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Zylstra v. State Respondent's Brief 1 Dckt. 41421

IN THE SUPREME COURT FOR THE STATE OF IDAHO

SAMUEL J. ZYLSTRA, **Plaintiff-Appellant-Cross Respondent,** **vs.** **STATE OF IDAHO, BOISE STATE UNIVERSITY,** **Defendants-Respondents-Cross Appellants.**	Supreme Court Case No. 41421 **Ada County District** **Case No. CV PI 1203319** **RESPONDENTS/CROSS-APPELLANTS STATE OF IDAHO, BOISE STATE UNIVERSITY'S RESPONSE BRIEF**

RESPONDENT/CROSS-APPELLANTS STATE OF IDAHO, BOISE STATE UNIVERSITY'S RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE HONORABLE CHERIE COPSEY, PRESIDING DISTRICT JUDGE

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I. COURSE OF PROCEEDINGS

Boise State University adopts, by reference, its statement of the Course of Proceedings set forth in the Respondent/Cross-Appellant's Brief in Support of Cross-Appeal.

II. STATEMENT OF FACTS

Boise State University adopts, by reference, the Statement of Facts set forth in the Respondent/Cross-Appellant's Brief in Support of Cross-Appeal.

III. ADDITIONAL ISSUES PRESENTED ON CROSS APPEAL

1. Zylstra has waived any argument the district court erred when it concluded that medical testimony was necessary to establish causation in order to avoid BSU's Motion for Summary Judgment.

2. Zylstra has waived any argument the district court erred when it granted, in part, the BSU Motion to Strike portions of the affidavits of Stephanie Zylstra, Helen Zylstra, Jeff Dolifka and Dale Dolifka.

3. Zylstra has waived any argument that, after the district court granted, in part, BSU's Motion to Strike, the remaining record established an issue of material fact sufficient to avoid summary judgment.

IV. STANDARD OF REVIEW

When reviewing a decision to strike affidavit testimony on evidentiary grounds offered in connection with a motion for summary judgment, the trial court's evidentiary ruling is reviewed for an abuse of discretion. ***See AED, Inc. v. KDC Investments, LLC***, 155 Idaho 159, 307 P.3d 176 (2013); ***Gem State Ins. Co. v. Hutchison***, 145 Idaho 10, 175 P.3d 172 (2007). The appellant must demonstrate the trial court abused its discretion and that its error affected a substantial right. ***See Hurtado v. Land O'Lakes, Inc.***, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012). The

admissibility of expert testimony offered in connection with a motion for summary judgment is committed to the discretion of the trial court. ***Athay v. Stacey***, 142 Idaho 360, 366, 128 P.3d 897, 903 (2005). If the trial court's discretion is affected by an error of law, the appellate court "is to note the error made and remand the case for appropriate findings." ***Gem State Ins. Co. v. Hutchison***, 145 Idaho at 16.

V. ARGUMENT

A. Any Arguments Challenging Portions Of The District Court's Ruling That are Not Set Forth in Zylstra's Opening Brief Are Waived.

Under the Idaho Rules of Appellate Procedure, the appellant's opening brief must include a statement of the issues presented on appeal, and an argument. ***See I.A.R. 35(a)(4)*** and ***(6)***. The argument section must identify the legal issues to be considered and provide statutory or case authority supporting the issues the appellant feels the appellate court should consider. ***See I.A.R. 35(a)(6)***. The appellate courts will not consider any issue which is not supported by propositions of law, authority, or argument. ***See Taylor v. Browning***, 129 Idaho 483, 490, 927 P.2d 873, 880 (1996); ***Thomas v. Medical Center Physicians, P.A.***, 138 Idaho 200, 205–206, 61 P.3d 557, 562-563 (2001); ***Gem State Ins. Co. v. Hutchison***, 145 Idaho 10, 16, 175 P.3d 172, 178 (2007) . The failure to raise legal issues in an appellant's opening brief will preclude the appellate courts from addressing those matters. ***See Sun Valley Shopping Center, Inc. v. Idaho Power Co.***, 119 Idaho 87, 803 P.2d 993 (1991); ***State v. Killinger***, 126 Idaho 737, 740, 890 P.2d 323, 326 (1995); ***State v. Raudebaugh***, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993). The Supreme Court will not consider issues raised for the first time in the reply brief. ***Id.***

The district court made three significant rulings that are not challenged in Zylstra's opening brief. First, the court ruled that, as part of his *prima facie* case, Zylstra was required to

present expert medical testimony establishing his injuries were caused by the decision of the BSU athletic staff to allow him to continue participating in the PAC-10 Tournament after he was injured in his first match. Tr. Vol. I, p. 109, L. 9; p. 111, L.22. Second, the district court granted, in part, BSU's Motion to Strike the affidavits of lay witnesses, Stephanie Zylstra, Helen Zylstra, Jeff Dolifka, and Dale Dolifka. Tr. Vol. I, p. 72, L. 22; p. 80, L. 8; R. Vol. I, p. 730-731. Third, after granting, in part, BSU's Motion to Strike, the district court ruled the record did not establish a disputed issue of material fact concerning whether Zylstra's injuries and damages were caused by his continued participation in the PAC-10 Tournament after he was initially injured. Tr. Vol. I, p. 111, L. 23, p. 115, L. 16; R. Vol. I, p. 733.

Lacking in Zylstra's opening appellate brief is any argument that he was not required to establish causation through medical testimony. Additionally, Zylstra's opening brief fails to challenge the portions of the trial court's ruling striking, in part, the affidavits of Stephanie Zylstra, Helen Zylstra, Jeff Dolifka, and Dale Dolifka. Finally, Zylstra's opening brief does not discuss, or dispute that, in the absence of the affidavits of Drs. Epperson and Brzusek, the record does not create an issue of material fact that his injuries were caused by the decision to allow him to continue wrestling in the tournament after he suffered his initial concussion.

