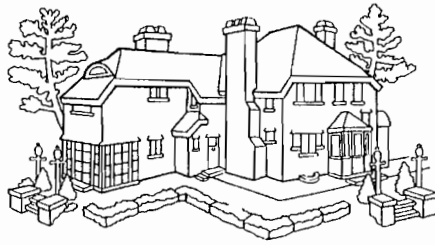


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December 20, 2013

6<sup>th</sup> Circuit Court – Merrimack  
Concord District Division  
32 Clinton Street  
Concord, NH 03301-2359

**RE: STATE OF NH FISH AND GAME DEPARTMENT v. EDWARD M. BACON**  
**DOCKET NO.: 429-2013-CV-138**

Dear Clerk:

Please find enclosed the Defendant's Closing Argument for filing with the Court.

Thank you for your courtesies.

Very truly yours,

A handwritten signature in black ink, appearing to be 'BD', with a long horizontal stroke extending to the right.

Brad C. Davis, Esquire

Enclosure

cc: Edward M. Bacon  
Philip B. Bradley, Esquire – NHAG Office

# The State of New Hampshire

6<sup>th</sup> Circuit Court – District Division - Concord

State of New Hampshire Fish & Game Department

v.

Edward M. Bacon

DOCKET NO.: 429-2013-CV-00138

## DEFENDANT'S CLOSING ARGUMENT

**NOW COMES** Defendant, Edward Bacon, by and through counsel, and submits the following closing argument:

1. The State in this matter is attempting to recover the costs of the New Hampshire Fish and Game rescue that occurred on September 18, 2012 involving the defendant who had dislocated his hip during a hike.
2. Given the facts in this case, the defendant, Mr. Bacon, suffered a hip dislocation that happened regardless of the weather and though unfortunate for all involved, the dislocation, which caused the need for the rescue, was not a result of anything negligent that the defendant had done.
3. The statutory authority for this action clearly indicates the threshold issue for the court to determine from the facts is whether or not the defendant was negligent bringing about the need to be rescued. NH RSA 206:26-bb. Following that, the court must determine what is the reasonable amount of the rescue fee's charged.
4. NH RSA 626:2 provides the definition of negligence to be applied in this case.

“A person acts negligently with respect to a material element of an offense when he fails to become aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that his failure to become aware of it constitutes a gross deviation from the conduct that a reasonable person would observe in the situation.”

5. In this case the facts support that Mr. Bacon was an experienced hiker, had hiked this area at least on two prior occasions, he was properly prepared with a full sack containing hydration, navigation, and communication (cell phone) equipment and he carried gear such as a tent and sleeping bag for overnight stay and he had proper clothing including full rain gear.
6. The planned hike was very modest, 4.9 miles and he set out at 7:40 a.m. allowing him plenty of time to reach the Greenleaf hut, the final destination for the day. At the time of the dislocation (approximately 1 p.m.) he was only a few miles from the hut, which is a fully protected structure with overnight accommodations and a food provided by the Appalachian Mountain Club (“AMC”).
7. In fact he was on course and on route when the dislocation occurred and was located by the AMC volunteers under cover, warm and dry.
8. Although the State believes that foul weather was forecasted for several days in the area, Mr. Bacon did see a weather posting which showed 30=>40=>70 with respect to wind velocity. His understanding was 30 to 40 mph winds with gusts to 70 and rain. Lt. Kneeland was questioned about the weather report for the Mount Washington area, which only predicted mostly cloudy skies and rain showers likely, temps around 50 degrees. Winds were given a range of 30 to 80 mph. Lt. Kneeland pointed out Mt. Washington was 20 miles away; however, this report was for the Summits, and no severe weather system was forecasted in the Summit areas.
9. The State also failed to provide actual weather data to show any severe weather during the time of the hike. Although the fast changing weather occurred after the

rescue had started, there is no evidence that the weather had anything to do with the need to rescue the defendant.

