Filed
File Date: 11/15/2024 9:24 AM
Rockingham Superior Court
E-Filed Document

STATE OF NEW HAMPSHIRE

ROCKINGHAM, *ss.* SUPERIOR COURT

CASE NO. 217-2020-CV-00026

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE, et al.

*****THIS FILING PERTAINS TO PLAINTIFF MEEHAN'S INDIVIDUAL CASE*****
*****THIS FILING DOES NOT PERTAIN TO CONTRACTOR DEFENDANTS*****

INTERLOCUTORY APPEAL STATEMENT

Plaintiff David Meehan, by his counsel, in accordance with New Hampshire Superior Court Rule 46 and New Hampshire Supreme Court Rule 8, respectfully submits this statement requesting the New Hampshire Supreme Court's interlocutory review of the Rockingham Superior Court's rulings on (1) Plaintiff's motion for partial judgment notwithstanding the jury verdict issued in this case on May 3, 2024; (2) Plaintiff's motion for a new trial regarding the number of "incident[s]" on which the verdict was based under RSA 541-B:14, I, the sovereign-immunity waiver statute; and (3) the State's[1] motion to apply the waiver statute's $475,000 per-incident damages cap to the $38,000,000 verdict.

I. Introduction

The outcome of this case is important not only to Mr. Meehan, but also to hundreds of other survivors who have come forward to allege child abuse that occurred while they were in the State's custody. Unfortunately, entering a final judgment has become complicated by an unusual but

[1] The "State" refers collectively to the defendants identified in Part II of this statement.

obvious jury error with respect to a question on the special-verdict form that likely seemed inconsequential to the jurors at the time it was answered but now looms large.

In denying Mr. Meehan's motion for partial judgment notwithstanding the verdict, the superior court ruled that the "combination" of the jury's findings was "conclusively against the manifest weight of the evidence" insofar as the jury found a single "incident" of actionable conduct under RSA 541-B:14, I, in response to question 10 of the special-verdict form but also awarded Mr. Meehan $38,000,000 in compensatory and enhanced damages in response to questions 1 through 9. 11/1/24 Order at 9; *see also* 5/22/24 Order at 14–15, 41. Appendix ("App.") 93; App. 23-24, 50. Although the "combination" of these findings was against the manifest weight of the evidence, the court ruled that it could not "rewrite the jury's verdict by increasing the number of incidents" because, in the court's view, the jury could have reached multiple different conclusions about that number. 11/1/24 Order at 10. App. 94.

In denying Mr. Meehan's motion for a new trial regarding the number of "incident[s]," the superior court ruled that resubmitting the evidence to a new jury for a new finding regarding the number of "incident[s]" could "not be done" because "[t]here is no way to determine what 'incidents' . . . the first jury found were proven by a preponderance of the evidence." 10/31/24 Margin Order at 3. App. 73.

In granting the State's motion to apply the damages cap, the superior court ruled that, in the absence of a timely motion for reconsideration seeking a full retrial, the court would issue a final judgment in Mr. Meehan's favor capped at $475,000, plus statutory interest and recoverable costs, because, in relevant part, the damages cap is constitutional as applied to the jury's finding of "a single incident of sexual assault." 11/4/24 Order at 8, 9. App. 103, 104.

Although the superior court's rulings relate to a jury verdict, the questions presented by those rulings are purely legal in nature because, as the superior court acknowledged, it is undisputed that "[n]o reasonable jury would award $38 million for a single instance of abuse." 5/22/24 Order at 38. App. 47. Thus, in asking the Supreme Court to accept an interlocutory appeal from the superior court's rulings, Mr. Meehan is not asking the Supreme Court to reweigh the evidence, but rather to resolve three questions of law:

1. Is the $475,000 per-incident damages cap in the sovereign-immunity waiver statute unconstitutional as applied to a special verdict in which a jury has found that the State's conduct toward the plaintiff was wanton, malicious, or oppressive?

2. Does the superior court have the authority to enter partial judgment notwithstanding the verdict to conform a special verdict to the evidence presented at trial, without invading the province of the jury, where nine out of the ten findings of the special verdict are supported by the trial record, the tenth finding is obviously the product of juror error and stands against the conclusive weight of the evidence, the obviously erroneous finding does not affect the remainder of the special verdict, and the obviously erroneous finding can be severed from the remainder of the special verdict?

3. In a case governed by the sovereign-immunity waiver statute, RSA 541-B:14, I, does the superior court have the authority to order a partial retrial on the number of "incident[s]" in question where the jury's finding of liability, and the jury's award of damages, are supported by the trial record but its finding regarding the number of "incident[s]" is not?

As shown by the superior court's finding that "[n]o reasonable jury would award $38 million for a single instance of abuse," combined with its "reluctant[]" entry of an order granting the State's motion to apply the damages cap, a substantial basis for a difference of opinion exists on each of these questions. 5/22/24 Order at 38; 11/4/24 Order at 1. App. 47; App. 96.

In addition, an interlocutory appeal addressing these questions will materially advance the termination of the litigation. If the Supreme Court finds that (1) the damages cap is unconstitutional as applied, (2) the superior court has the authority to enter a partial judgment notwithstanding the

verdict striking question 10 from the verdict form, or (3) the superior court has the authority to order a partial retrial on the number of "incident[s]" suffered by Mr. Meehan, then the Supreme Court's ruling will either end the litigation or result in a partial retrial rather than a full retrial.

An interlocutory appeal also will protect Mr. Meehan from the substantial and irreparable psychological injury of a full retrial. In a full retrial, Mr. Meehan will again be forced to recount the traumatic events of his time at the Youth Development Center ("YDC") in detail, suffering re-traumatization as he does so. By contrast, if the damages cap is declared unconstitutional as applied, or if the superior court is deemed to have the authority to enter a partial judgment notwithstanding the verdict based on striking question 10 from the special-verdict form, the litigation will end. Similarly, if a partial retrial on the number of "incident[s]" is conducted, the partial retrial will involve limited testimony about Mr. Meehan's memory of specific incidents and Mr. Meehan's best estimate of how many separate incidents occurred, rather than a complete replication of the entire four-week trial.

Finally, an interlocutory appeal will decide issues of general importance regarding the constitutionality of the damages cap in RSA 541-B:14, I, the superior court's authority to enter a partial judgment notwithstanding the verdict based on striking a superfluous aspect of a special verdict, and the superior court's authority to allow a partial retrial as a remedy for a verdict where the trial record supports the jury's findings regarding liability and damages.

For these reasons, and as further discussed below, the Supreme Court should accept this appeal and answer the questions presented by Mr. Meehan.

II. List of All Parties and Counsel of Record

Plaintiff: Mr. Meehan is the plaintiff seeking to bring this interlocutory appeal.

Plaintiff's Counsel of Record:

Nixon Peabody LLP
David A. Vicinanzo, Esq. (Bar No. 9403)
W. Daniel Deane, Esq. (Bar No. 18700)
Mark Tyler Knights, Esq. (Bar No. 264904)
Nathan Warecki, Esq. (Bar No. 20503)
Erin S. Bucksbaum, Esq. (Bar No. 270151)
Allison K. Regan, Esq. (Bar No. 272296)
Jonathan O'Neil, Esq. (Bar No. 276336)
900 Elm Street, 14th Floor
Manchester, NH 03101
T: 603-628-4000
dvicinanzo@nixonpeabody.com
ddeane@nixonpeabody.com
mknights@nixonpeabody.com
nwarecki@nixonnpeabody.com
ebucksbaum@nixonpeabody.com
aregan@nixonpeabody.com
joneil@nixonpeabody.com

Rilee & Associates, P.L.L.C.
Cyrus F. Rilee, III, Esq. (Bar No. 15881)
Laurie B. Rilee, Esq. (Bar No. 15373)
264 South River Road
Bedford, NH 03110
T: 603.232.8234
crilee@rileelaw.com
lrilee@rileelaw.com

Defendants: The State of New Hampshire acting through its constituent departments and divisions, including the Department of Health and Human Services; the Division for Children, Youth, and Families; the Division of Juvenile Justice Services; the Sununu Youth Services Center (f/k/a Youth Development Center); and the Youth Detention Services Unit (f/k/a Adolescent Detention Center).

Defendants' Counsel of Record:

State of New Hampshire, Attorney General
Brandon F. Chase
New Hampshire Bar No. 270844
Samuel R.V. Garland
New Hampshire Bar No. 266273
Catherine A. Denny
New Hampshire Bar No. 275344
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397
T: (603) 271-3650
brandon.f.chase@doj.nh.gov
samuel.rv.garland@doj.nh.gov
catherine.a.denny@doj.nh.gov

Verrill Dana, LLP
Martha C. Gaythwaite (*pro hac vice*)
Maine Bar No. 2811
John W. Van Lonkhuyzen (*pro hac vice*)
Maine Bar No. 3487
Sara E. Hirshon (*pro hac vice*)
Maine Bar No. 4776
One Portland Square
Portland, ME 04101-4054
T: (207) 774-4000
mgaythwaite@verrill-law.com
jvanlonkhuyzen@verrill-law.com
shirshon@verrill-law.com

III. Statement of Facts and Inclusion of Transcripts

A. Overview

This case is one of multiple matters arising from decades of systemic and widespread child abuse—including acts of physical, sexual, and psychological abuse—perpetrated by agents and employees of the State against children whom the State had taken into legal and physical custody and who relied on it for care and protection. Most of the victims were abused in State-operated congregate-care residential facilities for juveniles, including the YDC and the Youth Detention Services Unit ("YDSU").

On July 8, 2022, Mr. Meehan, the lead plaintiff in the YDC/YDSU consolidated litigation, acting through counsel, filed a master complaint setting forth allegations common to all plaintiffs in the consolidated litigation. The master complaint alleges seven causes of action—breach of fiduciary duty; breach of nondelegable duty; civil conspiracy; aiding and abetting a breach of fiduciary duty; negligence; negligent hiring, training, supervision, and retention; and negligent failure to adopt and implement rules—against the State of New Hampshire acting through certain departments and divisions, including the Department of Health and Human Services; the Department of Youth Development Service; the Division for Children, Youth and Families; the Division of Juvenile Justice Services; the Sununu Youth Services Center; and the Youth Detention Services Unit. The master complaint generally alleges that each plaintiff suffered one or more of the following types of abuse while the plaintiff was a child in the physical and legal custody of the State: physical abuse, sexual abuse, mental or emotional abuse, excessive restraints, excessive confinement, deliberate indifference and neglect, and deprivation of statutory and constitutional rights to an adequate education.

The general allegations and legal causes of action set forth in the master complaint are incorporated into, and supplemented by, the particularized allegations in the individual complaints

filed by each plaintiff, including Mr. Meehan, in individualized dockets in the Rockingham Superior Court for each case. Each plaintiff's individual complaint, filed in the form of a "short form" complaint, incorporates by reference the general factual allegations and causes of action of the master complaint and adds a statement of facts particular to each individual plaintiff's case.

As of the date of this filing, over 1,000 individualized short form complaints incorporating the allegations of the master complaint have been filed in the consolidated litigation under individual docket numbers. In some cases, the short form complaint also adds allegations and causes of action against additional, non-State defendants based upon abuse that occurred while the plaintiff was in State custody in a privately operated facility, such as a group home or residential treatment center, that contracts with the State.

B. The Jury Instructions, Special-Verdict Form, and Verdict

In April 2024, Mr. Meehan's case went to trial, the first YDC/YDSU case to do so. On May 2, 2024, after four weeks of testimony, the jury heard closing arguments, as well as part of the superior court's charge. The following day, the jury heard the remainder of the court's charge, received the case around 10:00 a.m., and returned a verdict around 2:00 p.m.

Mr. Meehan's counsel requested that the verdict be read in open court. The State's counsel objected to this approach, and a lengthy colloquy followed. *See* 5/3/24 Trial Tr. at 4–11. App. 124-131. Ultimately, when giving the jury instructions, the court stated that the verdict would be read with counsel in chambers, rather than in open court. *Id.* at 47. App. 167. As a result, the jury was not present when its verdict was delivered. As far as Mr. Meehan's counsel were aware, at the time the verdict was delivered, the jury had already been dismissed.

The jury memorialized its deliberations on a special-verdict form containing ten questions. The jury rendered internally consistent, reconcilable answers to nine of those questions, resulting in the jury's decision to award Mr. Meehan $18 million in compensatory damages plus an

additional $20 million in enhanced compensatory damages based on its finding that the State's conduct was "wanton, malicious or oppressive." The jury's answer to question 10, finding that Mr. Meehan suffered only one "incident" or "episode" of abuse, was contrary to the overwhelming and uncontradicted trial evidence and irreconcilable with the other nine answers.

Following the verdict, the superior court entered an order stating that "[n]o reasonable jury would award $38 million for a single instance of abuse," and "no reasonable jury would have believed plaintiff's testimony as it related to a single hour and disbelieved his testimony as it related to all of the other hours, days, weeks, and months" at issue. 5/22/24 Order at 38. App. 47. The court also recognized the likely basis for the jury's confusion was the language of the special-verdict form, and the language of the jury instructions, regarding how the jury should answer question 10. *See id.* at 39–40. App. 48-49.

One problem was that the instructions did not explain why the question was asked. A second problem was that the definition of "incident" was vague. *See id.* at 39. App. 48. The superior court overruled objections by Mr. Meehan on both issues. *See* 4/25/24 Trial Tr. at 99–103 (arguing that the jury should be instructed on the law, including the damages cap); 5/3/24 Trial Tr. at 42–43 (objecting to the phrasing of question 10). App. 115-119; App. 162-163.

Unbeknownst to the jury, question 10 was added to the special-verdict form because the State is the beneficiary of a statutory cap limiting damages in tort actions to $475,000 for "any single incident." RSA 541-B:14, I. App. 256. Since "incident" is not defined in the statute, Mr. Meehan proposed a definition, while the State argued that Mr. Meehan's entire claim was one "incident."

At the initial charging conference on May 1, 2024, the superior court rejected both positions and declined to include a definition of "incident," preferring to reserve that question for

the Supreme Court and indicating that it would attach a list of alleged incidents to the special-verdict form so the jury could indicate which incidents had been proved and which had not. Because the State objected that this list would unfairly prejudice the defense, the court proposed a stipulation at a subsequent conference.

The stipulation to which the parties ultimately agreed on May 2, 2024, provided that the jury would make one damages award, not an incident-by-incident award, and would separately determine the total number of "incidents" proved. *See* 5/2/24 Stipulated Order. App. 1. The superior court would then calculate an aggregate damages cap by multiplying $475,000 by the number of "incidents" found by the jury. *See id*. By this stipulation, the court's list of alleged incidents was no longer necessary and was not provided to the jury. At the time, the parties still did not know whether or how the court would define "incident" in the instructions or verdict form.

The parties' counsel delivered their closing arguments on the afternoon of May 2, 2024, and the superior court began giving its jury instructions. On the morning of May 3, 2024, just before the jury charge resumed, the court provided counsel with the final version of the verdict form, including the new question 10, which asked, "How many 'incidents' does the jury unanimously find the plaintiff has proven by a preponderance of the evidence"?

The superior court defined an "incident" as a "(a) single episode during which the plaintiff was injured; (b) for which injuries the jury has found DHHS liable in response to previous questions; (c) on claims the jury found to be timely claims in response to question 1." Mr. Meehan objected to the phrasing of question 10, which only defined "incident" by reference to another undefined term, "episode." The court overruled the objection and finished delivering its oral instructions to the jury.

C. The Postverdict Motions

In the weeks following the verdict, the parties filed a variety of postverdict motions. Those motions included, in relevant part, (1) Mr. Meehan's motion for partial judgment notwithstanding the jury verdict, (2) Mr. Meehan's motion for a new trial regarding the number of "incident[s]" on which the verdict was based, and (3) the State's motion to apply the sovereign-immunity waiver statute's $475,000 damages cap to the $38,000,000 verdict.

On May 22, 2024, while the motions were still being briefed, the superior court sua sponte entered an interim order intended to provide guidance to the parties. In its order, the court acknowledged that the jury misunderstood question 10 of the special-verdict form and that the mistake could not be left unaddressed, stating, "The cognitive dissonance between a $38 million verdict and the finding of a 'single incident' of actionable abuse cannot stand." 5/22/24 Order at 2. App. 11. The court outlined five preliminary options for addressing this mistake in the hopes of identifying the "least incorrect" option. *Id*. at 4. App. 13.

The first two options included recalling the jury to interrogate them or ask them to resume deliberations. The court deemed it too late to seriously consider these options. *Id.* at 5–14. App. 14-23.

The other three options were (1) granting the State's motion to enter judgment applying the statutory cap, thereby reducing Mr. Meehan's recovery by $37,525,000 and effectively leaving him with an empty verdict after factoring in costs and legal fees; (2) granting a motion to set aside the verdict and order a new trial on all issues; and (3) granting a motion for "something akin to additur," if both parties would agree to it. *Id.* at 14–57. App. 23-66.

On June 24, 2024, the superior court conducted a hearing on the pending postverdict motions and invited the parties to file any additional motions or supplemental papers they might deem appropriate.

On August 1, 2024, the superior court entered an order extending the deadline for postverdict motions and memorializing various aspects of the court's discussion with the parties' counsel at the June 24 hearing. 8/1/24 Order. App. 67-70. In its order, the court recognized that the State would not agree to additur. *Id.* at 1–2. App. 67-68. As a result, the court narrowed its options to either entering a judgment applying the statutory damages cap or ordering a new trial. *Id.* at 4. App. 70.

D. The Rulings on the Postverdict Motions

Following supplemental briefing, the superior court denied Mr. Meehan's motion for partial judgment notwithstanding the verdict, denied Mr. Meehan's motion for a partial retrial, and granted the State's motion to apply the damages cap. *See* 10/31/24 Margin Order; 11/1/24 Order; 11/4/24 Order. App. 71-73; App. 85-95; App. 96-104.

In denying Mr. Meehan's motion for partial judgment notwithstanding the verdict, the superior court ruled that the "combination" of the jury's findings was "conclusively against the manifest weight of the evidence" insofar as the jury found a single "incident" of actionable conduct under RSA 541-B:14, I, in response to question 10 of the special-verdict form but also awarded Mr. Meehan $38,000,000 in compensatory damages and enhanced compensatory damages in response to questions 1 through 9. 11/1/24 Order at 9; *see also* 5/22/24 Order at 14–15, 41. App. 93; App. 23-24, 50. Although the "combination" of these findings was against the manifest weight of the evidence, the court ruled that it could not "rewrite the jury's verdict by increasing the number

of incidents” because, in the court’s view, the jury could have reached multiple different conclusions about that number. 11/1/24 Order at 10. App. 94.

In denying Mr. Meehan’s motion for a new trial regarding the number of “incident[s],” the superior court ruled that resubmitting the evidence to a new jury for a new finding regarding the number of “incident[s]” could “not be done” because “[t]here is no way to determine what ‘incidents’ . . . the first jury found were proven by a preponderance of the evidence.” 10/31/24 Margin Order at 3. App. 73.

In granting the State’s motion to apply the damages cap, the superior court ruled that, in the absence of a timely motion for reconsideration seeking a full retrial, the court would issue a final judgment in Mr. Meehan’s favor capped at $475,000, plus statutory interest and recoverable costs, because, in relevant part, the damages cap is constitutional as applied to the jury’s finding of “a single incident of sexual assault.” 11/4/24 Order at 8, 9. App. 103, 104.

To preserve his rights, Mr. Meehan has filed a motion for reconsideration seeking a full retrial. However, he has also filed a motion to stay the disposition of that motion until the disposition of an interlocutory appeal from the orders on his motions for partial judgment notwithstanding the verdict and a partial retrial and the State’s motion to apply the damages cap.

E. Transcripts

All relevant trial and hearing transcripts are included in the appendix to this statement. This appeal does not require ordering any other transcripts, though others may be cited for further context if the appeal is accepted.

IV. Statement of the Questions

1. Is the $475,000 per-incident damages cap in the sovereign-immunity waiver statute unconstitutional as applied to a special verdict in which a jury has found that the State's conduct toward the plaintiff was wanton, malicious, or oppressive?

2. Does the superior court have the authority to enter partial judgment notwithstanding the verdict to conform a special verdict to the evidence presented at trial, without invading the province of the jury, where nine out of the ten findings of the special verdict are supported by the trial record, the tenth finding is obviously the product of juror error and stands against the conclusive weight of the evidence, the obviously erroneous finding does not affect the remainder of the special verdict, and the obviously erroneous finding can be severed from the remainder of the special verdict?

3. In a case governed by the sovereign-immunity waiver statute, RSA 541-B:14, I, does the superior court have the authority to order a partial retrial on the number of "incident[s]" in question where the jury's finding of liability, and the jury's award of damages, are supported by the trial record but its finding regarding the number of "incident[s]" is not?

V. Statement of Reasons

The Supreme Court may accept an interlocutory appeal when (1) "a substantial basis exists for a difference of opinion on the question[s]" at issue and (2) the interlocutory appeal "may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general important in the administration of justice." N.H. Sup. Ct. R. 8. Each of the questions presented by Mr. Meehan meets this standard.

A. A substantial basis exists for a difference of opinion regarding the questions presented by Mr. Meehan.

In the superior court's May 22, 2024, order, which the court incorporated into its orders on Mr. Meehan's motion for partial judgment notwithstanding the verdict, Mr. Meehan's motion for a partial retrial, and the State's motion to apply the damages cap, the court found that "[n]o reasonable jury would award $38 million for a single instance of abuse." 5/22/24 Order at 38; 10/31/24 Margin Order at 3; 11/1/24 Order at 2; 11/4/24 Order at 1. App. 47; App. 73; App. 86; App. 96. The court also concluded that entering a "$475,000 judgment in favor of the plaintiff, rather than the $38 million intended by the jury," based on the jury's obviously erroneous finding of a single incident would "be an obvious miscarriage of justice." 11/4/24 Order at 14. App. 23.

Despite this conclusion, the court "reluctantly" entered an order granting the State's motion to apply the damages cap and contemporaneously denied Mr. Meehan's motions for partial judgment notwithstanding the verdict and a partial retrial. 10/31/24 Margin Order at 3; 11/1/24 Order at 10–11; 11/4/24 Order at 1. App. 73; App. 94-95; App. 96. Based on the tension between the court's orders, it is evident that a substantial basis exists for a difference of opinion regarding the questions presented by Mr. Meehan, each of which were raised in the postverdict briefing.

First, with respect to the constitutional question, the Supreme Court has held that, despite the "long history" of the doctrine of sovereign immunity, the doctrine is disfavored when the State harms one of its citizens by negligence or other misconduct. *See Pet. of N.H. Div. for Child, Youth & Fams.*, 175 N.H. 596, 599 (2023). Considering the inherent tension between the common-law-turned-statutory doctrine of sovereign immunity and the constitutional guarantees of equal protection of the laws, a lawful and accountable government, and the right to a complete remedy, *see* N.H. CONST. pt. I, arts. 2, 8, 12, & 14, the Court has warned that the "continued existence of any application of the doctrine . . . depends upon whether the restrictions it places on any injured

person's right to recovery be not so serious that they outweigh the benefits sought to be conferred upon the general public." *Id*. at 600 (internal quotation marks omitted).

Here, the jury found that the State's conduct exceeded an ordinary breach of duty and was "wanton, malicious, or oppressive." 5/3/24 Trial Tr. at 32 (jury instructions describing basis for enhanced compensatory damages). App. 152. To account for the State's willful bad faith in caring for Mr. Meehan, the jury more than doubled its overall damages award, adding $20 million in enhanced compensatory damages to its award of $18 million in ordinary compensatory damages. App. 107. The jury thus found the State's conduct to be the opposite of the usual conduct necessary to support reasonable sovereign-immunity-based limitations on liability, such as when the offending State employee "acted under a reasonable belief that his conduct was authorized by law" or when the employee's conduct reflected the exercise of "due care." *Opinion of the Justices*, 126 N.H. 554, 564, 565 (1985).

Where, as here, a jury has found that the State's conduct was "wanton, malicious or oppressive," no liability limitation can be constitutionally justified. The Supreme Court has identified four policy considerations that support continuing the sovereign-immunity doctrine in New Hampshire. *See id*. at 560. None are legitimately served by allowing State employees to engage in tortious behavior with wanton, malicious, or oppressive disregard for the citizens for whom those employees are responsible.

On the contrary, the Supreme Court has recognized that allowing governmental immunity in similar circumstances would undermine sound public policy. *See City of Dover v. Imperial Cas. & Idem. Co.*, 133 N.H. 109, 119–20 (1990). In *City of Dover*, the Court stated that "[t]he laws of our State should be structured to encourage diligent service on the part of public employees," concluding that "[a] statute which rewards intransigence on the part of municipalities or their

employees, to the injury of others, should not be condoned." *Id.* If mere governmental "intransigence" is enough to void sovereign-immunity restrictions on a citizen's constitutional rights, then "wanton, malicious or oppressive" government conduct is enough to do so as well.

In any event, a substantial basis for a difference of opinion exists because this question is one of first impression. The New Hampshire Supreme Court has never addressed the question presented here—whether the State's sovereign immunity defense can survive a jury finding that the State's conduct against Mr. Meehan was "wanton, malicious or oppressive." Granting the State immunity in these circumstances violates the New Hampshire Constitution's guarantee of an "orderly, lawful, and accountable government." N.H. CONST. pt. I, art. 8.

Second, with respect to the ruling on Mr. Meehan's motion for partial judgment notwithstanding the verdict, New Hampshire case law supports using partial judgment notwithstanding the verdict to sever the erroneous part of a special verdict from the nonerroneous part and enter judgment on the latter. *See*, *e.g.*, *Plummer v. Currier*, 52 N.H. 287, 298 (1872) (affirming entry of judgment on special verdict containing superfluous finding where, although the jury "passed upon one matter not involved in the case . . .[,] all facts necessary to a perfect verdict were specially found, and the court c[ould] plainly see for what sum judgment should be rendered"); *Tucker & Stiles v. Cochran*, 47 N.H. 54, 57–58 (1866) (rejecting the part of the jury's special verdict in favor of the defendant as "surplusage," entering judgment on the part of the verdict in favor of the plaintiff, and noting that "in such a case it is the duty of the court to mould and work [the verdict] into form, according to the justice of the case"); *see also DeRoy v. Capp*, 123 N.H. 13, 15 (1983) (stating that "[w]hen a verdict form contains ambiguous language, it should, if possible, be construed so as to effect the jury's intent," which "may be derived from the evidence presented at trial and the trial court's instructions to the jury").

Federal precedent in the context of "judgment as a matter of law" under the Federal Rules of Civil Procedure, which is analogous to judgment notwithstanding the verdict under New Hampshire law, further supports this approach. *See*, *e.g.*, *Mycogen Plant Sci., Inc. v. Monsanto Co.*, 243 F.3d 1316, 1326 (Fed. Cir. 2001) (granting judgment as a matter of law to remedy inconsistent jury-verdict answers where one of the answers "lack[ed] a sufficient evidentiary basis" because "if a jury returns a verdict that contains portions that may be inconsistent, the law does not state that the verdict must be thrown out immediately and a new trial ordered"); *Floyd v. Laws*, 929 F.2d 1390, 1397–99 (9th Cir. 1991) (upholding trial court's decision to excise superfluous answer from special-verdict form on the basis that a trial court "should defer only to legitimate or viable findings of fact" and should dismiss jury findings that violate the court's instructions); *Am. Cas. Co. of Reading, Penn. v. B. Ciancolo, Inc.*, 987 F.2d 1302, 1305 (7th Cir. 1993) (granting judgment as a matter of law to "excise one answer [in a jury verdict] in a way that le[ft] the rest consistent and enforceable" because "[a] judge may dissipate . . . inconsistency by setting aside one of the conflicting verdicts, if that verdict was unsupported by evidence").

Here, the superior court is empowered to correct the jury's error without causing further harm to, or imposing further burden on, the parties, particularly Mr. Meehan, who has now proved that he was the victim of child abuse at the YDC. The court can "excise[]" the "irrational part of the verdict . . . while enforcing the remainder," which is the product of a month-long trial, including many days of testimony concerning the intimate details of the hundreds of child rapes and beatings Mr. Meehan suffered while in State custody. *See Ciancolo*, 987 F.2d at 1306.

Third, with respect to the ruling on Mr. Meehan's motion for a partial retrial, a court has broad discretion to "impose such conditions on the award of a new trial as seems necessary and may limit the scope of the issues to be retried." Gordon J. MacDonald, *Wiebusch on N.H. Civil*

Prac. & Pro. § 53.12 & n.39 (4th Ed. Matthew Bender & Co. 2024) (citing RSA 526:3). "If it is possible to isolate the error for which a new trial is granted and try only a portion of the case again, the court may so restrict its order." *Id.* § 53.12 n.40 (collecting cases); *see also Kilfoyle v. Malatesta*, 101 N.H. 473, 475 (1958) ("It is not the practice in this state to require a retrial of issues as to which no error has been committed, if they can be separated from issues as to which error did occur.").

It is well established, for example, that a trial court has the discretion to grant a partial retrial on damages only. *See*, *e.g.*, *Thibeault v. Campbell*, 136 N.H. 698, 703 (1993); *Panas v. Harakis*, 129 N.H. 591, 607–08 (1987); *Eichel v. Payeur*, 107 N.H. 194, 196–97 (1966).

The same principles apply here. The record supports a finding that the jury's mistaken conclusion on the number of "incident[s]" resulted from a misunderstanding of question 10. Questions 1 through 9 on the special-verdict form were not affected by that error, and the jury's answers to those questions are consistent with each other and fully supported by the record. *See* 5/14/24 Order; 5/22/24 Order at 1–2, 14–15, 38–40, 49–50. App. 2; App. 10-11, 23-24, 47-49, 58-59.

For these reasons, although the court ruled against Mr. Meehan on these issues, Mr. Meehan has demonstrated that a substantial basis for difference of opinion exists on the constitutionality of the damages cap in RSA 541-B:14, I, the superior court's authority to enter a partial judgment notwithstanding the verdict based on striking a superfluous aspect of a special verdict, and the superior court's authority to allow a partial retrial as a remedy for a verdict where the trial record supports the jury's findings regarding liability and damages.

B. This appeal will materially advance the termination of the litigation, protect Mr. Meehan from substantial and irreparable injury, and present the opportunity to decide several issues of general importance.

An interlocutory appeal also will meet the other criteria of New Hampshire Supreme Court Rule 8, any one of which independently justifies accepting the appeal.

First, an interlocutory appeal addressing the questions presented by Mr. Meehan will materially advance the termination of the litigation. N.H. Sup. Ct. R. 8(1)(d). If the Supreme Court finds that (1) the damages cap is unconstitutional as applied, (2) the superior court has the authority to enter a partial judgment notwithstanding the verdict striking question 10 from the verdict form, or (3) the superior court has the authority to order a partial retrial on the number of "incident[s]" suffered by Mr. Meehan, then the Supreme Court's ruling will either end the litigation or result in a partial retrial rather than a full retrial. Either outcome will materially advance the resolution of this dispute, which has now been pending since July 2022.

Second, an interlocutory appeal will protect Mr. Meehan from the substantial and irreparable psychological injury of a full retrial. In a full retrial, Mr. Meehan will again be forced to recount the traumatic events of his time at the YDC in detail, suffering re-traumatization as he does so. *See* 5/22/24 Order at 42 ("[T]he court is particularly mindful of the effect of the court proceedings on the plaintiff. Two psychiatrists and a psychologist testified as to his delicate state of mind, resulting from his diagnosis of complex PTSD. A de novo trial about how he was repeatedly raped as a young teenager may literally be deleterious to his health.").

By contrast, if the damages cap is declared unconstitutional as applied, or if the superior court is deemed to have the authority to enter a partial judgment notwithstanding the verdict based on striking question 10 from the special-verdict form, the litigation will end. Similarly, if a partial retrial on the number of "incident[s]" is conducted, the partial retrial will involve limited testimony

focused merely on the quantity of the incidents of abuse Mr. Meehan suffered, not the details about the nature and characteristics of that abuse. Once the number of incidents is found by the new jury, the court can calculate the cap's ceiling by applying the stipulated order of May 2, 2024. Rather than repeating the entire four-week trial, a partial retrial, including jury selection, likely could be completed in a week or less.

To that end, the first nine questions of the special-verdict form are not connected with determining specifically how many "incident[s]" of abuse occurred for purposes of applying the sovereign-immunity waiver statute. On the contrary, the first nine questions barely relate to, and are severable from, question 10. Testimony that would be relevant to answering the first nine questions on the special-verdict form is irrelevant to determining the number of "incident[s]" at issue.

For example, testimony concerning the timeliness of Mr. Meehan's complaint, the State's breach of its duties of care, and the apportionment of fault for those breaches has nothing to do with how many "incident[s]" of assault Mr. Meehan endured at YDC. While there is some relation between the damages questions (i.e., questions 3, 4, and 5) and question 10, the superior court has repeatedly reaffirmed that it is preferable to keep the "incident[s]" deliberation separate from the damages deliberation. *See* 5/22/24 Order at 39 (noting that the superior court did not inform the jury about the damages cap "because the number of incidents is not dependent on either the existence or the amount of the damages cap[, and] . . . telling the jury about the damages cap might introduce an irrelevant wildcard into the deliberations"). App. 48.

Third, an interlocutory appeal will decide issues of general importance regarding the constitutionality of the damages cap in RSA 541-B:14, I, the superior court's authority to enter a partial judgment notwithstanding the verdict based on striking a superfluous aspect of a special

verdict, and the superior court's authority to allow a partial retrial as a remedy for a verdict where the trial record supports the jury's findings regarding liability and damages. N.H. Sup. Ct. R. 8(1)(d).

Each of these issues has implications outside Mr. Meehan's case. If the Supreme Court holds that the damages cap is unconstitutional as applied where a jury has found that the State's conduct toward Mr. Meehan was wanton, malicious, or oppressive, that holding could be important in any other YDC/YDSU case that proceeds to trial.

Similarly, if the Supreme Court holds that the superior court has the authority to enter partial judgment notwithstanding the verdict by striking and disregarding an erroneous, superfluous aspect of a special verdict, doing so would clarify that, where appropriate, New Hampshire courts may still apply a well-established, if infrequently used, approach to reconciling special verdicts with the evidence presented at trial. *See Plummer*, 52 N.H. at 298; *Tucker*, 47 N.H. at 57–58; *see also DeRoy*, 123 N.H. at 15.

Finally, if the Supreme Court holds that the superior court has the authority to order a partial retrial as a remedy for a verdict where the trial record supports the jury's findings regarding liability and damages, doing so would reaffirm New Hampshire courts' broad discretion to tailor the award of a new trial in a way that isolates the error for which the new trial is granted, thereby promoting efficiency, judicial economy, and the interests of justice.

VI. Conclusion

For these reasons, Mr. Meehan respectfully (1) submits this statement for the superior court's approval in accordance with Superior Court Rule 46(a) and Supreme Court Rule 8 and (2) requests that his interlocutory appeal be heard.

VII. Signature of the Trial Court Transferring the Question

This interlocutory appeal statement is approved, and this Court hereby requests that the Supreme Court answer the questions set forth in Part IV of the statement.

Dated: ______________________________ ______________________________

Hon. Andrew R. Schulman

Dated: November 15, 2024

Respectfully submitted,

DAVID MEEHAN

By and through counsel,

RILEE & ASSOCIATES, P.L.L.C.

/s/ Cyrus F. Rilee, III
Cyrus F. Rilee, III, Esq. (Bar No. 15881)
Laurie B. Rilee, Esq. (Bar No. 15373)
264 South River Road
Bedford, NH 03110
T: 603.232.8234
crilee@rileelaw.com
lrilee@rileelaw.com

NIXON PEABODY LLP

/s/ W. Daniel Deane
David A. Vicinanzo, Esq. (Bar No. 9403)
W. Daniel Deane, Esq. (Bar No. 18700)
Mark Tyler Knights, Esq. (Bar No. 264904)
Nathan Warecki, Esq. (Bar No. 20503)
Erin S. Bucksbaum, Esq. (Bar No. 270151)
Allison K. Regan, Esq. (Bar No. 272296)
Jonathan O'Neil, Esq. (Bar No. 276336)
900 Elm Street, 14th Floor
Manchester, NH 03101
T: 603-628-4000
dvicinanzo@nixonpeabody.com
ddeane@nixonpeabody.com
mknights@nixonpeabody.com
nwarecki@nixonnpeabody.com
ebucksbaum@nixonpeabody.com
aregan@nixonpeabody.com
joneil@nixonpeabody.com

CERTIFICATE OF SERVICE

I certify that, on November 15, 2024, I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's e-filing system to all attorneys and to all other parties who have entered electronic service contacts (e-mail addresses) in this case.

/s/ W. Daniel Deane
W. Daniel Deane, Esq.

STATE OF NEW HAMPSHIRE

ROCKINGHAM, *ss.* SUPERIOR COURT

CASE NO. 217-2020-CV-00026

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE, et al.

*****THIS FILING PERTAINS TO PLAINTIFF MEEHAN'S INDIVIDUAL CASE*****
*****THIS FILING DOES NOT PERTAIN TO CONTRACTOR DEFENDANTS*****

APPENDIX TO PLAINTIFF'S INTERLOCUTORY APPEAL STATEMENT

TABLE OF CONTENTS

DESCRIPTION	PAGE
Order regarding Stipulation as to the Applicability of RSA § 541-B:14 (Rockingham Super. Ct. May 2, 2024) (Schulman, J.)	App. 1
Margin Order on State Defendants' Motion for Judgment Notwithstanding Verdict (Rockingham Super. Ct. May 14, 2024) (Schulman, J.)	App. 2
Order following Jury Verdict (Rockingham Super. Ct. May 22, 2024) (Schulman, J.)	App. 10
Order on Plaintiff's Third Assented-To Motion to Extend Deadline to File Post-Verdict Motions (Rockingham Super. Ct. Aug. 1, 2024) (Schulman, J.)	App. 67
Margin Order on Plaintiff's Motion for New Trial as to Number of "Incidents" (Rockingham Super. Ct. Oct. 31, 2024) (Schulman, J.)	App. 71
Margin Order on State Defendants' Motion to Reconsider and Vacate May 22, 2024 Order (Rockingham Super. Ct. Oct. 31, 2024) (Schulman, J.)	App. 74
Order on Plaintiff's Motion for Partial Judgment Notwithstanding Verdict (Rockingham Super. Ct. Nov. 1, 2024) (Schulman, J.)	App. 85
Order on State Defendants' Motion to Apply Damages Cap (Rockingham Super. Ct. Nov. 4, 2024) (Schulman, J.)	App. 96
Special Verdict Form (Redacted)	App. 105
Excerpted Transcript of Jury Trial held April 25, 2024	App. 112
Transcript of Jury Trial held May 3, 2024	App. 121
Transcript of Motion Hearing held June 24, 2024	App. 173

DESCRIPTION	**PAGE**
NEW HAMPSHIRE CONSTITUTION, Part 1, Article 2	App. 252
NEW HAMPSHIRE CONSTITUTION, Part 1, Article 8	App. 253
NEW HAMPSHIRE CONSTITUTION, Part 1, Article 12	App. 254
NEW HAMPSHIRE CONSTITUTION, Part 1, Article 14	App. 255
N.H. Rev. Stat. § 541:B-14	App. 256

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

ORDER REGARDING STIPULATION AS
TO THE APPLICABILITY OF RSA 514-B: 14

The State takes the position that this individual case involves only a single incident within the meaning of RSA 541-B:14, I.

The plaintiff takes the position that there is a separate incident for each episode of each type of abuse. Thus, in the plaintiff's view an episode involving both sexual and physical abuse would be two incidents.

The court believes that the term "incident" applies to an episode of abuse. Both parties' positions were argued and are preserved.

The State objects to asking the jury to make incident by incident determinations of the amount of damages, in the event the jury rules against the State on limitations and liability. Instead, the State asks for the jury to determine damages for all incidents on a single line.

In return, the State agreed that for this case, in the event that the Supreme Court rejects the State's definition of "single incident," the damages cap under RSA 541-B:14 would be equal to the total number of incidents found by the jury (or the Supreme Court) multiplied by $475,000. (Thus, by way of example, if the jury found 10 incidents, the cap would be $4,750,000).

Counsel agreed to this in open court.

