

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

**WRIGHT-PIERCE’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
IN LIMINE TO EXCLUDE EVIDENCE OF DAMAGES**

NOW COMES the defendant, Wright-Pierce (“Wright-Pierce”), by and through counsel, Donovan Hatem LLP, and respectfully submits this Memorandum Of Law In Support Of Its Motion *In Limine* To Exclude Evidence Of Damages. The Town of Wolfeboro’s (“Town”) expert opinions regarding damages must be excluded under Fed. R. Evid. 702 and 403 because they lack any reasonable quantification or methodology and are prejudicial where supporting documentation for damages was not submitted by the Town during discovery.

INTRODUCTION

Wright-Pierce seeks to exclude from the trial all opinions of the Town’s expert, Philip Forzley (“Mr. Forzley”) of Fuss & O’Neill (“F&O”) that purport to calculate the Town’s damages. F&O issued two expert reports in this case which contain opinions by Mr. Forzley that the Town is entitled to \$10,326,833.00 in damages. However, the Town failed to provide any supporting documentation during discovery, failed to quantify its damages, and it never provided any methodology to arrive at its damages calculations. In

fact, F&O's Initial Expert Report only provides generalizations as to its damages. At his deposition, Mr. Forzley retracted certain opinions, and admitted that he utilized an unreliable methodology for quantifying damages in both of the F&O expert reports; he failed to independently calculate damages in the reports, and instead, copied erroneous numbers from a spreadsheet provided by the Town, without examining any back up invoices, or confirming the validity of the calculations. Mr. Forzley's opinions on damages are inadmissible under Fed. R. Evid. 702 and 403 because they are based upon speculation and conjecture, and are not sufficiently reliable to survive a *Daubert* challenge. Additionally, the Town produced documents after the discovery deadline of January 6, 2014, some of which contain information relating to damages. The Town should be precluded from offering any late disclosed expert testimony regarding damages and/or late produced documents regarding damages.¹

BACKGROUND

The New Hampshire Department of Environmental Services ("NH DES") issued an Administrative Order ("AO") on April 19, 2005, which required the Town to implement improvements to their wastewater disposal facilities. The Town retained Wright-Pierce to provide engineering services in connection with the design and construction of a Rapid Infiltration Basin ("RIBs" or "Project") site to dispose of its treated effluent. On April 2, 2012, the Town filed the present law suit against Wright-Pierce, alleging claims which sound in professional negligence. On October 19, 2012, the Town served Wright-Pierce with F&O's Initial Expert Report, authored by Robert D.

¹ Wright-Pierce also relies upon and incorporates a separate motion to preclude all untimely disclosed documents and any fact/expert opinions and reports relating to said documents, as well as its motion to preclude a speculative total loss damages theory, and its motion to strike untimely expert and lay opinions.

Bowden, Jr., LEP (“Bowden”), Christopher J. Cullen, P.E. (“Cullen”) and Phillip Forzley (hereinafter, “F&O Initial Expert Report”). A copy of F&O’s Initial Expert Report is attached hereto as **Exhibit 1**. The F&O experts testified at their depositions that Section 5 was prepared solely by Mr. Forzley. On January 23, 2014, Wright-Pierce deposed Mr. Forzley, and a copy of his deposition transcript is attached hereto as **Exhibit 3**. Mr. Forzley testified that he was the “primary author” of the damages sections of the F&O reports. *Id.*, p. 16, 23. With regard to the Supplemental Report, dated February 8, 2013, he testified that “if there was discussion of damages in there, then I was likely the primary author of that section.” *Id.*, p. 23. Additionally, Mr. Cullen, also confirmed at his deposition that only Mr. Forzley prepared the damages sections of the F&O expert reports. (See **Exhibit 4**, p. 17, 194 Cullen Depo. Tr.)

