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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * * *

LARRY HANSEN,	)	
	)	DOCKET NO. 38904-2011
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	
MATTHEW ROBERTS,	)	
	)	
Defendant/Respondent.	)	

* * * * * * * *

FILED - COPY
MAR 13 2012
Supreme Court ___ Court of Appeals ___
Entered on ATS by ___

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE WILLIAM H. WOODLAND, DISTRICT JUDGE PRESIDING

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TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of Proceedings 1

C. Statement of the Facts 2

ISSUES ON APPEAL 2

DEFENDANT'S EXPERT WITNESSES PROPERLY AND APPROPRIATELY TESTIFIED AT TRIAL OF THIS MATTER 3

A. Defendant's Disclosure Of His Experts Were Timely; Trial Court Did Not Abuse Its Discretion; Any Error Regarding John Droge Was Harmless 4

B. Scott Kimbrough Testified Appropriately; Plaintiff Waived His Right To Object To This Testimony 10

C. Issue Regarding John Droge Is Moot Due To Comparative Negligence Finding By Jury; John Droge's Area Of Expertise Is Valid, Scientifically Reliable; Plaintiff Failed To Preserve Objections 15

PLAINTIFF WAIVED OBJECTIONS TO VIDEO TRIAL DEPOSITION; OBJECTIONS WERE UNSUPPORTED; ANY ERROR WAS HARMLESS 22

THE DISTRICT COURT PROPERLY GRANTED DEFENDANT'S MOTION IN LIMINE REGARDING INSURANCE; PLAINTIFF FAILED TO PRESERVE OBJECTIONS 29

DEFENDANT IS ENTITLED TO ATTORNEY'S FEES ON APPEAL 41

CONCLUSION 42

TABLE OF CASES AND AUTHORITIES

CASE PAGE

A.J. Miller Trucking Co., v. Wood,
474 S.W.2d 763 (Texas 1971) 39

Bowers v. Norfolk Southern Corp. et al,
537 F.Supp.2d 1343 (M.D. Georgia 2007).......... 21

Bressan v. Herrick,
35 Idaho 217, 205 P. 555 (1922).......... 34

Brockett v. Tice,
445 S.W.2d 20 (Tex. 1969)..........39

Byington v. Horton,
61 Idaho 389, 102 P.2d 652 (1940)..........35, 36

Chapman v. Chapman, 147 Idaho 756,
215 P.3d 476 (2009)..........13

Clark v. Klein, 137 Idaho 154,
45 P.3d 810 (Idaho2002).......... 8

Cochran v. Gritman, 34 Idaho 654,
203 P. 289 (Idaho 1921)..........34, 35

Faris v. Burroughs Adding Mach. Co.,
48 Idaho 310, 282 P. 72 (1929).......... 35, 36

Frank v. Frank,
47 Idaho 217, 273 P. 943 (1929)..........12, 40

Garcia v. Estate of Wilkinson,
800 P.2d 1380 (Ct. App. Colo. 1990).......... 39

Hallmark v. Eldridge,
189 P.3d 646 (Nev. 2008)..........20, 21

Harris v. Alessi, 141 Idaho 901,
120 P.3d 289 (Ct. App. 2005).......... 31, 34, 37, 38

Harris v. Sawtelle Rentals, Inc.,
133 Idaho 199, 984 P.2d 122 (1999)..........14, 18

Highland Enterprises, Inc. v. Baker, 133 Idaho 330,
986 P.2d 996 (1999).......... 25

Home Mutual Fire Insurance Co. v. Hagar,
242 Ark. 693, 415 S.W.2d 65 (1967).......... 21

In the Interest of J.T.,
285 Ga. App. 465 (Ga. Ct. App. 2007)......21

Jolley v. Clay, 103 Idaho 171,
646 P.2d 413 (1982)......27

Kozlowski v. Rush,
121 Idaho 825, 828 P.2d 854 (1992)......30, 37

Langley v. Turner's Exp. Inc.,
375 F.2d 296 (4th Cir. 1967)......39, 40

Loza v. Arroyo Dairy,
137 Idaho 764, 53 P.3d 347 (2002)......30, 36, 37, 38

Maness v. Bullins,
198 S.E.2d 752 (Ct.N.C. 1973)......38

Marshall v. Bare, 107 Idaho 201,
687 P.2d 591, (Ct. App. 1984)......26

Martin v. Hackworth,
127 Idaho 68, 896 P.2d 976 (1995)......16

Morris By and Through Morris v. Thomson,
130 Idaho 138, 937 P.2d 1212 (1997)......3, 4

Murrell v. Spillman,
442 S.W.2d 590 (Ct.App.Ky. 1969)......39

Myers v. Workmen's Auto Ins. Co.,
140 Idaho 495, 95 P.3d 977 (2004)......9, 15, 16

Owen v. Burcham, 100 Idaho 441,
599 P.2d 1012 (1979)......30, 36

Radmer v. Ford Motor Co.,
120 Idaho 86, 813 P.2d 897 (1991)......8

Reali v. Mazda Motor of Am., Inc.,
106 F.Supp.2d 75 (D. Me. 2000)......19, 20

Russo v. Birrenkott,
770 P.2d 1335 (Ct.App.Colo.1988)......39

Shaddy v. Daley,
58 Idaho 536, 76 P.2d 279 (1938)......35, 36

Slack v. Kelleher,
140 Idaho 916, 104 P.3d 958 (2004)......11, 32, 33

Soria v. Sierra Pac. Airlines, Inc.,
111 Idaho 594, 726 P.2d 706 (1986) 9, 16

Speet v. Bacaj,
377 S.E.2d 397 (Va. 1989).. 38

State v. Barnes,
147 Idaho 587, 212 P.3d 1017 (Ct. App. 2009)..10, 32

State v. Carlson,
134 Idaho 389, 3 P.3d 67 (Ct. App. 2000)...10, 32

State v. Corwin,
147 Idaho 893, 216 P.3d 651 (Ct. App. 2009).. 13, 14

State v. Dickens,
68 Idaho 173, 191 P.2d 364 (1948).. 40

State v. Gleason,
123 Idaho 62, 844 P.2d 691 (1992)..12, 40

State v. Hester,
114 Idaho 688, 760 P.2d 27 (1988)... 12

State v. Miller,
141 Idaho 148, 106 P.3d 474 (2004).. 26

State v. Longest,
149 Idaho 782, 241 P.3d 955 (2010)... 10, 11, 32

State v. Owsley, 105 Idaho 836, 673 P.2d 436, 438 (1983)................................. 12, 40

State v. Perry, 139 Idaho 520,
81 P.3d 1230 (2003).. 13, 14

State v. Perry, 150 Idaho 209,
245 P.3d 961 (2010) 11

State v. Perry,
2010 WL, 2880156 (2010).. 11

State v. Ramos, 119 Idaho 568,
808 P.2d 1313 (1991)... 40, 41

State v. Wozniak,
94 Idaho 312, 486 P.2d 1025 (1971).. 40

Thompson v. Olsen,
147 Idaho 99, 205 P.3d 1235 (2009)... 33

Vendelin v. Costco Wholesale Corp.,
140 Idaho 416, 95 P.3d 34 (2004).. 13

Viehweg v. Thompson,
103 Idaho 265, 647 P.2d 311 (Ct. App. 1982).. 8

Walling v. Walling,
36 Idaho 710, 214 P. 218 (1923).. 12, 40

Wilson v. St. Joe Boom Co.,
34 Idaho 253, 200 P. 884 (1921).. 34, 35, 39

Yarchak v. Trek Bicycle Corp.,
208 F.Supp.2d 470 (N.J. 2002) 21

OTHER AUTHORITIES

Idaho Code §6-801.. 9, 15

Idaho Code §12-121.. 42

Idaho Rule of Civil Procedure 26(b)(4).. 5, 6, 7, 8

Idaho Rule of Civil Procedure 30(b)(4).. 23, 24

Idaho Rule of Civil Procedure 32(b).. 24

Idaho Rule of Civil Procedure 54(e)(1).. 42

Idaho Rule of Evidence 104(a).. 13

Idaho Rule of Evidence 702.. 13

Idaho Rule of Evidence 704.. 13

Idaho Rule of Evidence 801.. 26

STATEMENT OF THE CASE

A. Nature of the Case

This case involves an automobile collision that occurred on December 8, 2008, in Rexburg, Idaho, between a vehicle driven by plaintiff/appellant Larry Hansen and a vehicle driven by defendant/respondent Matthew Roberts.[1] R. 14. Mr. Hansen claimed injuries as a result of the collision. R. 14-15. Mr. Roberts claimed property damage as a result of the collision. R.11. While plaintiff states the collision definitively "caused" the claimed injuries of Mr. Hansen, this was a disputed issue at trial of this matter, and the jury found Mr. Roberts' conduct did *not* cause Mr. Hansen's injuries. R. 205.

B. Course of proceedings

Mr. Hansen filed a complaint on May 26, 2009, in Bonneville County District Court to recover his claimed damages. R. 13-16. Mr. Roberts filed a small claims complaint in Madison County Magistrate Court on August 3, 2009, to recover his claimed property damage. R. 11. Pursuant to a stipulation between the parties, these two matters were consolidated into one case on October 14, 2009. R. 17-18.

Trial in this matter commenced on October 19, 2010. Tr. p. 68. After the first day of trial, Mr. Roberts received a telephone call from the University of Utah stating a matching liver had been found for him, and asking him to proceed to Salt Lake City for a liver transplant procedure. Tr. p. 224, LL. 7-10. Trial was continued and the second day of trial was held December 15, 2010. Tr. p. 256.

[1] Matthew Roberts, technically, was also a plaintiff in his small claims action. However, for ease of reference, and order of presentation of evidence, the trial court determined Mr. Hansen would be referred to as the "plaintiff" and Mr. Roberts would be referred to the "defendant." Mr. Roberts will continue with these references herein, for purposes of consistency in the record.

At the end of the second day of trial, the jury returned a verdict in this matter finding both parties negligent and attributing 90% of the negligence to Mr. Hansen and 10% of the negligence to Mr. Roberts. R. 204-206. The jury also found Mr. Roberts' negligence was not a proximate cause of the damages claimed by Mr. Hansen. R. 204-206. Finally, the jury found Mr. Hansen's negligence was the proximate cause of the property damage claimed by Matthew Roberts. R. 204-206. Therefore a judgment was entered in favor of Mr. Roberts in the amount of $3,399.14. R. 500-502.

