The State of New Hampshire

Supreme Court

No 2018-0327

James G. Boyle, Individually and as
Trustee of the 150 Greenleaf Avenue Realty Trust,

v.

City of Portsmouth

and

James G. Boyle, Individually and as
Trustee of the 150 Greenleaf Avenue Realty Trust,

v.

Comcast of Maine/New Hampshire Inc.

MANDATORY APPEAL
FROM RULINGS OF THE ROCKINGHAM COUNTY SUPERIOR COURT

REPLY AND ANSWERING BRIEF OF APPELLEE,
JAMES G. BOYLE,
INDIVIDUALLY AND AS TRUSTEE

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INTRODUCTION

Portsmouth unjustly keeps trying to get something for nothing. For fifty years, it used a sewer line for free and now refuses to move it, preventing Mr. Boyle from developing his property. To succeed, Portsmouth must convince this Court to either overrule long-standing black letter law, or hold that the jury speculated when it awarded damages despite significant and concrete proof. Portsmouth's "Hail Mary" arguments should be dismissed, and ten years of litigation finally resolved by this Court.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

I. The Statement Of The Case Contains Improper Argument.

Portsmouth submitted a twelve page statement of the case. It goes far beyond a recitation of the relevant history of the case. It intertwines argument, speculation and facts, many of which are disputed as they only arose in conjunction with summary judgment, were not material to the Trial Court's decision on the motion, and were never considered by the jury. Nevertheless, despite the disputed facts and argument, it generally sets out the relevant events.

II. Portsmouth Continuously Tries To Create a Misimpression Over Eminent Domain.

In the related eminent domain case, Portsmouth tried to create an impression that it was following the Court's suggestion in initiating the taking. Mr. Boyle has demonstrated how that is impossible given the state of the record when the Court suggested it (summary judgment on only the issue of the sewer line and not the wetlands). Now, Portsmouth attempts to make it appear it was part of a diligent process by stating the eminent domain process began shortly after the trial notice issued.

The correct timeline is that the Court suggested a taking in February 2014. The trial notice issued in April 2016. Portsmouth did nothing regarding eminent domain for two years. It was not until September 2016 that the City Council considered it and the declaration was filed in December 2016, a month before trial. Clearly, the taking was not

diligently following the Court's suggestion, but rather an eleventh hour ploy to influence the litigation.

FACTS

The majority of Portsmouth's fact section attempts to retry the wetlands as being naturally occurring and pre-existing the sewer line. However, the focus on the origination of the wetlands is a red herring. The jury found the wetlands are a nuisance, and Portsmouth did not appeal that finding.

I. The Facts Necessarily Found By The Jury Must Be Followed If Unchallenged.

Portsmouth has not appealed the jury's finding that the wetlands constituted a nuisance. Factual findings which are not appealed become binding throughout the case. *See State v. Aldrich*, 124 N.H. 43 (1983); *Loveren v. Eaton*, 80 N.H. 62 (1921). Throughout its brief, Portsmouth ignores this fundamental tenet.

In order to determine that the wetlands were a nuisance for which Portsmouth is responsible, the jury had to make several necessary determinations, all of which are supported by ample evidence. Before the State's ownership, the property was used as a landfill. BoyleReplyApp.60. The area in dispute was dry before the sewer line was installed. This is supported by aerial photography, the view, and testimonies of Mr. Gove[1] (wetlands expert) and Mr. Scamman (civil engineer). BoyleReplyApp.4; TR.637:22-628:1; 702:3-703:10. Mr. Gove extensively testified to work he conducted on the property over the prior decade which led to his opinion the wetlands are man-made. TR.556:17-558:20; 559:17-563:2; 567:5-569:19; 573:3-575:22; 578:23-587:17. Mr. Scamman testified that the culverts are in disrepair, and development upstream has caused 10 acre feet of water to back up. TR.703:11-710:1; *see also* BoyleReplyApp.11. Mr. Boyle testified the wetlands have been growing as the Comcast Culverts deteriorate.

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[1] The City claims Mr. Gove conducted a wetland delineation in 2003. CityBrief at 27. The 2003 plan involved a partial delineation to mark the wetland boundary line for distance from the building. TR.554:8-555:1. It did not delineate the entire western portion of the property as wetland. The markers were placed on the map by MSC, the surveying company, and did not represent the opinion of Gove Environmental Services. TR.555:19-556:15.

TR.143:22-144:7; 144:18-145:19. In 2011, the Portsmouth planning board discussed the need to replace the Comcast Culverts at length. BoyleReplyApp.11. Since the installation of the 2011 Boyle culverts, the area has dried up. TR.154:14-155:1.

From there, the jury had to determine that the property could be developed. The owner prior to Mr. Boyle listed the real estate explicitly stating: "it appears further development is possible"; "excellent underutilized investor/developer property"; and "property has residual land". BoyleReplyApp.58. The possibility of development is further supported by the Consent Decree, and all of the work done by Mr. Gove and Mr. Scamman, including the detailed plans for the site. CityApp.375; BoyleReplyApp.18; TR.554:8-556:9; 605:25-606:22; 607:20-608:14; 668:19-669:10; 736:19-738:21; 760:24-762:1. The Consent Decree specifically states the area is to be paved with pervious pavement to treat the water and eliminate safety concerns posed by the berm. BoyleReplyApp.18; TR.159:16-22; TR.400:1-9; TR.710:19-713:5. NH DES and Mr. Gove are in agreement the area consists of man-made wetlands. TR.633:21-23. Portsmouth has maintained its view the wetlands are not man-made since a previous litigation over buffer zones. BoyleReplyApp.10.[2]

As to obtaining permits, Mr. Boyle testified to his ability to have always obtained needed permits in the past. TR.336:21-23; BoyleReplyApp.5; BoyleReplyApp.7. Urban planning expert Jon Witten testified that another auto dealership on site is consistent with Portsmouth's Master Plan. TR.517:9-518:14. Since Portsmouth claimed a property right in the land, the 2009 site plan with the second dealership was put on hold by a joint decision. TR.138:24-139:18. The City and Mr. Boyle entered into a tolling agreement which discussed phased site development. BoyleReplyApp.54. The electrical box for the second proposed building was approved in phase one. TR.195:25-193:21. Importantly, the City Attorney testified concerning several land use lawsuits between Mr. Boyle and Portsmouth, and that Mr. Boyle prevailed in all. TR.941:14-949:16. To the City

[2] As shown in the planning board meeting minutes, the City has historically denied any water is impounded by the sewer line.

Attorney's knowledge, Portsmouth has litigated more extensively with Mr. Boyle than anyone, and he could not recall an instance where Mr. Boyle didn't prevail. TR.953:1-10, 954:13-20.

