

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

TOWN OF WOLFEBORO	)	
	)	
Plaintiff,	)	Civil No. 1:12-cv-00130-JD
v.	)	
	)	
WRIGHT-PIERCE,	)	
	)	
Defendant.	)	

**WOLFEBORO’S OBJECTION TO WP’S MOTION IN LIMINE TO  
EXCLUDE EVIDENCE OF DAMAGES**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) hereby objects to WP’s Motion in Limine to Exclude Evidence of Damages (WP’s “Motion”, Document No. 97-1).

**INTRODUCTION**

WP’s Motion seeks the following relief: (1) disqualify Mr. Forzley of Fuss & O’Neill as an expert and preclude his testimony at trial (Motion at pp. 6-12); and (2) exclude damages documents allegedly produced after the discovery deadline (Motion at pp. 12-13). In addition WP makes the broad request for relief that “the Town should be precluded from introducing any evidence as to its damages at trial (sic).” Motion at p. 11-12.<sup>1</sup>

First, Wolfeboro formally withdraws Mr. Forzley as a testifying expert in this litigation. Therefore, WP’s Daubert challenge as to the sufficiency and admissibility of his testimony at trial is moot. Second, WP’s request to preclude the damages documents produced after the discovery deadline is identical to,<sup>2</sup> and more fully briefed in, WP’s Motion to Preclude Untimely Disclosed Documents. See Document No. 101. Rather than restating its opposition to that

<sup>1</sup> WP’s Request for Relief, Paragraph A, also requests that Wolfeboro be precluded from “submitting any evidence of damages.”

<sup>2</sup> The section of WP’s Motion concerning its request to preclude documents (pages 12-13) is identical to a portion of its Motion in Limine to Preclude Untimely Disclosed Documents.

Motion, Wolfeboro expressly incorporates and relies on its Objection to WP's Motion To Preclude Untimely Disclosed Documents. In brief, WP's allegation that the damage documents were withheld until after the discovery deadline is incorrect. With the exception of some documents created after Wolfeboro's initial productions of documents in the Spring of 2013, the damage documents that WP seeks to exclude were previously-produced.<sup>3</sup>

Therefore, the only remaining issue that must be addressed in WP's instant Motion is its broad request that Wolfeboro be precluded from introducing any evidence of damages at trial. WP's Motion appears to erroneously presume that expert opinion is required to present evidence of direct damages in this case. In fact, expert testimony is not required, and Wolfeboro intends to present evidence of its damages by and through its Director of Public Works, David Ford.<sup>4</sup>

### **FACTUAL BACKGROUND**

#### **A. Withdrawal of Mr. Forzley**

Wolfeboro withdraws Mr. Forzley as a testifying expert in this case as to the specific amount of direct damages suffered by Wolfeboro. Wolfeboro intends to present its damages through Wolfeboro's Director of Public Works, Dave Ford. In light of Wolfeboro's withdrawal of Mr. Forzley as a testifying expert in this case, WP's Daubert challenge as to the qualifications and admissibility of Mr. Forzley's expert opinion is moot.

#### **B. Wolfeboro's Damages**

On or about February 12, 2013, Wolfeboro served its answers to WP's interrogatories. See Exhibit 1, email to Attorney Corkum with attached Answers. Wolfeboro fully answered

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<sup>3</sup> The January 30<sup>th</sup> Production is a compendium of previously-produced documents and documents created in the normal course of business after Wolfeboro's initial productions. As described in Wolfeboro's Objection to the Motion to Preclude Untimely Disclosed Documents, the purpose of collecting, organizing, and labeling the damage documents was to have one manageable binder of supporting documentation, rather than having individual purchase orders subsumed throughout one large production.

<sup>4</sup> As well as potentially the Board of Selectmen and/or the Keeper of Records for Wolfeboro.

WP's interrogatories, including Interrogatories No. 12 and 21 addressing Wolfeboro's damages. Id. Mr. Ford signed Wolfeboro's Answers to Interrogatories and will testify as to its contents, including Wolfeboro's damages at trial.