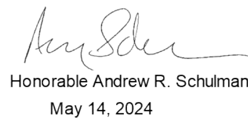
May 2, 2024
Date

Andrew R. Schulman
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/02/2024

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
5/2/2024 12:21 PM

5-14-2024 Respectfully DENIED. Please see margin order on the last page.



Honorable Andrew R. Schulman
May 14, 2024

Clerk's Notice of Decision Document Sent to Parties on 05/15/2024

Filed
File Date: 5/13/2024 9:42 PM
Rockingham Superior Court
E-Filed Document

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 217-2020-cv-00026

David Meehan

v.

New Hampshire Department of Health and Human Services et al

THIS DOCUMENT PERTAINS ONLY TO PLAINTIFF MEEHAN'S INDIVIDUAL CASE

THIS DOCUMENT DOES NOT PERTAIN TO CONTRACTOR DEFENDANTS

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

The Department of Health and Human Services ("DHHS"), by and through counsel, pursuant to Rule 43, and for all those reasons in the full trial record – incorporated herein by reference in full – DHHS is entitled to judgment on all counts in the complaint.

A. All of Plaintiff's claims are barred by the three-year statute of limitations within the limited waiver of sovereign immunity.

RSA 541-B:14, IV provides that "[a]ny claim submitted under [RSA chapter 541-B] shall be brought within 3 years of the date of the alleged bodily injury, personal injury or property damage or the wrongful death resulting from bodily injury." It is undisputed that all of Plaintiff's claims arose no later than September 12, 1998. Indeed, Plaintiff stated that after the groin injury on September 12, 1998, all claimed abuse stopped. Therefore, Plaintiff must have filed this lawsuit no later than September 12, 2001. The burden, then, is on Plaintiff to prove the applicability of the discovery rule. *See Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 824 (2005) ("Once the defendant establishes that the cause of action was not brought within

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
5/15/2024 8:53 AM

three years of the alleged act, the burden shifts to the plaintiff to raise and prove the applicability of the discovery rule.").

RSA 508:4, I, provides:

> [W]hen the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

"Thus, the discovery rule exception does not apply unless the plaintiff did not discover, and *could not reasonably have discovered*, either the alleged injury or its causal connection to the alleged negligent act." *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 713 (2010) (quotation marks omitted; emphasis added).

As the New Hampshire Supreme Court recently reiterated, "the discovery rule employs an objective standard," so a "plaintiff's *subjective knowledge is not dispositive* of" this issue. *Troy v. Bishop Guertin High Sch.*, 176 N.H. 131, 136 (2023) (quotation marks omitted; emphasis added). Rather, "[a] party attempting to invoke the discovery rule will be held to a *duty of reasonable inquiry*." *Id.* at 137 (citing *Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 624 (2005)) (emphasis added). "The discovery rule applies only when a plaintiff 'did not have, and could not have had with due diligence, the information essential to bringing suit.'" *Id.* (quoting *Portsmouth Country Club*, 152 N.H. at 624).

Further, for the statute of limitations to run, "a plaintiff need not be *certain* of this causal connection; the *possibility* that it existed will suffice to obviate the protections of the discovery rule." *Beane*, 160 N.H. at 713 (emphasis added). Significantly, "[r]egardless of how the predicate *facts* become (or should have become) available to a putative plaintiff, the claim

accrues at that point, even if the plaintiff lacks knowledge of his or her *legal* rights." *Ouellette v. Beaupre*, 977 F.3d 127, 139 (1st Cir. 2020).

The discovery rule, therefore, requires Plaintiff to have filed suit by the *earlier* of (a) when Plaintiff personally knew of his alleged injury and the *possibility* of a *factual* (not legal) connection to the Youth Development Center ("YDC"); or (b) when a *reasonable plaintiff*, *exercising reasonable diligence*, would have known of the alleged injury and the *possibility* of a factual (not legal) connection to the YDC.

Plaintiff's last claimed incident of abuse was in September of 1998. Plaintiff was released from YDC in 1999. Plaintiff, however, did not file this action until January 2020. A reasonable plaintiff, with a duty of reasonable inquiry, would have known of his injuries and the mere possibility of a factual connection to YDC well before January 2017. The evidence presented at trial demonstrates that Plaintiff knew about his alleged injuries long before January 2017. There is no dispute that Plaintiff knew about the alleged abuse and resulting injuries at the time the abuse occurred and never forgot about it.

The evidence also demonstrates that Plaintiff has always known of the possible connection of his alleged injuries to YDC. He has known since at least 1995 that YDC is a State-run facility – he was committed to the YDC by the Rockingham District Court on multiple delinquency charges – and he has always known that his alleged abusers were employees of YDC. Plaintiff also has always known that his alleged abusers were hired by YDC and supervised by higher-level officials.

Plaintiff testified multiple times about his knowledge of the possible factual connection between his alleged injuries and YDC. For instance, Plaintiff testified that he had been trying to tell people about what had happened to him at the YDC going as far back as 2002 – if not earlier.

Plaintiff The jury heard testimony of numerous and regular occasions where Plaintiff was telling his therapists since 2002, and for year after year, that he was having nightmares and flashbacks as a result of the abuse that he endured at the YDC. Plaintiff also testified, and the evidence shows, that Plaintiff filed a claim for social security benefits in 2012 based on the injuries – namely PTSD – that he claimed to have suffered as a result of what happened to him at YDC. Plaintiff's economist even used this year as a starting point for the economic damages calculation for Plaintiff's injuries at YDC. And, Plaintiff specifically testified, and Exhibit E1 shows, that at least as of October 8, 2013, Plaintiff was aware of his injury, and was aware of a potential causal connection between his injuries and the YDC. Specifically, Plaintiff was asked "if [Exhibit E1 – Seacoast Mental Health Records] is accurate, it means that in October of 2013, at least by then, you were aware of your injury and you were aware of a potential causal connection between your injuries and the detention center, correct?" Plaintiff responded, "it would implicate that, yes."[1] There was no evidence that Exhibit E1 – Plaintiff's own Seacoast Mental Health records – are inaccurate.

Moreover, even if Plaintiff did not *personally* know of the possible connection to YDC, a *reasonable* plaintiff in his position exercising *reasonable* diligence would have known of the possible connection based on that which is outlined above and for those reasons set forth more fully in the trial record. Additionally, in a similar case (*S.C. v. DHHS*), the plaintiff sued the State in 2011, more than eight years before Plaintiff's lawsuit, based on alleged abuse (including sexual abuse) perpetrated by YDC staff while he was a resident of YDC in 1997-1998. Exercising due diligence, Plaintiff should have brought his suit long before he did. Given his

[1] New Hampshire YDC trial: David Meehan testifies for fourth day (Part 3) (https://www.wmur.com/article/new-hampshire-ydc-trial-david-meehan-day-4-part-3/60581720) at 0:10:20-0:10:50 (last visited 4/27/2024).

lack of reasonable diligence since at least September 12, 1998, Mr. Meehan's own alleged subjective ignorance until 2017 does not satisfy his burden of proof under the discovery rule.

Because all of Plaintiff's claims are time-barred, this Court lacks subject-matter jurisdiction under RSA 541-B and DHHS is entitled to a verdict in its favor.

B. Even if Plaintiff's claims are not time-barred, DHHS is entitled to a verdict in its favor on the merits of all claims.

Plaintiff asserted claims of breach of fiduciary duty and negligence (specifically, negligent hiring, retention, training and supervision). This court previously ruled that discretionary function immunity, *see* RSA 541-B:19, I(c), narrows Plaintiff's claims in the following way: policy decisions regarding the general hiring, training, and supervision of staff are barred by discretionary function immunity; but derelictions of duty in violation of established common law duties of care are not barred by sovereign immunity. *See* Order on DHHS's Motion to Dismiss the Master Complaint Nos. 1 and 2, pp. 24-39. Notwithstanding this ruling and the burden of proving what the common law duties of care of the leadership of a secure juvenile detention facility might have been in 1996-1998, Plaintiff elected not to call his designated liability expert, Dr. Patrick McCarthy, a standard of care/policies expert. As a result, the Plaintiff presented no evidence to establish the standard of care for the DHHS leadership during the relevant time periods. There was no evidence to support the notion that DHHS breached its standard of care in relation to the causes of action alleged. In the absence of actual evidence, the jury was left to speculate about what the standard of care was. How could a jury of laypeople in 2024 have any idea what the leadership of a juvenile detention facility like YDC was required to have for hiring, training and supervision policies and procedures twenty-eight years ago? Clearly, they could not.

To succeed on a claim of negligent hiring and retention, a plaintiff must prove he was injured in a foreseeable way by "an employee that the employer knew or should have known was unfit for the job so as to create a danger of harm to third persons." *Marquay v. Eno*, 139 N.H. 708, 718 (1995). For example, "a school . . . has a duty not to hire or retain employees that it knows or should know have a propensity for sexually abusing students." *Id*. at 720. Quite simply, Plaintiff has presented no evidence that could support a finding that DHHS knew or should have known that Plaintiff's alleged abusers – Buskey, Davis, Woodlock, Murphy – created a danger of harm to juveniles held at YDC. Plaintiff also failed to submit any evidence as to the hiring process for any of these four individuals and what, if anything, was known at the time of the hiring.

To succeed on a claim of negligent training or supervision, a plaintiff must prove that the defendant negligently failed to provide clear instructions or adequate supervision to an employee, *regarding a foreseeable risk of harm attendant to the employee's job*, and that the plaintiff was injured as a result. *Cutter v. Town of Farmington*, 126 N.H. 836, 841 (1985).

Plaintiff presented no evidence that could support a finding that DHHS failed to adequately train or supervise the alleged abusers regarding a foreseeable risk of harm attendant to their jobs. All of the harm that Plaintiff alleges he suffered at the hands of his alleged abusers stemmed from independent criminal conduct, of which DHHS had no notice of, that was well-outside the scope of their employment. The evidence demonstrates that DHHS provided clear instructions and adequate supervision to employees at YDC relating to issues attendant to their jobs, such as the proper use of force in situations necessitating the use of physical force on a juvenile and the unambiguous prohibition of any physical or sexual abuse. DHHS did not have a duty to train employees not to sexually assault or intentionally physically assault juveniles, and

Plaintiff has presented no evidence that DHHS was aware of a foreseeable risk of unlawful assaults at YDC such as to create a heightened duty to supervise related to this issue. Finally, Plaintiff' breach of fiduciary duty claim is grounded on DHHS's alleged failure to use due care in the hiring, retention, training and supervision of its employees. *See* Order on DHHS's Mot. to Dismiss the Master Complaint Nos. 1 and 2, p. 38. Therefore, that claim fails as a matter of law for the same reasons set forth above. WHEREFORE, DHHS respectfully requests that this honorable court:

A. Grant this Motion; and

B. Issue Judgment in Favor of DHHS; and

C. Grant such other relief as is just and equitable.

Respectfully Submitted,

New Hampshire Department of Health and Human Services; Department of Youth Development Services; Division of Children, Youth, and Families; Division of Juvenile Justice Services; and Sununu Youth Services Center, a/k/a Youth Development Center and Youth Development Services Unit, f/k/a State Industrial School and Adolescent Detention Center

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: May 13, 2024

/s/ Brandon F. Chase
Brandon F. Chase, Bar #270844
Assistant Attorney General
Catherine A. Denny Bar #275344
Assistant Attorney General
New Hampshire Department of Justice
Civil Bureau
1 Granite Place South
Concord, NH 03301

Clerk's Notice of Decision
Document Sent to Parties
on 05/15/2024

(603) 271-3650
brandon.f.chase@doj.nh.gov
catherine.a.denny@doj.nh.gov

Honorable Andrew R. Schulman
May 14, 2024

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record on the date above.

/s/ Brandon F. Chase
Brandon F. Chase

5-14-2024 Respectfully DENIED.

(1) With respect to limitations, the plaintiff proved that during his stay at YDC he had no reason to suspect that the rot in the agency extended any further than the cottage staff. A resident would not ordinarily have contact with anybody higher in the organizational chart than the house leader. There is no evidence that Mr. Meehan ever met Ron Adams (Superintendent) or Bob Boisvert, or other managers. From a resident's perspective, there was a gang of rogue line staff members who preyed on some residents and prevented complaints to management by intimidation and retaliation. After Mr. Meehan left YDC, he had no facts to show that the central management at YDC, and the supervisors at DYDS, DYCF and DHHS were really to blame. If he had requested information, he would have been given a Potemkin Village of de jure policies on Harm Prevention, Room Confinement and the Ombudsman System. If he called Ron Adams, would he have learned the truth? It took a State Police Major Crimes investigator, acting with the imprimatur of the AG's task force, assisted by a staff, and aided by search warrants, to uncover the truth. Sure, in 2013 Mr. Meehan associated his injuries with YDC. But his reference to "YDC" was not a metonym for the decision makers-e.g. the managers whose conduct is properly that of the agency. His reference to YDC was to the crimes committed against him at YDC by individual line staff members, not to the sovereign State agencies that operated YDC. Had he filed suit in 1983, his complaint would have been dismissed for failure to state a claim against anybody other than the low level staff members who assaulted him. The discovery rule/limitations question was close, but the jury decided it just as the court would have decided it. Mr. Meehan's claims are timely by virtue of the discovery rule.

(2) With respect to the merits, Mr Meehan proved--beyond cavil, beyond doubt, and certainly by more than a preponderance of the evidence--that the State Defendants (e.g. the management at YDC and their superiors at DYDS, DCYF and DHHS) breached their common law and fiduciary duties of care with respect to training, supervising and disciplining line staff. More particularly, the State Defendants utterly failed to implement their published personnel policies relating to (a) the prevention and reporting of sexual abuse, physical abuse and emotional abuse of residents by staff, (b) the establishment of an ombudsman system to allow residents to report abuse without fear of retaliation and (c) the use and conditions of room confinement. The jury could have easily found that the evidence established that (a) YDC hired cottage staff without special qualifications, training or experience in dealing with behaviorally, legally, mentally and emotionally challenged youth (which is not actionable) (b) YDC provided minimal--if any--training to its unqualified cottage staff with respect to how to deal with the resident population, (c) YDC management allowed house leaders to keep cottage staff away from training (so the facility was downright refractory to training), (d) YDC allowed its staff to corrupt and disable the ombudsman program, (e) YDC management failed to enforce the rule requiring reporting of abuse, (f) YDC leadership was, at best, wilfully blind to entrenched and endemic customs and practices under which a group of cottage staff engaged in frequent sexual assaults of residents, engaged in graphic and gruesome physical assaults of residents, engaged in constant emotional abuse of residents, and refused to allow trainers and ombudsmen into the cottages, (g) YDC's Superintendent encouraged the criminal use of excessive force as punishment (altough he did so using oblique language), and (h) whistleblowing was punished. Worse, there was some evidence from which the jury could find that reports of physical abuse at YDC were made by a teacher to DYCF, but no investigations were initiated. In 1994, the agencies leaders received a report concerning events at YDSU which put them on notice of the need to train, supervise and discipline line staff. They were put on particular notice that staff member Bradley A need both training and vigilent supervision. The testimony of former resident Michael G. and the testimony of the plaintiff demonstrated endemic physical and sexual abuse. YDC leadership either knew and didn't care or didn't care to learn the truth.

The court can only rule based on the trial record, and maybe there is more to the story, but based on the trial record liability for negligence and breach of fiduciary duty was proven to a geometric certainty.

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

I. Preface

This order addresses the jury's finding that its verdict of $18 million in compensatory damages, and $20 million in enhanced compensatory damages, was grounded on one "incident." Pursuant to RSA 541-B:14, I, a plaintiff cannot recover more than $475,000 from the State or its agencies for injuries arising from a "single incident." Therefore, if the statutory damages cap were applied to the jury's verdict, the judgment would be for $475,000, or just 1/80th, or 1.25%, of the total verdict.

Yet, plaintiff David Meehan's (uncontradicted) testimony was that he was violently sexually assaulted on many different days, by different individuals, in different locations, under different circumstances, over the course of many months, with intervening events such as multi-day furloughs and AWOLs from YDC. He also testified, that he was beaten to the point of

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
5/22/2024 3:58 PM

hospitalization on one occasion, beaten and bruised on other occasions, raped at gunpoint in a staff member's home, otherwise subjected to outrageous emotional abuse, and at times denied access to toilet facilities. The cognitive dissonance between a $38 million verdict and the finding of a "single incident" of actionable abuse cannot stand.

Regardless of what anybody may say about the finding of a "single incident," it is important to also say that the jurors are heroes. In an age of limited attention spans, each juror paid close attention to the evidence for a month. From what the court could observe from the bench, the jurors recognized the heavy weight of their jobs as judicial officers. They approached each day with observable diligence, without complaint, and as good sports. Each juror gave up his or her regular life for a month. The court assumes that many jurors lost significant income, or gave up vacation days or PTO time. The jurors put up with court delays. The evidence they heard must have had an emotional impact on them. This judge will forever hold these jurors in the highest esteem. Period.

II. The Issue And The Ruling

The matters before the court are the State Defendants'[1] **Motion To Apply The Damages Cap** and plaintiff David Meehan's **Emergency Motion For A Hearing**. Both parties' motions relate to the jury's finding that plaintiff proved only a single "incident." Notwithstanding Superior Court Rules 10(g) and 13, the court treats each party's motion as doing double duty as an objection to the other parties' motion.[2]

An emergency hearing is not required. But a hearing following full briefing is required to aid the court in choosing among what the court has referred to below as Options 3, 4 and 5. The clerk has already scheduled an hour long hearing for June 24, 2024. Pending this hearing, the court will forbear from granting judgment on the verdict. Nothing in this order

---

[1] The caption of the Master Complaint lists a number of state agencies and subsidiary units as defendants. In its rulings this court has consistently referred to these defendants as the State Defendants. By the time this individual case reached the jury, the only remaining defendant was DHHS (which had assumed the liabilities of its predecessor, DYDS, and all of the subsidiary units of both DHHS and DYDS, including DCYF and YDC). Nonetheless, for the sake of consistency, the court will continue to follow the convention in these consolidated cases of referring to "the State Defendants."

[2] Since those motions were filed, the plaintiff moved to recall the jury. The court denied that motion via a brief margin order and cited to the fact that this order would be forthcoming. The State moved for JNOV. The court denied that motion by margin order. The plaintiff filed a motion for partial JNOV, to which the State Defendants have not yet responded.

prevents either party from filing any other timely post-verdict motions.

Memoranda of law on the issues discussed below are invited, either before or after the hearing.

III. The Five Options

Things may have changed, but when this judge took the bar exam, the multistate section included many questions that asked, in essence, which of five incorrect answers was the least incorrect. The present situation presents precisely such a question.

The five incorrect options are:

1. Asking the jury to clarify its verdict (e.g. to require further deliberations and a second verdict from the same jury);

2. Taking testimony from individual jurors as to the course of deliberations and their subjective intents, when no suggestion of juror misconduct or exposure to outside influences has been made;

3. Granting the State Defendants' motion to enter judgment in the amount of the $475,000 statutory damages cap for injuries arising from a "single incident." RSA 541-B: 14,I;

4. Granting a motion to set aside the verdict (or for a new trial) and ordering a *de novo* jury trial on all issues; and

5. Granting a motion for something akin to additur with respect to the number of "incidents" subject to both parties'

right to reject the "additur" and demand instead a *de novo* jury trial on all issues.

IV. Option 1 (Recalling The Jury)

An emergency hearing, as requested by the plaintiff, would be useful only if the court were to consider the two most incorrect options at this juncture. The rock bottom worst option would be to recall the jury for the purpose of clarifying its verdict. A jury should not be asked to clarify its verdict, or to deliberate further, after (a) it has been discharged, (b) the jurors have gone home for a weekend or more, (c) the jurors have been exposed to outside influences (such as the statewide saturation news coverage of their verdict and discussions with friends and family), (c) the jurors have discussed the case with others, and (d) the jurors have had time to redeliberate and rethink their verdict in light of the commentary they heard regarding its effect.

The time frame within which a discharged jury may be properly recalled is typically measured in minutes, sometimes measured in hours and rarely, if ever, measured in days. As the U.S. Supreme Court cautioned in Dietz v. Bouldin, 579 U.S. 40, 42 (2016), "the potential for tainting jurors and the jury process after discharge is extraordinarily high," and therefore a trial judge's ability to recall a discharged jury is "limited

in duration and scope and must be exercised carefully to avoid any potential prejudice."

In Dietz, the jury found liability but awarded a personal injury plaintiff "$0" even though the parties had stipulated to $10,136 in medical expenses. The judge discharged the jurors, but then recalled them almost immediately. Only one juror had time to leave the building. None of the jurors had discussed the case with anybody. The U.S. Supreme Court held that under those circumstances the District Court acted within its discretion when it recalled the jury. See also Emamian v. Rockefeller University, 971 F.3d 380, 392 (2nd Cir. 2020) (It was proper for the judge to ask the jury to continue their deliberations, even though he had verbally discharged the jurors, because (a) they had not yet even stood up to leave the jury box and (b) the verdict form included both damages and a finding of "no liability," which needed to be clarified.)

In Dietz, the Supreme Court stressed the hazards of recalling a jury after more than a few minutes has elapsed, especially in a case that has garnered media attention, and especially in a case in which emotions ran high. Jurors may speak with spouses, family, and friends. Freed from the court's instructions, they may consume news coverage of the case. They may consult social media. Through no fault of their own, they may no longer remain as impartial as the lot of humanity will

admit. N.H. Constitution, Part 1, Article 35. See, e.g., State v. Green, 995 S.W.2d 591, 606–07 (Tenn. Ct. Crim. App. 1998) (A jury that acquitted a defendant of first degree murder, but was mistakenly not asked for their verdict on the lesser included offense of second degree murder, could not be recalled after the jurors left the courtroom and were exposed to the public.); Montanez v. People, 966 P.2d 1035, 1037 (Colo. 1998) (Trial court erred by recalling the jury shortly after discharge when two jurors had an opportunity to mingle and discuss the case with outsiders).[3]

In this case, following traditional New Hampshire practice, the verdict form was read to the parties and counsel outside of the jurors' presence. The jurors remained in the deliberation room and were not discharged until after all counsel were provided with copies of the verdict form. While the jurors were still in the deliberation room, and still under the court's instructions, this judge stated to counsel that the verdict form

[3]Although the court cited to two criminal cases, the court is well aware that there may be a difference with respect to the scope of a trial judge's discretion to recall a criminal jury, as opposed to a civil jury, after uttering the not-so-magic words, "You are discharged." See Dietz, 579 U.S. at 51 (noting the additional concerns in criminal cases, such as attachment of the double jeopardy bar). However, the risks to the integrity of the verdict that are created by recalling a jury, after the jurors have left the protective bubble of the deliberation room and have been freed from the court's instructions, are precisely the same in civil and criminal cases.

raised questions. None of the seven attorneys in the room asked for the jury to continue their deliberations.

Had counsel asked for the jury to continue deliberating, or to do so after further instructions, that request would have been given thoughtful consideration. By standing mute, counsel ensured that the jury would be discharged. Thus, counsel waived (or at least forfeited)[4] the opportunity to make a timely request for further deliberations based on the verdict form.

Following the reading of the verdict, the jury in this case was discharged. The jurors disbanded and went back to their lives. At least one--but presumably all--were exposed to the media coverage of their verdict. One juror, who was concerned at what he learned was the legal effect of the jury's findings regarding the number of incidents, approached plaintiff's counsel. The court assumes that the other jurors spoke at least briefly about the case with their significant others. Who would not after a month of forced silence?

The court recognizes that there is no bright line rule in New Hampshire that forbids recalling a jury to correct a

[4]For the difference between waiver and forfeiture, see United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.').

mistake. State v. Adams, 169 N.H. 293, 296 (2016) (citing Dearborn v. Newhall, 63 N.H. 301, 302-303 (1885)). To do so in this case, however, would be a poor and likely unsustainable use of discretion.

V. Option 2 (Juror Testimony To Impeach The Verdict)

An emergency hearing would also be useful if the court were to consider the second worst option, e.g., to have the jurors testify (either in person or by affidavit) about the course of deliberations and their subjective understandings of the court's instructions. In general, a verdict cannot be impeached by a juror's testimony. Bunnell v. Lucas, 126 N.H. 663, 667-668 (1985):

> The law of this jurisdiction recognizes the soundness of the policy against testimonial disclosure of the conduct of jury deliberations. The most notable expression of this policy is the rule governing the treatment of juror testimony offered to support or to impeach a verdict. Under this rule, the affidavit or testimony of a single juror is admissible in exculpation of himself, to sustain a verdict, but is inadmissible where it is offered as a basis for setting the verdict aside.

(internal quotation marks, bracketing and citation omitted)); see also Kravitz v. Beech Hill Hospital, L.L.C., 148 N.H. 383, 386 (2002) ("It is well established that the testimony or affidavits of jurors are not admissible to impeach the verdict."); Drop Anchor Realty Trust v. Hartford Fire Insurance Company, 126 N.H. 674, 682 (1985) ("The affidavit of a juror is

inadmissible in evidence to impeach a verdict."); Caldwell v. Yeatman, 91 N.H. 150 (1940) (tracing the history of the rule from the earliest reported New Hampshire cases to the mid-twentieth century).[5]

This is particularly true with respect to whether the jury, or individual juror(s), misunderstood the court's instructions. In Bunnell, the court reaffirmed the vitality of an early eighteenth century case, Tyler v. Stevens, 4 N.H. 116 (1827), in which the court expressly held that juror testimony cannot be admitted to show misapprehension of the court's instructions. 126 N.H. at 668. As stated in Tyler, and restated in Bunnell:

> If it were once settled that the affidavits of jurors could be received to prove that they had misunderstood the instruction given them by the court, and that such misunderstanding was a legal ground for granting a new trial, the consequences would be most mischievious. For a very little tampering with individual jurors after the trial would enable any party to procure such affidavits and no verdict could be permitted to stand.

Id.

---

[5]For those interested, the rule prohibiting juror testimony to impeach a verdict was first fully articulated in a 1785 English decision by Lord Mansfield, Vaise v Delaval, 99 Eng. Rep. 944 (K.B. 1785). The holding in that case was adopted and referred to on both sides of the Atlantic as the "Mansfield Rule." Under the Mansfield Rule, juror testimony was not admissible even to prove misconduct. The Mansfield Rule was later modified to varying degrees in all American jurisdictions. See, Pena-Rodriguez v. Colorado, 580 U.S. 206, 215-218 and Appendix (2017)
As explained below, modern New Hampshire precedents grant the court considerable discretion to inquire into juror misconduct, improprieties during deliberation, and/or exposure to outside influences.

The reasons for prohibiting juror testimony regarding the course of deliberations go beyond those articulated in Tyler. Tyler noted the risk of tampering by the parties to procure grounds for a new trial. In this case, at least, that is not a risk at all, because both parties are represented by respected and ethical attorneys, who would never do anything to influence what a juror might say.

But if jurors could impeach their verdicts by their after-the-fact understandings of the terms and phrases in the jury instructions (e.g., if they could be heard to say that they had a less than perfect understanding of the law at the time of the verdict), then no verdict would have finality. Jurors could upend verdicts, or at least require evidentiary hearings, based on little more than articulable 'buyer's remorse.'

We do our best to instruct the jury in terms that they will understand. This judge's practice is to provide multiple written copies of the instructions, as was done in this case. This judge's practice is also to read the instructions with short breaks in the narrative, and with brief *ad lib* statements (that do not add to the substance), designed to keep the jury's attention. This judge runs a draft of the instructions by counsel, not only to invite

objections and suggestions regarding substance, but also to invite comments on clarity and form. Finally, the jury is told that it can ask questions about the law during deliberations. Beyond this, while counsel does not instruct the jury, counsel's job is to focus the juries' attention on the salient facts and legal principles.

Just the same, jury instructions deal with abstract and nuanced concepts (compare, e.g., criminal recklessness versus criminal negligence, RSA 626:2; or, as in this case, define the dividing line between "pain and suffering" and "hedonic damages," or between permissible "enhanced compensatory damages" and impermissible "punitive damages."). It must be fairly common for jurors, who have varied degrees of education, with varied verbal comprehension and reasoning abilities, and with varied prior exposure to legal concepts, to misapprehend some of the nuances.

When a misconstrued instruction results in a verdict that is objectively and conclusively against the weight of the evidence, the remedy is to set the verdict aside or order additur or remittitur. See Babb v. Clark, 150 N.H. 98, 100 (2003); Quinn Brothers. v. Whitehouse, 144 N.H. 186, 190 (1999); George v. Al Hoyt & Sons, Inc., 162 N.H. 124, 131 (2011); N.H. Superior Court Rule 43; RSA 526:1. The

remedy is not to hear from the jurors themselves about their personal and subjective understandings. But when the verdict is supported by the weight of the evidence, the importance of finality trumps the quest for perfection.

Another reason for prohibiting testimony by jurors regarding the course of deliberation is that, if we had a tradition of freely recalling jurors, it would chill free and open discussions in the privacy of the deliberation room. See Bunnell, 126 N.H. at 667.

Further, while individual jurors are free to voluntarily disclose what they experienced during the trial and in the deliberation room, to cross-examine them about these matters would be harassment and invasive of personal privacy.

All of this said, the court has considerable discretion to consider juror testimony when there is a suggestion of possible misconduct, impropriety, or exposure to outside influence. See Drop Anchor Realty, 126 N.H. at 682 ("Although a juror's affidavit that impeaches a verdict is inadmissible in evidence, it may be considered by the trial court to determine whether the jury should be reconvened for questioning on the propriety of the conduct of their deliberations."); Bunnell, 126 at 669 (The trial

court acted within its discretion when it considered juror testimony that the jury averaged comparative fault).

However, in this case there is no claim of misconduct or impropriety. There is no suggestion that the jury intentionally disregarded any of the court's instructions. All that has been alleged is a good faith misunderstanding as to the meaning of a term in the instructions (i.e., the word "incident.").

In this case, the jurors were not informed about the statutory damages cap. They were asked to indicate the number of "incidents" for which they found liability. They found just one "incident." While that finding cannot stand, it is not misconduct. But this is to be decided by an objective standard that looks only to the verdict, the evidence, and the law. The subjective opinions of the individual jurors, and their recollection of the deliberations, is neither relevant nor admissible.

VI. Option 3 (A "Single Incident" Judgment Of $475,000)

(A) Introduction

A third way the court could err would be by granting the State's motion to apply the damages cap to the "single incident" found by the jury. This would result in a $475,000 judgment in favor of the plaintiff, rather than the $38 million intended by the jury. In the court's view, this be an obvious miscarriage of justice because the finding of a "single incident" was

conclusively against the weight of the evidence. See, e.g., George, 162 N.H. at 131 ("We will set aside a jury verdict if it is conclusively against the weight of the evidence[.] . . . 'Conclusively against the weight of the evidence should be interpreted to mean that the verdict was one no reasonable jury could return.'"); see also Babb, 150 N.H. at, 100; Quinn, 144 N.H. at 190 (1999).

(B) The State Defendants' Statutory Argument

Overview: The court previously rejected the State Defendants' argument that, as a matter of law, all of plaintiff's claims and injuries arose from a "single incident" within the meaning of RSA 541-B:14, I. If the State were correct then the jury's finding of a "single incident" would be superfluous. While the court addressed this issue orally on the record on several occasions, including during the charging conference, a more fulsome explanation of the court's reasoning is in order.

The question is one of statutory construction. The applicable statutory provision, RSA 541-B:,14,I provides that, with respect to state law tort claims against the State and its agencies:

> All claims arising out of any single incident against any agency for damages in tort actions shall be limited to an award not to exceed $475,000 per claimant and $3,750,000 per any single incident, or the proceeds from any insurance policy procured

pursuant to RSA 9:27, whichever amount is greater; except that no claim for punitive damages may be awarded under this chapter. The limits applicable to any action shall be the limits in effect at the time of the judgment or settlement.

(emphasis added).

Thus, the statute establishes two damages caps for every "incident" for which tort liability has been established. The first cap applies to individual claimants who are injured in a "single incident." Individual claimants can recover no more than $475,000. The second cap applies to all claimants who are injured in the same "single incident." The total amount payable to all claimants is $3,750,000. This type of per incident cap on damages assessed against the State is constitutional on its face. Opinion of the Justices, 126 N.H. 554, 567 (1985) ("The authority of the legislature to set reasonable limits on damages recoverable against government entities well established."); see also Laramie v. Stone, 160 N.H. 419, 437-438 (2010) (applying the $475,000 cap).

Neither RSA 541-B:14, nor any other relevant statute, defines the term "single incident." The New Hampshire Supreme Court has not yet had occasion to construe the term. Therefore, this court must do its best to interpret the statute.

Statutory Construction In General: The New Hampshire Supreme Court has said, with respect to RSA 541-B:14,I in particular, what it has repeatedly said for all statutes:

> The interpretation of a statute is a question of law[.] . . . We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meaning to the words used. When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include. If a statute is ambiguous, however, we consider legislative history to aid our analysis. Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.

Laramie, 160 N.H. at 436.

In construing the meaning of statutory terms, the court cannot consider the words and phrases in isolation, but must read them in the context of the statute as a whole. White v. Auger, 171 N.H. 660, 666-67 (2019). Further, the court must bear in mind that that "[t]he legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." Id.

The State Defendants' Argument: The State Defendants' argument can be restated as follows:

> (a) The statutory term "incident" refers to an "incident" of tortious conduct by the defendant. Thus, in the State Defendants' view, the statute provides a damages cap for each "incident" of tortious behavior; and

(b) In this case, the Complaint (e.g. the Master Complaint and the First Amended Short Form Complaint) alleged, and the jury found, that the tortious conduct was the State Defendants' failure to adequately train, supervise, and discipline YDC staff members. More particularly, the State Defendants were found liable for failing to exercise reasonable and fiduciary care in the implementation of their published personnel policies relating to (a) the prevention and reporting of sexual, physical and emotional abuse of residents by staff, (b) the establishment of the ombudsman system to allow residents to report abuse without fear of retaliation, and/or (c) the use and conditions of room confinement as a penalty for serious disciplinary offenses; and

(c) The State Defendants' breach of their duties of care, was alleged to be a continuing tort. According to the Compliant, the tortious conduct began before plaintiff arrived at YDC in 1995 and continued, uninterrupted and unabated, until after plaintiff left YDC in 1999. Indeed, plaintiff argued, and proved, liability for continuing omissions, e.g., for fiddling while Rome burned (or to use a different metaphor, for

aggressively sitting on one's hands, and continuing to do so for years, when action was called for); and

(d) Although plaintiff was assaulted on many different dates, in several different locations, and by several different staff members, the Complaint did not allege any new or different tortious conduct by the State Defendants after the first assault. (Thus, for example, the State Defendants did not engage in any specific, new actionable conduct between the date the plaintiff was first sexually assaulted by Jeffrey B., and the next day when the plaintiff was first sexually assaulted by Steve M. (with assistance from James W.)); and

(e) Because there was only a single, continuous tort, there was only once "incident."

The State Defendants Misread The Statute: The primary problem with the State Defendants' argument is that it improperly conflates the statutory term "single incident" with tortious conduct. The State Defendants have not cited any authority for this position. They have not parsed the statute. They have not pointed to persuasive decisions from other jurisdictions. They cite none of the cannons of the statutory construction. They simply say it is so.

The court starts with the statute itself. RSA 541-B is a comprehensive statutory scheme governing tort claims against the State and its agencies. The statute uses two terms of interest: "claim" and "single incident."

The term "claim" is defined to include "any request for monetary relief for either: (a) 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." RSA 541-B:1,II-a. Thus, a "claim" is essentially a cause of action. In other words, a "claim" is an allegation of tortious conduct.

While the term "single incident" is not defined, it is clearly something very different from a "claim" (e.g. an allegation of a tortious conduct). This must be so, because the statute defining the damages cap, RSA 541-B:14,I, applies to "All **claims** arising out of any **single incident**[.]" Why would the Legislature have wasted words, and introduced the concept of a "single incident" when it could have simply said, " "**All claims**?"

The only sensible way to read the phrase, "All claims arising out of any single incident," is to recognize that:

(A) Multiple "claims" by individual claimants (such as, for example, negligence and breach of fiduciary duty) may arise from

a single incident, in which case all such claims would be subject to the $475,000 damages cap;

(B) Multiple "claims" by different claimants may arise from a "single incident" (such as the archetypical example of multiple claimants who were injured in the same automobile collision (and all of those individuals' claims would be subject to the overall per incident damages cap of $3,750,000);

(C) A single "claim" by an individual claimant may arise from multiple, discrete incidents (when, for example, as in this case, a plaintiff alleges that as a result of a state agency's breach of a duty of care he was violently raped by different state actors, on different dates, separated by intervening events, and in different locations); and

(D) "Claims" by multiple claimants may arise from multiple incidents (as in these consolidated cases in which over 1,200 plaintiffs allege that they were harmed at different times and places, by different staff members and under different circumstances).

Other states have similar language in their statutes which waive sovereign immunity for tort claims. To this judge's knowledge, no other court has construed the term "incident" or "occurrence" to refer solely to a government defendant's tortious conduct.

The case of Barnett v. Florida Department Of Financial Services, 303 So. 3d 508 (Fla. 2020) is particularly instructive and worthy of extended discussion. The relevant Florida statute conditioned that the state's waiver of sovereign immunity on a $200,000 damages cap on all "claims" "arising out of the same incident or occurrence." Fla. St. Ann. §768.28(5). In this respect the Florida statute is similar to New Hampshire's statute.

The Barnett case arose from a quintuple murder, aggravated assault, and suicide. A gunman entered the home of his estranged spouse, killed her, killed four of her children, severely injured a fifth child by shooting him in the neck, and then killed himself. A few months earlier, the Florida Department of Children and Families ("DCF") had received a report on its domestic abuse hotline that the same man had threatened the same estranged spouse with a knife, said that he would kill her, and slashed all of her tires. DCF conducted an investigation, but then closed its file after opining that the children were not at risk of harm. The DCF investigation noted that both the parents and the older children had agreed to a safety plan which consisted of calling 911 in case of emergency.

The Barnett case was brought by the fathers of the killed and injured children. They sued DCF in their representative capacities, alleging that DCF had breached its duty of care. DCF

raised various defenses, including the $200,000 per incident cap on damages. The Florida Department of Financial Services, which would be responsible for paying any judgment, filed a petition for declaratory relief seeking a determination as to whether the $200,000 damages cap applied.

In Barnett, the state agencies argued precisely what the State Defendants argue in this case, e.g., "the statutory phrase 'incident or occurrence' refers to the negligent or wrongful acts or omissions of . . . the 'state actors[.]" Barnett, 303 So.3d at 514. Thus, in their view, the "occurrence or incident" was the tortious conduct by DCF. The plaintiffs disagreed and argued that the term "incident or occurrence" referred to the crimes that directly harmed the plaintiffs.

The Florida Supreme Court persuasively rejected the state agencies' position:

(A) The Florida Supreme Court first explained--as this court did above with respect to the New Hampshire statute--that the state agencies were conflating two separate statutory terms:

> First, to equate "negligent or wrongful act or omission" with "incident or occurrence" would negate the Legislature's decision to use different phrases in different parts of [the statute]. . . . If the Legislature wanted to link the limit of liability to a state actor's breach of duty, it knew how to describe the breach, having done so repeatedly with the "act or omission" language. Use of the words "incident or occurrence" . . . signals that the language means something different.

Barnett, 303 So.2d at 514.

(B) The Barnett court then noted that the that the term "incident" (and the term "occurrence" which is in the Florida statute, but not the New Hampshire statute) "more naturally and reasonably include the point at which damages are inflicted, not just the (potentially remote) point at which the state defendant's negligent or wrongful act occurs." Id. at 514-15. The Florida Supreme Court then string cited definitions from Dictionary.com, Meriam-Webster Dictionary, Webster's Third New International Dictionary, and Black's Law Dictionary. The Florida Court noted that, "What these definitions all share in common is action, a happening, and event." Id. at 515. This is also true for the definition given in the New Hampshire Supreme Court's current dictionary of choice, the Oxford English Dictionary, which defines the term "incident" to mean, among other things, "an occurrence or event viewed as a separate circumstance."

In Barnett, the Florida Supreme Court held that the plain meaning of the term "incident", as reflected in the dictionaries, described the gunman's "immediate harm-causing actions" but did not describe "DCF's alleged omissions and failures to act." Id. The Court went on to note, "That this is typical of derivative liability cases, which usually involve omissions, or failures to act, and allegations that if the

correct actions had been taken, those actions would have prevented the harm caused by the action of the second tortfeasor (the immediate harm-causing event)." Id.

