THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0648

Charles W. Cole

v.

Town of Conway

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK SUPERIOR COURT

BRIEF FOR THE TOWN OF CONWAY

By its Attorneys,

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Oral Argument by Attorney Matthew V. Burrows

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I. Did the trial court correctly determine that Primex³ (i.e., the New Hampshire Public Risk Management Exchange) is a pooled risk management program as contemplated by RSA 5-B and that it does not provide "insurance coverage" as contemplated by RSA 507-B:7-a?

II. Did the trial court abuse its discretion when it denied Plaintiff's motion for leave to amend his complaint when the proposed amendments to the complaint would not satisfy the pleading requirements under RSA 231:92?

STATUTES INVOLVED

5-B:1 Purpose. – The purpose of this chapter is to provide for the establishment of pooled risk management programs and to affirm the status of such programs established for the benefit of political subdivisions of the state. The legislature finds and determines that insurance and risk management is essential to the proper functioning of political subdivisions; that risk management can be achieved through purchase of traditional insurance or by participation in pooled risk management programs established for the benefit of political subdivisions; that pooled risk management is an essential governmental function by providing focused public sector loss prevention programs, accrual of interest and dividend earnings which may be returned to the public benefit and establishment of costs predicated solely on the actual experience of political subdivisions within the state; that the resources of political subdivisions are presently burdened by the securing of insurance protection through standard carriers; and that pooled risk management programs which meet the standards established by this chapter should not be subject to insurance regulation and taxation by the state.

Source. 1987, 329:1, eff. July 24, 1987.

5-B:6 Declaration of Status; Tax Exemption; Liability. –
I. Any pooled risk management program meeting the standards required under this chapter is not an insurance company, reciprocal insurer, or insurer under the laws of this state, and administration of any activities of the plan shall not constitute doing an insurance business for purposes of regulation or taxation.
II. Any such program operating under this chapter, whether or not a body corporate, may sue or be sued; make contracts; hold and dispose of real property; and borrow money, contract debts, and pledge assets in its name.
III. Participation by a political subdivision in a pooled risk management program formed and affirmed under this chapter shall not subject any such political subdivision to any liability to any third party for the acts or omissions of the pooled risk management program or any other political subdivision participating in the program.

Source. 1987, 329:1, eff. July 24, 1987.

231:90 Duty of Town After Notice of Insufficiency. –
I. Whenever any class IV or class V highway or bridge or sidewalk thereon in any municipality shall be insufficient, any person may give written notice of such insufficiency to one of the selectmen or highway agents of the town, or the mayor or street commissioners of the city, and a copy of said notice to the town or city clerk. The notice shall be signed and shall set forth in general terms of the location of such highway, bridge, or sidewalk and the nature of such insufficiency.
II. For purposes of this subdivision, a highway or sidewalk shall be considered "insufficient" only if:
(a) It is not passable in any safe manner by those persons or vehicles permitted on such sidewalk or highway by state law or by any more stringent local ordinance or regulation; or
(b) There exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway at posted speeds or upon such sidewalk, in obedience to all posted regulations, and in a manner which is reasonable and prudent as determined by the condition and state or repair of the highway or sidewalk, including any warning signs, and prevailing visibility and weather conditions.
III. A highway or sidewalk shall not, in the absence of impassability or hidden hazard as set forth in paragraph II, be considered "insufficient" merely by reason of the municipality's failure to construct, maintain or repair it to the same standard as some other highway or sidewalk, or to a level of service commensurate with its current level of public use.

Source. 1893, 59:2, PL 82:8. RL 98:8. 1945, 188:1, part 18:9. RSA 247:9. 1981, 87:1. 1991, 385:3, eff. Jan. 1, 1992.

231:91 Municipality to Act; Liability. –
I. Upon receipt of such notice of insufficiency, and unless the highway agents or street commissioners determine in good faith that no such insufficiency exists, the municipality shall immediately cause proper danger signals to be placed to warn persons by day or night of such insufficiency, and shall, within 72 hours thereafter, develop a plan for repairing such highway, bridge, or sidewalk and shall implement such plan in good faith and with reasonable dispatch until the highway, bridge, or sidewalk is no longer insufficient, as defined by RSA 231:90, II.
II. If the municipality fails to act as set forth in paragraph I, it shall be liable

in damages for all personal injury or property damage proximately caused by the insufficiency identified in the notice, subject to the liability limits under RSA 507-B:4.

Source. 1893, 59:2, PL 82:9. RL 98:9. 1945, 188:1, part 18:10. RSA 247:10. 1981, 87:1. 1991, 385:4, eff. Jan. 1, 1992.

