THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2014 TERM

CASE NO. 2013-0885

CITY OF KEENE

v.

JAMES CLEAVELAND, GARRETT EAN, KATE AGER,
IAN BERNARD A/K/A IAN FREEMAN,
GRAHAM COLSON, AND PETE EYRE

ON APPEAL FROM FINAL ORDER OF THE
CHESHIRE COUNTY SUPERIOR COURT

BRIEF ON BEHALF OF DEFENDANTS/APPELLEES

JAMES CLEAVELAND, GARRETT EAN, KATE AGER,
IAN BERNARD A/K/A IAN FREEMAN, GRAHAM COLSON

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CONSTITUTION OF NEW HAMPSHIRE

Pt. 1, Art. 8. [Accountability of Magistrates and Officers; Public's Right to Know.} All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonable restricted.

Pt. 1, Art. 22. [Free Speech; Liberty of the Press.] Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

RSA 47:17 BYLAWS and ORDINANCES

The city councils shall have power to make all such salutary and needful bylaws as towns and the police officers of towns and engineers or firewards by law have power to make and to annex penalties, not exceeding $1,000, for the breach thereof; and may make, establish, publish, alter, modify, amend and repeal ordinances, rules, regulations and bylaws for the purposes stated in this section. Provisions in this section granting authority to establish and collect fines for certain violations shall not be interpreted to limit the authority hereunder to establish and collect fines for any other violations:

II. Order and Police Duty. To regulate the police of the city; to prevent any riot, noise, disturbance, or disorderly assemblages; to regulate the ringing of bells, blowing of horns or bugles, and crying goods and other things; and to prescribe the powers and duties of police officers and watchmen.

VII. Use of Public Ways. To regulate all streets and public ways, wharves, docks, and squares, and the use thereof, and the placing or leaving therein any carriages, sleds, boxes, lumber, wood, or any articles or materials, and the deposit of any waste or other thing whatever; the removal of any manure or other material therefrom; the erection of posts, signs, steps, public telephones, telephone booths, and other appurtenances thereto, or awnings; the digging up the ground by traffic thereon or in any other manner, or any other act by which the public travel may be incommoded or the city subjected to

expense thereby; the securing by railings or otherwise any well, cellar, or other dangerous place in or near the line of any street; to prohibit the rolling of hoops, playing at ball or flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets and sidewalks, or to frighten teams of horses within the same; and to compel persons to keep the snow, ice, and dirt from the sidewalks in front of the premises owned or occupied by them.

STATEMENT OF THE CASE

This action was originally brought by the City of Keene against six individuals as a Petition for Preliminary and Permanent Injunctive Relief. App., p.1. The Petition sought an injunction against:

1. Any Respondent coming within a "safety zone" of 50 feet of any PEO while that PEO was on duty.
2. Enjoining the Respondents from video recording within the 50 foot safety zone.
3. Enjoining the Respondents from *"communicating with any PEO in a manner which seeks to taunt, harass or intimidate the PEO . . . ."*. App., pp. 10-11.

The sole count alleged in the Petition is tortious interference with contractual relations.

Subsequent to the filing of the Petition, the City filed a Motion to Clarify/Amend Petition, App., p. 33, alleging that in addition to acting in individual capacities, Respondents were also acting *"in a collective capacity to interfere with the City's Parking Enforcement Officers."* App., p. 34, and accordingly should be held jointly and severably liable. App., p. 35. In its Motion to Amend, it asserts that *"Petitioner does not seek to amend the Petition by stating an entirely new cause of action but seeks to only clarify that the Petition was intended to include the Respondents in their individual capacity and also as joint actors within a civil conspiracy."* Id.

Respondents filed a Motion to Dismiss, supplemental App. at 1, alleging that the Petition failed to state a cause of action upon which relief could be granted, and that a

ruling in Petitioner's favor would violate Respondents' constitutional rights. Prior to ruling on Respondents' Motion to Dismiss, the Trial Court held three days of evidentiary hearing with regard to the Petitioner's Motion for Preliminary Injunctive Relief. After the first of the three hearing dates, the City filed a civil complaint against the same individuals. App., pp. 52-59. That complaint made the same factual allegations as set forth in its Petition, but added the claims of negligence and attorney's fees and costs, and requested judgment holding each Defendant jointly and individually responsible for all damages, costs and attorney's fees.

