

THE STATE OF NEW HAMPSHIRE

6TH CIRCUIT

DISTRICT DIVISION – CONCORD

No. 429-2013-CV-00138

State of New Hampshire Fish & Game Department

v.

Edward M. Bacon

**CLOSING MEMORANDUM**

NOW COMES the State of New Hampshire Department of Environmental Services (“State”), through the Office of the Attorney General, and submits this closing memorandum relative to the December 12, 2013 hearing on the merits.

RSA 206:26-bb provides that “any person determined by the department to have acted negligently in requiring a search and rescue response by the department shall be liable to the department for the reasonable cost of the department’s expense for such search and rescue response.” “The negligence standard is defined as how a reasonable man might act under the same circumstances.” *Gelinas v. Metropolitan Property & Liability Ins. Co.*, 131 N.H. 154, 161 (1988) (quotation omitted).<sup>1</sup>

When Mr. Bacon set off on a five-day, solo hike in the White Mountains on September 16, 2012, he was fifty-nine years old, had undergone four hip surgeries since 2005, had an artificial left hip that had dislocated five times – including twice during the previous year, had a bad back, was on over twenty medications for a multitude of ailments, and needed to use two

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<sup>1</sup> To the extent Mr. Bacon argues for application of the criminal negligence standard set forth in RSA 626:2, II(d), the State submits that RSA 206:26-bb is a civil statute. Although the statute provides for the possible suspension of various licenses, any such suspension would also be civil and after an administrative hearing by the agency that issued the license.

canes (not walking poles) for support while hiking. He had hiked in the area when he was younger and, despite his physical infirmities, apparently believed he could still conquer some of New Hampshire's highest mountains – the respective 5089 foot and 5260 foot summits of Mt. Lincoln and Mt. Lafayette – even in the stormy weather that had been forecast days in advance. Unfortunately for everyone involved, Mr. Bacon negligently exceeded his physical abilities under the circumstances. He made it only about halfway before dislocating his hip, necessitating a challenging rescue in horrible weather conditions that required approximately fifty Fish and Game Department personnel and volunteers during afternoon and evening of September 18 and into the early morning hours of September 19, 2013.

When Lt. James Kneeland, with the Fish and Game Department for approximately two decades, visited Mr. Bacon at Littleton Regional Hospital right after the rescue, Mr. Bacon explained that he had misread a weather report as forecasting 30-40 mph winds with gusts to 70 mph and heavy rain, instead of forecasting 30-40 mph winds increasing to 70 mph and heavy rain. Mr. Bacon also told Lt. Kneeland that he dislocated his hip when he fell and caught his left leg while attempting to jump backwards up onto a ledge. The explanation of the dislocation is consistent with the one he immediately revealed to Sgt. Brad Morse, a Conservation Officer serving the Fish and Game Department for nearly a decade, who found Mr. Bacon on the trail between Little Haystack and Mt. Lincoln. Mr. Bacon explained to Sgt. Morse that he had slipped and fallen while trying to climb a rock shelf. As Mr. Bacon later commented to Reporter Kristi Garofalo from the *Union Leader*, “The one thing I would change if I could have was . . . maybe to not go up that day at all.”

Mr. Bacon testified that he had planned a low-cost vacation of hiking in the White Mountains. When he learned that the low-cost vacation was turning into a high-cost vacation

because the Fish and Game Department was charging him for the cost of the rescue, Mr. Bacon changed his story to make his actions seem more reasonable and his injury less foreseeable. At the hearing, he said he was not sure about the weather forecast because he did not have his reading glasses on while he was with some other hikers who were reviewing a weather posting at Liberty Springs Tentsite. He testified that he did not encounter any significant rain or wind. He recounted how he had trained extensively for the hike, and produced some “after the fact” approval letters from various medical providers. Finally, he explained that when he dislocated his hip, he had jumped backwards over a rock ledge and swung his legs up while perfectly maintaining his left leg to avoid flexion and internal rotation.