On December 13, 2013, Wolfeboro supplemented its answers to Interrogatories 12 and 21. See Exhibit 2, Email to K. Malone and Supplemental Answers ("Supplemental Answers"). Once again, Mr. Ford signed Wolfeboro's Supplemental Answers. Attached to the Supplemental Answers is a spreadsheet created by Mr. Ford itemizing and detailing Wolfeboro's direct damages (the "Damages Spreadsheet"). Exhibit 3, Damages Spreadsheet. The Damages Spreadsheet includes relevant citations to purchase orders, invoices, and other supporting documentation, as well as a full itemization and calculation of Wolfeboro's damages. Id. Wolfeboro's Supplemental Answers reduced the damages claimed by Wolfeboro's by roughly \$1,500,000.

Mr. Ford will testify at trial that he has been involved in the Project since virtually its inception. He will testify that he is intimately familiar with the design, construction and operation of the Project, and that his job responsibilities include Project budgeting, engaging consultants and contractors to work on the design, construction and operation of the Project, drafting Purchase Orders, reviewing and paying invoices, monitoring progress of design and construction, monitoring operations, issuing payments to consultants and contractors, and tracking Project costs for both internal budget reasons as well as for requests for disbursements from the State Revolving Fund ("SRF"), which provided a funding source for the Project.<sup>5</sup>

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<sup>5</sup> The 1996 Amendments to the Safe Drinking Water Act created a Drinking Water State Revolving Fund (DWSRF) to provide assistance in the form of low interest loans to public water systems to finance the cost of drinking water infrastructure. Public water systems eligible for this program include all community public water systems and non-transient non-profit public water systems. In addition, funds are used to promote proactive drinking water measures such as source water protection, operator certification, small system technical assistance/capacity development, and program administration.

### **C. Wolfeboro's Damage Documents**

WP alleges that Wolfeboro withheld damage documents and allegedly produced those documents for the first time in this case after the discovery deadline. WP's allegation is incorrect, as the damage documents were produced in Wolfeboro's initial productions. The supplemental production was a collection of previously-produced documents and documents created in the normal course of business after the initial productions. The purpose of collecting, organizing, and labeling the damage documents was to have one manageable binder of supporting documentation, rather than having individual purchase orders subsumed throughout one large production. Wolfeboro directs the Court to its Objection to WP's Motion to Preclude Untimely Disclosed Documents for the entirety of Wolfeboro's argument with respect to this issue.

## **LEGAL ANALYSIS**

### **A. Motions in Limine**

The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence. See Stephen v. Hanley, 2009 U.S. Dist. LEXIS 43334 (E.D.N.Y. 2009) (citations omitted). Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. Id. (citing Baxter Diagnostics, Inc. v. Novatek Med., Inc., 1998 U.S. Dist. LEXIS 15093 (S.D.N.Y. 1998)). Motions in limine that exclude broad categories of evidence are disfavored, and such issues are better dealt with during trial as the admissibility of evidence arises. See Saenz v. Reeves, 2013 U.S. Dist. LEXIS 8262, \*3 (E.D.N.Y. 2013) (citing Sperberg v. Goodyear Tire & Rubber, Co., 519 F.2d 708, 712 (6<sup>th</sup> Cir. 1975)).

### **B. Standard for Proving Damages**

In general, the Plaintiff is typically entitled to damages that “put the injured party in as good a position, so far as money damages can put him, as he would have occupied had the defendant fully performed.” See Peter Salvucci & Sons, Inc. v. State, 110 N.H. 136, 154 (1970). “New Hampshire does not require that damages be calculated with mathematical certainty, and the method used to compute damages need not be more than an approximation.” Maloof v. See Phillips v. Verax Corp., 138 N.H. 240, 247 (1994) (citing Peter Salvucci & Sons, Inc., 110 N.H. at 154.); Bonser, 145 N.H. 650, 655 (2000).

It is a well-established rule of law that in awarding compensatory damages for breach of contract, “the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract . . . .” Coos Lumber Co. v. Builders Supply Co., 104 N. H. 404, 406 (1963). Determination of damages for breach of a contract is an inexact science and the sum reached by whatever method used will often be no more than an approximation. Peter Salvucci & Sons v. State, 110 N.H. 136, 154 (N.H. 1970).

