**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2010-0868, Charles J. Bowser, Jr., Special Administrator of the Estate of Kenneth Countie v. Town of Epping & a., the court on September 16, 2011, issued the following order:**

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). The motion of Local Government Center, Inc. (LGC) to be heard at oral argument is, therefore, moot. We affirm.

The plaintiff, Charles J. Bowser, Jr., Special Administrator of the Estate of Kenneth Countie, appeals an order of the superior court dismissing his claims against defendants Sean Gallagher and Richard Cote (officers Gallagher and Cote) on the basis that they were immune from liability pursuant to RSA 507-B:4, IV (2010). He argues that the trial court erred by concluding that he had not pleaded facts from which a jury could find that officers Gallagher and Cote acted in bad faith for purposes of RSA 507-B:4, IV, and by concluding that the defendant Town of Epping (town) had not "procure[d] . . . policies of insurance described in RSA 412," RSA 507-B:7-a (2010), so as to render any immunity to officers Gallagher and Cote unavailable.

In reviewing an order granting a motion to dismiss, "our task is to ascertain whether the allegations pleaded in the plaintiff's writ are reasonably susceptible of a construction that would permit recovery." Bel Air Assocs. v. N.H. Dep't of Health & Human Servs., 154 N.H. 228, 231 (2006) (quotation omitted). We assume all well-pleaded allegations of fact in the writ to be true, and construe all reasonable inferences from those facts in the plaintiff's favor. See id. We do not, however, credit those allegations that are not well-pleaded, "including the statement of conclusions of fact and principles of law." ERG Inc. v Barnes, 137 N.H. 186, 190 (1993). "We then engage in a threshold inquiry that tests the facts in the complaint against the applicable law." Bel Air Assocs., 154 N.H. at 231 (quotation omitted).

In matters of statutory construction, "[w]e are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." Cecere v. Loon Mt. Recreation Corp., 155 N.H. 289, 291 (2007). We ascribe the plain and ordinary meaning to the statutory language, mindful of the overall "policy sought to be advanced by the entire statutory scheme." Id. Where reasonably possible, we also interpret statutes dealing with a similar subject

matter consistent with, and so as not to contradict, one another. See State v. Farrow, 140 N.H. 473, 475 (1995).

In this case, the record reflects that the plaintiff asserted claims against both the town and officers Gallagher and Cote arising out of the murder of Kenneth Countie by Sheila LaBarre. See generally State v. LaBarre, 160 N.H. 1 (2010). The trial court dismissed the claims against the town on the basis that it was immune pursuant to RSA 507-B:5 (2010). Since the plaintiff does not appeal that ruling, we assume, without deciding, that it was sound.

Thereafter, officers Gallagher and Cote moved to dismiss under RSA 507-B:4, IV, which provides that where a "claim is made or . . . civil action is commenced against a present or former employee . . . of a municipality . . . , the liability of said employees . . . shall be governed by the same principles and provisions of law and shall be subject to the same limits as those which govern municipal liability." RSA 507-B:4, IV. For this statute to apply, however, the employee must have been "acting within the scope of his office and in good faith." Id. The trial court found that, while the well-pleaded factual allegations in the plaintiff's writ may give rise to an inference that officers Gallagher and Cote acted in a willful, wanton, or grossly negligent manner in failing to protect Kenneth Countie, they did not establish bad faith sufficient to trigger liability under RSA 507-B:4, IV. The plaintiff argues that "[i]f a jury could find the defendants' conduct was wanton and reckless, it is illogical that such conduct could not also be considered bad faith." Accordingly, the plaintiff contends that whether officers Gallagher and Cote, under the circumstances of this case, had been acting in "good faith" is a question of fact that should be decided by the jury. We disagree.