The opinion of the Trial Court included a summary of the testimony presented at the preliminary injunction hearing. However, it utilized the motion to dismiss standard of review, analyzing "the facts contained on the face of the writ to determine whether a cause of action has been asserted." Op., p. 9 (citations omitted). It's denial of the request for injunctive relief was premised upon its dismissal of the underlying case. Op., p. 15.

The Brief submitted by the City includes its rendition of the testimony presented at the hearing. Respondents strongly dispute the accuracy of this summary. However, it is both unnecessary and improper to consider the testimony where the decision under appeal is one of dismissal based upon the conclusion that even if the properly alleged facts in the Complaint are accurate, the Petition and Complaint do not state a valid cause of action against Respondents.

In its third question presented, Petitioner allege that the Trial Court erred in denying the City's Petition for Preliminary and Permanent Injunctive Relief. That issue was not stated as a question presented in Petitioner's notice of appeal, and is

accordingly improper pursuant to Rule 16 (b) of this Court. Even if this issue had been previously raised, it is not ripe for review where the Trial Court has not addressed the merits or permissible scope of injunctive relief.

SUMMARY OF THE ARGUMENT

The primary questions in this case are whether the City has set forth a viable claim of tort liability, and whether that claim can be utilized as a means of securing injunctive and monetary relief against non-violent political protestors based on the allegation that the protestors' activities on the City's streets and sidewalks was harassing to its employees. The City acknowledges in its Brief that it is requesting this Court to create *"new law"*. Brief at 9. This self-description understates the magnitude of what it is requesting of this Court. Acceptance of its position would mark a dramatic extension in tort law, and even more fundamentally, in federal and state constitutional law. It would create potentially limitless liability particularly, but not exclusively, with respect to political protests. Equally novel is the City's position that jurors, not the court, should determine whether protest activities are constitutionally protected.

Although the "Robin Hood" type protest involved in this case may be unusual, it falls well within the bounds of non-violent expressive speech and conduct on matters of public concern occurring on public streets and highways which is entitled to the greatest level of constitutional protection. The Trial Court properly held that it would be unconstitutional to vest a jury with the discretion to make such expression tortious through a determination that the Defendants were engaging in *"improper"* interference.

Plaintiff's position that political expression in a public forum, where no violence has been alleged, can be subject to monetary damage and injunctive relief under state tort law, is directly contrary to governing Supreme Court precedent. The Court made clear in NAACP v. Claiborne Hardware, 458 U.S. 886 (1982), a case in which white merchants sued for economic damages incurred as a result of a civil rights boycott, that absent violence, intentional tort claims even where valid must give way to the constitutional rights of protestors.

As a constitutional matter, Plaintiff's complaint violates the First Amendment and Part 1, Articles 8 and 22 of the New Hampshire Constitution. The very concept of government accountability set forth in Article 8 is antithetical to the claim that private citizens can be subject to a damage remedy for videotaping government employees, or attempting to persuade them to leave their employment. Plaintiff's assertion of a public employee right to be left alone has no legal basis, particularly as applied to political speech on public sidewalks, and does not trump the right of protestors to express their message at close range or from afar.

The application of the tort of interference with contractual relations to political demonstrations is inherently content based because it is premised on one type of communications - - persuasion against maintaining contractual relations. Subjecting political activism to this tort would indiscriminately subject virtually any expression of anti-government sentiment to a chilling potential damage remedy. The fact that the Plaintiff is seeking joint and several liability is further indicative of its desire to use the threat of a monetary sanction to suppress speech.

The violation of basic constitutional principles that runs throughout Plaintiff's case is further demonstrated by the relief requested, a 50-foot floating zone around each PEO whenever and wherever they are conducting their duties throughout downtown Keene. Such relief would offend the bedrock principle that any restriction on public protest in the public arena must be narrowly tailored to a compelling government purpose (or to a substantial purpose when the restrictions are not content related), and far exceeds any restrictions on speech that have been recognized by the United States Supreme Court. The purportedly more limited restrictions proposed by the City during the course of the injunction hearing utilize such vague terms as to be equally chilling in their proposed operation.

There are other alternatives that the City could have utilized to protect PEO's if the actual facts resembled those claimed in the complaint including adopting and enforcement of local ordinances governing public ways. None of these would have sufficed to shield the PEO's from the Robin Hooders, but that is the price of protecting the right of political expression.