C. **Statement of the Facts**

The facts of what occurred during the subject automobile collision are disputed. Plaintiff claims defendant attempted to pass him illegally on the right. Tr. p. 135, LL. 16-20. It is defendant's position plaintiff attempted an illegal right-hand turn into a parking lot, from the middle of the roadway, across his lane of travel. Tr. p. 143, L. 7 though p. 144, L. 15. What is not disputed is that this accident occurred in an area where a one-lane road expanded into a three-lane road. It is also undisputed a collision occurred between the vehicle driven by plaintiff/appellant Mr. Hansen and the vehicle driven by defendant/respondent Matthew Roberts.

ISSUES ON APPEAL

In his original Notice of Appeal, Mr. Hansen listed ten potential issues on appeal in this matter, but it appears these have now been narrowed to five issues. Plaintiff has framed these issues in a manner indicating his position, thereby indicating his position is accurate. Defendant submits the following are the true issues on appeal:

1. Whether the trial court was within its discretion in denying plaintiff's unsupported verbal motion to exclude defendant's two expert witnesses from testifying, which was made on December 15, 2010, at the beginning of the continued second day of trial;

2. Whether plaintiff has preserved for appeal any objections to the expert witness opinion testimony of Scott Kimbrough;

3. Whether the trial court was within its discretion in allowing Scott Kimbrough to testify to typical accident reconstruction expert opinions;

4. Whether the trial court was within its discretion in denying plaintiff's objection to the testimony of John Droge on the basis biomechanical/biomedical engineering is not a reliable science;

5. Whether the admission of the testimony of John Droge was harmless error, if any error occurred;

6. Whether the trial court was within its discretion in ruling the plaintiff had waived his objections to the video trial testimony of Matthew Roberts due to plaintiff's failure to timely move to strike the subject portion of the DVD, which required editing prior to submission to the jury;

7. Whether plaintiff's objections voiced during the taking of the video trial testimony of Matthew Roberts were valid;

8. Whether the video trial testimony of Matthew Roberts that plaintiff argues should not have been allowed, if it was allowed in error, was harmless error;

9. Whether the trial court was within its discretion in granting defendant's motion in limine regarding the raising of the issue of insurance during trial of this matter;

10. Whether plaintiff's new objections to defendant's motion in limine regarding insurance were preserved for appeal;

11. Whether the trial court's error, if any, regarding defendant's motion in limine was harmless.

ADDITIONAL ISSUE ON APPEAL

Defendant respectfully requests the Court determine the issue of whether defendant is entitled to attorney fees on appeal in this matter.

I.
DEFENDANT'S EXPERT WITNESSES PROPERLY AND APPROPRIATELY TESTIFIED AT TRIAL OF THIS MATTER

Plaintiff has launched a three-prong attack against the two expert witnesses who testified during the second day of trial of this matter, on December 15, 2010, during defendant's case in

chief.[2] It is defendant's position these experts were timely and properly disclosed, especially given the delays and numerous motions defendant was forced to file to obtain Rule 26(b)(4) disclosures and depositions from plaintiff relative to his experts in this matter. Furthermore, defendant's experts clearly testified to appropriate expert witness opinions, and had ample foundation to testify to these opinions. One of these witnesses, Scott Kimbrough, testified as an accident reconstruction expert. Tr. p. 351, L. 10 through p. 381, L. 15. The second expert, John Droge, testified as a biomedical engineer. Tr. p. 388, L. 8 through p. 421, L. 25.

A. Defendant's Disclosure Of His Experts Were Timely; Trial Court Did Not Abuse Its Discretion; Any Error Regarding John Droge Was Harmless.

According to the trial court's March 31, 2010, order setting trial and pretrial conference, the parties were to disclose the names, addresses and telephone numbers of expert witnesses who may be called to testify at trial, not later than 90 days before the date set for trial. R. p. 34. The court did not order Rule 26(b)(4) disclosures. R. p. 34. Defendant provided the information required by the Court's March 31, 2010, order to plaintiff on July 21, 2010, for Scott Kimbrough. R. p. 38-42.

Within the July 21, 2010, Defendant's Disclosure of Expert Witnesses, defendant specifically stated discovery was ongoing and the disclosure may be updated. R. p. 40. Defendant also specifically stated plaintiff had failed to provide all of the medical records and radiology films requested in discovery and reserved the right supplement his expert witness disclosure. *Id.* Defendant furthermore reserved the right to supplement his disclosure "in the event additional facts and information become known prior to trial that would necessitate defendant to retain additional expert witnesses." R. p. 41.

---

[2] Defendant agrees with plaintiff that the standard of review on appeal of trial court's decisions on each of these three issues regarding experts is an abuse of discretion standard.

Importantly, defendant pointed out that plaintiff had failed to respond to defendant's Rule 26(b)(4) discovery requests, and specifically stated in his disclosures as follows:

> Plaintiff has failed to respond to defendant's discovery requests seeking information regarding plaintiff's expert witnesses. Since plaintiff has the burden of proof in this case, defendant's expert witnesses essentially are rebuttal expert witnesses. Therefore, defendant reserves the right to supplement this discovery response and provide information regarding rebuttal expert witnesses once plaintiff has responded to defendant's discovery request.

Id.

Finally, defendant reserved the right to supplement his disclosure "in the event the testimony and opinions rendered by any expert witness retained by plaintiff... required defendant to retain additional expert witnesses." *Id.*

Scott Kimbrough was disclosed in the July 21, 2010, document. R. p. 38.[3]

Despite significant efforts to obtain his deposition (R. p. 43-63; Tr. p. 3, L. 1-8), plaintiff was not produced for deposition until September 6, 2010. R. p. 59-63. Tr. p. 333, LL. 3-9.

Nevertheless, defendant also propounded discovery requests to plaintiff, Mr. Hansen, on February 8, 2010, which included Rule 26(b)(4) interrogatories. R. p. 71-74. Plaintiff responded on March 11, 2010, but failed to respond to the Rule 26(b)(4) discovery requests. R. p. 75-76. Plaintiff further supplemented his discovery responses on August 10, 2010, but still no opinions were provided, only general statements about how plaintiff's treating medical care providers might be considered experts. R. p. 77-78. Therefore, defendant was forced to file a motion to strike plaintiff's experts, or in the alternative a motion to compel discovery responses. R. p. 64-65.

---

[3] Plaintiff has included a statement in his timeline that Scott Kimbrough was "retained" in August, 2010. Plaintiff points to Dr. Kimbrough's testimony in this regard. However, Dr. Kimbrough only testified "nothing shows up as billable" until August. Tr. p. 379, L. 17 through p. 380, L. 1. Furthermore, the question asked of Dr. Kimbrough was not when he was "retained," but when he was first "contacted by Ms. Brizee." *Id.* Nevertheless, plaintiff's counsel and defense counsel discussed expert witness disclosures on July 19, 2010, and expert witnesses were contacted by defense counsel on that same date. (R. p. 258) so defendant, at the very least, was discussing expert witness reviews with witnesses on July 19, 2010.

As outlined in defendant's Memorandum in Support of Defendant's Motion to Strike Experts, or in the Alternative, to Compel Discovery Responses, plaintiff produced, late, numerous new medical records on September 6, 2010. R. p. 68, fn 1. *See also*, Tr. p. 3, LL. 9-17. Also on that same date, there was testimony by plaintiff of a potential pre-existing condition, but no medical records had been produced regarding the same. *Id.* Further, defendant had requested the plaintiff provide radiological films so that his experts could complete their evaluation and finalize their opinions. *Id.* Only some of the films requested were produced and they were produced late, again on September 6, 2010. *Id.*

In this same Memorandum, defendant pointed out to the court that he had not yet been able to fully disclose his experts because of the lack of full disclosure on the part of plaintiffs. R. p. 68. Defendant asked the court to strike plaintiff's experts, or in the alternative, to compel plaintiff to provide expert witness opinions within three days of the September 13, 2010, hearing. R. p. 69-70.

At the hearing on defendant's motion to strike, plaintiff attempted to argue "most of" the information to be testified to by his experts would be factual. Tr. p. 5, LL. 14-17. However, as the court noted, any testimony about the nature, extent and duration of the injury, the need for ongoing treatment or future surgery, etc. would be expert witness opinion testimony that needed to be disclosed per the Rule 26(b)(4) interrogatories propounded by defendant on plaintiff. Tr. p. 5, L. 18 through p. 6, L. 15.[4] As pointed out during the hearing, the medical records themselves provided **no** information relative to whether the subject accident **caused** the claimed wrist injury, or whether the plaintiff needed a second surgery, as claimed in plaintiff's deposition by plaintiff.

[4] Defendant also refers the court to the hearing of October 5, 2010, on Defendant's Motion to Strike Dr. Jost and in the Alternative, to Compel Discovery Responses due to plaintiff's failure to produce Dr. Jost for deposition, wherein Judge Shindurling admonished plaintiff for his failure to respond timely to discovery requests. Tr. p. 14, LL. 6-14.

Tr. p. 8, L. 15 through p. 9, L. 7. Furthermore, plaintiff had listed accident reconstruction experts, but had not provided any opinions. R. p. 77-78.

The Honorable Jon. J. Shindurling declined to strike plaintiff's experts, but instead granted the motion to compel and ordered the plaintiff to answer defendant's Rule 26(b)(4) discovery responses by September 20, 2010. R. p. 81-82, 83-84. Plaintiff faxed supplemental discovery responses to defendant at 9:37 p.m. on September 20, 2010, which were not received until September 21, 2010. R. p. 104.

As a result of this late Rule 26(b)(4) opinions of plaintiff's experts, defendant retained Dr. John Droge as a causation witness. When defendant disclosed John Droge, defendant alerted the Court and counsel that he had just been retained on September 29, 2010, and the determination was made on October 1, 2010, that he would be called to testify at trial of this matter. R. p. 111. Defendant submits again, it had just received plaintiff's expert's opinions on September 21, 2010. Therefore, defendant, within six business days, retained a rebuttal expert to Dr. Jost's newly-disclosed alleged opinions, and within two days had supplied that rebuttal expert's opinions to plaintiff. Defendant submits he acted with due diligence and supplemented his disclosures and discovery responses seasonably. On October 1, 2010, both John Droge's name as well as his opinions were provided to plaintiff. R. p. 115-116.[5]

It should be noted, again, the Court's March 31, 2010, order did not require Rule 26(b)(4) disclosures. R. p. 34. It only required the names, addresses, and telephone numbers of expert witnesses. R. p. 34. Therefore, Scott Kimbrough, who's name was disclosed to plaintiff on July 21, 2010 (R. p. 38-42) was certainly timely disclosed, per the court's order. His opinions were

[5] Plaintiff attempts to argue John Droge's opinions were not disclosed until October 4, 2010. However, if plaintiff will review the discovery produced on October 4, 2010, he will realize the October 4, 2010, supplemental discovery response was to provide trial exhibits, and that John Droge's opinions were disclosed on October 1, 2010. R. p. 115-116.

disclosed on September 24, 2010, within three days of receiving plaintiff's experts' opinions and within 18 days of plaintiff's deposition. (R. p. 86-87).