Any argument that the district court's rulings on these three issues was erroneous is, at this point, waived and cannot be raised in Zylstra's reply brief. ***See Thomas v. Medical Center Physicians, P.A.***, 138 Idaho 200, 205–206, 61 P.3d 557, 562-563 (2001). Accordingly, the only remaining issue is whether the district court abused its discretion when it struck the affidavits of Drs. Epperson and Brzusek. If the trial court did not abuse its discretion in that regard, its ruling granting BSU's motion for summary judgment must be affirmed.

B. The District Court Did Not Abuse Its Discretion When It Struck the Affidavits of Dr. Epperson and Dr. Brzusek.

On June 4, 2013, BSU filed its motion for summary judgment, R. Vol. I, p. 154-156, 437-455. The motion was filed on the deadline established by the district court for filing dispositive motions. R. Vol. I, p. 21-24. Zylstra's response included the affidavits of Drs. Brzusek and Epperson. R. Vol. I, p. 508-538 and 539-554. BSU then filed a motion to strike arguing the affidavits of the two experts offered opinion testimony that had not been previously disclosed despite the fact those opinions had been requested through written discovery. R. Vol. I, p. 562-563. The district court agreed and granted BSU's motion. Tr. Vol. I, p. 56, L.8; p. 72, L. 21, R. Vol. I, p. 730.

1. Legal standard governing admissibility of evidence in summary judgment proceedings.

Affidavits offered in connection with a motion for summary judgment are governed by IRCP 56(e). The Rule requires affidavits contain testimony that would be admissible as if the affiant were testifying at trial. ***See Carnell v. Barker Management, Inc.***, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002); ***Gem State Ins. Co. v. Hutchinson***, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007). A trial court's determination of the admissibility of testimony offered in connection with a motion for summary judgment is reviewed for an abuse of discretion. ***See Gem State Insurance Co.***, 145 Idaho at 14-15; ***see also Hopper v. Swinnerton***, 2013 WL 6198245 (November 26, 2013). If affidavits are challenged, the trial court "must first make a threshold determination as to the admissibility of the evidence 'before proceeding to the ultimate issue, whether summary judgment is appropriate.'" ***Gem State Insurance Co. v. Hutchinson***, 145 Idaho at 14. The decision "to exclude undisclosed expert testimony pursuant to I.R.C.P. 26

(e)(4) is committed to the sound discretion of the trial court." ***Schmechel v. Dille***, 148 Idaho 176, 180, 219 P.3d 1192, 1196 (2009).

To determine whether a district court has abused its discretion, this Court asks:

> (1) Whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

See Sirius LC v. Erickson, 150 Idaho 80, 87, 244 P.3d 224, 231 (2010); ***Sun Valley Shopping Center, Inc. v. Idaho Power Co.***, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). In this case, the district court granted BSU's motion to strike the Brzusek and Epperson affidavits because Zylstra was offering expert opinion testimony that had not been previously disclosed. Tr. Vol. I, p. 56, L. 8; p. 72, L. 21. The court advised counsel for Zylstra that its ruling was not a sanction. Tr. Vol. I, p. 160, L.16-25. Instead, the court was addressing a motion to strike brought pursuant to IRCP 56(e) and determining whether the disputed evidence was admissible.

In ***Hopper v. Swinnerton***, supra, this Court considered whether a trial court had abused its discretion when it struck an untimely affidavit. The trial court's ruling was affirmed because it recognized the issue as one of discretion and "applied the correct legal standards because it analyzed the admissibility of the affidavits under IRCP 56(e)". ***Id.*** at *4. "[B]ecause the district court correctly identified [the] evidentiary decisions as calling for the exercise of its discretion, acted within the boundaries of its discretion and consistent with applicable legal standards, and reached its decisions by an exercise of reason, it did not abuse its discretion in striking" the offending affidavits. ***Id.***

2. Factors considered by the District Court when it struck the affidavits of Brzusek and Epperson.

On July 23, 2012, Zylstra provided answers to BSU's First Set of Interrogatories and Requests for Production of Documents. R. Vol. I, p. 50, 57-58. Interrogatory No. 4 and Request for Production No. 1 asked Zylstra to identify experts who would testify at trial. Zylstra was asked to "state the subject matter on which each expert is expected to testify, the substance of the facts the expert has reviewed and is relying upon, and any and all opinions to which the expert is expected to testify." R. Vol. I, p. 57. Zylstra was also asked to produce copies of the expert's current curriculum vitae, copies of materials the experts had reviewed in connection with the litigation and, all reports and draft reports they had authored. R. Vol. I, p. 58. Other than the report of Dr. Epperson, no other expert reports or materials were identified or produced prior to the filing of the BSU motion for summary judgment. ***Id.***

On April 8, 2013, almost a year after answering BSU's written discovery Zylstra submitted his expert disclosures as required by the court's scheduling order. R. Vol. I, p, 23; 61-120. Dr. Brzusek was identified as an expert witness. ***Id.*** The disclosure identified areas of potential testimony for Epperson and Brzusek but, failed to describe any specific opinions addressing medical causation. R. Vol. I, p. 62-63.[1] On April 10, 2013, counsel for BSU communicated with Zylstra's attorney outlining deficiencies in plaintiff's answers to discovery relating to expert witnesses and the fact the expert disclosure failed to disclose the actual opinions that would be offered by the various expert witnesses at trial. R. Vol. I, p. 126-127.

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[1] Zylstra had produced the Epperson report. R. Vol. I, p. 58. However, the report did not offer an opinion on medical causation and stated more information was needed to determine whether Zylstra suffered additional injuries by continuing to participate in the tournament. R. Vol. I, p. 64; **see also** § C(1), infra.

