THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2014 Term
June Session

No. 2013-0885

City of Keene

v.

James Cleaveland, et als.

RULE 7 MANDATORY APPEAL FROM
CHESHIRE SUPERIOR COURT

BRIEF OF THE NEW HAMPSHIRE MUNICIPAL ASSOCIATION AS *AMICUS CURIAE*

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STATEMENT OF FACTS

The City of Keene (hereinafter "City") is a New Hampshire municipal corporation granted authority by the New Hampshire Legislature to regulate and enforce parking regulations pursuant to NH RSA 47:17 (XVIII). In furtherance of its authority to regulate parking on city streets, the City employs Parking Enforcement Officers (PEOs)whose essential duties include patrolling " . . . the parking district, on foot or by vehicle in an irregular pattern, issuing tickets for all violations of the City Parking Ordinance." See, Verified Petition for Preliminary and Permanent Injunctive Relief, Cheshire County Superior Court Docket #213-2013-CV-00098, Attachment A (hereinafter "Petition"). The Petition was brought by the City to obtain an injunction against James Cleaveland, Garrett Ean, Kate Ager, Ian Bernard a/k/a Ian Freeman, Graham Colson and Pete Eyre (hereinafter referred to as "Keene Defendants") to prevent those individuals from taunting, harassing, intimidating and intentionally interfering with the duties of the PEOs. The apparent object of the Keene Defendants was to protest the City's parking ordinances and parking fine assessment system by interceding on behalf of persons about to receive parking tickets. This intervention was carried out by shadowing the PEOs in the areas of downtown Keene where parking was controlled by assembling in groups of two to five people and by putting coins into expired meters in the vicinity of the PEOs as they checked for parking violations and issued parking tickets.

As attested by the three PEOs, Linda Desruisseaux, Jane E. McDermott and Alan E. Givetz, commencing in December of 2012 the Keene Defendants began ". . . following [the PEOs] around, whether videotaping or not, talking to us on regular basis, initially . . . Trying to basically --- I kind of figured out, was trying to just, you know, stop me from doing my job."

Evidentiary Hearing Transcript at page 30 (hereinafter "Transcript"). Desruisseaux would ask the Keene Defendants to please not speak with her and please stay away from her. Transcript page 31. The Keene Defendants would follow along too closely taunting her at times. Transcript page 36. " . . . [T]hey chase me around all day and say disparaging things and demean me in public, in front of other people." Transcript at page 36. On occasion the Keene Defendants would physically touch Desruisseaux. Transcript at page 37. Among the demeaning comments directed at Desruisseaux, James Cleaveland accused her of being a thief and Graham Coleson told her she was stealing from people.

PEO Alan Giretz considered his working conditions a hostile work environment due to the conduct of the Keene Defendants. Transcript at page 180. Giretz' interactions with the Defendants included getting ". . . in my face and not [moving] when I asked them to, calling me names, making remarks, attacking my veteran status, attacking my belief in God, attacking my religion, my faith." Transcript at page 239. "They brought up my family. It was just provocative statements just to get me to react a certain way. ." Transcript at page 239. In particular, Graham Coleson directed comments at Giretz where after Giretz asked him to move out of his way, Coleson said "What are you going to do about it, boy?" Transcript at page 242. Coleson would follow Giretz so closely that if he turned around quickly, Coleson would bump into him. Transcript at page 244 – 245. Keene Defendants Cleaveland, Coleson and Ean repeatedly directed comments at Giretz telling him to get another job, urging him to quit, and making clear that the taunting and following around the PEOs will continue as the Keene Defendants would not stop. Transcript at page 257. Giretz did quit his job as a PEO with the City of Keene. Transcript at page 180.