231:92 Liability of Municipalities; Standard of Care. –
I. A municipality shall not be held liable for damages in an action to recover for personal injury or property damage arising out of its construction, maintenance, or repair of public highways and sidewalks constructed thereupon unless such injury or damage was caused by an insufficiency, as defined by RSA 231:90, and:
(a) The municipality received a written notice of such insufficiency as set forth in RSA 231:90, but failed to act as provided by RSA 231:91; or
(b) The selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or
(c) The condition constituting the insufficiency was created by an intentional act of a municipal officer or employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard.
II. Any action to recover damages for bodily injury, personal injury or property damage arising out of municipal construction, repair or maintenance of its public highways or sidewalks constructed on such highways shall be dismissed unless the complaint describes with particularity the means by which the municipality received actual notice of the alleged insufficiency, or the intentional act which created the alleged insufficiency.
III. The acceptance or layout of a private road as a public highway shall not be construed to confer upon the municipality any notice of, or liability for, insufficiencies or defects which arose or were created prior to such layout or acceptance.
IV. The setting of construction, repair, or maintenance standards or levels

of service for highways and sidewalks by municipal officials with responsibility therefor, whether accomplished formally or informally, shall be deemed a discretionary, policy function for which the municipality shall not be held liable in the absence of malice or bad faith.

Source. RS 57:1. CS 61:1, 7. GS 69:1, 2. GL 75:1, 2. PS 76:1. 1893, 59:1. 1915, 48:1. 1921, 107:1. 1925, 52:2, 4. PL 89.1. 1935, 118:1. RL 105:1. 1945, 188:1, part 18:17. RSA 247:17. 1981, 87:1. 1991, 385:5, eff. Jan. 1, 1992.

507-B:2 Liability for Negligence. – A governmental unit may be held liable for damages in an action to recover for bodily injury, personal injury or property damage caused by its fault or by fault attributable to it, arising out of ownership, occupation, maintenance or operation of all motor vehicles, and all premises; provided, however, that the liability of any governmental unit with respect to its sidewalks, streets, and highways shall be limited as provided in RSA 231 and the liability of any governmental unit with respect to publicly owned airport runways and taxiways shall be limited as set forth in RSA 422.

Source. 1975, 483:1. 1981, 376:2. 1991, 385:9, eff. Jan. 1, 1992.

507-B:7-a Insurance Policies Procured by Governmental Agency. – It shall be lawful for the state or any municipal subdivision thereof, including any county, city, town, school district, school administrative unit or other district, to procure the policies of insurance described in RSA 412. In any action against the state or any municipal subdivision thereof to enforce liability on account of a risk so insured against, the insuring company or state or municipal subdivision thereof shall not be allowed to plead as a defense immunity from liability for damages resulting from the performance of governmental functions, and its liability shall be determined as in the case of a private corporation except when a standard of care differing from that of a private corporation is set forth by statute; provided, however, that liability in any such case shall not exceed the limits of coverage specified in the policy of insurance or as to governmental units defined in RSA 507-B, liability shall not exceed the policy limit or the limit specified in RSA 507-B:4, if applicable, whichever is higher, and the court

shall abate any verdict in any such action to the extent that it exceeds such limit.

Source. 2003, 144:14, eff. Jan. 1, 2004.

514:9 Amendments. – Amendments in matters of substance may be permitted in any action, in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice; but the rights of third persons shall not be affected thereby.

Source. RS 186:11. CS 198:11. GS 207:9. GL 226:9. 1879, 7:1. PS 222:8. PL 334:9. RL 390:9.

STATEMENT OF THE FACTS

Appellant Charles W. Cole ("Plaintiff") appeals the trial court's decisions to grant the Town's motion to dismiss and deny Plaintiff's motion for leave to amend. Accordingly, for the purposes of this appeal only, the facts in the "Complaint" are accepted as true.

On or about September 7, 2020, Plaintiff was walking in North Conway Village in the Town of Conway (hereinafter the "Town.") PB 10.[1] Plaintiff contends that while in front of Sister Crows Native American store and North Conway Twin Theatre, Plaintiff's foot "caught a hole in the sidewalk, causing him to trip and fall, striking his right arm and shoulder on the ground." PB 11. Plaintiff also contends that, although not known at the time of his fall, "the sidewalk had holes in its surface including many of the sidewalk's bricks being chipped, cracked or otherwise broken." Id. Plaintiff "believes" that the Town removed some of the bricks. Id. It is not clear from Plaintiff's Complaint or Brief whether he believes that his foot "caught" a chipped, cracked, or otherwise broken brick or in the alternative, whether his foot caught a removed brick. See id. Nevertheless, Plaintiff contends that there were "no cones, signs or other warnings to pedestrians using this sidewalk that bricks were missing and/or that holes or other tripping hazards existed." Id. Plaintiff brought a complaint against the Town seeking compensation for personal injury he claims to have suffered as a result of the fall. PA 3.[2]

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[1] "PB" refers to Plaintiff's Brief.
[2] "PA" refers to Plaintiff's Appendix to Brief.

STATEMENT OF THE CASE

On or about March 25, 2022, Plaintiff brought a single claim of negligence against the Town. PA 3–5. Pertinent to this appeal, Plaintiff baldly asserted that the Town had "written notice of the insufficiency of the sidewalk" and believed that the Town "chose to remove" several broken bricks, which made the "sidewalk impassible in any safe manner by those persons using the sidewalk." PA 4. On or about March 29, 2022, the Town moved to dismiss the claim on the basis that Plaintiff failed to plead sufficient facts to overcome the requirements set forth under RSA 507-B:2 and RSA 231:90 et seq. PA 6–10. Plaintiff objected and the Town replied. PA 11–17, 20–25.