(C) The Florida Supreme Court also looked closely at the Florida Legislature's use of the phrase "arising out of." Like the New Hampshire statute, the Florida statute applies to any "**claim or judgment . . . arising out of the same incident or occurrence**," (emphasis added). In Barnett, the court held that the words "arising out of" imply that an "incident or occurrence" refers to the immediate injury-causing event, not just the negligent omissions that allegedly gave rise to the event" Id. As the court explained:

> The object of "arising out of" in the statute is the plaintiff's "claim or judgment." No claim exists, and no judgment can occur, until the cause of action accrues by completion of the last element—damages as a result of an injury. "Arise" is defined as "to begin to occur or to exist; to come into being. Because the claim does not "come into being" or "begin to exist" until the last element accrues, the text is most reasonably read as including the "incident or occurrence" that caused the last element and the cause of action to accrue—the injury-causing event, that is, the event at which damages are actually inflicted.

Id. (internal citations, quotation marks and bracketing omitted).

Other jurisdictions have reached similar conclusions. See, e.g., C.J. v. State, Department of Corrections, 151 P.3d 373, 383–84 (Alaska 2006) (A plaintiff who alleged she was sexually

assaulted by a parolee due to the negligence of the state parole authorities, could recover for three "incidents" of sexual assault, based on three different sexual acts.); Rodriguez v. Cambridge Housing Authority, 795 N.E.2d 1, 10 (Mass. Ct. App. 2003), aff'd, 823 N.E.2d 1249, 1255-1256, fn. 9 and 10 (Mass. 2005) (A plaintiff who was violently attacked during two different home invasions, that occurred on different dates, and who sued a public housing authority for failing to change her lock, could recover for two "incidents."); Folz v. State, 797 P.2d 246, 252, fn 5 (N.M. 1990) (Noting that a per incident damages cap does not cap the total amount of damages which could be awarded for a state defendant's negligence in connection with a highway construction project: "Here, a separate occurrence would have existed had the events in this case been repeated by a second runaway truck that same day, regardless of whether a subsequent negligent act was committed by the Department."); Cf: Essex Insurance Company v. Doe ex rel. Doe, 511 F.3d 198 (D.C. Cir. 2008) (Kavanaugh, J) (A plaintiff who sued a children's home for negligence resulting in four separate sexual assaults by peers could recover for four "occurrences" under the applicable insurance policy.); Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Company, 991 N.E.2d 666 (N.Y. 2013) (Finding a separate "occurrence" within the meaning of an occurrence-based liability insurance policy, for

each occasion on which the same priest sexually molested the plaintiff, when there were multiple sexual assaults that occurred over the span of four years);[6] Renguette v. Board of School Trustees ex rel. Brownsburg Community School Corporation, No. 1:05-cv-1548-SEB-JMS, 2007 WL 1536841, at *8 (S.D. Ind. May 23, 2007) (Holding that Indiana's parental liability statute, which makes a parent vicariously liable, up to a cap of $5,000, for their child's knowing, intentional, and reckless torts, applied separately to each of 58 incidents of sexual assault committed by the defendant's child.).

Conclusion: The court rejects the State Defendants' argument that the Complaint alleges, and the defendant proved, only a "single incident" within the meaning of RSA 541-B:,I.

(C) The Plaintiff's Statutory Argument

During the course of trial the court also rejected the plaintiff's proposed construction of the statutory term "single incident." As it did above with respect to the State's

[6]The court looked to insurance law cases construing occurrence-based policies, because (a) there are not that many on-point decisions under state tort claims statute, (b) there is a plethora, or at least a myriad, of insurance law cases, and (c) insurance policy limits are capped on a per "occurrence" basis, which makes them analogous to tort claims act cases. Unfortunately, not only does the policy language defining an "occurrence" vary significantly, but more importantly, modern insurance policies expressly state that multiple instances of sexual assault will be deemed a single occurrence. Thus, the carriers reacted to decisions such as those set forth above, and amended their policies accordingly.

argument, the court takes a moment here to better explain its reasoning.

If the State's construction of the term "single incident" is strained, plaintiff's construction is even more so. Plaintiff advocates for what might be called a 'time, place and **type-of-intentional-abuse**' standard:

(A) All of the acts must be part of the same "occurrence of any action or situation that is a separate **unit of experience**" Plaintiff's Proposed Jury Instruction No. 38 (emphasis added); and

(B) To be part of the same **unit of experience**, all of the acts of abuse must be of the same type of abuse (e.g, physical abuse, sexual abuse, false imprisonment or emotional abuse). Disparate types of abuse committed at the same time count as different "units of experience" and therefore different "incidents" within the meaning of RSA 541-B:14, I. Id. (An "incident" can be "a single rape, a single physical assault, or a single instance of being locked in confinement," each of which "should be considered independently of the other "incidents.")

Thus, for example, plaintiff would count two incidents, each subject to the $475,000 damages cap, for the late October 1997 episode in which Steve M. and James W.:

(a) committed a violent physical assault by forcing plaintiff to the ground, strangling him, punching him, and

leaving him bloodied (e.g., a number of physical assaults, each of which could be charged as a separate purposeful crime, but all of which together constitute a "unit of experience."), and

(b) simultaneously committed a sexual assault by forcing plaintiff to engage in fellatio with Steve M. (which, in plaintiff's opinion is an entirely separate "unit of experience")

All of these acts occurred during the same compressed time period, without any intervening events, and in the same location. All of the acts were part of a single, uninterrupted attack and were, therefore, closely related to each other. But the physical abuse was a different type of abuse than the sexual abuse and, therefore, in the plaintiff's eyes, there were two "incidents" within the meaning of RSA 541-B:14,I.

Indeed, if the court were inclined towards scholastic reasoning, the number of angels on the head of this particular pin could be greater because the physical and sexual assaults were preceded by emotional abuse. Recall that Steve M. taunted plaintiff by saying "I hear you are a good little cocksucker," which was a reference to the previous day's assault by Jeffrey B.

Plaintiff's position is a compromise under which separate acts can be part of the same "incident," but only if they are chargeable under the same chapter of the Criminal Code (or, less

argumentatively, only if they can be grouped together by type). Thus, two pokes in the eye equals one "incident," but a poke in the eye while fondling the buttocks equals two "incidents," and three different acts of sexual penetration within a few minutes equals one "incident." Considering that the physical and sexual abuse often occurred simultaneously with alleged unlawful room confinement and verbal abuse, plaintiff's definition supports an enormous number of incidents.

Plaintiff stops short of entirely equating "incident" with "act" (or, with "intentional act," or "crime").[7] Plaintiff still sees some use for the traditional notion of an "incident" as an episode or event limned by time, location, the nexus among acts, and the presence or absence of intervening circumstances. But plaintiff envisions an exception to this plain and ordinary understanding of the term "incident" that would double or treble the damages cap for many of the episodes of abuse in this case.

Plaintiff's argument is grounded on little more than moral outrage at the prospect that the damages cap for a sexual assault could be reduced because the plaintiff was also physically assaulted at the same time. Plaintiff's lead counsel

---

[7]The Alaska Supreme Court took the position that each separate criminal act is a separate "incident" within the meaning of Alaska's per incident damages cap. In C.J., 151 P.3d at 383–84, the court held that three discrete sexual acts, committed in a compressed period of time, equated with three incidents. As explained below, the court rejects this view.

explained that his reasoning was captured by the mantra "no free rapes." During closing argument he argued to the jury that there should not be a "bogo" (buy one, get one) for raping children. The same is presumably true for beat downs and choke outs (which were inflicted on the witness Michael G.), and other physical assaults against children.

"No free rapes" and "no bogos" are great slogans, but they ignore the truth that a damages cap is designed to limit the amount of recoverable damages for all injuries sustained during the same episode. Put more bluntly, so long as it is high enough to pass Constitutional muster, a damages cap is indeed a discount on the amount state agencies must pay for the injuries they inflict. To use plaintiff's marketing argle-bargle, while the cap is not exactly a "bogo", it is an all inclusive price for incidents that cause more than $475,000 in damages to a claimant.

This court rejects the plaintiff's argument because (a) it ignores the plain and ordinary meaning of the term "incident," see above and below, and (b) nothing in the entire statutory scheme evinces a Legislative intent to double or treble the damages cap if different types of abuse are committed at the same approximate time, in the same location, without intervening events and when there is a tight nexus among all of the acts of abuse.

(D) The Court's Construction of The Statutory Language

This court believes that the statutory term "single incident" in RSA 541-B:14,I equates with the OED definition of "incident," e.g., "an occurrence or event viewed as a separate circumstance." This is the same meaning that the court was trying to get at when it instructed the jury that an incident is an "episode."

Of course, this definition begs the question of what criteria should be used to determine when one "single incident" ends and a new one begins. While a "single incident" can take place in a fraction of a second (i.e., as in motor vehicle collisions, slip and falls, and surgical mishaps), it can also take days, weeks or even years to conclude (i.e., as in wrongful imprisonment, or seepage of toxic wastes into an abutter's water supply).

The New York Court of Appeals decision in the Diocese of Brooklyn case, cited above, provides a working description of the factors at play in a case of this nature:[8]

-First, there must be "a close temporal and spatial relationship" among all of the individual actions that comprise

[8]As noted above, Diocese of Brooklyn involved the interpretation of the word "occurrence" in an insurance policy. It did not attempt to define the term "incident," and it did not involve a statute that conditioned the waiver of sovereign immunity on a damages cap. However, the court's analysis and language are persuasive.

the incident. Diocese of Brooklyn, 991 N.E. at 672. The New York court found that each instance of sexual abuse was a separate "occurrence" because they took place on different dates, over a six year time period, and in multiple locations.

-Second, all of the actions must be "part of the same causal continuum, without intervening agents or factors." Id. In Diocese of Brooklyn, the New York court found that the causal continuum factor was best illustrated by a three car collision in which one vehicle hit an oncoming car, ricocheted off and struck a second car more than 100 feet away. Id. at 673. In that example, "the continuum between the two impacts was unbroken, with no intervening agent or operative factor." Id. In contrast, the New York court found that instances of sexual abuse, even though they involved the same perpetrator, were not precipitated by a single causal continuum and, therefore could not be grouped into a single occurrence.

Thus, in determining what acts constitute a "single incident," this court will look to the following factors:

(a) closeness of **time**,

(b) closeness of **location**, (

(c) the causal continuum (i.e. **nexus**) among the acts, and

(d) the presence or absence lack of **intervening events.**

Applying these factors, the court concludes that all related acts of abuse--sexual, physical, or emotional--that

occur in a compressed time frame, in a single location, without any salient intervening events constitute a "single act" within the meaning of RSA 541-B:14, I.

(E) The Debate Over Jury Instructions

The Plaintiff's Position Going Into The Trial: Going into the trial, plaintiff's position was that were "hundreds" of incidents. See Plaintiff's Final Pretrial Statement, p. 7. Plaintiff proposed that the verdict form ask the jury, if it found liability, to state the total number of "incidents" for which it found liability. Plaintiffs did not originally ask that the jury be provided with a list of alleged "incidents' or that it create a verbal list of proven "incidents."

The problem with the plaintiff's proposal was that the damages cap applies separately to each "incident." RSA 541-B:14,I. (To make this clear: Imagine a case in which the jury awards $350,000 for one incident and $450,000 for a second incident. The State would be liable for the entire $800,000 because the damages for neither incident exceeded $475,000. Now change the hypothetical so that the jury awards $750,000 for the first incident and $50,000 for the second incident. The State would now be liable for $525,000, e.g., the cap of $475,000 for the first incident and $50,000 for the second incident.). Without knowing how the jury allocated damages among

"incidents," the court would have no way of knowing whether damages for some "incidents(s)" exceeded the cap.

The plaintiff argued that the damages cap for the entire case should be $475,000 multiplied by the number of "incidents" reported by the jury. While this had the advantage of simplicity, it did not comport with the "per incident" nature of the damages cap.

The State Defendants' Position Going Into The Trial: The State Defendants took the position that no instruction regarding the number of "incidents" was necessary because, as a matter of law there was only one "incident." See above.

The Court's Initial Proposal And The Parties' Reactions To It: The court circulated draft jury instructions to counsel. Those instructions included a proposed jury verdict form. The verdict form included a list of alleged incidents which the court took from the plaintiff's testimony. For each alleged incident, the jury was asked to decide:

(a) Whether the plaintiff discovered or should have discovered both his injury and the State Defendants' causative role in bringing the injury about;

(b) Whether the plaintiff proved that he was injured as a result of the State Defendants' breach of either the common law or the fiduciary standard of care;

(c) Whether (for DeBenedetto purposes) the plaintiff's injuries resulted from the State Defendants' knowing and active participation in a common plan or design that harmed the plaintiff (RSA 507:7-e,I(C));

(d) Whether any of the named DeBenedetto parties were partially at fault for the "incident" and, if so, what was their proportionate share of fault (RSA 507:7-e,I(b)); and

(e) What percentage of the total compensatory and, if applicable, total enhanced compensatory damages was attributed to that incident.

Plaintiff had no objection to the court's approach. The State Defendants, however, objected on two grounds. Their primary objection, which remains preserved, was that there was only "incident" as a matter of law. In the alternative, and without waiving their primary objection, the State Defendants objected to the court providing the jury with a list of alleged incidents. The State Defendants argued, with great vigor, bordering on ire, that this would be reversible commentary on the evidence.

The court responded to the State Defendants, during the charging conference, that it knew of no other way to poll the jury with respect to each incident. In the court's view, while the parties contested many facts, there was no dispute as to what plaintiff alleged. The First Amended Short Form Complaint did not include an acceptable list of specific incidents. The parties did not submit a list of incidents. *What else could the court do to ensure unanimous verdicts on liability and damages with respect to each incident?*

In any event, in the last few minutes of the court day, with closings and jury instructions scheduled for the following

day, the State Defendants indicated that they might agree to the plaintiff's initial proposal, e.g., asking the jury for a total number of incidents and agreeing that the damages cap would equal $475,000 multiplied by the number of incidents. Counsel for the State Defendants indicated that they needed to confer and obtain authority for such a stipulation.

The following morning, subject to and in the alternative to their primary argument that there was just one "incident," the State defendant agreed to:

(A) As the jury to provide the total number of incidents for which they found the State Defendants liable;

(B) For this case only, stipulate that the State Defendants would be liable for damages not to exceed $475,000 multiplied by the number of incidents.

The plaintiffs also agreed to this and the court issued a brief order commemorating their stipulation. This order was written in open court and the wording was approved by counsel for both sides.

Thus, the jury was instructed to (a) determine the damages for the case as a whole and (b) report the number of "incidents" for which liability was found.

(F) The Jury Instruction And The Verdict

The jury was instructed that an "incident" was a "single episode during which plaintiff was injured," for which injuries the jury found liability, on claims the jury found to be timely.

This instruction was included on the verdict form. It was not included in the body of the instructions. However, the court went over the instruction in detail.

Because the court believed that determining the number of incidents would be laborious, the court jokingly told the jury that he expected to hear a groan after he gave the instruction.

(G) The Juries $38,000,000 Verdict Cannot Be Reconciled With The Finding Of A Single Incident

An overly clever logician might say that the jury could have found that plaintiff proved one instance of abuse, disbelieved his testimony regarding all of the other instances, and awarded $38,000,000 for the single instance.

But this would be sophistry rather than true logic. No reasonable jury would award $38 million for a single instance of abuse. No reasonable jury would have believed plaintiff's testimony as it related to a single hour and disbelieved his testimony as related to all of the other hours, days, weeks, and months. Indeed, the State Defendants did not even challenge the plaintiff's testimony with respect to the several instances of sexual abuse for which the intentional tortfeasors were indicted. For that matter, the plaintiff's testimony was not

specifically contradicted with respect to <u>any</u> of the instances of sexual assault or physical assault (although the State Defendants did suggest that the injuries for which the plaintiff was hospitalized could have resulted from playing football). In general, the plaintiff's testimony was corroborated with respect to the torfeasors' opportunities to commit the abuse.

The State Defendants did not ask even a single question, or present any evidence, with respect to the first instance of sexual assault, i.e. the anal rape committed by Frank D. Frank D. was indicted by the State for this conduct, and the State Defendants said nothing about it during closing argument. If a reasonable jury found that this incident occurred, could it also conclude that nothing untoward at all happened with Jeff B., or Steve M., or James W.?

The finding of a one "incident"--as that statutory term was defined on the verdict form, and as it has been construed by the court--is conclusively against the weight of the evidence.

The court does not blame the jury for this error. The court's instructions might have been too vague. The court chose not to tell the jury about the damages cap. The court made this decision because the number of incidents is not dependent on either the existence or the amount of the damages cap. The court opined that telling the jury about the damages cap might introduce an irrelevant wildcard into the deliberations.

In retrospect, however, the court realizes that the jury was never informed as to why it needed to count the number of incidents for which it unanimously found liability. Without that ballast, the question may have seemed superfluous.

Further, the court should have provided a more detailed instruction on the definition of "incident." The court was loathe to do so, because the New Hampshire Supreme Court had not defined the term, and any definition might be erroneous. However, on reflection, the court now sees that it would have been preferable to instruct the jury as detailed above.

In any event, there was plainly more than one incident. Entering a verdict of $475,000, when the only proper verdict is many multiples of that number would be a gross and unconscionable miscarriage of justice.

VII. Option 4: A New Trial De Novo

The fourth incorrect option is a *de novo* jury trial, e.g. a do-over.

As explained above, the court may set aside a verdict and order a new trial under Superior Court Rule 43, and may grant a motion for a new trial pursuant to RSA 526:1, if the verdict is conclusively against the weight of the evidence. George, 162 N.H. at 131; Babb, 150 N.H. at, 100; Quinn, 144 N.H. at 190 (1999).

For all of the reasons detailed above, a *de novo* jury trial would be a legally correct result. However, it would be extremely burdensome to the parties, potentially harmful to the plaintiff, and dilatory with respect to reaching a final resolution of both this individual case and all of the consolidated cases.

An order granting a new trial would be an interlocutory order. See Supreme Court Rule 3 (defining an "interlocutory appeal" as an appeal of "rulings adverse to a party, before a final decision on the merits in a trial court."); Appeal of Mullen, 165 N.H. 344, 345 (2013) (suggesting that an order granting a new trial is interlocutory)[9]; Hodgdon v. Beatrice D. Weeks Memorial Hosp., 128 N.H. 366, 367 (1986) (describing an appeal from an order granting a new trial as interlocutory); Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33, 34 (1980)("An order granting a new trial is interlocutory in nature and therefore not immediately appealable").

What this means is that if the court orders a *de novo* jury trial, there will be another month long jury trial with the same

[9]In Mullen, the court dismissed an appeal from an administrative adjudication on the grounds that it had not yet become final because the agency reopened the record and the proceedings were ongoing. In reaching this result, the Supreme Court cited Okongwu v. Stephens, 488 N.E.2d 765, 768 & n.6 (1986), for the proposition that an order granting a post-trial motion for new trial is interlocutory and not immediately appealable;

evidentiary rulings. While this judge continues to believe that he struck the right balance between probity and the risk of unfair prejudice, there were admittedly some big ticket choices to make and, once there is a final judgment, the Supreme Court may find error. That would result in a *third* month long jury trial.

Further, if the appeal in this case is delayed then the parties in the consolidated 1,200 (+/-) cases will be prejudiced by the continued lack of certainty as to the legal issues that were raised in this case.

Conversely, if this court approved, and the Supreme Court accepted an interlocutory appeal, that might substantially delay the conclusion of Mr. Meehan's individual case. The case is already four and a half years old. If the decision to grant a new trial is affirmed on interlocutory appeal, it will likely be six years old at the time of the second trial, and then there will be another appeal. If the decision to grant a new trial is reversed on interlocutory appeal, then there may be further trial court proceedings, plus an appeal from the final judgment.

Finally, the court is particularly mindful of the effect of the court proceedings on the plaintiff. Two psychiatrists and a psychologist testified as to his delicate state of mind, resulting from his diagnosis of complex PTSD. A *de novo* trial

about how he was repeatedly raped as a young teenager may literally be deleterious to his health.

An order granting a new trial is by no means the most incorrect option, but it is still not an ideal option.

VIII. Option 5: "Additur Of Incidents"

The least incorrect option might be something akin to additur. "Where there has been a finding as to liability and the damages are grossly inadequate, the appropriate remedy is to order additur, or, in the event the defendant does not consent to the additur, a new trial on damages." Kravitz v. Beech Hill Hosp., L.L.C., 148 N.H. 383, 390 (2002); see also, Belanger by Belanger v. Teague, 126 N.H. 110, 111(1985) ("Additur is customarily sought as alternative relief on a motion for new trial on the ground of inadequate damages. . . . The option of accepting an additur rests with the defendant.").

In this case, perhaps, the court can order something similar to additur with respect to the number of "single incidents" found by the jury. To be sure, the State Defendants would have to accept such an "additur of incidents" in the alternative to a full blown *de novo* jury trial. (The State Defendants would not, however, have to waive their underlying objection to granting the plaintiff any form relief from the one "incident" verdict. Thus, the State Defendants could accept something akin to additur, in the alternative, without waiving

their primary argument that the judgment should be for one "incident" and $475,000).

The court's authority to order traditional additur is derivative of its jurisdiction to order a new trial. The same logic should enable the additur-like order that the court is considering as an alternative to a new trial.

The biggest problem with ordering "additur of incidents" (aside from the fact that there may not be such a thing) is that the court has no way of knowing precisely which "incidents" supported the jury's verdict. Did the jury find that the plaintiff had proven some, all, or none of his claims related to room confinement? How many instances of sexual assault did the jury believe occurred? Did the jury find that the plaintiff was hospitalized due to a beating in the course of a forcible rape, or due to a football injury? With respect to the emotional abuse claims, what conduct did the jury find tortious and what did it find merely offensive?

Thus, the court needs to tread carefully and modestly. In general, the court would consider "additur of incidents" with the following ground rules:

1. **With one exception, the court would not find <u>any</u> "incidents" for room confinement.** The room confinement claims were the most factually contested claims. During some of the time that plaintiff testified he was subject to "solitary

confinement," he was actually allowed to go to school for six hours on each school day. The conditions of room confinement, per the plaintiff, varied from flatly unconstitutional (e.g. no toilet facilities) to lawful but unpleasant. The outer boundaries of the agency's discretionary policy regarding those conditions was not completely described at trial. What they knew or should have known twenty-five years ago about the effect of room confinement on teenage development was largely unanswered.

Furthermore, for the most part, the room confinement sanctions were for actual disciplinary offenses such as going AWOL, assault, stealing, etc. Even if plaintiff would have an arguable competing harms defense to some of these charges in criminal court, he pretty much admitted the serious disciplinary violations. He also received short one day sanctions for yelling (e.g. "loud voice"), talking out of turn, and similar minor violations.

To be sure, Plaintiff alleged that he was kept in his room for almost two months, commencing in late April 1998, to cover up his injuries from the physical abuse he suffered. But there was actual contradictory evidence regarding the reason for this room confinement, its duration, and the conditions of confinement. This room confinement was allegedly imposed for an escape attempt that involved a screwdriver. Plaintiff was

apparently allowed to go to school during part of the room confinement sanction. The conditions of the room confinement varied over the course of the sanction. The length of the room confinement was disputed. Plaintiff did not testify that he was denied toilet facilities.

Overall, while a reasonable jury certainly could find one or more room confinement "incidents," there is no way to know how this jury viewed the evidence. The modest and prudent thing to do, in considering "additur of incidents," as an alternative to a trial *de novo,* is to find no "incidents" for room confinement, except for the one immediately below.

2. Plaintiff testified that there was one occasion, commencing on September 17, 1997, when he was subjected to room confinement without toilet facilities for up to ten days. The lack of toilet facilities would be an Eighth or Fourteenth Amendment violation in an adult jail or prison. See, e.g., Flakes v. Percy, 511 F. Supp. 1325, 1332 (W.D. Wis. 1981) ("[D]eprivation of basic elements of hygiene is beyond the constitutional power of the state. . . . [W]hen the Eighth Amendment is operative, its ban is violated by locking a person, for any significant period of time, in a cell lacking a flush toilet and a washbowl."); Masonoff v. DuBois, 899 F. Supp. 782, 788 (D. Mass. 1995)("Having a sanitary place to dispose of one's bodily waste is one of the minimal civilized measures of life's

necessities.” (internal quotation marks and citations omitted)); Strachan v. Ashe, 548 F. Supp. 1193, 1205 (D. Mass. 1982) (“An inmate's constitutional right to adequate and hygienic means to dispose of his bodily wastes [is] clearly established.”); Whitnack v. Douglas County, 16 F.3d 954, 958 (8th Cir.1994) (“[R]easonably adequate sanitation and the ability to eliminate and dispose of one's bodily wastes without unreasonably risking contamination are basic identifiable human needs of a prisoner protected by the Eighth Amendment”). The court thinks it reasonable that the jury in this case would have found the experience to be actionable.

With respect to the likelihood that the jury accepted plaintiff’s testimony on this point, the court notes that another resident who testified, Michael G., confirmed that refusing access to bathroom facilities was a custom and practice that was often observed. The likelihood that these two former residents, who did not otherwise know each other, would have made up this allegation--at the time they made their first statements--is remote.

The court views the entire 10 days of room confinement as a one “single incident” within the meaning of RSA 485-B:14, I. There were no intervening circumstances between the first moment and the last moment of room confinement.

3. With only one exception the court would not find any "incidents" for purely emotional abuse that was not accompanied, in the same incident, by either physical or sexual abuse. This is so because there was a wide continuum of emotional abuse and it is impossible to determine where the jury likely drew the line.

The court would find one "incident" for the event in November 1997 when Jeff B. forced plaintiff to witness Jeff B. sexually assault plaintiff's female friend. Forcing a person to witness what might be called the rape of a friend is clearly actionable.

Of note, erring on the side of caution in the State Defendants' favor, the court did not count any incidents for:

(a) any portion of the Teddy Bear incident, aside from the sexual assault on the day it began,

(b) the emotional abuse by Jeff B. circa Halloween 1997, when he first told plaintiff that he would make him break up with his girlfriend and perform oral sex on Jeff B. on the same day, and that he would not go home for Thanksgiving unless he broke up with his girlfriend, or

(c) The instances in which plaintiff was forced to watch other residents engaged in forced assaults of each other.

While the court finds these instances to be abhorrent, the court cannot speculate on whether the jury found liability for any incident of pure emotional abuse, without accompanying physical contact, with the exception of the incident where plaintiff was forced to observe the sexual assault of his friend.

There were other instances of emotional abuse that would have qualified as free-standing "incidents" if they were not committed as part of an "incident" involving sexual abuse.

4. With respect to the many instances of sexual abuse, the court notes that the State Defendants never attempted to disprove any of the acts alleged in the pending indictments against the tortfeasors. Thus, much of what plaintiff had to say was (a) never specifically contradicted by testimony or other evidence, and (b) while not quite conceded, not quite disputed either. The State Defendants did attempt to cast doubt on the exact number of incidents, and they challenged some of the facts relating to some of the incidents. But the State Defendants did not argue that the tortfeasors were innocent men unjustly accused of horrific acts.

Overall, and considering the amount of the verdict, the court concludes that the jury necessarily accepted most of the plaintiff's testimony regarding the sexual assaults. Although the determination of witness credibility is not the court's to

make, in the court's eyes, the plaintiff was a most credible witness. His testimony was broadly corroborated by the resident Michael G. who credibly testified to similar conduct by an overlapping cadre of cottage staff. Thus, the jury could have found that YDC management should have been aware of a custom or practice relating to the sexual assault of residents by staff members.

The court would find one "incident" for each day that a sexual assault by Jeff B. occurred (regardless of whether the sexual assault was accompanied by a physical assault or emotional abuse). There were intervening events between one day's assault and the next day's assault. Jeff B. presumably left the YDC campus and went to his own home. A new shift of staff members came and went in the cottage, which, in theory should have served as an opportunity for plaintiff to make a report. Most of the time, plaintiff went to school where he was surrounded by staff members who were not associated with the cottage.

For the same reasons, the court would find a separate "incident" for each day that a sexual assault by Steve M. occurred (with or without assistance from other staff members).

As the court understands the evidence, Jeff B. and Steve M. never committed sexual assaults together, but rather did so at different times. Therefore, the court would treat each Jeff B.

"incident" as separate from each Steve M. "incident." Thus, there could be a Jeff B. "incident" and a Steve M. "incident" within the same 24 hour day.

The court gave the State Defendants the benefit of the doubt when it came to counting the number of "incidents:"

> (A) Plaintiff testified that there was a four week period (October 29/30 to November 27, 1997) during which he was sexually assaulted by Jeff B. two to three times per week.[10] Each sexual assault occurred on a different date. A reasonable jury could find as many as twelve sexual assaults (e.g., 3 x 4).
>
> The court assumed only two incidents per week (due to the preponderance standard) which reduces the number of incidents to eight. The court then reduced this number by one to account for the fact that, depending on the date of the first and last incidents, there may not have been four full weeks. This reduction also served the purpose of what might be called a "gestalt reduction," e.g., a discount in the

[10]The court's trial notes reflect that after a break in his testimony, counsel asked plaintiff a leading question that assumed there were two to <u>four</u> incidents (rather than two to <u>three</u> incidents) of sexual assault by Jeff B. each week between October 29/30 and November 27, 1997. The discrepancy does not matter because, applying the preponderance standard, the court used the lowest number of estimated incidents.

State Defendants' favor on the number of incidents to account for how the jury might have viewed the evidence. This leave seven incidents. They are accounted for on four different rows as Nos. 3, 6, 8 and 11-14.

(B) Plaintiff testified that there was a 16-week period (January 3, 1998 to April 23, 1998) when he was sexually abused four to five times per week by Jeff B. A reasonable jury could find as many as 80 incidents. The court found just 50 incidents. That is a full one-third reduction from the maximum number of incidents the jury could find. To arrive at this number:

-The court used the lower estimate of four times per week (which the court thought was necessary due to the preponderance standard of proof);

-The court then reduced the resulting number (e.g., 64 incidents) by one because the time frame was two days short of a full 16 weeks.

-The court then further reduced the number of incidents by 20% to 50.4 incidents. This "gestalt reduction" in the

State Defendants' favor accounts for fact that the jury may have been concerned about the specificity of plaintiff's memory. Finally the court truncated the number to 50 incidents.

(B) The court engaged in a somewhat similar process with respect to reducing the number of incidents attributable to Steve M. during the same 16 week time frame. Plaintiff testified that Steve M. sexually assaulted him twice each week. That worked out to 32 incidents. The court reduced this figure by 20% to 25.6 incidents. The court then truncated this down to 25 incidents.

(C) The court used the same approach for the seven-week time period of April 23, 1998 to June 13, 1998. Plaintiff testified he was sexually abused by Jeff B. four to five times per week during this time frame. The jury could have found as many as 35 incidents. The court assumed no more than four incidents of abuse each week, resulting in 28 incidents. The court applied a 20% "gestalt reduction" and truncated the result to calculate 22 incidents.

(E) The court used the same approach for the 13-week period between June 13, 1998 and September 12, 1998. The court's math is set forth in the chart.

All told, while the court recognized a large number of incidents of sexual abuse, this was the lowest reasonable number of incidents consistent with believing the gist of the plaintiff's testimony.

The lowest reasonable number of incidents, which include only, (a) one incident for room confinement without toilet facilities for up to ten days, (b) one incident of being forced to watch a female friend be sexually assaulted, and (c) incidents of sexual assault, some of which were accompanied by violence, is 155.

To this number the court applies one more global "gestalt reduction" of 25% in the State Defendants' favor. In the court's view this is essentially a large, deliberate error, discounting the number of incidents from 155 to 116 for the purpose of "additur of incidents." Simply put: no reasonable jury could have accepted the gist of plaintiff's testimony, awarded $38 million in damages, and found less than 116 incidents.

Pursuant to the parties' court approved agreement, under which there would be no allocation of damages among "incidents," the maximum amount of damages payable by the State would be

greater than the jury's actual award of compensatory and enhanced compensatory damages.

Thus, as explained in the chart below, the court would propose an "additur of incidents" to allow a judgment for 103 "incidents":

1	January 1997: Alleged sexual assault (anal rape) by Frank D.
2	September 17-26, 1997: Room confinement without toilet facilities for 10 days (without interruption); had to go to the bathroom on the floor, and had to wear the shirt he used for cleaning urine.
3	October 29 or 30, 1997: First sexual assault by Jeff B. (forced fellatio), and emotional abuse (forcing Meehan to call his girlfriend to break up)
4	Late October or early November, 1997: First Physical assault (forced to ground, choked, strangled, held down, bloodied) and sexual assault (forced oral sex) by Steve M. and James W. (in plaintiff's room)
5	Early November 1997 (a week after No. 5): Physical assault (punched with closed fist in the abdomen, kidneys, and ribs) and sexual assault (forced oral sex) by Steve M. in the checkroom.
6	Early November 1997 (a day after No. 6): Physical assault (very hard punch with closed fist), sexual assault (anal rape) and emotional abuse by Jeff B.
7	Circa Halloween 1997 (Likely November): Emotional abuse, forced to watch Jeff B. engage in non-consensual oral sex with a female resident.
8	November 11 or 18, 1997: Sexual assault, at gunpoint, by Jeff B. in Jeff B.'s apartment.
9-10	Two additional sexual assaults (forced oral sex) by Steve M. Plaintiff testified that there were a total of four sexual assaults by Steve M. between October 29/30, 1997 and November 27, 1997. Two of the sexual assaults are listed above (e.g. Nos. 4 and 5). The other sexual assaults, which occurred on different dates, are listed on this row.
11-14	October 29/30 to November 27, 1997: Four additional sexual assaults by Jeff B. (Plaintiff testified that he was sexually assaulted by Jeff B. 2 to 3 times

	every week from October 29/30, 1997 to November 27, 1997. The court assumes that this includes the 3 sexual assaults listed above (e.g., Nos. 3, 6 and 8). Each time Jeff B. committed on of these sexual assaults, plaintiff was either anally raped or forced to perform oral sex or both. All of the sexual assaults occurred on different dates. There were approximately four weeks in the time frame. The maximum number of "incidents" a jury could find would be 12 (e.g., 3 x 4). The court instead assumes only 2 times for 8 incidents. The court reduces this number by 1 because the fourth week may have been two days shy of a full week, depending on the dates of the first and last sexual assaults. The court then reduces the resulting number of 7 incidents to account for the 3 incidents of sexual assault listed above. Thus: the maximum number of incidents of sexual assault by Jeff B. in the time period is 12, but the court counts only 7 (four on this row and 3 above).
15-64	1/3/98 to 4/23/98: Fifty incidents of sexual assault by Jeff. B. Plaintiff testify that Jeff B. sexual abused him "every day" that Jeff B. worked at YDC during this 16-week period. Plaintiff testified that Jeff B. worked four to five days per week. The court uses the <u>lower</u> number (e.g., four days per week) to calculate 64 separate incidents over the 16 week period. The court reduces the number of incidents by 1 to account for the fact that the time period was two days shy of a full sixteen weeks. This court reduces the resulting number, 63, by 20% to err on the side of caution, in the State Defendants' favor, and to account for how the jury may have viewed the evidence. This leaves 50.4 incidents. The court truncates down to 50. The highest number of incidents the jury could find based on plaintiff's testimony would be 5x16, or 80. The court lists only 50 on this row. The court does not separately count the sexual assault by Jeff B. that occurred in a car in the Spring of 1998 because it <u>might</u> <u>possibly</u> fall within this timeframe. The court does not separately count the Teddy Bear incident for the same reason, even though involved different types of conduct, including emotional abuse.
65-89	1/3/98 to 4/23/98: 25 incidents of sexual assault by Stephen M. Plaintiff testified that Steve M. sexually abused him "about twice a week" during this 16 week period. Thus, plaintiffs testimony would support a finding of 32 incidents.

	The court reduces this by 20% and truncates the resulting number to a whole number. The court counts only 25 incidents.
90-111	4/23/1998 to 6/13/1998: 22 incidents of sexual assault by Jeff B. Plaintiff testified that he was sexually assaulted by Jeff B. four or five times per week during this 7 week period. The maximum number of sexual assaults a jury could find is 35 (4 x 7). The court assumes only four sexual assaults per week, reducing this number to 28 incidents of sexual assault. The court then reduces the number by 20%, to err on the side of caution in the State's favor, resulting in 22.4 incidents, which the court truncates to 22.
111-114	4/23/1998 to 5/10/1998: Four sexual assaults by Stephen M. Plaintiff testified that Stephen M. sexually assaulted him two times each week for these two and half weeks. The court errs on the side of caution by treating the frame as if it were just two weeks.
115-155	June 13, 1998 to September 12, 1998: Plaintiff testified that he was sexually assaulted by Jeff B. four to five times per week for this 13-week period. The maximum number of incidents a jury could find is 65. The court assumes no more than four sexual assaults per week, resulting in 52 incidents. The court then applies a gestalt reduction of 20% to calculate 41.6 incidents. The court truncates this number to 41. (This includes the sexual assault on September 12, 1998 that plaintiff claims were accompanied by extreme violence, resulting in injury and hospitalization).
	GLOBAL "GESTALT REDUCATION" OF 25%, ON TOP OF THE EARLIER GESTALT REDUCTIONS = 116 INCIDENTS FOR "ADDITUR OF INCIDENTS"

IX. Conclusion

There is no clear correct option. The court has identified what it believes to be the five available options. These options shall be discussed at the upcoming hearing.

May 22, 2024

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/22/2024

TATE 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

Plaintiff's third assented to motion to extend his deadline to file post-verdict motions is GRANTED. The court is not about to give counsel a hard time when they are diligently working to frame the issues that will both inform the court's future post-verdict order(s) as well as any appeals.

That said, it has been three months since the jury verdict of May 3, 2024. The time is nigh to have the issues fully briefed and decided, so that this individual case can advance to the next stage.

The court draws counsel's attention to its 57 page narrative order of May 22, 2024, and to the discussion among counsel and the court at the hearing on June 24, 2024. There are a limited number of options for the trial court:

1. At the June 24 hearing, the State eliminated one possibility, e.g. "additur of incidents," which would have been

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
8/1/2024 1:36 PM

available as an alternative to a full-fledged new trial in the non-movant’s discretion.

2. The court all but eliminated another possibility, e.g. JNOV. At the June 24 hearing the court indicated that it was disinclined to surgically alter the number of incidents on the verdict form via a JNOV. A JNOV would substitute the judge’s findings of fact, as to what occurred on what dates and at what locations, for the jury’s. In contrast, the traditional practice of additur, and by extension the non-traditional practice of “additur of incidents,” are grounded on the court’s ability to order, and the non-movant’s ability to insist upon a new trial.

3. The constitutionality of the per claimant, per incident damages cap need not be reached at this juncture. It is presently a non-issue. If the jury had found liability for only a single episode, that occurred in a compressed time period on a single day, it is doubtful that any court would find the cap unconstitutional. The problem in this case is that there were a large number of distinct episodes, spread out over more than a year, at multiple locations, involving different tortfeasors, and these incidents were separated by intervening events (such as furloughs from YDC). Thus, the real question in this case is whether a reasonable jury could have found that (a) there was only one incident and (b) this single incident supported an

award of $38 million in combined compensatory and enhanced compensatory damages. If the answer to this question is "no," then the remedy is a new trial, rather than the elimination of the statutory per claimant, per incident damages cap.

4. Further, the court is not inclined to find that the per claimant, per incident damages cap is unconstitutional:

-The constitutionality of the per claimant, per incident damages cap depends largely on the proper construction of the statutory term "single incident." If this court's understanding of the term, as set forth in the May 22 order (and as intended in the court's jury instructions), is correct, then there is likely no constitutional concern with the statute.

-While in a case with many claimants, the total per incident damages cap for all claimants might be found unconstitutional by a trial court, the per claimant, per incident damages cap is clearly constitutional on its face, and presumptively constitutional as applied. A trial court's job is to apply existing caselaw, so plaintiff's arguments to contrary are best preserved here and briefed elsewhere. The court does not give short shrift to the plaintiff's arguments, but is rather cognizant of

a trial court’s role in the adjudicative process and the development of the law.

4. As this judge said many times at the June 24 hearing, in the absence of a motion for a new trial, the issuance of a judgment consistent with the State’s Motion To Apply Damages Cap will likely be a ministerial act. Therefore, the question facing plaintiff on the cusp of this third extension of the deadline for post-trial motions, is how to caption his forthcoming motion.