The F&O Initial Expert Report, Section 5, “Summary of Damages” opines that the Town “is entitled to recover \$10,326,833 in damages.” **Exhibit 1**, p. 26. On February 8, 2013, the Town served Wright-Pierce with F&O’s Supplemental Report (hereinafter, “Supplemental Report”). A copy of the Supplemental Report is attached hereto as **Exhibit 2**. At his deposition on January 23, 2014, Mr. Forzley admitted that he made a \$2 million dollar mistake in his quantification of damages in the F&O expert reports, and he retracted his opinion that the Town is entitled to recover \$10,326,833.00 in damages. **Exhibit 3**, p. 124-125. Mr. Forzley admitted that his methodology for computing damages in the Initial Expert Report was simply to utilize “information [provided] by the Town” without verifying the numbers or examining any back up invoices. *Id.*, p. 17.

Mr. Forzley conceded that he did not undertake his own investigation to independently analyze the numbers he included in the expert reports, but instead, copied the damages calculations from spreadsheets provided to him by David Ford, Wolfeboro's Director of Public Works. Mr. Forzley testified repeatedly that "Dave Ford" was the person at the Town who gave him the spreadsheet and calculations. *Id.* at p. 29, 30, 34, 80, 81, 82, 83, 84, 123, 124. Specifically, Mr. Forzley testified, "[T]he way the numbers in this report . . . came to be were summaries in the Town's spreadsheet," which he simply copied. *Id.*, p. 18. Later, when preparing for his deposition he attempted to verify the numbers, but the Town could "not reproduce the invoices. They could not find them . . ." *Id.*, p. 20. He admitted that there were many errors in the "numbers that went into" Wolfeboro's Initial Expert Report, and that he could not verify the numbers that were used to quantify the following categories of damages in the Initial Expert Report: "(1) Site Investigation/Evaluation of Disposal Alternatives - \$1,283,893;" "(3) Design and Permitting Costs - \$1,012, 588;" "(5) Expenses to Remediate and Address Site Failures - \$386,428;" and "(7) Borrowing Costs - \$3,273,564." Compare **Exhibit 3**, p. 21 with **Exhibit 1**, p. 26.

At his deposition, Mr. Forzley attempted to rely upon a different calculation of damages of "eight plus million, that's in the interrogatories." **Exhibit 3**, p. 124. As more fully set forth below, the Town's experts have failed to formulate reliable opinions and reports with respect to damages and their testimony regarding damages must be excluded. Additionally, the Town should be precluded from relying upon any untimely disclosed expert opinions, or documentation supporting its damages claims that was produced after the discovery deadline.

STANDARD

Pursuant to Local Rule 16.2(b)(3), a party may move in *limine* to exclude certain evidence. See *Aumand v. Dartmouth Hitchcock Medical Center*, 611 F.Supp.2d 78 (2009). A motion in *limine* affords an opportunity for the trial court to rule on the admissibility of evidence prior to trial and for counsel to devise trial strategy accordingly. *Zola v. Kelley*, 149 N.H. 648, 651 (2003). A motion in *limine* may be used to eliminate unsupported, irrelevant and prejudicial allegations from trial. *Id.*

Part of the gate-keeping function of trial court is to ensure that expert testimony that will be presented to a jury is both relevant and rests on a reliable foundation. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). The admissibility of expert opinion testimony is governed by Fed. R. Evid. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

See Fed. R. Evid. 702. Under Rule 702, the court serves as a gatekeeper, “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert*, 509 U.S. at 597; see also *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 147 (1999).

DISCUSSION

A. Forzley's Opinions Regarding Damages Must Be Excluded Because They Are Not The Product Of A Reliable Methodology

Forzley's opinions must be excluded because they are neither based upon his own calculations or understanding of the numbers included in Section 5 ("Summary of Damages") of the F&O Initial Expert Report, and/or the F&O Supplemental Expert Report, nor are they based upon any reliable methodology. And all of the Town's damages relate to supporting documentation that was withheld from Wright-Pierce during discovery, including expert discovery, and so the supporting documentation must be excluded at trial and cannot serve as a basis for any damages methodology.