The revised version of events recounted by Mr. Bacon is not credible. His story about not knowing the weather forecast conflicts with what he told Lt. Kneeland immediately after the rescue. At the hospital, he told Lt. Kneeland that he misread the forecast, which means he did know the forecast and was at least aware of the deteriorating weather that was approaching. His recent trial testimony also conflicts with what he told Reporter Garofalo shortly after the rescue about the rain and the wind. The Union Leader article states that at 10:30 that morning, the rain started, and quotes Mr. Bacon as stating that his pack cover “on its own accord came off and flew away in the wind.” At trial, however, Mr. Bacon claimed he had not secured his pack cover properly.

To bolster the new version of events revealed at trial, Mr. Bacon produced several photographs that he claimed showed that it was not very windy or raining. One is a picture of two female hikers descending, that Mr. Bacon says he took at around 12:00 noon, about an hour before the rescue. It does not take much studying, however, to see that the women are wearing full rain gear with their hoods up over their heads even as they posed for a photo.

While Mr. Bacon testified at the hearing that he had good stability and could not possibly have put his left leg into the position of flexion and internal rotation that his orthopedic surgeon, John David Blaha, M.D. of the University of Michigan Medical School, warned him to avoid in a letter dated July 24, 2013, such a claim is doubtful. Sgt. Morse demonstrated the position of flexion and internal rotation in court, and explained that it would be impossible to avoid that position while hiking the terrain Mr. Bacon encountered on the Franconia Ridge Trail, which is rocky and which is steep at times. It simply is not credible that a short, overweight, 59-year old with an artificial hip and a heavy pack who has just spent five hours climbing rugged terrain is going to be able to keep his left leg perfectly positioned while jumping backwards onto a rock ledge in wind and rain while moving his legs up and over the ledge. Although Mr. Bacon now denies that conditions were slippery, he admitted to Reporter Garofalo that he had slipped earlier on loose gravel, slid down the trail, hit his pack on a rock and lost his tent down a ravine. In spite of this, he stubbornly continued on, now without his tent and the rain cover for his pack, and in weather that grew more grave in exposed mountains notorious for some of the most treacherous weather in New England.

Sgt. Morse, a certified emergency medical technician and former medic with the U.S. Army Special Forces, testified that Mr. Bacon's left leg was flexed and internally rotated when he found him on the trail several hours later. The dislocation was foreseeable -- Mr. Bacon admitted that he dislocated his artificial left hip a year earlier while stomping on a sprinkler or garden hose in his yard. The likelihood of injury was high given the adverse weather conditions that Sgt. Morse and Lt. Kneeland testified would decrease the stability and increase the fatigue of a hiker. Mr. Bacon's training back home in a city park during good weather did not test his physical limitations like the Franconia Ridge Trail during a storm.

Simply put, Mr. Bacon dislocated his artificial hip because he overestimated his abilities on the rigorous hike and disregarded warning signs such as a report of alarming weather, his pack cover being ripped off by the wind and lost, and the mishap resulting in the loss of his tent - a vital shelter in any high altitude emergency. Mr. Bacon ignored reasonable options under the same circumstances, such as not going on the hike in difficult terrain with a bad weather forecast in the first place, choosing a less arduous trip from the many that were readily available, staying at Liberty Springs Tentsite until the forecast improved, retreating below the treeline to relative safety when conditions worsened, taking an alternative route down such as the Falling Waters Trail that he passed, or hiking with a companion who could help when needed. Sgt. Morse testified that a hiking companion can lend support when hiking over unstable terrain and could be handed a pack to make it easier to climb over an obstacle. Mr. Bacon acknowledged to Reporter Garofalo, “The one thing I would change if I could have was to talk someone into walking with me.”

