STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE,
DIVISION OF HEALTH AND HUMAN SERVICES

217-2020-CV-00026
(This Order Applies Only To The Individual Meehan Case)

ORDER

The matter before the court is plaintiff David Meehan's motion for partial Judgment Notwithstanding Verdict(Docket Document 769). The motion asks the court to modify the verdict by increasing the number of "incidents" for application of the damages cap, or, in the alternative, order a partial new trial solely to determine the number of "incidents" upon which the first jury's verdict was grounded.

The motion is respectfully DENIED.

Before going further, the court notes that this is one of two substantive post-verdict motions filed by the plaintiff. The other motion--Plaintiff's Motion For New Trial As To The Number Of Incidents (Docket Document 847)--was denied on October 31, 2024 by margin order.

I. The Centrality Of The May 22, 2024 Order And Some Thoughts On The State's Oral Argument At The June 24, 2024 Hearing

The court incorporates by reference its Order of May 22, 2024 (Docket Document 777). Incorporation by reference should be used sparingly because it can be burdensome on the reader. However, the only alternative would be to cut and paste most of the May 22, 2024 Order into this Order. That might be even more burdensome.

The May 22, 2024 Order includes (a) a description of each party's construction of the term "single incident" as used in RSA 541-B:14, I, and (b) the court's construction of the same term.

The court notes that the State Defendants orally urged a different construction at the June 24, 2024 motions hearing. Prior the June 24 hearing, the State Defendants argued that the term "single incident" referred to an incident of tortious conduct by the defendant. They further argued that the complaint alleged continuing torts of negligence and breach of fiduciary duty, that began before plaintiff arrived at YDC and continued after he left YDC. Therefore, the State Defendants claimed there was only one "single incident" of tortious conduct for the purpose of imposing the damages cap. See Order of May 22, 2024 at p. 17-18.

At the June 24 hearing, the State Defendants advanced a very different interpretation of the statute. More particularly, the State Defendants claimed, for the first time, that the term "single incident" referred to an incident of harm suffered by the plaintiff. The State Defendants reasoned that because a cause of action only accrues once all of the elements of the tort occur, and because harm is an element, an "incident" cannot be complete until the plaintiff is harmed. The State Defendants then argued that the plaintiff could have suffered only a single, indivisible harm.

This late-in-the-day argument suffers from two fatal flaws. One is case specific: The plaintiff alleged that he was anally raped and forced to perform fellatio, on many different occasions, at many different times, some separated by furloughs, sometimes by force and once at gun point. Do the State Defendants maintain that the essential element of harm was lacking after the first, or second, hundredth alleged rape? Do they deny that each alleged rape would have caused compensable harm, regardless of whether any of the other alleged rapes occurred? Do they disagree that the plaintiff could have filed suit the day after the first rape, without prejudice to suing again when he was assaulted again? Therefore, even if the State Defendants' present interpretation of the statute was correct, the application of that interpretation to this case

would support a finding of many "incidents," within the meaning of RSA 541-B:14, I.

However, the State Defendant's present interpretation of the statue is not correct. The flaw in their argument that "incident" means "incident of harm" is the same flaw that caused the court to reject their earlier argument that "incident" means incident "tortious conduct." The State Defendants conflate the statutory term "claim" with the statutory term "incident." See Order of May 22, 2024 at pp. 20-21.

Recall that damages cap applies to "all claims arising out of any single incident." RSA 541-B:14, I. The term "claim" refers to the cause of action: See RSA 541-B:1, II-a, defining "claim," in pertinent part, to include:

> [A]ny request for monetary relief for either: . . . bodily injury, personal injury, death or property damages caused by the failure . . .to follow the appropriate standard of care when that duty was owed to the person making the claim.

Thus, the term "claim" refers to the defendant's tortious conduct, the plaintiff's harm, and the nexus between the two. As this court determined in the May 22 Order, the term "incident" refers to events related to each other by the following factors: closeness of time, closeness of location, causal nexus and lack of intervening events. May 22 Order, p. 33.

Finally, the court disagrees with the State Defendant's contention at the June 24 hearing that this judge's construction of the term "incident" was chosen, almost randomly, from an out-of-state, intermediate appellate court opinion interpreting an insurance contract. See Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Company, 991 N.E.2d 666 (N.Y. 2013).

Not to nitpick, but the cited opinion is actually from the highest court of New York State, notwithstanding its modest name, i.e. the Court of Appeals. More important, because the New Hampshire Supreme Court has not yet decided the issue, this court: (A) Looked to the plain and ordinary meaning of the term "incident" in several dictionaries, (B) Conducted a national search for case law construing the term "incident," and similar terms, as they are used in sovereign immunity damages cap statutes in other jurisdictions, and (C) Noting the hazards of looking to insurance cases, due to the particularities of different policies, nonetheless reviewed analogous cases. This judge simply found that the principles at issue were stated in the clearest prose by the New York Court. Nothing more, nothing less.

II. How To Instruct A Jury

As a former trial lawyer, this judge has great admiration for the skill, dedication and thoughtfulness of all of the trial

lawyers in this case. Nonetheless, it must be said that the plaintiff's legal team did not think through the need for a special verdict form that asked the jury for incident by incident verdicts.

Ordinarily, the determination of what constitutes a "single incident" for the purposes of the damages cap should be a question for the court. The jury should then determine liability and damages for each incident separately.