The Trial Court's decision is also sustainable on the ground that Plaintiff's complaint fails to satisfy the elements of the torts alleged. In particular, the claim of interference with contractual relations, is not applicable to persuasion directed at employees at will like the PEO's, and does not vest in the employer the right to sue for allegedly impeding work performance. The secondary claim of negligence, which is articulated in even more perfunctory terms, fails because the private citizen Defendants do not have a duty to third party employees, particularly public employees, and the Complaint does not contain the assertion of any negligent acts. Finally, the add-on

claim of civil conspiracy presupposes the existence of a separate valid tort claim which is not present here.

Plaintiff's primary complaint is that the Trial Court did not sufficiently *"scrutinize"* its complaint. But it has entirely failed to specify what it is in its complaint that the Trial Court overlooked. From the perspective of protecting constitutional rights, deciding this case as a matter of law is of critical importance in reaffirming that peaceful political demonstrations in public forums are protected from tort liability, in sparing demonstrators from the burden of having to go through a trial, and in insulating political speech from the chilling effect of potential financial liability.

Plaintiff claims, without citing any precedent, that determining *"where on the spectrum of protected and non-protected conduct the defendants' activities fall, is the domain of the jury."* P. 22. This is not just error; it conflicts with the fundamental right and responsibility of the judiciary to define and protect constitutional rights. The role of the jury is to determine disputed facts, and for the purpose of Defendants' Motion to Dismiss there are none.

ARGUMENT

I. The Complaint Does Not State A Valid Cause Of Action For Intentional Interference With Contractual Relations.

As the Trial Judge noted, neither he nor the parties could locate any precedent applying the tort of interference with contractual relations to private citizens protesting in regard to government employees. Op. 10. The underlying controversy from which this

case arises has nothing to do with contractual relations. The Petition does not make any allegation about the nature of the contracts in question except for alleging that the PEO's are employed by the City,[1] and members of a union. Pet. ¶ 1, App. 1. There is no assertion in the Complaint that any contract was breached as a result of any actions engaged in by Defendants. Under the Restatement and the common law, the critical requirement is that defendant act with *"improper"* motive, a concept defined by the Restatement in terms of seven criteria including the nature of the actor's conduct, the actor's motive, the interests of the plaintiff, the interests of defendant, the social interests in protecting the defendants freedom of action and plaintiff's contractual interest, the connection between the defendant's conduct and the interference, and the relations between the parties. Restatement 2nd of Torts, § 767.

The Trial Judge correctly determined that applying the interference tort to the Defendants' conduct would have violated their constitutional rights because it would require a jury determination of whether their interference was *"improper"*. Plaintiff's claim also fails as a matter of tort law. Its attempt to establish that its asserted interference claim meets the standards of tort law is limited to one conclusory paragraph in its Brief which misstates the controlling law; in particular it attempts to collapse the distinction between the separate requirements that the interference be intentional and improper. Brief at 15. In fact, both requirements must be met. Res. Tort 2d. § 766. *"Only improper interference is deemed tortious in New Hampshire."* Roberts v. General Motors, 138 N.H. 532, 540 (1994) (emphasis in original). Plaintiff errs by quoting out of context this court's opinion in Demetracopoulos v. Wilson, 130 N.H. 371, 373-374

[1] Testimony at the hearing was that the PEO's were employees at will without any contractual rights. Tr. 270-271.

(1994). In that case, the court cited from Comment D of § 767 that to establish defendant's conduct was improper the plaintiff had to show that the interference with contractual relations was desired or substantially certain to result. Id. But the fact that intentional conduct is a necessary element does not mean that it is sufficient. To the contrary, the very Restatement Comment cited by this Court in the Demetracopoulos opinion goes on to state that *"(i)ntent alone, however, may not be sufficient to make the interference improper, especially when it is supplied by the actor's knowledge that the interference was a necessary consequence of his conduct rather than by his desire to bring it about."*

There is no precedent in New Hampshire law for this tort being applied outside the context of economic competition. Even between economic competitors, it has no legal basis on the facts alleged here. The New Hampshire Federal District Court has ruled that the tort of intentional interference with contractual relations is not applicable to a case, such as this one, involving employment at will. Rand v Town of Exeter, 11-CV-55-PB (10/02/13) (DNH 133). It makes no sense, and would be contrary to fundamental precepts of justice and equity, to conclude that an employer, who provides no expectation of continued employment, reserving the right to terminate at any time, could nonetheless bar third parties from attempting to persuade the employee to leave employment. Given the employee at will's unrestricted right to leave his employment, there is no conceivable reason why a third party should be barred from encouraging that employee to do so. According to the Restatement:

> *The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing*

> *the termination [of the employment at will relationship]. Thus, he may offer better contract terms, as by offering an employee of the plaintiff more money to work for him or by offering a seller higher prices for goods, and he may make use of persuasion or other suitable means, all without liability. Res. 2d Tort, § 768, Comment i.*

Indeed, the recruitment and job placement industry would be decimated if encouraging an employee at will to leave his or her position were determined to be a tort. If there is a privilege to persuade a person in an employment at will relationship to change jobs for economic reasons, it follows that there is the same right to engage in political persuasion.