Counsel responded stating "I do not agree with you that there is an obligation to provide full opinions and supporting materials by the deadline for disclosure of expert opinions." R. Vol. I, p. 129. Thereafter, on April 12, 2013, BSU filed a motion to compel. R. Vol. I., p. 39.

At the May 9, 2013, hearing, BSU argued that Zylstra's expert disclosures and answers to discovery were inadequate because he had refused to provide the actual opinions to which his expert witnesses would testify at trial. Tr. Vol. I, p. 18, L. 1-17. The motion was not limited to Drs. Brzusek and Epperson. ***Id.*** The trial court agreed stating:

> THE COURT: Well, if what you're referring to – and I'm looking at the plaintiff's list of experts, for example, that was attached to your affidavit. If what you're referring to is what they essentially said here are categories they're going to testify to, then I would agree with you, Mr. Collaer, that's not sufficient and doesn't answer Interrogatory No. 4, nor does it respond to Request for Production No. 1, that in this case you can't just say here's the general subject matter. You've got to disclose the actual opinions they're going to testify to, otherwise there's no point in having your – there's nothing for your experts to respond to. And if that's what you're talking about, than I would tend to agree with you.

Tr. Vol. I, p. 18, L. 18 - p. 19, L.8. (emphasis added) Addressing the deficiency of the Brzusek disclosure, the district court stated:

> THE COURT: Well, I – you know, with due respect, I'm looking at the responses here on the plaintiff's list of experts and I don't think you can avoid providing the material by simply saying, well, they're not really experts, they are – they are treating physicians. Because, for example.
>
> ...
>
> THE COURT: For - because I'm going to give you an example. For example, you have a treating physician, Dr. Eggers, and he - what you say is he can testify regarding his diagnosis, causation of the condition, appropriateness of treatment and future treatment and prognosis. Now, clearly he can talk about future treatment. He can talk about what he did. What he can't do is talk about causation because that's expert opinion.

...

> But if you're going to be talking about causation or you're talking about things like - if he's going to talk about issues related to concussions in general, post-concussive symptoms, there's - you're really walking a very fine line and you may find yourself here at trial up a creek. And so I think that's something you need to think about.

Tr. Vol. I, p. 19, L. 22 - p. 22, L. 3. The court concluded by warning Zylstra:

> THE COURT: Okay. Well, that's a possibility, but I will warn you that in the cases that I've had before, one of the things that happens is that they – there's not a timely supplementation and that's determined because you look at the dates that reports are received and things like that, then you still run the risk that something could be excluded.
>
> So I guess what I'm saying to all parties here is remember the purposes behind the rules is to provide a mechanism to insure that discovery is robust and that neither party goes into a trial with a hood over their eyes unless it's a hood of their own making. I think that's what I was trying to tell Mr. Collaer is the way I read the Idaho rules whereas the federal rules now basically put all the burden on the parties to disclose without any action on the part of a party. I don't think the Idaho rules have gone that far. And I think - .

Tr. Vol. I, p. 22, L.14 - p. 23, L.8. (emphasis added)

BSU then posed the hypothetical situation where an element of the plaintiff's prima facie case required expert testimony and, until a motion for summary judgment was filed at the dispositive motion deadline, the plaintiff had failed to disclose expert opinions needed to support their claim. BSU suggested that scenario would cause the defendant to file a motion to strike expert opinions disclosed for the first time to oppose the motion for summary judgment. Tr. Vol. I, p. 24, L.10-24. The trial court responded stating:

> THE COURT: Well, I'll tell you the way I see this. I'm not going to rule in a vacuum. I'm probably fairly well known as being pretty strict with the rules and pretty strict with the pre-trial orders.

> It would be an extraordinary situation for me to allow someone close to trial to change the opinions such that it would prejudice the other side.
>
> So, I guess, that's the only way – I can't tell you that it's necessarily going to be granted, but I can tell you that I'm not afraid of granting it. So - but I can't rule in a vacuum because I don't know what the circumstances are.
>
> And the reason I'm saying that is that I have had an occasion where new – a new medical problem arose subsequent to discovery. So I'm not going to say, well, that's just tough. That's – it may result in the trial being changed if that were to occur. But – so I'm not going to give you a ruling in advance.
>
> If that occurs – if your scenario occurs, I can assure you that I do believe in enforcing the rules, so -

Tr. Vol. I, p. 24, L. 25 - p. 25, L.22.

Following the motion to compel hearing, the parties continued with discovery and preparing for trial. Despite the hypothetical posed by BSU at the May 9, 2013, hearing and, the warning the trial court provided to Zylstra that his expert disclosures were not adequate, Zylstra did not supplement his answers to discovery or his expert disclosures prior to the discovery cut-off or the dispositive motion deadline. BSU filed its motion for summary judgment on June 4, 2013, the date established as the deadline for dispositive motions. R. Vol. I, p. 22 and 154. The affidavits of Epperson and Brzusek provided new opinions addressing the critical issue of medical causation. R. Vol. I, p. 511-513 and p. 543-544. The trial court concluded the affidavits contained new opinions, Tr. Vol. I, p. 60, L. 4 - p. 66, L. 15; and explained why the new opinions were untimely. Tr. Vol. I, p. 66, L.16 - p. 72, L.21.

During the summary judgment hearing, Zylstra did not offer an excuse for his failure to provide earlier supplementation. Instead, he argued his prior disclosures were adequate because they placed BSU on notice that more detailed opinions would be developed and offered at trial.