Mr. Forzley testified that he was the "primary author" of the Summary of Damages in the Initial Expert Report, *see Exhibit 3*, p. 23, and damages information in the Supplemental Report, *see id.*, p. 23, 164-165, but that all of the numbers were taken directly from a spreadsheet given to him by David Ford of Wolfeboro, and that he did not analyze or verify any of the numbers before issuing the reports. *Id.*, p. 62. Prior to his deposition, however, he attempted to verify the numbers and discovered mistakes. Specifically, he stated that he did not agree with the numbers in the Initial Expert Report of Supplemental Report, because there were mistakes in David Ford's spreadsheet. Specifically, he testified:

Q. This report, this [Initial Expert Report], do you agree with everything in [the Initial Expert Report]?

A. We've had cause to go back and verify some of the numbers that went into that exhibit, and as I said, we were initially

provided with the information by the Town, and we went back and tried to, and verified tried to verify all of it, and found there were some mistakes that were made, not what we would consider a major major, but some mistakes in the numbers.

Q. Could you tell me what those mistakes were?

A. I could generalize for you. The spreadsheet, that I believe is part of the record, has many, many line items, and there were some discrepancies . . .

Q. Which spreadsheet are you referring to?

A. I couldn't tell you the exhibit, but it is sort of a running cost analysis, an expenditure analysis that I believe the Town provided.

Id., p. 16-17 (emphasis added).

The Town's expert testimony regarding damages testimony must be excluded for because Mr. Forzley did not independently calculate damages, and doesn't have a reliable basis for his damages opinions. In fact, he freely admits that the damages opinion provided within the expert disclosure deadline was flawed and erroneous. He has actually admitted to a \$2 million dollar mistake in the F&O expert reports, and has retracted his opinion that the Town is entitled to recover \$10,326,833.00 in damages. *Id.*, p. 124-125. He also admitted that he could not verify the numbers that were used to quantify the following categories of damages in the Initial Expert Report: "(1) Site Investigation/Evaluation of Disposal Alternatives - \$1,283,893;" "(3) Design and Permitting Costs - \$1,012, 588;" "(5) Expenses to Remediate and Address Site Failures - \$386,428;" and "(7) Borrowing Costs - \$3,273,564." Compare **Exhibit 3**, p. 21 with **Exhibit 1**, p. 26. Moreover, Forzley testified that he did not check any of the numbers

provided by the Town, or review any backup, but simply adopted the numbers provided by David Ford in his spreadsheets, as follows:

Q. You stated that you found or you have discovered some errors or discrepancies, and I believe you said that it was in the underlying spreadsheets that you reviewed, and that information somehow got translated to your report?

A. Right.

Q. And I'm trying to understand what changed.

A. Right, right. The way the numbers in this report [the Initial Expert Report] came to be were summaries in the Town's spreadsheet. What we did, to verify these numbers in preparing for my deposition, was to look at the records that would've generated these numbers. So invoices, state revolving fund records, the Town's purchase order records and so forth, and really tried to drill down and corroborate these numbers, and that's where we found some discrepancies. The Town's that's where we found some discrepancies.

Q. So the Town's data was wrong?

A. The numbers, some of the numbers in the summary spreadsheet were wrong.

Q. What was the origin of that mistake in the Town's data?

A. That's a hard question for me to answer. We asked the town for specific invoices to try to corroborate these numbers, and they weren't able to come up with every single invoice . . .

A. . . . they could not reproduce the invoices. . . . Another one, another area was, for example, a purchase order that was cut for an amount, but that entire amount wasn't, we couldn't nail down that entire PO amount was spent. So that entire PO amount shows up in [the Initial Expert Report] but we couldn't find a record that the entire amount was spent.

Exhibit 3, p. 18-20 (emphasis added). Mr. Forzley testified that after recognizing the mistakes in the F&O expert reports, and re-evaluating damages, he has reduced Wolfeboro's calculation of damages from \$10 million to \$8 million "plus", as follows:

- A. . . . When we did this a part of this report, we didn't look at all the invoices, but we have now . . . And that's how we got from the ten million plus dollar claim that we have here, to the eight plus million that's in the interrogatories . . . So the revised claim is a lot less the 10 million.