The Petition sets forth statements of alleged contractual interference which are pure speech: *"(r)espondents repeatedly told the PEO's to terminate their employment relationship with the City, going as far as offering to assist the PEO's in finding alternative employment. . .",* Complaint, ¶17, App. 5; *one of the parking attendants "fears for her job security [as if she had any], as the Respondents have stated an intention to shut down the City's parking department. . .",* ¶ 19, App. 5. Rendering these statements illegal would mean that a private citizen asking a public employee to fire a public employee for misconduct could similarly be liable for contract interference. And the debate over the size of government would be skewed and chilled, with the supporters of smaller government (but not their ideological opponents), being subject to tort liability for political activism aimed at potential downsizing.

The principal thrust of the complaint is that the PEO's job performance and conditions of employment were impacted by Defendants' *"taunting, intimidating, harassing and video recording PEO's at close proximity. . .".* ¶28, App. 7, and the City's claim that it has in consequence suffered due to the PEO's diminished job performance.

¶ 30. But the intentional interference tort is premised upon interference in contractual relations, not interference in work performance. Otherwise its scope would be far beyond that recognized by existing law. Many employees in both public and private employment are required to endure difficult working conditions, often made more difficult by customers or other third parties. One of the PEO's duties in their written job description was to *"endure verbal and mental abuse when confronted with hostile views and opinions of the public and other individuals often encountered in an antagonistic environment."* App. 14-15. Under Plaintiff's theory of the case, each citizen expressing ire about a parking ticket becomes a potential tortfeasor against the City as does any citizen complaining too vehemently about or demonstrating against any other government service. Quite apart from the free speech implications of this consequence, it would extend tort liability beyond any currently recognized limit. Conversely, if liability were limited to political protests, that would create a double standard antithetical to the constitutional doctrine that political speech is entitled to a greater level of protection than non-political speech.

One of the considerations set forth in the Restatement for determining whether interference is *"wrongful"* is the *"social interest in protecting the freedom of the action of the actor . . . ."*. Res. 2d Torts § 767(c). The social interest in protecting the freedom to engage in political protest in public arenas is so powerful, particularly as contrasted to the public employer's contractual rights with at will employees, as to preclude Plaintiff's claim as a matter of law, and to entirely negate its argument that this balance should be drawn by a jury.

II. Plaintiff's Complaint Does Not State A Valid Cause Of Action For Negligence.

Count II of Plaintiff's Complaint alleges that Defendants breached their alleged legal duties to the City and its PEO officers not to engage in conduct that would create hostile and unsafe working conditions for the PEO's. App., pp. 40-41. In its Brief (p. 16), the Plaintiff states the legal requirements for a negligence claim, and asserts in entirely conclusory terms that it has satisfied these conditions. But it provides neither a legal basis nor precedent for the alleged duty of private citizens to public employees particularly as it relates to political activists on public sidewalks. The implied claim that private citizens have a duty of care not to contribute to a claimed hostile work environment on the part of public or presumably private employees, is so broad in its potential application as to lead to virtually limitless liability. And private citizens could then at least equally claim that public employees have a duty not to cause them stress or harassment (e.g. parking tickets). Indeed, almost any stressful encounter could become the occasion for one if not multiple negligence claims.

Even if it were determined that the Defendants, and presumably everybody else, have a legally enforceable duty of care not to unintentionally burden the work environment of the PEO's, Plaintiff's claim would still fail because it does not assert any negligent conduct against the Defendants. To the contrary, all of its assertions in the Complaint about the Defendants' alleged misdeeds are claims of intentional misconduct. Thus, the City is making a negligence claim without negligence.

Had the Defendants engaged in negligent acts and had those acts violated an alleged duty to the PEO's, that would still not provide a legal basis for this case in which the sole Plaintiff is not the PEO's but the City. The City has not cited any legal support for its unasserted premise that an employer has a right to recover under a negligence theory for acts which allegedly create a hostile work environment for its employees. The City's claim to be acting on its employee's behalf is particularly questionable given the fact that the PEO's are a member of a union responsible for their representation. Pet. ¶ 1. App. 1.