Finally, the jury had to find that Mr. Boyle would have had a dealership to operate. In this regard, Mr. Boyle testified extensively of his skill in operating dealerships and his history of being able to gain loans for dealerships. TR.106:18-113:4; TR.108:14-19. Mr. O'Brien explained a franchise can be obtained from a manufacturer as an "open point", or bought and moved on site. TR.780:20-781:2. Under New Hampshire law, a manufacturer cannot refuse to transfer a franchise unless there is good cause. R.S.A. 357-C:7. Thus, there would be no impediment into obtaining some dealership.

The jury had the substantial benefit of a view. Both the driveway and second dealership were staked out so the jury could visualize the location of the development on the ground. The jury saw the surrounding businesses, confirming Mr. Boyle's testimony there are 16 dealerships within a couple of miles right off the traffic circle. TR.112:10-12. Almost every dealer in the area is number one in New England, not just New Hampshire. TR.112:21-113:4. Mr. Boyle described 150 Greenleaf Avenue as a "godsend" large, 14 acre parcel in the middle of the action with 808 feet of frontage on the Route 1 Bypass. TR.114:10-22. The plan was to remodel the existing building within its footprint and then expand. *Id*; TR.301:3-9. Toyota as a manufacturer only requires 4.5 acres, which leaves room for one or two more dealerships. TR.186:5-15; BoyleReplyApp.57. The real estate packet even included prior plans for expansion. TR.117:9-19.

In its recitation of the facts Portsmouth largely ignores the jury's conclusion. Instead it argues its own version of the facts. Yet clearly the jury did not find credible any of Portsmouth's experts. Nor did it find credible Mr. Loughlin or Mr. Dodge. This was not surprising as Mr. Dodge admitted on cross-examination that he was using words given to him by the attorneys. TR.438:10-14. Thus, this Court should meet any factual assertions made by Portsmouth with a high degree of skepticism as Portsmouth tries to re-argue the facts.

ARGUMENT

SUMMARY OF ARGUMENT

The trial court did not err in submitting the issue of lost profits to the jury. The jury heard two weeks of evidence about how Mr. Boyle would develop a new dealership, and it heard reasonably certain evidence of lost profits. The future dealership was not hypothetical and profits were not speculative. Neither the Trial Court nor Mr. O'Brien considered lost profits impermissibly speculative. The verdict must be given great weight and there is no error in affirming the award. Further, for the simplification of a complex trial, Mr. Boyle as the person in control was the proper party to recover.

Portsmouth has no permanent rights in the sewer line. Irrevocable licenses are not recognized under New Hampshire law and even if they were, Portsmouth acted unreasonably when it failed to follow state law concerning obtaining an interest in state lands. At most, Portsmouth obtained a revocable license from the Board of Education consistent with the black letter law set out in *Houston v. Laffee,* 46 N.H. 505 (1866). There are no policy or fairness grounds to reverse *Laffee.* To the contrary, there are significant grounds to uphold it. Nor did Portsmouth obtain a prescriptive easement. A license cannot ripen into an easement. Further, Portsmouth argues an untenable construction of R.S.A. 539:6 for the starting of the prescriptive period. Finally, Portsmouth cannot establish adverse use or when the prescriptive period would have started. Thus, the jury was correct when awarding damages for trespass and nuisance.

I. Submission Of Lost Profits To The Jury Was Neither An Error Of Law Nor An Unsustainable Exercise Of Discretion

"The admissibility of evidence is generally within the trial court's discretion. *State v. Roldan*, 151 N.H. 283, 287, 855 A.2d 445 (2004). Absent an unsustainable exercise of its discretion, we will not reverse the trial court's decision. *Id.* To show that the trial court's exercise of discretion is unsustainable, the defendant must show that the decision was clearly unreasonable to the prejudice of his case. *Id.*" *State v. Lucier*, 152 N.H. 780 (2005). The Trial Court correctly allowed evidence to be submitted that a new dealership would exist but for the nuisance and trespass.

A. THE CALCULATION OF LOST PROFITS WAS BASED ON REASONABLY CERTAIN DATA.

To quantify lost profits, a plaintiff must put on reasonably certain data. *Fitz v. Coutinho*, 136 N.H. 721, 735 (1993); *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, 117 N.H. 843 (1977). Portsmouth stresses *Fitz*, although that case is far different than the present. In *Fitz* the issue was lost profit on timber harvesting. The plaintiff based his claim on a short informal walk-through appraisal using five year old data. He did not use generally accepted statistical methods, and did not account for the quality of the wood. The court also noted a vast discrepancy between the amounts initially claimed and those claimed at trial. Based on all these factors, the court concluded the evidence for calculating damages was too speculative. The court noted "the term 'speculative and uncertain profits' is not really a classification of profits, but is instead a characterization of the evidence that is introduced to prove that they would have been made if the defendant had not breached the contract. 5 Corbin, supra § 1022, at 139 (1964)." *Fitz* at 735. In contrast, the evidence in this case is solid.

Here, an expert CPA analyzed financial records for the years damages were claimed. After trial was rescheduled, Mr. Boyle supplemented for additional years using the same method. TR.391:21-392:21. The information was detailed. TR.781:17-784:20. Since Mr. Boyle did not know what brand he would ultimately obtain, his Toyota dealership data was selected and compared to national averages. Toyota is a mid-level franchise with average profits in the same geographical area as the proposed dealership. TR.781:7-16. As an operating dealership on site, many variables, such as the market, the location, the skill of the operator, staffing ability, and interaction with the community were eliminated. The expert CPA explained:

> Because there's variation between the different franchises and the different performances of those franchises, I thought it made more sense to use Mr. Boyle's current dealership for two reasons. One, it's in the same geographic market, so it gives a good basis as to what a dealership would sell as far as new and used vehicles. And, number two, the car business is -- it's a people business. It's predominantly based on the people that are involved. And

> who better to base a projection on than the operator of the current dealership on that location. TR.816:5-14.

Thus, using the existing data was far more reliable than arbitrarily selecting a single make. Without a developed site Mr. Boyle could not get a specific franchise. Moreover even with a specific make, numbers would have to be averaged accounting for different markets and dealer performance. The very method Portsmouth advocates has the same limitations as Mr. Boyle's method, except Portsmouth's method does not eliminate all the other variables, such as location, which Mr. Boyle addressed by using existing data.

The question of whether data is sufficiently reliable is a question of fact. *Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 138 N.H. 110 (1993); *Cf. Fitz v. Coutinho*, 136 N.H. 721 (1993). Notably in *Fitz*, the defendant put on no expert testimony to challenge and explain why the plaintiff's calculations were too speculative. Portsmouth never put on an expert to challenge Mr. Boyle's methodology. Absent such evidence, there is nothing more than unsupported attorney's argument, which the jury did not accept. At the close of trial, the Court stated Mr. O'Brien's opinions were properly cross-examined and the reliability of his testimony is an issue reserved for the jury. TR.1298:2-5.

