IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

WRIGHT-PIERCE'S OBJECTION TO WOLFEBORO'S SUBMISSION FOR DAMAGES PURSUANT TO THE FINAL PRETRIAL ORDER

NOW COMES the defendant, Wright-Pierce ("Wright-Pierce"), by and through counsel, Donovan Hatem LLP, and hereby submits the following Objection to the Town of Wolfeboro's ("Town") Submission as to Itemization of Damages Pursuant to the Final Pretrial Order, dated April 9, 2014. As a preliminary matter, the Town's submission fails to comply with the Court's Order. Such failure demonstrates the Town's inability to substantiate its damage claim. Moreover, any attempted itemization that the Town might provide would be deficient by lack of required expert opinions concerning causation to liability and due to the complexity of the Town's damages. Lastly, the Town utterly failed to put forth any methodology for its damages. As discussed more fully below, the Town's submission must be denied and the Town must be precluded from introducing evidence of its damages at trial.

A. The Town Failed To Submit an Itemized List of the Amount of Damages For Each Count.

In its Pretrial Statement, the Town provided a list of its alleged special damages, pursuant to Local Rule 16.2(a)(7). See Docket No. 88. At the April 3, 2014 Final Pretrial Conference, the Court asked counsel for the Town to designate its damages items to each count of the complaint. Counsel was unable to articulate a response. As a result, the Court ordered the Town to file "an

itemized list of the amounts of damages that it is seeking for each count by April 9, 2014" (the "Order"). See Docket No. 144.

The Town failed to comply with this Court's Order. Instead, the Town simply refers the Court back to the itemization of damages it filed in its Pretrial Statement - the very document the Court deemed insufficient at the Pretrial Conference and ordered the Town to supplement – and tells the Court to issue a jury instruction. See Docket No. 145. The Town did not make any attempt to comply with the Order. To date, the Town has not disclosed which of its damages items it associates with each count, nor has it applied any damages methodology.

B. The Damages Itemization Filed By The Town Contains Inaccurate Information.

Not only is the Town's submission deficient for its failure to itemize per count, a cursory review of the Town's damages spreadsheet reveals erroneous data, miscalculations, improper estimations, and speculative conclusions of damage, including but not limited to: (1) the Purchase Order Amounts and Total Amount Paid for several line items do not match up; (2) the Town seeks full compensation for the cost of the land and the facility without any reduction for present value; (3) there is no explanation for how loan interest is calculated; and, (4) the Town did not discount its alleged future economic damages to net present value. Based on these failures alone, the Town's submission should be denied and its evidence of damages precluded.

C. The Town Cannot Replace Required Expert Testimony with a Lay Witness as to Damages.

Here, the Town's damages claim must be precluded because it cannot prove by a preponderance of the evidence through expert testimony that it suffered any damages. The Town is required to present its damages evidence with expert testimony because of the complexity of its damages claim. The Town seeks damages including, among other things, damages for the value of the land and the waste water treatment facility, which would require an expert appraiser,

but the Town has not disclosed an appraiser. The Town also seeks future economic damages, which requires expert testimony by way of an economist, which the Town cannot proffer. As the Court is aware, the Town has withdrawn its only damages expert, Philip Forzley ("Mr. Forzley") of Fuss & O'Neil ("F&O"), as a testifying expert in this matter. Instead, the Town improperly seeks to prove damages through testimony of lay witness, David Ford ("Mr. Ford"). Mr. Ford is not a real estate appraiser, he is not an economist, and he does not have the requisite qualifications to provide opinions necessary to the value of damages related to the invoices for design services, construction work and other costs claimed by the Town. Moreover, the Town has not presented any methodology in support of its damages.

Furthermore, this Court has already determined that expert opinion testimony is required on damages. Pursuant to this Court's Order, expert testimony is required concerning the Town's duty to mitigate its damages, which would necessarily include calculations of present value of the land and facility, costs to repair and/or remediate, and the resulting impact on the Town's overall damage estimates. See Docket No. 136. And all of these costs then need to be applied with a methodology as to actionable amounts. Indeed, the Court acknowledged that the mitigation issues pertain to the design, engineering, operation, and failure of the rapid infiltration basin ("RIB") system and to the continued use of the Wolfe 1-A site. Id. The Court further found that these matters implicate specialized engineering, geotechnical, hydrological, and other scientific and professional principles and knowledge that are far beyond the common understanding of lay persons. Accordingly, expert testimony is required as to all of the Town's damages concerning these items, especially as to the present value, remediation costs, and impact to alleged damages.