PEO McDermott had an incident with Keene Defendant Coleson grabbing her arm. Transcript at page 300. Coleson also had the habit of standing very close to McDermott when she was writing parking tickets, sometimes as close as a few feet away. McDermott characterized this as someone standing over her which McDermott found uncomfortable. Transcript at page 311. As a consequence of these and other actions by Keene Defendants Cleaveland and Coleson, PEO McDermott no longer felt safe working when they were present she changed her schedule to not work Saturdays, a day of the week when they were very active.

SUMMARY OF ARGUMENT

The trial court decision to dismiss the City of Keene's Petition for an injunction against the Keene Defendants for the harassment and taunting of its Parking Enforcement Officers did not adequately weight the significant governmental interest in the protection of governmental employees from harm and the unimpeded operation of the Keene parking enforcement ordinance against the minimal burden on the First Amendment. The Trial Court should have weighed the governmental interest against the reasonable time, place and manner restrictions proposed by the City of Keene before dismissing the City's Petition for Injunctive Relief. Even protected speech is not equally permissible in all places and at all times. The manner of the free speech activity as exercised by the Keene Defendants is subject to reasonable time, place, or manner restrictions, including the proposed limitation on being in close proximity to the PEOs. The Trial Court failed to weigh whether the allegations in the City's pleadings are reasonably susceptible of a construction that would permit recovery. As such, this Court should rule that it was improper to grant the motion to dismiss.

ARGUMENT

THE TRIAL COURT DECISION DID NOT WEIGH THE SIGNIFICANT GOVERNMENTAL INTEREST IN PROTECTING PUBLIC EMPLOYEES FROM HARM AGAINST THE REASONABLE TIME, PLACE AND MANNER RETRICTIONS SOUGHT BY THE CITY, AND THUS THE TRIAL COURT COMMITTED REVERSIBLE ERROR

The trial court decision stated that the City's " . . . tortious interference with contractual relations and civil conspiracy claims against the Respondents unreasonably prevent the Respondents' from exercising their right to free speech." See, Notice of Appeal, at page 19. The Court made is ruling without weighing the governmental interest against the reasonable time, place and manner restrictions proposed by the City. The Court concluded that the injunction could not move forward because the civil claims of tortious interference and conspiracy could not be presented to a jury due to the likelihood that the jurors dislike of the manner of expression would intrude on First Amendment freedoms. The Free Speech Clause of the First Amendment can serve as a defense in state tort suits, including suits for intentional interference in contractual relations. Snyder v. Fred W. Phelps, 131 S. Ct. 1207, 1215 (2011). However, that said even protected speech is not equally permissible in all places and at all times. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 799 (1985). The manner of the free speech activity as exercised by the Keene Defendants is subject to reasonable time, place, or manner restrictions that are consistent with the standards announced in this US Supreme Court's precedents. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

In its Verified Petition for Preliminary and Permanent Injunctive Relief in Docket Number 213-2013-CV-00098 the City sought an injunction restraining the Keene Defendants from video recording and/or coming within a safety zone of fifty (50) feet of any PEO while on duty performing her duties on behalf of the City. See, Verified Petition, at page 11. In evaluating the decision of the Superior Court to dismiss this request for an injunction, the standard of review is whether the allegations in the City's pleadings are reasonably susceptible of a construction that would permit recovery. The City's pleadings are assumed to be true and all reasonable inferences construed in the light most favorable to the City. This Court should engage in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, this Court should hold that it was improper to grant the motion to dismiss. Robin Plaisted v. Jeffrey A. LaBrie, 165 NH 194, 195 (2013).