III. Plaintiff's Complaint Does Not Allege A Valid Independent Claim For Civil Conspiracy.

The claim of civil conspiracy was made as an amendment to the original Petition. App. 34. In its Motion to Amend, Plaintiff alleged that it *"does not seek to amend the Petition by stating an entirely new cause of action, but seeks only to clarify that the Petition was intended to include the Respondents in their individual capacity and also as joint actors within a civil conspiracy."* App., p. 35, ¶ 4. In its Brief (p.16), Plaintiff cites the case of Sheeler v. Select Energy and NEChoice, LLC, 2003 WL 21735496 (DNH 2003).), for the proposition that *"for civil conspiracy to exist there must be an underlying tort which the alleged conspirators agreed to commit."* Given the fact as outlined supra. that Plaintiff's claims of intentional interference with contractual relations and negligence fail as a matter of law, the conspiracy claim must fail as well.

IV. Defendant's Political Expression Is Protected Under The First Amendment And Part 1, Articles 8 and 22 of The New Hampshire Constitution.

Plaintiff does not dispute the determination of the Trial Judge that Defendants' activities were entitled to robust constitutional protection. Even those activities that did not involve speech were expressive conduct entitled to First Amendment protection. Doyle v. Commissioner of Department of Resources and Economic Development, 163 N.H. 215, 220 (2012) (Plaintiff's guerilla theater is entitled to the same constitutional protection as great literature). Defendant's speech and expressive conduct was political in content, regarding matters of public concern and took place on the streets and sidewalks of downtown Keene. Insofar as the Defendants acted in common to achieve common political goals, the Trial Court appropriately recognized that their actions were *"deeply embedded in the American political process."* Op. p. 12. (Quoting from NAACP v Claiborne Hardware Co., 458 U.S. 886, 907 (1982)).

Quite apart from free speech protection, Defendants' activities are entitled to special protection under Part I, Article 8 of the New Hampshire Constitution, Accountability of Magistrates and Officers; Public's Right to Know. This Court has broadly defined the protections accorded by that Article with regard to press access to government records and proceedings. It has recognized that public scrutiny of governmental proceedings benefits society as a whole by promoting government accountability. Associated Press v State of New Hampshire, 153 N.H. 120 (2005). It has also noted that public scrutiny "enhances the quality and safeguards the integrity of the fact finding process, with benefits to both defendant and society as a whole", and "fosters an appearance of fairness, thereby heightening public respect for the judicial process." State v Decato, 156 N.H. 570, 577 (2007) (quoting from Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).

The decisions of this Court interpreting Article 8 have viewed media access as a proxy for public access, and the media as a vehicle for public accountability. The same principles are at least equally applicable when the demand for accountability comes directly from private citizens. The actions of the Defendants in this case in videotaping and following the PEO's comes within the core protection of Article 8 notwithstanding Plaintiff's attempt to convert them into tortious misconduct.

From the perspective of the government employee, public scrutiny, particularly when it occurs on a daily basis through the use of videotaping and other recording devices, and being followed around may well be stressful and upsetting as alleged by the City in this case. That is in the very nature of being held accountable, and cannot be proscribed without vitiating the essence and purpose of Article 8.

V. The PEO's Do Not Have A Constitutional Right To Be Sheltered From Political Expression During The Course Of Their Public Employment.

This City has attempted to escape the implications of the governing constitutional law by asserting a right to be *"left alone"*. But this purported right does not afford a legal basis for its employees to be sheltered from constitutionally protected speech. In Doyle v. Commissioner, New Hampshire Department of Resources and Economic Development, 163 N.H. 213 (2012), the State took the position that it had a significant interest in protecting hikers in a state park who did not want to be exposed to the plaintiff's guerilla theater activities. This Court expressed doubt whether that type of protection in a public forum constituted a legitimate government interest even with regard to hikers in the relative wilderness. Id. As a matter of federal constitutional law, this question was subsequently resolved by the U.S. Supreme Court in the case of

McCullen v. Coakley, 573 U.S. ___ (2014), in which the Court addressed the State's claim that it had an interest in protecting women seeking abortion services from the speech of anti-abortion demonstrators at close range. The Court noted with respect to streets and sidewalks:

> *They remain one of few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,'* this aspect of a traditional forum is a virtue not a vice.
> Op., pp. 8-9.

