no reason to "opine that the circumstances no longer apply," because the circumstances could not "no longer exist," if they had not yet existed. Thus, an opinion that circumstances justifying the seal no longer apply is not necessary (or possible) prior to sealing the minutes.

Finally, the affidavits the Selectwomen submitted were submitted by the Selectwomen themselves, Selectwoman DeWolfe, and the Town Administrator. Appx. Vol. I at 172-185. All these individuals have reason to provide self-serving affidavits: The Selectwomen because they are Defendants in this suit; Selectwoman DeWolfe because she was mentioned in, and offended by, Tejasinha's interview; and the Town Administrator because he read the information and also represents the Town, which is also being sued for a different

violation.[15] Appx. Vol. I at 3-14 and 315. Though the Superior Court cannot resolve credibility issues, it should have found a reasonable basis to dispute the facts in the affidavits.

Because both the timeline and the nature of the affidavits raises reasonable bases to dispute the Selectwomen's claim that the BOS reached an agreement or formed an opinion to divulge information, the Superior Court should have denied the Motion for Summary Judgment.

B. The Competing Affidavits and Other Evidence Further Illustrate A Genuine Question of Whether the BOS Actually Reached an Agreement or Formulated an Opinion During the Non-Public Session.

At summary judgment, "the trial court cannot weigh the content of the parties' affidavits and resolve factual issues." *Iannelli v. Burger King Corp.*, 145 N.H. at 193 (*citing Salitan v. Tinkham*, 103 N.H. 100, 102 (1960)). The same rule applies to other evidence. *See Sabinson v. Trs. of Dartmouth College*, 160 N.H. 452, 460 (2010).

The Selectwomen's affidavits contradict Tejasinha's affidavit and other record evidence. The affidavits fundamentally differ as to the procedure by which announcements and other information discussed during a non-public session are disclosed afterwards. Appx. Vol. I at

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[15] The Superior Court never granted the Selectwomen's Motion to Supplement the Motion for Summary Judgment with Casey Barney's Affidavit. The Superior Court also did not rely upon it in its Summary Judgment Order. *See* Ad. at 55. Therefore, it is not part of the Summary Judgment record. Even if it is, his Affidavit contains the same deficiencies that Tejasinha raised as to the other Affidavits submitted, and it should not be considered part of the record. Appx. Vol. II at 36-38.

214, ¶4-215, ¶5 and 214, ¶3-215, ¶5, 240:11-14, and 244-296. Tejasinha has shown that the Selectwomen's claim of coming to a non-recorded agreement, despite every other prior similar situation having been recorded, creates a genuine issue of material fact.

Furthermore, the Town's own conduct immediately following the June 4, 2018 non-public session contradicts the Selectwomen's affidavits. Indeed, the Town Administrator confirmed that any documented announcement would be stated in the public minutes. Appx. Vol. I at 215, ¶7, and 227-228. This is consistent with Tejasinha's observation as a Selectman pertaining to announcements. *Id*. at 214, ¶¶3-4-215, ¶5. When Tejasinha received the June 4 non-public minutes after they were unsealed, no disclosure or announcement was appended to the minutes. *Id*. at 232-233. No version of the June 4 public minutes indicates an announcement was made following the non-public session and vote to seal. *Id*. at 220, ¶¶29-30 and 235-243.

Sharps' June 18, 2018 request for a consensus to eliminate the Citizen Inquiry also calls into question whether one was reached during the June 4 non-public session. She requested the consensus, there was a discussion, and it was recorded both on video and the minutes. Appx. Vol. I at 192, *see also* n.14. In contrast, despite the clear effort for a recorded consensus to eliminate the Citizen Inquiry form, the BOS made no effort to record the agreement/opinion or consensus to divulge the June 4 non-public information. *Id*. at 232-233 and 235-243.

The BOS' historic procedure for making announcements, reaching agreements, the Town's statements to Tejasinha, and the other record evidence are contrary to the statements in the Selectwomen's affidavits.

Thus, there is a genuine issue of material fact as to whether the BOS agreed/opined, and the Superior Court erred by finding that none existed.

CONCLUSION

As a matter of law, the BOS could not have agreed or opined to release the information because no recording of it exists as required by RSA 91-A:3, III. Furthermore, any decision to divulge information was overruled by the subsequent unanimous, unqualified decision to seal the non-public session. Therefore, this Court should REVERSE the Superior Court's Summary Judgment Order.