Furthermore, it was due to plaintiff's own refusal to respond to defendant's Rule 26(b)(4) discovery requests, and the fact defendant was forced to file a motion to compel to obtain the opinions of plaintiff's experts, that led to the inability of defendant to determine the need for additional experts. Plaintiff cannot now be heard to complain of a situation he himself created. Upon receipt, finally, of plaintiff's expert's opinions, on September 21, 2010, defendant worked very diligently to retain and disclose any additional experts needed for trial.

Nevertheless, Scott Kimbrough and John Droge did not testify until the second day of trial, on **December 15, 2010**. Tr. p. 388. Therefore, John Droge was disclosed 76 days prior to his trial testimony.[6] There was ample time for plaintiff to do a number of things during this time period if he believed he was prejudiced by John Droge's disclosure. Plaintiff could have deposed John Droge, or could have filed a motion to strike John Droge, or a motion in limine. The same is true of Scott Kimbrough. Plaintiff did none of these.

Instead, plaintiff's counsel moved to strike Scott Kimbrough and John Droge immediately prior to their trial testimony, on December 15, 2010, the day they were scheduled to testify, and were already present to testify. Plaintiff provided scant information as far as the basis for the motion, and provided no written record to the Court. Tr. p. 328, L. 5 through p. 338, L. 17. Notably, no explanation was provided as to why this issue had not been brought forward by

[6] For this reason, plaintiff's reliance on *Radmer v. Ford Motor Co.*, 120 Idaho 86, 813 P.2d 897 (1991) is misplaced. In *Radmer*, no disclosure was provided for a new theory of liability advocated by plaintiff until the first day of trial. *Id.* at 89-90. It is ironic that defendant had to file a motion to compel plaintiff's expert's opinions in this matter, yet plaintiff relies on a case discussing a party's responsibility to supplement his disclosures. Also distinguishable is *Clark v. Klein*, 137 Idaho 154, 158, 45 P.3d 810, 814 (2002) wherein the defendant did not disclose the expert's opinions until the middle of trial, and *Viehweg v. Thompson*, 103 Idaho 265, 271, 647 P.2d 311, 317 (Ct.App. 1982), wherein a new witness was disclosed at 4 p.m. the day before trial. No such situation existed in the case at bar.

plaintiff prior to the very day the two experts were scheduled to testify. This is especially concerning considering the interim two-month delay in trial, when there were numerous options for plaintiff to explore, and ample opportunity to resolve this issue, if he believed he had been prejudiced. Defendant submits the trial court did not abuse its discretion in declining to grant plaintiff's unsupported motion to strike defendant's expert witnesses.

Finally, it must be noted the jury in this matter found Mr. Hansen 90 percent negligent, and Matt Roberts 10 percent negligent. The jury verdict form was such that the jury was asked to address the causation questions prior to determining percentages of negligence of each party. R. p. 204-206. However, per Idaho Code §6-801, since plaintiff Mr. Hansen's negligence was **greater than** defendant Matthew Roberts' negligence, **plaintiff could not recover any damages, no matter how the jury answered the causation question.** I.C. §6- 801.

John Droge's testimony was purely related to the question of causation. Tr. p. 393, LL. 14-24. Therefore, even if there was an error on the part of the trial court, as far as John Droge, it was harmless error, at best. An appellate court will not reverse the district court if the alleged error is harmless. *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 504, 95 P.3d 977, 986 (2004). "[I]f an error did not affect a party's substantial rights or the error did not affect the result of the trial, the error is harmless and not grounds for reversal." *Id. See Martin v. Hackworth*, 127 Idaho 68, 70, 896 P.2d 976, 978 (1995); *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 608, 726 P.2d 706, 718 (1986).

Plaintiff does not provide this Court any argument or proof that a substantial right has been affected by John Droge's testimony. Moreover, any error regarding the same cannot be deemed to have affected the outcome of the trial. Furthermore, Scott Kimbrough was timely disclosed, per the Court's order. R. p. 38-42.

Defendant submits, therefore, the trial court did not abuse its discretion in denying plaintiff's motion to exclude Scott Kimbrough and John Droge from testifying at trial, especially given the information, or lack thereof, provided to the court by plaintiff, and especially given plaintiff's delay and failure to seasonably supplement his own discovery responses regarding expert witnesses.

B. Scott Kimbrough Testified Appropriately; Plaintiff Waived His Right To Object To This Testimony

Plaintiff next argues an accident reconstruction expert should not be allowed to testify to his opinions. Of note, the trial court instructed plaintiff's counsel to make his objections at the time of the testimony. Tr. p. 338, L. 20 through p. 339, L. 5. However, plaintiff's counsel failed to make any objections to the questions asked during Scott Kimbrough's testimony. Plaintiff, therefore, has waived his right to bring this issue before this Court. By failing to object, as instructed by the court, plaintiff has not preserved this issue on appeal, as there was no opportunity for the court to rule on this perceived issue.

As a general rule, the Idaho Supreme Court will not consider error not preserved for appeal by an objection at trial. *State v. Longest*, 149 Idaho 782, 784, 241 P.3d 955, 957 (2010). *See Slack v. Kelleher*, 140 Idaho 916, 921, 104 P.3d 958, 963 (2004); *State v. Barnes*, 147 Idaho 587, 597, 212 P.3d 1017, 1027 (Ct. App. 2009) ("It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal") (quoting *State v. Carlson*, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000)).

The purpose of this limitation on appellate court authority is to require the timely raising of claims and objections thereby allowing the trial court the opportunity to consider and resolve the same. *State v. Longest*, 149 Idaho at 784, 241 P.3d at 957. The trial court is in the best

position to determine the relevant facts and to resolve the dispute. *Id.* The requirement of a contemporaneous objection prevents a party from "sandbagging the court ... (by) remaining silent about his objection and belatedly raising the error if the case is not decided in his or her favor." *Id.*, citing *State v. Perry*, 2010 WL, 2880156 (2010).[7] In order for an objection to be preserved for appellate review, the party must either clearly provide the specific ground for the objection or the basis of the objection must be clear from the context of the trial record. *Slack v. Kelleher*, 140 Idaho at 921, 104 P.3d at 963.

Plaintiff argues error regarding Mr. Kimbrough's testimony that the accident was "caused" by plaintiff's careless right hand turn. Appellant's Brief, p. 11. Preliminarily, it must be noted that plaintiff has misstated Scott Kimbrough's testimony in this regard. Scott Kimbrough's testimony was that "this accident was **precipitated** by a careless right-hand turn by the plaintiff...." Tr. p. 357, LL. 15-17. Notably, there were no objections to the question that was asked prior to this testimony. Plaintiff never raised a contemporaneous and timely objection to this testimony, and therefore, failed to preserve this issue for appeal. Tr. p. 357, LL. 10-23.

Plaintiff also misstates the basis for Scott Kimbrough's opinions (Appellant's Brief, p. 11) by leaving out the following basis also testified to by Scott Kimbrough: (1) observing the behavior of other vehicles approaching the intersection; (2) measuring and obtaining key dimensions of the intersection, and (3) speaking with Matthew Roberts. Tr. p. 356, L. 7 through p. 357, L. 4.

Plaintiff appears to assert error pertaining to Mr. Kimbrough's testimony on the basis he developed his opinion by reading the police report, reading the plaintiff's deposition, reviewing

[7] The *Longest* court cited to the first *State v. Perry* decision, which was withdrawn. However, the same language was included in the replacement case. *See State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010).

the accident site on Google Earth, visiting the accident site, and speaking with an ex-highway patrolman. Tr. p. 356, L. 7 through p. 357, L. 4. Yet, plaintiff failed to raise a timely objection at the time of this testimony. *See Id.* As such, plaintiff failed to preserve this issue for appeal.

Plaintiff argues error regarding Mr. Kimbrough's testimony that defendant's conduct was reasonable and the plaintiff's conduct was not reasonable. Tr. p. 369, L. 19 through p. 370, L. 22. Again, plaintiff failed to raise a contemporaneous and timely objection at the time of this testimony. *See Id.* As a result, plaintiff failed to preserve this issue for appeal.

Plaintiff asserts error relating to Mr. Kimbrough's testimony that his opinions were based upon his personal weighing of the evidence[8] and that he was allegedly no better than the jury in reviewing the evidence. Tr. p. 374, L. 24 through p. 375, L. 15. However, Mr. Kimbrough did not testify he reached his opinions by "weighing the evidence" until asked that specifically worded and leading question by plaintiff's counsel. Tr. p. 374, L. 24 through p. 375, L. 15.

This testimony was elicited on cross-examination by plaintiff's counsel. Plaintiff cannot now be heard to denounce testimony that he roused. *State v. Gleason*, 123 Idaho 62, 66, 844 P.2d 691, 695 (1992). Doing so constitutes invited error, and is not permitted. *Id.* A party may not successfully complain of errors that he or she has acquiesced in or invited. *State v. Owsley*, 105 Idaho 836, 838, 673 P.2d 436, 438 (1983), citing *Walling v. Walling,* 36 Idaho 710, 214 P. 218 (1923). Errors which are consented to, acquiesced in, or invited are not reversible. *Id.*, citing *Frank v. Frank,* 47 Idaho 217, 273 P. 943 (1929). Thus, plaintiff's allegation of error on this issue must fail.

[8] Plaintiff cites the Court to *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988) for the proposition that an expert cannot "render an opinion regarding the weight of disputed evidence." Appellant's Brief, p. 11. However, this is not what the *Hester* court ruled. Additionally, expert "opinion" testimony is exactly that --the expert's opinion based upon his review of the evidence and information. That is the very essence and nature of expert witness testimony.

Furthermore, a close review of the exchange between plaintiff's counsel and Scott Kimbrough shows the testimony in this regard was in the context of only one of Scott Kimbrough's opinions — his opinion that Mr. Hansen did not use his turn signal prior to the collision. Tr. p. 374, L. 15 through p. 375, L. 15. The initiating question by plaintiff's counsel related to the turn signal issue, and the second question still related to the turn signal issue and Matthew Roberts' thought process. *Id.*

Plaintiff also asserts error on the grounds Scott Kimbrough's testimony did not assist the jury and allegedly invaded the province of the jury. Plaintiff's argument is improper. The question of admissibility of an expert opinion is one for the trial court. I.R.E. 104(a); I.R.E. 702. Idaho Rule of Evidence 702 requires that expert testimony be helpful to the determination of a fact in issue, and that the witness be properly qualified. I.R.E. 702. The Idaho Rule of Evidence 704 also provides that expert testimony in the form of an opinion or inference, which is otherwise admissible, is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. I.R.E. 704. *See Chapman v. Chapman*, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009). Further, the trial court's decision to admit expert testimony is reviewed for an abuse of discretion. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 429, 95 P.3d 34, 47 (2004).