The Court noted that *"'one-on-one communication' is 'the most effective fundamental and perhaps economical avenue of political discourse."* Id. p. 21 (citations omitted). It went on to hold that *"(w)hen a government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden."* Id., pp. 21-22. Communication at close range has particular value because *"it is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm."* Id. at 23. The fact that the communication may be unwanted on the listener's part is not a constitutional justification for its suppression. When one considers that the class of persons for whom protection was sought in McCullen - - private citizen medical patients - - has a much stronger claim to privacy than public employees, it follows a fortiori that PEO's hired with the forewarning that their work is controversial, are not entitled to be *"left alone"* from private citizen demonstrators even at close range.

VI. Application of Tort Liability To Defendants' Political Expression Would Violate Their Constitutional Rights.

The proposition that First Amendment rights of expression cannot be nullified by state tort claims absent acts of significant violence was definitively established in the case of NAACP v. Claiborne Hardware, Co., 458 U.S. 886 (1982). The white merchant plaintiffs in Claiborne attempted to utilize the tort of malicious interference with plaintiff's business, directly analogous to the interference claim being made in this case, as a vehicle to collect damages against civil rights organizers of a boycott of their businesses. On its face, the claim in that case was far stronger than that made here because the plaintiffs were asserting economic loss of the sort traditionally protected by tort law, and because the facts demonstrated a very strong pattern of what the Mississippi Supreme Court referred to as *"intimidation, threats, social ostracism, vilification, and traduction . . . ."* of potential black customers as well as scattered acts of serious violence. Id. at 894. Nonetheless, the court voided the judgment against the defendants because *"(s)peech does not lose its protected character, however, simply, because it may embarrass others or coerce them into action."* Id. at 910. It held that absent violent conduct *"use of speeches, marches and threats of social ostracism cannot provide a basis for damages award."* Id. at 933. And even where force is used, *"(t)he right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."* Id. at 924. (citations omitted.) *"But violent conduct is beyond the pale of constitutional protection."* Id. at 933.

Plaintiff's Brief summarizes the Claiborne Decision, pp. 17-20, and then concludes with virtually no analysis that it does not support the Trial Court decision because a reasonable jury could *"find that the Defendants authorized, directed, and engaged in specific tortious* activity in specific individuals, intended to cause intimidation and harassment . . . ." Br., p. 20. But the holding in Claiborne is that specific tortious activity is not enough; only severe acts of violence are subject to a tort remedy. The only allegations in Plaintiff's Complaint involving physical force were *"touching or nearly touching"* and *"bumping into"* App., p. 55, ¶ 16, fall far short of what is required to justify imposing tort liability on constitutionally protected expression.

In the more recent case of Snyder v. Phelps, 562 U.S. ___,131 S.Ct. 1207, 179 L.Ed. 2d 172 (2011), the Supreme Court once again affirmed the primacy of constitutionally protected expression over state tort claims. In that case, the plaintiff received a large verdict for being subject to intentional infliction of emotional distress arising out of hateful speech expressed during a demonstration at the funeral of his son. Although the elements of the intentional infliction tort claim were met, the Court held that the constitutional protection of expression trumped the plaintiff's tort rights. As Justice Roberts wrote:

> *Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and - - as it did here - - inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course - - to protect even hurtful speech on public issues to ensure that we do not stifle public debate.*
> 179 L.Ed.2d at 186.

Whatever pain or distress the PEO's allege here cannot exceed that which was suffered by the father in Phelps.

Plaintiff attempts to distinguish Phelps on the grounds that protestors in that case provided advance notice to local authorities and did not use profanity or violence. pp. 20-21.However, it is clear from Claiborne and Phelps that those attempted distinctions make no constitutional difference except in situations of substantial violence.

VII. Application Of The Tort Of Tortious Interference To Defendants' Activism Would Be Content Based And Overbroad.

There is a direct contradiction between protecting the right of political persuasion, particularly when employed face to face on public sidewalks, with the City's assertion that that same expression violates the employer's rights in tort and entitles it to injunctive and monetary relief. Notwithstanding the City's protestations that its position is content neutral, its primary tort claim of interference is by definition content based because it only prohibits one particular type of expression - - persuasion intended to encourage the listener to leave his or her employment. The content based nature of Plaintiff's action is further demonstrated by the fact that it does not seek to prohibit all communication with the PEO's in its proposed injunction, but only that which seeks *"to taunt, harass or intimidate . . . ."* App. 11.

