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*****

REPLY IN SUPPORT OF MOTION TO APPROVE PLAINTIFF DAVID MEEHAN'S INTERLOCUTORY APPEAL STATEMENT AND MOTION TO STAY PENDING INTERLOCUTORY APPEAL

Mr. Meehan's proposed interlocutory appeal statement asks the New Hampshire Supreme Court to address three questions of law regarding (1) the constitutionality of the damages cap in RSA 541-B:14, I, as applied to the circumstances in this case, (2) the superior court's authority to enter a partial judgment notwithstanding the verdict based on striking a superfluous aspect of a special verdict, and (3) 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. Interloc. Appeal Statement, Part IV.

The Defendant, the New Hampshire Department of Health and Human Services ("DHHS"), objects to an interlocutory appeal arguing that there is no substantial basis for a difference of opinion on the issues raised by Mr. Meehan because "[a]ll of these issues have been settled by the New Hampshire Supreme Court." Obj. to Mot. for Interloc. Appeal at 3. DHHS also argues that "[i]nterlocutory review of the Court's *Orders* will not terminate [Mr. Meehan's] case,"

id. at 13; Mr. Meehan's "health implications" do not support interlocutory review, *id*. at 15; and Mr. Meehan "argue[s] nothing more" than that "binding precedent from the Supreme Court will bring consistency to trial courts," *id*.

Rather than addressing Mr. Meehan's actual arguments, DHHS's objection addresses straw arguments that Mr. Meehan has not made. Primarily, DHHS seeks to recast Mr. Meehan's interlocutory appeal as a wasted effort to overturn settled law. That is not the case. As further discussed below, the issues raised by Mr. Meehan, which are important not only to this case but also to hundreds of others brought by child-abuse survivors against the State and its contractors, raise important and novel legal issues that warrant immediate review. This Court should approve and sign Mr. Meehan's interlocutory appeal statement, and the Supreme Court should accept this appeal and answer the questions presented by Mr. Meehan.

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

Contrary to DHHS's arguments, the New Hampshire Supreme Court has never addressed the targeted legal issues that Mr. Meehan seeks to raise in his interlocutory appeal.

First, there is a substantial basis for a difference of opinion regarding the constitutionality of the damages cap in RSA 541-B:14, I, as applied to the circumstances of this case where the jury found that DHHS, acting through its officials and supervisors, not only breached its fiduciary and supervisory duties to Mr. Meehan, but did so in a "wanton, malicious or oppressive manner." While the Supreme Court has upheld the damages caps in RSA 541-B:14, I generally, it has never addressed whether a state agency's sovereign-immunity defense can survive a jury finding that the misconduct of the state agency's officials was "wanton, malicious or oppressive."

The right to recover for personal injuries is an "important substantive right," and damages "caps" that infringe upon that right are disfavored in New Hampshire. *See, e.g., Brannigan v.*

Usitalo, 134 N.H. 50, 55 (1991) (cap on general noneconomic damages unconstitutional); *Carson v. Maurer*, 120 N.H. 925, 944 (1980) (cap on noneconomic damages in medical malpractice cases unconstitutional).

Sovereign immunity is also 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) ("Despite its long history in the state, this court has also been skeptical of the merits of the doctrine of sovereign immunity."). The Supreme Court has repeatedly reiterated that any statute that "restrict[s] the ability of a party to bring suit against the State must comport with the principles of equal protection guaranteed by the New Hampshire Constitution." *Id*. at 601.

The burden therefore rests with the government to show that applying sovereign immunity is "reasonable, not arbitrary," and bears a "fair and substantial relation" to the legitimate purposes of sovereign immunity. *Cmty. Res. for Justice v. Manchester*, 154 N.H. 748, 760, 762 (2007) (applying "intermediate scrutiny"). That burden is "demanding" and must be "exceedingly persuasive" in showing that sovereign-immunity principles, as applied to the circumstances of a specific case, substantially serve the legitimate goals of sovereign immunity. *Id*. at 761; *see also Pet. of N.H. DCYF*, 175 N.H. at 601 (same). And the State's facile truism that allowing liability could have an "effect on the public treasury[,]" "is not, in and of itself, a legitimate justification for depriving injured parties of a remedy." *City of Dover v. Imperial Cas. & Indem. Co.*, 133 N.H. 109, 118 (1990). DHHS must establish some additional legitimate purpose for immunity.