In *State v. Corwin*, 147 Idaho 893, 216 P.3d 651 (Ct. App. 2009), the Idaho Court of Appeals held that the trial court did not abuse its discretion when it permitted police officers to testify that the defendant was under the influence of alcohol and too impaired to operate a motor vehicle. *Id.*, 147 Idaho at 897, 216 P.3d at 655. The officers described their observations of the defendant, including his behaviors, and as a result, determined he was under the influence of alcohol and too impaired to drive. *Id.*, 147 Idaho at 896, 216 P.3d at 654. The Court of Appeals ruled that even though the officers' observations of the defendant directly related to an ultimate issue of fact,

their testimonies regarding the same did not invade the province of the jury as to its determination of whether the defendant was or was not guilty of having driven a vehicle while under the influence of alcohol. *Id.*, 147 Idaho at 896-897, 216 P.3d at 654-655.

Likewise, in the present case, the trial court did not abuse its discretion in admitting the testimony and opinions of Scott Kimbrough. Scott Kimbrough is a qualified expert regarding accident reconstruction. His testimony assisted the jury in determining facts in issue in the case, specifically, the events which occurred during the subject traffic collision. His testimony and opinions did not invade the province of the jury regarding its determination of liability as to the subject collision, or of negligence. Scott Kimbrough never testified about a duty on the part of either party or a breach of any duty. He never testified about fault or responsibility. Instead, he provided information not known to the jury and not within the common knowledge of the jury. He testified about the configuration of the intersection, how traffic flows through this intersection, and how many lanes were present in the unmarked area where the accident occurred. Tr. p. 360, L. 12 through p. 362, L. 19; p. 366, LL.1-16; p. 361, LL. 8-15. During cross-examination by plaintiff's counsel, Scott Kimbrough testified about mechanical drag, stopping/slowing distances and deceleration of vehicles. Tr. p. 371, L. 3 through p. 372, L. 19. Upon further questioning from plaintiff's counsel, Scott Kimbrough testified regarding the speeds of the vehicles prior to impact and at the time of impact. Tr. p. 375, LL. 16-21; p. 377, L. 17 through p. 378, L. 22.

None of these issues are within the common knowledge of a layperson, and have been testified to on numerous occasions in Idaho courtrooms. *See eg. Harris v. Sawtelle Rentals, Inc.*, 133 Idaho 199, 203, 984 P2d. 122, 126 (1999) (accident reconstructionist expert testified to speed, critical speed of subject curve, defendant's speed exceeded critical speed of curve). Therefore, the trial court properly admitted Scott Kimbrough's testimony.

Defendant respectfully submits the testimony of Scott Kimbrough did not invade the province of the jury, and the judgment in this matter should stand.

C. Issue Regarding John Droge Is Moot Due To Comparative Negligence Finding By Jury; John Droge's Area Of Expertise Is Valid, Scientifically Reliable; Plaintiff Failed To Preserve Objections

Next, Plaintiff claims the testimony of defendant's biomechanical/biomedical engineer, John Droge, should not have been allowed because defendant failed to provide adequate foundation for the same. A review of the trial transcript on this issue shows not only that there was sufficient foundation, but also that plaintiff declined to question the witness in aid of his own objection, and further did not object to specific questions during the testimony.

Nevertheless, preliminarily, again, it must be noted the jury in this matter found Mr. Hansen 90 percent negligent, and Matthew Roberts 10 percent negligent. The jury verdict form was such that the jury was asked to address the causation questions prior to determining percentages of negligence of each party. R. p. 204-206. However, per Idaho Code §6-801, since plaintiff Mr. Hansen's negligence was **greater than** defendant Matthew Roberts' negligence, **plaintiff could not recover any damages, no matter how the jury answered the causation question.** I.C. §6-801. John Droge's testimony was purely related to the question of causation, and in particular whether the subject accident could have caused Mr. Hansen's claimed injuries. Tr. p. 393, LL. 14-24.

Therefore, even if there was an error on the part of the trial court in allowing John Droge's testimony, it was harmless error, at best. An appellate court will not reverse the district court if the alleged error is harmless. *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 504, 95 P.3d 977, 986 (2004). "[I]f an error did not affect a party's substantial rights or the error did not affect the result of the trial, the error is harmless and not grounds for reversal." *Id. See Martin v.*

Hackworth, 127 Idaho 68, 70, 896 P.2d 976, 978 (1995); *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 608, 726 P.2d 706, 718 (1986).

Plaintiff does not provide this Court any argument or proof that a substantial right has been affected by John Droge's testimony. Moreover, any error regarding the same cannot be deemed to have affected the outcome of the trial, and was harmless.

However, defendant will address the substance of plaintiff's arguments in the instance the appellant court disagrees with his position regarding harmless error. The following is the exchange that occurred at trial during John Droge's testimony:

> Q (MS. BRIZEE): What opinions have you formulated as a result of your review and investigation in this matter?
> MR. GORDON: Objection, Your Honor. I object to the foundation. To the extent he's going to testify as a biomechanical engineer, there's been no foundation laid to show that that scientific—whether scientific evidence that's even been—
>
> THE COURT: You may examine in aid of objection if you desire.
> MR. GORDON: I don't. I just – biomechanical engineering isn't considered a legitimate scientific –
> THE COURT: I'm going to overrule the objection. If you feel more foundation would be appropriate, Ms. Brizee, you may proceed how you desire.
>
> Q (MS. BRIZEE): Well, Dr. Droge, let's deal with this. What is the science of biomechanical engineering?
> A (DR. DROGE): Biomechanical engineering is just take your engineering principles, principles of physics and math and applying them to the human body. In mechanical engineering, you would take a structure, and you would decide what kind of forces it would take to fail that structure, whether it's a building or a, you know, a metal pole or something. In biomechanical engineering what we do is we take that same analysis and we just look at what kind of forces it's going to take to fail structures of the human body.
>
> Q: Is that the same as biomedical engineering?
> A: There are a few different terms, and they are all related, yes. I like the term biomechanics, because it refers to mechanical engineering in the title, but bioengineering, yes.

Q: And, in fact, your master of science is from the Department of Biomedical Engineering at the University of Utah, correct?
A: Correct.

Q: All right. So Dr. Droge, again, what opinions have you formulated in this matter?
MR. GORDON: Same objection, Your Honor.
THE COURT: Noted, overruled.

Tr. p. 391, L. 23 through p. 393, L. 13.

Clearly, adequate foundation was laid relative to the science, generally, of biomechanical/biomedical engineering. Per John Droge's testimony, he received his master of science from the Department of Biomedical Engineering at the University of Utah. *Id.* This is a department at the University of Utah. *Id.* This is not some voodoo or junk science, as plaintiff would have this Court believe.

Nevertheless, there was no pre-trial motion filed by plaintiff regarding this issue – despite the interim two months between the first day of trial on October 19, 2010, and the second day of trial on December 15, 2010. Plaintiff never even requested the deposition of John Droge. Therefore, plaintiff provided no case law or briefing to the trial court, and provided no specific objections to specific opinions or questions. Instead, plaintiff objected to his testimony on these grounds in the middle of John Droge's testimony. Tr. p. 391, L. 23 through p. 393, L. 13.

Further, when the Court offered the plaintiff the opportunity to question John Droge in aid of his objection, plaintiff declined. Tr. p. 392, LL. 5-8. Therefore, the only basis for plaintiff's argument in this regard before the trial court was plaintiff's counsel's unsupported statement that biomechanical engineering is not considered a legitimate science. Tr. p. 392, LL. 7-8. There was nothing more presented by plaintiff in support for his objection. Now, for the first time on appeal, plaintiff cites to case law and makes additional argument not provided to the trial

court. Defendant submits plaintiff is precluded from now attempting to make these arguments, as they were not before the trial court. The only thing before the trial court were counsel's unsupported statements, nothing more. Nevertheless, the proper foundation for John Droge was provided. By John Droge's own testimony, biomechanical/biomedical engineering is a valid area of study, and in fact, is an entire department at the University of Utah. Tr. p. 392, L. 13 through p. 393, L. 9.

Furthermore, plaintiff now argues, for the first time on appeal, that specific sections of John Droge's testimony were "unscientific" and "subjective." Plaintiff has cited to specific portions of the trial transcript. However, plaintiff proffered no specific objections to these specific areas of questioning. Therefore, plaintiff has waived any such objections and cannot now be heard to voice the same for the first time on appeal.

Also, plaintiff's argument regarding a *Daubert* inquiry is of interest. In Appellant's Brief, plaintiff argues that "to determine whether scientific knowledge will assist the trier of fact, a trial court must make a two-step inquiry." Appellant's Brief, p. 13. He later argues: "Further, the trial court did not act consistent with applicable legal standards because expert testimony is not admissible unless the trial court makes a two-step inquiry to ensure the underlying scientific principles are reliable and were properly applied." Appellant's Brief, p. 17. Plaintiff appears to argue that before any expert witness called by any party can testify, the trial court, on its own volition, must make this inquiry. This is inaccurate. It is the parties' responsibility to raise such issues. *See e.g.*, *Harris v. Sawtelle Rentals, Inc.*, 133 Idaho 139, 204, 984 P.2d 122, 127 (1999).

Plaintiff never raised the issue of whether the underlying scientific principles of John Droge's opinions were reliable. Instead, plaintiff merely made a general objection that biomechanical engineering is not a legitimate science. Again, there was nothing provided by

plaintiff to the trial court in support of his objection but the bare assertion of counsel, and nothing more. Defendant submits this is not sufficient to trigger a full *Daubert* inquiry. In the cases now relied upon by plaintiff on appeal, there were separate pre-trial motions on the issue, and, at times, full evidentiary hearings. No such situation was created by plaintiff in the case at bar. Instead, plaintiff relied upon an eleventh-hour general verbal objection, supported by nothing more than counsel's arguments.

