STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-22-420

MAINE COUNTY COMMISSIONERS ASSOCIATION SELF-FUNDED RISK MANAGEMENT POOL,
Appellant,

v.

HUMAN RIGHTS DEFENSE CENTER,
Appellee.

On Appeal from the Superior Court, Kennebec County
Docket No. CV-21-131

REPLY BRIEF OF APPELLANT MAINE COUNTY COMMISSIONERS ASSOCIATION SELF-FUNDED RISK POOL

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ARGUMENT

I. The FOAA Appeal was Untimely.

"Relation back" principles are inapplicable here. HRDC admits that Mr. Ulmer informed it that MCCA was a different entity from the Risk Pool *the day after* the lawsuit was filed. (Red Br. at 5-6; *see also id.* at 11 ("[T]he Risk Pool had informed counsel for HRDC that MCCA was a separate entity from the Risk Pool").) It then waited until October 1—more than two months—to move to add the Risk Pool as a party. HRDC contends that it made a "mistake" about who to sue because its legal counsel had "investigated the status of the two organizations and concluded that they were likely one and the same." (*Id.* at 13.) HRDC cannot reasonably support its position with an argument that there was no public information indicating that the entities were distinct, while ignoring that it was explicitly provided with this information. Once it had this information, it then did nothing for two full months.

Moreover, after being informed that the two entities were distinct, HRDC's eventual response was to move to *add* the Risk Pool as a party—not to substitute a proper party for an improper party. It is apparent that HRDC fully intended to sue MCCA, having brought their lawsuit against MCCA initially and having maintained their claim against MCCA both after being informed that the entities were distinct and after moving to add the Risk Pool to the case. *See*

Wilson v. U.S. Gov't, 23 F.3d 559, 563 (1st Cir. 1994) ("Wilson fully intended to sue GEGS, he did so, and GEGS turned out to be the wrong party. We have no doubt that Rule 15(c) is not designed to remedy such mistakes."). The Risk Pool cannot reasonably be said to know that there was a "mistake concerning the identity of the proper party" when it was belatedly added to the case as a defendant alongside MCCA.

HRDC is also wrong that this case fits within the doctrine of judicial estoppel. HRDC fails to address that it would make no sense to bind a defendant to points made in a motion to dismiss when the facts in such a motion are based on the plaintiff's allegations in the complaint. If the motion to dismiss is unsuccessful, then the parties next proceed with the discovery process—where facts are uncovered, and trial positions can be further developed. *See* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2001 (3d ed. 2010) (the purpose of discovery is "to avoid surprise and the possible miscarriage of justice, to disclose fully the nature and scope of the controversy, to narrow, simplify, and frame the issues involved, and to enable a party to obtain the information needed to prepare for trial") (footnotes omitted).

Tellingly, HRDC avoids the related rules for summary judgment procedures which exemplify this point. *See* M.R. Civ. P. 56(d) ("In the event

that a moving party's motion for summary judgment is denied in whole or in part, facts admitted by the parties solely for the purpose of the summary judgment motion shall have no preclusive effect at trial."); M.R. Civ. P. 56(d) Advisory Note to 2011 Amend. ("The amendment to Rule 56(d) establishes that a fact admitted or not opposed by any party solely for purposes of summary judgment is not deemed admitted for any other purpose if the motion for summary judgment is denied."); *CitiMortgage, Inc. v. Chartier*, 2015 ME 17, ¶ 10 n.6, 111 A.3d 39 (stating that the purpose of M.R. Civ. P. 56(d) "is to make it unnecessary to controvert facts for purposes of summary judgment solely because of concern about the possible preclusive effect of any admission of fact at trial or in other subsequent proceedings") (quotation marks omitted). *See, e.g., Toto v. Knowles*, 2021 ME 51, ¶ 15, 261 A.3d 233 ("Because Knowles's motion for summary judgment must therefore be denied, facts admitted by the parties solely for the purpose of the summary judgment motion shall have no preclusive effect at trial.") (quotation marks omitted).

This same rationale applies here. The Risk Pool cannot be bound by facts asserted in an unsuccessful motion to dismiss. HRDC says that "'[s]uccess' in the estoppel context means not a party's ultimate success on the merits, but a party's success in convincing the court to accept its prior inconsistent position." (Red Br. at 17.) The Risk Pool's position in its motion to

dismiss was that HRDC did not file its FOAA appeal within the statutory 30-day period, even if the last conceivable date in the complaint were used (liberally construing the complaint in favor of HRDC). This is true regardless of the specific dates from which the deadline ran, given that HRDC did not attempt to bring the Risk Pool into the case until October. These dates did not become relevant until after the Risk Pool's motion was denied. This cannot reasonably be interpreted as a situation where the doctrine of judicial estoppel would apply.

This is especially so where the Risk Pool's position was supported by the evidence at trial. Mr. Wright testified that the Risk Pool had responded to the request as much as it was going to by June 21, 2021, *see* Sept. 29, 2022, Hearing Tr. at 101, and the Risk Pool reasonably argued that HRDC's FOAA appeal deadline should run from that date. HRDC's claim that this position "is contradicted by the undisputed written record" (Red Br. at 21), is refuted by Mr. Wright's uncontroverted testimony. None of the arguments HRDC raises bring its complaint within the strictly construed appeal deadline. *See Guy Gannett Publ'g Co. v. Maine Dep't of Pub. Safety,* 555 A.2d 474, 476 (Me. 1989).