In these circumstances, applying the sovereign-immunity cap could not possibly be (1) "reasonable, not arbitrary," and (2) "fairly and substantially" in service of the legitimate purposes of sovereign immunity. The discrimination and disparity created by the cap in this case serves no legitimate purpose. To the contrary, in the circumstances of this case, where a jury has found,

based on a trial record replete with testimony from former DHHS employees, that DHHS's conduct in caring for children in its custody was "wanton, malicious or oppressive," the public interest is actively undermined by allowing immunity.

DHHS's argument that the Supreme Court has already rejected the question presented by Mr. Meehan is mistaken. DHHS contends that, in *Opinion of the Justices*, 126 N.H. 554 (1985), the Supreme Court both (1) upheld the statutory cap and (2) "required waiver of sovereign immunity to allow suits against State actors for intentional torts not grounded on a reasonable belief in the lawfulness of the disputed act while acting within the scope of the actor's employment." Obj. to Mot. for Interloc. Appeal at 4 (emphasis added) (citing *Op. of Justices*, 126 N.H. at 565). *Opinion of the Justices* did not, however, consider an as-applied challenge to the constitutionality of the damages cap. Instead, *Opinion of the Justices* commented generally on "[t]he authority of the legislature to set reasonable limits on damages recoverable against governmental entities," *id.* at 567, leaving room for further case-specific analysis when the policy considerations supporting sovereign immunity are not met, *id.* at 560. While the cap may pass constitutional muster on its face, when applied to the facts of Mr. Meehan's case, it intrudes upon his rights under article 2 (right to equal protection), article 8 (right to accountable government), and article 14 (right to a fair remedy) of part I of the New Hampshire Constitution. N.H. CONST. pt. I, arts. 2, 8, & 14.

Additionally, DHHS's suggestion that the Supreme Court has already approved damages caps for intentional torts not grounded on a reasonable belief in lawfulness is a red herring. None of Mr. Meehan's causes of action were premised on DHHS's vicarious liability for the intentional torts of its agents. Rather, the jury in Mr. Meehan's case found DHHS *directly* liable for its own

"wanton, malicious or oppressive conduct." This type of claim was not considered in *Opinion of the Justices* or in any case since.

Moreover, there are compelling reasons to believe that the Supreme Court will not allow a state agency to benefit from the damages cap in RSA 541-B:14, I, when the conduct of that agency through its supervisory employees was "wanton, malicious or oppressive." As previously argued, the Supreme Court has warned that "any application" of sovereign immunity is justifiable only to the extent it may confer some public benefit (beyond simply protecting the public fisc), such as by fostering the "diligent service" of public servants. *See City of Dover*, 133 N.H. 109, 119-20 (1990) (observing that "[t]he laws of our State should be structured to encourage diligent service on the part of public employees," and concluding that "[a] statute which rewards intransigence on the part of municipalities or their employees, to the injury of others, should not be condoned."); *Op. of the Justices*, 126 N.H. at 559 (stating that the "continued existence of *any application* of the doctrine of sovereign immunity 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*") (emphasis added); *id*. at 564 (striking a balance aimed at encouraging rather than discouraging "diligent service on the part of State personnel").

Insulating a state agency from liability where its conduct was determined by a jury to be "wanton, malicious or oppressive" is at odds with the public policy of promoting diligent public service. It is also contrary to the statutory expression of sovereign immunity in RSA 99-D. The legislature codified the common law doctrine of sovereign immunity with the passage of RSA 99-D:1 in 1978, setting forth a statement of policy both as to sovereign immunity and the derivative doctrine of official immunity. *See Tilton v. Dougherty*, 126 N.H. 294, 297-98 (1985).

In pertinent part, the statute provides that the "sovereign immunity of the state, and by the extension of that doctrine, the official immunity of officers, trustees, officials, or employees of the state or any agency thereof acting within the scope of official duty *and not in a wanton or reckless manner*, except as otherwise expressly provided by statute, is hereby adopted as the law of the state." RSA 99-D:1 (emphasis added); *see also* RSA 99-D:2 (providing publicly funded indemnification to public officials acting within the scope of their official duty, but not if their acts were "wanton or reckless").

