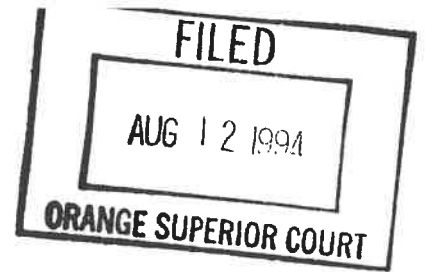


STATE OF VERMONT
ORANGE COUNTY, SS



R. Rene Charpiot, R. Weston
Kelley, and Richard Munis

Orange Superior Court

v.

Town of Thetford

Docket No. S 48-94 OeC

Decision and Order--

Defendant Town's Motion for Attorney's Fees

Plaintiffs brought this action to challenge certain aspects of the March, 1994 Thetford election for certain Town and School Board officers. Plaintiffs alleged that certain improprieties had tainted the validity and the outcome of the election process. Specifically, plaintiffs alleged: (1) that a candidate had been observed handling ballots; (2) anonymous and inflammatory political literature concerning the election had been sent through the mails and read aloud in the school; and (3) the signs for a candidate had been defaced and torn down prior to the election.

Shortly after plaintiffs initiated the action, the Town moved for dismissal and/ or summary judgment. These motions were denied, on the grounds that there remained disputed issues of material fact, and that plaintiff's allegations, if substantiated, could conceivably give rise to grounds for relief. A hearing on the merits was held on June 21 and 22 of 1994. At the conclusion of the plaintiffs' case, judgment was entered for the defendants, on grounds that, though the plaintiffs had indeed borne the threshold burden of showing that improprieties had occurred, they had failed to carry the heavier secondary burden of demonstrating that the improprieties had, in fact, undermined the legitimacy of the electoral process.

Defendant Town of Thetford now seeks to recover from plaintiffs the attorney's fees which it expended in defending their suit. The Town argues

that the plaintiffs initiated and pursued the action in bad faith for the sole purpose of using the litigation to probe into some of the facts underlying their allegations of improprieties. It analogizes to the elements of the tort of abuse of process, and claims that it has demonstrated that the plaintiffs have pursued this action for an improper purpose, such that it should be able to recover its legal fees. The Town points to a letter to the editor of a local paper, written by the plaintiffs, in which they stated that their "primary goal" in the litigation was "to bring certain people to testify under oath" as to the facts surrounding the allegations in the complaint. It claims that this establishes beyond refutation that the plaintiffs initiated and pursued this litigation for an improper purpose, such that they should be punished and the Town should be compensated through the award of attorney's fees.

One of the more recent discussions of the availability of attorney's fees in civil matters was set forth by the Vermont Supreme Court in the case of Robes v. Town of Hartford, No. 92-098 (Dec. 10, 1993). As the Court explained:

Vermont has consistently applied the American Rule with respect to the award of attorney's fees. Under the American Rule, attorney's fees are ordinarily unrecoverable in the absence of statutory authority or the parties' contractual provision concerning this expense.

Id., at p. 14-15. One of the exceptions to the American Rule is the situation presented by the "vexatious litigant." Robes, at 15. A "vexatious litigant" is one who, "in bad faith," abuses the judicial process in a manner which inflicts injury on the other parties, and whose conduct is "unreasonably obdurate or obstinate." Cameron v. Burke, 153 Vt. 565, 576 (1990). An example of such a scenario involves flagrant violations of the ethical standards imposed by Rule 11. Id. However, exceptions to the American Rule should be

recognized only in "exceptional cases and for dominating reasons of justice."
In re Gadhue, 149 Vt. 322, 330 (1988).

Bad faith requires not only the presence of an ulterior motive, but also the absence of a valid motive. Condosta v. Grussing, 144 Vt. 454, 458 (1984). The court notes that litigation, like many other human activities, often involves a mixture of different motives. The Town argues that the plaintiffs' action was wholly lacking in merit, and that this, in combination with the plaintiff's letter to the editor, establishes that the suit was brought for no valid purpose. The court is not ready to go this far. The plaintiffs did establish that certain improper events did take place in connection with the relevant election. The plaintiffs survived the Town's motions to dismiss and for summary judgment. The failure of the plaintiffs' case was merely a result of their failure to bear the heavy burden of showing that these incidents so tainted the election as to deprive it of fundamental validity. Plaintiffs may not have prevailed in the end, but they did raise colorable legal claims and present enough of a factual dispute to survive summary judgment.

The court concludes, in light of these considerations, that this is not one of the truly exceptional cases in which equity demands that a prevailing defendant receive attorney's fees. Though the court recognizes that suits such as this one can impose a significant burden on a municipality, the court also notes that the imposition of attorney's fees against citizens who assert claims against the government could have a significant "chilling effect" on other citizens in the future. This chilling effect could extend to strong cases as well as more marginal ones. For this reason, it should be a rather rare case indeed where a government body is able to recover attorney's fees from a private litigant who asserts a colorable claim that they have been injured by

electoral or official improprieties.

The defendant Town's request for attorney's fees is hereby DENIED.

Dated this 11th day of August, 1994, at Chelsea, Vermont.

Mary Miles Teachout
Mary Miles Teachout
Presiding Judge