While the Town's motion to dismiss remained pending, Plaintiff filed a motion for leave to file a surreply or alternatively a motion to amend his complaint on April 20, 2022. PA 26–27. In seeking to amend his complaint, Plaintiff stated that facts "ha[d] been recently discovered . . . [t]herefore, [Plaintiff] should be permitted to amend his [c]omplaint to add such facts." PA 26. Plaintiff never submitted a proposed amended complaint. See generally PA. The Town objected to Plaintiff's requests for relief incorporated—albeit improperly—in the same motion, i.e., the Town objected to the request for leave to file a surreply and the request to amend the complaint. PA 28–31. In objecting to Plaintiff's request for leave to amend, the Town argued that "even if the Plaintiff were permitted to amend his complaint to add this sole allegation, Plaintiff has still failed to plead sufficient facts to meet the requirements of RSA 231:92, II . . . ." Id.

Plaintiff did not file a reply to the Town's objection or otherwise attempt to supplement his motion seeking leave to amend.

On September 2, 2022, the Merrimack County Superior Court (*Kissinger*, J.) held a hearing on the Town's motion to dismiss. PA 52.[3] During the hearing and in response to questioning, Plaintiff reaffirmed his request for an opportunity to amend the complaint and provided a general overview that "news articles" and Town "minutes" indicated that there were problems "with that particular section of sidewalk in North Conway." Hr'g 5:16–25. Following the hearing, the Merrimack County Superior Court (*Kissinger*, J.) granted the Town's motion to dismiss and denied Plaintiff's motion for leave to amend his complaint in a narrative order dated September 19, 2022. AB 3–9.[4]

On September 29, 2022, Plaintiff filed a motion to reconsider, in which Plaintiff not only took issue with the trial court's narrative order but also attempted to proffer additional information in support of his request for leave to amend. The Town objected and the Merrimack County Superior Court (*Kissinger*, J.) denied Plaintiff's motion. PA 56–100; AB 10. The present appeal followed.

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[3] Plaintiff's Appendix includes only the notice of hearing on the motion to dismiss and does not include the transcript of the motion to dismiss. The Town supplements the record with the transcript from the Court's hearing, which has been appended to this brief and is hereinafter referred to as "Hr'g _:__."

[4] "AB" refers to Plaintiff's Addendum.

SUMMARY OF THE ARGUMENT

The Town's argument is twofold. First, the trial court did not err in granting the Town's motion to dismiss. Specifically, the trial court did not err when it determined Plaintiff's complaint did not comport to the pleading requirements of RSA 231:92 because Plaintiff did not adequately plead whether the Town received written notice; actual knowledge; or created the alleged insufficiency through an intentional act as required by the statutory framework. Moreover, the trial court did not err when it concluded that the Town participated in the pooled risk management program referred to as Primex³ and, at all times relevant to the instant litigation, did not procure insurance as defined by RSA 412. Plaintiff cannot point to any facts in the record to support his proposition that the Town is not a member of Primex³. Nor can Plaintiff point to any facts in the record that the Town had traditional insurance contemplated by RSA 412. Decisional law is clear that pooled risk management programs, such as Primex³, are not insurance as contemplated by RSA 412 and RSA 507-B:7-a. Accordingly, the Town, as a member of Primex³, is not precluded from utilizing the statutory standards of care under RSA 231:90 through :92. Perhaps more fundamentally, even if the Town had procured insurance as defined by RSA 412, the statutory standard of care established by the New Hampshire legislature under RSA 231:90 through :92 still governed Plaintiff's claim pursuant to decisional law.

Second, the trial court did not abuse its discretion when it denied Plaintiff's request for leave to amend his complaint. Plaintiff's motion for leave to amend the complaint suffered the same infirmities associated with

his initial complaint and Plaintiff failed to demonstrate how amendment would cure the pleading deficiencies. Furthermore, contrary to Plaintiff's argument, the trial court was not obligated to grant leave to amend the complaint where it had no reason to believe Plaintiff could satisfy the particularity requirements of the statute. Because Plaintiff's complaint was deficient and Plaintiff was unable to overcome the deficiency through amendment, dismissal was required pursuant to statute.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to dismiss, the Court must consider whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery. Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court assumes the plaintiff's allegations to be true and construes all inferences in the light most favorable to the plaintiff. Id. However, the Court need not assume the truth of statements in the complaint that are merely conclusions of law. See Tessier v. Rockefeller, 162 N.H. 324, 330 (2011) (citation and quotation omitted). The trial court must test the facts contained in the complaint against the applicable law. Jay Edwards, Inc. v. Baker, 130 N.H. 41, 44 (1987). Thus, to survive the motion to dismiss, the plaintiff must have pled sufficient facts to form a basis for the cause of action asserted. Mt. Springs Water Co. v. Mt. Lakes Vill. Dist., 126 N.H. 199, 201 (1985).