II. The Risk Pool Did Not Act in Bad Faith.

The Risk Pool did not purposely withhold responsive information in response to HRDC's request, nor did it rely on baseless exemptions to avoid

handing over documents in its possession. To the contrary, HRDC agrees that the Risk Pool provided it with the relevant settlement document and the settlement amount. *See* Red Br. at 3. The record reflects an effort to immediately respond to and comply with HRDC's request.

When HRDC was not satisfied with the Risk Pool's response, the Risk Pool made significant efforts to work with the requesting party and clarify the request. *See* A-87 ("Based on your response, it was my impression that your inquiry was resolved and that no further was required by the Risk Pool. If there is something further that you are seeking from the Risk Pool, please specify the information that you are seeking and I will be pleased to let you know whether such information exists and, if so, whether the Risk Pool will voluntarily provide the relevant information or document to you. *This approach strikes me as a more reasonable and more efficient approach to handling this situation than litigating an issue that seems to have already been resolved or, if not, is likely easily resolved.*") (emphasis added). There was an intent by the Risk Pool to avoid the unnecessary litigation that was ultimately pursued by HRDC in this case.

Through these discussions, HRDC made clear to the Risk Pool that it was after a document that showed that Kennebec County had agreed to pay $30,000. HRDC repeatedly clarified that what it wanted was "the actual

agreement that shows $30,000" (A-142)—HRDC "believe[d]" that such a document must exist somewhere (A-92). But such a document does not exist—a fact that cannot reasonably be undisputed at this point. And there is no requirement in the FOAA or otherwise requiring that the Risk Pool document settlements with an agreement specifying the amount of the settlement; the Risk Pool's interests are served by obtaining a release and a copy of what was provided.

HRDC maintained its demand for the actual agreement showing the consideration paid by the Risk Pool through the litigation, all the while the Risk Pool remained willing to try to resolve the parties' dispute. As Mr. Ulmer testified at the hearing, prior to his deposition he authorized his lawyer to contact HRDC's lawyer to try to determine exactly HRDC was requesting so that the parties could avoid incurring additional avoidable expenses. *See* Sept. 29, 2022, Hearing Tr. at 140. HRDC's lawyer responded by email that he wanted the document showing that Kennebec County agreed to pay Afanador $30,000. *Id.* at 140-41. The email did not say anything about requesting the Risk Pool's cancelled checks, accounting records, banking records, or financial records regarding the Afanador settlement. *Id.* at 141.

Thus, even after HRDC filed this lawsuit, it was the Risk Pool's reasonable understanding up through the hearing that HRDC was seeking a

particular document—one that did not exist. It was entirely reasonable for the Risk Pool to rely on dialogue with HRDC and its lawyer regarding the scope of HRDC's request, and "Plaintiff's incredulity at the fact that no responsive documents were uncovered in response to . . . its search request does not constitute evidence of unreasonableness or bad faith." *Bay Area Laws. All. for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992).

It was not until the hearing that HRDC's repeated request for a document showing that Kennebec County agreed to pay Afanador $30,000 was abandoned by HRDC and the request became about something else. It cannot be said that the Risk Pool made a "deliberate attempt to withhold" documents (Red Br. at 29), when the Risk Pool was cooperative with HRDC, attempted to understand its request, and provided what it reasonably believed HRDC was seeking. The Risk Pool is not intentionally hiding documents here. The settlement and settlement amount are no secret, and the Risk Pool has never tried to assert as much. *Cf. Williams v. Bruscato*, 2021 IL App (2d) 190971, ¶ 15, 188 N.E.3d 440, 444 (denial of fees under bad faith FOIA statute was warranted where "[n]othing in the record indicate[d] that defendant intentionally failed to comply with the FOIA and did so deliberately,

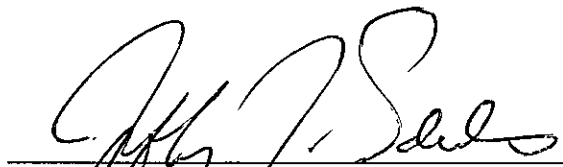
by design, and with a dishonest purpose"). The Risk Pool has not acted in bad faith.

The record reflects that the Risk Pool did not "tak[e] baseless positions or otherwise abus[e] the legal process." (Red Br. at 24.) Rather, it was HRDC who unnecessarily brought this lawsuit despite the Risk Pool's willingness to cooperate, and it was HRDC who—after clarifying numerous times that they wanted a document they believed the Risk Pool had—then changed the nature of the request. HRDC is free to request any public record it wants, but the Risk Pool did not act in bad faith when it did not produce documents that were clearly outside the scope of what HRDC's own legal counsel made clear HRDC was seeking. Nor is it bad faith in a FOAA case for the Risk Pool to raise common legal defenses such as the statute of limitations.

CONCLUSION

For the foregoing reasons, and those set out in the Risk Pool's appellate brief, the decision of the trial court should be vacated.

Dated at Portland, Maine this 24 day of April, 2023.



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CERTIFICATE OF SERVICE

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