August 1, 2024

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/01/2024

Filed
File Date: 8/21/2024 4:10 PM
Rockingham Superior Court
E-Filed Document

Clerk's Notice of Decision
Document Sent to Parties
on 11/04/2024

STATE OF NEW HAMPSHIRE

ROCKINGHAM, *ss.* SUPERIOR COURT

10-31-2024 Respectfully DENIED. See margin order at the bottom of page 3, which incorporates by reference the court's order of May 22, 2024

Honorable Andrew R. Schulman
October 31, 2024

CASE NO. 217-2020-CV-00026

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE, et al.

THIS FILING PERTAINS TO PLAINTIFF MEEHAN'S INDIVIDUAL CASE*
THIS FILING DOES NOT PERTAIN TO CONTRACTOR DEFENDANTS*

PLAINTIFF'S MOTION FOR NEW TRIAL AS TO NUMBER OF "INCIDENTS"

Pursuant to Superior Court Rule 43, Plaintiff David Meehan herewith moves for a new trial as to the number of "incidents." In support of this motion, Plaintiff states as follows:

1. The Court is already abundantly familiar with the background of this matter, which was tried before a jury over the course of four weeks following jury selection on April 8 and 9, 2024. On May 3, 2024, after only a few short hours of deliberations, the jury returned a decisive verdict in Plaintiff's favor on all substantive aspects of his case against the State Defendants. The sole exception was the jury's verdict as to question 10 of the special verdict form, which asked how many "incidents" Plaintiff had proven—a question to which the jury answered "1/one."

2. On May 13, 2024, Plaintiff filed a post-trial motion for partial judgment notwithstanding the verdict ("JNOV"), asking the Court to enter JNOV in Plaintiff's favor as to the number of incidents. As alternative relief in that motion, Plaintiff requested that the Court grant "a new trial on the number of 'incidents' pursuant to

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
11/4/2024 9:29 AM

RSA 526:1." Mot. for Partial JNOV at 1; *see also id.* at 10 (asking Court to, "[i]n the alternative, grant a new trial as to the number of 'incidents'").

3. Plaintiff believed that his May 13 Motion sufficiently presented his alternative request for a new trial (albeit a new trial limited only to determining the number of "incidents"). However, at the June 24, 2024, hearing and in its August 1, 2024, Order, this Court stated that Plaintiff has not made a motion for a new trial. So that his request is clear, To make clear his request, Plaintiff herewith moves for a new trial as to the number of "incidents."
4. Plaintiff has already set forth his argument as to the propriety of a new trial on the number of "incidents" in his May 13 Motion, his Reply in support thereof filed on June 10, 2024, and in his contemporaneously-filed Supplemental Memorandum of Law. Rather than reiterate those arguments here, he incorporates them herein by reference.
5. Pursuant to Superior Court Rule 11(c), Plaintiff has not sought the State's assent to the relief sought in this motion, as it can be reasonably assumed that he will be unable to obtain concurrence.

WHEREFORE, Plaintiff David Meehan respectfully requests that the court, should it deny his Motion for Partial Judgment Notwithstanding the Verdict:

a. Grant a new trial as to the number of "incidents" only; and
b. Grant such other and further relief as the Court deems just and equitable.

DAVID MEEHAN,

Dated: August 21, 2024

By and through counsel,

RILEE & ASSOCIATES, P.L.L.C.

/s/ Cyrus F. Rilee, III
Cyrus F. Rilee, III, Esq. (Bar No. 15881)
Laurie B. Rilee, Esq. (Bar No. 15373)
264 South River Road
Bedford, NH 03110
T: 603.232.8234
crilee@rileelaw.com
lrilee@rileelaw.com

NIXON PEABODY LLP

/s/ David A. Vicinanzo
David A. Vicinanzo, Esq. (Bar No. 9403)
W. Daniel Deane, Esq. (Bar No. 18700)
Mark Tyler Knights, Esq. (Bar No. 264904)
Nathan Warecki, Esq. (Bar No. 20503)
S. Amy Spencer, Esq. (Bar No. 266617)
Erin S. Bucksbaum, Esq. (Bar No. 270151)
Allison K. Regan, Esq. (Bar No. 272296)
900 Elm Street, 14th Floor
Manchester, NH 03101
T: 603.628.4000
dvicinanzo@nixonpeabody.com
ddeane@nixonpeabody.com
mknights@nixonpeabody.com
nwarecki@nixonnpeabody.com
aspencer@nixonpeabody.com
ebucksbaum@nixonpeabody.com
aregan@nixonpeabody.com

Clerk's Notice of Decision
Document Sent to Parties
on 11/04/2024

Honorable Andrew R. Schulman
October 31, 2024

CERTIFICATE OF SERVICE

I certify that on this August 21, 2024, I am serving a copy of this document by electronically sending it through the court's e-filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case.

/s/ David A. Vicinanzo
David A. Vicinanzo, Esq.

10-31-2024 Please refer to this court's post-verdict order of May 22, 2024. With the exception of those portions of the May 22 order that relate solely to recalling the jury, that Order is expressly incorporated herein by reference. As explained at great legnth in the May 22 order, the jury's verdict is conclusively against the weight of the evidence to the extent that the jury awarded $38,000,000 for a single "incident." As explained in the May 22 order, "a de novo jury trial would be a legally correct result" under RSA 526:1. Had plaintiff asked for this relief, it would have been ordered. That was made clear at the post-verdict hearing.

But plaintiff eschews a new trial. Plaintiff won't ask for a new trial on all issues. Instead, plaintiff wants to keep the $38,000,000 award, while resubmitting the evidence to a different jury so that it will find more incidents. This cannot be done. There is no way to determine what "incidents" (as the court defines the term in the May 22 Order, pp. 14-34) the first jury found were proven by a preponderance of the evidence. The jury could have found that plaintiff proved some but not all of what he alleged. The jury could have found that the State Defendants were not liable for some of the tortfeasors' conduct. Counsel will recall that both sides requested a general verdict and did not allow the court to specify specific occasions or incidents. If plaintiff wants a de novo jury trial, he can move to reconsider, but the court will order a new trial de novo sua sponte.

Filed
File Date: 5/31/2024 9:38 AM
Rockingham Superior Court
E-Filed Document

Clerk's Notice of Decision
Document Sent to Parties
on 11/04/2024

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

10-24-2024
Respectfully DENIED.
Please see margin order at the bottom of page 11.

Honorable Andrew R. Schulman
October 31, 2024

David Meehan

v.

State of New Hampshire,
Division of Health and Human Services

217-2020-CV-00026

THIS MOTION APPLIES ONLY TO THE INDIVIDUAL *MEEHAN* CASE

MOTION TO RECONSIDER AND VACATE MAY 22, 2024 ORDER

The State of New Hampshire, Division of Health and Human Services ("DHHS"), by and through counsel, hereby moves to reconsider and vacate this Court's May 22, 2024 Order. In support thereof, DHHS provides as follows:

1. On May 3, 2024, DHHS filed a motion to apply the cap under RSA 541-B:14, I.

2. On May 5, 2024, the Plaintiff filed an emergency motion for a hearing.

3. These motions do not object to, or respond to, one another.

4. On May 6, 2024, without awaiting an objection or response from either party, this court essentially denied Plaintiff's request for an emergency hearing, indicated it was already working on, or intended to issue, an "interim order," and would schedule a one-hour hearing in 30-45 days to address the motions.

5. On May 7, 2024, DHHS filed its objection to the Plaintiff's request for an emergency hearing.

6. The clerk's notice of decision of the court's May 6, 2024 order was issued on May 8, 2024.

7. On May 7, 2024, the Plaintiff filed an emergency motion for jury poll.

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
11/4/2024 9:25 AM

8. On May 8, 2024, without awaiting an objection or response from DHHS, the court appears to have denied the motion for reasons contained in the court's margin order of that date and for the reasons "to be detailed in a forthcoming order." The court expressed its view, without full briefing, that "at the very least, the finding of 'one incident' was contrary to the weight of the evidence." The court further raised *sua sponte* the issue of additur being the "better course" by citation to *Belanger v. Teague*, 126 N.H. 110 (1985), in lieu of filing a motion for a new trial, even though additur is sought as alternative relief on a motion for a new trial.

9. On May 13, 2024, DHHS filed a motion for judgment notwithstanding the verdict ("JNOV") regarding the statute of limitations and the merits, which was substantially identical to the Motion for Directed Verdict DHHS filed at the close of Plaintiff's case in chief.[1] A motion for JNOV challenges the sufficiency of the evidence and presents a question of law. "A party is entitled to JNOV only when the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the non-moving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand." *Halifax-American Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 576 (2018). "The court cannot weigh the evidence or inquire into the credibility of the witnesses, and if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied." *Id.*

10. Thus, a court's role in resolving a motion for JNOV is merely to review the record evidence in the light most favorable to the non-moving party and determine whether the evidence is so overwhelmingly in favor of the moving party that no contrary verdict can stand. If the court finds the record evidence is sufficient to permit the jury's verdict to stand, the court need only say as

[1] DHHS also orally made motions for directed verdicts based on the same arguments at the close of Plaintiff's case, during the charging conference, and following jury instructions to protect the appellate record. All were respectfully denied on the record.

much and deny the motion. The court's role is not to weigh in, resolve conflicts in the evidence, or to speculate about what the jury might have been thinking. It is merely to determine whether the evidence is sufficient.

11. Instead of adhering to that standard, on May 14, 2024, a day after DHHS' JNOV motion was filed, and without awaiting an objection from Plaintiff's counsel, this court issued an order denying the motion, commenting extensively on the merits of the case, and purporting to resolve the evidence by finding that the Plaintiff had definitively proven certain portions of the case. Respectfully, the court's order reads more like an objection filed on behalf of the Plaintiff, and less like a court order applying the applicable standard, and its purported findings therein go beyond what the court's role should be in resolving a JNOV motion. Many of these statements promptly entered the news media.[2] The clerk's notice of decision with respect to this order issued on May 15, 2024.

12. On May 13, 2024, the Plaintiff filed a motion for partial JNOV or, in the alternative, to set aside the verdict as to the number of "incidents."

13. This court did not immediately rule on or resolve that motion.

14. On May 22, 2024, before DHHS filed its objection to the Plaintiff's JNOV motion, this court issued a 57-page "interim order" that no litigant in this case asked the court to issue and

---

[2] *See, e.g.*, Boston Globe, *N.H. judge denies state's request to invalidate $38m YDC verdict* (May 15, 2024), https://www.bostonglobe.com/2024/05/15/metro/nh-judge-denies-states-request-invalidate-38m-ydc-verdict/ ("That request was denied by Judge Andrew Schulman, in a Tuesday order noting that Meehan had proved the state's liability for the rapes and other abuse he endured to a 'geometric certainty'"); Boston Globe, *Judge says $475,000 award in New Hampshire youth detention center abuse case would be 'miscarriage of justice'* (May 23, 2024), https://www.bostonglobe.com/2024/05/23/metro/judge-says-475000-award-new-hampshire-youth-detention-center-abuse-case-would-be-miscarriage-justice/ (quoting extensively from this court's May 14, 2024 order.); InDepthNH.org, *Judge: State's Liability in YDC Abuse 'Beyond Doubt'* (May 15, 2024), https://indepthnh.org/2024/05/15/judge-states-liability-in-ydc-abuse-beyond-doubt-nh-must-pay-38m-verdict/ (quoting extensively from this court's May 14, 2024 order).

that cannot be fairly construed as being issued in response to one or more fully briefed motions seeking specified relief.

15. Instead of allowing the parties to file motions seeking specific relief with respect to the verdict, waiting for proper objections to be filed, and resolving those motions pursuant to controlling legal standards, the court's "interim order" *sua sponte* sets forth five options for dealing with the jury's verdict, all of which it deems to be incorrect options, provides irrelevant commentary and characterization with respect to them, and purportedly enlists the parties' help to decide whether the court should pick Option 3 [letting the verdict stand and applying the cap, Option 4 [a new *de novo* trial on all issues], or Option 5 [additur of incidents].

16. In doing so, the court appears to regret not providing a more specific instruction on what a "single incident" means in RSA 541-B:14, I, though the court recognizes that the parties stipulated to the specific definition of "single incident" in the verdict form and agreed that the jury should determine the number of those incidents.

17. It is also unclear how Option 3 remains a viable option after this court in its order has definitively stated that moving forward with Option 3 would be an "obvious miscarriage of justice" because in its more nuanced view of what it believes an "incident" is under the statute, no reasonable jury could find one incident in this case. May 22, 2024 Order at 14-15.

18. DHHS disagrees with that position and, as a matter of basic fairness, due process, and this court's rules, should have been provided an opportunity to present its arguments before the court issued this order.

19. This court goes on to state that the jury's $38,000,000 verdict, $18,000,000 in compensatory damages and $20,000,000 in enhanced compensatory damages, cannot be reconciled with the finding of a single incident in this case. May 22, 2024 Order at 38.

20. DHHS also disagrees with this position and, as a matter of basic fairness, due process, and this court's rules, should have been provided an opportunity to present its arguments before the court issued this order.

21. The court permitted much evidence into the trial of this case, including hearsay evidence (such as testimony involving rumors), that DHHS contends should have been excluded.

22. The Plaintiff put a large quantity of evidence before the jury but did little to tie that evidence to specific breaches or to show legal causation between the alleged acts and omissions of DHHS and the injuries the Plaintiff claims.

23. Contrary to the suggestion in the "interim order", the Plaintiff himself was also impeached significantly.

24. Similarly, the suggestion that the amount of the award must mean that there was more than one incident is undercut by the statement in closing argument by Plaintiff's counsel that $1 billion in damages would not be enough compensation for any *single* incident of rape.

25. This court also permitted Plaintiff's counsel to break the "golden rule" during closing argument on multiple occasions, asking the jurors to imagine themselves as a parent of a child in the Plaintiff's position, and declined to grant DHHS a mistrial on that basis, though DHHS had timely objected and moved for a mistrial by raising it immediately after the closing argument. *See, e.g.*, *101 Ocean Blvd., LLC v. Foy Ins. Group*, 174 N.H. 130, 138 (2021) ("With respect to a closing argument in a civil jury trial, any objection must be raised either during or immediately after the closing argument.").

26. Under such circumstances, a jury verdict of $38,000,000, $18,000,000 for a single incident against DHHS alone (from which, according to the stipulated definition contained in the court's verdict form, multiple injuries could have been found to have occurred and from which

multiple types of damages could have flowed), and $20,000,000 in enhanced compensatory damages (which could have been awarded to reflect long-term psychological impacts, future lost wages, future pain and suffering, and other similar types of long-term impacts), is easily (and logically) capable of reconciliation with the record evidence and the advocacy in this case.

27. The jury did not apportion liability to any intentional tortfeasor which leads to the logical and reasonable inference that the jury viewed one act or omission of DHHS as creating a single incident that led to more than one injury for the Plaintiff and resulted in substantial damages. The record evidence amply supports this conclusion. *See e.g.*, DHHS's Obj. To Pl.'s Mot. for Partial JNOV Or, in the Alt., To Set Aside Verdict as to Number Of "Incidents" (Index #778) at 8-10. And many – if not all – of Plaintiff's experts testified as to the alleged continuous nature of the mental trauma that Plaintiff endured. In other words, according to Plaintiff's witnesses, the Plaintiff's entire YDC experience was a traumatic incident for Plaintiff, where ongoing psychological and emotional harm was allegedly occurring, even when specific instances of physical harm were not occurring. *See e.g.*, Tr. Ex. 123-124 (marked for ID). This is yet another way the jury could have viewed the evidence. In short, if reached by the jury, such a conclusion is not conclusively against the weight of the evidence, and sufficient evidence exists to support it.

28. The court's opining that "the only proper verdict" is "many multiples" of $475,000 otherwise "a gross and unconscionable miscarriage of justice" will occur is premature and unfortunate, May 22, 2024 Order at 40, and ignores the fact that the jury's verdict is not limited to the damages questions but rather contained, pursuant to the agreed upon verdict form, at least seven separate and distinct determinations (if not more) that each carried their own independent significance and profound importance to this case. Thus, while the verdict included a damages determination that was many multiples of $475,000, it also included a determination that the

Plaintiff only proved, by a preponderance of the evidence, that DHHS was legally responsible for no more than one incident. These two determinations by the jury – damages (questions 3-5 of the Verdict Form) and number of Incidents (question 10 of the Verdict Form) – along with each of the other determinations the jury made as part of its verdict, are entitled to equal respect and deference. The court's real dissatisfaction appears to be with the statutory damages cap and its effect on the case. The record, however, supports the verdict reached; the verdict is not conclusively against the weight of the evidence, and the verdict should therefore stand. Dissatisfaction with how the statutory cap applies is not grounds for a new trial.

29. The court's commentary on a new *de novo* trial and additur is also not helpful and reads as if the court is placing itself in the role of advocate for the Plaintiff. Additur of factual incidents is not a legally recognized concept, and the Plaintiff did not ask for it until this court raised it.[3] This portion of the court's order provides unnecessary commentary on the merits of the case that will make it substantially harder to retry the case to an impartial jury in the future, if that is the route this case ultimately goes, because the trial court has now expressed its opinion of how many "incidents" it believes definitively exist in this case.

---

[3] The court states in its order that it made a statement after the verdict "that the verdict form raised questions" and implies that this statement was intended as a prompt to counsel to request further deliberation with respect to the verdict perhaps with further instruction. May 22, 2023 Order at 7-8.

The court further states in its order that, after instructing the jury on an "incident," that it "jokingly told the jury that he expected to hear a groan after he gave the instruction" because "the court believed that determining the number of incidents would be laborious." May 22, 2023 Order at 38. It seems that the implication the court hoped the jury would take away from this statement was that it should be finding many "incidents."

Regrettably, these indirect prompts to both Plaintiff's counsel and the jury raise significant questions regarding whether DHHS can obtain a fair process before this court in this case and any of these cases moving forward.

30. The role of the court and its orders is not to raise issues and questions on its own and prejudge them, inviting commentary from the parties only after-the-fact. *See Kimble v. Muth*, 221 S.W. 3d 419, 421 (Mo. Ct. App. 2006) ("The adversarial process clearly defines and distinguishes the roles of the advocates and the ultimate legal decision-maker. Judges are not advocates; they are free to impartially evaluate conflicting arguments. A court is not charged with the dual responsibilities of posing questions to which it then provides answers. Rather, the parties frame the issues to be offered for judicial resolution. It both restrains the decision-maker's discretion and provides structure for the advocates, which in turn facilitates argument.); *cf. Kay v. Bd. Of Educ.*, 547 F.3d 736, 738 (7th Cir. 2008) ("The benefit of adversarial presentation is a major reason why judges should respond to the parties' arguments rather than going off independently.").

31. The role of the court is: to remain neutral; to allow the parties to raise the issues, seek specific relief, and interpose specific objections; and to resolve the issues and arguments presented to it by the parties. *See, e.g.*, N.H. Const. Pt. I, Art. 35 (mandating that all judges be "as impartial as the lot of humanity will admit"); N.H. Const. Pt. II, Art. 79 (forbidding judges from acting as counsel to any party); *Dennis v. United States*, 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."); *Bank of N.Y. Mellon v. Barber*, 295 So. 3d 1223, 1225 (Fla. App. Ct. 2020) ("The court is not authorized to become a party's advocate and raise a legal issue *sua sponte*."); *Commonwealth v. Pachipko*, 677 A.2d 1247, 1249 (Pa. Super. 1996) ("It is clearly inappropriate for a trial court to raise an issue on behalf of a party, thereby acting as an advocate."); *cf. Torromeo Indus. v. State*, 173 N.H. 168, 177-78 (2020) (explaining that the trial court cannot introduce its own evidence into a proceeding because to do so is inconsistent with the established role of the trial court in adversary litigation).

32. This court's May 22, 2024 order, like other orders that have come before it in this important and complex proceeding, departs from basic superior court rules and how our adversarial litigation process is designed to work.[4] Without full adversarial briefing by the parties, the court has prejudged the issues, has offered unnecessary commentary on the merits of the case, and is raising issues and arguments for the parties themselves before they have been placed before the court and fully briefed. These constitute appropriate grounds for reconsideration. *See* N.H. Super. Ct. Civ. R. 12(e) (stating that motions for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present").

33. DHHS would therefore respectfully request that this court reconsider and vacate the May 22, 2024 order and permit the parties to address the jury's verdict through ordinary motion practice, where they raise the arguments and interpose the objections, and this court adjudicates those motions by applying the appropriate legal standards. Those motions can be filed in advance of June 24, 2024 hearing, argued then, and resolved in the ordinary course.

34. That is the regular process every litigant in the court system is entitled to and is the one the parties should receive in this case.

WHEREFORE, DHHS respectfully requests that this court enter an order:

A. Vacating its May 22, 2024 order;

B. Permitting the parties to fully brief the issues they raise regarding motions filed by the parties within all normal timeframes set by the court[5]; and

---

[4] DHHS's motion for summary judgment is another example of a deviation from the traditional adversarial litigation process. DHHS timely filed a motion for summary judgment and, almost immediately, this court denied it without requiring a response, which New Hampshire law, RSA 491:8-a, and this court's rules require.

[5] DHHS recognizes that the court invited the submission of briefing "with respect to the issues below" referring to the issues the court identified in its "interim order." May 22, 2024 Order at 4. For the

C. Resolving those motions in the ordinary course, only after briefing is completed, and with a hearing as the court deems appropriate.

Respectfully Submitted,

N.H. Department of Health and Human Services

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: May 31, 2024

/s/ Brandon F. Chase

Brandon F. Chase, Bar #270844
Assistant Attorney General
Catherine A. Denny Bar #275344
Assistant Attorney General
New Hampshire Department of Justice
Civil Bureau
1 Granite Place South
Concord, NH 03301
(603) 271-3650
brandon.f.chase@doj.nh.gov
catherine.a.denny@doj.nh.gov

VERRILL DANA, LLP

/s/ Martha C. Gaythwaite

Martha C. Gaythwaite (admitted *pro hac vice*)
Maine Bar No. 2811
Verrill Dana LLP
One Portland Square
Portland, ME 04101-4054
(207) 774-4000
mgaythwaite@verrill-law.com

---

reasons explained in this Motion to Vacate, DHHS requests that the parties submit briefs with respect to motions that have been or are filed by a party.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record on the date above.

/s/ Brandon F. Chase
Brandon F. Chase

10-31-2024 Respectfully DENIED. The May 22, 2024 order was a proper exercise of the judicial function. The court did not make a pre-adjudication comment on the evidence. The trial was over. The evidence was submitted. The verdict was rendered. The jury went home. The parties began to file cross-motions for post-judgment relief. Their stances were obvious--the disagreed about what, if anything, to do, about the fact the jury issued a $38,000,000 judgment but found only a single "incident." The court properly addressed this conundrum, on the record, in writing, inter partes. The court's goal was to hasten the resolution of post-verdict proceedings. That goal was manifestly not achieved.

Honorable Andrew R. Schulman
October 31, 2024

Clerk's Notice of Decision
Document Sent to Parties
on 11/04/2024

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.

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
11/4/2024 9:14 AM

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:

<u>Hypothetical</u>

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

Clerk's Notice of Decision
Document Sent to Parties
on 11/04/2024

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 the State Defendants' Motion To Apply Damages Cap Under RSA 541-B:14,I (Docket Document 758). The motion is reluctantly GRANTED.

The statutory damages cap is $475,000 per claimant for all claims arising from a "single incident. Therefore, in the absence of a timely motion for reconsideration, the court will issue a final judgment plaintiff's favor in the amount of $475,000, plus statutory interest and recoverable costs, ten days from the date of the clerk's notice of this order.

I. Preface

The court continues to believe that, if the jury accepted the gist of the plaintiff's testimony, entering a judgment in the amount of the statutory damages cap will amount to a miscarriage of justice. See Order of May 22, 2024, p. 14. The amount of the verdict--$38 million in compensatory and enhanced

This is a Service Document For Case: 217-2020-CV-00026
Rockingham Superior Court
11/4/2024 2:36 PM

compensatory damages—cannot be reconciled with the jury's finding that this liability arises from only a single incident. (By agreement, the jury was instructed to determine the number of "incidents" for the purpose of the court's application of the damages cap in RSA 541-B:14,I.)

The court cannot resolve the inconsistency in the jury's findings by substituting one judge's view of witness credibility and circumstantial inferences for that of the jury. Put simply, this judge cannot:

A. Make up his own list of incidents (which would require a significant amount of line drawing, seeing as the plaintiff alleges more than 200 incidents, and some of the boundaries between incidents are open to reasonable debate); and

B. Then decide for himself, for each separate incident whether the plaintiff proved liability *vel non*; and finally

C. Replace the jury's findings with his own, perhaps idiosyncratic, findings.

Because the State Defendants have rejected the court's suggestion of "additur of incidents," (which the State Defendants have the absolute right to do) there is only one remedy for the disconnect in the jury's verdict. That remedy is a new trial de novo, as provided for in RSA 526:1.

Yet, the plaintiff has been resolute in asking for every form of relief except a new trial *de novo* on all issues. The

last opportunity to request one will be via timely motions for reconsideration of (a) this order and (b) the orders denying plaintiff's motions for a partial JNOV and, in the alternative, a partial new trial limited to a redetermination of the number of incidents.

II. The Damages Cap Is Constitutional On Its Face And As Applied

Plaintiff alleges that the "per claimant, per incident" damages cap in RSA 541-B:14,I violates his State Constitutional rights to equal protection (N.H. Constitution, Part 1, Articles 1, 2 and 12) and to a remedy (N.H. Constitution, Part 1, Article 14).

Although there are some plausible arguments why a somewhat higher per incident cap might be required (see below), plaintiff takes issues with the existence of any cap. To prevail on this argument, plaintiff would have to convince the New Hampshire Supreme Court to overrule forty years of precedent limning the State's sovereign immunity. This court must respect that precedent.

In a 1985 Opinion of the Justices, all five sitting justices opined that a $250,000 per claimant, per incident damages cap on damages against the State would be constitutional on its face. See Opinion of the Justices, 126 N.H. 554, 567–568 (1985):

> The bill thus establishes two damage ceilings: $250,000 per claimant and $2,000,000 per incident. The constitutionality of these limitations turns on whether the restrictions placed on an injured person's right to recovery by these limitations be not so serious that they outweigh the benefits sought to be conferred upon the general public. We find that this test is satisfied and therefore uphold the per claimant and the per incident damage ceilings. The authority of the legislature to set reasonable limits on damages recoverable against governmental entities is well established. . . .
>
> . . . We earlier noted that the State had an interest in minimizing its liability exposure because if the State incurred significant liability, the payment of claims could impair the financial ability of the State to render governmental services. Recognizing the risk posed by unlimited liability exposure, as well as the unique characteristics of the State-tortfeasor citizen-plaintiff relationship, we hold that reasonable recovery limits are constitutionally permissible.
>
> The $250,000 per claimant limitation distinguishes between persons injured by the State and persons injured by other tortfeasors. Although a plaintiff's legitimate damages may exceed this ceiling, we find that, even given the soaring costs of medical services, legal expenses, and other damages likely to be sustained by tort victims, this limit adequately balances the competing interests of the State and of the personal injury plaintiff at this time. We therefore uphold its constitutionality.

(Internal citations omitted; bracketing and quotation marks omitted; formatting cleaned up). <u>See</u> <u>also</u> <u>Laramie v. Stone</u>, 160 N.H. 419, 438 (2010) (applying the present $475,000 per claimant, per incident damages cap).

There remain two questions: (A) Whether, due to inflation, the present $475,000 damages cap is too low to be constitutional

on its face, and (B) if not, whether the application of that cap is constitutional as applied.

In answering these questions, the court takes judicial notice of the Consumer Price Indices published by the U.S. Department of Labor, Bureau of Labor Statistics ("BLS"). The court also takes judicial notice of the online inflation calculator published by the BLS. That tool converts the purchasing value of a dollar in any given year and month to the purchasing value of a dollar in any other year and month.

The court does not opine on whether the CPI is the best measure for comparing the present damages cap to the $250,000 approved by the Supreme Court in 1985. There might be well be a superior index that is more regional and more weighted towards certain types of costs. Yet the CPI is a reasonable gauge that it is easily accessible and properly the subject of judicial notice.

When the Legislature increased the damages cap from $250,000 to $475,000 in 2007 (2007 N.H. Laws 356:2), it almost exactly mirrored the increased cost of living as measured by the CPI. According to the BLS online calculator, $250,000 in November 1985 (when the Opinion of the Justice was issued) would be worth $477,750 (when the 2007 amendment became effective). Thus, this court must conclude that the damages cap of $475,000, was constitutional on its face when it was enacted in 2007.

This case was filed in January 2020. $475,000 in July 2007 (when the present cap became effective) was worth $588,270 in January 2020. This is a difference of about 24%. The reduction in purchasing power is meaningful, but no so large as to make the statute unconstitutional on its face. The Opinion of the Justices does not stand for the proposition that $250,000 was the lowest constitutional damages cap the Legislature could have enacted in 1985. Rather, it stands for the proposition that $250,000 was well within the zone of reason at the time. The Legislature is not required to track the CPI or any other gauge of inflation, let alone do so within any specified margin of error.

Plaintiff is entitled to pre- and post-judgment interest since the date of filing. See RSA 336:1. Although the interest rate on judgments tracks the discount rate on U.S. Treasury Bills, rather than the CPI, it effectively takes inflation into account. Thus, if the cap is applied, plaintiff will receive close to $100,000 in statutory interest:

	Judgment	Interest	Total
Judgment	$475,000		
2020 Interest @ 3.9% 1/11/20 to 12/31/20 (354 days)		$17,967	
2021 Interest @ 2.1%		$9,975	
2022 Interest @ 2.0%		$9,500	
2023 Interest @ 5.8%		$27,550	
2024 Interest @ 7.3% 1/01/24 to 11/04/24 (309 days)		$29,335	
TOTAL **(As of today)**	$475,000	$94,327	**$569,327**

If the damages cap was constitutional on its face as of the date of filing, then because of the interest on the judgment, it should still be constitutional at the time the judgment is paid.

That said, the court notes that $475,000 in July 2007 would be worth $719,004 in September 2024 (the most recent month for which data is available). This reflects the inflation of the last few years. However, the difference between what plaintiff would receive today inclusive of statutory interest (e.g. $569,327) and $719,004 is just about 25%. Once again, while this a measurable difference, it is not a constitutional one.

Plaintiff next argues that the damages cap is unconstitutional as applied in his case. But this argument is really not about the cap; it is once again about the number of incidents that form the basis for plaintiff’s claims. Plaintiff

argues that his case is different because he alleges he was sexually assaulted by several different State employees, in different locations, on different dates, under different circumstances, some separated by furloughs from YDC, on perhaps hundreds of occasions, spread out over years. Plaintiff testified to what, in the court's view, amounts to well over 100 separate incidents. Had the jury either (a) been asked to make individualized liability and damages findings for 100+ incidents, or (b) responded to the actual jury instructions by finding 100+ incidents, the aggregated damages cap would have been far larger than the actual verdict. The problem is the jury found just one incident.

A damages cap of $475,000 for a single incident of sexual assault may be unwise public policy, but it is difficult to believe that the New Hampshire Supreme Court would find such a cap unconstitutional. Why is a claimant who suffered a single incident of sexual assault, entitled to a more generous damages cap than a claimant who was grievously and permanently injured in some other way?

In any event, plaintiff does not say what amount of damages would be constitutional as applied. If the present Legislatively determined cap of $475,000 is unconstitutional, would $1 million be allowed? What about $2 million? Plaintiff does not posit

any logical stopping point. He has proffered no calculus that the court could apply.

For all of these reasons, the court finds that application of the damages cap is constitutional as applied.

III. Conclusion

Unless plaintiff requests a new trial *de novo,* on all issues, the court will enter judgment in his favor in the amount of $475,000 (plus statutory interest and recoverable costs) in ten days from the clerk's notice of this order.

November 4, 2024

Andrew R. Schulman,
Presiding Justice

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

VERDICT FORM

Part I: Limitations

Question 1

Does the jury unanimously find that plaintiff David Meehan has proven by a preponderance of the evidence that, prior to January 11, 2017:

He did not discover, and would not have discovered through the exercise of reasonable diligence, both:

(i) That he had been injured; and

(ii) That DHHS's conduct (i.e. "actions," "failures to act" and/or "customs and practices") caused his injuries.

__✓__Yes ______No

Explanation

-A "Yes" means that this suit timely in its entirety.

-A "No" answer means that this lawsuit in untimely and will be dismissed.

Instructions

If you answered "No," then skip Parts II, III, IV and V of this form. The foreperson should sign the last page of this form.

If you answered "Yes," go onto Part II.

Part II: Liability

Question 2

(Do not answer this question if your answer to Question 1 was "No.")

Does the jury unanimously find that plaintiff David Meehan has proven by a preponderance of the evidence that:

(a) He was injured during the time he was a resident at YDC; **and**

(b) DHHS's Negligence and/or Breach of Fiduciary Duty was a substantial factor in bringing about one or more of his injuries (i.e. a legal cause of the injury). (Please see the jury instructions for an explanation of "legal causation," "negligence" and "breach of fiduciary.")

__✓__Yes ________No

Explanation

A "Yes" answer means that you have found DHHS liable.

A "No" answer means that you have found that DHHS not liable.

Instructions

If you answered "No," please skip Parts III, IV and V. The foreperson should sign the last page of the verdict form.

If you answered "Yes," please go on to Part III.

Part III (Damages)

Question 3

(Do not answer any questions in this Part III (e.g., Questions 3, 4 or 5) if your answer to either Question 1 or Question 2 was "No.")

Please state the full amount of money (in words and numbers) that the jury unanimously finds Mr. Meehan has proven to be full, fair and adequate compensation for his injuries.

$ 18,000,000.00 (in numbers)
Eighteen million dollars (in words)

* * *

Question 4

Does the jury unanimously find that David Meehan has proven, that he is entitled to enhanced compensatory damages?

✓ Yes ______ No

INSTRUCTION
If your answer to Question 4 was "No," skip Question 5 and go on to Part IV.   **If you answer to Question 4 was "Yes," please answer Question 5.**

* * *

Question 5

6. Please state the full amount of money (in words and numbers) that the jury unanimously finds as enhanced compensatory damages.

$ 20,000,000.00 (in numbers)
Twenty million dollars (in words)

PART IV (Apportionment)

Question 6

(Do not answer any questions in this Part IV (e.g., Questions 6, 7, 8 and 9 if your answer to either Question 1 or Question 2 was "No.")

With respect to only those injuries for which you have found DHHS liable,

Were David Meehan's injuries caused by DHHS's knowing and active participation with others in a common plan or design that caused harm to David Meehan.

__✓__ Yes, as to all injuries for which DHHS is liable

________ No, as to all injuries for which DHHS is liable

________ Yes, as to one or more but not all of the injuries for which DHHS is liable.

Explanation

A defendant is liable for 100% of the monetary damages for injuries caused by its knowing and active participation with others in a common plan or design that caused harm to the plaintiff. Please also see the explanation following Question 9.

Instruction

If you answered "Yes, as to all," skip Questions 7, 8 and 9 and go on to Part V of this verdict form.

If you answered "No, as to all" skip Question 7 and go on to answer Question 8.

If you answer "Yes, as to one or more," go on to answer Question 7.

* * *

Question 7

(Answer only if the answer to Question 6 was "Yes, as to one or more.")

Viewing all of the plaintiff's injuries for which DHHS is liable as a whole, what percentage of plaintiff's injuries were caused by DHHS's knowing and active participation in a common plan or design?

_______ %

Question 8

With respect to only those injuries for which (a) you found DHHS liable, but (b) were NOT caused by DHHS's knowing and active participation with others in a common plan or design,

Has DHHS proven by a preponderance of the evidence that any of the conduct (acts and omissions) of any of the following individuals was also a substantial factor in bringing about the injuries:

Bradley Asbury	____ Yes ____ No
Frank Davis	____ Yes ____ No
Jeffrey Buskey	____ Yes ____ No
Stephen Murphy	____ Yes ____ No
James Woodlock	____ Yes ____ No
Richard Brown	____ Yes ____ No
Gordon Thomas Searles	____ Yes ____ No

Instruction

If you answered "No" with respect to all seven of these individuals, please skip Question 9 and go to Part V.

If you answered "Yes" with respect to one or more of these individuals, please go on to Question 9.

QUESTION 9

With respect to only those injuries for which (a) you found DHHS liable, but (b) which were NOT caused by DHHS's knowing and active participation with others in a common plan or design,

What is the proportionate share of fault in brining about the injuries that you attribute to each of the following entities and individuals. You must state your answer in percentage terms. The total number must equal 100%.

Please place a zero or the abbreviation "N/A" (for not applicable) for individuals whose conduct you did not find, in response to Question 7, to be a substantial factor in brining about any of the injuries.

Name	Percentage
DHHS	%
Bradley Asbury	%
Frank Davis	%
Jeffrey Buskey	%
Stephen Murphy	%
James Woodlock	%
Richard Brown	%
Gordon Thomas Searles	%
ALL TOGETHER	**100%***

*Of that portion of plaintiff's compensable injuries that was not the result of DHHS's knowing and active participation in a common plan or design that caused harm to the plaintiff.

EXPLANATION

For injuries that were not caused a defendant's active and knowing participation with others in a common plan or design that caused harm to the plaintiff:

The defendant is liable for 100% of the monetary damages if the defendant's proportionate share of fault is 50% or greater.

However, if the defendant's proportionate share of fault is less than 50%, the defendant is liable for only its proportionate share of the monetary damages based on fault.

Verdict Form
David Meehan v. N.H. DHHS, 217-2020-CV-00026

Part V

Question 10

How many "incidents" does the jury unanimously find the plaintiff has proven by a preponderance of the evidence. For the purpose of this instruction an "incident" is a:

(a) single episode during which the plaintiff was injured;

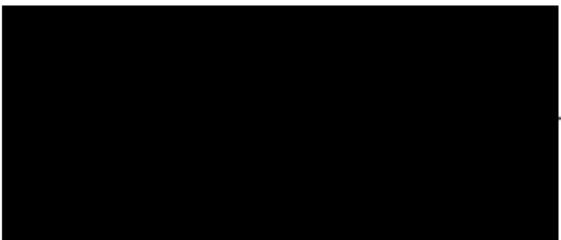
(b) for which injuries the jury has found DHHS liable in response to previous questions;

(c) on claims the jury found to be timely claims in response to question 1.