Alternatively, because there is a genuine issue of material fact as to whether the BOS agreed or opined by consensus to divulge the information, this Court should REVERSE the Superior Court's Summary Judgment Order.

STATEMENT REGARDING ORAL ARGUMENT

Because this is a matter of first impression, and because it includes complex issues of law and an important timeline, Appellant requests oral argument before the full Court. Attorney Stephen T. Martin will present oral argument on Appellant's behalf.

Dated: August 25, 2020

Respectfully Submitted,
Tejasinha Sivalingam,
By, The Law Offices of Martin & Hipple, PLLC

/s/Stephen T. Martin

Stephen T. Martin, Esq.
22 Bridge Street; Suite 3
Concord, NH 03301
smartin@nhlegalservices.com
603-856-0202 (Ext. 1)
NH Bar#: 19567

CERTIFICATE OF COMPLIANCE

COMES NOW Attorney Stephen T. Martin, Counsel for the Appellant/Cross-Appellee, Tejasinha Sivalingam, and hereby certifies that this Brief was produced using standard sized typewriter characters or size 13 font, and that excluding the Cover Page, Table of Contents, Table of Authorities, Statutory Provisions, the Certificate of Compliance, Certificate of Service, Signature Block, and Addendum, this brief contains 9,433 words.

Dated: August 25, 2020 */s/Stephen T. Martin*
Stephen T. Martin, Esq.

CERTIFICATE OF SERVICE

COMES NOW Attorney Stephen T. Martin, Counsel for the Appellant/Cross-Appellee, Tejasinha Sivalingam, and hereby certifies that I have caused a copy of the Brief, Addendum, and Appendix to be served upon Counsel for the Appellees/Cross-Appellants using this Court's electronic filing system.

Dated: August 25, 2020 */s/Stephen T. Martin*
Stephen T. Martin, Esq.

No. 2020-0216

State of New Hampshire
Supreme Court

TEJASINHA SIVALINGAM,
Plaintiff – Appellant / Cross-Appellee
v.
FRANCES NEWTON AND LEIGH SHARPS,
Defendants – Appellees / Cross-Appellants

On Appeal from the Grafton County Superior Court
Civil Action No. 215-2018-CV-00396

ADDENDUM TO OPENING BRIEF OF APPELLANT/CROSS-APPELLEE, TEJASINHA SIVALINGAM

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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

(1)

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."

(2)

> 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

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[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

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STATE OF NEW HAMPSHIRE
SUPERIOR COURT

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

Tejasinha Sivalingam

v.

Town of Ashland, et al.

ORDER on MOTION to RECONSIDER

The plaintiff has filed a Motion to Reconsider the court's order of October 19, 2019 granting the defendants' (Newton and Sharp) Motion for Summary Judgment as to Count II of the plaintiff's complaint. No party has requested a hearing on the pending motion, and the court holds that a hearing is unnecessary to resolve the issues raised by the parties in their pleadings. *See Super. Ct. Civ. R. 12(e).*

Upon consideration of the parties' pleadings and arguments set forth therein, the court finds and holds that there are no issues of fact or law which were not previously considered by the court with regard to the issues addressed by the court in its October 19, 2019 order or which warrant a different result than that determined by the court in such order.

For the reasons hereinabove stated, the plaintiff's Motion to Reconsider is DENIED.

SO ORDERED, this 10th day of December 2019.

Lawrence A. MacLeod, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 12/11/2019

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Granted as to prayer A only.

STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

Honorable Lawrence A. MacLeod, Jr.
March 4, 2020

GRAFTON, SS

SUPERIOR COURT

Tejasinha Sivalingam,
Plaintiff,
v.
Town of Ashland, Board of Selectmen, et al.
Defendants.