Mr. Boyle used the same methodology as used in *Wilco* — he analyzed profits for similar businesses at appropriate locations. Indeed, there is more uncertainty in *Wilco* as the two Chinese restaurants were in different parts of town, and the KFCs were in different cities. There was no detailed discussion of whether these operations were sufficiently similar although the Chinese restaurants had the same operator. This is unsurprising as, just like here, the defendant did not present an expert or other evidence to dispute the lost profits calculation.

At page 44 of the brief, the City incorrectly analyzes what it believes was the jury's thought process in awarding damages and claims it is speculation. Mr. Boyle testified as to his lost profits for 2014-2016, which total the approximate jury award.

TR.174:8-24[3]. Instead of taking Mr. O'Brien's numbers for earlier years, it appears the jury took Mr. Boyle's testimony and then allocated a portion of each year's lost profits to the respective claims for an award of $3,570,000 (the exact amount presented in closing argument). In fact, the verdict indicated an award of $4,165,000 which was reduced to $3,570,000 by the Trial Court to account for the date of revocation stated in the verdict. In any event, the damage calculations are well supported by voluminous data, expert testimony and the testimony of Mr. Boyle. Actual data from the location was used. It was supported by expert testimony. Thus, it met the standard for submission to the jury set for in *Wilko*, *Fitz* and *I.M.C., Inc.*

A jury verdict may only be set aside if no rational jury could have reached the result on the evidence before it. *Keeler v. Banks*, 145 N.H. 558 (2000); *Thomas v. Finger*, 144 N.H. 500 (1999). The standard is not whether the Court disagrees with the facts found. This Court has previously stated: "we will not endeavor to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because we feel that other results are more reasonable." *Stachulski v. Apple New Eng., LLC*, 191 A.3d 1231, 1242 (N.H. 2018). The jury heard two weeks of testimony and saw many exhibits to establish that Mr. Boyle could have had another dealership but for Portsmouth's conduct. There was strong evidence of lost profits, certainly not a lack of evidence that would justify setting aside the jury's determination.

B. NEITHER THE TRIAL COURT NOR EXPERT O'BRIEN CONSIDERED LOST PROFITS TOO SPECULATIVE.

Portsmouth tries to use out of context statements to bolster its claim of speculation. First, it misuses the Trial Court's statement that Mr. Boyle getting permits was speculative. In the eminent domain case, Mr. Boyle did not put on weeks of

[3] Mr. Boyle's testimony established lost profits of $4,040,000 for 2014-2016. In closing argument, the amount of $3,570,000 was given for the years 2014-2016. TR.1371:16-18.

evidence that he would, in fact, get his permits.[4] The eminent domain trial was three days principally focusing on Portsmouth's necessity for the taking. Simply put it was a different case with different evidence than the sewer line case. The Trial Court never made a finding of whether Mr. Boyle would get permits. It used the word speculative in the simplest sense of undecided or unknown. It was not used as a legal term of art referring to the certainty of damages.

Mr. O'Brien's testimony is likewise taken out of context. Mr. O'Brien did not admit his data, calculations and conclusion were too speculative to use. Rather he clarified that his projections included assumptions, and that "assumptions, by definition, are speculative." TR.798:15-799:2. He unequivocally denied his projection was based on improper speculation. *Id.* "There's a difference between knowing and opining. And I opine that, yes, they could sell the new cars. But I wouldn't know for sure, no." TR.800:7-9.

C. MR. BOYLE WAS THE PROPER PARTY TO RECEIVE DAMAGES.

The Trial Court has broad discretion in the conduct of trials including the manner of framing issues and minimizing confusion. This extends to substitution of parties. *In re: Sweatt*, __ N.H. __, 173 A.3d 1080 (2017). In this instance the Court properly exercised its discretion to allow damages to Mr. Boyle instead of Minato Auto, LLC.

The basis of the claim that Minato should have received damages is that the entire premises was leased to Minato. The lease was not in evidence, and the notice of lease does not say Minato leases the entire premises. CityApp.373. In fact, a portion of the premises is leased to AT&T, which lease was entered into evidence and the area it occupies was pointed out to the jurors on the view. TR.165:9-167:5; BoyleReplyApp.25. Mr. Boyle has control of Minato as the managing member. He is also trustee of the trust which owns and controls the premises. All development permits were in the name of the trust that owns the land, not Minato. There was no showing that Minato occupied the

[4] This evidence would be important to just compensation as it helps establish the value of the land.

entire premises or in any way interfered or objected to the trust developing the property. Besides the current AT&T lease, when the property was first purchased, there were multiple leases. TR.122:23-123:9. One lease, to Southern New Hampshire University, required Minato to move cars every night for student parking. *Id.* Without affirmative evidence to the contrary, a property owner is presumed to be in control of his or her property. *New Mkt. Mfg. Co. v. Town of Nottingham*, 86 N.H. 321 (1933). The basis of Portsmouth's argument is not supported by the evidence. Portsmouth's claims that since Minato's rent equates the mortgage the trust pays that it must lease the entire premises. This is error as there was no evidence to the exact area leased and used by Minato, nor was there evidence that area would change with a new dealership.

A second ground for awarding the profits to Mr. Boyle was also discussed. Mr. Boyle testified a new company, not Minato, would operate the dealership and that as owner of the new company all profits would flow to him. TR.391:9-20; 393:7-14. The Trial Court held:

> [A] jury could infer from the evidence presented that Mr. Boyle personally would have realized -- could have realized lost profits, if all the conditions had been met here or if the jury finds they're met, because he testified that the various entities that are relevant in this case are S Corporations or LLCs, in which the money passes through to him and is reported on his individual income tax statements. And as a result of that, he would have realized these profits, but for -- if the jury finds the prerequisites -- but for the nuisance and/or trespass. TR.1304:22-1305:7.

The Trial Court initially allowed an amendment to add Minato as it had no impact on discovery, trial preparation, or any of the issues to be considered by the jury. The Court then reasoned that as an S-corporation, the lost profits would ultimately go to Mr. Boyle, so for the sake of avoiding confusion, the Court let the original parties stand:

> And so I thought, given the particular -- despite the case law about the distinction between tenant and landlord and the nature of the LLC based on the particular evidence presented in this case, I thought that Mr. Boyle could still argue that without adding Minato Auto, LLC, to this case. I think adding Minato Auto adds a layer of complication. TR.1305:8-13.

This is just an instance where a practical trial solution trumps a technical but otherwise meaningless issue. The consideration of damages was correct.

II. The Jury Followed the Trial Court's Instruction Not To Speculate As There Was Sufficient Evidence In The Record So That Rational Jurors Could Find Lost Profits.