Plaintiff cites to *Reali v. Mazda Motor of America, Inc.*, 106 F.Supp. 2d 75 (D. Me. 2000), in which the plaintiff was a front seat passenger in a Mazda when the Mazda was rear-ended. *Id.* at 76. He suffered "difuse axonal injury, a form of mild traumatic brain injury." *Id.* He filed suit against Mazda, claiming a defectively designed seat caused his injuries. *Id.* Plaintiff retained a biomechanical engineer in his case. *Id.* The defendant filed for summary judgment, and **filed a motion in limine to exclude portions of the plaintiff's biomechanical engineer's testimony**. *Id.* A review of the *Reali* opinion shows the parties provided a clear record to the trial court relative to proposed testimony, and the specific issues in dispute, such as the "threshold level at which angular acceleration velocity leads to diffuse axonal injury." *Id. at 77.* Contrary to plaintiff Mr. Hansen's assertions that the *Reali* court excluded all of the biomechanical engineer's testimony, the *Reali* court allowed the biomechanical engineer to testify on a number of issues, including the threshold level, described above. *Id.* at 77.

For the first time on appeal, plaintiff now apparently argues John Droge's testimony regarding Delta V forces is objectionable, based upon the *Reali* case. Plaintiff did not object to this testimony at trial of this matter. Tr. p. 398, L. 9 through p. 401, L. 9. Again, plaintiff only objected at the beginning of John Droge's testimony on the grounds biomechanical engineering

is not a legitimate science. Tr. p. 392, LL. 7-8. There was no specific objection, ever, relative to John Droge testifying about velocity.

Furthermore, while plaintiff wants to attempt to liken John Droge's trial testimony to the *Reali* deposition testimony of plaintiff's expert, he fails. Since neither *Reali* nor this argument were before the trial court, this is a moot issue. Nevertheless, John Droge testified his opinions were based upon the deposition testimony, photographs of the vehicles, and repair estimates for the vehicles, which were **then validated using real world crashes with known speeds** and **simulations.** Tr. p. 391, LL. 1-13; p. 398, L. 13 through p. 399, L. 10; Tr. p. 398, LL. 14-16. While plaintiff attempts to characterize John Droge's opinions as an "initial gut feeling," and "eyeball guess" (Appellant's Brief, p. 16), this is an absolute mischaracterization of John Droge's testimony. Of interest, the *Reali* court's ruling that plaintiff's expert's Delta V figure was unreliable was based on plaintiff's failure to produce evidence this is an acceptable way to determine Delta V in response to defendant's specific motion regarding this issue. *Id.* at 77-78. In the case at bar, since plaintiff never raised this issue below, neither defendant nor the court had an opportunity to address this issue. Therefore, plaintiff cannot now be heard to say defendant presented no evidence, when plaintiff did not raise the issue so that any such evidence was required. However, John Droge's testimony goes beyond the testimony of the expert in *Reali* and clearly he did more than the expert in *Reali*.

Plaintiff also relies upon *Hallmark v. Eldridge*, 189 P.2d 646 (Nev. 2008). Once again, in that case, a motion was filed prior to trial to attempt to preclude the testimony of the biomechanical engineer. *Id.* at 649. Therefore, the parties, and the court, had an opportunity to fully evaluate the motion. The Supreme Court of Nevada actually found on appeal that the trial court had **not** abused its discretion when it determined the expert, Dr. Bowles, was qualified as

an expert. *Id.* at 651. Dr. Bowles held a bachelors of science degree in mechanical engineering and a doctorate in medicine (*Id.*) as compared to John Droge's master of science in biomechanical/biomedical engineering from the University of Utah. Tr. p. 393, LL. 6-9. The *Hallmark* court then proceeded to review Nevada's version of the *Daubert* factors. *Id.* 651-654. Courts should review these issues on a case-by-case basis. While the *Hallmark* court ultimately found the trial court should not have let Dr. Bowles testify to his opinions (*Id.* at 652). This was on grounds not raised by plaintiff in the case at bar. Furthermore, other courts have allowed biomechanical/biomedical engineers to testify. *See e.g. Bowers v. Norfolk Southern Corp. et al*, 537 F.Supp.2d 1343 (M.D. Georgia 2007); *Yarchak v. Trek Bicycle Corp.*, 208 F.Supp.2d 470 (N.J. 2002). In particular, the *Bowers* court surveyed other case law and stated "biomechanical engineers typically are found to be qualified to render an opinion as to the forces generated in a particular accident and the general types of injuries those forces may generate." *Id.* at 1377.[9]

John Droge was qualified to testify at trial of this matter. Nevertheless, even if this court believes it was an error for him to testify at trial, any such error was harmless since the question of causation became moot with the jury's apportionment of negligence between the parties.

In conclusion, each of plaintiff's three prongs of his attack on defendant's experts fails. The trial court did not abuse its discretion in denying plaintiff's unsupported, eleventh-hour motions to attempt to preclude defendant's experts from testifying. Furthermore, plaintiff has failed to preserve many of the arguments he now makes on appeal. Finally, most of plaintiff's arguments are related to testimony rendered moot and harmless given the jury's apportionment

[9] Part of the motion by the opposing party in *Bowers* was to limit the expert so he could not testify as to specific causation. *Id.* 1377-78. No such motion or objection was ever made by Mr. Hansen.

of negligence. Defendant's experts testified properly and appropriately, and the trial court's rulings in this regard should be affirmed.

II.
PLAINTIFF WAIVED OBJECTIONS TO VIDEO TRIAL DEPOSITION; OBJECTIONS WERE UNSUPPORTED; ANY ERROR WAS HARMLESS

After the first day of trial, defendant Matthew Roberts received a telephone call from the University of Utah stating a matching liver had been located for him and he needed to go to Salt Lake City for his long-awaited liver transplant. Tr. p. 224, L. 7 through p. 225, L. 7. As a result, the second day of trial was continued from October 20, 2010, to December 15, 2010. Further, Matthew Roberts was under strict medical orders and had to stay within a certain distance of the University of Utah in case of a rejection of the transplanted liver, and was not allowed to be out in public due to his suppressed immune system. Tr. p. 233, LL. 16-20; p. 234, L. 22 through p. 235, L. 13. Therefore, his trial testimony was videotaped in Salt Lake City, Utah, and his testimony was played at the December 15, 2010, second day of trial.[10]

Prior to the second day of trial, a hearing was held to hear motions relative to the video trial transcript of Matthew Roberts. Per plaintiff's counsel's own remarks, the attorneys had agreed objections would be addressed **prior to trial**. Tr. p. 258, LL. 1-4[11]. Defendant filed a motion to address his objections to the video trial testimony. R. p. 183-84. In his memorandum in support, defendant alerted plaintiff he would have to have the DVD professionally edited before it was played to the jury, and also provided notice he planned to play the entire video, with the exception of the delineated portions he was asking the court to strike. R. p. 186. Plaintiff did not

[10] Plaintiff had declined to take Matthew Roberts' deposition in this matter. Tr. p. 225, LL. 16-24.

[11] It was defense counsel's recollection that the attorneys had agreed objections would be addressed "at the hearing next week," meaning the December 8, 2010, hearing. Tr. p. 259, LL. 23-25.

file any written motion or other document asking the court to address additional objections or to oppose defendant's intent to play all other portions of the video.

A hearing was held to hear objections to the video deposition on December 8, 2010. Tr. p. 233-250. During this hearing, defendant's motion to strike and objections were discussed in detail. Again, it was reiterated the DVD had to be professionally edited before trial. Tr. p. 235, LL. 11-13. Clearly, the DVD could not be edited on the day of trial. This was a lengthy, arduous hearing, wherein counsel went through those sections of the deposition transcript raised by defendant line by line. Tr. p. 233, L. 1 through p. 250, L. 25. There was no way this could have been done "on the fly" at trial when it was being presented to the jury. During the hearing, the court gave plaintiff the opportunity to raise objections, or otherwise indicate whether there was anything else to discuss. No objections were raised by plaintiff. Tr. p. 249, LL. 19-24.

On the second day of trial, on December 15, 2010, immediately prior to the playing of the video trial deposition of Matthew Roberts, plaintiff raised the issue of his objections that he had made during the actual taking of the deposition. He asked the court to address the objections during the playing of the DVD to the jury. Tr. p. 257, L. 22 through p. 258, L. 25. The court, in response, told plaintiff a hearing had been held the week prior where objections were raised so the DVD could be edited prior to trial. Tr. p. 259, LL. 1-4. Plaintiff argued it was defendant's job to make sure plaintiff's objections were argued to the court, and blamed defendant for plaintiff's failure to raise this issue in a timely manner. Tr. p. 259, LL. 5-18.

Plaintiff went so far as to say it was defendant's responsibility to obtain a copy of the transcript of the deposition for plaintiff. Tr. p. 261, LL. 20-24. However, the Idaho Rules of Civil Procedure say otherwise. Per Idaho Rule of Civil Procedure, if a party wants a copy of the audio-visual recording, then he needs to request one. IRCP 30(b)(4)(A). If a party desires a copy of the

transcript, then he needs to request one, and can even, on motion, require the party who took the deposition to provide a copy. IRCP 30(b)(4)(C). It was unknown to defendant whether or not plaintiff had requested from the court reporter or videographer copies of the transcript or DVD. Tr. p. 262, LL. 7-15. Further, plaintiff never filed a motion to cause defendant to provide a copy of the transcript to him. In fact, plaintiff did nothing but attempt to blame defendant for his failure to follow up and get his objections before the trial court in a timely manner, or otherwise to respond to defendant's motion wherein it clearly was stated defendant planned to play all portions of the video trial deposition, other than those portions defendant had moved to strike.

Plaintiff refers this court to Idaho Rule of Civil Procedure 32(b). However, when dealing with a video trial deposition, which requires extensive editing of the DVD, the process is very different from merely reading into the record a written transcript of a deposition. Again, the editing cannot be done last minute, immediately prior to the introduction of the DVD.

Plaintiff, on appeal, further attempts to perpetuate his argument that defendant is to blame for his failure to voice his objections, and further attempts to twist the factual situation, by arguing it was defense counsel's responsibility to argue plaintiff's objections. Appellant's Brief, p. 18. There is nothing in the record showing defense counsel told plaintiff's counsel she would lobby and argue his objections for him to the court. This argument, in and of itself, is disingenuous. This is akin to a party arguing the other party should have voiced his objections for him at trial.

Nevertheless, it was clear to the court that plaintiff had an opportunity to raise any objections to the DVD at the December 8, 2010, hearing. By asking Mr. Ipsen if the plaintiff had filed a motion, the court was opening the door for Mr. Ipsen to voice any objections. The court's comment indicated this was the time and place for the plaintiff to raise any objections. The

question asked by the court was: "All right. You had not filed a motion, Mr. Ipsen?" Tr. p. 249, LL. 21-22. This came after defendant specifically stated, "We've covered everything on my motion." Tr. p. 249, LL. 19-20. This interchange allowed Mr. Ipsen the opportunity to voice any objections on behalf of plaintiff. This clearly was the time and place to do so, and nothing was verbalized. It had been made very clear the DVD was going to have to be edited in preparation for trial. The trial court appropriately deemed the plaintiff's failure to raise any objections at this point in time a waiver of any such objections. This was within the trial court's discretion, as the trial court was present for this interchange, and the manner in which the questions were asked and the manner in which the court and counsel were communicating. Trial court decisions regarding the admitting or excluding of evidence is reviewed solely for an abuse of discretion. *Highland Enterprises Inc. v. Barker*, 133 Idaho 330, 345, 986 P.2d 996, 1011 (1999).