The Town initially disclosed a damages expert, which is evidence that the Town understood expert testimony was required to present its damages evidence concerning its "total loss" theory. All three of the F&O experts testified at their depositions that the damage section of the report, was prepared solely by Mr. Forzley, who will no longer testify at trial. The Town now seeks to improperly offer evidence of damages through its lay witness, David Ford. Mr. Ford has never been disclosed as an expert in this case. Mr. Ford signed the Town's Answers to Interrogatories and created a spreadsheet allegedly itemizing damages, but this does not make Mr. Ford an expert on the Town's alleged damages and theory of "total loss." Moreover, Mr. Ford cannot provide a methodology demonstrating how the Town contrived its alleged damages. Mr. Ford has never conducted his own damage assessment nor does he have experience doing so. Likewise, Mr. Ford cannot opine as to the value of the site's equipment, land, and natural resources.

The Town has essentially acted as its own gatekeeper realizing that the analytical gap between the data and the opinion Mr. Forzley would proffer, would be pure speculation and not in compliance with Rule 702. However frustrating this may be for the Town, it cannot be allowed to circumvent its failure to have a damages expert by offering the testimony of an unqualified lay witness who has never disclosed a damages opinion. Without expert testimony, the Town cannot prove any alleged damages let alone a theory of total loss.

1. This is Not a Case Where The Average Juror May Have Common Knowledge of and Everyday Experience With Complex Damages.

It is well established, and the law makes it clear that "damages cannot be awarded on the speculation, passion, or guess of the jury." Stein on Personal Injury Damages §6:4 at 6—14 (3rd ed. Rev. 1997). To allow a lay witness to testify to damages in this matter would be an "unsustainable exercise of discretion." Laramie v. Stone, 160 N.H. 419 at 431. In Laramie, the

court found that the plaintiff's injuries involved "complex psychological and mental health conditions, the future effects of which are unknown." Laramie, supra at 430. "Determining whether [the plaintiff's] earning capacity was in fact impaired as a result of the injury caused by the defendants' conduct, and to what degree, involved more than simple mathematical calculations and it was **not** in the jury's realm of common knowledge and everyday experience. Id., citing Porter v. City of Manchester, 151 N.H. 30, 46 (2004) (emphasis added). "Where an injury is obscure,…loss of earning capacity must be established by expert medical testimony in order to avoid pure speculation on the part of the jury." Id., citing Parra v. Atchison, Topeka & Santa Fe Ry. Co., 787 F.2d 507, 509 (10th Cir. 1986). Without expert testimony, the Court explains, "any jury award for loss of earning capacity would be based on conjecture or speculation." In this matter, this Court has ruled that expert testimony is required to prove mitigation of damages. See Docket No. 91.

In its attempt to substitute Mr. Ford as a damages witness, the Town has essentially argued its theory of total loss of a complex RIB system is within a jury's common knowledge and everyday experience. In making its claims, the Town seeks complex real estate losses, economic losses, and damages related to a site that the Town has put to use for years. It is well established nationwide that with respect to professional architects and engineers, expert testimony is required in complex matters to prove (1) the applicable standard of care, and (2) the causal connection between the purported negligent conduct and associated damages.[1] The Town has not put forth an expert to causally connect the alleged wrongful conduct of Wright-Pierce to its alleged damages, and it does not have a damages expert. The Town's alleged damages,

[1] See Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal. App. 3d 278 (1977); Conam Alaska v. Bell Lavalin, Inc., 842 P.2d 148, 152 (Alaska, 1992) (court dismissed the contractor's claim for professional negligence because it failed "to adequately establish a basis for the jury to determine the amount of damages stemming from the [architect's] malpractice").

including the total loss of a complex RIB system, is exactly the type of case where scientific, technical and specialized knowledge is needed to assist the trier of fact as it is completely outside the common knowledge of a jury.

The Town's sole position is predicated upon a theory that the Town's RIB site cannot be used to dispose wastewater and is one of "total loss." The intricacies involved in any alleged damages in this case are completely outside the realm of common knowledge and everyday experience of a lay juror. Accordingly, this case falls squarely in line with the proposition that "expert testimony is 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. Laramie, supra at 160 NH 419, 426 (2010) citing Carbone v. Tierney, 151 N.H. 521, 527 (2004); see Docket No. 91 (ruling that expert testimony is required to prove mitigation of damages).