While RSA 99-D:1's carve-out for "wanton or reckless" conduct appears to be most directly linked to the immediately preceding clause concerning official immunity, it is best interpreted as a qualifier that applies to all species of sovereign immunity given that official immunity is merely an offshoot of sovereign immunity. Moreover, there is no qualitative difference in the principal goals of official immunity and sovereign immunity—at bottom, both exist for the benefit of the public good. RSA 99-D:1 and D:2 stand as public acknowledgments that the State will not condone "wanton and reckless" misconduct by its public officials and will not shield them from liability in cases involving such misconduct. Inasmuch as a public official is not entitled to immunity or indemnification for "wanton or reckless conduct" that harms a private citizen, it stands to reason that the agency that employs that official would likewise be denied immunity. In any event, this is a novel question worthy of the Supreme Court's consideration.

Second, there is a substantial basis for a difference of opinion regarding the superior court's authority to enter a partial judgment notwithstanding the verdict based on striking a superfluous aspect of a special verdict and there is an absence of Supreme Court precedent directly on point. DHHS argues, in a conclusory fashion, that "[o]ne cannot simply remove the jury's finding of 'one Incident' while enforcing the remainder of the verdict" in this case. Obj. to Mot. for Interloc.

Appeal at 8. But the evidence underlying the verdict was crystal clear: "No reasonable jury would [have] award[ed] $38 million for a single instance of abuse," and "[n]o 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 jury's answer to question 10 is, in fact, severable from the remainder of the special verdict. 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 question 10.

DHHS seeks to distinguish the case law cited by Mr. Meehan. Obj. to Mot. for Interloc. Appeal at 9–12. In doing so, DHHS fails to acknowledge that Mr. Meehan cites this case law not because the underlying facts are analogous to the unique facts of this case, but rather because it broadly supports the power of a trial court to use partial judgment notwithstanding the verdict to sever the erroneous part of a special verdict from the nonerroneous part and enter judgment on the latter. Interloc. Appeal Statement at 16–17. DHHS does not, and cannot, dispute that the case law allows partial judgment notwithstanding the verdict to be used for this purpose. Nor does DHHS cite any case law contradicting or prohibiting this use. The Supreme Court should definitively rule on the scope of a superior court's authority to enter a partial judgment notwithstanding the verdict based on striking a superfluous aspect of a special verdict and decide whether doing so is appropriate in the extraordinary circumstances of this case.

Third, there is a substantial basis for a difference of opinion regarding 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 on liability and damages. DHHS erroneously claims that because "the issues of liability and damages are intertwined . . . ., it cannot be presumed that $38 million is the amount

of damages regardless of the number of proven Incidents." Obj. to Mot. for Interloc. Appeal at 12. DHHS ignores the record, which 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 (App. 2); 5/22/24 Order at 1–2, 14–15, 38–40, 49–50 (App. 10–11, 23–24, 47–49, 58–59). Under the circumstances, it is permissible, and desirable, to limit the scope of the issues to be retried.

DHHS contends that "[e]ither the liability finding or the damages finding could have been in error . . . ." Obj. to Mot. for Interloc. Appeal at 13. Again, DHHS disregards the record.[1] As this Court has already acknowledged, the evidence presented at trial supported a minimum finding of 116 incidents. 5/22/24 Order at 54 (App. 63) ("[N]o reasonable jury could have accepted the gist of plaintiff's testimony, awarded $38 million in damages, and found less than 116 incidents."). In this case, it is not necessary to determine damages on an incident-by-incident basis because of the stipulation agreed to by the parties to set an aggregated damages cap calculated by multiplying the $475,000 cap by the total number of incidents found by the jury. Thus, after a partial retrial, a reduction in damages will only be necessary if the new jury finds fewer than 80 incidents, the number that results when $38 million is divided by $475,000. The Supreme Court should definitively rule on the scope of a superior court's authority to order a partial retrial as a remedy

[1] DHHS also disregards reality. While courts have valid reasons for disregarding extrajudicial juror statements made after trial, as this Court has done here, it is strikingly disingenuous (and offensive) for DHHS to rely on that legal fiction to argue that no one will ever know where the jury's error occurred. DHHS pretends that the Court did not receive several written juror statements, including from the jury foreperson, expressing their extreme dismay that their intended verdict of $38 million might be reduced by almost 99% due to their misunderstanding of the special-verdict form. Their statements were crystal clear that their confusion and error were with respect to their finding regarding the number of incidents, not their finding regarding DHHS's liability.

for a verdict where the trial record supports the jury's findings on liability and damages and decide whether doing so is appropriate here with respect to the number of "incident[s]." Given the extraordinary circumstances of this case, such an unusual remedy is justified.