This is illustrated by the following hypothetical:

Hypothetical

A plaintiff suffers a leg injury when a State snow plow driver negligently collides with his vehicle. Two years later, on the way into the courthouse, the same plaintiff suffers a shoulder injury when a careless State trooper backs his cruiser into the plaintiff's vehicle. Perhaps to avoid paying two filing fees, the plaintiff files a single lawsuit seeking damages for both collisions.

Under any interpretation of the statute, this hypothetical lawsuit would arise from two separate incidents. The court would ask the jury for separate verdicts with respect to each collision.

Now assume a total jury verdict of $800,000, allocated as follows:

A. If the jury awards $600,000 for the snowplow incident and $200,000 for the cruiser incident, the court would (a) apply the damages cap to the $600,000 award, thereby reducing it to $475,000 and (b) issue a judgment for $675,000 (e.g. $475,000 + $200,00).

B. If the jury awards damages of $475,000 for the snow plow incident and $325,000 for the cruiser incident, the court would have no occasion to apply the damages cap. The plaintiff would receive a judgment of $800,000 (e.g. $475,000 + $325,000).

As best the court can tell, when this trial began plaintiff's counsel opined that because there were so many alleged incidents, the damages cap was all but meaningless. Plaintiff expected that the jury to issue a general verdict with respect to the amount of damages. Plaintiff seemingly believed that RSA 541-B:14,I would allow the court to aggregate all of the per incident caps into a giant per case cap. In other words, plaintiff behaved as if the statutory damages cap equaled $475,000 multiplied by the maximum number of incidents that the jury could find (which plaintiff opined to be over 200).

Plaintiff thus ignored the words of the statute. The cap applies separately to each incident. The "unused" amount of the cap for one incident cannot be banked and applied to a separate incident. There is no statutory provision that allows for this sort of aggregation.

Plaintiff's counsel did not propose a list of incidents. The closest counsel came was that during plaintiff's testimony, counsel created an oversized, handwritten, virtually illegible chart. This was done in open court to illustrate the defendant's testimony.

The court, which has the responsibility to instruct the jury, then drafted proposed jury instructions that would have required the jury to make incident specific findings, based on

the court's understanding of the allegations, based on the evidence at trial. The State Defendants' objected to this on the grounds that it was commentary on the evidence, even though it was merely a restatement of the specific claims that were put to the jury.

It was against this backdrop that both parties agreed to Plan B, e.g. letting the jury decide the number of incidents, and then applying an aggregated damages cap of $475,000 multiplied by the number of incidents found by the jury.

It should be noted that there was no conceivable Plan C. The only other alternative would have been to give the jury a blank sheet of paper and ask it to (a) describe each incident in its own words, (b) determine liability for each incident, and (c) if liability is found, determine damages for each incident. Leaving that much blank space on the verdict form would have been the functional equivalent of directing a mistrial.

Thus, the only two plausible ways to instruct the jury were:

(A) The statutory way, in which the court defines each alleged incident and gives the jury a special verdict form; or

(B) The stipulated way, in which the jury gives the court the number of discreet incidents and the parties voluntary agree to a per case damages cap based on that number.

III. Humility vs. Hubris

The jury determined that there was only a single a incident and awarded $38,000,000 in compensatory and enhanced compensatory damages. As this court noted in the May 22 Order, this combination of findings is conclusively against the weight of the evidence. May 22 Order, pp. 14-15, 41. Simply put, while a reasonable jury could have found just one "incident" (as the court defined that term), it would have been beyond reason to award $38,000,000 for that single "incident." Conversely, while a reasonable jury could have awarded $38,000,000 for all that the plaintiff alleged, it would have been beyond reason to then find just one "incident."

This judge cannot substitute his personal opinions regarding witness credibility and circumstantial inferences for that of the jury. The jury could have concluded that plaintiff proved that the State Defendants were liable for the single sexual assault committed by Frank D, but found no liability for the allegations involving the other individual tortfeasors. Alternatively, the jury might have found the State Defendants' liable for some, but not all, of what the other individual tortfeasors allegedly did. Alternatively still, the jury might have found that the State Defendants' liability attached only after it was notified, or should have become aware of certain events.

The point is that the court cannot say that the jury's verdict was grounded on events equating with 10 "incidents", or 50 "incidents", or 100 "incidents", or 150 "incidents". Indeed, to be honest, although the jury was told to write down the number of "incidents" it may have just assessed liability based on the gestalt of the evidence. This was certainly how plaintiff's experts when about assessing the breadth and scope of plaintiff's emotional injuries.

This judge cannot rewrite the jury's verdict by increasing the number of incidents.

IV. Other Relief

As the court noted in its May 22 Order, the standard for a new trial de novo has been met. May 22 Order, p. 41. But the court will not order a new trial de novo *sua sponte.* Plaintiff has asked only for a new trial on the issue of incidents. That request was denied, and is denied again, for the reasons set forth above.

If plaintiff wants a new trial de novo, he may ask for via a motion for reconsideration.

The court also advised the parties that, if the State Defendants agreed, the court would order "additur of incidents" in lieu of a new trial. However, the State Defendants rejected "additur of incidents." Any form of additur or remitter depends on the court's ability to order a new trial, and the party

rejecting additur may always choose a new trial instead. The State Defendants' have made their choice. So far, at least, the plaintiff has declined to request a new trial de novo on all issue.

November 1, 2024

Andrew R. Schulman,
Presiding Justice