Tr. Vol. I, p. 40, L.22 – 25; p. 80, L. 17-22. This argument was rejected with the trial court stating that notice through the identification of general subject matters was insufficient as Zylstra was required, by the court's scheduling order and the Idaho Rules of Civil Procedure, to provide the experts' actual opinions. Tr. Vol. I, p. 80, L.23 – p. 81, L.11. This ruling mirrored the courts prior comments and warnings it provided at the May 9, 2013 hearing. Tr. Vol. I, p. 18, L. 18 - p. 19, L.8. Addressing the Zylstra's failure to timely supplement his disclosures, the court wrote:

> There is no excuse. Brzusek only met Zylstra and his wife six days after summary judgment was filed, six days after discovery was then to have been initiated and more than two weeks after rebuttal experts should have been disclosed and his opinion was disclosed for the first time after discovery had been...had been completed. These opinions were not seasonably supplemented.

Tr. Vol. I, p. 67, L.16-24.

Addressing the opinions of Dr. Epperson, the court wrote:

> In addition, in the face of an express warning issued by this Court, at this point the plaintiff had an opportunity to immediately seasonably supplement those. The information upon which Dr. Epperson relied could have been looked at and immediately have an update of his expert opinion. That did not happen. They could have - if they had thought that Mr.-Dr.- I can't remember his name – Brzusek was appropriate, he could have immediately had an examination and supplemented that. Neither thing was done. Instead, the plaintiff waited until the motion was filed and at that time sprang new and different opinions on the plaintiff. [sic] For that reason, I strike both affidavits.

Tr. Vol. I, p. 72, L. 7-21.

The trial court's comments demonstrate it reached the decision to strike the offending affidavits through an exercise of reason. The court described the deficiencies in the contents of the affidavits, the circumstances surrounding both of the experts developing new previously undisclosed opinions and, why the disclosure of those new opinions after BSU's motion for

summary judgment had been filed was untimely and, without legal excuse. The district court clearly recognized its ability to grant the motion to strike was within its discretion. It reached its decision by an exercise of reason and consistent with the applicable legal standards.

3. The District Court's ruling was consistent with applicable legal standards.

The determination of whether an affidavit that is filed in connection with a motion for summary judgment is admissible is a threshold question the trial court must address before determining whether an issue of fact exists in the record. ***See Hopper v. Swinnerton***, supra, *citing* ***JUB Engineers vs. SCC Insurance Co. of Hartford***, 146 Idaho 311, 314-315, 193 P.3d 858, 861-862 (2008). In ***Carnell vs. Barker Management, Inc.***, 137 Idaho 322, 48 P.3d 651 (2002) the trial court struck an affidavit offered to oppose a motion for summary judgment on evidentiary and procedural grounds. Prior to the summary judgment proceedings, the district court had granted plaintiff's motion seeking permission to depose a non-witness expert who had removed evidence from the scene of the fire. The plaintiff's motion was supported by the affidavit of a retained expert, George Bidstrup, who testified "to determine the cause of the fire and render an opinion on the fire's origin, he needed to speak to the person who had removed crucial evidence from the situs of the fire." ***Id.*** at 326. Thereafter, plaintiff's never conducted the depositions authorized by the court or, made arrangements to meet with the witnesses. ***Id.***

To oppose the defendant's motion for summary judgment, the plaintiff provided a second affidavit of Mr. Bidstrup containing opinion testimony addressing the origin of the fire and, establishing causation. This affidavit was stricken on evidentiary grounds in addition to the fact Mr. Bidstrup had not been disclosed as an expert witness in violation of the court's scheduling order. ***Id.*** at 326.

On appeal, Carnell argued the defendants "were aware of appellant's intention to use Bidstrup as an expert, so no prejudice resulted from untimely disclosure." ***Id.*** at 327. Carnell also argued the trial court should have altered the scheduling order and allowed her to identify Bidstrup as a retained expert after the defendants filed their motion for summary judgment challenging causation. These arguments were rejected with this Court concluding the trial court had not abused its discretion when it struck the second Bidstrup affidavit after providing the plaintiffs "[t]ime extensions to obtain expert testimony, ordered physical evidence removed from the fire situs to be given to appellants for their California expert to analyze, and granted appellants' permission to depose Itchon, a non-witness expert." ***Id.*** at 328. Despite these accommodations, the plaintiff never conducted the requested discovery and, never disclosed a causation expert. The suggestion the trial court should have extended the time to allow plaintiff to supplement the Bidstrup affidavit was rejected with this Court reasoning "[t]he appellants had ample notice of the hearing and knew what was required of them to survive the summary judgment motions." ***Id.*** at 329. In the absence of the second Bidstrup affidavit, the plaintiff could not create an issue of fact concerning the issue of causation. ***Id.*** at 328.

In this case, the district court engaged in a very similar analysis. At the May 9, 2013, hearing, Zylstra was warned that his expert disclosures and answers to interrogatories and requests for production of documents were deficient. Tr. Vol. I, p. 18, L.18 - p. 19, L.8. He was specifically told that identifying the general subjects upon which his experts may ultimately offer opinions was not a sufficient response. ***Id.*** Despite having the benefit of the court's direction and warnings, Zylstra failed to supplement his expert disclosures or answers to written discovery to include opinions held by Drs. Epperson and Brzusek addressing the critical issue of medical causation. He also ignored the trial court's response to the hypothetical scenario posed by BSU

which clearly suggested a motion for summary judgment would be forthcoming and, that any undisclosed expert opinions offered to oppose the motion would cause BSU to file a motion to strike. Tr. Vol. I, p. 24, L.10 - p. 25, L. 22.