II. 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. DHHS's arguments to the contrary have no merit.

First, an interlocutory appeal addressing the questions presented by Mr. Meehan will materially advance the termination of the litigation. DHHS argues that the Court should simply enter a capped judgment and that doing so will terminate this case in its entirety, thereby allowing an appeal from a final judgment. Obj. to Mot. for Interloc. Appeal at 13–14. In doing so, DHHS disregards the obvious injustice of this result, which this Court has acknowledged since May 2024, when it recognized that "[t]he 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); *see also id*. at 40 (App. 49) ("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."). DHHS would rather force its preferred outcome than give Mr. Meehan an opportunity to preserve the verdict.

Second, an interlocutory appeal will protect Mr. Meehan from the substantial and irreparable injury of a full retrial. Confusingly, DHHS argues that Mr. Meehan "do[es] not argue that this factor compels allowing an interlocutory appeal." Obj. to Mot. for Interloc. Appeal at 15. On the contrary, Mr. Meehan expressly states, with evidentiary support, that, in a full retrial, he will again be forced to recount the traumatic events of his time at the Youth Development Center

in detail, suffering re-traumatization as he does so. Interloc. Appeal Statement at 19. As this Court has already acknowledged, "[t]wo psychiatrists and a psychologist [have] testified as to [Mr. Meehan's] delicate state of mind, resulting from his diagnosis of complex PTSD." *See* 5/22/24 Order at 42 (App. 51). As a result, "[a] de novo trial about how he was repeatedly raped as a young teenager may literally be deleterious to his health." *Id.* (App. 51-52).

In addition, Mr. Meehan's appeal raises an important and novel constitutional question involving sovereign immunity, an antiquated concept the Supreme Court has been grappling for going on five decades. But if interlocutory review is not allowed now, the issue may be lost to Mr. Meehan forever as a retrial will wipe the slate clean. Finally, a full retrial will force Mr. Meehan to incur the significant expense associated with another trial, including but not limited to expert-witness fees easily exceeding six figures.

While DHHS argues that a full retrial "may occur whether there is an interlocutory appeal or not" because Mr. Meehan can bring the same appeal after the entry of a final judgment, Obj. to Mot. for Interloc. Appeal at 15, DHHS's argument is premised on the propriety of entering a capped judgment. As mentioned, Mr. Meehan should not have to endure this callous and palpably unjust result just because DHHS prefers it.

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. Notably, DHHS does not argue that these issues are unimportant. Obj. to Mot. for Interloc. Appeal at 15–16. Instead, it claims that taking these issues to the Supreme Court would be "premature." *Id.* at 16. But there is

nothing "premature" about asking the Supreme Court to resolve dispositive issues in this case that will also have implications in other matters, including in lawsuits brought by other survivors who have come forward to allege child abuse that occurred while they were in the State's custody. *See* Interloc. Appeal Statement at 20–21.

Before this Court enters a drastic remedy, either granting a full de novo retrial, with all the attendant burdens, expenses, and retraumatization that such a retrial will bring, or granting DHHS's motion for entry of a capped judgment, which this Court acknowledges would be a "gross and unconscionable miscarriage of justice," it should give the Supreme Court an opportunity to review for itself the issues raised by Mr. Meehan. It goes without saying that it should also grant Mr. Meehan's motion to stay pending the interlocutory appeal.

* * *

WHEREFORE, for all the foregoing reasons, and those set forth in Mr. Meehan's motion, Mr. Meehan respectfully requests that the Court approve and sign Mr. Meehan's interlocutory appeal statement, grant Mr. Meehan's motion to stay pending interlocutory appeal, and grant any other relief in Mr. Meehan's favor that the Court deems just.

Dated: December 5, 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 December 5, 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.