Id., p. 124-125.² In other words, the methodology employed by F&O utterly fails the four *Daubert* indicia of reliability, because he acknowledges an error of two million dollars. Under the first *Daubert* criteria, “whether the theory or technique can be and has been tested,” *Milward*, 639 F.3d at 14, Mr. Forzley himself tested the numbers in the F&O Initial Expert Report prior to his deposition, and found the numbers to be unreliable and inaccurate.

Under the second *Daubert* criteria, his technique – taking a spreadsheet of cost summaries from his client and adopting it without an understanding of where the numbers came from – was clearly not a “technique that has been subject to peer review and publication,” and he also admitted at his deposition that “we didn’t use textbooks or published information.” See **Exhibit 3**, p. 61. In short, the Town’s expert testimony on damages should be excluded because the methodology is unreliable and there is “too great an analytical gap between the data and the opinion proffered.” *Joiner*, 522 U.S. at 146.

This Court’s *Daubert* analysis in *Insight Technology*, 2005 WL 6001396, is directly on point and applies in the present case. In *Insight Technology*, the expert, Howe, was an employee of the plaintiff, with a B.S. in business administration and economics, and “some work toward an M.B.A. degree.” *Id.* at *4. This Court noted that his “qualifications as an expert on damages in this case appear to be minimal at best,” but

² Forzley testified that “[b]orrowing costs are removed . . . my recollection is that the costs are about 1.2 million dollars.” **Exhibit 3**, p. 138.

did not base its decision on those grounds. Instead, this Court granted a motion in *limine* to exclude Howe's testimony about damages because his expert opinions were unreliable, as they were "not based on his own calculations and understanding of those issues." *Id.* (emphasis added). This Court reasoned:

[W]hile he has knowledge of financial matters at Insight and has access to financial information pertinent to a damages calculation, he could not and did not make that analysis himself. Instead, Insight's counsel used the information Howe provided to calculate lost profits damages and a reasonable royalty and Howe merely presented that information as his opinion. Howe will not be permitted to present an opinion that is not the product of his own work and analysis and that he apparently does not understand.

Insight Technology, 2005 WL 6001396, *4. This Court should apply its reasoning in *Insight Technology* to the present case, and rule that Mr. Forzley's testimony on damages must be excluded, because he "will not be permitted to present an opinion that is not the product of his own work and analysis and that he apparently does not understand."³ *Id.*; *see also Bourne v. Town of Madison*, 2007 WL 1447672 (D.N.H. 2007) (plaintiff did not make sufficient showing that expert's methodology was reliable).

The damages claimed by the Town concern real estate appraisal, design and construction cost estimating and reasonable operational and remediation costs. Mr. Forzley did not provide a reasonable methodology for arriving his damages opinion

³ Forzley's testimony that the land which Wolfeboro purchased for the Rapid Infiltration Basins ("RIBs") "has zero value to the Town," even though it has "road frontage" and an "access road," and that Wolfeboro is entitled to reimbursement of the entire purchase price of \$1,050,000, is not credible, and lacks common sense. **Exhibit 3**, p. 112. He testified that he had no understanding of real estate appraisal procedures, and could not evaluate the economic value of the real estate which Wolfeboro purchased for the Project, as follows:

Q. Well, what it's worth to the Town and what the Town thinks it's worth is completely irrelevant, what is its economic value, what is it worth?

A. I don't know what an appraiser would appraise it at. I have no idea.

Id., p. 114-115 (emphasis supplied).

figures, and did not even attempt to ascertain what amounts of the costs allegedly incurred by the Town are recoverable items. He admitted that the timely disclosed damages opinions were inherently flawed, and when he provided late revised opinions at deposition –which should be stricken over timeliness- that also failed to consider any methodology or indicia of reliability. Accordingly, the Town should be precluded for introducing any evidence as to tis damages at trail.