Because Zylstra failed to supplement his expert disclosures, the hypothetical scenario posed by BSU at the May 9, 2013, hearing became a reality. BSU's motion, like the dispositive motion at issue in ***Carnell v. Barker Management, Inc.***, supra, alleged the defendant's actions did not cause the plaintiff's injuries. BSU further argued Zylstra was required to prove causation with expert testimony. R. Vol. I, p. 451-454. After BSU's motion was filed, Zylstra was seen, for the first time, by Dr. Brzusek. R. Vol. I, p. 510 (Brzusek Aff ¶5). Additionally, Dr. Epperson was provided new information to review and was asked to provide opinions on the issue of causation, which were not included in his earlier report. Tr. Vol. I, p. 61, L.19 - p. 62, L.18; R. Vol. I, p. 542 (Epperson Aff ¶8 and 9). ***See also*** § C(1), infra.

Consistent with its comments during the May 9, 2013 hearing, the trial court granted BSU's motion to strike the Epperson and Brzusek affidavits. R. Vol. I, p. 730, Tr. Vol. I, p. 71, L. 1 - p. 72, L.21. The reasoning the court provided is analogous to the approach taken by the trial court in ***Carnell v Barker Management, Inc.*** where, despite the fact the challenged expert had filed an earlier affidavit and it was unquestioned the defendants were aware that he would, at some time, offer expert testimony on the issue of causation, the plaintiff was not relieved from the obligation to disclose the expert and his opinions as required by the court's scheduling order and, the Idaho Rules of Civil Procedure. ***See*** 137 Idaho at 328.[2] The fact BSU was advised that

[2] The trial court in ***Carnell*** also ruled the opinions in the expert affidavit suffered evidentiary deficiencies which provided an alternative basis for striking the affidavit. ***See*** 137 Idaho at 326. This Court concluded the evidentiary issues were "immaterial because the appellants never

Drs. Epperson and Brzusek may, at some time in the undisclosed future, develop opinions on the issue of causation did not relieve Zylstra from his obligation to disclose the actual opinions of his expert witnesses. ***See*** IRCP 26(b)(4). In fact, neither expert was asked to address the causation issue until after BSU filed its motion for summary judgment.[3]

At the October 10, 2013 hearing addressing the motion for reconsideration, Zylstra admitted that, when the expert disclosures were originally filed, he was aware supplementation was needed. His counsel advised the court: "Dr. Epperson is expected to testify that allowing Mr. Zylstra to continue wrestling after his initial head injury caused additional damage and the point was, yes, we need to amplify that." Tr. Vol. I, p. 137, L. 13-17. Counsel acknowledged the obligation to supplement plaintiffs' disclosures by stating they were: "obligated to provide more information in due course, which we were planning to do as soon as Dr. Brzusek had his meeting with Mr. Zylstra." Tr. Vol. I, p. 137, L. 21-24. These statements are an admission Zylstra was aware of the medical causation issues in early April, 2013, and that expert testimony would be required to establish a prima facia case of negligence. Clearly, Zylstra "knew what was required...to survive the summary judgment motions." ***See Carnell***, 137 Idaho at 329. The fact the experts were not asked to provide opinions addressing causation until after BSU's motion for summary judgment was filed confirms the trial court's ruling there was no reason the opinions could not have been developed and disclosed earlier. Tr. Vol. I, p. 67, L. 16-24; p. 72 L. 7-21.

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disclosed Bidstrup as an expert witness in violation of the district court's scheduling order". ***Id.*** at 328.

[3] Dr. Brzusek did not meet with Zylstra and, therefore, did not have a factual basis to opine on the causation issue, until after the motion for summary judgment was filed. R. Vol. I, p. 510. Dr. Epperson, in his affidavit, admits he was not asked to offer an opinion on medical causation or, whether Zylstra was "insane" for purposes of tolling the notice of claim requirements, until after the BSU motion was filed. R. Vol. I, p. 542 (Epperson affidavit, ¶9).

In ***Edmunds v. Kraner***, 142 Idaho 867, 136 P.3d 338 (2006) this Court addressed the question of when the supplementation of an expert opinion is "seasonable" as required by IRCP 26(e)(1)(B). Trial courts were instructed to ask "was the opposing party *given an opportunity for full cross-examination*?" ***Id.*** at 346 (emphasis in original). In ***Edmunds***, the defendant, St. Alphonsus Regional Medical Center filed a motion for summary judgment. The plaintiff filed affidavits of Drs. Rotschafer and Hollander to oppose the motion. These affidavits were filed eight months prior to trial. The affidavit of Dr. Rotschafer was stricken because he had not been identified as an expert witness as required by the scheduling order. This aspect of the trial court's ruling was affirmed. ***See*** 142 Idaho at 873. The decision to strike the Hollander affidavit was reversed because the doctor had been timely disclosed. The fact new opinions appeared in his affidavit did not, automatically, require their exclusion as IRCP 26(e)(1)(B) allows supplementation of previously disclosed expert opinions. ***See*** 142 Idaho at 345. This Court concluded the supplementation of Dr. Hollander's opinions through the challenged affidavit was "seasonable" because the updated opinions were provided eight months prior to trial. ***See*** 142 Idaho at 872.

In this case, the trial court found the Zylstra's supplementation was not seasonable. Tr. Vol. I, p. 70, L. 15 - p. 72, L. 21. Factors supporting the court's conclusions which establish its ruling was an appropriate exercise of discretion include the fact that Zylstra was warned, and was aware his expert disclosures required supplementation in May of 2013, long before discovery was to be concluded and, before the dispositive motion cut-off. The only reason new information was ever provided to Drs. Brzusek and Epperson to address the medical causation issue was the fact BSU filed its motion for summary judgment. At that point, the discovery deadline had lapsed and the deadline for dispositive motions had expired. R. Vol. I, p. 21 - 23.