### **C. Expert Testimony is Not Required To Prove Wolfeboro’s Damages**

WP’s Motion suggests that in the absence of expert testimony as to the calculation of damages, Wolfeboro may not prove any damages and it should be precluded from offering any evidence concerning its damages at trial. This allegation is factually and legally untenable.

Expert testimony is not required in this case to prove damages. Expert witness testimony is only necessary when “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. “Proof of damages may require, but does not necessarily require, an expert witness.” Coldwell Banker Real Estate, LLC v. Brian Moses Realty, Inc., 752 F. Supp. 2d 148, 159 (D.N.H. 2010); See e.g.,

Bowling v. Hasbro, Inc., 582 F. Supp. 2d 192, 203 (D.R.I. 2008) (allowing patentee to testify in support of his royalty damages without expert testimony), *aff'd*, 2009 U.S. App. LEXIS 20408 (Fed. Cir. Sept. 15, 2009).

The New Hampshire Supreme Court has made it clear that with respect to damages, “expert testimony is required only ‘where the subject presented is so distinctfully related to some science, profession or occupation as beyond the ken of the average layperson.’” Transmedia Restaurant Company Inc. v. Devereaux, 149 N.H. 454, (2003). In Devereaux, the New Hampshire Supreme Court upheld the trial court’s decision to allow the plaintiff to offer opinion testimony as to the value of certain equipment for the purpose of proving damages. The Defendant appealed, arguing that:

The trial court erroneously permitted the jury to consider the defendants’ theory of damages based solely upon [plaintiff’s] testimony. [The Defendant] contends that the defendants were required, by law, to produce expert testimony on the value of the restaurant equipment. Id.

The Supreme Court disagreed, finding that expert opinion as to damages was not required because “[the plaintiff] had knowledge about how much she originally paid for [the equipment] and the trial court could reasonably have found her testimony helpful to the jury in determining the equipment’s value.” Id.

The Supreme Court’s opinion in Boynton v. Figueroa, 154 N.H. 592, 601 (N.H. 2006) is also persuasive. In Boynton, the Defendant argued that “the trial court erred when it permitted the plaintiffs to testify about the existence of the alleged defects in the home, efforts they undertook to remedy those defects, the need for those efforts, the cost of their remedial efforts and the reasonableness of those costs.” The Court disagreed, stating that expert testimony is only required where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson. Id. Expert testimony is not

required where the subject presented is within the realm of common knowledge and everyday experience. Id. The Court then stated:

We disagree with Signature that the plaintiffs were required to provide expert testimony to prove the existence of the alleged defects in the home and the reasonableness of costs to repair them. The types of defects at issue were not so far beyond the ken of the average layperson as to require expert testimony; they were defects that the plaintiffs observed themselves and, to the extent that they were not remedied, could be observed by the jury when it took its view. Moreover, the plaintiffs testified as to the expenses they have already incurred to remedy the defects they observed. As they note in their brief, "the remedial work in question here has already been completed, obviating the need for detailed expert projections of what damage award would be necessary to cover prospective construction costs.

Id. at 601.

**D. Mr. Ford May Testify to His Personal Knowledge As to Wolfeboro's Damages.**

Here, Wolfeboro will present its damages through Mr. Ford in his capacity as the Director of Public Works in Wolfeboro. See Adani Exps. Ltd. v. AMCI Corp., 2009 U.S. Dist. LEXIS 69340, 9-10 (W.D. Pa. Aug. 7, 2009) (denying motion to exclude Plaintiff's damage calculation and the damages testimony of Plaintiff's fact witness where Plaintiff "made the decision not to present its damages evidence through an expert witness, but rather to rely upon 'objective facts' within the personal knowledge of its [fact] witnesses...to establish its alleged damages...").