In Cannata v. Town of Deerfield, 132 N.H. 235 (1989), we upheld the dismissal of an action against municipal officials pursuant to RSA 31:104 (Supp. 1987) (amended 1991). That provision, similar to RSA 507-B:4, IV, immunizes certain municipal officials from damages arising out of "any vote, resolution or decision made by such person acting in his official capacity in good faith and within the scope of his authority." In Cannata, we agreed with the trial court that, despite the plaintiffs' claims that the officials had acted in a "wanton" manner, the writ "did not contain sufficient allegations of bad faith for the plaintiff to overcome the immunity hurdle of RSA 31:104." Cannata, 132 N.H. at 241. Construing RSA 31:104 and RSA 507-B:IV in a consistent manner, therefore, see Farrow, 140 N.H. at 475, we conclude that, to survive a claim of immunity under RSA 507-B:4, IV, the plaintiff must allege facts from which a jury could find that the municipal employees had acted in "bad faith"; conclusory allegations of "wanton" misconduct are not sufficient.

Moreover, we agree with officers Gallagher and Cote that construing RSA 507-B:4, IV to require allegations that they had acted in something more than

merely a "willful, wanton or grossly negligent" manner renders the statute consistent with the plain meaning of RSA 508:17, I (2010), another immunity provision. RSA 508:17, I, immunizes certain volunteers of governmental entities so long as: (1) the governmental entity has a record that the person is a volunteer; (2) the volunteer "was acting in good faith and within the scope of his official functions and duties"; and (3) "[t]he damage or injury was not caused by willful, wanton, or grossly negligent misconduct by the volunteer." If, as the plaintiff contends, "willful, wanton, or grossly negligent misconduct" could establish that an actor was not acting in good faith, it would have been superfluous for the legislature to have also required that a volunteer not have acted in a "willful, wanton, or grossly negligent" manner to enjoy immunity under RSA 508:17, I. In construing a statute, we presume the legislature did not intend to enact superfluous words. See State v. Thiel, 160 N.H. 462, 465 (2010).

Construing these statutes so as not to contradict one another, therefore, see Farrow, 140 N.H. at 475, we conclude that the legislature, in protecting municipal employees under RSA 507-B:4, IV, intended to except from the statute only "bad faith" conduct rising to the level of intentional misconduct. In this case, construing the plaintiff's well-pleaded factual allegations in the light most favorable to the plaintiff, a reasonable juror could not as a matter of law find that officers Gallagher and Cote acted in bad faith and outside the scope of their office relative to their alleged failure to protect Kenneth Countie.

We next address the plaintiff's argument that officers Gallagher and Cote were not entitled to immunity under RSA 507-B:4, because the town had procured a policy of insurance. We assume, without deciding, that the plaintiff preserved this issue for appeal.

Under RSA 507-B:7-a, a municipality "shall not be allowed to plead as a defense immunity from liability for damages resulting from the performance of governmental functions" to the extent the municipality has "procure[d] [a] polic[y] of insurance described in RSA 412." The record in this case indicates that the town had not procured coverage though a "polic[y] of insurance described in RSA 412," but through the LGC, a pooled risk management program (PRMP). See RSA chapter 5-B (2003 & Supp. 2010). The plaintiff concedes that insurance "products marketed by PRMPs are expressly exempted from insurance regulations and taxes that apply to non-PRMP entities." He argues, however, that the coverage provided by the LGC should be deemed a "polic[y] of insurance described in RSA 412" because "[t]he New Hampshire Bureau of Securities Regulation is investigating LGC and its insurance pools for conduct dating back to 2003 that may put their entire legal existence into question." Specifically, the plaintiff contends that the LGC may have "commingled funds and . . . retained surplus monies, any and all of which would extinguish their status as a pooled self-insurer and make them an insurance company operating for profit and subjecting them to RSA 412."

Even if the ongoing investigation were to establish that the LGC committed the alleged statutory violations, the plaintiff cites no support for his contention that coverages obtained by insureds through it would be deemed "policies of insurance described in RSA 412" for purposes of RSA 507-B:7-a. Nor are we aware of any such authority. It is the plaintiff's burden, as the appealing party, to support its complaints concerning adverse trial court rulings with developed legal argument. See State v. Blackmer, 149 N.H. 47, 49 (2003). Here, the plaintiff has failed to establish why a regulatory investigation of a PRMP would transform policies issued by it into policies of insurance described by RSA chapter 412.

Affirmed.

Dalianis, C.J., and Duggan, Hicks, Conboy and Lynn, JJ., concurred.

**Eileen Fox,**
**Clerk**

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