While plaintiff argues he was not required to submit a motion on his objections, the record is clear plaintiff knew of defendant's plan to play all of the video deposition at trial, with the exception of those portions subject to defendant's motion to strike. In this situation, a plaintiff cannot merely decide to ignore this information, which was clearly communicated in defendant's memorandum (R. p. 186), ignore the hearing on the issue, and then later, when it is no longer possible to edit the DVD, to voice objections. The December 8, 2010, hearing was the time and place for plaintiff to timely raise any objections. This was a lengthy hearing, and made very clear this same process could not possibly be repeated in the middle of trial. Even if plaintiff was not prepared to argue on December 8, 2010, he still had a week to raise any objections to the DVD, and failed to do so until the eleventh hour, when it was too late to accommodate the same due to the need to edit the DVD.

Nevertheless, even if this Court disagrees with the trial court's ruling in this regard, none of the objections plaintiff now argues would have impacted the outcome of this trial. These objections clearly were unsupported, as follows:

1. Plaintiff argues the amount of the property damage to Matthew Roberts' vehicle as a result of the accident would not have been admitted into evidence, had his objections been ruled on by the court. Appellant's Brief, p. 20-21. However, this exact same issue was addressed during plaintiff's testimony, and the trial court allowed into evidence the plaintiff's document and plaintiff's testimony regarding the cost of repairs to plaintiff's vehicle as a result of the accident. Tr. p. 278, L. 8 through p. 281, L. 2. Likewise, the repair document and testimony of Matthew Roberts were admissible. Nevertheless, Matthew Roberts testified not only that the repair estimates were true and correct copies of the documents he received from the two auto body shops, but he also testified to his own independent recollection of the amounts of the same. Tr. p. 298, L. 11 through p. 303, L. 6.[12] Defendant submits even if this court believes there was some kind of error, any error on the part of the trial court is harmless. Matthew Roberts certainly was allowed to testify to his recollection of the amounts of the repair estimates, if nothing else, which put the dollar amount of the repairs into the record. Furthermore, the appropriate foundation was provided for the documents themselves to be entered into evidence. Parties are allowed to testify to the amount of property damage to their vehicles in an auto collision.

2. Plaintiff next argues a party cannot testify to what he said to other people. Plaintiff argues this is somehow hearsay. Matthew Roberts testified to what he told the 911

[12] Plaintiff refers this court to two cases in support of his argument that repair estimates are uniformly considered hearsay. Appellant's Brief, p. 21. However neither of these cases involve written repair estimates for vehicle damage. The first case, *Marshall v. Bare*, 107 Idaho 210, 687 P.2d 591 (Ct.App. 1984), the defendant attempted to enter into evidence only the verbal statements of other contractors to show the work could have been done at a lower rate. There were no written repair estimates provided. The second case, *State v. Miller*, 141 Idaho 148, 106 P.3d 474 (Ct.App. 2004) involved the issue of whether a probation receipt used to package methamphetamine could be used to show the defendant was the owner of the drugs.

dispatcher and what he told the investigating officer. Per Idaho Rule of Evidence 801, hearsay is a statement made by an out-of-court declarant. Matthew Roberts was not reciting what other people told him, but what he himself told other people. This is not hearsay. Furthermore, Matthew Roberts was not an out-of-court declarant and certainly was available for cross-examination by plaintiff. Per *Jolley v. Clay*, 103 Idaho 171, 646 P.2d 413 (1982), "(t)he out-of-court statements of parties to litigation are, and always have been, admissible, whether classified as non-hearsay or as an exception to the hearsay rule." *Id.* at 175, 646 P.2d at 417. Nevertheless, even if this Court believes Judge Woodland was in error, and then agrees with plaintiff these statements by Matthew Roberts were hearsay, any such error is harmless. Matthew Roberts merely testified he told the plaintiff he was going to call 911. He told dispatch neither he nor plaintiff were injured and that his car was in the middle of the road. He testified he told the police officer the same information he had just provided in his testimony. Tr. p. 310, L. 8 through p. 312, L. 12. None of this information in any way impacted the jury verdict in this matter.

3. Plaintiff's third alleged error involves the question asked of Matthew Roberts as to whether he received a citation from the police officer as a result of the subject collision. Appellant's Brief, p. 22. Of note, plaintiff filed a pre-trial motion with the court, asking that defendant be prohibited from entering into evidence the fact the **plaintiff**, as a result of the accident, **had** received a citation from the investigating police officer. R. p. 134-38. After significant argument, Judge Anderson granted plaintiff's motion. Tr. p. 39, L. 16 through p. 55, L. 1. While plaintiff now wants to expand his motion and Judge Anderson's ruling into something more than it was, at no time did plaintiff ever request a pre-trial order to preclude defendant from testifying he did not receive a citation as a result of the subject collision. A

review of the documentation and the verbal statements of counsel and the court clearly show the only issue on plaintiff's motion in limine was the citation that had been issued to the plaintiff after the accident.[13] Furthermore, plaintiff's objection at the time of the question was that it was irrelevant. Now, for the first time in appeal, plaintiff attempts to argue the question was asked in violation of the court's order. Plaintiff waived any such objection. Also, clearly, the fact the defendant did not receive a citation was relevant to this matter, and to Matthew Roberts' defense in this matter. Plaintiff also argues this question -- and Matthew Roberts' answer -- somehow imply the plaintiff did receive a citation. No such implication exists. In many accidents, no citation is issued. If plaintiff was worried about any such implication, he could have filed a motion in limine to preclude such testimony. No such motion was ever filed.

Plaintiff concludes his arguments on this issue by speculating what the jury would have done and how this would have changed the jury outcome. Plaintiff attempts to argue the question the jury asked about apportionment in the middle of deliberations somehow indicates or predicts what the jury would have done if plaintiff's objections had been upheld. At the end of the day, the jury apportioned 90 percent of the fault to plaintiff, and only 10 percent to Matthew Roberts. Implicit in the jury's question, if the parties are going to speculate on the same, was the fact all the jurors thought plaintiff was more at fault than Matthew Roberts. Tr. p. 491, L. 22 through p. 495, L. 13.

However, defendant submits this is all speculative, and any error on the part of the trial court in deeming plaintiff to have waived his objections to the video trial deposition by not presenting them prior to trial was harmless. The objections voiced by plaintiff during the video

[13] Judge Anderson ruled, "In other words, the parties will not testify that there was a citation or submit the citation for admission into evidence." Tr. p. 51, LL. 21-23. The only citation that was issued was the citation issued to the plaintiff.

trial deposition were unsupported and not viable. Matthew Roberts' testimony about the amount of the repair estimates would have still come into evidence, as would have his testimony of the statements he himself made, and his testimony that he did not receive a citation as a result of the accident.

In conclusion, the trial court did not err in ruling plaintiff had the opportunity to ask the court to review and rule on his objections on the DVD of Matthew Roberts' trial testimony, and that plaintiff had waived the same by not voicing them prior to the day the DVD was to be played to the jury. However, any error on the part of the trial court, if any, in this regard was harmless, since the objections were not valid, and the information would have come into evidence. The jury verdict should be allowed to stand.

III.
THE DISTRICT COURT PROPERLY GRANTED DEFENDANT'S MOTION IN LIMINE REGARDING INSURANCE; PLAINTIFF FAILED TO PRESERVE OBJECTIONS

In this matter, defendant filed a motion in limine requesting an order precluding plaintiff from mentioning insurance or the insurance industry during the course of trial, including during voir dire. R. p. 123.

During the pre-trial conference, The Honorable Judge Anderson held oral argument on several motions in limine, including defendant's motion in limine to preclude mention of insurance during trial. Tr. p. 22, L. 2 through p. 24, L. 17. No written objection or opposition was filed by plaintiff relative to this motion in limine. The only opposition by plaintiff was voiced during oral argument at the pre-trial conference. Plaintiff's sole objection was he wanted to be able to inquire of jurors about their **current** occupations to make sure no jurors were working in the insurance industry. Tr. 22, L. 17 through p. 23, L. 7. Plaintiff argued he should be

able to ask questions of the jurors about their current occupations. Tr. p. 22, L. 25 through p. 23, L. 2.

The court and counsel and the clerk then discussed whether the occupations of the jurors and the occupations of the jurors' spouses were included on the jury questionnaire. The clerk informed the court and counsel that the Bonneville County jury questionnaire does include both the juror's employment and the jurors' spouse's employment. Tr. p. 23, L. 8 through p. 24, L. 1. As a result, Judge Anderson granted defendant's motion in limine, since plaintiff's **sole objection** was already taken care of with the jury questionnaire. This was not an abuse of the trial court's discretion.

Judge Anderson even provided plaintiff an opportunity for relief if a juror failed to fill out the employment information, or the employment information for his/her spouse. Judge Anderson specifically ruled if this information was not completed by a juror, then the jury commissioner would meet with the juror and obtain this information, and have the juror fill out this information outside the presence of the rest of the jury. Tr. p. 24, LL. 2-14., R. p. 178-179.

A ruling on a motion in limine is reviewed under an abuse of discretion standard. *Loza v. Arroyo Dairy,* 137 Idaho 764, 53 P.3d 347 (2002). The decision of the trial court "in permitting or refusing the asking of questions related to insurance companies is a matter of the court's discretion. Unless abused, that discretion will not be disturbed on appeal." *Kozlowski v. Rush*, 121 Idaho 825, 831, 828 P.2d 854, 860 (1992), citing to *Owen v. Burchman*, 100 Idaho 441, 444, 599 P.2d 1012, 1015 (1979).

Furthermore, as stated by the Idaho Court of Appeals in *Harris v. Alessi*, 141 Idaho 901, 907, 120 P.3d 289 (Ct.App. 2005), Idaho's cases do not state a trial court **must** allow questioning of jurors about insurance. The *Harris* court stated the idea that such questioning **can** be allowed,

does not mean it **must** be allowed, and stated trial judges may prohibit such questioning during voir dire:

> The fact that this practice is not forbidden by Idaho law does not mean that a trial court must allow it. The decision whether to allow inquiries relating to insurance companies during voir dire is a matter within the trial court's discretion. ... Therefore, the trial judges of this court are free to prohibit this practice in their courtrooms.