1 (numerals)

One (words)

DATE: 5/3/2024



1 STATE OF NEW HAMPSHIRE

2 ROCKINGHAM COUNTY SUPERIOR COURT

3

DAVID MEEHAN,) Superior Court Case No.
4) 217-2020-CV-00026
Plaintiff,)
5) Brentwood, New Hampshire
vs.) April 25, 2024
6) 9:37 a.m.
STATE OF NEW HAMPSHIRE, ET)
7 AL.,)
)
8 Defendants)
______________________________)
9

JURY TRIAL
10 BEFORE THE HONORABLE ANDREW R. SCHULMAN
JUDGE OF THE SUPERIOR COURT
11

APPEARANCES:
12

For the Plaintiff: Cyrus Rilee, Esq.
13 RILEE & ASSOCIATES, PLLC
264 South River Road
14 Bedford, NH 03110

15 Dennis Ducharme, Esq.
DUCHARME RESOLUTIONS
16 20 Market Street, #206
Manchester, NH 03101
17
David Vicinanzo, Esq.
18 Mark Knights, Esq.
Daniel Deane, Esq.
19 NIXON PEABODY, LLP
900 Elm Street, #1400
20 Manchester, NH 03101

21 For the Defendants: Martha Gaythwaite, Esq.
VERRILL DANA
22 One Portland Square
Portland, ME 04101
23

24

25

For the Defendants:	Brandon Chase, Esq. Catherine Denny, Esq. NEW HAMPSHIRE DEPARTMENT OF JUSTICE 1 Granite Place Concord, NH 03301
Audio Operator:	Electronically Recorded by Vaughn Castora
TRANSCRIPTION COMPANY:	eScribers, LLC 7227 N. 16th Street, Suite 207 Phoenix, AZ 85020 (800) 257-0885 www.escribers.net

Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

WITNESS(ES)	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE PLAINTIFF:				
Daphne Glindmeyer	6	34	68	74
Mary Salerno	106	171	197	

WITNESS(ES)	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE DEFENDANTS:				
NONE				

MISCELLANEOUS	PAGE
NONE	

EXHIBITS	ID	EVD
NONE		

1 charge conference next week or tomorrow?
2 THE COURT: I think the charge conference will be
3 next week. These are really difficult instructions to write.
4 But I don't know, we'll see.
5 MR. VICINANZO: Well, if we're operating within the
6 475 cap, which we are, obviously.
7 THE COURT: Per incident you are.
8 MR. VICINANZO: Per incident, then I think the, the,
9 the issue of fine tuning early in the beginning and then Dr.
10 Kupers' chart, I mean, our view is that the anal rape of a
11 child is worth a lot more than 475 and I don't -- to us
12 anyway, the micromanaging within that 475 --
13 THE COURT: Well, your problem is this. Your
14 problem is if there was one incident, I don't want to single
15 out one of the criminal people. But if the first incident,
16 which was the Frank Davis incident, was the only incident, he
17 went home the next day. I mean, the jury came back --
18 MR. VICINANZO: Yeah.
19 THE COURT: -- hit 475.50, you wouldn't get the 50.
20 MR. VICINANZO: Right.
21 THE COURT: Because there's the cap. So --
22 MR. VICINANZO: No. But I'm just saying that I
23 understand your difficulty in thinking this all through, but I
24 mean, from our perspective, it's very much an exercise in
25 rough justice. It has to be because there are so many

1 instances in this case. At the same time, we take the
2 position there's no free rapes. They all count.
3 THE COURT: But why if the jury says the first one
4 was a million dollars, the second one was three quarters of a
5 million dollars, the third one was 300,000 dollars, and after
6 that, five bucks each.
7 MR. VICINANZO: But why would the jury do that? I
8 mean, if they know the cap is 475 so.
9 THE COURT: I don't know. They don't know.
10 MS. DENNY: No.
11 MR. VICINANZO: Well, why would they not know the
12 law?
13 THE COURT: They don't know the cap. The jury never
14 gets the cap. What the jury will get --
15 MR. VICINANZO: Can I ask why that is? I mean, the
16 jury should know the law. Why would we do something --
17 MR. CHASE: They never do.
18 MS. GAYTHWAITE: They never get the cap.
19 MR. VICINANZO: Produce such distortion?
20 THE COURT: They never they never get the cap.
21 They're told, come back with the actual amount of damages.
22 And it's interesting because they do get there's a
23 surprisingly not huge amount of DiBenedetto instructions going
24 around. But for comparative, they are told 51 percent liable
25 for everything, 50 percent liable for 50 percent. I don't

1 know why they're told that, but that's standard.
2 MR. VICINANZO: Yeah. Can I ask you to rethink
3 that, Judge? And I mean, I know that that they say everybody
4 does it, but why? What is the reason? Why would the jury not
5 be told? Why would such vital information be withheld from
6 them and create a situation in which their -- what they think
7 they're doing is going to actually be very distorted because
8 they don't have the knowledge of what the law says?
9 THE COURT: I am happy to rethink it.
10 MR. VICINANZO: Please. I ask you to.
11 THE COURT: I'm happy to rethink it.
12 MR. VICINANZO: Thank you.
13 THE COURT: I'm happy to rethink it with an open
14 mind. But I will say this, that we ask juries to decide cases
15 based just on the facts and the law, and to come up in damages
16 with the number that's full, fair, adequate period without
17 reference to anything else.
18 MR. VICINANZO: Right. And --
19 THE COURT: And come up with a number and then the
20 law works its magic just like we have --
21 MR. VICINANZO: And in almost every case that's
22 fine. But in cases involving the State that's different.
23 Sure, if it's Purdue or if it's Doctor So-and-so's office,
24 who's the defendant, nobody cares because there is no cap.
25 But in the case where there is a cap and the jury's got to

1 work within the cap --
2 THE COURT: But we don't --
3 MR. VICINANZO: -- why would the jury be deprived
4 that information?
5 THE COURT: We don't tell juries in first degree
6 murder cases, first degree life without.
7 MR. VICINANZO: No, I know. But I don't think I
8 honestly don't see the analogy. They're being asked to decide
9 what the penalty is here. They're asked what is a rape worth?
10 And if they if they, they think it's a million but they know
11 475 is the max, why aren't they allowed to go to the 475?
12 MR. CHASE: I think this goes to the heart of the
13 lively charging conference we're going to have.
14 THE COURT: Right.
15 MR. VICINANZO: Yes.
16 THE COURT: I think it does. I think we should wait
17 as opposed to --
18 MR. VICINANZO: But you know, Judge --
19 MR. CHASE: To put this on the record.
20 MR. VICINANZO: -- you said numerous times that
21 you're generally in favor of giving a jury more information.
22 THE COURT: Yes.
23 MR. VICINANZO: Can we think about this? Because
24 just because somebody says that it's been done this way
25 before --

1 MR. CHASE: We would object to that.
2 MR. VICINANZO: What is the rationale? And I think
3 there is a very good rationale for why that, if there is such
4 a rule or practice, why it should be abandoned, why shouldn't
5 the jury know? Why should we create a distorted process?
6 MR. CHASE: We'll provide case law on that.
7 THE COURT: All right. The other thing that you
8 guys could do. I can't do this. I cannot do this.
9 MR. VICINANZO: Yeah.
10 THE COURT: They can't do it. I don't think the
11 Supreme Court can do it. I don't know that you want to do it.
12 You can make life simple by just saying whatever they find --
13 I mean, they will be asked, did this incident occur?
14 Whatever, they find a number of incidents, take the total
15 number divide, see if that reaches the cap. I have a problem
16 with that because that's not the way the law works. But you
17 can always agree to that for the purpose of getting simplified
18 instructions. Just --
19 MS. DENNY: Understood, Your Honor.
20 THE COURT: All right.
21 THE BAILIFF: All rise.
22 (Recess at 12:24 p.m., recommencing at 1:08 p.m.)
23 THE COURT: (Audio begins midsentence.) -- exhibits
24 are. I could get the latter, but I don't have my own set of
25 exhibits. I can become involved when you need me to. Plus,

CERTIFICATE

I, Brittani Rolf, 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): Melissa Reid, CDLT-266

BRITTANI ROLF

Proofreader

May 23, 2024

1 STATE OF NEW HAMPSHIRE

2 ROCKINGHAM COUNTY SUPERIOR COURT

3

DAVID MEEHAN,	) Superior Court Case No.
4	) 217-2020-cv-00026
Plaintiff,	)
5	) Brentwood, New Hampshire
vs.	) May 3, 2024
6	) 9:08 a.m.
STATE OF NEW HAMPSHIRE,	)
7 ET AL.,	)
	)
8 Defendants.	)
______________________________	)

9

JURY TRIAL
10 BEFORE THE HONORABLE ANDREW R. SCHULMAN
JUDGE OF THE SUPERIOR COURT

11

APPEARANCES:

12

For the Plaintiff: Cyrus Rilee, Esq.
13 RILEE & ASSOCIATES
264 South River Road
14 Bedford, NH 03110

15 For the Plaintiff: David Vicinanzo, Esq.
Mark Knights, Esq.
16 Daniel Deane, Esq.
NIXON & PEABODY, LLP
17 900 Elm Street
Manchester, NH 03101

18

For the Plaintiff: Dennis Ducharme, Esq.
19 DUCHARME RESOLUTIONS, PLLC
20 Market Street
20 Suite 206, NH 03101

21 For the Defendants: Martha Gaythwaite, Esq.
Brandon Chase, Esq.
22 Catherine Denny, Esq.
VERRILL DANA, LLP
23 1 Portland Square
Portland, ME 04101

24

Audio Operator: Electronically Recorded
25 by Vaughn Castora

www.escribers.net | 800-257-0885

1
2 TRANSCRIPTION COMPANY: eScribers, LLC
7227 N. 16th Street, Suite 207
3 Phoenix, AZ 85020
(800) 257-0885
4 www.escribers.net

5 Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

WITNESS(ES)	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE PLAINTIFF:				
NONE				

WITNESS(ES)	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE DEFENDANTS:				
NONE				

MISCELLANEOUS	PAGE
NONE	

EXHIBITS		ID	EVD
Defendants' JJJ	Meehan timeline	19	
Defendants' KKK	Calendar	19	
Defendants' LLL	Pope PowerPoint	19	

1 (Proceedings commence at 9:08 a.m.)
2 THE COURT: Okay. Before we start up, there was, I
3 think, one from each side in before. I only printed off one
4 for each table of the verdict form, because I was just hopeful
5 that you would take a look, especially at the incident page.
6 Make sure there are no problems with it before we hand it to
7 the jury. And two, the question of the moment is whether we
8 proceed like we do in most civil cases where the jury gives us
9 the envelope, we have counsel back, it's very anticlimactic,
10 we open the envelope in chambers. Or we read what the jury
11 wrote in open court, and we have the jury come back. We would
12 do that where the judge would read the verdict. But that
13 would have been impossible with a long list of incidents, that
14 would have been insane. But if we do that, somebody judge or
15 clerk needs to read the form first to make sure that it is
16 logically coherent.
17 In other words, if there's a number written down and
18 it's spelled out T-E-N, and in numerals there is 11, we don't
19 have a verdict. And if we have percentages that add up to 113
20 rather than 100, we don't have a verdict. And if we have -- I
21 don't know. Yes on liability, but damages left out, we don't
22 have a verdict. And there's any number of logical mistakes
23 that human beings can make. So I wouldn't want to read a
24 verdict form before somebody goes through it to make sure that
25 it's coherent and make sense. Does anybody have any

1 preference for whether we do it the old fashioned way, open it
2 up with everybody all together, or open court?
3 MR. RILEE: I'd like the old fashion way.
4 THE COURT: What's that?
5 MR. RILEE: I'd like for the jury to be here and the
6 process in front of them. I personally would prefer it.
7 THE COURT: Okay. That's the newfangled way.
8 MR. VICINANZO: That's the new fashion way.
9 MR. CHASE: Your Honor, can we approach the mics for
10 just a second?
11 THE COURT: Sure.
12 MR. CHASE: So we would prefer the old fashioned
13 way, the normal way. There's been a lot of aggressive email
14 traffic directed at some of our team. And if or when the
15 public sees, again, for the jury, is we just don't want that
16 to be occurring for them. So we would prefer that the old
17 fashioned way.
18 MS. DENNY: I'm just thinking I'm getting hate
19 emails, Your Honor. And I'm concerned about the jury being
20 exposed. They've given up a lot. I really don't want to have
21 them further exposed and have their verdict. I think it's
22 just an uncomfortable, bad situation for them to be in. We
23 tried to not -- I'm hoping that their identity isn't going to
24 be ending up publicized.
25 THE COURT: Well, their identity is not -- their

1 identity is not public. It's known to you guys.

2 MS. DENNY: Correct, Your Honor, but I'm just -- if
3 the camera angle is such that we see jurors and people, I just
4 think there's some people with some very strong feelings,
5 obviously, and their hatred is spilling out.

6 THE COURT: I mean, one, the cameras know not to
7 get -- the only cameras that that are here that I know of
8 right now is MUR, and they know not to photograph jurors.
9 There was somebody from the Boston Globe who was allowed to
10 record on the phone and was told, no jurors. But in theory,
11 we know of every camera in the courtroom, whether somebody
12 comes in with a phone that we don't know about, we don't know
13 about it. How do we know about it? but I'm not so much
14 worried about that. Let me just ask you, in -- I don't know
15 why it was always done in chambers and civil cases, except
16 sometimes you get complicated verdict forms.

17 I don't know the reason why in New Hampshire history
18 that's the case. And frankly, I don't know how it works
19 everywhere else in the Country. But like juries come back in
20 murder cases where they have the Defendant, the Defendant's
21 family, the victim's family, the lawyers who may or may not be
22 invested in the case, and they give verdicts. And there are
23 people with strong feelings. Do you perceive a difference?

24 MS. DENNY: Well, just the other jurisdictions.
25 You're right, Your Honor, we don't do it in chambers, they do

1 it in open court. But if that's the tradition and practice in
2 New Hampshire, I think because of the issues that we've
3 mentioned, we'd prefer to keep it the way tradition and
4 practice is.
5 MR. VICINANZO: Can I, Judge? I can tell you, I
6 know, and of course, I have the same experience in homicides
7 and other cases. Everything's public. Everything is
8 presumptively strongly, presumptively public in a judicial
9 proceeding. But I know in federal court civil cases I've --
10 THE COURT: Names of jurors are not --
11 MR. VICINANZO: No, no, but the jury just says what
12 they -- what their verdict is. And I think it's a
13 particularly poor look for the State in a case like this to be
14 asking for more secrecy. I think that's a bad thing. I don't
15 think that helps. Doesn't help the standing of the judiciary
16 and the jury system. I have not heard articulated a real
17 reason why you should not have the jury do it in public. I
18 mean, is it would you look at the form before they actually
19 read it?
20 THE COURT: Either myself or the clerk would have
21 to.
22 MR. VICINANZO: Yeah, I think so. Yeah.
23 THE COURT: Because like, what do you do if --
24 right? I mean people are people. So anything can happen.
25 MR. VICINANZO: Yeah.

1 THE COURT: What do you do? Yes, no? And you get
2 an X in the middle.
3 MR. VICINANZO: Yeah.
4 THE COURT: And what do you do if you have
5 mathematically disinclined people, and you add it all up, and
6 it gets to 78 and a half?
7 MR. VICINANZO: Yeah.
8 THE COURT: Or it's not -- it's we do -- lawyers
9 overdo this, I think, when they're typing things up. But we
10 do write out the number and give us the number and numerals so
11 that they agree. What if they don't? And it's like that has
12 happened.
13 MR. VICINANZO: Um-hum.
14 THE COURT: Somebody needs to look at it to make
15 sure that it is coherent.
16 MR. VICINANZO: I prefer that you look at it and
17 then give it to jury to announce their verdict.
18 THE COURT: Well, I think it would be announced by
19 the clerk.
20 MR. VICINANZO: Or the clerk, sure.
21 THE COURT: Or the judge. All right.
22 MR. VICINANZO: Well, that begs another issue,
23 Judge. The instructions seem to suggest that a foreperson
24 will be chosen by random. Is that how it works?
25 THE COURT: Yes. Well, that is how -- there's not a

1 rule on it. That's how it is done almost exclusively in New
2 Hampshire.
3 MR. VICINANZO: Okay.
4 THE COURT: There's no rule on it. There had been,
5 when I started to practice, sometimes they would number one
6 would be the foreperson at random.
7 MR. VICINANZO: Um-hum.
8 THE COURT: Sometimes, which is the worst of all
9 possible systems, is the judge picks the foreperson that I
10 think is like meddling.
11 MR. VICINANZO: I generally experience that they
12 pick their own.
13 THE COURT: Yeah.
14 MR. VICINANZO: I don't know if that has downsides
15 too.
16 THE COURT: I don't know that I've ever heard that
17 done in New Hampshire.
18 MR. VICINANZO: Well I went to a federal court.
19 That's how they do that.
20 THE COURT: Yeah.
21 MR. VICINANZO: I went to a CLE once where the
22 speaker said, I think she was like criminal defense CLE, there
23 were three outcomes, guilty, not guilty, and do over.
24 MR. VICINANZO: Yeah.
25 THE COURT: Her position was get them to fight about

1 who should be the foreperson. If they spend two hours doing
2 that --
3 MR. VICINANZO: Yeah. Okay. Okay. I was just
4 asking for clarity.
5 THE COURT: No. We pick the foreperson. It random.
6 It's a voluntary position unless all 12 declined. I don't
7 think we've ever had issues with that. And random always
8 seems to be fair. People have declined. The fear is you
9 don't want the strongest voice to be the foreperson. And you
10 also don't really want the benchwarmer to be the foreperson.
11 MR. VICINANZO: No.
12 THE COURT: They may decline, but the best, the
13 fairest way to do it is randomly, because nobody's putting any
14 spin on it.
15 MR. VICINANZO: Yeah. Okay.
16 THE COURT: Yeah, that's what we do. We keep the
17 alternates around in case we need to plug them in. The
18 further deliberations gets along, the more difficult it would
19 be to plug them in. But in theory, if a juror took ill three
20 hours into deliberation, we'd have an alternate and they'd
21 have to start over again. I'm going to think about what we're
22 going to do with respect to whether we read the verdict in
23 court or not. I think it's discretionary on my part. What's
24 not discretionary is that they fill out the form the way they
25 do. Whether they'll return to the Court or not, I think is

eScribers
www.escribers.net | 800-257-0885

1 discretionary. I don't think it's going to make a difference
2 in what their verdict will be. And certainly, at least in
3 terms of the people sitting here they seem to have been mostly
4 for the most part professionals. Mainly they've been
5 attorneys for contractor Defendants.
6 MS. DENNY: Your Honor, there's a compromise
7 position. Potentially to read it in the courtroom, but not
8 make the jury have to be here.
9 THE COURT: I don't know that -- I don't know that I
10 would do that. I'm going to think about it. What weighs on
11 one side is the weight of tradition. What weighs on the other
12 side is I've always thought it's a better practice to read
13 verdicts in court. What I won't do is what we do in criminal
14 cases, which is poll the jury. I'm not going to do that. I
15 mean, they say they're unanimous, they're unanimous, because
16 that certainly been the practice in in civil cases. In
17 criminal cases, either side can ask for the jury to be polled,
18 obviously to ensure jury unanimity.
19 MS. DENNY: Right.
20 THE COURT: But I'm going to think about that.
21 Otherwise we're good and nobody has any problems with my last
22 page?
23 MR. RILEE: No, we do.
24 THE COURT: You do?
25 MR. RILEE: The problem is that using the word

1 episode undefined to define the word incident.

2 THE COURT: I know, I know.

3 MR. VICINANZO: An undefined terms defining and

4 undefined terms, and we've already argued based on the

5 instructions we had, otherwise we probably won't. I don't

6 know, I don't know which of what you're thinking, Judge, on

7 why the second thoughts, or?

8 THE COURT: On which?

9 MR. VICINANZO: On the last page there.

10 THE COURT: Oh, I don't have second thoughts. I

11 know that I'm saying incident means episode. Episode to me

12 signals some temporal beginning and end, and I don't --

13 MR. RILEE: This is the definition we gave you a

14 couple of days?

15 THE COURT: Yeah, that has the word episode in it,

16 actually.

17 THE COURT: You have distinct act, and your idea is,

18 right? If you get to distinct act, you may get to the point

19 where as, as in criminal cases, one form of sexual penetration

20 quickly followed by another form of sexual penetration re two

21 indictments.

22 MR. VICINANZO: Or how about a punch in the face --

23 THE COURT: Right.

24 MR. VICINANZO: -- first, then a penetration, then a

25 then you got three; don't you?

1 THE COURT: You do.
2 MR. VICINANZO: Why would it be different here?
3 THE COURT: I take the position that for the purpose
4 of why does a single incident in 541-B, which is a bit
5 different than the legislature's definition of the unit of
6 prosecution in 6302(a), I mean, there it's a little -- there's
7 some there's a similarity of the type of question, but it's
8 apples and oranges within those questions that a single
9 incident is an episode. And it gets -- and I have episode as
10 in curtailed in time. The sources of law are one. There is
11 some -- and I do not know the law well enough to say write an
12 appellate brief on it, but there is some law around the
13 Country on damages caps, and the word incident. And it tends
14 to go in different directions. And there's a lot of law on
15 the separate word occurrence in insurance policies, which has
16 a policy by policy definition.
17 MR. VICINANZO: Yeah.
18 THE COURT: And that's also all over the place. And
19 then there are the cases that involve relationships that go on
20 for some period of time between, say, the piano teacher and
21 the student. So there's a sexual relationship with a 14 year
22 old where under the policy, that may count as one quote,
23 unquote, occurrence as opposed to a bunch of discrete acts. I
24 personally get off the bus at, in this case where none of it
25 can be -- if what the Plaintiff says is accurate, none of it

1 could fall into that category of ongoing relationship. I kind
2 of get off the bus at saying each incident, whether it's a
3 kick, a punch, and a sexual assault, or just a kick, or 27
4 punches, each incident is a single incident for the purposes
5 of a damages cap. If the State were to be sued because some
6 madman walks in here and I was going to say shoots people
7 dead. The problem with that is you only have one act, but I
8 don't know. I beat somebody up, I don't know, somebody comes
9 in beats up a litigant in several different ways. And on the
10 way out, steals his wallet. And the State sued under some
11 failure to protect. I would say that's one single incident.
12 You disagree and you disagree. You say, what's an
13 incident is dependent on, at least to some extent, on the
14 nature of the cause of action. And the cause of action is the
15 breach of fiduciary duty. And it's a continuing tort that
16 results in multiple injuries. And your position, State's
17 position, is not without some support in the case law, and
18 your position is not without some support. And my position is
19 the middle position. If you take my middle position and if
20 you say -- if you just take my middle position, which is the
21 reason why I define it as episode, and the reason I don't
22 define episode further is because I think that there's a
23 question of fact sometimes as to when an episode begins and
24 when an episode ends.
25 MR. VICINANZO: Yeah.

eScribers
www.escribers.net | 800-257-0885

1 THE COURT: You could have an episode that lasts
2 multiple days, if you're right on the confinement claim with
3 respect to lack of toilet facilities, and that lasts two days,
4 that's probably one episode. Most of these are when the
5 episode begins and ends are pretty clear cut.
6 MR. VICINANZO: Well, if I just can anticipate. So
7 the jury comes back with a question and says, well, if there's
8 a beating first and then there's a rape, is that two
9 incidences or one? How do we answer that? Which it seems
10 likely that that would be -- they would come back with that
11 because we're all thinking about it.
12 THE COURT: Right.
13 MR. VICINANZO: How do we answer it? That does not
14 seem to make it clearer in my view, but I --
15 THE COURT: I mean, I would answer that as if
16 they're temporarily -- if they are occur within the same
17 narrow time frame as part of a single course of conduct, I
18 would say one. I don't think it's worthwhile for our purposes
19 here, which is just the damages cap to really get in to
20 defining episode, a little bit what it is like.
21 MR. VICINANZO: Okay.
22 THE COURT: And the reason it gets a little bit
23 squishy is just like here. This is something you're way more
24 familiar with than me. But like, if you want a bad analogy,
25 right, armed career criminal, you need prior offenses that

1 were not part of the same --

2 MR. VICINANZO: Same bank robbery.

3 THE COURT: Yeah. It can't be part of the same bank

4 robbery. But what if you rob two banks in one day?

5 MR. VICINANZO: Yeah.

6 THE COURT: And the federal courts put themselves in

7 a pretzel with that.

8 MR. VICINANZO: That's one way of looking at, but

9 the other way to look at it is actually separate harms.

10 Obviously, a broken nose and a rape are two separate harms to

11 the victim.

12 THE COURT: But it doesn't talk about separate

13 harms. I mean 541-B.

14 MR. VICINANZO: Separate torts, that is another

15 tort. The injury is what defines the tort or delineates the

16 tort. Duty breach cause harm. There is no tort until there's

17 a harm. There's a harm with a broken nose. And then there's

18 three minutes later, 20 minutes later, harm with the rape.

19 MR. CHASE: For brevity's sake. I mean, this was

20 the argument that you made, I guess, yesterday and a couple

21 other days. I made a different argument, the judge came with

22 a third position.

23 THE COURT: Yeah, I think that --

24 MR. VICINANZO: That wasn't very helpful because

25 we're talking about this here.

1 THE COURT: We're talking about the verdict forms.
2 But I think your argument's preserved. I think the State's
3 arguments preserved.
4 MS. DENNY: Thank you.
5 THE COURT: And I do think that the verdict form
6 ultimately is just keyed in to this one issue. And I don't
7 know, my sneaking suspicion is if they get as far as question
8 10, they have to get over all the other questions first. The
9 number of incidents is unlikely to matter given the State's
10 position that it's 475 per incident.
11 MR. VICINANZO: Yeah, I understand that.
12 THE COURT: It doesn't take terribly many incidents
13 before you're into scientific notation.
14 MR. RILEE: Your Honor, there was one typo in your
15 instruction. If you could show me.
16 THE COURT: It's on the verdict form.
17 MR. RILEE: Yeah. I'm sorry. Does the jury
18 unanimously -- unanimously jury.
19 THE COURT: Oh, sorry.
20 MR. RILEE: Yeah. So it should be unanimous, not
21 unanimously.
22 THE COURT: Does the jury --
23 MR. RILEE: unanimous jury.
24 THE COURT: Yeah. Okay. I will fix that.
25 MR. RILEE: That's everything.

1 THE COURT: And then they'll get the verdict form.
2 Yeah.
3 MR. KNIGHTS: Yeah, just a suggestion on question
4 10. I find the language of C, and I can give that to you, if
5 you need a correct copy to look at. I find the language of C
6 a little confusing just because it's so lengthy. And I'm
7 wondering if there's a way to short that -- shorten that in a
8 way that says sort of parallels A and B, it says for which the
9 Plaintiff's claims arising from such episode are timely.
10 MR. VICINANZO: For which one?
11 MR. KNIGHTS: For which the Plaintiffs claim arising
12 from such episode are timely.
13 THE COURT: For which the Plaintiff's claims are
14 timely --
15 MR. CHASE: It just has to relate back to question
16 one.
17 THE COURT: More timey, it just has to relate back
18 to -- it has to say in response to question one.
19 MR. KNIGHTS: Okay.
20 THE COURT: So it just has to say, hey, this is with
21 respect -- okay.
22 MR. KNIGHTS: Very good.
23 THE COURT: Good. All right. So we are at long
24 last set? And Vaughn, I'll have to make those changes to the
25 verdict form before we can give it to the jury.

1 THE BAILIFF: Are you ready for the jury?
2 THE COURT: Yes.
3 MR. CHASE: And Your Honor, while the jury is
4 getting ready, we had three exhibits that just needed to be
5 tagged for ID.
6 THE COURT: Okay.
7 MR. CHASE: So I just want to read for the record.
8 So what is the letter?
9 MS. DENNY: JJJ, KKK, LLL.
10 MR. CHASE: so JJJ is the Meehan timeline that was
11 used in closing. KKK is the calendar for April to June 1998
12 used in closing. And then LLL is the Pope PowerPoint.
13 (Defendants' Exhibits JJJ, KKK, LLL marked for
14 identification)
15 THE COURT: Okay. So those can all be for ID. Do
16 you need to make the big ones for ID?
17 MR. CHASE: They are.
18 THE COURT: Okay.
19 MR. CHASE: Yeah. That's what we just did.
20 THE COURT: Okay.
21 MR. CHASE: We're being efficient this morning.
22 THE BAILIFF: Please rise to the jury.
23 (Jury in at 9:30 a.m.)
24 THE COURT: Please be seated. Possibly for the last
25 time. Has anybody discussed the case, been exposed anything

1 about the case, or been approached about the case?
2 Okay. I don't know if any of you own businesses or
3 hire employees, but if your employees showed up as late for
4 work as we're showing up for you. Well, they'd probably all
5 be fired. So we are very appreciative of your patience. I'm
6 going to pick up from where we left off yesterday. Hopefully,
7 you recall yesterday's instructions, but you'll get them in
8 writing and you'll extra copy or so as well.
9 I want to speak to you about damages. You can
10 consider the question of damages only if you unanimously find
11 that DHHS is liable to the Plaintiff. So first you have to
12 address limitations, then you go on to liability if the claims
13 are timely, then you would go on to damages, if you find
14 liability. Understand that every civil jury trial, the judge
15 instructs the jury on both liability and damages before the
16 jury begins to deliberate. So the fact that I'm giving you
17 instructions on damages must not be taken as an indication as
18 to whether I think you should or should not reach the question
19 of damages. Mr. Meehan has the burden to prove that it's more
20 probable or not, that the damages he seeks were caused as a
21 result of DHHS's legal fault, that is, by negligence and or
22 breach of fiduciary duty. He has the burden to prove the
23 extent and the amount of those damages.
24 An injury or any other type of harm is caused by a
25 Defendant's legal fault if the Defendant's legal fault was a

1 substantial factor in bringing about the injury or harm. And
2 you see certain concepts repeated through these instructions,
3 causality is almost always substantial factor causality.
4 Damages should be awarded for an injury caused by the
5 Defendant's legal fault, even if the injury was more severe
6 than could have been foreseen. In determining the amount of
7 damages, you may draw such inferences as are justified by your
8 common experiences and the observations of mankind from the
9 evidence of the nature of the injuries and the results
10 thereof.
11 Now, the amount of damages must be full, fair, and
12 adequate. In many ways, the damages instruction could stop
13 there. It goes on and there's more detail, but really, it's
14 just explaining full, fair and adequate. It must not be cheap
15 and miserly, nor should it be a reward or a prize. The
16 Plaintiff is entitled to be fully compensated for harm
17 resulting from the Defendant's legal fault. Damages are
18 not -- I go off script for a moment just to remind you,
19 they're not to send a message. They're not to punish anybody.
20 They're to be full, fair, and adequate. Monetary damages can
21 only be awarded to compensate the Plaintiff for injuries
22 incurred as a result of the Defendant's legal fault. The law
23 cannot do the impossible by turning back the clock and
24 eliminating the injury or harm from having ever occurred. It
25 does provide a means by which a Plaintiff can be made whole by

1 awarding full, fair, and adequate compensation. Monetary
2 damages cannot be awarded to punish the Defendant or to make
3 an example of the Defendant. Thus, you cannot award punitive
4 damages in this case.
5 You need to avoid speculation. The Plaintiff must
6 establish the amount of money representing adequate
7 compensation, which as much certainty as the circumstances
8 permit. The law does not require mathematical certainty in
9 computing damages, but you may not indulge in speculation or
10 conjecture. Now I'm going to go through the categories of
11 damages that you may consider, but you're not required to
12 compensate the Plaintiff for any of these categories simply
13 because I list it, or because I explain how to measure it.
14 For each category that the Plaintiff claims, the Plaintiff
15 must prove that it's more probable than not, that's the
16 preponderance standard again, that the Plaintiff has such loss
17 or harm, and that the loss or harm was caused by the
18 Defendant's legal fault. If you decide that the Plaintiff has
19 proven these two matters to be more probable than not, then
20 you must decide how much money will fully, thoroughly, and
21 adequately compensate the Plaintiff for each of those items of
22 loss or harm.
23 In awarding damages, the following categories can be
24 considered. Future medical expenses the reasonable value of
25 future medical care, medical services, including mental health

1 treatment, medications, and supplies. Now, Mr. Meehan has not
2 made a claim for past medical expenses. We don't have medical
3 bills or anything like that before us. Therefore, you cannot
4 award damages for past medical expenses. But there has been
5 some evidence that there may be future medical expenses. Lost
6 income and lost earning capacity. You may award monetary
7 damages to compensate Mr. Meehan for lost income and lost
8 earning capacity. Such damages are measured by the value of
9 any income that Mr. Meehan probably would have earned, but did
10 not earn, or will not earn, as a result of DHHS's negligence.
11 Mr. Meehan has the burden to prove his lack of
12 earning capacity. It is up to you to decide whether he's
13 proven a total lack of earning capacity, a partial lack of
14 earning capacity, or no reduction in his earning capacity. If
15 you find that Mr. Meehan has proven that he will not fully
16 regain his earning capacity in the future, then you may award
17 damages for lost income in the amount you find he would have
18 probably earned but will not earn as a result of DHHS
19 negligence and or breach of fiduciary duty.
20 Now, the next two categories of damages are pain and
21 suffering and hedonic damages. These are noneconomic damages,
22 meaning that there's not a set mathematical way to measure
23 that. Pain and suffering. You may award monetary damages for
24 reasonable compensation for any pain and suffering that Mr.
25 Meehan experienced or is likely to experience in the future.

1 This includes compensation for physical pain, discomfort,
2 fears, anxiety, and mental, and emotional distress. No
3 definite standard or method of mathematical calculation is
4 prescribed by law by which to fix reasonable compensation for
5 pain and suffering. Nor is the opinion of any witness
6 required as to the amount of such reasonable compensation. In
7 making an award for pain and suffering, you should exercise
8 your reasonable judgment, and the damages that you determine
9 have to be full, fair, and adequate in light of all the
10 evidence.
11 Next, hedonic damages. One of the lawyers, I
12 forget, who explained the derivation of the word hedonic is
13 same as hedonism, enjoyment, or happiness. That's the root of
14 the word. It's like a $5 word. But what it means is that you
15 may award damages for reasonable compensation for any loss of
16 enjoyment of life that Mr. Meehan experienced or is likely to
17 experience in the future. That is the inability to carry on
18 and enjoy life as if the injury or harm had not occurred.
19 This category of damages is separate and distinct from claims
20 of conscious pain and suffering. I'm just going to give you a
21 little bit of an example to clarify this, because it's hard
22 sometimes to figure out how is pain and suffering different
23 from hedonic damages?
24 Let's say in a non -- nobody's at fault situation, I
25 roll my ankle, I twist my ankle, and I'm on crutches for a

1 while, and I have pain, and I go home, and I'm on ice and it
2 hurts. But that's all sort of pain and suffering. It's hurt
3 that I didn't have before, when I put any pressure on the
4 foot, I get a sharp pain. But let's say that I planned to go
5 hiking with friends this weekend, and I can't hike because I'm
6 on crutches because I rolled my ankle. Now I'm not enjoying
7 my hike. And you can have, say, a physical injury to a leg
8 that could go on for quite some time, and somebody's not able
9 to enjoy whatever activities they used to do. And that's
10 different from the pain and suffering that they're going
11 through. So they're similar but distinct concepts.
12 I need to speak to you about the duty to mitigate
13 damages. A person who has been injured through the fault of
14 another is obligated to use reasonable efforts without undue
15 risk, expense, or humiliation to care for his physical and
16 mental injuries. And reasonable means to prevent their
17 aggravation and to accomplish healing. So a Plaintiff may not
18 recover for damages that he could have prevented by making
19 reasonable efforts without undue risk, expense, or
20 humiliation. A Plaintiff may, however, recover expenditures
21 reasonably incurred to avoid or minimize damages. Now, when a
22 Plaintiff does not use reasonable efforts to care for his
23 physical or mental injuries, and those injuries are aggravated
24 as a result of such failure, the Defendant's responsibility is
25 limited to the amount of damage that would have -- that he

1 would have suffered had the Plaintiff exercised the effort
2 required of him.
3 The fact that a competent physician or therapist
4 advised the person to submit to a course of treatment does not
5 require an inference that the injured person was unreasonable
6 in declining such treatment. Other factors as confronted the
7 injured person must be considered in determining whether,
8 although he refused or failed to follow the physician's or
9 therapist's advice, he nevertheless exercised reasonable
10 efforts in caring for himself and his injuries. You should
11 not include in the verdict such damages, if any, that the
12 Plaintiff could have avoided by reasonable effort without
13 undue risk, expense, or humiliation.
14 I want to speak to you about a preexisting
15 conditions and aggravating preexisting conditions. Evidence
16 was presented that Mr. Meehan may have had a prior emotional
17 injury and or mental health condition at the time he first
18 became a resident at YDC. A Plaintiff is not entitled to
19 recover damages for a condition or disability that he already
20 had before the injury at issue occurred. However, he is
21 entitled to recover damages for aggravation of a preexisting
22 condition that was caused by the Defendant's legal fault.
23 This is true even if the person's condition made him more
24 likely to experience ill effects than a normally healthy
25 person would have been. And even if a normally healthy person

1 would have not suffered any injury at all, if you find that an
2 existing condition is aggravated by the Defendant's legal
3 fault, the damages are limited to the additional damage caused
4 by its aggravation.
5 Now, there's one thing that you can't do, and that
6 is what's called a quotient verdict. In awarding damages, you
7 must each make a judgment as to what amount will fully,
8 fairly, and adequately compensate the Plaintiff for the losses
9 you find he's incurred. So each of you need to make up your
10 own mind. You are not allowed to average. That is, add up
11 the damages, and then divide by 12, and agree that that will
12 be your verdict. So you can't just take the average of what
13 everybody thinks. Everybody has to think for themselves, and
14 you have to reach unanimity on a number. I'm not saying
15 necessarily that that's easy, but that is what the law
16 requires.
17 Okay. The next portion of the instruction deals
18 with apportionment of damages. And this can be an abstract
19 instruction. And I'm going to use an example to help bring it
20 to life. A Plaintiff's injury may be the result of legal
21 fault on the part of multiple parties. Consider this example.
22 It's a motor vehicle example, as I say, I try and pick
23 examples that have nothing to do with the case at hand.
24 Driver A is in the lead car in front. Driver A brakes
25 suddenly because he's confused about whether to take the next

1 exit. He's the guy in front of you on 101. As you're driving
2 by, driving who all of a sudden goes really slow out of
3 nowhere, brake lights go on. Driver B is immediately behind
4 driver A. Driver B is going a safe and reasonable speed and
5 keeping a proper distance from driver. Driver B is blameless
6 in about what's to occur. When driver A brakes, driver B must
7 break. Guy in front of you brakes, you brake.
8 Driver C is behind driver B, he is playing with his
9 phone and does not see that the cars ahead of him have slowed
10 down. Driver C rear ends driver B, causing injuries to driver
11 B. So the guy in front of you slows down out of nowhere. You
12 slow down, unfortunately, the guy behind you is playing with
13 his phone, doesn't see it, and rear ends you, and you get
14 injured. In this hypothetical example, a jury could find that
15 both drivers A and C were negligent and therefore legally at
16 fault for injuries to driver B. In a case in which more than
17 one person or entity is at fault for a Plaintiff's injury, the
18 jury is asked to apportion fault among the responsible
19 parties. And I should add, it's not in the form whether they
20 are Defendants or not.
21 A Defendant who is less than 50 percent at fault is
22 responsible for only that Defendant's proportionate share of
23 the damages based on fault. A Defendant who is 50 percent or
24 more at fault is responsible for 100 percent of the damages.
25 So to return to my example, imagine that driver B sues drivers

1 A and C. So in my example, A and C are both named Defendants,
2 but they don't have to be. Imagine further that the jury
3 finds both Defendants are legally at fault, and that the total
4 amount of damages is $100. Finally, imagine the jury finds
5 driver A, the lead driver is 49 percent at fault, and driver C
6 the rear car is 51 percent at fault. Driver A would have to
7 pay $49. That's 49 percent of the damages. It's his share.
8 He's less than 50 percent at fault. He pays his proportionate
9 share based on fault.
10 Driver C, however, would be liable for the full
11 $100, but he'd be entitled for a set off for what driver A
12 actually paid. The fancy words for this is that driver's seat
13 would be jointly and severally liable, but all you need to
14 know is 50 percent or more equals 100 percent of the damages.
15 There is one exception to this rule. So if it's not already
16 complicated, I'm going to complicate it.
17 There is one exception to this rule. If a Defendant
18 was a knowing and active participant in a common plan or
19 design that caused harm to the Plaintiff, then that Defendant
20 is liable for 100 percent of the damages, regardless of the
21 degree of fault for each participant in the plan. Knowing an
22 active participant in a common plan or design. I'm going to
23 return to my hypothetical. It's going to become clearer.
24 Imagine that driver's A and C, lead car, and the car behind,
25 were both angry at driver B, and they decided they'd hassle

1 driver B by slamming on their brakes and following too close.
2 So they're both playing a game with the driver in the middle,
3 and as a result of their common plan that they're both
4 participating in, knowingly, the guy in the middle gets hurt.
5 Both drivers would be jointly and severally liable for one
6 hundred percent of the damages.
7 Knowing and active participation in a common scheme,
8 I'm off script for a second. Doesn't require like an
9 agreement in writing. It doesn't require an express
10 agreement, but it requires a common plan or design, and
11 knowing an active participation. In this case, DHHS, the only
12 Defendant who's in court, claims that the following
13 individuals are also at fault for the Plaintiff's injuries.
14 Brad Asbury, Frank Davis (phonetic), Jeff Buskey, Stephen
15 Murphy (phonetic), James Woodlock (phonetic), Richard Browns
16 (phonetic), Gordon Thomas Searles (phonetic). Ordinarily, I'd
17 say the names over again, but you're going to get them.
18 You've heard them through this trial.
19 Now, DHHS says that these individuals have some
20 fault in bringing about the Plaintiff's injuries. DHHS has
21 the burden to prove by a preponderance of the evidence, that
22 one or more of these individuals was also responsible for
23 Plaintiff's injury, and also the degree of fault that's
24 properly attributable to all individuals at fault. So the
25 burden of proof for this particular issue, and only this issue

1 falls on DHHS. On all of the other issues that I've discussed
2 so far, and I'm going to discuss further on, Mr. Meehan has
3 the burden of proof. But on this one it's reversed because
4 DHHS is the party that would -- is the party claiming that
5 these individuals share some of the fault.
6 Now, so if you find DHHS to be legally at fault, you
7 will have to determine the following questions. One, the
8 extent to which, if any, and understand I'm instructing you
9 always in the hypothetical, I'm not suggesting anything about
10 the facts. The extent to which, if any, that Plaintiff's
11 injury was caused by DHHS active and knowing participation in
12 a common plan or design with any of those individuals. If
13 there's a common plan or design that answers one of the
14 questions. Two, whether any of the individuals named above
15 were also at fault for Plaintiff's injuries. And then three,
16 viewing Plaintiff's compensable injuries as a whole, the
17 specific percentage of fault for DHHS and each of the
18 individuals, if any, who you also find to be at fault, and the
19 total percentages must add up to 100. This is explained
20 further, actually in the verdict form, and I just want to put
21 a pin in these three questions because they're asked in the
22 verdict form. And I just think it will be less complicated if
23 we give you the extra wrinkle as we read the verdict form.
24 It's right in there.
25 All right. New topic. We're nearing the end.