A. THE VERDICT MUST BE GIVEN GREAT WEIGHT.

A jury verdict will be set aside only if after a review of the evidence, no rational jury could have reached the verdict. *Stachulski v. Apple New England LLC,* 171 N.H. 158 (2018), *Thomas v. Finger*, 144 N.H. 500 (1999). Put conversely, as long as there is some evidence to support the verdict, it will be upheld. *Babb v. Clark*, No. 2002-502 (N.H. 10/2/2003).

The Trial Court expressly recognized that Mr. Boyle put on a *prima facia* case of both developing a new dealership and the profits it would have generated. Its cogent and reasoned analysis on the record is attached as an addendum to this brief for ease of the Court's reference. Thus, the jury was properly charged with its task of fact-finding, which it did in Mr. Boyle's favor. Further, the jury was instructed not to speculate and only award lost profits that: "Number 1, were reasonably certain to be realized by the Plaintiff, but for the Defendant's nuisance; and Number 2, that those profits were reasonable ascertainable." TR.1379:17-1380:6; quotation at TR.1379:22-24. There is absolutely no evidence that the jury engaged in improper speculation. Portsmouth doesn't like the result of the jury's fact finding, but that is not a ground to reverse.

B. THE JURY FACTUALLY FOUND A SECOND DEALERSHIP WAS REASONABLY CERTAIN TO EXIST.

Portsmouth characterizes Mr. Boyle's projected second dealership as "hypothetical." While that is nice hyperbole, it is not supported by the evidence. All future events require some uncertain projections, but they are not impermissibly speculative if likely to occur. *City of Portland v. Uber Techs., Inc.*, Case No. 3:14-cv-01958-SI (D. Or. 2014) ("testimony about lost profits or future compliance costs necessarily involve some degree of projection, and that fact alone does not render...statements inadmissible speculation"); *Khorrami v. Mueller*, Case No. 07-C-812 (E.D. Wis. 2014) (projection of future earnings proper subject for cross-examination). Indeed, even "hypothetical improvements to vacant land" may be considered. *State by*

Com'r of Transp. v. Van Nortwick, 670 A.2d 548, 287 N.J.Super. 59 (N.J. Super. App. Div., 1995).

Here, the jury heard extensive evidence showing Mr. Boyle had reasonably certain grounds to develop another operational dealership but for the trespass and nuisance. There was hundreds of thousands of dollars of engineering work. State permits were in process. City permits were on hold simply due to Portsmouth's trespass and its position in the lawsuit, but Mr. Boyle explained how he always got the appropriate permits from the City. The current application to the City was submitted to grandfather the project before certain zoning changes.

The site itself, as supported by the view, was a perfect site for an additional dealership. Mr. Boyle was an experienced and respected dealer who owned two dealerships and a leasing company. Owning two dealerships on the same site allows for economies of scale, and the management team is already staffed. TR.276:14-17. There was the possibility of getting a Lexus franchise since the point was open, or another franchise by purchase. Mr. Witten testified an additional dealership was consistent with the Portsmouth Master Plan. TR.517:9-518:14. Mr. Witten's testimony was clear that he cannot predict if a future board will grant an application, but that Mr. Boyle's application is consistent with Portsmouth's master plan and any variances necessary are reasonable. There was substantial concrete evidence that a second dealership would have existed but for the sewer line and wetlands.

Portsmouth's appeal completely fails to address all of the specific evidence on which the jury could rely. Instead, it focuses on lack of a franchise agreement and lack of permits. As to the lack of a franchise agreement, Mr. Boyle explained that he could not even apply for one until he had a developed site. TR. 275:4-7. The jury, based on Mr. Boyle's track record in the automotive industry, could easily have concluded that he would get a dealership franchise once the site was developed. As to the permits, Mr. Boyle explained his history of always getting the required permits.

The jury could have taken note of the Consent Decree, BoyleReplyApp.17, entered by the Court. The Decree, entered as an order of the court, required development

of the entire parcel and required the NH DES to approve it. There were no issues of state permitting. Further, the Consent Decree was to remediate certain environmental and safety conditions on the property. As such, the property had to be developed accordingly, even if it conflicted with local permitting. *Metro. Housing Development Corp. v. Village of Arlington Heights*, 469 F. Supp. 836 (N.D. Ill., 1979). The hullabaloo Portsmouth makes about permits is just noise as they are not controlling.

C. THERE IS NO DOUBLE AWARD BY THE JURY WHICH WANTED TO AWARD $5,950,000 TO MR. BOYLE.

Mr. Boyle testified to lost profits for 2013 through 2016 in the following respective amounts: $1,260,000, $1,260,000, $1,340,000 and $1,440,000. TR.174:8-24. Thus, the total award by the jury is consistent with Mr. Boyle's testimony. It simply appears that after determining a total, the jury allocated various amount to each claim.

When there are fact disputes, it is error to try and go behind a verdict and speculate as to its reasoning. Review of a damage award is the responsibility of the trial court. *Stachulski v. Apple New England LLC,* 171 N.H. 158 (2018). Absent an abuse of discretion, a trial court's treatment of a damage award will not be reversed. *Id.* It can hardly be an abuse of discretion when the award is consistent with Mr. Boyle's testimony, and when it was the exact amount asked for in closing argument by counsel.

III. The Years For Which Damages Are Available Must Be Expanded.

A. REVOCATION OF THE LICENSE OCCURRED IN 2008.

Portsmouth seeks to penalize Mr. Boyle for reasonably allowing the sewer line to remain on his property pending attempts at resolution by somehow claiming his reasonable permission is irrevocable. There is simply no evidence that Mr. Boyle agreed to irrevocably let the line stay forever, or waive claims for damages. To the contrary, there is testimonial evidence that Mr. Boyle was not giving up any rights when granting permission for the sewer line to remain pending resolution. TR.401:12-15.

The 2008 letter revoked all prior permissions. BoyleApp.140. It did not use the word license because, at that time, there had been no determination a license existed. The letter is clear. The issue Portsmouth raises about barriers is insincere — Portsmouth

agreed not to come on Mr. Boyle's land unless it had case-by-case express permission, obviating the need for barriers. The City's argument concerning the lawsuit not revoking permission is incomprehensible. How can a lawsuit not be a sufficiently adverse act to revoke a license and put the trespasser on notice?

Portsmouth incorrectly claims counsel's opening statement admits revocation took place in 2013. It was an opening statement consistent with the Trial Courts rulings on the issue. In light of the many objections and argument concerning this point, it can hardly be considered reflective of Mr. Boyle's position. Mr. Boyle always maintained he revoked all permission in 2008. He testified:

> Q But that agreement stayed on until -- I think the Court determined in this case that it was terminated in 2013; is that right?
>
> A I threw him off in 2008. I wrote a letter to them. In fact, yes.
> TR.341:1-9.