10. The exhibits (specifically the photos taken by Mr. Bacon on the morning of the hike and during the hike) show that there was no rain when he began the trek, and only about 2.9 miles from the Greenleaf Hut it was merely foggy with some wind.
11. Absent the dislocation, Mr. Bacon would have made it to the hut before any severe weather. Again, the rescue was required because of the dislocated hip, which would have happened even if the weather was sunny and warm.
12. The defendant testified and the exhibits confirm that other hikers were in the area that day despite any foul weather and therefore this would also lead the defendant to believe that it was reasonable to believe that the weather was not going to be severe and that he would finish this leg of the hike without any difficulties.
13. The defendant testified that he had trained for this hike. This included carrying packs up to 40 lbs and hiking hills and stairs to test the strength of his hips and back.
14. Mr. Bacon's medical providers were aware of the hiking activity and the records document that it was reasonable for him to believe that his hip was fine for hiking.
15. "Mr. Bacon has several medical conditions, none of which preclude him from hiking on the Franconia Ridge Trail as described in the White Mountain Guide." Dr. Ross Summers (P. 0002 of the defendant's medical packet.)
16. The defendant's surgeon also opined that "...He knew the position of potential instability and knew how to avoid that position. No further restrictions were suggested to Mr. Bacon." "Mr. Bacon knew his restrictions and it is reasonable for him to have expected to be able to carry out a hiking trip without problem." Dr. David Blaha (P. 0003 of the defendant's medical packet).
17. The defendant's physical therapist has also stated "At the time of his discharge it was our opinion that Mr. Bacon had the necessary strength, range of motion and endurance to participate in his hiking activities." Dennis Engerer, P.T. (P. 0004 of the defendant's medical packet).

18. Based on the information regarding the function of his hip by the defendant's medical providers, none had told him that he shouldn't hike, or that he should expect any problems at all with the hip.
19. The defendant also testified that he was aware of the "position of instability." That is crossing the leg inward, which would potentially cause disruption in the hip socket.
20. The actual event that caused the dislocation was when Mr. Bacon came upon a ledge that was blocking the trail. He chose the most reasonable way to traverse the ledge, which was to turn backwards and sit up on it. This maneuver would not have required him to rotate the left leg inward in any fashion. So he reasonably took the best approach to prevent any possible injury. The dislocation was unexpected.
21. The State also provided a summary spreadsheet regarding the fee's incurred as a result of the rescue. Lt. Kneeland testified with respect to the fees that only one (1) fish and game officer needed to be called in as a result of the rescue. All the other officers involved were already on duty and the remaining rescuers were volunteers. Even if officers needed to be reassigned from their regular duties to the rescue, the expense incurred by the State for the on-duty officers would have been the same regardless of the rescue. The only additional fees may be if the State in fact paid mileage to the officers. The exhibit shows a mileage expenses, but there was no testimony that demonstrated that the fees were actually incurred by the state as a result.
22. In a collections case, such as this, the State bears the burden of proof to by a preponderance of the evidence that the damages they seek were caused as a result of the legal fault of the defendant. (NH Civil Jury Instruction 9.2) The damages requested must be supported by the evidence; it cannot be speculative. (See NH Civil Jury Instruction 32.42).
23. In this case the damage calculation is not clear and is not broken down as to what is the legal fault of the defendant and therefore the Court would have to speculate in order to find damages in the favor of the State.

24. In this case, regardless of the facts that demonstrate the defendant was not negligent in hiking on September 18, 2012, the State failed to meet its burden as to proving damages.
25. Given the foregoing, the Court should find in the favor of the defendant in this matter.

Respectfully Submitted,  
**Edward Bacon**  
By and through his attorney,

Dated:

12/20/13

  
\_\_\_\_\_  
Brad C. Davis, Esquire  
Seufert, Davis & Hunt, PLLC  
59 Central Street  
Franklin, New Hampshire 03235  
(603) 934-9837

**CERTIFICATION**

I hereby certify that on this date I forwarded a copy of the foregoing objection to Philip Bradley, Esquire.

Dated:

12/20/13

  
\_\_\_\_\_  
Brad C. Davis, Esquire