1 Enhanced compensatory damages. New Hampshire law does not
2 allow punitive damages. Therefore, you cannot award damages
3 to punish or make an example of DHHS. But in certain
4 circumstances, the law permits you but does not require you to
5 consider an award of additional damages to reflect aggravating
6 circumstances. These damages are called enhanced compensatory
7 damages. Enhanced, greater than, compensatory, still
8 compensation damages. You may award enhanced compensatory
9 damages only if Mr. Meehan has proven, by a preponderance of
10 the evidence that DHHS conduct was wanton, malicious, or
11 oppressive. Wanton means reckless indifference or disregard
12 of consequences. Malicious means ill will, hatred, hostility,
13 or bad motive. Oppressive means abuse of power.
14 Now, just to state the obvious, abuse of power does
15 not mean simply that it's a government agency on the other
16 side of the V. It means abuse of power by the government
17 agency, not merely that it acted negligently, but abuse of
18 power. I need to instruct you on some things that can't be
19 considered on the issue of damages. You have to determine the
20 amount of damages based solely on the evidence in this case.
21 You cannot consider, discuss, or speculate on any events, any
22 factors, any possibilities, or any matters not admitted in
23 evidence. In short, your job is to adjudicate without any
24 worry about anything else other than the facts and the law.
25 The rules of evidence prohibit either party from introducing

escribers
www.escribers.net | 800-257-0885

1 into evidence the existence or nonexistence of insurance
2 coverage. This includes health insurance, disability
3 insurance, liability insurance, motor vehicle insurance,
4 worker's compensation benefits, unemployment compensation, you
5 name it. No inference may be drawn from the failures of the
6 parties to mention the existence or nonexistence of insurance
7 coverage. Generally, the word insurance is off limits in
8 civil cases for injury.
9 Likewise, you may not consider or speculate on
10 whether the Plaintiff has received benefits from other sources
11 in connection with the alleged injury or harm. This includes
12 health insurance coverage. Any benefits through the VA. I
13 don't think there's any evidence of -- that Mr. Meehan was a
14 veteran, but still, this is the standard instruction, or any
15 other insurance benefits. The law does not permit you to make
16 any deduction from the Plaintiff's damages to reflect benefits
17 that he may have received from other sources. This is so
18 because the Plaintiff may be required to pay such other
19 sources from any award made in this case. Your duty is to
20 determine damages based only on the evidence presented at
21 trial and the legal instructions I give you.
22 You may not consider any publicity, any
23 advertisements, or any news articles about lawsuits in
24 general, or the effect, if any, that your verdict might have
25 on others straight out of the standard instruction. You are

1 not to consider the effect that your verdict might have on
2 others. We are not in the message sending business. We are
3 in the adjudication business. The amount of damages suggested
4 by counsel is not evidence. A specific request for a total
5 dollar amount made by Plaintiff's counsel is simply a request
6 for a recovery. In the event you find for the Plaintiff, the
7 amount of the verdict must be based solely on the evidence
8 presented during the course of trial and the law which I have
9 given you.
10 In conclusion, let me say this case is important to
11 all of the parties. The principles of law that I've given you
12 are intended to guide you in reaching a fair result. You are
13 to exercise your judgment and common sense with honesty,
14 understanding, and due deliberation. And as I said before,
15 you should decide the case without fear, without passion,
16 without prejudice, and without sympathy. We spent a
17 considerable amount of time selecting the jury, and as you
18 will recall, the formulation that I used was the one in the
19 New Hampshire Constitution. We select jurors and judges as
20 far as the lot of humanity will allow. That's what it means.
21 Without prejudice, without passion, without fear, and without
22 sympathy. We need to consider the motivations and the
23 emotions of the people in the case. But we do not put
24 ourselves in their shoes. We do not accept appeals to
25 passion.

1 It is your highest duty as officers of this Court to
2 conscientiously determine a fair and a just result in this
3 case. Juror unanimity. Your verdict must represent the
4 considered judgment of each juror. In order to return a
5 verdict, it is necessary that each and every juror agree with
6 the verdict. In other words, your verdict must be unanimous.
7 All 12 jurors must agree. As you deliberate, try your best to
8 work out differences. Do not hesitate to change your mind if
9 you are convinced that other jurors are right and that your
10 original position was wrong, but do not change your mind just
11 because other jurors see things differently, or just to get
12 the case over with. In the end, your vote must be exactly
13 that, your own vote. It's important for you to reach
14 unanimous agreement, but only if you can do so honestly and in
15 good conscience.
16 You should each think for yourself about the
17 evidence and the law. You should each speak up and let your
18 fellow jurors know your opinions, views, and positions. You
19 should each listen carefully and keep an open mind as to what
20 your fellow jurors have to say, and you should make a
21 reasonable effort to reach unanimous agreement. Before I do
22 the last few paragraphs of the instruction, I want to walk
23 through the verdict form. I was considering getting all of
24 you copies of the verdict form to work through with me, but I
25 always find as I read through these that I always find typos

1 that last minute.

2 The first question is limitations. Now, this is an

3 awkward question because it stated in the negative. I have

4 tried to come up with a way to state it in the positive, and

5 maybe I'm just not as -- that creative, but I haven't found a

6 way to state it nice and short for a yes, no answer that's any

7 better than this. Question 1, does the jury unanimously find

8 that Plaintiff David Meehan has proven by a preponderance of

9 the evidence that prior to January 11th, 2017, that's three

10 years before the date the suit was filed, he did not discover

11 and would not have discovered through the exercise of

12 reasonable diligence, both that he had been injured and that

13 DHHS conduct actions, failures to act and customs or practices

14 caused his injury. Yes or no? Yes, means yes, he did not

15 discover and would not have discovered. So yes means, yes, he

16 did not. It's a little tricky. No means no, he did discover,

17 or no, he would have discovered.

18 I try and clear this up. A yes answer means this is

19 timely in its entirety. If you answered yes, go on to part

20 two. A no answer means that this lawsuit is untimely and will

21 be dismissed. So if you say no, that means that no, he either

22 discovered or would have discovered prior to January 11th,

23 2017. If you answer no, you skip parts two, three, four, and

24 five, and the foreperson signs for unanimous jury on the

25 bottom of the last page. So there's an explanation and

1 instructions.
2 Question 2, so if you get past question one with a
3 yes, question 2 is liability. This one is very simple, but
4 it's looking at all of the incidents as a whole. And you only
5 answer it if you found the suit timely. Does the jury
6 unanimously find that Plaintiff David Meehan has proven by a
7 preponderance of the evidence that A, he was injured during
8 the time he was at YDC, and B, DHHS negligence and or breach
9 of fiduciary duty was a substantial factor in bringing about
10 one or more of his injuries that is a legal cause of the
11 injury. Please see the jury instructions for explanations of
12 legal causation, negligence, and breach of fiduciary duty.
13 I put them both in the same instruction because
14 they're both duties of care, and the scope of the duty is
15 somewhat similar. But you have to be -- you have to be
16 unanimous with respect to negligence, or breach of fiduciary
17 duty, or both. A yes answer means that you have found DHHS
18 liable. A no answer means that you have found DHHS not
19 liable. If you answered no, you skip the rest of the
20 instructions and the foreperson signs for a unanimous jury at
21 the bottom of the last page. That would be timely, no
22 liability, sign on the last page. If you answered yes, you go
23 on to part three.
24 Part three I already find a typo. So that's the
25 circled. So when you get it, the typo won't be there. Please

1 state the full amount of money in words and numbers, like
2 you're writing a check. You put down the number and you write
3 out the words and that is because -- well, you know why? It's
4 because it's because we need to be sure. And sometimes
5 people's handwriting can be a little bit messy, and we need to
6 be 100 percent certain. Please state the full amount of money
7 and words and numbers that the jury unanimously finds --
8 there's one more typo, but I'll get it -- that the jury
9 unanimously finds Mr. Meehan has proven to be full, fair, and
10 adequate compensation for his injuries. So you write down the
11 amount of damages. Now, this is not yet dealing with
12 apportionment. This is the total amount of damages for
13 everything full, fair and adequate except enhanced
14 compensatory damages for fair and adequate damages.
15 Next question. Does the jury find that David Meehan
16 has proven that he is entitled to enhance compensatory
17 damages? Yes, no. If your answer was no, you skip the next
18 question. And if your answer is yes, you answer the next
19 question. If you answered yes to enhanced compensatory
20 damages, state the full amount of money and words and numbers
21 that the jury unanimously finds as enhanced compensatory
22 damages. So damages, and then enhanced compensatory damages.
23 And in between the question whether you find enhanced
24 compensatory damages.
25 Now we first get in to the tricky part of the

1 verdict form. This has to do with apportionment. With
2 respect to only those injuries for which you have found DHHS,
3 liable, so only with respect to what you found DHHS liable
4 for, were David Meehan's injuries caused by DHHS knowing and
5 active participation with others in a common plan or design
6 that caused harm to David Meehan? First option. Yes, as to
7 all injuries for which DHHS is liable. If it's yes to all,
8 you basically will skip the rest of apportionment because, as
9 I explained earlier, if you knowingly and actively participate
10 in a common scheme, you're on the hook for 100 percent joint
11 and severally. No, as to all injuries for which DHHS is
12 liable. That would be a finding that no, there's not a common
13 plan or design or there wasn't knowing and active
14 participation by DHHS in it, at least. And in that case, you
15 would answer the other questions.
16 Yes, as to one but not all of the injuries. And
17 let's just assume that I slip on a banana peel on the way out
18 to the parking lot, and as I'm hobbling to my car, I get hit
19 by some other car. It would be possible that my first injury
20 was caused by somebody in -- by people acting in a common
21 scheme and that one of those people acting alone later mowed
22 me down. So you could have some, but not all injuries. Just
23 as a theoretical matter, I'm not suggesting what the evidence
24 is. I'm just talking theory. So there are three options.
25 Yes to all, no to all, yes to one or more but not all. If you

1 answer yes to all, you skip the rest and go right on to the
2 last part of the verdict form. If you answer no to all, you
3 skip the next question. And the next question is viewing all
4 the Plaintiff's injuries for which DHHS is liable as a whole,
5 what percentage of those injuries were caused by DHHS knowing
6 and active participation in a common plan or design? If you
7 ask no for all, the answer to that would be zero, so you can
8 skip the question. If you answer yes to one or more, then if
9 you answer yes to one or more, then you have to answer
10 question 7.
11 Here's where it gets tricky. You now have all the
12 injuries that you believe Mr. Meehan is entitled to
13 compensation for. You have your number, I'm going to call it
14 $100 just to have a placeholder. You have $100. Now, the
15 question is -- and you say that DHHS was a knowing and active
16 participant in a common plan or design for some. So well, all
17 right. What does sum mean? Let's just say, I'm just being
18 arbitrary here, so I'm going to pick 50 because it's the most
19 arbitrary number. Let's just say you answer 50 percent. What
20 that would mean is that for 50 percent of the injuries, at
21 least DHHS would be on the hook for 100 percent. So it's on
22 the hook for 100 percent of 50 percent. The total damages was
23 $100. That's $50.
24 And then you go on to the next question, which is
25 with respect to only those injuries that you find DHHS liable

1 for but which were not caused by the common plan or design.
2 Has DHHS proven by a preponderance of the evidence that any of
3 the conduct of any of the following individuals was also a
4 substantial factor in bringing about the injuries? I'm seeing
5 a little bit of glazed over. What this means, in my example.
6 I did 50/50 and maybe I should have used different numbers
7 just because there would be a 50 over 50, everything is even.
8 You're taking 50 percent off the table right here. This is
9 asking for the remaining 50 percent, did any of these guys
10 contribute to or any of them also at fault? Yes, no. If you
11 find none of them at fault, then you skip the next question.
12 If you find any of them at fault, this question asks what is
13 their percentage of fault and what is DHHS's percentage of
14 fault, but only for that second 50 percent. Are you guys
15 following me?
16 THE JURY: Yeah.
17 THE COURT: Okay. It's complicated. So with
18 respect to only those injuries for which you found DHHS
19 liable, but which were not caused by DHHS knowing and active
20 participation with others in a common plan or design, what is
21 the proportionate share of fault in bringing about the
22 injuries that you attribute to each of the following entities
23 and individuals? You must state your answer in percentage
24 terms, but total percentages must add up to 100, so it's one
25 hundred percent of 50 percent. Please place a zero or the

1 abbreviation NA for not applicable for individuals whose
2 conduct you did not find in response to question 7 to be a
3 substantial factor in bringing about any of the injuries. And
4 where it says altogether 100 percent there's an asterisk, and
5 it says if that portion of Plaintiff's compensable injuries
6 that were not the result of Defendants knowing and active
7 participation in a common plan or design, so it's 100 percent.
8 Of whatever that percentage is. Could be 100 percent of 100
9 percent, could be 100 percent of one percent. It's up to.
10 All right. Lastly, part -- you're too polite to
11 groan, but I'm going to get a groan when I read part five.
12 And then, at some point, you're too polite to sigh, but I'm
13 going to get a sigh of relief, as well, when I read part five.
14 Part five asks, how many incidents does the jury unanimously
15 find the Plaintiff has proven by a preponderance of the
16 evidence? For the purpose of this instruction, an incident is
17 a single episode during which the Plaintiff was injured, for
18 which the jury has found DHHS liable in response to previous
19 questions, for which the jury has found -- for which the jury
20 has found the claims to be timely.
21 So it's asking for how many episodes for which how many
22 episodes for which are a liability, based on timely claims.
23 And again, we need unanimity. So now I think I'm hearing the
24 silent groan for that, let me tell you why. The instructions
25 that I've given you would work perfectly for a car crash.

1 There's a car crash; there may be multiple people to blame.
2 There's one incident; there's one set of injuries. All of
3 that looks fine.
4 In this case, whatever else is true, we have heard of a
5 number of different events over a fairly prolonged period of
6 time. One option, which the lawyers, here's the sigh of
7 relief, have both agreed we do not need to do is get
8 individual incident-by-incident findings, express, as to
9 limitations, liability, and apportionment on each one of what
10 the Plaintiffs allege to be a myriad, a plethora, an enormous
11 number of incidents, that's their allegation.
12 What we need, instead, is just the number of incidents
13 for which you find liability, based on timely claims. That
14 does require you, when you're looking at timeliness, for you
15 to consider what is time limited in theory? In theory, I
16 could slip on a banana peel on my way out of a building when I
17 get out of the hospital, come back to confront the banana peel
18 owner, and slip again on the way up the stairs. And if
19 there's a period of time separating them, one slip and fall
20 might be timely, and another not.
21 And two, liability; you might find some things there's
22 liability for, and other things there's not. And all that we
23 are requiring is a number of incidents, based on the agreement
24 of counsel, that that would be what's on the verdict form.
25 Does everybody understand the verdict form? I've done my best

escribers
www.escribers.net | 800-257-0885

1 to kind of walk you through it. Okay.
2 So in a few moments, we're going to randomly select two
3 alternates and a foreperson. We don't know who they are. I
4 have numbers 1 through 16, but we're missing two. On these
5 little Post-its, we're going to pick randomly. Let me first
6 give more than a pep talk to the alternates. The alternates
7 are essential to the trial. We lost two jurors. If we went
8 to this trial with one alternate, we wouldn't have a trial.
9 We would have an automatic do over because somebody got sick.
10 We lose jurors, regularly, for all kinds of reasons.
11 Somebody becomes disqualified, somebody becomes ill,
12 somebody's kid becomes ill. I mean, it just -- it happens.
13 Without alternates, we do not have a trial. If that happens
14 often enough, we don't have a functioning jury system. The
15 alternates, and I really do mean this, are as important to
16 this process as anybody else in the Court.
17 And we don't have a trial without a monitor. We don't
18 have a trial without court security. We don't have a trial
19 without the lawyers. We don't have a trial without the People
20 who back up the lawyers. We don't have a trial without the
21 judge. We don't have a trial without the clerk. We don't
22 have a trial without the alternates. And we don't have a
23 judicial system without trials.
24 So if you're the alternate, your time has not been
25 wasted. Plus, we keep you here, and we may plug you in if

1 something happens to a deliberating juror. Now, let me speak
2 briefly about the foreperson. We select the foreperson
3 randomly. It is a voluntary position, unless all of the
4 remaining 12 jurors decline the position, which has never
5 happened, to my knowledge.
6 The foreperson acts like the chair of a committee. He or
7 she should make sure that you take up the issues I've
8 described, and make sure that each juror has a full
9 opportunity to present his or her opinions and arguments. The
10 foreperson is not a super juror. The foreperson only gets the
11 same one vote. The foreperson is just helping the discussion
12 along by essentially empowering everybody else, to make sure
13 that everybody is heard.
14 If questions about the law arise during your
15 deliberation, the foreperson should write the questions out
16 and hand them to the Court officer. We have a new procedure
17 where you're going to get envelopes. I think you're going to
18 get three or four, for questions. And what you're to do is
19 put-- there'd be instructions in your jury room, but you put
20 the question in the envelope, and you seal the envelope.
21 What happens with your questions is that the court
22 officer will get them and bring them to me. I get the
23 lawyers. I can't answer the simplest question without
24 consulting with the lawyers. Sometimes it takes a little
25 while for the lawyers to get to my office. In this case, and

1 in some cases -- in some of our criminal cases, the same
2 lawyers appear in multiple cases, so got to wait for them to
3 get out of court here.
4 The lawyer should be able to get to my office pretty
5 quickly. Still, sometimes what you think is an easy question
6 causes us to start taking books off the wall. And sometimes
7 what you think is a complicated question can be very quick to
8 answer. But we do drop everything to answer your questions.
9 There are some questions that just -- here's one that you
10 shouldn't ask; can we have the testimony read back? No,
11 because we do not do daily transcripts. We don't have
12 transcripts. We have no way to read the testimony back to
13 you.
14 It is true that we are recording everything, and we have
15 a monitor who is taking notes on what we are recording, but
16 the only thing we could do is play a whole day of testimony
17 back to you. So I mean, unless you want to be here for
18 another month of testimony, we can't read anybody's testimony
19 back to you.
20 So the second thing, certainly ask questions about the
21 law or things you don't understand. But understand that we,
22 myself and counsel, cannot comment on the evidence. We can't
23 help you out with your job, which is to find facts. And if
24 you have a question about what the evidence is, you can look
25 to your notes, you can look to each other, you rely on your

1 collective memory, you can look through the exhibits, but if
2 it's not there, if it's something that is not in evidence,
3 it's just not in evidence, even if you think it should be;
4 even if you think you would like to know that fact.
5 If it's not in evidence, unfortunately, you don't get it.
6 We only get the evidence that these guys, collectively, have
7 brought into court. So unlike verdicts in criminal cases,
8 which are delivered in open court, a verdict in a civil case
9 like this is given in writing and delivered to me by the court
10 officer, to be open in the presence of counsel in chambers.
11 When you've reached a verdict, you knock on the door of
12 the deliberation room or pick up the phone, and the court
13 officer will deliver the written verdict to me in the envelope
14 that you have. So we're not going to read that in open court.
15 We're going to keep you there until we go through the verdict
16 form and make sure that it makes sense. If we see you write
17 out the number 10, and then put down the numerals 11, we need
18 to -- there's something that we have to discuss in court,
19 because that doesn't make sense.
20 If we see you do percentages, and it comes out to 112 and
21 a half, we have an issue. If we see that you found no
22 liability, but enhanced compensatory damages, we have an
23 issue. Not that you would do any of that, but if we have a
24 court system, and we have juries all the time, we can't
25 just -- we can't release you until we make sure that the

1 verdict form makes sense. And my plan would be, at least, a
2 possible to thank you for your service.
3 Before I have the lawyers come up here one more time, and
4 before we select alternates and foreperson, let me say this.
5 And I don't usually take liberties and speak for other people,
6 but I'm sure that I speak for all of the lawyers. I'm sure I
7 speak for the DHHS representative who's here. I'm sure I
8 speak for Mr. Meehan. We are all incredibly appreciative of
9 your time and effort, and diligence in this case. Whatever
10 your verdict is, we know that you have taken a lot of time off
11 for your life. You haven't been here for, like, one jury
12 selection and a half day driving after suspension case.
13 You have been here for a long trial, with some gaps that
14 were put in where you had to wait. The testimony, by all
15 accounts, has been emotional; not commenting on the evidence,
16 but that's just -- you've been through a lot, and you have our
17 sincere appreciation and thanks and respect. With that said,
18 let me have counsel come up, briefly.
19 (Sidebar begins at 10:18 a.m.)
20 THE COURT: So other than the objections to the jury
21 instructions that were put on the record yesterday, and to the
22 verdict form that was put on the record today, which
23 objections I consider to be fully renewed right now and made
24 on the record again, any additional objections?
25 MS. GAYTHWAITE: Your Honor, we just wanted to renew

1 the motion for mistrial, the motion for a directed verdict
2 (indiscernible).
3 THE COURT: Okay. Thank you. And I saw it that
4 that was a written motion for directed verdict that came with
5 it.
6 UNIDENTIFIED SPEAKER: Yes.
7 THE COURT: It wasn't put in my (indiscernible).
8 Okay.
9 MR. CHASE: Yeah. Here's the same arguments, Your
10 Honor. We just filed it (indiscernible).
11 THE COURT: So the motion for mistrial, and the
12 motion for directed verdict are denied on the same grounds
13 earlier. Thank you for renewing them.
14 MR. CHASE: Thank you.
15 THE COURT: And again, just to be clear, I consider
16 that both sides have made all of the objections they made
17 yesterday and this morning all over again right now.
18 MS. GAYTHWAITE: Thank you, Your Honor.
19 THE COURT: Okay. Thank you.
20 MR. CHASE: Thank you, Judge.
21 (Sidebar ends at 10:19 a.m.)
22 THE COURT: All right. If we get numbers that
23 aren't here, it will be anticlimactic. The alternates are
24 Jurors 5, who is Robert Nobrega (phonetic).
25 You are an alternate.

1 THE COURT: And Juror No. 2, who is Daphne Beaton
2 (phonetic).
3 I assure you that this is, like, as random as it
4 gets. Also, you'll note the great expense that the judicial
5 branch of the State of New Hampshire goes through. I didn't
6 have to pay for the Post-its. The foreperson, if the
7 foreperson accepts it, is Juror No. 11, who is Jean Genier
8 (phonetic). Are you willing to serve as foreperson?
9 JUROR NO. 11: Sure.
10 THE COURT: Okay. Then, you are the foreperson.
11 The case is yours. In a few minutes, the monitor will bring
12 you the exhibits, and you'll get copies of the instructions.
13 And as soon as I take the typos out of the verdict form, you
14 will get one verdict form in an envelope -- and you'll get a
15 couple of drafts because it's a complicated verdict form. All
16 right.
17 THE BAILIFF: Please rise for the jury.
18 JUROR: We're taking our notes with us, correct?
19 THE CLERK: Judge, just make sure that --
20 THE COURT: Oh.
21 THE CLERK: -- the two alternate --
22 THE COURT: Oh. Right.
23 THE CLERK: We need you to make sure the two
24 alternates --.
25 THE COURT: The two alternates should leave their

1 notes there. I'm sorry. And everybody else should take their
2 notes with them. My apologies.
3 (Jury out at 10:21 a.m.)
4 THE COURT: Can I share a thought with you guys? I,
5 obviously, am not going to comment on the slightest on the
6 evidence, or anything like, but the process has been, to my
7 mind, somewhat profound because, in a sense, it's all so
8 ordinary. But if we step back -- I mean, I've heard it said
9 that the rule of law means that the State can win or lose in
10 its own courts.
11 And here, we see 12 people chosen at random in a
12 fair process, deciding a case according to the law and facts.
13 And I mean, it's at least worth noting for all of us who
14 participated in it, we're all in the trenches doing our thing.
15 I'm trying to get the jury instructions out and run the trial
16 in a fair way. You're up all night litigating your cases, but
17 it's at least worth a deep thought that this isn't what
18 happens everywhere in the globe.
19 So it's just something to think about. And I'm
20 really happy to have had the experience of all of these good
21 lawyers. And I'm not going to comment at all on the evidence.
22 UNIDENTIFIED SPEAKER: Thank you.
23 UNIDENTIFIED SPEAKER: Thank you, Judge.
24 THE COURT: Thank you.
25 (Proceedings concluded at 10:22 a.m.)

CERTIFICATE

I, Raven Wood, 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): Nicole Ferguson, CDLT-149
Raven Wood, CDLT-305

CERISSA JORDAN May 14, 2024
Proofreader

1 STATE OF NEW HAMPSHIRE

2 ROCKINGHAM COUNTY SUPERIOR COURT

3

DAVID MEEHAN,	) Superior Court Case No.
	) 217-2020-cv-00026
Plaintiff,	)
	) Brentwood, New Hampshire
vs.	) June 24, 2024
	) 2:01 p.m.
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,	)
	)
Defendants.	)
______________________________	)

10 MOTION HEARING
BEFORE THE HONORABLE ANDREW R. SCHULMAN
11 JUDGE OF THE SUPERIOR COURT

12 APPEARANCES:

13 For the Plaintiff: Cyrus Rilee, Esq.
RILEE & ASSOCIATES
14 264 South River Road
Bedford, NH 03110

15

For the Plaintiff: David Vicinanzo, Esq.
16 Nathan Warecki, Esq.
NIXON & PEABODY
17 900 Elm Street
Manchester, NH 03101

18

For the Plaintiff: Dennis T. Ducharme, Esq.
19 DUCHARME RESOLUTIONS
20 Market Street, #206
20 Manchester, NH 03101

21

22

23

24

25

www.escribers.net | 800-257-0885

For the Defendant New Hampshire Department of Health and Human Services:	Anthony J. Galdieri, Esq. Brandon Chase, Esq. Catherine Denny, Esq. Sam Garland, Esq. STATE OF NEW HAMPSHIRE 1 Granite Place South Concord, NH 03301
For the Defendant State of New Hampshire:	Martha C. Gaythwaite, Esq. VERRILL DANA LLP One Federal Street, 20th Floor Boston, MA 02110
Audio Operator:	Electronically Recorded by Vaughn Castora
TRANSCRIPTION COMPANY:	eScribers, LLC 7227 N. 16th Street, Suite 207 Phoenix, AZ 85020 (800) 257-0885 www.escribers.net

Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

1 (Proceedings commence at 2:01 p.m.)
2 THE COURT: Good morning.
3 UNIDENTIFIED SPEAKER: Good afternoon, Judge.
4 THE COURT: Good afternoon. Good morning somewhere.
5 Not on the east coast of North America, but it is morning
6 somewhere. So please be seated. And why don't we have
7 counsel identify themselves? We are here on the really the
8 Meehan individual case, the State cases. So I don't know that
9 we need to have all the contractors who may be here or in
10 Webex land identify themselves. So why don't we start with
11 the many plaintiffs?
12 MR. RILEE: Good afternoon, Your Honor. Rus Riley
13 for the Plaintiff, David Meehan.
14 MR. VICINANZO: Dave Vicinanzo for David Meehan.
15 MR. WARECKI: Good afternoon, Your Honor. Nathan
16 Warecki on behalf of the Plaintiff.
17 MR. DUCHARME: Dennis Ducharme for David Meehan.
18 MR. GALDIERI: Your Honor, Anthony Galdieri for
19 DHHS.
20 THE COURT: Good to see you. Welcome aboard, as it
21 were.
22 MR. GALDIERI: Thank you.
23 THE COURT: Or welcome back aboard.
24 MR. CHASE: Brandon Chase for DHHS, Your Honor.
25 THE COURT: Good to see you.

1 MS. DENNY: Catherine Denny for DHHS.
2 THE COURT: Good to see you.
3 MS. GAYTHWAITE: Good afternoon, Your Honor. Martha
4 Gaythwaite for DHHS.
5 THE COURT: Good to see you.
6 MR. GARLAND: Good afternoon, Your Honor. Sam
7 Garland for DHHS.
8 THE COURT: And welcome back on board as well,
9 Attorney Garland. I think we probably have enough lawyers.
10 There is a lot to get through in a relatively confined period
11 of time. I want to start, perhaps in an odd place, which is
12 somewhere, I don't know, a few weeks ago, we received a notice
13 from the Supreme Court that they received a Rule 11 filing,
14 but we haven't heard anything much about it until the recent
15 spate of activities with the Trial 2 plaintiffs.
16 We then got a copy of the Rule 11 notice, and it was
17 what I thought it might be, which is a petition for original
18 jurisdiction regarding the joinder of plaintiffs in the Trial
19 2 cases, which was accepted by the New Hampshire Supreme Court
20 recently, like within a couple of weeks. This is telling me
21 that, in all likelihood, there is no way we can have Trial 2
22 in September. And there's a reason why I want to start the
23 hearing on Meehan, Trial 1, with figuring out if we all agree
24 that Trial 2 in September is basically impossible if they just
25 accepted the case a couple of weeks ago. I mean, each side

1 has to brief it. Presumably they schedule an oral argument.
2 They will need to decide the case. That can't all happen by
3 September.
4 MR. VICINANZO: Judge, I think you had previously
5 extended the dates from September to October.
6 THE COURT: To October.
7 MR. VICINANZO: Or thereafter.
8 THE COURT: Okay.
9 MR. VICINANZO: So --
10 THE COURT: Still.
11 MR. VICINANZO: -- I think it was in October 21st or
12 whatever convenient for the Court or something like that. And
13 so we don't actually have a firm trial date. But we would
14 agree that the Supreme Court is unlikely to act this year --
15 THE COURT: Right.
16 MR. VICINANZO: On the issue of the consolidation of
17 those six. But I can give you an update on where we are with
18 that. Or wherever we are anyway.
19 THE COURT: Okay. But let me just, because as we're
20 trying to put together dates and I think it impacts Trial 1,
21 Meehan, let's just, I just want to figure out if we're all
22 pretty much in agreement. Because if we leave it on for fall
23 on the thought that like, maybe it bounces back, I don't know,
24 it's a lot of work for everybody. Do you guys agree that
25 there's just, like, the likelihood of getting an answer back

1 from them before November, December is pretty slim?
2 MR. CHASE: I believe that you're correct.
3 THE COURT: Yeah.
4 MR. CHASE: It would be pretty slim on the
5 consolidation issue.
6 THE COURT: Right.
7 MR. CHASE: Correct.
8 THE COURT: Well, but right, but we can't go
9 forward --
10 MR. CHASE: Correct. With the consolidated trial,
11 correct.
12 THE COURT: With the consolidated trial. And we
13 can't go forward with an individual trial. So we can't go
14 forward with the trial. You could give me your update briefly
15 and then I want to move on to Meehan 1.
16 MR. VICINANZO: Yeah, just a brief update. Two of
17 the original six have opted to go --
18 THE COURT: Yes.
19 MR. VICINANZO: -- into the settlement fund. What
20 we actually propose and have proposed to the State is that we
21 continue with at least one of the plaintiffs, since there's no
22 issue with that. And we've chosen Michael Gilpatrick to go
23 next. He was the second person to come forward and the second
24 person to file his complaint. His depositions have already --
25 he's already had two depositions taken. The State has his

1 interrogatories, his discovery substantially.
2 THE COURT: And he testified.
3 MR. VICINANZO: And he testified. That's right.
4 Everybody got a preview of who he is and his testimony. We
5 don't think there's any mar, I mean, there's any reason that
6 he shouldn't be going forward. I don't know if October is
7 even feasible, but at least next in line, whether it's shortly
8 after or at that time.
9 THE COURT: I think we've been keeping September
10 open. But okay, moving on to Meehan and you'll see the reason
11 why I asked. We have a number of motions where the parties
12 have taken, in my estimation, the positions that most favor
13 the parties and are not necessarily the positions that the
14 Court will end up sharing.
15 The State takes the position jury came back, single
16 incident, apply the cap, enter a judgment of 475,000, be done
17 with that. The plaintiffs object really on two grounds. One
18 ground is, frankly, the way I see it above my pay grade, which
19 is that the cap should be held unconstitutional. The Supreme
20 Court has a couple of decisions where they say that at least
21 the individual cap, in concept, is plenty Constitutional. And
22 475 as an individual single incident cap isn't that far out of
23 line with what the cap was when it was first created, given
24 the passage of time and inflation and other caps.
25 The issue that's not before us now is the logic of

1 the one incident. The State's logic of the one incident being
2 the incident being a breach of a duty of care would suggest
3 that, if you use the bus crash analogy, that it was one
4 incident involving many plaintiffs, and then there's a cap of
5 9.75 million. And the State hasn't made the argument that
6 that would be the cap for everybody. But that argument, I
7 mean, but that might be so far afield as to raise an issue
8 that even the Superior Court could address.
9 But with respect to constitutionality of the 475, I
10 mean, frankly, I think that that's for the Supreme Court and
11 they'll do with it what they want.
12 MR. VICINANZO: Can I just --
13 THE COURT: You can.
14 MR. VICINANZO: -- give you our interpretation that
15 we're not challenging the cap per se. We're only challenging
16 it as applied --
17 THE COURT: As applied.
18 MR. VICINANZO: -- to these facts. And that's a
19 very different issue. I mean, the jury found $38 million to
20 be the fair and reasonable amount under the Constitution, and
21 to suggest that it should go down to a little more than one
22 percent of that is not reasonable.
23 THE COURT: No. It's not --
24 MR. VICINANZO: It's arbitrary. The Supreme Court
25 has been very clear that you cannot apply principles of

1 sovereign immunity in an arbitrary and unreasonable way, and
2 this is unreasonable. It is on these facts, much as the CRJ,
3 Community Resources for Justice decision was also an as-
4 applied challenge. And the Supreme Court said in that case it
5 was property rights rather than a right to a recovery. They
6 applied intermediate scrutiny, and they said the same thing.
7 It cannot be arbitrary, it can't be reasonable, and it has to
8 be substantially related to the important governmental
9 interest. Here, there is no substantial relation at all
10 between the jury's accident or its error and the State getting
11 a windfall because of that mistake. That cannot pass
12 Constitutional muster under any of the case law in the Supreme
13 Court that I've read.
14 THE COURT: You have assumed in their, what you
15 dispute in the second half of their argument, that it's not
16 really one incident. If there is one incident in the car
17 crash example, I mean, and that's what everybody thought when
18 they -- you read the statute. That's clearly what everybody
19 had in mind. In the car crash example, the most horrible,
20 horrible accident that you can imagine with enormous medical
21 bills and horrible need for rehabilitation and living and lost
22 earning and this and that measured, these days, 10 million, 12
23 million. It's not crazy to think of a traffic accident that
24 could generate those kind of damages. 475 is probably
25 Constitutional as applied. At least, I think that that's an

1 issue, as I say --

2 MR. VICINANZO: In the car crash case you mean?

3 THE COURT: Yeah, in the car crash case. And I

4 think that if it's not, and I'm not agreeing or disagreeing

5 that that's a good line to draw. I just think that that's an

6 issue that's not for this --

7 MR. VICINANZO: Well can I tell you what I think the

8 distinction is?

9 THE COURT: You can if you --

10 MR. VICINANZO: I'm sorry.

11 THE COURT: You can. But if you hang on --

12 MR. VICINANZO: Okay.

13 THE COURT: -- a second, the second issue is you say

14 it's not really one incident and that's the issue that more

15 concerns me with respect to granting their motion for a

16 $475,000 verdict, which I think that -- I mean, and the way I

17 put it, and I know that the State didn't like the fact that I

18 put it at all. But the way I put it is understand that we

19 don't know exactly what the jury was thinking, because you

20 don't know what's inside people's heads.

21 But 38 million doesn't square with a single

22 incident, as the term "incident" was given to them in

23 instructions and as I believe upon greater reflection and a

24 boatload of research, the term incident actually means. I

25 think that that type of number would, I mean, frankly, make

1 sense only with many incidents. And there was certainly much
2 evidence of many incidents. And therefore, there's a
3 disconnect between the number and the incident -- the number
4 of incidents. That's different than saying that the cap
5 itself is unconstitutional. It's an evidence issue. It's not
6 a cap issue.
7 MR. VICINANZO: Yeah, we're not saying the cap is
8 unconstitutional.
9 THE COURT: Right. As applied.
10 MR. VICINANZO: As applied, I mean. Most times you
11 have a car crash, and it happens, and it all happens in
12 seconds in the end. And the damage happens at the same time
13 that the breach of duty happens. What I think is different
14 here is that I think your analysis of "incident" in your order
15 was excellent. I think it was right on the money. That
16 Barnett case. I didn't know it existed. But you found it,
17 and I think, I don't think anybody can improve on the
18 reasoning.
19 What it essentially says, though, is that there is
20 no tort when there's merely a breach of duty. You can be
21 breaching a duty and get lucky, and nobody gets hurt. Nothing
22 bad happens. You're still breaching your duty, but there's
23 nothing actionable. There's no cause of action. There's only
24 a tort when you have a duty, breach, cause, and harm. Harm is
25 the thing that triggers it. And in a car accident, it all

1 happens at once.

2 Here, I guess the suggestion is that going back to

3 1980, when Tom Rath was the AG, and saying that YDC is a mess,

4 there's abuse there. It's got to be reformed. You got to do

5 something. And nobody did it. Is that when the breach of

6 duty began? And does that mean that every one of these

7 incidents are part of the same tort? I think that's an absurd

8 result. Ultimately, there's no tort and there's no negligence

9 effectively, until there's a rape, until there's a beating,

10 until there's a harm. And that's what Barnett said. And I

11 thought your analysis building on Barnett was excellent. I

12 think it's right on the money.

13 THE COURT: So where my thought is, is that's my

14 problem granting the State's motion. The Plaintiff is looking

15 for two things. And I guess both sides are looking to avoid

16 the large object that is day-by-day seeming to take up my

17 entire field of vision and might be unavoidable. The

18 Plaintiff says we would like a judgment notwithstanding

19 verdict by juicing up the number of incidents, or

20 alternatively, a little mini retrial on the number of

21 incidents.