B. THE CORRECT STANDARD OF REVIEW IN KEEPING OUT LOST PROFITS AFTER 2016 IS LEGAL ERROR RATHER THAN AN UNSUSTAINABLE EXERCISE OF DISCRETION BECAUSE THE COURT WAS CONSIDERING A QUESTION OF LAW RATHER THAN AN EVIDENTIARY QUESTION.

The motion in limine, although about evidence of lost profits, was a motion to exclude the issue of lost profits from the trial since it moved to exclude all evidence. As such, it presented a legal issue concerning the effect of the taking. Thus, it is subject to review de novo, not the evidentiary standard of unsustainable exercise of discretion as argued by the City. *City of Livermore v. Baca*, 205 Cal.App.4th 1460, 141 Cal.Rptr.3d 271 (Cal. App. 2012).

As detailed in the initial brief, the transfer of title did not immediately stop trespass damages from accruing. Even after the taking, to this day, the nuisance still affects and damages Mr. Boyle's remaining property. Thus, there was no basis to arbitrarily cut off damages and it constitutes legal error.

Finally, even if an unsustainable exercise of discretion standard applies, it is an unsustainable exercise of discretion to cut off consideration of damages that are continuing. To do so leaves Mr. Boyle with only a partial remedy.

IV. Portsmouth Has No Permanent Rights In the Sewer Line.

Any easement argument originates with the premise that the Board of Education did not have the power to grant a license. A license can never ripen into an easement so in making this argument, Portsmouth is denying the very permission it asserts it obtained. Even if the Board didn't have the power to grant a license, or if the license were automatically revoked upon transfer in ownership, the only evidence in the record is Portsmouth had permission from all owners prior to Mr. Boyle. TR.237:16-240:11. Mr. Boyle testified he granted permission until 2008. TR.341:1-9.[5] There is no evidence Portsmouth made adverse claims. Thus, under the evidence, the issues discussed below are moot. Mr. Boyle will address them as they are the crux of Portsmouth's appeal, but just like so many instances in this case, the City ignores the evidence.

A. PORTSMOUTH ACTED UNREASONABLY.

The threshold question in Portsmouth's appeal, which it does not address, is reasonableness. In an easement by estoppel the party claiming the estoppel must reasonably rely on a representation. *Healy v. Town of New Durham*, 140 N.H. 232, 240 (1995); *City of Concord v. Tompkins*, 124 N.H. 463 (1984) (stating that "the traditional New Hampshire rule of applying estoppel against the government only when a government official, acting within the scope of his or her authority, has induced reasonable detrimental reliance"). SJ Order at 5. *See also Kellison v. McIssac*, 131 N.H. 675 (1989). With an executed license, the person claiming the license must have expended funds in reasonable reliance on the permission granted. *Id.*; SJ Order at 5-6. Here, the Court held that Portsmouth's conduct was unreasonable. SJ Order at 8-10; Order on Reconsideration at 17.

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[5] The letter in City App. 380 does not confirm any ongoing negotiations regarding the sewer line. It refers to work on the headwall/culverts as stated in the subject, and if anything demands remediation of wetland area. While Mr. Boyle did give consent to work on the Comcast Culverts, which are on abutter Comcast's property, he did not consent to anything on his property at that time.

Portsmouth is a sophisticated entity represented by counsel. It is chargeable with knowledge of the law, including the procedure required by R.S.A. 4:40 for disposition of state lands. Both the Governor's and Governor's Council's consent was, and remains to be, required to convey a permanent interest in state owned land. Order on Reconsideration at 2. Since Portsmouth was both sophisticated and represented by counsel, it knew an easement was required under the procedure provided in R.S.A. 4:40 in order to gain permanent rights. As the Trial Court stated: "Portsmouth, which is presumably a sophisticated entity represented by legal counsel, was aware it had not met the prerequisites for obtaining a permanent interest in state-owned property." Order on Reconsideration at 15. Portsmouth's knowledge that it had not met the prerequisite for a permanent interest is supported by other evidence. The record shows that in the 1960's Portsmouth obtained written easements for other sewer projects. BoyleApp.139. It even obtained written easements for other aspects of this project. BoyleApp.132. In addition, the Board discussed the procedure of going to the Governor and Governor's Council in the same meeting that approved it Portsmouth's request. CityApp.115. John Driscoll, the City Attorney for Portsmouth and Board of Education Chairman, was present and therefore inevitably had actual knowledge of the procedure to follow. CityApp.107.

Since Portsmouth's conduct was unreasonable, neither an irrevocable executed license nor an easement by estoppel could exist, assuming that either was the law of New Hampshire. Thus, the questions Portsmouth raises about changing state decisional law, overruling *Houston v. Laffee,* 46 N.H. 505 (1866), and reviewing these concepts anew are moot. Even if there were the wholesale changes in law advocated by Portsmouth, the result would be the same. Portsmouth would not have an easement by estoppel or an irrevocable license because it did not act reasonably.

Ordinarily, the Supreme Court does not decide moot questions. *Petition of Thayer*, 145 N.H. 177 (2000). Subject to narrow exceptions, any appeal which raises moot questions and which does not decide a justiciable issue is dismissed. Thus, the Court need not reach the arguments about either an easement by estoppel or an irrevocable license.

B. PORTSMOUTH HAS NO EASEMENT BY ESTOPPEL.

This Court has a policy choice. It can overrule *Laffee*, create an exception to the statute of frauds, nullify the power of the Governor and Governor's Council, and erode the stability of real estate transactions in order to give Portsmouth a windfall through permanent free use of someone else's land; or it can reaffirm the need to follow statutory procedures and observe requisite formalities in real estate transactions. The Trial Court chose to respect precedent, and should be affirmed.

Although Portsmouth attempts to portray the existing caselaw as confused and contradictory, it is not. The cases form a comprehensive whole that provides guidance in real estate transactions. The Trial Court correctly distinguished the concept of an executed license to past performance based on the expenditure of money from future performance, which is unexecuted and revocable. The only concept left for further development is whether there is fraud in the revocation. As will be discussed below, Portsmouth has not been subject to a fraud and is not in need of a remedy. As the Trial Court found, Mr. Boyle made no representations to Portsmouth. He could not have committed a fraud. Nor is there any suggestion the Board committed a fraud

1. A License Is A Revocable Interest In Land Even When Funds Are Expended.

Portsmouth is correct in that *Woodbury v. Parsley*, 7 N.H. 237 (1834) is the initial case in which an executed license creates a partially irrevocable license. However, it overlooks that there is a time limit on the existence of the license. It did not create a permanently irrevocable license. What is most notable about the case is that even with a large construction project such as erecting a dam, the *Woodbury* court did not grant an easement. It held when funds were expended the license was irrevocable "until such reasonable time had elapsed." *Id.* Clearly the court was concerned about substantial expenditure of funds and the license being revoked as soon as construction was completed. It wanted to avoid a fraudulent situation where permission is revoked to gain benefit from the other's expenditure of funds without allowing the person who spent the funds reasonable time to benefit.