Mr. Ford signed Wolfeboro's Answers to Interrogatories and Supplemental Answers (which specifically concern damages). Mr. Ford prepared the Damages Spreadsheet attached to the Supplemental Answers. Mr. Ford was the designated 30(b)(6) witness for Topic No. 49 in WP's 30(b)(6) deposition notice concerning Wolfeboro's damages. As discuss in Wolfeboro's Objection to WP's Motion to Preclude Untimely Disclosed Documents, WP failed to ask Mr. Ford any questions regarding Wolfeboro's damages during his four (4) days of deposition. Mr. Ford is competent to testify as to Wolfeboro's damages and no expert testimony is required. See

Porter v. City of Manchester, 151 N.H. 30, 45-46 (N.H. 2004) (holding that plaintiff proved his damages claim with reasonable certainty and rejecting defendant's argument that plaintiff was required to provide expert testimony to substantiate his damages claim). The New Hampshire Supreme Court in Porter held that the calculation of a "lost earnings" claim was "not so complex as to be beyond the ken of the average layperson." Id. at 46, citing Transmedia Restaurant Company Inc. v. Devereaux, 149 N.H. 454 (2003). "Porter had personal knowledge of how much he earned when he was working at the welfare department, as well as how much he was earning at his new job...therefore...expert testimony with respect to Porter's lost future earnings was not required." Id. at 45-46. Similarly, Dave Ford has personal knowledge of the review, processing, and payment of all invoices on the Project.<sup>6</sup> Mr. Ford was responsible for hiring consultants (subject in certain instances to approval from the Board of Selectmen), confirming that the consultants completed their work in accordance with various contracts, drafting and processing purchase orders, and paying these consultants. At trial, Dave Ford will testify as to his job responsibilities, as well as the amounts Wolfeboro paid to various consultants and contractors for work related to the Project. See Exhibit 2 and 3. Mr. Ford's testimony that Wolfeboro paid these amounts to design, build, and operate the failed RIB System is not the type of scientific or technical evidence that is beyond the ken of an average layperson. Id. For this reason, expert testimony is not required as to the amounts paid to various consultants and contractors on the project. See Coldwell Banker Real Estate, LLC v. Brian Moses Realty, Inc., 752 F. Supp. 2d 148, 159 (D.N.H. 2010); Adani Exps. Ltd. v. AMCI Corp., 2009 U.S. Dist. LEXIS 69340, 9-10 (W.D. Pa. Aug. 7, 2009).

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<sup>6</sup> WP also reviewed and verified all amounts paid on the Project for Wolfeboro's applications to the NHDES for SRF loan disbursements.



In addition to Mr. Ford's personal knowledge, the type of business records that Wolfeboro will rely on to prove damages at trial are generally invoices, purchase orders, and loan applications which show the amounts Wolfeboro paid to various consultants and contractors to design, build, and operate the RIB System. See Exhibit 3 (identifying Purchase Orders for amounts paid to consultants). These business records are not the type of scientific or technical evidence that would require expert witness testimony to explain their meaning to the tier of fact. See Coldwell Banker Real Estate, LLC, 752 F. Supp. 2d at 159.

Wolfeboro's calculation of damages is a straightforward sum of costs incurred by Wolfeboro to investigate the RIB Site, purchase the RIB Site, design, construct, and operate the RIB System on the RIB Site, supported by the testimony of Mr. Ford and the invoices, purchase orders, and loan applications produced to WP in this case. See Exhibit 3. There is no calculation of lost profits, present value calculations, lost earnings potential, or any other complex calculations that require expert testimony. This case is about the fact that Wolfeboro spent \$8,876,055.13 to build a wastewater disposal system that does not work and, in the opinion of Wolfeboro's liability experts, is a complete and total loss. Identifying and adding up the amounts spent by Wolfeboro to investigate the RIB Site, purchase the RIB Site, design, build, operation, and remediate the RIB System on the RIB Site does not require expert opinion. Indeed, courts from around the country have found no need for expert opinion to prove damages, in some cases involving calculations far more complex than those in this case. See Wise v. Kansas City Life Ins. Co., 433 F. Supp. 2d 743, 752 (N.D. Miss. 2006) (where plaintiffs testified as to their actual contractual damages, no expert was required); Bethley v. Allstate Ins. Co., 2009 U.S. Dist. LEXIS 104750, 2009 WL 3481131, \*4 (E.D. La. Oct. 26, 2009) (allowing plaintiff to prove future lost wages with tax documents and not requiring expert testimony); McCammond v.