In ***Edmunds v. Kraner***, the challenged supplementation occurred eight months prior to trial which also predated the dispositive motion deadline created by IRCP 56(b). In that case, the defendant was not denied the opportunity to cross-exam Dr. Hollander prior to having its motion for summary judgment considered. In this case, the late disclosure of Brzusek and Epperson's causation opinions prevented BSU from cross-examining those individuals or being able to challenge their opinions in connection with the motion for summary judgment. Additionally, as recognized by the trial court, if the untimely supplementation was allowed, the court would have been forced to vacate the trial. Tr. Vol. I, p. 71, L. 18 - p. 72, L. 21. Considering the lack of any credible explanation regarding why the expert opinions were not disclosed earlier, the trial court did not abuse its discretion when it concluded it would not vacate the trial and, that Zylstra had failed to seasonably supplement his answers to discovery as required by IRCP 26(e)(1)(B). This is the same situation which caused the expert affidavit in ***Carnell v. Barker Management, Inc.***, supra, to be stricken. ***See also Clark v. Raty***, 137 Idaho 343, 348, 48 P.3d 672, 677 (2002) (Trial did not abuse its discretion by excluding an expert witness's late-disclosed opinions where there was no legitimate explanation why the opinions were not disclosed earlier.)

Based upon the foregoing, and consistent with this Court's rulings in ***Hopper vs. Swinnerton***, supra, ***Carnell vs. Barker Management, Inc.***, supra, and ***Edmunds vs. Kraner,*** supra, the district court correctly identified the evidentiary issues raised by the late disclosure of the Brzusek and Epperson opinions and, acted within the boundaries of its discretion and consistent with applicable legal standards by striking those affidavits. For that reason, the district court's decision granting BSU's motion to strike the Brzusek and Epperson affidavits should be affirmed.

C. Arguments Raised by Appellant that are not Supported by the Record.

(1) Dr. Epperson's opinions on medical causation contained in his affidavit were "new" opinions.

Zylstra argues the opinions expressed by Drs. Epperson and Brzusek in their affidavits submitted in opposition to BSU's motion for summary judgment on July 1, 2013, were not "new." Appellant's Brief, p. 12-16. He claims there was prior disclosure of Dr. Epperson's opinions on causation. ***Id.*** This contention is not supported by the record. On April 8, 2013, Zylstra provided his List of Experts. R. Vol. I, p. 32-38. With respect to Dr. Epperson, Zylstra stated that a copy of his "comprehensive report" was provided to BSU on January 28, 2012, and that the doctor's testimony at trial "will be consistent with his report subject to modification based on evidence developed after his evaluation was performed." R. Vol. I, p. 35. As to causation, Zylstra's disclosure simply indicated Dr. Epperson was "expected to testify" that it was "likely" Zylstra suffered multiple lesser brain injuries during subsequent matches. ***Id.***

In his "comprehensive report," Dr. Epperson did not render a definitive opinion on causation, instead indicating additional information was needed to reach a conclusion on that point. R. Vol. I, p. 582-605. Dr. Epperson stated:

> He may have sustained additional concussions when he was put back into matches in a state of post-traumatic amnesia. Further information would be helpful, but prolonged post-traumatic amnesia for four months suggests the likelihood of subsequent concussions. The significant current brain dysfunction deficits also suggest more than one concussion.

R. Vol. I, p. 603 (emphasis added).

After discussing the neuropsychological testing, Epperson concluded that "these problems stem from his concussion or multiple concussions." R. Vol. I, p. 604 (emphasis

added). In other words, Dr. Epperson did not have an opinion regarding the critical causation issue. He could not distinguish between the initial concussion and possible subsequent concussions as causing Zylstra's alleged injuries or cognitive deficits.[4] This is the problem with Dr. Epperson's opinions that Zylstra fails to comprehend. The opinions in the Epperson report did not address the issue of medical causation. For that reason, the opinions expressed in Dr. Epperson's affidavit were substantially different than the opinions expressed in his report. ***See*** R. 543-544 and 603-604 .

After receiving Zylstra's List of Experts, BSU sent him a letter indicating the disclosures were inadequate because they did not contain a complete statement of all opinions to be expressed. R. Vol. I, p. 126-127. In response, Zylstra disagreed that he was obligated to provide full opinions at that time, stating his belief that the disclosures provided a clear picture of what he expected his experts to say, and stating that a "very detailed report from Dr. Epperson" had been provided. R. Vol. I, p. 129.

On April 12, 2013, BSU filed a motion to compel. R. Vol. I, p. 39-41. The subject of the motion was the adequacy of Zylstra's expert disclosures. In response, Zylstra submitted the affidavit of James Whitehead. R. Vol. I, p. 137-143. Mr. Whitehead testified that Dr. Epperson's opinions had been provided "in the form of a comprehensive 24 - page report." R. Vol. I, p. 140.

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[4] Lacking in either Drs. Epperson's or Brzusek's affidavits is any testimony stating Zylstra actually suffered additional concussions in his later wrestling matches. R. 511-512 and 542-543. Considering the video of the matches confirm he suffered no further blows to the head, R. 421 (Hoesch Aff. ¶2) highlights Dr. Epperson's statement that further information was needed to reach an opinion regarding whether further injuries occurred or whether the concussion Zylstra suffered in the first match was aggravated by his continued participation in the tournament. R. Vol. I, p. 603.