22 And while I didn't write back on this, my problem

23 with that is it's one thing to say I see a disconnect with

24 what the jury did. It's not sustainable to say one incident,

25 $38 million. It's another thing altogether to say, like it or

1 not, this is going to be the number of incidents without
2 giving the State the opportunity to say no, we'd rather have a
3 whole retrial because you're just guesstimating and plucking
4 out of the air, in a reasoned way, but nonetheless in a way
5 that may conflict with what the jury did, some number and
6 you're not -- it's neither fish nor fowl. You're neither
7 ordering a new trial nor accepting the verdict. You're just
8 messing with the verdict.
9 And the same would be true for a retrial just on the
10 number of incidents because we don't know, the jury could have
11 found against the Plaintiff on all kinds of theories and just
12 to say, assume the maximum, assume findings for everything by
13 the Plaintiff how many incidents doesn't work for the same
14 reason. And nobody seems to have latched on to my idea of,
15 like, adherer of incidents, which is maybe not a thing in the
16 law, I get that. But to say, well, under these circumstances,
17 a new trial would be appropriate, but a motion for a new trial
18 in entirety would be denied if the State could live with so
19 many incidents. It's like additur of damages.
20 A motion for new trial is correct. The other side
21 has the right to reject the additur or remittitur, as the case
22 may be, and then there would be a new trial. But if they
23 accept the additur while being able to still argue against
24 the -- but in lieu of a new trial, they could still argue
25 against the additur -- then it is perceived as fair, because

1 it's not just saying this is the number we're finding for the
2 jury. It's saying if you accept this number, we don't need to
3 have a whole new trial.
4 And the way that I see things is both sides are kind
5 of dug in. If there's no motion for a new trial period, I
6 think all I can do is enter judgment for 475. If there's a
7 motion for a new trial, I think I could probably order additur
8 of incidence if it was accepted, if everybody was on the same
9 page. But I don't see that. But I don't think I can -- I
10 don't think I can just say this is the number of incidents,
11 like it or not. We're just going in and redoing the verdict.
12 We're having a trial just on incidents.
13 And I don't -- but absent a motion for a new trial,
14 I have to grant the 475 even though I think that it's not
15 particularly sustainable. And then you would appeal, but you
16 wouldn't have the issue should the judge have granted a new
17 trial because you didn't ask for one. You follow that logic?
18 MR. GALDIERI: Your Honor --
19 THE COURT: Yeah, why don't we --
20 MR. GALDIERI: -- I know we'll get a chance to speak
21 but --
22 THE COURT: Yeah.
23 MR. GALDIERI: But we don't -- we do not agree with
24 the position that option three is not consistent with the
25 judgment. We do see a finding of a single incident to be

eScribers
www.escribers.net | 800-257-0885

1 consistent with the evidence in this case, the record that was
2 built, which seem to be consistent with the jury instructions
3 that were given and that were provided. We see this case as
4 the jury could have reasonably found that more than one act of
5 negligence gave rise to a single harmful condition that the
6 Plaintiff was exposed to, and that that could be a single
7 episode or instance as it was defined to the jury. And the
8 jury could have rationally come to that conclusion and made
9 that finding. That's supported by the evidence in the case;
10 it's supported by the instructions.
11 THE COURT: So let me -- so all right so there are
12 several, this is a little bit tricky because there are several
13 different ways you could get to your result. One would be you
14 could say that the jury could find that there was just a
15 single incident of sexual assault; one day or one time frame,
16 one relatively compressed time frame with particular actors
17 limited by space and time and could have rejected -- right?
18 It's a jury. And they don't write a report, they get a
19 verdict.
20 So in theory, they could have found Frank Davis was
21 the first individual at YDC whom Mr. Meehan testified abused
22 him. They could have found him making up facts. They could
23 have found Frank Davis, the one incident with Frank Davis that
24 happened, but we don't believe any of the rest of it. So
25 that's one way to get to one incident.

1 And to my way of thinking, 38 million for one
2 incident is, that's not a sustainable verdict. I know the
3 Plaintiff stood up in closing and said, to some extent
4 contrary to the rule as well, if it was my kid, I'd want a
5 billion, but just the same that it wouldn't be sustainable for
6 one incident. I do disagree.
7 MR. GALDIERI: Well, I think, Your Honor, we're
8 having a disagreement over what perhaps a single incident is.
9 THE COURT: That's the second -- that's the second
10 issue.
11 MR. GALDIERI: I think there is plenty of case law
12 out to support that what the breaches of negligence cause is
13 the incident. And if the breaches of negligence allege here
14 cause a single dangerous condition to arise, that the
15 plaintiff was continuously and persistently exposed to over a
16 period of time, that a jury applying their common sense and
17 looking at the record of this case, could reasonably conclude
18 that that was one incident, one incident, and that the
19 recovery is limited to 475.
20 THE COURT: So you think it's the equivalent of the
21 carcinogen seeping through the groundwater that eventually
22 results in some health problem. In other words, there's a
23 slow -- there's negligence at one point in time and then a
24 slow seepage into and trespass onto the plaintiff's property.
25 And slowly over time, the plaintiff takes in the carcinogen

1 and eventually, twenty years later, gets diagnosed with a
2 cancer. That's when the tort's complete and it's one
3 incident.
4 MR. GALDIERI: Yes. It's a continuous condition of
5 confinement that's harmful that he's continuously exposed to
6 over a period of time. And the test that the Court is looking
7 at adopting is, quite frankly, a single test out of an out-of-
8 state jurisdiction out of New York, applying a test that
9 appears to be unique to New York under the insurance law.
10 It's a plurality decision. The dissent would have come to the
11 opposite conclusion, that there was one incident in that case,
12 and I don't think it's very predictive of what the New
13 Hampshire Supreme Court would do or say on this issue.
14 I think what we have to focus on and the weight of
15 the analysis, the evidence issue in this case, the analysis
16 needs to focus on what was the evidentiary record and what
17 were the agreed upon instructions. And the agreed upon
18 instructions and the verdict read as a whole would support a
19 view of the evidence that there was a single incident here, a
20 single dangerous condition of confinement that arose as a
21 result of one or more acts of negligence.
22 THE COURT: So it's interesting, but just sort of
23 ping you on, you agree with me that under, I don't want to say
24 my definition, but under the definition of incident is limited
25 by space, time, and causality, a single act sexual assault.

1 That's like --

2 MR. GALDIERI: There's a causal continuum component

3 to it.

4 THE COURT: Right. Is not 38 million. I mean, if

5 there was somebody who came in here with one case, 38 million,

6 you would jump up and say, remittitur. And I think everybody

7 would agree that you were correct. 38 million just -- right?

8 All right. Do you disagree with that? I mean, I'm just like

9 at that level. And then I'm going to go back to --

10 MR. GALDIERI: Well, I guess I'm trying to

11 understand. The way we see --

12 THE COURT: I know.

13 MR. GALDIERI: -- a single incident --

14 THE COURT: Right.

15 MR. GALDIERI: -- is the negligence has given rise

16 to a single dangerous --

17 THE COURT: I understand.

18 MR. GALDIERI: -- condition of confinement.

19 Exposure to that repeatedly and consistently over time.

20 THE COURT: I get that. But I'm just trying to --

21 MR. GALDIERI: To support a $38 million verdict.

22 THE COURT: Yes. I get that argument. I want to

23 deal with that in a second. But I started off, I just want to

24 close the door with what I started off on. Maybe it's a --

25 maybe it's a silly point just to see if there's agreement

1 there.

2 MR. GALDIERI: That -- what was the --

3 THE COURT: That if it was, if incident was, as I

4 defined it, that 38 million would have to be either more than

5 one incident or not rational for one incident.

6 MR. GALDIERI: I don't think that's necessarily

7 true.

8 THE COURT: Okay.

9 MR. GALDIERI: I think the test that you're applying

10 in your order is one that reasonable jurists in the case it

11 comes from disagreed on the application.

12 THE COURT: Right. But I'm not -- right now I'm not

13 asking -- if you give me two minutes, we'll get on to the test

14 issue. I'm just asking whether under that test, under my

15 articulation, do you agree that 38 million for a single -- for

16 a single sexual assault standing alone. I'll say the Frank D.

17 incident just so that we know we're talking about facts.

18 That's not a -- that wouldn't be a rational verdict.

19 MR. GALDIERI: I don't know that I --

20 THE COURT: You don't agree?

21 MR. GALDIERI: -- agree with that. I don't know

22 that I can't agree with that, or I fully understand it.

23 THE COURT: Okay. All right.

24 Now, with respect to the test, first of all, I don't

25 think it's quite fair to say that I'm relying solely on this

1 New York case. I didn't get to the New York case until I
2 looked at every case from many jurisdictions involving
3 sovereign immunity statutes that had a cap. I mean, frankly,
4 there aren't that many that addressed this incident, this
5 issue of what's an incident or what's an occurrence. And
6 oddly, there were a bunch from Florida, and they all deal with
7 mass shootings. So I guess that's what happens if you
8 practice in Florida.
9 MR. GALDIERI: Well, I do think the Barnett case,
10 Your Honor, I think it would be helpful too if we could file
11 briefs in response to your --
12 THE COURT: Yes.
13 MR. GALDIERI: -- order -- in response to these.
14 THE COURT: That was the -- that was the whole goal
15 of issuing it.
16 MR. GALDIERI: Yes.
17 THE COURT: But and I think the reason that I like
18 the New York case is because I thought that it had persuasive
19 authority and jibed with the other cases that I cited, and
20 granted, there's not a ton of case law on this. I guess the
21 other thing is, I think that you are articulating a different
22 theory of what an incident is then you did at trial.
23 But regardless, the jury instruction, for better or
24 for worse, I share some of the blame here, I think we -- well,
25 you do not individually because you weren't here, but those of

1 us who were here all share, the jury instruction said episode
2 on which liability is based that falls within the limitations
3 period or something like that. So the word was "episode".
4 Which sadly may have left more to the imagination, but it's
5 not like the jury was instructed either with respect to your
6 definition or with respect to the one that you had suggested
7 at trial or with respect to the one the plaintiffs proposed.
8 I just used "episode".
9 MR. GALDIERI: Well, but the agreed upon -- the
10 instruction was agreed upon.
11 THE COURT: Yes, it was eventually agreed upon.
12 MR. GALDIERI: And that's how the jury was
13 instructed and --
14 THE COURT: Then it said "episode".
15 MR. GALDIERI: And if there's an -- if there's
16 preservation with respect to that issue and an error, the
17 appellate court can deal with that. But if it's agreed upon,
18 the error and the error has been made.
19 THE COURT: But it said "episode" and so I would
20 believe that the jury must have misunderstood episode. And
21 while I certainly am absolutely thirsty for more information
22 and case law regarding, in particular, sovereign immunity
23 cases with this issue of what an incident is, I had
24 articulated an episode as being -- not in the jury
25 instructions -- in the jury instructions I just used the word

1 episode, as you know, as being an incident confined by time.
2 But I rejected the plaintiff's argument that it was also abuse
3 specific. So if you had a punch in the face and a sexual
4 assault, there were two incidents. If you had two sexual
5 assaults in half an hour, there's one incident. To my mind,
6 that made no sense, and I didn't find any support for that.
7 MR. GALDIERI: But it doesn't mean that the episode
8 couldn't be the entire period of confinement. It doesn't mean
9 that the episode couldn't be a significant portion of that
10 that they found was proved by a preponderance of the evidence.
11 The record would support that. And the instructions given are
12 not incorrect.
13 THE COURT: Well, they're not incorrect because
14 they're Zelig-like instructions because it said episode and
15 they didn't come back and say, what's an episode? And nobody
16 asked to define it further. You're reading into the word
17 episode everything that you want, and perhaps I'm reading into
18 the word episode --
19 MR. GALDIERI: Well, I think the jury read into it
20 what they thought --
21 THE COURT: Right.
22 MR. GALDIERI: -- it meant, based on the instruction
23 that was given --
24 THE COURT: Right.
25 MR. GALDIERI: -- and against the evidence that was

1 established.

2 THE COURT: Right.

3 MR. GALDIERI: I think they could have found one

4 episode reasonably and rationally. And I don't think an

5 agreed upon instruction is a grounds, now, to unseat the

6 verdict.

7 THE COURT: So. I'm trying to suss out two things.

8 One of them is, because I know what your first position is.

9 One of them is the argument's in favor of your first position,

10 but the second is whether you have a fallback position. And

11 so far I don't see that from the State, and I don't think I

12 see it from the Plaintiffs either, which is going to put me in

13 the position of either saying precisely, either saying

14 precisely what you said, which is, well, in the absence of a,

15 certainly, in the absence of a motion for new trial, the

16 judgment has to be for 475 period. I'm not seeing any takers

17 in the alternative, meaning free to argue their first position

18 at the Supreme Court. But takers into the alternative between

19 the two stark realities of a 475 verdict and an order for a

20 new trial.

21 Let me just put you on hold one second.

22 Attorney Vicinanzo, do you understand what my

23 conc -- I mean, I know what -- I know what their first choice

24 is, which is a verdict for 475. I know that they support it

25 for the arguments that they make today, which are a little bit

1 different than the arguments Attorney Chase made. But and I
2 know what your first position is, but I don't know if you have
3 a fallback.
4 MR. VICINANZO: I'm not sure if I'm understanding
5 the question, Judge, but maybe I can -- well, can get there by
6 I can explain a little bit more of my -- how I'm looking at
7 it. I'm looking at your order from May 22nd.
8 THE COURT: Yes.
9 MR. VICINANZO: You say no reasonable jury could
10 have accepted the gist of David Meehan's testimony, awarded
11 $38 million in damages, and found less than 116 incidences.
12 Now that was your biggest gestalt (indiscernible) --
13 THE COURT: Yes. Right. There were a lot of
14 reductions. Yes.
15 MR. VICINANZO: Yeah. You seem to me you've already
16 said that though you said no reasonable jury could have come
17 to a conclusion less than that. Now, of course, all we need
18 is 80 to --
19 THE COURT: Right.
20 MR. VICINANZO: Right? I don't understand why that
21 doesn't meet the standard --
22 THE COURT: Because of the --
23 MR. VICINANZO: -- under Halifax for --
24 THE COURT: -- because there's an assumption of a
25 fact not in evidence.

1 MR. VICINANZO: Which is what?

2 THE COURT: Which is no reasonable jury could have

3 A) accepted the gist of what Mr. Meehan testified to.

4 MR. VICINANZO: Yeah.

5 THE COURT: So in other words, the jury could have

6 been picky and choosy and accepted something other than the

7 gist. I go as far as saying, and I appreciate that the State

8 doesn't agree with it.

9 MR. VICINANZO: Well, but why do you say that

10 though, Judge? I mean, I think what the issue was the $38

11 million. Nobody thinks $38 million is rested on a single

12 incident. We know that that's kind of a ridiculous position.

13 I'm surprised, well I'm not surprised but I understand --

14 THE COURT: Well, there's one -- when you --

15 MR. VICINANZO: So you're just saying State is

16 essentially --

17 THE COURT: -- you argued otherwise.

18 MR. VICINANZO: -- State is essentially saying that,

19 oh yeah, 100 rapes, 200 rapes, it all equals one rape. That's

20 what the Attorney General's Office is actually saying.

21 THE COURT: Well, that is, I think --

22 MR. VICINANZO: And what reasonable person really

23 thinks that?

24 THE COURT: Well, you're putting me in the position

25 of being a devil's advocate, but in fairness, I think that

1 what they're saying is consistent with the evidence, the
2 damages here are complex PTSD, where the latter sexual
3 assaults, it wasn't that he got inured to it, but it was
4 actually worse. And if you're going to look at it from a
5 medical viewpoint, is what I picked up from the experts, if
6 you're going to look at it from a medical point of view, it is
7 all one long chain of events and probably remembered as Mr.
8 Meehan as, by Mr. Meehan as such. What happened at YDC
9 leading to a diagnosis where it's sort of impossible to tease
10 out the, if you would, the harm from incident day one, from
11 day two, day we know. So I mean that -- I think that
12 that's --
13 MR. VICINANZO: But that was never argued. That was
14 not part of the jury instructions. And aren't we talking
15 about a preponderance of the evidence standard here --
16 THE COURT: Yeah but --
17 MR. VICINANZO: -- when we're talking about what the
18 jury -- what a reasonable jury would believe?
19 THE COURT: But there's a -- there's a huge quantum
20 of difference between saying if they bought the gist of what
21 Mr. Meehan had to say, and they came up with 38 million, then
22 that's inconsistent with the word "episode" and really what an
23 incident is more involved than that anyway. That's on the one
24 hand. And therefore, on this one hand, the right result would
25 be to say, hey, if the State's willing to live with what I'm

1 calling additur of incidents, then we don't need to have a new
2 trial.
3 MR. VICINANZO: No, that's --
4 THE COURT: It's another thing altogether to say,
5 well, I'm just going to assume that the jury believed
6 everything that Mr. Meehan said and then go to the lowest
7 number of incidents that that would support. And my number of
8 incidents, I mean, it's somewhat arbitrary. I took a bunch of
9 gestalt reductions. I tried to do it in a way that I applied
10 what I thought was the right framework. And then I went,
11 frankly, as low as possible to honor what -- to honor the role
12 of the Court.
13 MR. GALDIERI: Agreed.
14 THE COURT: Which, while the State may not think I'm
15 being particularly humble, is a humble role when you're
16 dealing with a jury. This difference between, like, the
17 additur concept, where there's always the right to say, no,
18 I'll have the new trial instead, and the rewrite the verdict
19 concept, which is put yourself in the place of the jury and
20 make their findings for them. I don't think I can do that.
21 MR. VICINANZO: Well, I mean, you've already said,
22 though, that no reasonable jury could have done something
23 different.
24 THE COURT: If they bought the gist.
25 MR. VICINANZO: That's the standard in the Halifax

1 decision. So I think you already have established that a JNOV
2 is appropriate. And I also want to go back to is the -- I
3 heard your remarks earlier about what the Supreme Court would
4 do. Are you averse, do you feel averse, to actually
5 addressing the Constitutional issue, or do you think that's
6 for something that they will deal with when we get to it?
7 Because I think the State taking the position that one rape is
8 the same as 100 or 200 cannot possibly pass Consitutionally --
9 THE COURT: Well, I don't think --
10 MR. GALDIERI: That's not our position, Your Honor.
11 I'll just throw that out.
12 MR. VICINANZO: -- it cannot pass Constitutional
13 (indiscernible).
14 MR. GALDIERI: Thank you.
15 MR. VICINANZO: It cannot. Well, how is that
16 different? How is it different?
17 THE COURT: Yeah, I do think --
18 MR. VICINANZO: Where am I wrong on that? I mean,
19 it's an arbitrary and unreasonable position the State's
20 taking. And sovereign immunity must always be supported by
21 reasonable and nonarbitrary justifications for the deprivation
22 of individual Constitutional rights. David Meehan has equal
23 protection. He's Article 8. He's got Article 14
24 Constitutional rights that are deemed to be important
25 Constitutional rights. And they're being stripped away based

1 on a fortuity, based on an accident. And you know it's an
2 accident. You've said it's an accident, Judge. We all know
3 it's an accident.
4 THE COURT: In fairness, just so that we're clear,
5 because I think one of my jobs is probably to bring down the
6 volume a little bit, at least if you read the recent
7 pleadings, they're sort of higher volume, is while there's no
8 doubt that the State is arguing that the entire pattern of
9 sexual assaults in their view, which isn't my view, is one
10 incident. I don't think they're quite saying one rape is the
11 same as a million rapes. They're saying it's one incident and
12 it might be worth a great sum of money, but there's a cap. Am
13 I pretty much restating your argument?
14 MR. GALDIERI: Yes. I think we have a -- we have a
15 disagreement as to what an incident means under the law and
16 prevailing case law.
17 THE COURT: Right.
18 MR. GALDIERI: The New Hampshire Supreme Court has
19 not answered that question. There'd be tremendous benefit in
20 getting that answer from the New Hampshire Supreme Court to
21 move all of these cases forward, not just this case.
22 THE COURT: Right.
23 MR. GALDIERI: But it's certainly not the State's
24 position that, as Attorney Vicinanzo articulated, that's not
25 the State's position.

1 THE COURT: Yeah. I mean, it's not for nothing, but
2 it doesn't escape my notice that the more recent pleadings
3 have, I don't know, they haven't become personal, but they've
4 become more personal if you if you would. But it's --
5 MR. VICINANZO: It's difficult. I would say it's
6 difficult, Judge. We have a client here who's been
7 suffering --
8 THE COURT: Right. We do.
9 MR. VICINANZO: -- for decades. And finally, a jury
10 of 12 strangers hears the evidence and says the State owes him
11 not just $38 million, but they acted with wanton, malicious,
12 and oppressive conduct. And that's the majority of the award.
13 And what's the State do? That's a lot of money, 475,000.
14 What force does one reach the same as 100 or 200? How can we
15 not be upset about that?
16 THE COURT: To answer your question, while I, and I
17 have an open mind, if I'm going to get more case law. But as
18 I sit here, while I disagree with the State Defendants as to
19 the definition of an incident, and for that matter, as to the
20 proper construction of the jury instruction, your question
21 was, would I not reach the Constitutional issue? No, I would
22 reach it, but I wouldn't see the diff -- but I think that
23 there's not a difference between a plaintiff with a severe $20
24 million car accident injury and a plaintiff with a severe $20
25 million toxic seepage injury and a plaintiff with a severe

1 injury of the type at YDC.

2 I mean, I think that if it is one incident, they

3 have accepted the notion of these sorts of caps and 475 is

4 low, but it's by and large a legislative decision. So I think

5 the answer is yes, of course I'd address it, but I don't see

6 that there's a lot of room for as applied.

7 Now, as applied, single incident, 1,200 defendants,

8 yes, that I think, I mean, there it might be. And they've

9 even suggested this issue in one of the O.J. opinions, the

10 opinions of the justices. I think the '86 one; I'm not sure.

11 Where they said, well, the total per incident cap for all

12 claimants could be problematic when it's only eight times as

13 large as the per claimant per incident cap.

14 So if there was one incident, 1,200 individuals,

15 that might be a real as-applied problem that could be

16 addressable in the superior court. But I think that if the

17 notion of a cap for an incident in general of this kind of

18 sort of order of magnitude comes up, it's hard to have an as-

19 applied challenge.

20 On the other hand, I think that the definition of

21 incident is at the very least up for grabs. If not, and I

22 don't mean to be, I certainly don't mean to be dug in.

23 There's nobody in the room who's more elated when I find out

24 I'm wrong than me to say, oh, I was wrong. You're right. But

25 I think the -- I think an incident is, time, space, no

1 intervening events in a connection. This could be called a
2 causal connection, but a nexus between what was going on.
3 That's what I think an incident is.
4 So I would have to say that this was a case where
5 the testimony from the Plaintiff was that there were many
6 incidents. But that said, I don't think I can just
7 arbitrarily say it's whatever it is, it's 115 incidents.
8 That's it. I'm just going to do surgery on the jury's
9 verdict. I think you can say I'll grant a new trial unless
10 the other side, in preference to a new trial, would accept an
11 additur of incidents, in which case we can do that, and they
12 can still trot off to the Supreme Court and say that there was
13 no reason to not issue judgment on the 475. And there is a
14 difference there.
15 MR. VICINANZO: Well, we haven't heard from the
16 State on the issue, but they know our phone number and we'll
17 always talk to them. So I appreciate how you set it up in
18 your order, Judge. And I was kind of thinking maybe we'd get
19 a phone call, but we haven't. And I don't know what to expect
20 there, but I saw what you were suggesting. And obviously,
21 you're a reasonable person. It was a reasonable suggestion.
22 It remains a reasonable suggestion, but so far we haven't
23 heard anything. Except that 475 is fair for the hundreds of
24 rapes, and it's really the equivalent. That's what we've
25 heard.

1 THE COURT: You would agree with me if I were to
2 reject the JNOV, judgment notwithstanding verdict, for the
3 reasons that I gave, which is I don't think that I can just do
4 complete surgery on the verdict. And if I were to do that,
5 what I don't see, what I haven't seen coming over the transom
6 is either a motion for a new trial, generally, so that we
7 would have incidents lined up with liability. Right? I mean,
8 so we'd know. Or alternatively, a motion for well, I call it
9 the additur of incidents and it is a little troublesome that
10 there's no name for it because it sort of, but the logic is
11 there. Or in the alternative, a new trial. If I don't get
12 one of those motions, don't you think I then have to, if I
13 don't grant JNOV and I don't get a motion for a new trial,
14 then I have to grant a judgment based on the verdict?
15 MR. GALDIERI: Yes, Your Honor.
16 MR. VICINANZO: I think we had proposed a limited
17 retrial as an alternative.
18 THE COURT: Right. But how do I -- but your retrial
19 would be just to determine the number of incidents. I mean,
20 like --
21 MR. VICINANZO: The only thing to dispute, I guess.
22 THE COURT: Right. But I mean, you don't like my
23 factual scenario of what if the jury believed the Frank Davis
24 incident, but not any others? What if the jury believed and
25 this is sort of far more to the point, bad things happened

1 with Jeffrey B. but it couldn't have possibly been every day
2 that he worked. And discounted it down to, I don't know, once
3 a week or once a month and just said the standard is
4 preponderance. And the number of days he worked -- literally
5 add up all the questions and that part was done in five
6 minutes. And how good is the memory about that? And so on
7 and so forth. We don't know what that jury thought.
8 Then you go to another jury, and you say, so how
9 many incidents? I'm not quite sure how you can do that. You
10 go to another jury and say, we don't tell them we're doing a
11 do over but here's a do over. What do you find? And give
12 them a more fulsome definition of incident. And this leads to
13 its own question. What do we do -- what do we-- what do we do
14 there.
15 So I mean your position number one is that the Court
16 just write down the number of incidents and say this is the
17 number of incidents because I say so. No opportunity for a
18 new trial. Or two, have a new trial only on incidents, which
19 raises some of the same concerns. And that's what I'm saying.
20 Neither side wants a new trial. It's kind of like the large
21 object that's approaching.
22 Unless you don't move for one, then there's no --
23 then there's no motion for a new trial. I grant the State's
24 motion. Well, unless I'm convinced of your JNOV, which is now
25 fully briefed. I would have to grant the State's motion for

1 judgment. And I don't know, I mean, not for nothing. There
2 would be no denial of a motion for new trial to go up on.
3 MR. GALDIERI: We'd presumably go up on appeal on
4 other issues.
5 THE COURT: On other issues?
6 MR. GALDIERI: It sounds really like what the
7 Plaintiff is concerned about is the application of a
8 legislative policy to the verdict in this case.
9 THE COURT: Right.
10 MR. GALDIERI: Which is the statutory cap. That's
11 nothing that we can change on the Defense side, that's nothing
12 that the (indiscernible) court can change.
13 THE COURT: Right. There are five people who can
14 change it.
15 MR. GALDIERI: But there are people above who can
16 change it. There are people in the gold dome in Concord who
17 can change it, and those arguments can be made there.
18 MR. VICINANZO: But we're not writing on a slate
19 that has no chalk on it. The fact is, we already have cases
20 construing the constitutionality of the application of
21 sovereign immunity. Every time the case mentions a cap, it
22 says it must be reasonable. And there's no reason to think
23 that that is any different as a facial challenge than on an
24 as-applied challenge. And here, hundreds of rapes at 475,
25 applying that cap is inherently irrational. You've said it

1 probably 15 times in your order already that --
2 THE COURT: And it's --
3 MR. VICINANZO: -- what was reasonable and what
4 wasn't reasonable. And I agree with you. You're right about
5 it. And I think everybody deep down knows you're right about
6 it. It was an irrational result.
7 THE COURT: And it's less than the cap of the
8 settlement damages. I mean, it's less than the cap of the --
9 I don't know that this is the measuring stick or not, but it's
10 at least noteworthy that the maximum you could get from the
11 nonjudicial settlement process, I think, had been a million.
12 And it's now, what is the absolute --
13 MR. VICINANZO: It was a million five, now it's two
14 and a half.
15 THE COURT: Yeah. So now it's two and a half
16 million. So it would be odd if you go to court and the
17 State's definition of incident is correct. Then everybody
18 would have one incident, right? It would be odd if you get 20
19 percent of what you could get with the settlement process as a
20 cap by going to court. That would be odd, because it would
21 suggest that the legislature thinks the cases might be worth
22 as much as two and a half on a comparatively quick process,
23 but then cap it at 475. But I don't know what to do with
24 that.
25 MR. GALDIERI: I think a lot of assumptions are

1 being made there, Your Honor.

2 THE COURT: Yes.

3 MR. GALDIERI: And I'm not sure that that process is

4 necessarily analogous to the court process. It may very well

5 be that the legislature created that fund so that folks had a

6 different avenue for relief that was quicker and speedier and

7 perhaps did apply, would give them money above or beyond the

8 cap in a different way, under different metrics. That's all

9 appropriate for the legislature to do. The Plaintiff can take

10 their verdict to the legislature and see if the legislature

11 will appropriate them more money than the legislature's

12 appropriated under the cap. But the legislative policy of the

13 cap applies, and they're not requesting a new trial. And I

14 think that motion has to be granted and the Court has to --

15 THE COURT: When this case was tried, the cap was

16 currently 1.5. I thought it was one, but.

17 MR. VICINANZO: One and a half here, Judge. It was

18 two and a half as of two weeks ago.

19 THE COURT: It was one and a half.

20 MR. VICINANZO: Okay.

21 THE COURT: I mean, there is --

22 MR. VICINANZO: And I should tell you, Judge, that

23 that, because I've become quite familiar with that process,

24 they do not at all treat the definition of incidents the way

25 the Attorney General's Office is treating it now. They treat

1 it the way you treat it, as an episode. Every rape is counted
2 separately as an incident.
3 THE COURT: Well, but they have a -- they have a per
4 claimant cap.
5 MR. VICINANZO: They do. Exactly.
6 THE COURT: So.
7 MR. VICINANZO: But they have an incident, they
8 define incident the way you do and the way most common sense
9 (indiscernible).
10 THE COURT: But they don't have -- but they have no
11 need to -- they don't have a need to define incident to know
12 what their cap is.
13 MR. VICINANZO: No. But --
14 THE COURT: They're doing it for whatever --
15 MR. VICINANZO: -- yeah, no, it's a different
16 process.
17 THE COURT: It's a different process.
18 MR. VICINANZO: But they're defining incident in a
19 way that you are and the way most reasonable people --
20 THE COURT: But I mean, it would be odd if the
21 legislature says at the time that this case went to trial, if
22 you go route A, the cap is 1.5. If you go route B, the cap is
23 475,000. That would, at the very least, be odd. I'm using
24 the word odd rather than lacking a rational basis.
25 MR. CHASE: Right. These are, as you noted,

1 throughout this entire case, the claims fund and litigation
2 are two completely different avenues --
3 THE COURT: Yep.
4 MR. CHASE: -- and we've separated them --
5 THE COURT: Yep.
6 MR. CHASE: -- throughout the entire time from
7 before the motion to dismiss process all the way through. You
8 made multiple notations throughout your orders indicating that
9 they were separate processes, and we essentially should not be
10 looking to one or the other. They are two separate processes.
11 Both have different guidelines or rules and laws to follow.
12 Again, the legislature, as Attorney Galdieri said, had made
13 this fund separate for a more efficient, speedier process
14 using different definitions of things. Here, they're both
15 they're completely different. They're not analogous to one
16 another.
17 THE COURT: So I --
18 MR. GALDIERI: I don't think it would change, Your
19 Honor, the cap, the process, the whether or not the cap is
20 Constitutional on its face or as applied. And I don't know
21 that you could even have an as-applied Constitutional
22 challenge in this context, because it would seemingly, what
23 would the benchmark be? How much do you get? What does a
24 judge just decide over the legislative, the well-considered
25 legislative, choice of what appropriately balances an

1 individual's right to recovery --
2 THE COURT: Well --
3 MR. GALDIERI: -- with protection the public? The
4 judge chooses a number?
5 THE COURT: -- I mean, the numbers do mean
6 something. If they were to make a $50,000 cap, I'm quite sure
7 that the Supreme Court would have a problem with it. I don't
8 know exactly what their remedy would be, but I mean, it's not
9 like -- it's not like just because there is a number there
10 that there's not a Constitutional issue.
11 MR. GALDIERI: Well, but that might be a facial
12 challenge to it. And there may be an objective number that
13 you could come to that is middle of the road average by some
14 objective metric. But I don't know how you, on an as-applied
15 basis, start to say one person is going to get a certain
16 amount of the cap, the next person is going to get a
17 different, the next person is not going to get a
18 Constitutional challenge. That strikes me as a lot of policy
19 making for the Court to engage in rather than adherence to an
20 objective standard that can be managed by --
21 MR. VICINANZO: Can I point out though that --
22 THE COURT: Well, I think that that was -- I mean, I
23 read, before I wrote the May 22nd order and I read it a few
24 times, but I haven't read it since, they did discuss the
25 concept of this cap. And I think they did it in not one, but

1 two decisions. And that was partially the Supreme Court's
2 position, which was, well, we're not really here to draw
3 lines, and they seem more trouble by the eight to one. What
4 if you had many and with that particular number? But nor did
5 they say any number goes for all time. So I'm not disagreeing
6 with you. I'm just --
7 MR. VICINANZO: Well, in subsequent cases, Judge, is
8 they keep saying that the cap must be reasonable.
9 THE COURT: Must be reasonable.
10 MR. VICINANZO: Reasonable means something. And
11 it's certainly something that a court can review. Why not?
12 I'm having a hard time with it. And I hope I don't sound like
13 I'm beating a dead horse or repeating myself. But David
14 Meehan has important Constitutional rights that are being
15 stripped from him by the application of this cap, and nobody
16 seems to care about it. Nobody seems to think that's an
17 issue.
18 What Anthony is referring to is a statutory scheme.
19 It's sovereign immunity, which the State was -- you know the
20 Supreme Court is very skeptical about, has been for 50 years
21 for a good reason. And we have important substantive and
22 Constitutional rights that seem to get short shrift to a mere
23 statutory scheme that the Court and lots of people have a lot
24 of doubt about. I think we need to focus on that more. I
25 really think it's getting short shrift.

1 MR. GALDIERI: And Your Honor, I do think that the
2 Court can rule on the motion to apply the cap. Those
3 arguments are in there. Come out how it may and that
4 ultimately will be taken up on appeal where those arguments
5 could be made, and the issue can be resolved. That issue, any
6 issue related to the word incident in the statute. Any other
7 issues that have been preserved. It sounds like that's the
8 trajectory of where things should go and the most efficient
9 and effective way to deal with them.
10 THE COURT: Well, I'm not sure where on the present,
11 I mean, I guess my job is to rule on the motions in front of
12 me, and not necessarily to figure out everybody's subsequent
13 moves on the chessboard. But it seems that I think maybe
14 you're right. The Plaintiffs have put, not all of their eggs,
15 but most of their eggs in a Constitutional basket. And that
16 can certainly be the subject of a decision here and then a
17 subject of a decision by the Supreme Court.
18 But they're not putting terribly many of their eggs
19 at this point in the basket of what an incident is, beyond
20 asking me to just dictate a number of incidents or
21 alternatively, order a new trial on the number of incidents.
22 And I find that I am getting pushed toward making a decision
23 on the Constitutional issue and having that be the issue
24 that's on appeal, which really won't have much to do with the
25 number of incidents at all.

1 MR. VICINANZO: Well, Judge, we also, it's not only
2 the Constitution, and although I'm making a big pitch for it
3 because I feel like somehow it is still the supreme law of the
4 State. But it's getting short shrift. That's how I feel
5 about it. I may be wrong.
6 THE COURT: Right.
7 MR. VICINANZO: But we're also talking to about the
8 JNOV, and we also did, as an alternative, ask for a new trial
9 on damages, on just damages.
10 THE COURT: But not anywhere a new trial period.
11 MR. VICINANZO: Well, I know, but I mean, we have
12 asked for it -- at least on damages. So I just want to kind
13 of correct the record. I also took some reliance on your
14 statement in your order that you would be inviting --
15 THE COURT: Yes.
16 MR. VICINANZO: -- subsequent submissions.
17 THE COURT: And I was. And --
18 MR. VICINANZO: And usually I --
19 THE COURT: -- yes.
20 MR. VICINANZO: -- I don't usually say no. And I'm
21 definitely not going to say no here. We will definitely take
22 you up on your offer. But we want to think about what you've
23 said, and we will. I'm looking forward to at some point
24 having a real conversation with the State, because I think
25 that is an important thing to do. But we would want to file

1 an additional motion. I didn't want you to think that we had
2 completely ignored the issue of a new trial, but we did it on
3 a limited basis. It's possible we refine that and look at it
4 a little bit more in light of your comments.
5 THE COURT: It's tricky. Can I ask a question about
6 a different issue? It's technically not ready, but I just --
7 there's this motion to clarify the order that, a protective
8 order with respect to what came out of the criminal cases, so
9 that it could be used in the settlement process. Are you guys
10 able to chat about that?
11 MR. VICINANZO: Yes, we can. There are other folks
12 involved in that. I'm not primarily and that person is not
13 here for us today.
14 MR. GARLAND: Likewise, Your Honor. I have a
15 general awareness of that. I do know that there have been a
16 number of conversations between folks at our office and folks
17 at Nixon Peabody about that, and we obviously would try to
18 avoid any need for the Court's intervention if we didn't think
19 we needed it.
20 THE COURT: Well, that's good. I just wanted to say
21 this. I think, I mean, right, I understand there's one
22 superior court that sits in all 10 counties, but Judge Delker
23 and the judges in Hillsborough who sealed the criminal
24 matters, they sealed it. And I said, well, we have this case,
25 and we have this case we have to get through. So I'm just

1 going to issue a protective order because we can't have the
2 materials not used in this case.
3 I'm not sure that I have any business messing around
4 with their orders with respect to what I'm calling the
5 nonjudicial settlement. I mean, I know somehow it's under the
6 judicial branch in some way, shape, or form, but it doesn't
7 involve a court.
8 MR. VICINANZO: Well, it's interesting that I think
9 the State filed a request with you, but I don't think they
10 filed a request with Hillsborough.
11 THE COURT: I just --
12 MR. VICINANZO: Because there's another order down
13 there that would also be implicated. I don't think anybody's
14 thought about that until now.
15 THE COURT: Yeah. I mean, it's not -- I mean, my
16 protective order was really just to make it possible for
17 everybody to have this trial and to use the documents here. I
18 mean, frankly, if there was a need to have this -- if
19 Hillsborough modified their order and it was just housekeeping
20 to have us modify ours, of course I would do it. I'm just,
21 just so you know, I'm just a little bit wary about stepping on
22 their toes, feet, and shins. Even though my innate belief is
23 that, of course, everybody should have the records relating to
24 these cases. I mean, certainly the lawyers litigating the
25 settlement, that seems to me self-evident, subject to a

1 protective order.
2 MR. VICINANZO: I'll bring a message back to my
3 office, and I'm sure those people will talk with each other.
4 Is the motion, I don't know if it's fully briefed or not.
5 THE COURT: It's not. No. I think that the State
6 wanted to get something else in, but I think it was filed
7 sometime.
8 MR. VICINANZO: Okay.
9 THE COURT: I wanted to bring it up. And then you
10 have the issue with depositions for the group 2 plaintiffs.
11 And I don't know, I mean, it seems to me on the one hand, the
12 State can -- seems to me a few things. One, the State can,
13 well, you have enough cases. You can depose whoever you want.
14 There's no reason you can't depose a lot of people right now,
15 whether they've gone to the settlement fund or not. There are
16 enough people who are overlapping witnesses.
17 I mean, I guess if there's somebody who was the last
18 one there and knows nothing except about himself, why would
19 you depose him? But I mean, of the group 2 people who were
20 overlapping, you can take a lot of depositions with all of
21 these cases. But I'm not necessarily sure that you want to if
22 you know that we can't do anything until 2025 in the group 2
23 cases.
24 MR. VICINANZO: Well, there was a -- there was a --
25 under the current scheduling order, the discovery was supposed

1 to close on July 3rd.
2 THE COURT: Right.
3 MR. VICINANZO: So that was driving the train. I
4 guess --
5 THE COURT: But that's obviously --
6 MR. VICINANZO: -- probably relieved now. But and
7 that is something that we have begun talking about. I haven't
8 really gotten any response yet, a definitive response, on the
9 State's position but we have been talking. We did talk on
10 Thursday.
11 THE COURT: And your group 2 went from five or six
12 to three or four.
13 MR. VICINANZO: Right. And now it's one that's what
14 our proposal is for the next, for trial 2, would be Michael
15 Gilpatrick would be the next one. That is a question. We
16 didn't want -- we want to pursue a trial in -- a trial next
17 with Michael Gilpatrick. I don't know though. Do we need to
18 ask -- do we need to file in the Supreme Court to ask to sever
19 him from that so he will go by himself and not with the group?
20 Or can you do that?
21 THE COURT: If his case is up there then the
22 question is whether he should go by himself or the group. I
23 think you need to ask to remand it before you can go to trial,
24 because they have his case up there. I don't know for all of
25 these cases. What's the right way to put this. There's some

1 sort of distribution. Maybe it looks like a bell curve, maybe
2 it looks like something else, of cases where there are
3 hopefully Mr. Meehan was on the most severe end of things.
4 And then there are people on a less severe end of things.
5 Having heard Mr. Gilpatrick testify, my hope is that
6 he is on the more severe end of things, and I'm not sure that
7 it necessarily, it may help Mr. Gilpatrick not necessarily
8 just with his case, but with the fact that he was one of the
9 ones whose case has been pending a long time. There's some
10 psychological weight that the whole litigation process brings
11 to bear and so on and so forth.
12 But it might not help the long list of plaintiffs
13 and the State in figuring out what to do about these cases, to
14 try another guy who is on the severe end without knowing what
15 the moderate or middling cases are, or what the issues of
16 proof are. I mean, if you want feedback --
17 MR. VICINANZO: Well, and there's a lot of --
18 THE COURT: -- should he really be?
19 MR. VICINANZO: -- we're getting a lot of feedback
20 in the settlement process, and we have about 500 people in
21 there now so there's a lot of feedback. And we have a pretty
22 good name, a good, a pretty good idea. But Michael was the
23 second guy to come forward, the second guy to file. His case
24 is ready to go. He's already been deposed. So he's
25 substantially ready and far more ready than any of the other

1 plaintiffs.