Schwan's Home Serv., 2011 U.S. Dist. LEXIS 92012 (D. Colo. Aug. 17, 2011) (expert testimony not required to prove damages in breach of employment contract case); see also Brough v. Imperial Sterling Ltd., 297 F.3d 1172, 1180 (11th Cir. 2002) (holding that “the district court did not commit error by allowing the jury to calculate damages without the testimony of an expert on present value.”).

WP’s instant Motion cites no law in support of its broad proclamation that Wolfeboro should be precluded from introducing any evidence as to its damages at trial. WP’s Motion contains absolutely no explanation as to why Wolfeboro should be precluded from offering testimony from Mr. Ford, the person responsible for, *inter alia*, issuing purchase orders, engaging consultants, and paying invoices for entities that worked on the Project. Because expert testimony is not required to prove damages, Wolfeboro should be permitted to present non-expert evidence and testimony as to its damages at trial.

**E. Mr. Ford May Offer Fact Witness Lay Opinion Testimony Regarding Damages at Trial.**

Mr. Ford may be required to offer lay opinion testimony regarding the damages. Such testimony is admissible under Fed. R. Evid. 701, which states:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701; see also Transmedia Restaurant Co. v. Devereaux, 149 N.H. 454, 460, 821 A.2d 983 (2003) (holding trial court was not in error to allow plaintiff to offer lay witness opinion regarding the value of restaurant equipment based on personal knowledge of the original purchase price and finding her testimony helpful to the jury in determining the equipment’s

value); Coldwell Banker, 752 F. Supp. 2d at 159 (D.N.H. 2010) (witnesses testimony as to damages admissible under Rule 701 based on personal knowledge the witness acquired from her experience working for Plaintiff); Downeast Ventures, Ltd. v. Wash. County, 450 F. Supp. 2d 106, 109-110 (D. Me. 2006) (explaining that lay witnesses whose job experience gives them specialized knowledge can testify about the value or projected profits of a business); see Wallace Motor Sales, Inc., 780 F.2d at 1061 (defining qualified witness as “one who can explain and be cross-examined concerning the manner in which the records are made and kept”); see also Downeast Ventures, Ltd., 450 F. Supp. 2d at 110 (explaining Rule 701 allows testimony from witnesses whose particularized knowledge and expertise comes from their business experience).

Mr. Ford’s training and experience at the Director of Public Works allows him to offer opinions or inferences which are rationally based on his perceptions and may be helpful to a clear understanding of his testimony or the determination of various factual issues at trial.

#### **CERTIFICATION PURSUANT TO LR 7.1(a)(2)**

Pursuant to LR 7.1(a)(2), no memorandum of law is necessary, as all supporting authorities are cited herein.

#### **REQUEST FOR RELIEF**

WHEREFORE Wolfeboro respectfully requests that the Court deny WP’s Motion in Limine to Exclude Evidence of Damages, specifically:

- A. Deny WP’s Request to preclude Mr. Forzley from testifying as an expert at trial as this issue is moot;
- B. Deny WP’s Request to preclude Wolfeboro from introducing damage documents at trial for the reasons described herein and in Wolfeboro’s Objection to WP’s Motion to Preclude Untimely Disclosed Documents;

C. Deny WP's request to preclude Wolfeboro from introducing any evidence of damages at trial for the reasons described herein; and

D. Grant such further relief as is necessary and just.

Respectfully submitted,

**The Town of Wolfeboro,**

By its attorneys,

Date: March 27, 2014

/s/ Seth M. Pasakarnis

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**CERTIFICATE OF SERVICE**

I, Seth M. Pasakarnis, Esq., hereby certify that on this date a true and accurate copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Seth M. Pasakarnis

Seth M. Pasakarnis