At the May 9, 2013 hearing, Zylstra stated that Dr. Epperson's report had already been provided along with everything else he had so far with respect to his experts. Tr. Vol. I, p. 16, L. 21-22; p. 19, L. 17-18. No supplementation was provided until Dr. Epperson's affidavit was submitted on July 1, 2013, in opposition to BSU's motion for summary judgment. R. Vol. I, p. 539-554. In his affidavit, Dr. Epperson opined for the first time that, "with [a] reasonable degree of neuropsychological and scientific probability...Sam suffered additional damage as a result of defendants' decision to allow him to continue wrestling after his first concussion." R. Vol. I, p. 543.[5] Dr. Epperson also opined, for the first time, that it was his opinion "again expressed with reasonable neuropsychological or scientific probability, that Sam's ability to evaluate his condition, and the extent and cause of his injuries, was compromised significantly, especially during the first three or four months after the wrestling tournament." R. Vol. I, p. 544. These opinions were not expressed in Dr. Epperson's report. R. Vol. I, p. 582-605. In his report, he did not, and because he needed further information, could not, differentiate between Zylstra's initial concussion or possible subsequent concussion(s) as the cause of his alleged cognitive deficits.[6] In contrast, in his affidavit, Dr. Epperson differentiated between the concussions and opined that the alleged subsequent concussions caused Zylstra's deficits which also rendered him

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[5] The suggestion Zylstra suffered additional injuries remains an incomplete and inadmissible opinion. The Epperson affidavit fails to identify what injuries the doctor is referencing or, whether those unidentified injuries were caused by allowing Zylstra to continue wrestling at the tournament. "Expert opinion that is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict and therefore is inadmissible." ***Weeks v. E. Idaho Health Serv.***, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2002). Dr. Epperson's new opinions concerning additional undescribed injuries are conclusory, lack foundation, and are therefore, inadmissible.

[6] The question of whether Zylstra has cognitive deficits is disputed in the report authored by Dr. Craig Beaver. R. Vol. I, p. 434; Aug R; 12/18/13, (Craig Beaver report).

unable to evaluate his condition for purposes of complying with the Idaho Tort Claims Act. These opinions were new and, were not disclosed prior to BSU's motion for summary judgment.

In opposition to BSU's motion to strike, Zylstra changed his characterization of Dr. Epperson's report. Instead of being a "comprehensive report" it became a "preliminary report" in which Dr. Epperson was not asked to express any opinions on the basis of reasonable medical or scientific probability. R. Vol. I, p. 620.[7] Zylstra also argued that the language in Dr. Epperson's report and Zylstra's List of Experts put BSU "on notice" that it was "likely" Dr. Epperson would testify, "if asked," that in his opinion, allowing Zylstra to continue wrestling after his initial concussion had caused additional damage. R. Vol. I, p. 620-621.

The Idaho Rules of Civil Procedure do not suggest that it is sufficient if an expert disclosure puts the opposing party "on notice" of what the experts opinions are likely to be "if asked." Pursuant to Rule 26(b)(4), parties are allowed to discover by interrogatory "a complete statement of all opinions to be expressed and the basis and reasons therefore." Zylstra's argument is also inconsistent with the holdings in ***Carnell v. Barker Management, Inc.***, supra. and ***Clark v. Raty***, supra. BSU was entitled to discover the actual opinions held by Dr. Epperson. While Zylstra's List of Experts stated that Dr. Epperson was expected to testify about causation, his disclosure and answers to written discovery did not identify those opinions. BSU was advised Dr. Epperson would testify consistent with his report. R. Vol I, p. 35. Dr. Epperson's report did not include the opinions expressed in his affidavit. Therefore, the opinions expressed in the affidavit were new and, as found by the district court, untimely.

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[7] On appeal, Zylstra reverts back to characterizing Dr. Epperson's report as an "extensive report" and "thorough report." Appellant's Br., p. 11 and 13.

(2) Dr. Brzusek's opinions on medical causation contained in his affidavit were "new" opinions.

Zylstra concedes that he did not have, and did not disclose, Dr. Brzusek's opinions on causation until after BSU filed its motion for summary judgment. Appellant's Br., p. 17. Instead, he argues that Dr. Brzusek's opinions were not "new" because they did not differ in any material respect from Dr. Epperson's opinions. *Id.*, p. 19. First, if Dr. Brzusek's opinions truly did not differ from Dr. Epperson's opinions in any material respect, then his opinions were cumulative and inadmissible on that basis. Second, a similar argument was discussed and rejected in ***Carnell v. Barker Management, Inc.,*** where the plaintiff argued the defendants were aware of the identity of their retained expert and, that the witness would eventually develop expert opinions addressing causation. ***See*** 137 Idaho at 327-328. ***See also*** § B(3), supra. Finally, Zylstra did not raise this argument before the trial court. Arguments raised for the first time on appeal will not be considered. ***See Patterson v. State, Dept. of Health and Welfare***, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011).

In opposition to BSU's motion to strike, Zylstra argued that "the salient opinions contained in Dr. Brzusek's affidavit, which defense counsel asserts had not been previously disclosed at all, had been disclosed on a April 8 and/or on April 29." R. Vol. I, p. 623. In support of his motion for continuance, Zylstra again argued that Dr. Brzusek was listed as an expert on April 8 and that list was supplemented on April 29. R. Vol. I, p. 720. At the October 10, 2013 hearing Zylstra also argued, for the first time, that "full disclosure" of scheduling problems with Dr. Brzusek was made to BSU during the May 9 motion to compel hearing, allegedly advising BSU and the trial court that Dr. Brzusek's opinions could not be

supplemented until after June 10, to which BSU did not object. Tr. Vol I, P. 121, L. 9 – p. 122 L.12. Neither of these statements are supported by the record. [8]

Zylstra's List of Experts identified Dr. Brzusek as an osteopath who "may be called to testify on issues of liability and damages..." R. Vol. I, p. 33. Further, it was expected that "if called," Dr. Brzusek would testify regarding the applicable standard of care and "may also testify regarding the likelihood that Plaintiff suffered additional injury during subsequent matches..." R. Vol. I, p. 34. Nothing further was provided regarding the doctor's opinions on causation until his affidavit was submitted in opposition to BSU's motion for summary judgment. R. Vol. I, p. 508-538. In Zylstra's brief, he argues that Dr. Brzusek's opinions were supplemented on April 29, 2013, to include the following disclosure regarding causation: "In particular he will testify that the medical literature confirms that allowing an athlete to return to competition before his brain injury has had time to recover can lead to multiple brain injuries, or death, that could have been avoided with proper rest." Appellant's Br., p. 28. Zylstra's supplemental list of experts provided on April 29, 2013, is not in the record. Nevertheless, the quoted language above, at most, discloses Dr. Brzusek's opinion regarding general causation. It is not an opinion regarding specific causation and whether returning to competition before his alleged brain injury had time to recover actually caused Zylstra's alleged cognitive deficits. That opinion was not disclosed until Zylstra submitted Dr. Brzusek's affidavit in opposition to BSU's motion for summary judgment.