At the hearing, Mr. Bacon’s overconfidence was apparent when he said, “Why not?” to the question of whether he might possibly have completed his planned hike that day on schedule had he not dislocated his hip. The reality is that he had spent five hours on the easy part of the hike, was little more than half way to his destination, and according to Sgt. Morse and Lt. Kneeland, had the hardest part ahead of him still. Mr. Bacon had just listened to Sgt. Morse’s testimony that the winds were among the worst he had ever seen in that area of the Franconia Ridge Trail and had blown him to the ground repeatedly. Had he been able to continue, Mr. Bacon would have experienced the same devastating winds that knocked Sgt. Morse to the ground repeatedly, and almost certainly would have fared worse. It was likely more a question of “when” Mr. Bacon would dislocate his hip in this terrain and under these weather conditions

than “if” he would dislocate it. This Court should find that Mr. Bacon acted unreasonably in these circumstances and negligently caused his emergency rescue.

Assuming the Court finds Mr. Bacon liable for the cost of the rescue, the damages are \$9,186.38, representing the Department’s costs for the fifteen personnel involved in the rescue, including overtime, mileage and benefits. This amount is reflected on the Search and Rescue Mission Report, which was admitted by stipulation as a full exhibit, the authenticity of which cannot be questioned.<sup>2</sup> Mr. Bacon knew that if he dislocated his hip on the Franconia Ridge Trail, he would not be able to move and would have to be carried off the mountain, because he had dislocated his hip on five previous occasions and had to be transported to a hospital each time for a reduction. Costs were also high because Mr. Bacon, in spite of signs at trail crossings and summits, did not know where he was actually stranded. Based on the misinformation he provided, rescuers wasted time and energy in potentially deadly conditions circuitously hiking towards Mr. Bacon. Rescue costs were also high because of the adverse weather conditions in which Mr. Bacon chose to hike, conditions he knew were forecast to worsen, because a large number of rescuers were required. As Mr. Bacon told Reporter Garofalo after the rescue, he should have thought more about what would happen if things went wrong.

Counsel for Mr. Bacon noted that some of the Fish and Game Department personnel involved in the rescue were scheduled to work during part of the rescue, perhaps implying that the Department did not pay those personnel to help with the rescue. The State disagrees. RSA 206:26-bb specifies that liability shall be “for the reasonable cost of the department’s expense for such search and rescue response.” The reasonable cost of the rescue is what the Fish and Game

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<sup>2</sup> Lt. Kneeland testified that fifteen Fish and Game Department personnel worked on the rescue effort, which started sometime after 1:00 p.m. on September 18, 2013 and ended sometime after 3:00 a.m. on September 19. He also testified that the rescue cost included regular and overtime pay, mileage to the rescue site and benefits, although he was not familiar with the format of the summary document to which the parties stipulated to avoid bringing in additional witnesses from the Fish and Game Department.

Department paid its personnel to work on the rescue, including their regular time, overtime, mileage and benefits. Any time worked on the rescue by scheduled personnel is time the Fish and Game Department lost because those scheduled personnel were not able to perform their scheduled duties.

The breadth of the statute is evident from the additional language that further allows the Fish and Game Department to recover interest from the date the bill is due and for legal fees and costs incurred by the Department in obtaining judgment. The Fish and Game Department first sent Mr. Bacon a bill on November 16, 2012, due within 30 days, or by December 17, 2012. Assuming the Court finds Mr. Bacon liable, the Fish and Game Department will be submitting a further bill for legal fees and expenses and for the time and mileage of its witnesses, regardless of whether counsel and witnesses were scheduled to work anyway on the day of the December 12, 2013 hearing.

WHEREFORE, the State requests that the Court:

- A. Grant judgment in favor of the State;
- B. Order Mr. Bacon to pay \$9,186.38 as the cost of the rescue;
- C. Order Mr. Bacon to pay the State's legal fees, costs, and interest from December 17, 2012; and
- D. Grant such other relief as is just and appropriate.

STATE OF NEW HAMPSHIRE,

JOSEPH A. FOSTER  
ATTORNEY GENERAL

December \_\_\_\_, 2013

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CERTIFICATE OF SERVICE

I certify that on this day, I mailed a copy of the foregoing pleading, first-class mail, postage prepaid, to Brad C. Davis, Esq., counsel for Mr. Bacon.

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Philip B. Bradley, NHBA #10975