2 MR. CHASE: A couple point -- a couple points to

3 that, Your Honor. So first, I agree with you that originally

4 we were scheduling all of these cases back about a year plus

5 ago. The goal was to get essentially a bellwether so that

6 we --

7 THE COURT: Right.

8 MR. CHASE: -- both sides can figure out what these

9 cases are in litigation.

10 THE COURT: Right.

11 MR. CHASE: Not in the settlement fund. We had a

12 long discussion, multiple status conferences that again, I

13 feel like a broken record now. The two are different

14 processes. Some plaintiffs are going to go to the settlement

15 fund. That's faster, it's easier. Some people are going to,

16 for lack of better ways, risk and go to trial, go to

17 litigation. They are two separate paths. We need valuations

18 on both.

19 And for here, the whole point of scheduling the

20 different trials was to get a bellwether. I agree that I

21 don't know if Michael Gilpatrick's case would be to aid in the

22 bellwether nature of these cases. So that's the first piece

23 that I'll say, completely agree with that.

24 As for the second piece where you said that the case

25 was basically ready, I'm sure you saw a flurry of discovery

1 motions from us. The short version is we disagree with that.
2 There's a lot of deficiencies in discovery, from my
3 perspective. And then going back to just one point, just so I
4 don't miss it. The depositions. They have brought 1,500,
5 give or take, cases. We should be allowed to do discovery on
6 them.
7 THE COURT: Yes.
8 MR. CHASE: Back in January of '23 or so we, DHHS,
9 was required to produce millions of documents pursuant to
10 certain tagging from 1960 through present day. And we've done
11 that. They have only given us snapshots of each of the
12 different plaintiffs. We can't, of course, speak to witnesses
13 in different cases because they represent them.
14 THE COURT: Right. You can take --
15 MR. CHASE: So we have to be able to do discovery to
16 get the information. But we've --
17 THE COURT: You can do discovery in 1,500 cases at a
18 time --
19 MR. CHASE: And we've been trying.
20 THE COURT: -- whatever.
21 MR. CHASE: Well, we've been trying to do that, Your
22 Honor. But we keep getting stonewalled. And so recently is
23 when I started filing motions, which the Plaintiffs are
24 calling heavy handed. The fact of the matter is the motions,
25 they aren't getting us the stuff that we need. So it's

1 essentially the opposite side of what they claimed happened
2 back in October.
3 THE COURT: What do you think -- so okay. Well, one
4 issue is, is should Mr. Gilpatrick go next and is he a
5 bellwether? And as I was saying, as I was trying to say, that
6 having lived through the Meehan case, I'm sure that from your
7 perspective it, for both sides, it had a lot of meaning. But
8 hopefully he is not the bellwether. Hopefully he is not the
9 center of the bell curve. Right?
10 MR. CHASE: Correct.
11 THE COURT: Hopefully, he is far on the severe side.
12 Do you think I have jurisdiction to order discovery
13 in the five cases that are up at the Supreme Court? Now, the
14 discovery is collateral to the issue of whether they get tried
15 together. But on the other hand, the whole reason that they
16 would be tried together would sort of be to manage their
17 litigation as a whole. And is it treading on their
18 jurisdiction?
19 MR. CHASE: I think you can order discovery. The
20 only issue that's up there right now is the consolidation for
21 trial. We can still do discovery into these cases, and for a
22 couple of reasons. A) Which was just discussed. There's the
23 potential, I guess, the Plaintiffs might remand Gilpatrick to
24 go to trial. So that's one piece. But the second piece is
25 these cases are -- discovery needs to happen in them one way

1 or another.

2 THE COURT: Right.

3 MR. CHASE: And we're being forced, essentially, to

4 be doing discovery at the tail end of discovery deadline

5 because things keep getting pushed by the Plaintiffs.

6 THE COURT: Well, I would be --

7 MR. CHASE: So I think the short version is we

8 should be getting discovery, we should be allowed to be

9 getting discovered. And I think you have the jurisdiction to

10 order discovery in these cases.

11 THE COURT: Right.

12 MR. CHASE: Again, the only issue is consolidation.

13 It's not discovery.

14 THE COURT: I would definitely have the jurisdiction

15 if there was an order on a motion for a limited remand. If

16 there's not an order on a motion for a limited remand, there's

17 at least a question as to whether the fact that it's up at the

18 Supreme Court.

19 MR. VICINANZO: Judge, can I just say, I think I

20 think that's a little bit overstated, that there are several

21 depositions that we postponed after we got that unanticipated

22 notice from the Supreme Court, but it's a handful of

23 depositions. They could be rescheduled in the next few weeks

24 and next month or so. They're not going to trial for a long

25 time. So there's really no hurry. I mean, because of what

1 the Supreme Court did.

2 THE COURT: One of the things --

3 MR. VICINANZO: I think some of the urgency is

4 manufactured a little bit here. And the fact is they got

5 another law firm that's doing all this stuff while we were in

6 trial for a month, preparation and then trial for two months,

7 essentially. And so when we come out, we got to -- we're

8 facing a big, awful lot of stuff on our desk.

9 THE COURT: There's an appearance there's somebody

10 on your side.

11 MR. VICINANZO: What's that?

12 THE COURT: There's an appearance from some lawyer

13 on your side. You could put them to work doing discovery.

14 MR. VICINANZO: Yeah, well, the State have several.

15 They have three law firms working on this, too. So they're

16 not without resources. And they and most of them are not

17 working on this case, the Meehan case, so they, I'm just

18 saying, we need to ask for a little bit of accommodation to

19 catch up and we will be -- we'll get -- we will get those

20 depositions done in short order. And there's no crisis.

21 There's no issue.

22 MR. CHASE: Your Honor, Nixon Peabody has what 650

23 lawyers? The State does not. I had to staff up. We staffed

24 up in order to adequately defend these cases, to protect the

25 New Hampshire taxpayers, to protect the DHHS, and its

1 obligations and rights. The depositions, yes, were being
2 taken by somebody else because, as you know, we were on trial.
3 So yes, there was stuff going on in the background because
4 we're defending these cases. They've brought them, they've
5 got plenty of lawyers. They need to be able to work the
6 cases. They have ethical obligations under Rule 1.3 that they
7 need to abide by. That's the short version. They brought the
8 cases. They should be able to make discovery on them. We've
9 asked for discovery, and we haven't gotten it.
10 MR. WARECKI: Can I interject, Your Honor?
11 THE COURT: You may.
12 MR. WARECKI: Nathan Warecki on behalf of the
13 Plaintiffs. I want to make one point crystal clear first off,
14 which is that the Court has stayed all the other cases except
15 for the six which are on for trial 2 and the one, Mr. Meehan.
16 Those cases are stayed. So to the extent we're concentrating
17 our energies on what needs to go forward first, because the
18 priority is what we're doing.
19 The point on the bellwethers. Mr. Chase is
20 complaining about perhaps the identity of the plaintiffs who
21 are on the slate for trial 2. The State did not propose an
22 alternative slate.
23 MR. CHASE: We weren't allowed to.
24 MR. WARECKI: The six we have -- with 2, definitely
25 allowed to. They chose not to. And so the slate we have is

1 the slate we have. And that's where we've concentrated our
2 energies --
3 THE COURT: Well, the issue wasn't the particular
4 group of five, who by and large overlap, for the most part in
5 time and for the most part in place. The issue was whether
6 Mr. Gilpatrick -- the issue that that we raised today is
7 whether Mr. Gilpatrick is typical. I mean, we have some sense
8 of how one jury feels with respect to an extreme case. Mr.
9 Gilpatrick, him having testified, impressed me as a similar
10 extreme case, and I am hoping against hope that there are not
11 1,200 similar extreme cases.
12 MR. WARECKI: But we also would hope that's the
13 case, but unfortunately --
14 THE COURT: Right.
15 MR. WARECKI: -- I mean, it's not.
16 THE COURT: But I mean, all I'm saying is, one of
17 the things that I thought you needed was jury verdicts in the
18 average mine run of cases cases rather than -- and I think if
19 you put yourself in the State's position, you might say, cap,
20 no cap. The big verdict in Meehan doesn't tell me very much
21 what they're going to do about the more middling case. And so
22 a verdict in Gilpatrick might not also serve that function.
23 MR. WARECKI: If I were in the State's position, I
24 would propose to us a slate of alternative plaintiffs, which
25 they've not done. And so we're left with where we're at right

escribers
www.escribers.net | 800-257-0885

1 now.

2 THE COURT: But you have those plaintiffs in trial

3 2.

4 MR. WARECKI: Yeah, we have the plaintiffs.

5 MR. VICINANZO: They're all severe cases.

6 MR. WARECKI: Yeah, they were severe cases that we

7 proposed. And there was no alternative proposal from the

8 State. At this point, we're too far down the road to change

9 course. We have those plaintiffs. We've engaged in

10 discovery.

11 THE COURT: Well, do --

12 MR. WARECKI: We've done the paper discovery.

13 There's a disagreement over some of the production, which

14 we're going to hash out. There's no question that's going to

15 happen. There's been a multitude of records requested at the

16 depositions scheduled, slightly delayed. There's been experts

17 retained. There's been a lot of work put into these

18 plaintiffs. And we're hamstrung because the State chose to

19 challenge the consolidated basis.

20 Now they're complaining, of course, about the

21 consequences of that. But they chose this this route and it's

22 hamstrung all of us into what we proposed them doing in the

23 first place. And so now we're trying to make the best of

24 where we're at. And that is a single plaintiff can go forward

25 while the Supreme Court deals with the jurisdiction issue.

1 THE COURT: But I mean, but at that point, the
2 Supreme Court, if you had -- did you have five or did you have
3 six?
4 MR. WARECKI: We had six originally.
5 THE COURT: You had six. So you had six. Two are
6 gone. That leaves four. If you took one out, that leaves
7 three. You were already dealing with a different -- with
8 something that's sort of different in, I don't know, either
9 degree or kind. You decide. But you're dealing with a
10 different beast than a trial with that many. I mean --
11 MR. WARECKI: Right. But my point is we're -- we
12 cannot do that, I guess, to get to this bellwether piece. But
13 then we've wasted time and effort we put into preparing this
14 trial. There's no reason why we can't, with a trial date
15 available, try the single case while the Supreme Court goes
16 through the probably 18 months it's going to take to get
17 everything briefed on the original jurisdiction, and argued,
18 and then decided. That 18-month interlude, we can try a case.
19 I mean, we've got a case to try. And the State doesn't have
20 an alternative. So let's try it.
21 THE COURT: Well --
22 MR. WARECKI: I mean, that's our (indiscernible)
23 pitch on the jurisdictional issues and all those sort of
24 thing.
25 And I just wanted to make another comment on the

1 discovery issues, which is there's been some discovery issues
2 which happen in civil cases. Parties don't always get along.
3 The State has undertaken the effort to improperly move for
4 conditional default against some of our clients who have
5 replied -- who have responded to the interrogatories and
6 requests for production. The State doesn't agree with some of
7 the objections and some of the responses. We're in the
8 process of going through the meet and confer process. We're
9 doing what we're supposed to be doing. I don't think there's
10 anything that's out of field though.
11 THE COURT: I always thought that conditional
12 default is not -- I always thought if you get responses, a
13 motion to compel is appropriate. Conditional default is not.
14 Now I could be wrong, but I always thought --
15 MR. WARECKI: It's in the rule.
16 MR. CHASE: There are some plaintiffs where we
17 didn't get anything, Your Honor, which is --
18 THE COURT: And that's --
19 MR. CHASE: -- why it happened. And --
20 THE COURT: -- and that's different.
21 MR. CHASE: -- one of the reasons why we moved for
22 that is because July 3rd was the discovery deadline.
23 THE COURT: Right.
24 MR. CHASE: However, going just really quickly onto
25 the group of the six plaintiffs, or it was originally, going

1 back in time, it was originally 10 that they put out there.
2 We disagreed. We started coming up with the list. We had a
3 hearing with you. You then essentially truncated it.
4 THE COURT: Right.
5 MR. CHASE: Said consolidation is going forward.
6 THE COURT: Right.
7 MR. CHASE: We were always focused on the
8 consolidation of cases at that point in time.
9 THE COURT: Right.
10 MR. CHASE: We had brought up a couple of cases on
11 that hearing.
12 THE COURT: Right.
13 MR. CHASE: I stood up and talked about a couple of
14 them. Then you chose six specific cases that overlapped. And
15 there were some time, some --
16 THE COURT: Yeah, they're imperfect.
17 MR. CHASE: -- perpetrators. They're imperfect.
18 But it was a slight range of injuries. They're not all severe
19 cases because we would have --
20 THE COURT: Right.
21 MR. CHASE: -- I mean, that would have been a
22 completely different issue because the entire time you and I
23 and Attorney Vicinanzo were talking about, we need to
24 essentially get a valuation of cases.
25 THE COURT: Right.

1 MR. WARECKI: I don't think Mr. Chase was here on
2 the hearing when you granted the motion to consolidate.
3 THE COURT: He was.
4 MR. CHASE: I was, but --
5 THE COURT: Well, but there were -- it was an issue
6 that was discussed at many hearings. And I mean, frankly, at
7 first everybody agreed with the idea of having some joint
8 trials and the State didn't want it. I can't say who was here
9 each time, but definitely the State always was of the opinion
10 that the purpose is to get some bellwether cases and know what
11 these cases were like.
12 I think that with respect to ordering depositions.
13 If I had to take an exam on, a bar exam again, and there was a
14 appellate procedure question, I would think that the trial
15 court would have jurisdiction to order discovery when the
16 Supreme Court is deciding joinder at trial, because it's a
17 collateral issue. And that would be my guess.
18 But I think that what I would then write is that the
19 better practice would be to keep the Supreme Court apprised of
20 what's going on by filing a motion for a limited remand
21 pursuant to their rules. And this way there is no doubt as to
22 our jurisdiction to consider the order, and it wouldn't be
23 treading on their jurisdiction. Or if they thought that it
24 was too closely related, they could deny a limited remand.
25 So I mean, respectfully, I think that the better

1 practice, when there's a case up there, is to ask for a
2 limited remand so the Superior Court doesn't unintentionally
3 tread on the appellate court's jurisdiction. Even though I'm
4 not -- even though I think, like, push came to shove, and the
5 issue was for a point on an exam, is it a collateral order or
6 not? I would say yeah, it probably is.
7 MR. CHASE: So then for the other cases, are we
8 allowed to continue this discovery on these other cases while
9 apparently --
10 MR. WARECKI: Which cases?
11 MR. CHASE: -- we are not allowed to do? Any of
12 them? Well you have discovery, or you have --
13 THE COURT: Yeah. What I think you ought to do --
14 what do you think about --
15 MR. WARECKI: Well, the discovery is stayed in all
16 the other cases except for the six.
17 MR. CHASE: Then I'm asking to continue the
18 discovery so that we don't have to come into this again.
19 THE COURT: Right. Well, I think, I mean, well, the
20 one thing that makes no sense -- there is one thing that makes
21 no sense, and that is, I mean, I don't know who the youngest
22 lawyer here is. But whoever the youngest lawyer here is will
23 be retired and their kid will be retired if we go on the pace
24 that we're going on, even if half the cases get siphoned off
25 to the settlement fund. We've managed to try one case. Kind

1 of. We've managed to try one case in four years.
2 So the one thing that I think would be a disaster
3 would be to have our few spot check plaintiffs on appeal with
4 respect to the issue that we sent there on limitations, to
5 have another few plaintiffs on appeal with respect to joinder
6 and have no discovery with anything and nothing else going on,
7 and to have nothing moving and no case possible, no
8 possibility of trial before really January 2025 at the
9 earliest, and then no other cases being prepared for trial.
10 That I think would be, frankly, a disservice to everybody
11 involved. And your list of aging witnesses will be worse than
12 aging by the end of this process.
13 MR. WARECKI: I think that's exactly right, Your
14 Honor. I think we can probably alleviate this concern by
15 moving ahead with proposing candidates for trial 3, trial 4,
16 start to get a slate of future trials on the schedule. And in
17 the meantime, we have Mr. Gilpatrick. We can proceed with
18 that. We can get the other cases ready to go. And I mean, I
19 don't think --
20 THE COURT: Do you need me for discovery in the
21 like --
22 MR. CHASE: I would say yes, Your Honor. I have
23 tried to move for a hearing with Judge McNamara, but it was
24 unilaterally canceled when the Plaintiffs did not respond to
25 my letter. So I would ask that you do get involved. I would

1 like to get discovery on these plaintiffs for a couple of
2 reasons. One, the plaintiffs are potentially facing
3 spoliation issues with these documents that I haven't been
4 able to get because they won't give them to me. So discovery
5 should be continuing.
6 MR. WARECKI: Mr. Chase received a updated letter
7 yesterday from our office in terms of the issues, which he has
8 seemingly has an issue with mostly has to do with
9 authorizations that he is seeking and then blaming us for the
10 inability of third-party providers to get authorizations --
11 THE COURT: Well, the authorizations --
12 MR. CHASE: Authorizations. Some of which were
13 signed June 4th of this year. So I mean, yes, there is some
14 concern on my part. But again, the other piece of discovery
15 is they have a whole stable of plaintiffs of which we're still
16 entitled to discovery on. I'm worried that as time goes on,
17 we might not be able to receive some of these documents.
18 THE COURT: You should be able to get like --
19 MR. CHASE: I agree.
20 THE COURT: Stay or no stay, you should be able to
21 get authorizations for -- I mean, if you're the ones --
22 MR. CHASE: I agree.
23 THE COURT: -- who are sending them to the medical
24 providers, the authorizations are not heavy lifting.
25 MR. CHASE: Again, I agree.

1 MR. WARECKI: So I think again that that moves us
2 toward let's get on the schedule within the conversation.
3 Identify plaintiffs to move forward on the next trial. You
4 can't try 1,200 cases in the same month in the same year. You
5 just can't do it. We have to prioritize. It's an unfortunate
6 reality of where we're at. Let's do that. Instead of
7 spending time on this wasteful motion practice, which is
8 avoiding the real issue, which is that we have a case that's
9 ready to go. We have the appeal which affects this Court's
10 jurisdiction. We have a plan, perhaps, to move forward on the
11 case that's the most far ahead. And the one which could go
12 forward the soonest. And then we can have a conversation
13 about --
14 THE COURT: Do you agree with me? I mean, obviously
15 you're not going to be able to turn on a dime and do this, but
16 do you agree with me that basically they should be able to get
17 the documents, right? I mean, they should have, on all of
18 your plaintiffs, the medical releases, the medical
19 information, and interrogatories, because that part is -- that
20 part is doable. Now, the depositions and all that. It's also
21 doable. But I mean, certainly the easiest one is request for
22 documents and medical providers. And then, after that in
23 terms of complexity is interrogatories, because at some point
24 you're going to want them to take a look at all of these
25 cases.

1 And I'm not quite sure, and I know you may not have
2 your experts lined up on all of them. And you had powerful
3 experts in the Meehan case, at least with respect to the
4 psychology. I won't comment with respect to some of the
5 others. But with respect to the psychology, you certainly
6 did. And the medical damages. But even if you don't have the
7 experts, they would be able to see what the treatment and
8 other history is.
9 Do you disagree that they shouldn't be able to do
10 that on a sort of large scale basis?
11 MR. WARECKI: Well, I don't disagree with --
12 THE COURT: They're not going to get 1,000
13 plaintiffs turned around in 30 days. That's crazy.
14 MR. WARECKI: Yes, I agree with you on that one,
15 Your Honor. I think there's probably a subset of plaintiffs
16 that can go. We've provided information upon request from the
17 State's (indiscernible) on a reasonable timeframe which is not
18 going to be 30 days, but frankly going to 90 days. It's a
19 going to take a lot of lifting to talk with a lot of people.
20 THE COURT: Although, right, and I understand that
21 your cohort of plaintiffs includes people from a variety of
22 walks of life and --
23 MR. WARECKI: And locations.
24 THE COURT: -- and locations.
25 MR. WARECKI: And notaries. I mean, it's --

1 THE COURT: Yeah.

2 MR. WARECKI: The Court may be reminded when we were

3 doing the declarations, the contractor's motion to dismiss.

4 There's a lot of groundwork that goes into collecting all that

5 information --

6 THE COURT: No, I understand, but to get the

7 signature on releases is not.

8 MR. WARECKI: It's not undoable. Correct.

9 THE COURT: That's not asking a lot of them. And

10 they are plaintiffs in the lawsuit. And I the variety of

11 plaintiffs you have. And you don't know me that well, but

12 when I was in practice, I had a caseload of people who were

13 impossible to get a hold of. So I mean, if you --

14 MR. WARECKI: The other piece of this is --

15 THE COURT: -- if you know me.

16 MR. WARECKI: -- the other piece of this is -- I'm

17 sorry to interrupt.

18 THE COURT: No. That's all right.

19 MR. WARECKI: The other piece is just in terms of

20 priority. Some of our clients are going into the settlement

21 fund.

22 THE COURT: Yep.

23 MR. WARECKI: I mean, is there -- there will be a

24 stay once they going to the settlement fund of their claim

25 before the Court. So discovery really doesn't make any sense

1 to go forward on those cases while the settlement fund is
2 pending. And we've already made arguments concerning the
3 arbitration nature.
4 THE COURT: Yeah, there will be a stay. I'm a
5 little bit worried about -- there's no good solution, but I'm
6 a little bit worried about people who go into the settlement
7 fund -- I mean, say these, I don't know anything about the
8 trial 2 plaintiffs, their names or even their John Doe
9 numbers -- but if you had cases coming up for trial, let's say
10 they were October and they say, no, we're going to a
11 settlement conference. Then they don't like what happened
12 there. Now they can leave the -- they're not stuck, because
13 they go into the settlement conference, with what it produces.
14 It's either the number they take and then their claims are
15 gone, or it's a number and they reject it, and they go to
16 court.
17 So I'm a little bit worried about people going in
18 and out close to trial. I mean, and I know that they say that
19 they can do that, but it doesn't -- and I issued a snarky
20 little order that says it gets stayed if you ask to stay and
21 we issue the order staying it. But I'm a little bit worried
22 about the possibility that some plaintiffs will throw monkey
23 wrenches into trials.
24 MR. WARECKI: Well, I understand the concern, Your
25 Honor, but it hasn't happened yet.

1 THE COURT: No.

2 MR. WARECKI: And I think the settlement process is,
3 by definition under the statute, victim centered and trauma
4 informed. It provides space where these child abuse survivors
5 can discuss what happened to them, have someone look them in
6 the eye and not cross-examine them, call him a liar. I mean,
7 it's a different process. And I think it does have a lot of
8 benefits for the people who choose it. We haven't had anyone
9 go into it and come back to you and say, no, we're going to go
10 on for trial. I'm not sure that's going to happen at all, but
11 I understand the Court's concern. We don't foresee that being
12 an issue. The monkeying around to (indiscernible).

13 The State has just said it's two processes. It is.
14 And also, I mean, it's not necessarily a replacement for the
15 ADR process, which is part of the case structuring order for
16 any case that goes to court. So there's multiple
17 opportunities for an alternative dispute resolution, either
18 through the settlement fund and nonbinding arbitration through
19 that process. The regular mediation requirements were also
20 cases in New Hampshire and then otherwise discussions which
21 you know frankly we expect to have with the State.

22 THE COURT: But do you guys need, I mean, it just
23 seems to me that figuring out who you're going to take
24 discovery on and what cases go next is like quintessentially
25 the things that counsel generally do cooperatively.

1 MR. WARECKI: Agreed.
2 THE COURT: I am fearful that whatever I do is going
3 to be in ignorance of salient facts and therefore cause more
4 trouble than good. I definitely hear what you're saying.
5 MR. WARECKI: So the State and Plaintiff's counsel
6 have a regularly scheduled meet and confer every Thursday. We
7 can talk about issues with discovery for --
8 THE COURT: And you had Judge McNamara, but
9 apparently something got canceled. I don't get notice of when
10 you want to see Judge McNamara.
11 MR. CHASE: I understand.
12 MR. WARECKI: We had a discovery dispute, and we
13 were talking about it, and if there's still a discovery
14 dispute we had we'll elevate it to Judge McNamara. And I
15 think as Mr. Chase just mentioned, it was a July 3rd deadline
16 which was pushing us toward a more adversarial posture there.
17 But we could do that. I mean, we're there every day. We
18 could do that. We can have these discussions and present to
19 you, for example, a case structuring order or a trial 2,
20 single plaintiff trial 2, discussion about plaintiffs for
21 trial 3 and trial 4, get people identified and prioritized.
22 We can have discussions about when to schedule depositions.
23 THE COURT: Of course, the problem with trial 3 and
24 trial 4 is we don't know what the Supreme Court will say about
25 joint trials.

1 MR. WARECKI: Right. That's a way to prioritize the
2 discovery. I mean, and then we can have a discussion about
3 when depositions should go and who should be deposed based on
4 who the plaintiff is, who's going to go in trial 2? I mean,
5 we have to remember, you just have to remember we're dealing
6 with child abuse victims. The State's own protocols. If the
7 State was prosecuting cases instead of defending it they would
8 recognize that -- they would probably be sitting here where we
9 are saying you can't depose our clients right now because of
10 the issues that are coming up in terms of when trial is going
11 to go. You don't want to retraumatize --
12 THE COURT: You're also dealing with people -- I
13 mean, in fairness, I get that that you're dealing with child
14 abuse victims and alleged victims, but they're also claimants
15 who have brought claims. And they're the ones who have
16 elected to prosecute their cases.
17 MR. WARECKI: Right.
18 THE COURT: So they're a little bit, like in a
19 criminal case, the victim is not the one bringing the case.
20 In the civil case the alleged victim is the one bringing the
21 case.
22 MR. WARECKI: But in a prosecution the victim is the
23 evidence. So the State has --
24 THE COURT: Yes.
25 MR. WARECKI: -- and the State has devised protocols

1 recognizing what we all know about child abuse at this point
2 in time, which these are difficult issues for people to relive
3 in a deposition in an adversarial context.
4 THE COURT: They're very difficult. Yes.
5 MR. WARECKI: Probably the most difficult any
6 person's going to -- the most difficult situation any person
7 will have to go through. So that's my bullets in the back of
8 our minds. And I'm sure it's in the back of the mind of the
9 State, too. But we just want to keep that ball in front of
10 us.
11 THE COURT: All right. This is my suggestion. This
12 is what my suggestion is. Why don't we say the parties will
13 file a proposed case structuring order that will address,
14 among other things, discovery and depositions. And if they're
15 unable to agree, request a hearing, and we can do a hearing.
16 Somebody should bring coffee and Danish, because you guys have
17 got to agree more than you've been agreeing on paper. And at
18 least the ones that I know of the lawyers are all nice people,
19 and I'm assuming that's true of the ones that I don't know
20 very well either. And I don't know, you'll get a lot more
21 done if you do what apparently you're not allowed to do on
22 closing argument, which is walk in the other guy's shoes for a
23 second. But if you still need me to break deadlocks and make
24 decisions that are better off made by yourself because you got
25 yourselves as an entity, the two sides, I'd be happy to do it,

1 but take 20 days and try and do it.

2 On the issue with respect to the depositions, I

3 mean, one, yeah, I know there was a July 3rd discovery cut

4 off, but we're also not going to trial anytime soon. I'm

5 certainly not going to prejudice the State in its ability to

6 get discovery. But if you want me to rule with respect to the

7 ability to take the depositions of the five, I think that the

8 better practice is to get a limited remand. And I can't see a

9 reason for going with the worst practice. I mean, it's a five

10 minute motion for you guys. And can I also say 20 days for

11 other post-judgment filings before issuance of a ruling on

12 post-judgment matters. Does that sound fair?

13 MR. WARECKI: Did you have a deadline, Your Honor,

14 on the post case structuring order or just --

15 THE COURT: 20 days?

16 MR. WARECKI: 20 days.

17 THE COURT: Does that sound fair? So today is

18 the -- today is the 24th. So 7 days is the 1st; 14 would be

19 the 8th; 21 would be July 15th. So what about does July 15th

20 work?

21 MR. WARECKI: For us. Plaintiff's lawyers. Thank

22 you.

23 MR. CHASE: July 15 is for the, like, memos in

24 response to your order or?

25 THE COURT: And also for a proposed case structuring

1 order.

2 MR. CHASE: Okay. So --

3 THE COURT: Does that give you enough time?

4 MR. CHASE: -- so okay, both?

5 THE COURT: Yeah.

6 MR. CHASE: Yeah, I think that does, Your Honor.

7 THE COURT: Yeah. I mean, I want to keep things

8 moving, but on the other hand, you do things too quickly.

9 MR. CHASE: Yeah. No, July 15 should work. And I

10 just want to kind of streamline the post-trial stuff, because

11 Attorney Vicinanzo brought it up a couple of times. We do not

12 agree to additur of incidents. I mean, will not agree to

13 additur of incidents.

14 THE COURT: So that leaves us with -- okay. So one,

15 thank you on that. I was trying to suss out did you have a

16 second best position and that's fine. So your position is you

17 think there should be a judgment of 475 based on the verdict.

18 You don't think that the application of the cap is

19 unconstitutional as applied.

20 MR. CHASE: Correct.

21 THE COURT: Or at the very least, you don't think

22 it's unconstitutional as applied under controlling law. And

23 if somebody thinks otherwise, it's up to them in Concord.

24 MR. CHASE: Correct.

25 THE COURT: Frankly, on either side of the river, as

1 he pointed out.
2 MR. CHASE: Correct.
3 THE COURT: And that you would object, obviously,
4 well, you did object to the JNOV --
5 MR. CHASE: Yes.
6 THE COURT: -- or partial new trial. So that
7 objection is. And if they filed a motion for a new trial, you
8 would object to that. And if they don't file that sort of
9 motion, I have to resolve their JNOV and partial JNOV. But if
10 they're denied, I think I have no choice but to grant the 475
11 verdict subject to the Constitutional issue.
12 MR. CHASE: Yes.
13 THE COURT: Subject to the Constitutional issue.
14 And if they do move, you would object and then there would be
15 an order one way or the other.
16 MR. CHASE: Yes.
17 THE COURT: Okay. It's good to know that you, well,
18 it's good and it's not good to know. But it's good to have
19 the knowledge that you would object to additur -- if there was
20 an order for additur of incidents, you would say you reject
21 that, which would mean either a new trial or the 475. So you
22 have a dualist view of things, dual being two, not duel being
23 swords at noon.
24 MR. CHASE: Yes.
25 THE COURT: Okay. All right. Do we think we're

1 good?

2 MR. VICINANZO: Judge, we, as I said, intend to --

3 THE COURT: Yes.

4 MR. VICINANZO: -- submit more paper.

5 THE COURT: Yes.

6 MR. VICINANZO: I can't predict exactly what it will

7 look like. I know we want to analyze the Constitutional issue

8 a little deeper.

9 THE COURT: Okay.

10 MR. VICINANZO: And we are mindful of what you said

11 about the motion for new trial and our partial request for a

12 partial new trial as an alternative, second or third best

13 alternative, but we want to -- if we can take a little bit of

14 time to think about what you've said and what we've heard

15 today and get something to you. I think I'm going to ask for

16 after the 4th of July holiday, because a lot of people are our

17 next week.

18 THE COURT: Yeah. I wrote down -- I wrote down July

19 15th.

20 MR. VICINANZO: Oh. 15th? Okay.

21 THE COURT: If you need more time than that, look,

22 if people are working and doing things, I've never been one

23 for -- if people are working and doing things, I've never been

24 one for deadlines. If you need more time than that, file a

25 motion saying you need more time for doing this.

1 MR. VICINANZO: No. For now the 15th's fine. Thank
2 you, Judge.
3 THE COURT: Yeah. Okay. Good.
4 MR. VICINANZO: Oh, Judge, one thing we didn't
5 discuss is we talked about October, September. And I know
6 that we have the issue with the Supreme Court, but assuming
7 that a trial is going forward, can you tell us what the
8 availability is in the fall, winter, or where we are?
9 THE COURT: We pick juries every two weeks and we're
10 remarkably busy. I mean, I was thinking if there was going to
11 be a new trial in this case, we could slot it quickly, but
12 apparently that's not really what's going to be in the cards.
13 There was talk about a January trial at some point, and I'm
14 not sure, like, we have a pretty busy calendar, at least until
15 January.
16 THE CLERK: So we had these all slated for September
17 9th.
18 THE COURT: Right?
19 THE CLERK: So --
20 MR. VICINANZO: But there was an order, though,
21 moving them to after October 21st from (indiscernible). I
22 remember reading it. I know --
23 THE COURT: There may have been.
24 MR. CHASE: I would agree with him on this one.
25 MR. VICINANZO: Yeah? Okay.

1 MR. CHASE: It was --
2 MR. VICINANZO: So but it didn't set a date. It
3 said after. And that was a month or two ago. So I know
4 things fill up. I just --
5 THE COURT: There was a January date that we had
6 been holding I think originally for group 3.
7 MR. VICINANZO: Do we know what day in January it
8 would be?
9 THE CLERK: We don't have the January calendar set
10 up yet. And as soon it's set up, I can email counsel. Since
11 it's not set up, Judge Schulman would not have anything
12 scheduled. We don't have 2025.
13 THE COURT: Oh, we don't have it even in the book.
14 THE CLERK: Not 2025, no. So I can email counsel
15 with those dates. And then if counsel plans on having trials
16 in January, then we can put these ones in the calendar if
17 they're not.
18 MR. VICINANZO: Thank you. Well, we will be in
19 touch.
20 THE COURT: I mean, I think what you probably ought
21 to do is because we can't, I mean, realistically, if this case
22 were a new trial, it's not going September or October. I
23 mean, it's just not. Group 2 or Gilpatrick isn't going there.
24 I mean, right now he's still in the Supreme Court and the one
25 thing I know is we can't do a trial until there's a remand of

1 his case.

2 So I think we're stuck regrouping, sadly, which puts

3 us January '25. If I were you guys, I would say I'm not sure

4 who's going, but somebody is going January '25, March '25, and

5 April '25. Taking one month off. In fact, if it were up to

6 me, and it's not and I think we'd all go crazy, it would be

7 January '25, February '25, March '25, April '25, take a

8 breather. But I don't think we can do that. But I would say

9 January, March, May, July, and get those -- every other month

10 we should be trying cases until most of these end up getting

11 more control.

12 Oh, the last thing is, I know that most people have

13 asked for like, a joint what's up structuring hearing with the

14 contractors as well, many of whom are in attendance either

15 here or in TV. And I had issued a brief order asking the

16 clerks to put that together, which is difficult because there

17 are now many judges involved, and it doesn't make sense not to

18 have them participating either in one location or by Webex.

19 So all right. We're good. Kind of.

20 MR. VICINANZO: Thank you, Judge.

21 THE COURT: Okay. Thank you.

22 THE BAILIFF: All right.

23 (Proceedings concluded at 3:41 p.m.)

24

25

www.escribers.net | 800-257-0885

CERTIFICATE

I, Kelly Borngen, 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.

KELLY BORNGEN, CDLT-290 June 30, 2024
Transcriptionist/Proofreader

Revised Statutes Annotated of the State of New Hampshire
Constitution of the State of New Hampshire (Refs & Annos)
Part First. Bill of Rights

N.H. Const. Pt. 1, Art. 2d
Also cited as NH CONST Pt. 1, Art. 2

[Art.] 2d. [Natural Rights.]

Currentness

All men have certain natural, essential, and inherent rights--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

Copyright © 2024 by the State of New Hampshire Office of the Director of Legislative Services and Thomson Reuters/West 2024.
N.H. Const. Pt. 1, Art. 2d, NH CONST Pt. 1, Art. 2d
Current through Chapter 381 (End) of the 2024 Reg. Sess. Some statute sections may be more current, see credit for details.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Revised Statutes Annotated of the State of New Hampshire
Constitution of the State of New Hampshire (Refs & Annos)
Part First. Bill of Rights

N.H. Const. Pt. 1, Art. 8th
Also cited as NH CONST Pt. 1, Art. 8

[Art.] 8th. [Accountability of Magistrates and Officers; Public's Right to Know.]

Effective: December 5, 2018
Currentness

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 unreasonably restricted. The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.

Copyright © 2024 by the State of New Hampshire Office of the Director of Legislative Services and Thomson Reuters/West 2024.
N.H. Const. Pt. 1, Art. 8th, NH CONST Pt. 1, Art. 8th
Current through Chapter 381 (End) of the 2024 Reg. Sess. Some statute sections may be more current, see credit for details.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

Revised Statutes Annotated of the State of New Hampshire
Constitution of the State of New Hampshire (Refs & Annos)
Part First. Bill of Rights

N.H. Const. Pt. 1, Art. 12th
Also cited as NH CONST Pt. 1, Art. 12

[Art.] 12th. [Protection and Taxation Reciprocal.]

Currentness

Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

Copyright © 2024 by the State of New Hampshire Office of the Director of Legislative Services and Thomson Reuters/West 2024.
N.H. Const. Pt. 1, Art. 12th, NH CONST Pt. 1, Art. 12th
Current through Chapter 381 (End) of the 2024 Reg. Sess. Some statute sections may be more current, see credit for details.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Revised Statutes Annotated of the State of New Hampshire
Constitution of the State of New Hampshire (Refs & Annos)
Part First. Bill of Rights

N.H. Const. Pt. 1, Art. 14th
Also cited as NH CONST Pt. 1, Art. 14

[Art.] 14th. [Legal Remedies to be Free, Complete, and Prompt.]

Currentness

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Copyright © 2024 by the State of New Hampshire Office of the Director of Legislative Services and Thomson Reuters/West 2024.
N.H. Const. Pt. 1, Art. 14th, NH CONST Pt. 1, Art. 14th
Current through Chapter 381 (End) of the 2024 Reg. Sess. Some statute sections may be more current, see credit for details.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

Revised Statutes Annotated of the State of New Hampshire
Title LV. Proceedings in Special Cases (Ch. 534 to 546-C)
Chapter 541-B. Claims Against the State (Refs & Annos)

N.H. Rev. Stat. § 541-B:14

541-B:14 Limitation on Action and Claims.

Effective: May 30, 2018
Currentness

I. All claims arising out of any single incident against any agency for damages in tort actions shall be limited to an award not to exceed $475,000 per claimant and $3,750,000 per any single incident, or the proceeds from any insurance policy procured pursuant to RSA 9:27, whichever amount is greater; except that no claim for punitive damages may be awarded under this chapter. The limits applicable to any action shall be the limits in effect at the time of the judgment or settlement.

II. If a claim is filed against the state for time unjustly served in the state prison when a person is found to be innocent of the crime for which he was convicted, such a claim shall be limited to an award not to exceed $20,000.

III. The payment of interest shall be granted on any award authorized under this chapter at the rate provided in RSA 336:1 in the same manner as is provided for in civil actions generally.

IV. Any claim submitted under this chapter shall be brought within 3 years of the date of the alleged bodily injury, personal injury or property damage or the wrongful death resulting from bodily injury. As a condition precedent to commencement of the action, the agency shall be provided written notice within 180 days after the time of the injury or damage as to the date, time, and location the injury or damage occurred. The lack of written notice shall not bar a claim unless the agency can show by a preponderance of the evidence that its ability to defend against the action was substantially prejudiced thereby. Such notification may be made either by the claimant or an appropriate representative of the claimant.

Credits
Source. 1977, 595:2. 1985, 412:10, 11. 1993, 119:1. 1995, 237:2. 1996, 267:3. 2003, 150:11, eff. Jan. 1, 2004. 2007, 356:2, eff. July 17, 2007. 2018, 125:6, eff. May 30, 2018.

Copyright © 2024 by the State of New Hampshire Office of the Director of Legislative Services and Thomson Reuters/West 2024.
N.H. Rev. Stat. § 541-B:14, NH ST § 541-B:14
Current through Chapter 381 (End) of the 2024 Reg. Sess. Some statute sections may be more current, see credit for details.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.