Subjecting Robin Hood activism to tort liability for interference with contractual relations is by definition indiscriminate. It does not distinguish between any of the types of activism described in the Complaint; subjecting them all to liability for attempting to persuade the PEO's to leave their positions, and causing them stress. The chilling effect is further exacerbated by the City's choice to add a claim of civil conspiracy claiming that each of the Defendants, no matter how remotely involved in the demonstrations, are financially liable for damages occasioned by the acts of any other

demonstrator. It would be difficult to imagine another theory more hostile to constitutional rights of expression, and the promotion of government accountability particularly when the right to associate is also being exercised

Under the City's theory, any abortion protestor who attempted to persuade a woman not to enter a clinic could be sued for interfering with the contractual relations between that woman and the clinic. Any animal rights demonstrator who tried to persuade a would-be patron from entering a McDonald's could similarly be sued for interfering with the contractual or prospective contractual relations between the restaurant and the customer. Determining whether demonstrations or other speech were proper or improper within the meaning of tort law would become a chilling pre-requisite to almost all political expression.

VIII. Plaintiff's Petition Is Not Supported By New Hampshire Employment Law.

Plaintiff's appeal is based in part on an inflated statement of the rights of public employees. It complains that the Trial Court "*should have recognized public employees' rights and interests in their public employment. . . .*". Br., p. 9. But "*(t)he power to appoint officers or employees of a municipal corporation carries with it the power of removal of such employees at the municipality's pleasure unless the power of removal is restricted by statutory law.*" New Hampshire Practice: Local Government Law (3rd Ed.), Peter J. Laughlin § 425. Plaintiff cites the law of constructive termination, Br., pp. 13-14, but omits the fact that constructive termination is not illegal in itself unless the employer acted with illegal motive or the employee had a vested right to continued employment. Further, the right to be free from harassment only applies to harassment based on illegal motive such as sex or race which is not alleged here. And the claim

that public employees have the *"right to be left alone and the right to peace and tranquility while acting as government officials,"* Br. At 14, has no application to any political or legal system short of the former Soviet Union.

Even if Plaintiff had accurately stated New Hampshire employment law, the right it asserts cannot trump constitutional rights of private citizens to express their political opinions in public places - - no matter how much stress or aggravation their expression may engender. In relying on the case of Muniz v. National Can Corp., 737 F2d 145 (1st Cir. 1984) (Br., p. 14), Plaintiff ignores the crucial distinction from a constitutional perspective between protecting employees from toxic lead fumes and *"protecting"* them from demonstrators who disagree with their mission.

IX. The Trial Court Correctly Determined That Vesting The Jury With The Authority To Determine Tort Liability For Political Expression Would Vest It With Unconstitutional Discretion.

The Trial Court determined that it would be unconstitutional to vest in a jury the discretion to make the determination of whether the alleged interference was improper. The problem is not so much potential prejudice, but that the jury is being asked to make a content based determination about political speech without the benefit of objective criteria. Under the standards set forth in the Restatement (§ 767), the jury would have to assess the demonstrator's motives, their interests, and the degree of the social interest in protecting their freedom of action. This would violate the fundamental First Amendment prohibition against content based discrimination, Mosley v. City of Chicago, 408 U.S. 92 (1972), since each juror would of necessity apply his or her own subjective values. As Chief Justice Roberts ruled with respect to permitting a jury to determine

whether speech is *"outrageous"*, that would create an *"unacceptable risk"* to free speech. Phelps, 179 L.Ed. 2d, 185. And it would amount to an abdication of the judiciary's responsibility to define and protect the parameters of constitutional rights.

X. The Injunctive Relief Requested By Plaintiff Would Violate The Defendants' Constitutional Rights.

The degree to which the City departs from basic constitutional principles is further demonstrated by the relief that it requested. The 50 foot floating buffer zone throughout the City of Keene requested by the City is far in excess of anything that had been recognized as constitutional in regard to political demonstrations. In Schenck v. Pro Choice Network of Western New York, 519 U.S. 357 (1997), the Court, notwithstanding the extraordinary record of violence and clinic blockades, struck down a 15 foot buffer zone around any person or vehicle seeking access to the clinic. It noted:

> *It would be quite difficult for a protestor who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its term prohibits. That is, attempts to stand 15 feet from someone entering or leaving a clinic and to communicate a message - - certainly protected on the face of the injunction - - will be hazardous if one wishes to remain in compliance with the injunction.* Id. at 378.