This is exactly what happened in *Ameriscoggin Bridge v. Bragg,* 11 N.H. 102 (1840). As soon as the plaintiffs completed the bridge, the landowner revoked permission so that he could take the profits from tolls without the cost of building the bridge — clearly a fraudulent or unconscionable situation. The confusion in the caselaw started when *Ameriscoggin Bridge* said the license was irrevocable or only revocable on full compensation. It failed to recognize the reasonable time requirement of *Woodbury* and left the impression that the expenditure of funds could create a permanent irrevocable license.[6] Thus, by ignoring the temporal aspect of the license, it appeared that the expenditure of funds determined whether a license was executed and irrevocable. Without putting a time limit on the irrevocable nature of the license, the *Ameriscoggin* court created a remedy that was not needed to reach a just result and a result whose legal structure violated the statute of frauds.

Houston v. Laffee, 46 N.H. 505 (1866) corrected the situation. In essence, it held that one of the remedies allowed by *Ameriscoggin Bridge*, a permanent irrevocable license, violated the statute of frauds. It left open the question of remedies and distinguished the cutting of the pipe to revoke permission from a malicious cutting of the pipe. Again, the court was focusing on whether fraudulent conduct occurred in light of the expenditures and the timing and manner of the revocation, not simply the expenditure of funds.

The trial court was correct that *Laffee* was a watershed case in that it was not focusing on the simple expenditure of funds, but also past performance and future performance.[7] Past performance could not be revoked, i.e. one could not obtain past rent

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[6] Without limiting the duration of the license to being reasonable or a discussion of the relation of the amount of funds expended and the scope of the license, absurd results could happen. If a camper were allowed to camp on someone's land and spent a few dollars erecting a tent, it would be absurd to claim he or she had an irrevocable license to forever use the land.

[7] Mr. Boyle does not believe that *Laffee* was as abrupt a change in the law as the Trial Court suggests and Portsmouth argues. It is fully consistent with *Woodbury,* which included a limited reasonable time element. It simply corrected *Ameriscoggin* so that it did not conflict with the statute of frauds. Because the license in *Woodbury* was not permanent, it did not violate the

for use of property by revoking permission. However, future permission could be revoked. The executed portion of the license, the past, could not be undone; it is irrevocable. The unexecuted potion of the license, the future, could be revoked. All of the remaining decisions cited by Portsmouth are consistent with New Hampshire law as set out in *Laffee* by trying to avoid fraudulent situations while still recognizing the importance of the statute of frauds and formalities in real estate. *Laffee* is good law, and has been consistently followed in a number of cases as acknowledged by Portsmouth.

As to all the authorities from other states and the Restatement, it is clear that they are in accord with New Hampshire law looking to prevent a fraud. The only difference is that some states may allow a remedy of an irrevocable license (mostly a temporarily irrevocable license) while New Hampshire does not allow a permanent irrevocable license. Interestingly, the lead out-of-state case cited by Portsmouth, *Tatum v. Dance,* 605 So.2d 110 (Fla. Ct. App. 1992) as well as the majority of cited cases only prevent revocation for as long as needed to recoup any investment. The sewer line cost a little more than $20,000 to install. There were no land costs.[8] Portsmouth has collected sewer fees from over 100 users of this line for over 50 years. It is inconceivable that Portsmouth has not recouped its investment. It simply wants its windfall to continue.

2. There Are No Policy Reasons To Reverse *Laffee.*

There are no policy reasons to reverse *Laffee*. It requires compliance with the statute of frauds. It has been followed through the years. It does not prevent a remedy for fraudulent or unconscionable conduct. On the other hand, there are significant reasons not to reverse *Laffee*. It will create an exception to the statute of frauds, which would reduce certainty in real estate transactions. It would reward unreasonable conduct, and, if applied to this case, significantly undercut the authority of the Governor and the

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statute of frauds. As seen from these cases, throughout the development of New Hampshire law from the earliest time, compliance with the statute of frauds is paramount.

[8] Had Portsmouth followed the procedure under R.S.A. 4:40, it would have had to pay market value for the easement. The Portsmouth City Attorney was also the chair of the State Board of Education. Perhaps the failure to get an easement was not a mistake lost to history as Portsmouth claims.

watchdog functions of the Governor's Council. The only support for reversing *Laffee* is the Restatement. However, New Hampshire law is more enlightened; it preserves stability while still operating to prevent fraud. This is not about balancing policies. Rather all factors mandate that *Laffee* not be reversed.

Portsmouth claims, without basis, that it would be unfair or unjust not to reverse *Laffee.* At best there is a split of jurisdictions concerning irrevocable licenses. See: e.g. *Tatum v. Dance*, 605 So.2d 110. The strongest policy should be the one cited by the Trial Court: stare decisis. "The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *Jacobs v. Director, N.H. Div. of Motor Vehicles*, 149 N.H. 502, 504 (2003) (quotations omitted); *see also State v. Holmes*, 154 N.H. 723, 724 (2007). Among the factors to be considered in determining whether precedent should be overruled are: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Jacobs*, 149 N.H. at 505; *State v. Quintero*, 162 N.H. 526 (2011). There has to be stability in real estate law especially.

Portsmouth only claims unfairness, but it has done no analysis of the tests when a case should be overruled, probably because this case does not meet a single prong of the tests. *Laffee's* rule has been followed for years with success — it is not intolerable. It would pose a hardship if overruled by destabilizing real estate transactions and would work a particular hardship on Mr. Boyle by preventing development of his land without compensation for his reliance on a verdict. The rule is not abandoned but survives in many jurisdictions. Finally the rule, as well as the statute of frauds, have not been robbed of justification.

Further, there is no injustice to Portsmouth. It had fifty years of free use of the sewer line without even paying for an easement as required by law. It is protected by eminent domain to take a narrow easement for the line and presumably pay just compensation as it should have done years ago.[9] Portsmouth argues that situations like this could arise again to disadvantage municipalities, but it points to no facts to back its arguments. Essentially, it is asking this Court to reverse longstanding caselaw simply to continue its windfall. That is not a proper ground to overrule longstanding law.

C. PORTSMOUTH HAS NO PRESCRIPTIVE EASEMENT.

Portsmouth advocates a strained reading of R.S.A. 539:6 by arguing against its plain words. The statute unambiguously states that no rights are acquired against the state or its grantees.