Id.

The *Harris* court went on to provide examples of how this could be done, such as prohibiting questions during voir dire unless permission is requested and obtained from the court ahead of time upon a showing of need. *Id.* The *Harris* court stated this would "protect the legitimate interests of both parties." *Id.*

Therefore, defendant submits Judge Anderson was within his discretion to grant defendant's motion in limine, especially given the fact the court and the clerk dealt with, and resolved, plaintiff's sole objection to the motion in limine.

It should be noted, on the morning of the first day of trial, plaintiff asked to "make a record on the insurance issue." Tr. p. 64, LL. 15-16. This was not a motion for reconsideration, but merely a move to "make a record" on the insurance issue. During this record-making process, plaintiff's counsel then made new arguments not previously made to Judge Anderson during the pre-trial conference. Plaintiff then proceeded into a lengthy discussion of tort reform, and attempted to somehow link tort reform to insurance. Plaintiff argued by not allowing him to mention the word "insurance," he was precluded from inquiring as to tort reform. Tr. p. 64, L. 15 through p. 65, L. 5. Defendant and the court agreed plaintiff could inquire of the jurors about tort reform, but he just could not bring insurance into the questioning. Tr. p. 66, L. 24 through p. 67, L. 7.

Despite the fact this is not a bad faith case, plaintiff also added to his record an argument that Judge Anderson's ruling precluded him from asking the jurors about insurance claims they might have made. Tr. p. 65, LL. 6-14. Plaintiff also put into the record information about his beliefs regarding financial bias of jurors, and attempted to link that issue to insurance. Tr. p. 65, L. 23 through p. 66, L. 5.

Defendant submits none of these new issues precluded plaintiff from selecting a fair and impartial panel. It is defendant's position allowing plaintiff to inquire into these irrelevant issues would have only served to introduce insurance into the juror's minds. Nevertheless, since plaintiff did not ask the court to reconsider Judge Anderson's ruling, then on appeal this court must look only to the information and argument provided to Judge Anderson when he made the original ruling. None of plaintiff's new statements to "make a record" the first day of trial with Judge Woodland were argued before Judge Anderson during the pre-trial conference in this matter.[14] Therefore, plaintiff is precluded from now making these arguments on appeal.

As a general rule, the Idaho Supreme Court will not consider an alleged error not preserved for appeal by an objection at trial. *State v. Longest*, 149 Idaho 782, 784, 241 P.3d 955, 957 (2010). *See Slack v. Kelleher*, 140 Idaho 916, 921, 104 P.3d 958, 963 (2004); *State v. Barnes*, 147 Idaho 587, 597, 212 P.3d 1017, 1027 (Ct. App. 2009) ("It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal") (quoting *State v. Carlson*, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000)).

[14] It is defendant's position that plaintiff's statements to Judge Woodland, were, as represented by plaintiff's counsel, his making of a record regarding Judge Anderson's ruling. However, even if this court treats these statements as a motion that needed to be ruled on by Judge Woodland, defendant submits any ruling by Judge Woodland on this issue likewise was within his discretion and not an abuse of discretion.

The purpose of this limitation on appellate court authority is to require the timely raising of claims and objections thereby allowing the trial court the opportunity to consider and resolve the same. *State v. Longest*, 149 Idaho at 784, 241 P.3d at 957. The trial court is in the best position to determine the relevant facts and to resolve the dispute. *Id.* The requirement of a contemporaneous objection prevents a party from sandbagging the court by remaining silent about an objection and belatedly raising the error if the case is not decided in his or her favor. *Id.* In order for an objection to be preserved for appellate review, the party must either clearly provide the specific ground for the objection or the basis of the objection must be clear from the context of the trial record. *Slack v. Kelleher*, 140 Idaho at 921, 104 P.3d at 963.

Furthermore, per *Thompson v. Olsen,* 147 Idaho 99, 205 P.3d 1235 (2009), "if the objecting party made the wrong objection, that is not error by the trial court. When an objection is made, the trial court is only asked to determine the validity of that objection; it is not asked to determine whether there is another objection that would have been sustained had it been made." *Id.* at 105-106, 205 P.3d at 1241-42.

On appeal, plaintiff now argues the trial court erred by "prohibiting Hansen from inquiring whether a prospective juror or one of his family members **were or had ever been** employed by an insurance carrier." Appellant's Brief, p. 23. This is different than the objection voiced by plaintiff at the time and the place for the hearing on the motion in limine. At the hearing, plaintiff only objected on the grounds plaintiff should be entitled to know if the juror or the juror's spouse is **currently** working in the insurance industry. Tr. p. 24, L. 22 through p. 23, L. 15. There was no objection relative to other family members, or past employment, which plaintiff now wants to argue on appeal.

Plaintiff argues error now on different grounds than were before Judge Anderson. Plaintiff never raised these grounds before Judge Anderson and cannot now be heard to argue Judge Anderson's made the wrong decision when these grounds were not before Judge Anderson. Plaintiff has failed to preserve this issue for appeal.

Nevertheless, in the instance this court determines to consider this issue, defendant submits Judge Anderson did not abuse his discretion in ruling on the motion in limine. The case law relied upon by plaintiff does not support his position that Judge Anderson did abuse his discretion. This is in part because this is a discretionary call on the part of the trial judge. None of the cases cited to by plaintiff are directly on point. That is because when the appellate review is an abuse of discretion standard, there is great deference given to the trial court's ruling. None of the cases relied upon by plaintiff involved a pre-trial motion in limine. None of the cases relied upon by plaintiff involved a situation wherein a pre-trial ruling had been made that insurance could not be mentioned in voir dire, with the exception of the two later cases, *Kozlowski v. Rush*, 121 Idaho 825, 828 P.2d 854 (1992) and *Harris v. Alessi*, 141 Idaho 901, 120 P.3d 289 (Ct. App. 2005), which will be discussed herein.

For instance, plaintiff cites to *Wilson v. St. Joe Boom Co.*, 34 Idaho 253, 200 P. 289 (1921) for the proposition that it is the "privilege" of the plaintiff to inquire "whether a prospective juror or one of his family members are or have ever been employed by an insurance carrier." Appellant's Brief, p. 24. Plaintiff has artfully phrased this statement to make it sound as if every plaintiff has a right to make this inquiry.[15] This is not what the *Wilson* court stands for. In fact, the *Wilson* court stated, to the contrary, that "the line of demarcation between prejudicial

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[15] Ironically, in all of the cases cited by plaintiff, the only time the word "privilege" appears is in *Faris v. Burroughs Adding Machine Co.*, 48 Idaho 310, 282 P. 72 (1929) wherein the court said it is "the privilege of a party, within reasonable limits and good faith, to ascertain the **occupation of a juror** and the extent of his possible interest in the trial ..." *Id.* at 321.

and nonprejudicial questions and remarks in the examination of jurors must depend upon the particular circumstances of the case." *Id.* at 261. The same is true of the second case cited by plaintiff, *Cochran v. Gritman*, 34 Idaho 654, 203 P. 289 (1921), wherein the court stated that counsel **may** be permitted to examine a juror about insurance. *Id.* at 664. The *Cochran* court did not say this was a "right" or a "privilege" as now argued by plaintiff on appeal. The next case cited by plaintiff, *Bressan v. Herrick*, 35 Idaho 217, 205 P. 555 (1922), merely cites to *Wilson*, *supra*, and states the "may" rule from *Wilson*. *Bressan* at 221.

In *Faris v. Burroughs Adding Machine Co.*, 48 Idaho 310, 282 P. 72 (1929), also cited by plaintiff, the plaintiff's counsel actually inquired about a specific insurance carrier, the American Automobile Insurance Company, and made an offer of proof, stating "we are advised that there is an insurance company connected or interested in the suit." *Id.* at 316. Apparently, these earlier cases took place before the rules of discovery allowed a party to ascertain whether an insurance carrier provided any coverage for the claims being made in the litigation. Furthermore, in *Faris*, the defendant agreed the voir dire inquiry was appropriate, so the issue of the voir dire questioning was not at issue – it was plaintiff's counsel's offer of proof statement that was at issue. *Id.* at 317.

In *Shady v. Daley*, 58 Idaho 536, 76 P. 279 (1938), also cited by plaintiff, the court merely relied upon *Wilson* and *Cochran* cases. *Shady* at 539. However, it should be noted it does not appear defense counsel objected to the voir dire question at issue in that case. The same is true of *Byington v. Horton*, 61 Idaho 389, 102 P.2d 652 (1940), another case cited by plaintiff. *Id.* at 394-95. In *Byington*, the court cited to *Shaddy* and its predecessors, but notably also cited to two California cases wherein it was stated the plaintiff may ask **broad** questions of the potential jurors, and the questions must be asked in such a way that there is no emphasis that the

defendant is insured. *Id.* In *Faris, supra*, the court subsequently allowed plaintiff to ask whether any members of the jury were "pecuniary interested in any company or concern, in which you may be connected, that would have, or could have any interest in the result of this case." *Faris* at 320. This was allowed by the court to avoid any inference of insurance. *Id.* Defendant submits plaintiff certainly could have asked a broader question to ascertain bias of jurors, without mentioning insurance companies, *per se*, such as whether any of the jurors had a financial interest in the outcome of the trial. Plaintiff chose not to ask any such questions, and cannot now be heard to complain.

In *Owen v. Burchman*, 100 Idaho 441, 599, P.2d 1012 (1979), the court again relied upon its predecessors, *Shady* and *Byington* and indicated the court's allowance of plaintiff's inquiry regarding insurance was not an abuse of discretion. *Owen* at 444.

It is important to note none of the cases cited by plaintiff involved a specific pre-trial motion in limine to address the issue of whether insurance could be mentioned during trial and to what extent. Again, in the case at bar, defendant filed a motion in limine on this matter and the **only** objection raised by plaintiff at the hearing on the same was considered by Judge Anderson, and was resolved. The only objection raised by plaintiff was that he believed he was entitled to know of the current occupation of the jurors, which was resolved via the jury questionnaire. Therefore, these cases relied upon by plaintiff are distinguishable, on their face.

It should also be noted, plaintiff's 1920-1930 cases discuss jury bias in terms of whether the juror has a potential financial interest in the outcome of the litigation. However, in order to actually get to the root of whether a juror has an interest in the outcome of the litigation via a relationship with an insurance carrier, the specific insurance carrier would have to be mentioned. Defendant submits to do so would absolutely be in violation of the strong precedent set by the

judiciary of Idaho to avoid creating a prejudicial situation for the defendant by allowing evidence of involvement of an insurance company. *See e.g. Loza v. Arroyo Dairy,* 137 Idaho 764, 766-67, 53 P.3d 347, 349-50 (2002).