Whether the First Amendment prohibits the granting of the proposed injunction to the City and against the Keene Defendants does in part turn on whether the speech in question is of public or private concern, as determined by all the circumstances of the case. Snyder, 131 S.Ct. at 1215. The apparent object of the Keene Defendants was to protest the City's parking ordinances and parking fine assessment system by interceding on behalf of persons about to receive parking tickets. This intervention was carried out by shadowing the PEOs in the areas of downtown Keene where parking was controlled, and this activity was carried out by groups of two to five people who put coins into expired meters in the vicinity of the PEOs as they checked for parking violations and issued parking tickets. Included in this activity was videotaping that was later rebroadcast by one or more of the Keene Defendants over internet channels such as Youtube. The *amicus* concedes that this is protected free speech activity. That being said, under all the attendant circumstances this concession does not immunize the Keene Defendants from

reasonable time, place and manner restrictions. In addition, the Keene Defendants would also be subject to the captive audience doctrine to protect unwilling listeners from protected speech. For example, the US Supreme Court has upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, See, Rowan v. Post Office Dept., 397 U.S. 728, 736-738 (1970), and an ordinance prohibiting picketing "before or about" any individual's residence, Frisby v. Schultz, 487 U.S. 474, 484-485 (1988).

Since the type of relief sought by the City was a civil injunction order, the standard of review of the form of potential intrusion on First Amendment freedoms is evaluated employing the principles enunciated by the US Supreme Court in Madsen v. Women's Health Center, 512 U.S. 753 (1994). That case involved the review of two injunction orders issued by State of Florida trial courts to limit picketing near medical offices that provide abortion medical services. Testimony provided to the trial court resulted in a conclusion that its original injunction had proved insufficient to protect the health, safety and rights of women in Brevard and Seminole County, Florida and surrounding counties seeking access to medical and counseling services. The state court therefore amended its prior order, enjoining a broader array of activities. The amended injunction prohibited petitioners from entering a 36-foot buffer zone around the clinic entrances and driveway, and it was found that the injunction did not, on balance, burden speech more than necessary to accomplish the governmental interests in protecting access to the clinic and facilitating an orderly traffic flow on the street. Madsen, 512 US at 757. Because the government intrusion on free speech freedoms was an injunctive order, its constitutionality was assessed under the standard whether the time, place, and manner restrictions were narrowly tailored to serve a significant governmental interest. Madsen, 512 US at page 764. More particularly, the question that must be addressed is whether the challenged provisions of the

injunction burden no more speech than necessary to serve a significant government interest. Madsen, 512 US at 765.

As stated by the US Supreme Court in NAACP v. Claiborne, 458 US 886 (1982):

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Claiborne, 458 US at page 912. As expressed in the Verified Petition, the City sought the injunction because the activities of the Keene Defendants was causing the PEOs to suffer anxiety and distress, impeding the ability of the PEOs to perform their jobs, creating intolerable working conditions for the PEOs, and likely resulting in the resignation of one of the PEOs from their positions with the City. Verified Petition, pp. 8 – 9. The City further asserted that the impact of the conduct of the Keene Defendants on the PEOs would cause the City to spend time and money hiring and training a new PEO preventing the City from fulfilling its statutory authority with respect to parking. Verified Petition, at page 9. As provided in NH RSA 231:132-a, the City has the authority to enact parking enforcement mechanisms.

The municipal interest in ensuring a healthy working environment for its employees is manifest in many legislative directives. The City is obligated pursuant to NH RSA Chapter 281-A to provide workers compensation coverage for its employees, and has a strong municipal interest in preventing work injuries, including claims for stress induced occupational injuries. Compare, NH Municipal Trust Workers Compensation Fund v. Flynn, 133 NH 17 (1990) (whether potential cost of providing workers compensation coverage for firefighters presumed to

be injured due to smoke inhalation was an unfunded mandate). The City must ensure that its employees do not suffer a hostile work environment due to discrimination based on age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin. See, RSA Chapter 345-A. These governmental interests should have been weighed by the Trial Court to determine whether the proposed limitation on physical proximity to the PEOs was an unreasonable intrusion on the First Amendment, and yet the Trial Court did not undertake a weighing of interests before dismissing the Verified Petition for Preliminary and Permanent Injunctive Relief.