In the context of reviewing a trial court's ruling on a motion to amend, the Court must consider whether the trial court abused its discretion. While a court should allow amendments to pleadings to correct technical defects, it "need only allow substantive amendments when necessary to prevent injustice." New London Hospital Assoc., Inc. v. Town of Newport, 174 N.H. 68, 75 (2021) (citing Keshishian v. CMC Radiologists, 142 N.H. 168, 175 (1997); RSA 514:9). "An amendment may . . . be denied if it would not cure the defect in the complaint." Id. (citing Sanquedolce v. Wolfe, 164 N.H. 644, 647–48 (2013)). "When reviewing whether a ruling made by the trial court is a proper exercise of judicial

discretion, [the Court] determine[s] whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." Id. (citing In the Matter of Silva & Silva, 171 N.H. 1, 4 (2018)).

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE TOWN'S MOTION TO DISMISS.

The trial court concluded that Plaintiff failed to meet the pleading requirements under RSA 231:92 and, therefore, Plaintiff was precluded from proceeding forward with his claim of negligence against the Town and dismissal was appropriate. AB 6–8. In his brief and notice of appeal, Plaintiff does not appear to challenge the trial court's threshold decision that Plaintiff failed to plead notice, with required particularity, to meet the language of RSA 231:92, and Plaintiff does not appear to challenge the trial court's treatment of his motion for reconsideration. Plaintiff has, therefore, waived any argument relative to the trial court's decisions on these fronts. See Town of Londonderry v. Mesiti Dev., Inc., 168 N.H. 377, 380–81 (2015) (concluding that "[a]n argument that is not raised in a party's notice of appeal is not preserved for appellate review" and the Court will also "deem waived issues that are raised in the notice of appeal but are not briefed.").

Rather than address the substance of the preceding conclusions by the trial court, Plaintiff takes a different approach in attempting to overcome the statutory pleading requirements. Plaintiff spends much of his brief arguing that the Town was not entitled to "plead immunity" in this litigation because RSA 507-B:7-a does not allow a municipality to plead

immunity if it is insured against a loss and there was "insufficient evidence" that the Town was a member of a pooled risk management program (Primex³). Alternatively, Plaintiff proffers that even if the Town was a member, Primex³ still offers a form of "insurance" as contemplated by RSA 412. PB 13. Plaintiff's arguments are without merit.

As a threshold matter, there can be no dispute that the Town is a member of Primex³, a pooled risk management program as defined by RSA 5-B, and entitled to municipal immunity as described in RSA 507-B. See PA 23–24. Plaintiff, both at the trial court and in his brief, has failed meaningfully to dispute this fact. Plaintiff's position that "insufficient evidence" existed for the trial court to conclude that the Town was a member of Primex³ is puzzling and undermined by Plaintiff's own conduct before the trial court—Plaintiff submitted a letter on Primex³ letterhead as an "attachment" to his objection to the Town's motion to dismiss, which stated: "The Town of Conway is a member of Primex³ . . . a public entity risk pool established under RSA 5-B." PA 16–17. This attachment alone refutes Plaintiff's argument that "insufficient evidence" existed to support the trial court's determination that the Town was a member of Primex³, a pooled risk management program established under RSA 5-B.

Moreover, Plaintiff's alternative argument that Primex³, even as a pooled risk management program, may still provide traditional insurance under RSA 412 to the Town presents a tortured analysis that is inconsistent with the plain language of RSA 5-B and RSA 507-B:7-a. RSA 507-B:7-a specifically contemplates "policies of insurance described in RSA 412." As reflected in RSA 5-B though, the legislature treats pooled risk management programs differently from insurance providers. See RSA 5-B:1 (explaining

that risk management can be achieved through purchase of traditional insurance or by participation in pooled risk management programs); RSA 5-B:6, I ("Any pooled risk management program meeting the standards required under this chapter is not an insurance company, reciprocal insurer, or insurer under the laws of this state, and administration of any activities of the plan shall not constitute doing an insurance business for purposes of regulation or taxation." (emphasis added)); Martineau v. Antilus, No. 16-cv-541-LM, 2017 WL 2693491, at *5 (D.N.H. June 22, 2017) ("Although PRMPs may provide liability coverage that is comparable to traditional insurance, see RSA 5-B:3, the New Hampshire legislature has chosen to treat PRMPs organized under RSA 5-B differently from providers of insurance policies regulated under RSA 412."). As a result, Plaintiff's argument that the trial court erred in "hold[ing] that Primex did not provide insurance coverage", PB 19, misses its mark because adopting Plaintiff's argument would render the statutory language of RSA 5-B meaningless. Put another way, the legislature explained that pooled risk management programs that meet certain statutory standards should be not subject to insurance regulation and taxation by the state and are, likewise, not insurers under the laws of this state. See RSA 5-B:1; RSA 5-B:6. For this reason alone, Plaintiff's argument fails. But in addition to being inconsistent with the statutory framework, Plaintiff's argument is also undermined by existing case law addressing this issue. See Stratford Sch. Dist., S.A.U. Dist. No. 58 v. Employers Reinsurance Corp., 162 F.3d 718, 722 (1st Cir. 1998) (applying New Hampshire law) ("The New Hampshire courts have not considered whether, given the above statutory exception, the benefits paid by a [pooled risk management program] should nonetheless be

considered as 'insurance' for the purposes of an insurer's 'other insurance' clause. We think it likely that were the Supreme Court of New Hampshire presented with the question, it would answer in the negative."); Martineau, 2017 WL 2693491, at *5; Bowser v. Town of Epping, No. 2010-0868 (nonprecedential New Hampshire Supreme Court order); Lyna v. Merrimack School Dist. et al., No. 2015-CV-00155 (Merrimack Super. Ct. July 22, 2015).