Furthermore, plaintiff seems to forget that Matthew Roberts filed a separate small claims action against him. Therefore, the potential prejudice that comes with introducing insurance into the minds of the jurors would have cut both ways, and against both parties, since plaintiff was also a defendant in this consolidated action, and also insured.

Plaintiff refers this Court to *Kozlowski v. Rush*, 121 Idaho 825, 828 P.2d 854 (1992) and *Harris v. Alessi*, 141 Idaho 901, 120 P.3d 289 (Ct. App. 2005). In *Kozlowski*, the Honorable Peter D. McDermott ruled on a pre-trial motion brought by the plaintiffs, and declined to allow plaintiffs to question jurors about the "insurance crisis." *Id.* at 830-31. The plaintiffs asked the court's permission to engage in this line of questioning prior to trial. *Id.* Importantly, the *Kozlowski* court emphasized that in the cases it relied upon, the court had recognized, first, that there was possible exposure to the insurance advertisements – the advertisements plaintiffs were claiming entitled them to ask jurors about the alleged "insurance crisis." *Id.* at 833. However, the *Kozlowski* court concluded "there has not been a sufficient showing here that the potential jurors may have been exposed to such advertisements." *Id.* The court remanded the case for other reasons, and indicated the plaintiffs would have another opportunity to raise this issue with the trial court. *Id.* at 833-34.

Defendant submits the *Harris* court, *supra*, promulgated the best rule -- that this issue should be left to the discretion of the trial court, so that it can be evaluated on a case-by-case basis. There are numerous factors that could steer the court's determination of this issue one way or another. For instance, there still exist situations wherein there is no insurance coverage for

defendant for plaintiff's claims. Therefore, there cannot possibly be any reason to inquire into insurance during jury selection, except for plaintiff's desire to create the impression there is insurance coverage available. There are also instances wherein the trial court may believe it needs to put parameters upon jury questioning by a specific attorney due to past experience with counsel, and counsel's inability to inquire in good faith. There may be a myriad of other potential scenarios in which the trial court, in its discretion, needs to be able to craft a ruling regarding the issue of insurance -- on a motion in limine from either party -- that is specific to the needs of the particular parties and/or particular claims in the case.

Plaintiff advocates for a blanket rule allowing all plaintiffs to inquire of all juries about insurance. However, this is not a "one size fits all" situation. There are too many potential situations wherein the trial court should have the freedom to either prohibit questioning of a jury about insurance, or place specific parameters around the same. The risk of prejudice is too high to create a blanket rule in this regard. Clearly, the courts of Idaho have recognized this risk, per Idaho Rule 411, and the ensuing case law interpreting the same and prohibiting evidence the defendant is insured. *See e.g. See e.g. Loza v. Arroyo Dairy,* 137 Idaho 764, 766-67, 53 P.3d 347, 349-50 (2002).

Defendant submits the *Harris* court's ruling in this regard, which preserves this issue for the trial court's discretion, is the proper rule of law.

It should be noted, many courts in other jurisdictions have ruled any mention of insurance during voir dire is prejudicial error and grounds for mistrial or reversal. *See e.g. Maness v. Bullins*, 198 S.E.2d 752, 752-53 (Ct.N.C. 1973) (ruled that plaintiff's question to panel whether any member felt his liability rates would increase if he returned a verdict "could only be calculated to instill in the minds of the jurors that defendants have adequate liability

insurance…" and was prejudicial); *Speet v. Bacaj*, 377 S.E.2d 397, 398 (Va. 1989) (upholding trial court's denial of motion by plaintiff to inquire about insurance crisis); *Brockett v. Tice*, 445 S.W.2d 20 (Tex. 1969) (ruling questions whether jurors had any connection with insurance company, and whether jurors believed a verdict in that case would affect their insurance rates were to deliberately and knowingly asked to convey impression defendant had insurance); *Murrell v. Spillman*, 442 S.W.2d 590 (Ct.App.Ky. 1969) (upholding trial court's ruling prohibiting questions regarding advertising by insurance companies regarding the impact of large verdicts); *Russo v. Birrenkott*, 770 P.2d 1335 (Ct.App.Colo.1988) (upholding ruling of trial court prohibiting inquiry by plaintiff of jurors regarding newspaper articles about jury verdicts being too high because such articles are usually related to tort insurance reform). *See also*, *A.J. Miller Trucking Co. v. Wood,* 474 S.W.2d 763 (Texas 1971); *Garcia v. Estate of Wilkinson*, 800 P.2d 1380 (Ct.App.Colo. 1990).

In *Langley v. Turner's Exp. Inc.*, 375 F.2d 296 (4th Cir. 1967), the court summed the situation up best when it stated the trial court must balance the competing interests of the parties, and ruled the balance weighs in favor of not having the jury award damages without fault because it was aware there were insurance proceeds available:

> We must strike a balance between the probability of danger to plaintiffs that someone sympathetic to insurance companies may remain on the jury and the danger to the defendant that the jury may award damages without fault if aware that there is insurance coverage to pay the verdict. We think the latter danger is the greater than is the former.

Id. at 297.

Finally, plaintiff attempts to argue his own motion to strike a juror for cause shows support for his position. As defendant has already argued, plaintiff cannot invite error, and then use it as support for his position. *State v. Gleason*, 123 Idaho 62, 66, 844 P.2d 691, 695 (1992).

Doing so constitutes invited error, and is not permitted. *Id.* A party may not successfully complain of errors that he or she has acquiesced in or invited. *State v. Owsley*, 105 Idaho 836, 838, 673 P.2d 436, 438 (1983), citing *Walling v. Walling,* 36 Idaho 710, 214 P. 218 (1923). Errors which are consented to, acquiesced in, or invited are not reversible. *Id.*, citing *Frank v. Frank,* 47 Idaho 217, 273 P. 943 (1929).

During jury selection, juror Sarah Hix stated she worked for Allstate Insurance. Tr. p. 71, LL. 21-24. At the close of voir dire, plaintiff's counsel requested Ms. Hix and another juror be dismissed for cause, and they were excused for cause. Tr. p. 101, L. 24 through p. 102, L. 18. Plaintiff's counsel made the motion, defense counsel did not object, and the trial court promptly removed these two jurors from the panel. *Id.* Plaintiff did not have to use any peremptory challenges, so plaintiff was not prejudiced, and cannot show the jury panel that heard the evidence in this matter was biased.

In *State v. Ramos*, 119 Idaho 568, 569, 808 P.2d 1313, 1314 (1991), the trial court denied the criminal defendant's challenge for cause of an allegedly substantially impaired juror. Ultimately, the defendant used one of his peremptory challenges to excuse the subject juror from the jury panel. *Id.* The defendant argued he was prejudiced, and specifically relied upon the holding in *State v. Dickens*, 68 Idaho 173, 191 P.2d 364 (1948), for the premise his right to exercise his full complement of peremptory challenges was impaired since he was forced to use one of his peremptory challenges to remove said juror, thus warranting reversal. *Id.*

However, the *Ramos* court relied upon its holding in *State v. Wozniak*, 94 Idaho 312, 486 P.2d 1025 (1971) to implicitly overrule the statement in *Dickens, supra*. *Id.*, 119 Idaho at 570, 808 P.2d at 1315. In *Ramos*, this Court determined the defendant failed to show he was prejudiced by being required to use a peremptory challenge to remove the subject juror. *Id.*

Furthermore, this Court held the defendant did not demonstrate, nor even suggest, any of the other jurors remaining on the panel were biased or not impartial. *Id.* The Court ruled if there was any error, it was harmless. *Id.*[16] In the present case, the court excused Ms. Hix for cause, on plaintiff's unopposed request. Plaintiff did not even have to use a peremptory challenge to excuse Ms. Hix. Any claim that the jury was not impartial must focus on the jurors who actually sat on the jury. *Ramos, supra.* Plaintiff has not demonstrated, or suggested, any of the other jurors remaining on the panel were biased or not impartial. *Ramos, supra.* Plaintiff did not challenge for cause any of the jurors who ultimately sat on the jury. Plaintiff passed the rest of the jury for cause and cannot show any bias or prejudice of a sitting juror. Tr. p. 101, L. 24 through p. 102, L. 18.

The sitting jury in this case was impartial, Ms. Hix was not on the jury, and thus, plaintiff did not suffer any prejudice.

Again, plaintiff on appeal argues, for the first time, new arguments that were never before Judge Anderson during the hearing on defendant's motion in limine. Defendant submits Judge Anderson listened to plaintiff's objections, and assured himself and counsel that plaintiff's concerns were alleviated via the jury questionnaire. Judge Anderson's decision was within the bounds of discretion and should not be overturned on appeal.

IV.
MATTHEW ROBERTS IS ENTITLED TO ATTORNEY'S FEES ON APPEAL

Matthew Roberts submits he is entitled to attorney's fees pursuant to Idaho Code §12-121 and Idaho Rule of Civil Procedure 54(e)(1), which provide that fees may be awarded by the court when it finds the case was brought or pursued frivolously, unreasonably or without foundation.

[16] See *supra* for case law regarding harmless error.

Despite the clear and unambiguous law, and the jury verdict in favor of Matthew Roberts, the lawsuit filed by plaintiff has continued to the appellate level. Matthew Roberts has been required to continue to defend this matter.

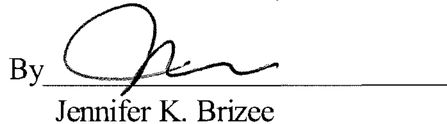
The law of Idaho is clear on the issues involved, plaintiff's position is not supported by Idaho law, and plaintiff's position did not include any argument or support for a change in Idaho law. Therefore, the continued pursuit of this matter to the appellate level was frivolous, unreasonable and without foundation. This is sufficient grounds for recovery of costs and fees. Nevertheless, Matthew Roberts submits he will be the prevailing party on appeal, and, therefore, is also entitled to costs and fees on appeal.

CONCLUSION

Based upon the foregoing, Matthew Roberts respectfully requests the rulings of the trial court in this matter now challenged by plaintiff on appeal be affirmed, in all respects.

DATED this 23rd day of March, 2012.

POWERS TOLMAN, PLLC



By______________________
Jennifer K. Brizee

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2012, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served by the method indicated below, to the following:

Brent Gordon
GORDON LAW FIRM, INC.
477 Shoup Ave., Suite 101
Idaho Falls, ID 83402

☒ First Class Mail
☐ Hand Delivered
☐ Facsimile
☐ Overnight Mail

____
Jennifer K. Brizee