B. Forzley Is Not Qualified To Testify On The Subject Of Damages

Finally, the Town cannot meet its burden of showing that Mr. Forzley is qualified to provide expert opinion testimony about the Town’s damages in this case. At his deposition, Mr. Forzley testified that he has a “Bachelor’s degrees in Biological Sciences and Civil Engineering,” and “a Master’s degree in Environmental Engineering,” *see Exhibit 3*, p. 5, but that he is “not a hydroegologist or a geologist or a geotechnical engineer,” and “primarily reviewed the damages portion of the case.” *Id.* p. 10-11. He has no specialized training as an accountant, *see id.* at 16, or an economist, *id.* at 14, or real estate appraiser, *id.* at 114-115, and had never worked on a rapid infiltration basin project. *Id.* at 11. Instead, his role was “just to make sure it was a coherent report and presented the information that we were asked to present [by David Ford].” *Id.* p. 24-25. Under these circumstances, he is not “a witness qualified as an expert by knowledge, skill, experience, training, or education,” within the meaning of Rule 702. *Compare Insight Technology*, 2005 WL 6001396, * 4 (issue of witness’s qualifications to testify about damages did not need to be resolved, because his expert opinions were inadmissible for the different reason that they were not based on his own calculations).

The damages claimed by the Town concern real estate appraisal, design and construction cost estimating and reasonable operational and remediation costs. Mr. Forzley does not have a background in any of these areas, and did not even attempt to ascertain what amounts of the costs allegedly incurred by the Town are recoverable items. Accordingly, the Town should be precluded for introducing any evidence as to its damages at trial.

C. The Town Should Be Precluded From Introducing Late Expert Opinions On Damages And From Relying Upon Late Produced Documents Regarding Damages

The Town has produced documents after the discovery deadline of January 6, 2014, which should be excluded from evidence at trial. *See Exhibit 5*; (Letter dated January 30, 2014 regarding the Town's supplemental document production); *Exhibit 6* (Letter dated February 26, 2014 regarding the Town's supplemental document production). Some of these untimely produced documents contain information relating to damages. All evidence of damages produced or disclosed by the Town after January 6, 2014 should be excluded by this Court because it was produced after the discovery deadline.

The Town and Wright-Pierce agreed to a joint discovery plan pursuant to Federal Rules of Civil Procedure 26(f)(3)(B), which provides, "A discovery plan must state the parties' views and proposals on . . . when discovery should be completed . . ." *See* Fed. R. Civ. P. 26(f)(3)(B). The purpose of discovery "is to narrow the issues of the litigation and prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial." *Bursey v. Bursey*, 145 N.H. 283, 286 (2000). "[T]o prevent unfair surprise, a party may be precluded from presenting evidence that he

fails to disclose during discovery." *Id.* Accordingly, the Town's late disclosed damages information should be excluded because it was produced after the close of discovery and essentially on the eve of trial.

CONCLUSION

The Town's expert evidence of damages should be excluded because it is unreliable and speculative. Fed. R. Evid. 702. Additionally, the F&O expert reports should be excluded entirely under Fed. R. Evid. 403 because their probative value is substantially outweighed by the risk of unfair prejudice to Wright-Pierce, if a jury adopts F&O's speculative "total loss" damages theory and its erroneous \$10.3 million calculation of damages. Finally, the Town's late produced documents should also be excluded from trial.

WHEREFORE, the defendant, Wright-Pierce, respectfully requests this Honorable Court to grant the following relief:

- A. Grant this Motion in Limine to Preclude the Town of Wolfeboro from Submitting any Evidence of Damages;
- B. Grant such further relief as this Court deems just and equitable.

Respectfully Submitted by,

WRIGHT-PIERCE

By its attorneys,

/s/Kelly M. Malone

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Dated: March 18, 2014

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.4(b), I hereby certify that this document filed through the ECF system on March 18, 2014, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non registered participants.

/s/ Kelly M. Malone

Kelly M. Malone

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