Plainly, the Town is a member of Primex³ as represented by the Town in its pleadings and cemented by the "attachment" to Plaintiff's objection to the motion to dismiss. Primex³ is a pooled risk management program as defined by RSA 5-B and Plaintiff cannot point to any compelling case to prove otherwise. Thus, Plaintiff's argument that the Town's membership with Primex³ may still constitute insurance coverage under RSA 412 would render meaningless the legislature's decision to codify risk management for political subdivisions, eviscerate the purpose of RSA 5-B:1, and render meaningless the language of RSA 5-B et seq. Because Plaintiff's argument is inconsistent with the plain language of the statutory scheme and contrary to existing case law, it should be rejected.

The Court, however, need not engage in exhaustive analysis of the foregoing. Even if, for the sake of argument, the Town was not a member of Primex³ and had procured insurance contemplated by RSA 507-B:7-a and RSA 412, RSA 231:90 through :92 would still apply to Plaintiff's claim because it sets forth the standard of care for a municipality. Cf. In re R.M., 172 N.H. 694, 699 (2019) (concluding that when the trial court reaches the correct result on mistaken grounds, "we may affirm if valid alternative grounds support the decision").

RSA 231:90 through :92 sets forth a standard of care for a municipality rather than a private citizen. See Cloutier v. City of Berlin, 154 N.H. 13, 18–19 (2006). Indeed, a municipality's procurement of traditional insurance under RSA 412 does not alter the applicability of the standard of care under RSA 231:90 through :92. Rather, RSA 507-B:7-a provides in pertinent part: "It shall be lawful for . . . any municipal subdivision . . . including any . . . town . . . to procure the policies of insurance described in RSA 412. In any action against . . . any municipal subdivision thereof to enforce liability on account of a risk so insured against, the . . . municipal subdivision thereof shall not be allowed to plead as a defense immunity from liability for damages resulting from the performance of governmental functions, and its liability shall be determined as in the case of a private corporation except when a standard of care differing from that of a private corporation is set forth by statute[.]" (emphasis added). Even if the Town had procured insurance for the risk at issue, the statutory standard of care contemplated by RSA 231:90 through :92 still applies to Plaintiff's case because the Town is a municipality rather than a private citizen or private entity, and therefore the Town is governed by this different standard of care. See Cloutier, 154 N.H. at 18–19.

Since the Town's liability in this case is governed by a statutory standard of care, the provisions of RSA 507-B:7-a upon which Plaintiff relies with regard to his "Primex³ arguments" do not undermine the trial court's decisions in this matter. Where, as here, statutory standards of care govern the Town's liability, the exception to RSA 507-B:7-a is triggered regardless of whether the Town procures a policy of insurance under RSA 412. There is no waiver of the statutory standard of care simply by virtue of

a municipality purchasing liability insurance coverage. See Cloutier, 154 N.H. at 18–19. Accordingly, Plaintiff's argument that the trial court erred in applying RSA 231:90 through :92 is flawed and should be rejected.

As correctly determined by the trial court, under the statutory standard of care, Plaintiff's complaint failed to set forth sufficient facts as required by RSA 231:92, II to establish the prerequisites for maintenance of the action under RSA 231:92, I. Plaintiff's conclusory and insufficient allegations failed to provide the requisite detail as mandated by the statutory scheme, rendering the trial court's dismissal appropriate. Likewise, Plaintiff's arguments raised in this appeal in an attempt to side step the pleading requirements set forth in RSA 231:92 are without merit. Therefore, the trial court's order dismissing Plaintiff's complaint should be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT BECAUSE AMENDMENT WOULD NOT CURE THE INFIRMITIES ASSOCIATED WITH THE COMPLAINT.

Plaintiff asserts that the trial court erred when it denied Plaintiff's motion for leave to amend his complaint. PB 20–22. Plaintiff's brief appears to treat his request for leave to amend as a right conferred upon him under existing precedent. PB 21 ("Plaintiff must be given leave to amend his complaint to correct perceived deficiencies prior to dismissal of his action."). Plaintiff is wrong.

As a threshold matter, New Hampshire case law does not support Plaintiff's proposition that a trial court must allow a party leave to amend

his complaint under all circumstances. See, e.g., New London Hosp. Assoc., Inc., 174 N.H. at 76 ("We are not persuaded that the court's denial of the motion was error simply because it was the Hospital's first time moving for amendment to the complaint or because the motion was based upon evidence newly obtained during discovery."). Plaintiff's position is inconsistent with well-settled case law and ignores the fact that Plaintiff, in seeking leave to amend under these circumstances, must actually cure deficiencies associated with his initial complaint—deficiencies that Plaintiff has failed to challenge in this appeal.