The direct and focused contact between the Keene Defendants and the PEOs is more like the type of focused picketing banned from an abortion clinic buffer zone, and is unlike the type of generally disseminated communication that cannot be completely banned in public places, such as hand billing and solicitation. Madsen, 512 US at 769. The public speech and protest conduct of the Keene Defendants, including videotaping, was directly solely at the Parking Enforcement Officers. Although the Keene Defendants claimed their ability to conduct their free speech conduct as directed at the PEOs would be restrained, they were left with a wealth of free speech outlets, such as picketing and handbilling in the Keene downtown area that would be completely unimpeded by the injunction sought by the City of Keene. On balance, the proposed limitations on the speech activities of the Keene Defendants in and in near proximity to the PEOs burdens no more speech than necessary to accomplish the governmental interest at stake. Compare, Madsen at 770

It is also notable that the type of communication used by the Keene Defendants is more akin to taunting and could perhaps even be a form of a threat. To that degree, the conduct of the Keene Defendants and their language towards the PEOs ("I had them call me a coward, a bitch,

say that I was a racist, I condone the drowning of brown babies because I was a veteran" Transcript at page 239) strayed into an area of speech that is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm. See, Madsen at 774.

The limitations proposed on proximity to the PEOs also does not run afoul of case law concerning the right to videotape public employees in the performance of their duties. Simon Glik v. John Cunniffe, et als, 655 F.3d 78 (1st Cir., 2011). Glik was principally focused on constitutional limitations on the degree to which public officials are entitled to qualified immunity from personal liability arising out of actions taken in the exercise of discretionary functions. Glik, at page 81. The First Circuit concluded that the filming of government officials engaged in their duties in a public place ". . . serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." Glik, at page 82. Nevertheless the Court in Glik noted that right to film is not without limitations, and may be subject to reasonable time, place, and manner restrictions. Glik, at page 84

In Agnes Clift, et al. v. City of Burlington, 925 F. Supp. 2d 614 (D. Vt., 2013), the Court found that the City of Burlington, Vermont ordinance on regulating conduct near abortion clinics was designed to ensure public safety and order, regulate the use of public sidewalks and other conduct, promote the free flow of traffic on streets and sidewalks, reduce disputes and confrontations requiring law enforcement services, protect property rights, protect First Amendment freedoms of speech and expression and secure a person's right to seek reproductive health care services. Clift at page 619. These governmental objectives were significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics. Clift, at pp. 636 – 637. As observed by the Federal Court in Clift, the final requirement for time-

place-manner restrictions is that they must leave open ample alternative channels for communication; however, this requirement does not guarantee protesters access to every or even the best channels or locations for their expression. The communication alternatives need not be perfect substitutes for the channels of communication denied to protestors and the protestors' ability to communicate with their intended audience cannot be completely foreclosed. Clift, at page 640.

Similarly, in Catherine Bleish v. Master Patrolman Todd M. Moriarty, et al., 2012 DNH 118, Civil No. 11-cv-12-LM (Decided July 6, 2012), the US District Court District of New Hampshire found that irrespective of the ruling in Glik, the government may lawfully condition the exercise of First Amendment rights through the imposition of reasonable time, place, and manner restrictions. Even though direct and up close communication by the Keene Defendants is their stated preference for how they wish to communicate with the Parking Enforcement Officers, the City of Keene is still entitled to protect its employees from harassment and taunting, while at the same time leaving ample opportunity for the Keene Defendants to communicate their message about the evils of the Keene parking ordinance and enforcement procedures.

CONCLUSION

For the foregoing reasons, the *amicus curiae* respectfully joins in the City of Keene's request for relief.

Dated: June 11, 2014

Respectfully submitted,

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that this 11th day of June, 2014 I have mailed two copies of this brief to each of Jon Meyer, Esq., Counsel for Defendants James Cleaveland, et al,, Pete Eyre, Defendant, *pro se*, Charles P. Bauer, Esq., Counsel for the City of Keene, and Thomas P. Mullins, City Attorney, City of Keene.

Date: 6/11/14

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Stephen C. Buckley