Unambiguous statutes will be enforced as written. *Rogers v. Rogers*, __ N.H. __, 203 A.3d 85 (2019). The plain meaning is ascribed to the words. *Petition of Second Chance Bail Bonds v. Castine*, __ N.H. __, 204 A.3d 874 (2019). The only possible reading of the statute is that the commencement of the time for adverse possession shall not run against the State or its grantees. Otherwise property owned by the State and its initial grantee would become unmarketable, because upon conveyance, possession would automatically vest in the person claiming adverse rights if it had been twenty years. This would be the equivalent of enforcing adverse possession against the State and its grantee since they would lose the right to sell the property, unless an action of trespass was brought within the twenty years. This goes against the purpose and words of the statute. There can be no dispute the statute is protecting the State and its grantees. *Hacklander v. Parker*, 204 Minn. 260 (Minn. 1939) (tax deed protected defendant as state's grantee); *Green v. Pennington*, 105 Va. 801 (1906); *Hunnewell v. Adams*, 153 Mo. 440 (Mo. 1900).

[9] This is a limited easement, not the debacle created by trying to take one third of Mr. Boyle's property to prevent development.

Portsmouth argues the purpose of the statute is simply to protect State-owned lands. However, the statute extends the protection by its express terms to grantees of the State. The plain language of the statute nullifies Portsmouth's unsupported policy arguments.

Further, Mr. Boyle would likely be protected as a bona fide purchaser for value. The Trial Court ruled the City had a license for the sewer line, and the jury found the City had permission for the flow of water. The issue of whether Mr. Boyle is a bona fide purchaser was rendered moot in the manner in which summary judgment was decided. However, Mr. Boyle testified he had no knowledge or information on the sewer line or wetlands prior to purchasing the property. TR.119:9-11; TR.249:25-250:9; 253:11-17; 263:18-264:7; 322:1-10; 323:6-23. Even after it was found, the sewer line was not confirmed to be a City sewer line until later. TR.129:9-11. The subdivision plan Portsmoutth claims puts Mr. Boyle on notice was not in his chain of title, does not say it is a sewer line, and further does not say it is a City sewer line. TR.321:12-20. The plan is wholly insufficient to qualify as notice. *Soukop v. Brooks*, 977 A.2d 551 (2009). Thus, no prescriptive easement would apply against him.

1. As A Matter Of Law The City Cannot Establish Adverse Possession Simply By Continuous Use Of The Sewer Line Because Its Use Does Not Constitute A Claim Of Right.

In order to establish adverse possession, Portsmouth must show it was occupying the property under a claim of right and its actions were adverse[10] to the owner. *Wason v. Nashua*, 85 N.H. 192 (1931). The burden is on the City to prove its claim by clear and convincing evidence. *O'Dell v. Robert 226*, W. Va. 590, 703 S.E.2d 561 (2010).[11] Mere

[10] Adversity is a question of fact. *Town of Warren v. Schortt*, 138 N.H. 240 (1994). The trial court did not need to make such a finding in light of its reasoning. Accordingly, in the rare event that the trial court erred in its analysis of prescriptive easements, this Court should not make a determination of fact absent a record. Thus, it cannot grant the City's request that it find a prescriptive easement.

[11] *O'Dell* is a lengthy and comprehensive opinion which addresses all aspects of prescriptive easements and collects cases from many jurisdictions.

continuous use alone does not establish a claim of right as a matter of law. *Wason*, 85 N.H. 192 (1931). The *Wason* court stated:

> Evidence of continuous and uninterrupted public use of the premises for the statutory period, though uncontradicted, is insufficient alone to establish prescriptive title as a matter of law. When no charter of right or other color of title in the public has been shown it must appear that the user was adverse; that is, under a claim of right. Where, as here, this essential element is left to be implied solely from the public use, it must appear that such use was of a character calculated to apprize the owner that it was had under a claim of right. (string cites omitted) The nature of the use must be such as to show that the owner knew, or ought to have known that the right was being exercised, not in reliance upon his toleration or permission, but without regard to his consent. *Wason*, 85 N.H. 192, 198 (1931) (string cites omitted).

In *Wason* the public used a sidewalk for as long as anyone could remember. The landowner initially installed it for public access to his businesses. However, the city resurfaced it on several occasions and performed all maintenance. For all appearances, it was a public sidewalk, just like any other city sidewalk. Yet without the city making a claim adverse to the owner, it could not establish whether it was adverse or pursuant to a license. Here, the sewer line is of no different character than this sidewalk. Both are construction projects requiring funds be spent. The only evidence Portsmouth has presented is continuous use of the sewer line, which started as a permissive use. There is no evidence Portsmouth was making a claim adverse to anyone in the chain of title sufficient to put them on notice to protect their rights. Nor is there evidence that Portsmouth claimed the sewer line was there as of right instead of permission.[12] Moreover, it would be unreasonable for a city to construct a sewer line without permission, so every subsequent owner would continue this implied permission for it to remain if they did not object to it. Further, when there has been a license allowing the use, the person claiming a prescriptive easement must take action sufficient to inform the

[12] Until this suit, it does not appear Portsmouth even considered if the sewer line was on the property by permission or a claim of right.

owner of the adverse use taken. *Town of Warren v. Shortt*, 139 N.H. 240 (1994). There is no evidence Portsmouth did this. Since it has a license, Portsmouth needed to clearly refute the license for adversity to begin.

2. Mr. Boyle's Permission And The City's Agreement To Seek Permission From Mr. Boyle When Entering The Property Interrupts Any Claim Of Uninterrupted Use.

To establish a prescriptive easement, Portsmouth would have to show a twenty year period of continuous and uninterrupted use. *Wason v. Nashua*, 85 N.H. 192 (1931). As a matter of law, it cannot succeed. First in 2004, Mr. Boyle gave permission for the line to remain for a time. TR.130:3-23. This permission itself interrupts continuous adverse use.

Second, in February 2008, Mr. Boyle sent the demand that Portsmouth remove the sewer line. He also indicated he was going to erect barriers to prevent access. BoyleApp.140. In response to the demand, Portsmouth agreed to seek and get Mr. Boyle's permission for any further entries on the property. In the Order on Pending Motions, the trial court found: "At the hearing on the motions for reconsideration both sides recognized that they already had an agreement not to enter Boyle's property without his permission." Order on Pending Motions at 4-5. Thus, it is indisputable that Portsmouth was no longer claiming the right to enter the property, but acknowledging Mr. Boyle's superior rights. There can be no prescriptive easement in light of this agreement.