Thus, in the context of evaluating whether to grant or deny Plaintiff's motion for leave to amend, the trial court was required to evaluate whether the proposed amendment would cure the deficiencies that existed with the initial complaint. Under RSA 231:92, a "municipality shall not be held liable for damages . . . arising out of its construction, maintenance, or repair of . . . sidewalks . . . unless such injury or damage was caused by an insufficiency[.]" RSA 231:92, I; see also RSA 231:90, I (identifying when a sidewalk is considered insufficient).

In addition to establishing an "insufficiency" as contemplated by the statutory scheme, RSA 231:92 further requires that one of three conditions must be satisfied to maintain an action:

> (a) The municipality received a written notice of such insufficiency as set forth in RSA 231:90, but failed to act as provided by RSA 231:91; or
>
> (b) The selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks

> thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or
>
> (c) The condition constituting the insufficiency was created by an intentional act of a municipal officer or employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard.

RSA 231:92, I. Finally, RSA 231:92, II provides that any action to recover for a personal injury arising out of the municipality's maintenance of the sidewalk "shall be dismissed unless the complaint describes with particularity the means by which the municipality received actual notice of the alleged insufficiency, or the intentional act which created the alleged insufficiency." (emphasis added); see also Opinion of the Justices, 123 N.H. 266, 278 (1991) (analyzing the constitutionality of Senate Bill 151-FN (1991) and concluding that "[p]roposed RSA 231:92, II, requiring a plaintiff's complaint to specify the means by which a municipality learned of an insufficiency, does no more than admonish a plaintiff to properly investigate and carefully plead his or her case." (emphasis added)); In re Liquidation of Home Ins. Co., 157 N.H. 543, 554 (2008) (quoting Theresa S. v. Sup't of YDC, 126 N.H. 53, 55 (1985) (concluding that the word "shall" is unambiguous and has been held to be "mandatory, not permissive, language.").

Against the preceding statutory framework, the trial court, appropriately analyzing Plaintiff's sparse and inadequate supplemental assertions, sustainably exercised its discretion when it denied Plaintiff's

motion for leave to amend. As a threshold matter, Plaintiff never supplied the trial court with a proposed amended complaint, but instead generally asserted that "recently discovered facts" relating to the Town's notice and knowledge of the condition of the sidewalk had come to light. PA 26.[5] Like his initial complaint, which fell well short of meeting the statutory requirements, Plaintiff's motion for leave to amend suffered the same deficiencies—namely, Plaintiff's proposed amendments to the complaint still failed to describe "with particularity the means by which the municipality received actual notice of the alleged insufficiency, or the intentional act which created the alleged insufficiency." RSA 231:92, II (emphasis added). Thus, the record establishes an objective basis to sustain the trial court's discretionary judgment in denying Plaintiff's motion for leave to amend. PB 09; see New London Hosp. Assoc., Inc., 174 N.H. at 76.

In spite of the record evidence in this appeal, Plaintiff nevertheless appears to foist blame on the trial court by baldly claiming that the trial court never considered the merits of Plaintiff's motion for leave to amend the complaint. Indeed, Plaintiff goes so far as to suggest that the trial court "chose to deny Plaintiff leave to amend his Complaint without addressing the merits of the April 20, 2022 motion." AB at 21 (emphasis added). Plaintiff's arguments are directly undermined by his own conduct during the September 2, 2022 hearing, the transcript of the hearing, and the trial

[5] Additionally, the "recently discovered facts" alleged in Plaintiff's motion for leave to file a surreply and amend his complaint appear related to a Conway Daily Sun news article dated February 5, 2021—i.e., an article published five months after the event that formed the basis of Plaintiff's complaint.

court's questioning. During the hearing and in response to questioning, Plaintiff voluntarily raised his request for leave to amend the complaint. When questioned regarding the specifics associated with the proposed amendment to the complaint, Plaintiff was afforded an opportunity to further elaborate on additional facts he would include in an amended complaint, which included Plaintiff making reference to a news article that was appended to his motion for leave to amend in an attempt to justify his proposed amendment. The trial court's colloquy with Plaintiff demonstrates that it had considered the parties' respective written positions relative to Plaintiff's request for leave to amend. Hr'g 6:1–3 ("It looks like that news article, at least by . . . what the Defense maintains, that news article was dated after the incident."). As the record reveals, Plaintiff was given numerous opportunities to add to his revolving door of factual theorem in attempting to generate a sufficient factual predicate to meet the statutory requirements. Plaintiff failed to meet the statutory requirements. Plaintiff's suggestion that the trial court did not consider his written motion to amend is without merit and his claim that the trial court abused its discretion in denying his request for leave to amend his complaint should be rejected.

