THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Docket No. 217-2020-cv-00026

David Meehan

v.

New Hampshire Department of Health and Human Services et al

THIS DOCUMENT PERTAINS TO ALL CONSOLIDATED ACTIONS
THIS DOCUMENT DOES NOT RELATE TO CONTRACTOR DEFENDANTS

DEPARTMENT OF HEALTH AND HUMAN SERVICES'
REPLY TO PLAINTIFFS' OBJECTION TO MOTION TO STAY ALL TRIALS
PENDING RESOLUTION OF SUPREME COURT APPEALS

This Court decided some time ago to take a bellwether approach to these consolidated matters. The goal was to try certain test cases so that key issues could be determined and a valuation of cases could be better ascertained.[1] This critical information would help guide resolution of the remaining cases in an efficient and effective way. The first of these bellwether cases has now been tried and, through that experience, the parties and the Court have learned that the single most critical issue that must be finally resolved before these cases can be accurately

[1] *See, e.g.*, June 24, 2023, Mtn. Hear. Tr. 49:5-10 (AAG Chase: ". . . So first, I agree with you that originally we were scheduling all of these cases back about a year plus ago. The goal was to get essentially a bellwether so that we --" The Court: "Right." AAG Chase: "-- both sides can figure out what these cases are in litigation." The Court: "Right."); July 11, 2023, Stat. Conf. Tr. 23:2-7 (The Court: ". . . And my idea was that they would pick a range of cases. You know, it wouldn't just be the Plaintiff's best – and I use the word best advisably – you know, best case or the Plaintiff's most difficult cases. It would just be a range of cases so that we would get some feedback from juries.").

valued, potentially settled, and correctly adjudicated is what the term "single incident" means in RSA 541-B:14, I.

That key legal issue—common to all of these consolidated cases—is on appeal with the New Hampshire Supreme Court. Awaiting the answer to that question before trying further cases will allow the parties to accurately value these cases and weigh the pros and cons of proceeding to trial. It will help ensure that these cases are properly tried and that the juries are instructed correctly. It will also help ensure that the first few cases tried, the bellwether cases, produce reliable jury verdicts that reflect the actual potential value of these cases. Awaiting a supreme court decision, in short, facilitates the bellwether approach this Court has been implementing in these cases. It is not rational or reasonable, as the plaintiffs suggest, to present a jury with a special verdict form that requires a vast amount of different and alternative factual findings with alternative verdicts so that when the New Hampshire Supreme Court finally settles the law, the parties can try to discern which alternative findings and verdicts control.

The plaintiffs request that this Court barrel-forward with trials in a manner which departs sharply from the measured bellwether approach reasonably adhered to by this Court thus far and in a manner which would only be logical if we assume the impossible—that a single superior court judge can try all of the cases consolidated in this matter within any meaningful period of time. This Court has two choices going forward; one choice which is profoundly inefficient and will likely result in an extreme amount of waste for the parties, jurors, the court system, and taxpayers; and a second which calls for work on the cases to proceed in a measured way such that the limited resources of the parties, the court system, and the jury pools are being used to move cases forward efficiently toward final resolution. This Court should choose the second

option and grant DHHS's motion to stay trials in these related, consolidated matters until the New Hampshire Supreme Court resolves the interlocutory appeals presently before it.

1. In granting the plaintiffs' interlocutory appeal request, this Court emphasized that what the term "single incident" means in RSA 541-B:14, I is important to all of these cases.

2. DHHS agrees that what the term "single incident" means in RSA 541-B:14, I is of critical importance and is pivotal to the resolution of all of these cases, including how these cases are valued, how they are developed in discovery, how they are tried including what evidence comes in at trial and how it comes in, and how the jury is instructed.

3. DHHS has always understood the Court—in consolidating these cases, requiring a master and short form complaint process, issuing broad orders on a multitude of legal issues, and structuring these cases for discovery and trial—to be taking a bellwether approach akin to that taken in federal multidistrict litigation.

4. The purpose of a bellwether approach is not to try every one of these consolidated cases as quickly as possible. It is to carefully and correctly resolve a limited number of cases so the parties can ascertain the value of the remaining cases for settlement purposes, resolve some number of them without trial, and correctly try the remaining cases in which settlement is not possible.