This defect would be considerably amplified here where the proposed injunction would apply to the entirety of downtown Keene and beyond.

Most recently in McCullen v. Coakley, 573 U.S. ___ (2014), the Court struck down a 35 foot buffer zone even though that buffer zone was limited to entrances, access and driveways around abortion clinics, on the ground that the state had not

demonstrated that that was the least restrictive way to accomplish a substantial government purpose. The standard applied in this case should be even stricter than in McCullen because the tort alleged here is inherently content based, and because the parties to be protected are public employees not private citizen medical patients. However, even were the McCullen standard applicable, the City's request for a fifty foot zone would fail, because the *"floating"* aspect of that zone throughout Keene is well beyond anything authorized by precedent.

Plaintiff primarily relies on the Supreme Court decision in Hill v. Colorado, 530 U.S. 703 (2003), but there is nothing in that sharply divided opinion suggesting that the Court would uphold a buffer zone floating throughout an entire city. Further, the continued vitality in the Hill opinion is extremely questionable since in McCullen the Court invalidated a statute modelled on the statute upheld in Hill even though it did not explicitly overrule the Hill opinion. Op. at 2.

Insofar as the City points to third parties assaulting Robin Hood demonstrators, that provides no support for restrictions against those same demonstrators. Recognition of a *"heckler's veto"* would be fundamentally incompatible with free speech. As this Court has previously said, the obligation of the municipality is to protect protestors against public safety issues not suppress them on the rationale of safeguarding them:

> *When peaceful orderly public comments are involved, the police have a duty to take reasonable affirmative steps to ensure the maintenance of the protestor's right of freedom of speech and expression.* State v. Nickerson, 120 N.H. 821, 226 (1980) (emphasis in original).

During the course of the proceeding, the City appeared to recognize the unconstitutional nature of its original proposed relief by substitution a more limited proposal which prohibited "*touching, taunting, obstructing, defaming, hindering, impeding, blocking, intimidating or harassing any Parking Enforcement Officers (PEO's) within thirty (30) feet . . . .*" As a constitutional matter, this proposal fails because of the vagueness of some of the terms utilized such as "*taunting*", "*intimidating*" and "*harassing*", their overlap with constitutionally protected expression, and the necessarily chilling effect that the injunction's vagueness would have on protected speech. From the PEOs' perspective, every aspect of Robin Hood activity was "*harassing*" and "*intimidating*".

XI. Plaintiff Has Failed To Utilize Other Alternatives To Secure The Interest Asserted In Its Brief.

The City's claim that in the absence of injunctive relief it is powerless to protect the PEO's is without basis. In addition to training and counseling, the City, unlike private employers, employs a police department which can take a wide variety of actions to protect public safety including that of PEO's. The PEO's are members of that department. App. 14. The City can, subject to the constitutional limits set forth supra, pass and enforce ordinances and bylaws regarding activities on public by-ways. RSA 47:17 (II & VII) as well as enforcing criminal statutes. Utilizing local ordinances to address public safety issues is less intrusive on speech than creating buffer or safety zones. McCullen v. Coakley, 573 U.S. ___. Op. 24-25. The fact that no arrests or ordinance violations have been alleged against the Defendants in regard to "*Robin Hood*" activities reflects the City's judgment that the Defendants have remained within

the requirements of statutory law, and casts serious doubt on whether its Complaint has not considerably overstated the Defendants' alleged transgressions.

In its decision, the Trial Court noted that if necessary for legitimate protection of PEO's, the City could amend its ordinances. In response, the City in its Brief made the extraordinary observation that it had no assurance *"in a democratic system", "that such an ordinance could be enacted in a timely manner to prevent further injury."* P. 25, n. 3. The City's implicit acknowledgment that its citizens might not acquiesce to further restrictions upon public expression is encouraging, but offers no reason for this Court to step into the breach by creating the *"new law"* the City Requests.

REQUESTED RELIEF

Defendants respectfully request that the decision of the Trial Court be affirmed, and the case be remanded to that Court for the possible award of attorney's fees on Defendants' behalf.

REQUEST FOR ORAL ARGUMENT

Defendants request fifteen minutes of oral argument to be given by their attorney, Jon Meyer.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on this 28th day of July, 2014, two copies of the within Brief for Defendants/Appellees was sent by U. S. Postal Service first class mail, postage pre-paid to:

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