Finally, it bears noting that Plaintiff attempted to use his motion for reconsideration as a vehicle to interject additional facts that he claimed supported his position that he should be entitled to amend his complaint. While any question relative to the trial court's treatment of Plaintiff's motion for reconsideration on this front has been waived, the trial court's treatment of the motion for reconsideration does not constitute an abuse of its discretion. Specifically, as argued by the Town in its objection to Plaintiff's motion for reconsideration, "whether to receive further evidence

on a motion for reconsideration rests in the sound discretion of the trial court," Lillie-Putz Trust v. DownEast Energy Corp., 160 N.H. 716, 726 (2010), and Plaintiff's belated attempt to inject such additional information into the proceeding was improper. Furthermore, none of the information relied upon by Plaintiff in his motion for reconsideration would rise to the level of meeting the statutory pleading requirements, as previously argued by the Town. PA 101–23. Put simply, the record is devoid of facts that would rise to the level of meeting the statutory pleading requirements.

In closing, the decision of a trial court to deny a motion to amend is not overturned absent an unsustainable exercise of discretion. Lamprey v. Britton Constr., 163 N.H. 252, 261 (2012). Plaintiff's strategy of introducing—in piecemeal fashion—additional facts under the guise of being "newly discovered" information throughout the underlying litigation before the trial court is the antithesis of proper pleading under the statutory framework. While Plaintiff may prefer a minimalist approach in pleading his claim, such an approach falls well short of establishing the requisite detail necessary to maintain his claim of negligence against the Town and runs contrary to the very purpose of the pleading requirements set forth in the statutory framework. Moreover, even considering the facts that Plaintiff did set forth before the trial court, these facts still fail to meet the pleading requirements under RSA 231:92. The simple truth is that Plaintiff has not—and cannot—marshal sufficient facts to meet the statutory pleading requirements. Thus, the record establishes an objective basis to sustain the trial court's discretionary judgment in denying Plaintiff's motion for leave to amend. It follows that the Court should reject Plaintiff's argument on this ground and affirm the trial court's decision.

CONCLUSION

From the inception of this litigation, Plaintiff's complaint and subsequent efforts to avoid dismissal have been based on speculation and conjecture. Plaintiff's present appeal and briefing are no different. For the foregoing reasons, the Town of Conway respectfully requests that this Honorable Court affirm the judgment below.

POSITION ON ORAL ARGUMENT

In the event the Court determines that oral argument would assist in deciding this appeal, the Town requests 15 minutes for oral argument and designates Matthew V. Burrows to present it.

Respectfully Submitted,

TOWN OF CONWAY

By its Attorneys,

Gallagher, Callahan & Gartrell, P.C.

April 5, 2023

/s/ Matthew V. Burrows
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CERTIFICATE OF COMPLIANCE

I, Matthew V. Burrows, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6867 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 5, 2023 */s/ Matthew V. Burrows*
Matthew V. Burrows

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Town of Conway's brief shall be served on Christopher Snook, counsel for Plaintiff, through the New Hampshire Supreme Court's electronic filing system.

April 5, 2023 *<u>/s/ Matthew V. Burrows</u>*
Matthew V. Burrows

ADDENDUM

BRIEF OF APPELLEE TOWN OF CONWAY

Page

STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY SUPERIOR COURT

CHARLES W. COLE, Plaintiff, vs. TOWN OF CONWAY, Defendant.	) Superior Court Case No. 217-2022-CV-00474) Concord, New Hampshire) September 2, 2022) 9:21 a.m.

HEARING ON MOTION TO DISMISS
BEFORE THE HONORABLE JOHN C. KISSINGER
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the Plaintiff:	Christopher C. Snook, Esq. SEUFERT LAW 59 Central Street Franklin, NH 03235
For the Defendant:	Keelan B. Forey, Esq. Matthew V. Burrows, Esq. GALLAGHER, CALLAHAN & GARTRELL 214 North Main Street Concord, NH 03301
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Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

(Proceedings commence at 9:21 a.m.)

THE BAILIFF: All rise for the Honorable Court. Merrimack County Superior Court is now in session.

THE COURT: Good morning, please have a seat.

This is the matter of Charles Cole v. Town of Conway. If I could just have counsel identify themselves and their clients for the record. First Plaintiff's counsel.

MR. SNOOK: Attorney Chris Snook for Charles Cole, sitting in the gallery.

THE COURT: And you can have a seat at -- you're a party, so you can have a seat at table, Mr. Snook -- Mr. Cole rather.

And for the Defense?

MS. FOREY: Keelan Forey, Your Honor, for the Town of Conway.

MR. BURROWS: Matt Burrows for the Town of Conway.

THE COURT: Excellent. This is a motion to dismiss filed by the Town. So I guess I want to start with Attorney Snook and ask specifically -- because there seems to be a dispute about the meaning of 231:92(II), and the particularity requirement under that statute. How do you believe the Plaintiff has satisfied the obligation of describing with particularity the means by which the municipality received actual notice? What's -- because you -- it seems to say you say -- you're suggesting by mail is adequate.

MR. SNOOK: Yes, Your Honor.

THE COURT: That's your position?

MR. SNOOK: The statute doesn't define particularity or have -- or the range in which the description needs to be for it to satisfy the pleading with particularity requirement. I could not find an authority that would define that, that was authoritative to that statute. And Defense has not provided one either.

THE COURT: So what was the mail notice?

MR. SNOOK: That they received mail on information --

THE COURT: What was the date of the mail that was -- that you rely on?