D. The Town Has Not Provided and Cannot Provide a Methodology as To its Alleged Damages.

Providing an expert witness in and of itself is not sufficient to meet the Town's burden of proof in demonstrating a causal link to alleged damages and apportionment of damages in this matter. In Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 597 (1993), the Supreme Court of the United States recognized that while it is the duty of the jury to decide what weight to give evidence in its deliberations, it is the function of the court to ensure that expert testimony is of sufficient validity to warrant its admission into evidence. Accord Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999). In General Electric Co. v. Joiner, 522 US. 136, 146 (1997) the Supreme Court elaborated on its findings in Daubert, stating that "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great of an analytical gap between the data and the opinion proffered."

"In selecting the expert and analyzing the expert's opinions, one must make a thorough assessment of the methodology underlying the opinions, and perhaps more importantly, whether that methodology can be properly applied to the facts at issue to reach a reliable conclusion." Robert F. Cushman, John D. Carter, Paul J. Gorman & Douglas F. Coppi, Proving and Pricing Construction Claims, 514 (3d ed. 2001). "[A]nother key issue [is] whether the expert has the necessary qualifications to proffer opinions on the subject involved in the dispute." Id. "For example, a materials expert could testify that a particular material in a building was defective based on his testing of that material. That same expert may not also be qualified to testify that some aspect of the design that incorporated that material was negligent, unless the expert has some knowledge and experience related to the design process." *Id.* In DeJagar Construction v. Schleininger, 938 F. Supp. 446 (W.D. Mich. 1996), the plaintiffs offered the expert testimony of an accountant to testify to the plaintiffs' damages and was excluded because of "mathematical mistakes, unsupported assumptions and projections and picking and choosing among purported facts to maximize the plaintiffs' damages." Id.

Here, the Town has failed to disclose any expert on damages, let alone one with sufficient education and experience in RIB design to demonstrate why there is a causal link between Wright-Pierce's design of the Project and the damages allegedly suffered by the Town. Moreover, such an expert must demonstrate that he utilized a methodology to relate specific wrongful conduct to itemized damages. In construction matters such as this, this is done through an itemization of defective items on the Project, the cost to repair or replace each item, and how each party is responsible for each item. As discussed, the Town has never disclosed and cannot disclose such an expert. The Town has not utilized any methodology whatsoever. Essentially, the Town is presenting a "bucket" of damages and is asking the finder of fact to figure out what

amount of costs are actionable damages without offering the finder of fact any assistance in reaching a conclusion. This matter is postured for the Town to recover windfalls and double recoveries due to the basic step of retaining a damages expert being forgotten. In a complex case involving design and construction professionals, this is impermissible.

Furthermore, the Town is not entitled to any alleged future economic damages without the testimony of an expert. "A plaintiff cannot recover future economic damages without expert testimony or other competent evidence discounting those damages to net present value." *West v. Bell Helicopter Textron, Inc.* 967 F.Supp.2d 479 (D. N.H. 2013) (quoting Hutton v. Essex Group, Inc., 885 F.Supp. 331, 334-35 (D.N.H. 1994). Here, the Town has no expert to testify as to present net value or its methodology of calculating any of its damages. Accordingly, all of the Town's damages must be precluded.

E. The Town Cannot Attempt to Qualify David Ford as an Expert.

Finally, any attempt by the Town to qualify Mr. Ford as an expert to opine on damages and the Town's "total loss" theory must be precluded. The Town failed to disclose Mr. Ford as an expert in its Rule 26 disclosures and the time has passed to do so. The Town does not have an expert to testify to damages and Mr. Ford is not qualified to testify as to the alleged damages in this matter. As a result, the Town's submission must be denied.

WHEREFORE, the defendant, Wright-Pierce, respectfully requests that this Honorable Court Deny the Town of Wolfeboro's Submission as to Itemization of Damages Pursuant to the Final Pretrial Order and preclude the Town from introducing evidence of its damages at trial.

Respectfully submitted,

WRIGHT PIERCE,

By its attorneys,

/s/ *Kelly Martin Malone*
Kelly Martin Malone, NH Bar # 18093
John W. Dennehy, NH Bar # 16166
Patricia B. Gary, NH Bar # 8163
DONOVAN HATEM LLP
53 State Street, 8th Floor
Boston, MA 02109
Tel (617) 406-4500

Dated: April 11, 2014

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.4(b), I hereby certify that this document filed through the ECF system on April 11, 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 Martin Malone*