5. The question currently before this Court, when it has arisen in federal multidistrict litigation, is answered through the application of a factor-based approach designed to determine whether a stay of all related cases pending appeal of a bellwether case should issue. *See, e.g.*, *Pride v. Zimmer, Inc.*, No. 18-MD-2859 (PAC) 2021 U.S. Dist. LEXIS 241221, 2021 WL 5964128 (S.D.N.Y. Dec. 16, 2021) (considering a request to stay further bellwether cases pending appeal of the first bellwether case); *PC Drivers Headquarters, LP v. AmbiCom*

Holdings, Inc., No. 16-mc-80125-HRL, 2027 U.S. Dist. LEXIS 34937, at *9 n.2 (C.N.D.C. March 10, 2017) (noting a variety of factor approaches used by federal courts).[2] A similar factor-based approach is appropriate here.

6. The single most important legal question across all of these consolidated cases is what the term "single incident" means in RSA 541-B:14, I. DHHS has taken the position that the term "single incident" should be construed consistent with the majority approach adopted across jurisdictions for the determination of what an occurrence or incident means in the insurance context. The plaintiffs and the court have put forward their own alternative interpretations, and other out-of-state case law may suggest further interpretations. DHHS, and the State more generally, will suffer irreparable loss of resources if it is forced to try numerous multi-week cases pending the *Meehan* appeals only to have to re-try those cases later if the supreme court disagrees with this Court's interpretation of the term "single incident." The public has a strong interest in these cases proceeding carefully and efficiently, in a manner that does not waste nearly a year of judicial time, juror time, and state attorney and outside counsel time and resources trying and re-trying cases. And the issuance of a stay of only trials for long enough to resolve the *Meehan* appeals, consistent with the bellwether approach this Court has endorsed, will not inflict prejudice or injury on the plaintiffs.

7. Consequently, the Court should stay trial in all these matters until these appeals are resolved.

8. The plaintiffs incorrectly assert in their objection that the State's argument on appeal will be that a "single incident" is the State's breach of a duty of care. As the State has

[2] The same or similar factor-based approaches like these are employed in federal litigation in contexts other than multidistrict litigation as well.

outlined in previous briefing at length, the State's position on appeal will be that the term "single incident" should be interpreted in line with the approach applied by the "vast majority of jurisdictions" known as the "causal approach." *Washoe County v. Transcontinental Ins. Co.*, 878 P.2d 306, 308 (Nev. 1994). Under the "causal approach," the focus of the inquiry is not "on the number, magnitude or time of the injuries, but rather on the cause or causes of the injury." *Id.*

9. Thus, if there is more than one cause, there may be more than one incident, and the plaintiffs fail to identify how that is an impermissible legislative policy choice or, in their words, is "absurd." They resort instead to inapt analogies premised on what would be *respondeat superior* liability.

10. The State is not seeking to delay these matters as the plaintiffs contend.

11. As outlined above, DHHS is pursuing a careful, efficient, time- and resource-effective way to correctly resolve these matters in accordance with the bellwether approach this Court adopted.

12. The plaintiffs make no effort to explain how their barrel-forward approach will not lead to *more* inefficiency, waste, and delayed resolution of their cases if three, four, or five cases are tried pending these appeals and subsequently must be re-tried thereafter. Wasting all of those state and judicial resources for the better part of a year is not in the public interest.

13. Much of the plaintiffs' objection to the stay requested by DHHS focuses on an assumption that the best, if not the only way, to make progress toward resolving these consolidated cases is to start trying cases in quick succession. However, this Court abandoned that assumption long ago when it chose a bellwether approach, an approach to which the plaintiffs assented. Had the plaintiffs desired to simply have their individual days in court as quickly as possible, they should have objected to putting over a thousand cases into a single

consolidated docket in front of a single judge. These consolidated cases do not represent a "massive backlog" of cases needing to be worked through, they represent a class of consolidated cases which are waiting to resolve (hopefully largely through settlement) once a few bellwether cases have produced the reliable information the parties need to make informed decisions.

14. The plaintiffs' citation to Part I, Article 14 of the New Hampshire Constitution, and other case law regarding it, is inapt in this context and conveniently ignores the fact that the word "promptly" and the phrase "without delay" in that constitutional provision is modified by the phrase "conformably to the laws." Given the size and volume of this matter, the resources available to the court system, the statutes and rules that govern fair trials, and the case orders structuring this matter consistent with a bellwether approach, the plaintiffs, based in part on their own strategic choices, are receiving the promptest trial process available for these cases "conformably to the laws." *See, e.g., Sousa v. State*, 115 N.H. 340, 343 (1975) (explaining that "comfortably to the laws" in Part I, Article 14 means "means the rules of statutory and common law applicable at the time the injury is sustained").