MR. SNOOK: I do not know.

THE COURT: So you just broadly assert mail as notice without providing any specificity as to who it was sent to, the date it was sent, the form it was given, and you think that satisfies the statute?

MR. SNOOK: We believe so, Your Honor.

THE COURT: If I have a different view, do you lose?

MR. SNOOK: We do not lose because we also raise the issue that the Town of Conway has liability insurance that covers the allegations, and you cannot raise in a defense of immunity when you have a liability policy covering the kind of claim that we're making.

THE COURT: Haven't other courts rejected that view?

MR. SNOOK: I --

THE COURT: That Primex is liability insurance?

MR. SNOOK: Not the Supreme Court. I believe various superior courts have --

THE COURT: And federal courts.

MR. SNOOK: And federal courts.

THE COURT: So can you point me to any court that has found differently?

MR. SNOOK: I don't believe anyone has ruled on that issue specifically. I don't know if any appeal has ever been made on that issue.

THE COURT: Okay. And I know -- Attorney Forey, do you want to add to your motion?

MS. FOREY: No, we have nothing to add, Your Honor. And I think, just to clarify, if we're referring to the mail as the letter sent to Primex in this matter, that was sent after the incident occurred. So we certainly don't think that that constitutes notice under the statute.

And in terms of Primex --

THE COURT: Is that -- let me ask Attorney Snook. Do you believe the letter that was sent to Primex? I mean, actual notice would have to be before the incident, do you agree?

MR. SNOOK: Correct, Your Honor.

THE COURT: Okay. But you just say that they had mail notice without date, recipient, time, any specifics, just mail?

MR. SNOOK: Correct.

THE COURT: So -- verbal would be another one without any specificity. Just the means by which the notice was given, without any more attached to that?

MR. SNOOK: Because New Hampshire is a notice pleading state, we're under the impression that the actual specific details do not need to be pled for the Town to be on notice for claims against them.

THE COURT: So you could say, by written, oral notice -- written and/or oral notice would be adequate?

MR. SNOOK: We believe so. If the Court disagrees, we would request leave to amend that complaint.

THE COURT: What would be -- what would you add to the allegation to amend the complaint? What specifics would you provide?

MR. SNOOK: We have found through news articles and minutes of the Selectmen's board that they were aware of problems with that particular section of sidewalk in North Conway. That the way that the pavers were installed originally was done in such a way that they were cracking and disintegrating over time. And there's debate over what to do about that particular issue. So this was information --

THE COURT: It looks like that news article, at least by -- for what I -- by what the Defense maintains, that news article was dated after the incident.

MR. SNOOK: We attached the -- the news article is what we originally found, and through subsequent research, we found previous meetings, and the Zamex Gates (phonetic), and what the Town engineer, said, we've been aware of this issue for years and years. And in that context, it was a context over either they're going to repave it or not, which I believe would be a discretionary function, the Defense would probably argue. But with that knowledge, before the date of the incident, failure to maintain or at least put up a sign or something like that would be a question of negligence and reasonable behavior. So we request leave to amend our complaint.

THE COURT: Attorney Burrows, yes?

MR. BURROWS: I'll speak to the amendment issue, Your Honor. I believe it's clear based on the motion to dismiss that should be granted, because the Plaintiff simply has not satisfied the statutory (indiscernible). (Indiscernible) need to be, that is the Court doesn't have in (Indiscernible).

On the issue of the leave to amend that rule, that should only be granted (indiscernible). This is the first time we're hearing about the reported meeting minutes, and so

(indiscernible) with the Town's knowledge. So let me focus first on this news article that was well after this event itself. That's simply insufficient. That's not enough in order to demonstrate the Town had knowledge, as required by the statute, written notice or actual knowledge.

And by the way, coupled with conduct on the part of Town officials, that would lean to further text in the statute, which is acting grossly negligent or in bad faith. We haven't heard any facts that would demonstrate that that type of conduct actually exists.

So on this issue of amendment, essentially our position is it would be futile because we don't even know what the content of the amended complaint would look like. And we would be back before you, presumably again, on a second motion to dismiss if that leave were afforded. So based on that, there's just no basis to go forward with another round of motions, Your Honor, in light of what we heard today. And the case should be dismissed and the motion to amend should be declined.

THE COURT: Mr. Snook?

MR. SNOOK: In cases where it's a motion to dismiss for failure to state a claim, the standard practice is to allow the plaintiff one attempt to amend their complaint to correct the issues, and no more beyond that. And that's all we're asking, Your Honor.

THE COURT: I'll take the motion under advisement. Thank y'all very much.

And did you want to say anything further before --

MS. FOREY: No, Your Honor.

THE COURT: Great. I'll take the motion under advisement. Thank y'all very much.

MR. SNOOK: Thank you, Your Honor.

(Proceedings concluded at 9:32 a.m.)

CERTIFICATE

I, TreLinda Wilson, a court-approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): TreLinda Wilson, CDLT-148

TreLinda Wilson

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Date: 2023.03.16 16:48:19 -07'00'

TRELINDA WILSON, CDLT-148
Proofreader

March 16, 2023