Docket No. 215-2018-CV-00396

PLAINTIFF'S MOTION TO SEVER COUNT II, AND FOR ORDER TREATING CERTAIN ORDERS RELATED TO COUNT II AS A FINAL JUDGMENT ON THE MERITS FOR PURPOSES OF APPEAL

COMES NOW the Plaintiff, Tejasinha Sivalingam ("Tejasinha"), by and through the undersigned Counsel, and for his Motion to Sever Count II, and for Order Treating Certain Orders Related to Count II as a Final Judgment on the Merits for Purposes of Appeal, states and moves this Honorable Court as follows:

1. Tejasinha brings this Motion pursuant to, and in accordance with Superior Court Rule 46(c).
2. This Case includes two counts and two sets of Defendants. Count I is a claim solely against the Town of Ashland, Board of Selectmen (the "Town") alleging that the Town violated RSA 91-A. Count II is a claim solely against Frances Newton and Leigh Sharps, seeking their dismissal as selectwomen pursuant to RSA 42:1-a.
3. Though some of the facts may overlap for collateral issues to each Count, the facts necessary to prove a violation of Count I, are not the same set of facts necessary to prove the elements of removal in Count II. Therefore, the outcome of Count I will not affect

the outcome of Count II, and neither will the outcome of Count II affect the outcome of Count I.

4. The Parties have agreed that the Town may take an Interlocutory Appeal as to Count I subject to the requirements set forth in this Court's Trial Management Conference Order, and the Court granted the Town's Motion for Interlocutory Appeal. Therefore, there is no current set trial date.

5. The Parties also agreed, during the Trial Management Conference, that Count II should be severed so that an appeal may be taken on this Court's Order granting the Defendants' Motion for Summary Judgment, the related Motion to Reconsider, and on the Defendants' Motion for Attorney's Fees. Doing so will allow the issues pertaining to both Count I and Count II to be resolved by the New Hampshire Supreme Court simultaneously, presuming the Supreme Court accepts the Interlocutory Appeal as to Count I.

6. Therefore, Tejasinha requests that Count II be treated as severed from Count I, so that a Rule 7 Mandatory Appeal may be taken. Attached to this Motion is a proposed Order, which satisfies Rule 46(c)'s requirements. *See* Ex. 1.

7. On December 28, 2019, the undersigned circulated a draft of a version of this Motion and the proposed Order seeking assent thereto. By January 13, 2020, the undersigned had not received confirmation either way. On January 13, 2020, the undersigned followed up. On January 14, 2020, noting that they received the Court's Order regarding the Motion for Attorney's Fees and Expenses, Counsel for Newton and Sharps explained that they "intended to review and get back … by close of business" on January 15, 2020. Instead

Defendants' counsel circulated a proposed draft Motion to Reconsider the Attorney's Fees Motion Order.

8. In its Trial Management Conference Order, the Court Ordered the Parties to "use their best efforts to reach agreement on filing the necessary pleadings … within 30 days." *See* TMC Order at 2. Though Defendants have not assented to this Motion or the attached Proposed Order, Plaintiff acted diligently in seeking their assent, and despite not obtaining their assent, he submits this Motion in an effort to comply with this Court's TMC Order.

WHEREFORE the Plaintiff respectfully requests that this Honorable Court grant the following relief:

A. GRANT this Motion, and treat Count II as severed from Count I; and

B. ADOPT the Proposed Order attached hereto as "Exhibit 1"; and

C. GRANT all further relief that this Honorable Court deems just and proper.

Dated: January 20, 2020

Respectfully submitted,
Tejasinha Sivalingam,
By, The Law Offices of Martin & Hipple, PLLC,

/s/Stephen T. Martin

Stephen T. Martin, Esq.
22 Bridge Street; Suite 3
Concord, NH 03301
smartin@nhlegalservices.com
603-856-0202 (Ext. 1)
NH Bar#: 19567

CERTIFICATE OF SERVICE

COMES NOW Attorney Stephen T. Martin, Counsel for the Plaintiff, and hereby certifies that I have caused a copy of the foregoing to be delivered to the following using this Court's electronic filing system:

Charles P. Bauer, Esq.
Weston R. Sager, Esq.
Steven M. Whitley, Esq.
Walter L. Mitchell, Esq.

Dated: January 20, 2020

/s/Stephen T. Martin
Stephen T. Martin, Esq.

CERTIFICATE OF SERVICE

Comes Now Attorney Stephen T. Martin, Counsel for the Appellant/Cross-Appellee, and hereby certifies that I have caused a copy of this Addendum to be served upon Counsel for the Appellees/Cross-Appellants, using this Court's electronic filing system.

Dated: August 25, 2020

/s/Stephen T. Martin
Stephen T. Martin, Esq.