3. The City Failed To Establish When Its Claimed Adverse Possession Started To Run.

Portsmouth cannot claim adverse possession while it still has permission, and has failed to establish an essential element of the claim — when adversity began. In the unlikely event that the Trial Court is reversed because the license terminated upon conveyance, Portsmouth still does not have a claim for adverse possession. If the license terminated, then Portsmouth would have a reasonable time to remove its sewer line. Conduct that may constitute a trespass, including the duty to remove property, is not a trespass if it is privileged. *Case v. St. Mary's Bank*, 164 N.H. 649, 658 (2013). A person

has a reasonable time to remove the property after a license terminates. *Cablevision of Boston, Inc., v. Shamatta*, 827 N.E.2d 246, 249, 63 Mass. App. Ct. 523 (2005). The *Cablevision* court stated: "If the license permitting placing the licensee's chattels on the real estate, however, the revocations does not instantly change the status of licensee to that of trespasser. The licensee has the right to remove his chattels and to go on the land or in the building for a reasonable time following revocation of the license for the purpose of removing the chattels." *Id.* The court then reasoned that the complexity of removal would be considered in determining a reasonable time, which in the case of an interconnected network of wires was lengthy, and the need to service customers without interruption could be considered.

Accordingly, even if Portsmouth's license were revoked on the conveyance from Coakley to MSM Brothers on October 21, 1988, and the elements of adverse possession were otherwise satisfied, the time would not start running on that date as Portsmouth would still have permission to remain on the land for a reasonable time to remove the sewer line. To replace the sewer line, Portsmouth would have to find a replacement location and obtain it, engineer the sewer line, get it permitted, construct it, and then remove its offending line from Mr. Boyle's property after obtaining wetlands and alteration of terrain permits for the work. City Engineer Rice stated that at least six months were needed for engineering and months for permits from DES. BoyleApp.34. Thereafter the work would be put to competitive bid. Add to this the time to acquire a substitute parcel and to physically perform all work, and two years would be reasonable to accomplish this work. Thus, even assuming Portsmouth 1) had a legal basis for adverse possession, 2) Mr. Boyle's grant of temporary permission in 2004 did not break any claim for adverse possession, and 3) the claim was open, notorious and adverse (which it was not); suit to oust Portsmouth for trespass was brought within the twenty

year period due the reasonable time Portsmouth had to remove the line.[13] There is no prescriptive easement for the sewer line.[14]

CONCLUSION

Mr. Boyle respectfully requests the Court to:

A) Affirm the Trial Court's order on reconsideration of summary judgment;

B) Reverse the Trial Court's date for determining damages to include determining damages from 2008 to 2012;

C) Reverse the Trial Court's date for determining damages to includes determining damages after 2016;

D) To hold further proceedings to determine damages as to those years;

E) To deny all aspects of Portsmouth's appeal; and

F) To grant such other relief as may be just.

REQUEST FOR ORAL ARGUMENT

Mr. Boyle respectfully reiterates his request for oral argument before the full court to be presented by Attorney Kuzinevich.

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[13] The parties entered a tolling agreement in May 2009 which would be the operative date for determining the timeliness of suit preventing adverse possession. From October 1988 to May 2009 is 20 years and 5 months. Five months is significantly less time than the City has stated it would need to remove the sewer line. Thus, under the City's own contentions, suit is timely.

[14] Portsmouth has not argued a prescriptive easement for the wetlands. In the eminent domain case, it tried to justify taking the wetlands by saying they were a consequence of the sewer line. This is factually inconsistent with it prior positions. More importantly, it points to no evidence in either the takings case or this case which inextricably links the sewer line to the wetlands. As fully explained in Mr. Boyle's takings brief, sufficient drainage under the sewer line would have prevented the wetlands, and there is no evidence to the contrary. Thus, even if this Court were to find a prescriptive easement for the sewer line, the nuisance award would stand.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, John Kuzinevich, hereby certify that two copies of the foregoing and the Reply Appendix has been forwarded to all counsel of record on June 24, 2019.

John Kuzinevich (#264914)

CERTIFICATE OF WORD COUNT

I, John Kuzinevich, hereby certify this brief contains 9,466 words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service, and certification of word count.

John Kuzinevich (#264914)

ADDENDUM

"So with respect to the prima facie foundational requirements, I think ultimately based on the evidence that's presented here, that's -- I think the Plaintiff has made out a prima facie case. Whether the jury ultimately credits the evidence is obviously an issue for the jury, but here Mr. Boyle and other witnesses have talked about substantial steps that Mr. Boyle has taken during the course of this case to develop the property, to submit applications, and has actually gotten some approvals and permits in furtherance of that development of a second dealership. And so I think a jury could conclude that but for the existence of the sewer line and/or trespassing water on the property, those plants would have come to fruition and Mr. Boyle during the relevant timeframe would have had a dealership that was up and running.

We've heard extensive testimony about his own experience in terms of development of this property. And so I think from that and the other witnesses' testimony the jury could conclude that he would have succeeded but for the defending conduct if they believed that that is in fact

With respect to the reliability of O'Brien's testimony [regarding lost profits], I think that one is a closer call in my mind, but I have to be mindful that the standard is ultimately one of whether the jury credits the testimony. And I don't think I can consider O'Brien's opinions in isolation. Mr. Boyle testified about his experience in the automotive industry and how his experience with this and other dealerships that he has dealt with, managed, developed, and what profits he realized from this dealership and how that would compare to a new dealership that he plans or planned t have on the site.

I think in that regard this is very similar to the Wilco case where while the two businesses at issue in those cases were specifically a franchise of the Kentucky Fried Chicken and there was a -- the issue was whether another Kentucky Fried Chicken would make the same lost profits, that one is very close. But it's really the second issue, that is, the Chinese restaurant, they had a person who apparently owned and operated another Chinese restaurant in Nashua testify about what his experiences were, what it took to own and operate a restaurant and what is profits were. And the Court found that to be sufficient evidence in this context for the Court to award lost profits in the Wilco case.

I think whether the jury believes that one franchise or another would have the same lost profits, that's one for them to evaluate in terms of the weight, but I think there is sufficient evidence considering not just O'Brien's testimony, but in conjunction with Mr. Boyle's testimony already for the

jury to evaluate and determine the reliability of those conclusions and opinions. So I'll allow O'Brien to testify." TR. 773:6-775:8.

"THE COURT: So the arguments raised by the city concerning Boyle's ability to secure a franchise dealership, his ability to obtain municipal and State approvals to construct will be relevant to the jury's consideration. And I think that the ability to secure a dealership falls into the same category. I mean he talked about what it takes to get a dealership license, what the prerequisites were, why he hasn't been able to get a dealership license in this case.

In other words, as Attorney Kuzinevich I think correctly articulated, it's if the jury finds that the city's trespassing behavior has prevented him from moving forward with getting a dealership, he could never prove this issue because he could never apply for and obtain a dealership license; because without the permits and approvals in place, they're not going to consider them. They need to know that he can develop the property in a way that would allow to sustain that dealership. And I think he's talked about -- Mr. Boyle has talked about all of those issues and steps that would be needed. So I think a jury could find that had those impediments not been in place, he would have moved forward and given his track record and success in securing a second dealership." TR. 775:16-776:14.