15. The plaintiffs' citation to an out-of-state criminal Massachusetts case regarding a criminal defendant's speedy trial right is simply not analogous for many reasons including that a potential remedy in such cases is dismissal. The New Hampshire Supreme Court has never extended a criminal defendant's speedy trial right where the defendant's significant liberty interests are at stake to a civil plaintiff pursuing a tort cause of action and seeking monetary relief.

16. The plaintiffs' assertion that any cases decided during the pendency of the *Meehan* appeals could be reopened and remanded for the Court to apply the cap in accordance with appellate guidance is simply wrong. If the supreme court adopts an interpretation of "single

incident" that is different than how the jury was instructed and the jury finds a certain number of incidents pursuant to that erroneous instruction, there is no way to undo that result without a new trial.

17. The plaintiffs' assertion that there are only three possible outcomes to the *Meehan* appeals is overly simplistic. First, it is highly likely that the New Hampshire Supreme Court will provide guidance on what constitutes a "single incident" given the centrality of its importance to both appeals and to all of the cases pending in this consolidated docket. Second, given the novelty of the issue and the many different interpretative approaches, an outright affirmance of this Court's interpretation is unlikely. Third, the adoption of the plaintiffs' proposed standard is unlikely. It is more likely that the New Hampshire Supreme Court adopts the majority causal approach over the plaintiffs' proposed standard. But, regardless, it is also quite possible given the multiple theories pressed below, that the supreme court interprets a "single incident" in a manner no one in these proceedings anticipates.

18. DHHS also disagrees with the plaintiffs' assertion that "how many tortious 'incidents' occurred" is a mixed question of fact and law such that the trial court could decide the issue. What a "single incident" means in the statute is a question of law for the supreme court ultimately to decide. How many "single incidents" have occurred in a given fact pattern presents a factual question emmeshed with the merits of these case that is properly placed before a correctly instructed jury. It is not a question for the court to decide or one that the court can decide without effectively converting the plaintiffs' cases into bench trials.

19. However, even if it were a question for the court to decide, taking this approach to every case would functionally grind all of these cases to halt as separate evidentiary hearings would need to be held in each one to reach a pretrial conclusion on how many "single incidents"

exist in a particular case so the jury could make proper liability and damages determinations as to each. The plaintiffs hope of prompt trials would be finally snuffed out by their own trial strategy.

20. DHHS also disagrees that a special verdict form can be framed to manage the issue. The majority-endorsed "causal approach" has a materially different factual focus than the plaintiffs' approach of focusing on the number of individual intentional torts inflicted by third-party tortfeasors or this Court's approach. And the number of incidents found will vary accordingly so alternative approaches will have to be applied by the jury and essentially alternative verdicts and conclusions will need to be reached. Such an approach has a high likelihood to confuse the jury and will inject unnecessary and prolonged delay into these cases. Such an approach will also not insulate these cases from reversal if the supreme court adopts an interpretation of "single incident" that the jury instructions and special verdict form do not anticipate thus altering the factual focus of the "incident" inquiry.

21. Moreover, whether any cases tried to a verdict while the *Meehan* appeals remain pending will themselves be appealed is not highly speculative. The State will appeal any case where the majority-endorsed "causal approach" is not instructed on and applied while the *Meehan* appeals are pending. Other appellate issues exist in these cases as well like the application of the discovery rule that the State will likely appeal. If the plaintiffs receive a verdict they are unsatisfied with, or if they lose on the discovery rule, they too will most likely appeal. And if every appeal raises the common legal question of what is a "single incident" under RSA 541-B:14, I, the resolution of one of those appeals may cause all of those other cases to have to be re-tried without the supreme court reaching any of the other issues in those cases,

thereby further delaying the receipt of critical information needed to move the bellwether process forward in an efficient and effective manner.

WHEREFORE, for all of the above reasons and those outlined in its initial motion, DHHS respectfully requests that this Court grant the motion to stay all trials pending the outcome of the *Meehan* appeals.

Respectfully Submitted,

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

By their attorneys,
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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
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