[8] During the October 10, 2013 hearing the trial court advised counsel that is had listened to the recording of the May 9, 2012 hearing. Counsel was advised his alleged statements concerning Dr. Brzusek did not appear and there was nothing on the recording suggesting his alleged comments had been erased. Tr. Vol I, p. 144 L.18 – p. 145, L. 3.

In his affidavit, for the first time, Dr. Brzusek offered an opinion regarding specific causation. He testified:

> Accordingly, it is my opinion, expressed with reasonable medical certainty, that allowing Sam to continue wrestling immediately after the timeout and then for three matches later that day and the next, caused additional damage and prolonged his symptoms, based on the literature that reveals the damage that additional physical exertion can cause immediately after a concussive incident, and the statistical likelihood that Sam would have recovered fully if he had been pulled from the tournament and allowed to rest until his symptoms disappeared...

R. Vol. I, p. 512-513.

Since Plaintiff had not previously disclosed any of Dr. Brzusek's opinions regarding specific causation prior to submitting his affidavit, this opinion was clearly a "new" opinion.[9]

Furthermore, Zylstra never informed BSU that he was having any difficulty scheduling an appointment with Dr. Brzusek and, therefore, BSU never agreed or acquiesced in allowing Zylstra to supplement Dr. Brzusek's opinions after June 10, 2013. In fact, at the May 9, 2013, hearing on BSU's motion to compel, Zylstra represented that Dr. Brzusek was only a consulting expert which he may or may not call to testify. It was Dr. Heygyvary that Zylstra represented he was going to see in June. Counsel advised the court:

> Dr. Brzusek right as of now he is a consulting expert we may call. We did disclose some basic outlines of what he might testify to. Where our client is in Seattle this summer, you may see Dr. Brzusek. Dr. Brzusek is a physician in Bellevue. That actually – that's Dr. Brzusek. If Dr. Brzusek believes an examination is necessary, then it will be done and in which case we will timely supplement and provide that report. Dr. H-e-y-g-y-v-a-r-y – I won't try to pronounce that – is to see Mr. Zylstra in June of this

[9] Dr. Brzusek's reference to "additional damage", like the affidavit of Dr. Epperson, fails to describe the additional damage. This aspect of his affidavit is incomplete as it fails to fully disclose his opinions. Standing alone, his opinion on this issue is conclusory and inadmissible. ***See Weeks v. E. Idaho Health Serv.,*** supra.

> year in Seattle. And when that occurs we will then timely provide that report.

Tr. Vol. I, p. 16, L. 8-20.

Accordingly, as of May 9, it was still undecided whether Zylstra would ever see Dr. Brzusek or whether the doctor would be anything other than a consulting expert as opposed to a trial witness. Zylstra reiterated this point.

> And so what I'm saying is we have provided everything that we have so far. Dr. Brzusek, if he determines that he needs to see and examine him, there will be a supplementation which will include that report.

Tr. Vol. I, p. 19, L. 17-21.

Moreover, Zylstra made this same argument during the hearing on his motion for continuance. The trial court took a recess to listen to the recording of the May 9, 2013, hearing and informed Zylstra that no such representation occurred. Tr. Vol. I, p. 144, L. 18 – p. 145, L.3. Zylstra then expressed his concern the recording stopped early or otherwise did not pick up his comments. Tr. Vol. I, p. 162, L. 7 – p. 163, L. 6. The trial court specifically informed Zylstra that the recording actually continued into the next hearing and it was clearly stated that Dr. Brzusek was only a consulting expert who may or may not see Zylstra at some unspecified time that summer. Tr. Vol. I, p. 163, L. 7 – p. 164, L. 2. The transcript reflects the trial court's representation of the testimony during the motion to compel hearing. Yet, incredulously, Zylstra continues to argue he represented to the trial court and BSU during the May 9 hearing that Zylstra was set to see Dr. Brzusek on June 10, despite the fact the record is completely devoid of any support for that statement.

(3) Zylstra could not have reasonably believed that supplementing his expert's opinions after the dispositive motion deadline was timely.

Zylstra argues that since the trial court did not impose a deadline for supplementing his expert disclosures, his supplementation after BSU filed its motion for summary judgment was timely. Appellant's Br., p. 20-23. Based upon his belief it was understood Zylstra was to see Dr. Brzusek in June, "Sam's counsel decided it made sense, consistent with their understanding of 'seasonable supplementation,' to await Dr. Brzusek's written report before providing his opinion and further supplementation, as necessary, of their other experts' opinions." Appellant's Br., p. 20-21. This position was unreasonable in light of the discovery deadlines and the hypothetical BSU posed during the motion to compel hearing.

The trial court issued is Order Governing Proceedings and Setting Trial on July 13, 2012 ("Scheduling Order"). R. Vol. I, p. 21-25. The Scheduling Order set the trial to commence on September 30, 2013. R. Vol. I, p. 21. Plaintiff's expert disclosure deadline was 180 days before trial, or by April 3, 2013. R. Vol. I, p. 23. All discovery was to be initiated 120 days before trial, or by June 2, 2013. ***Id.*** Dispositive motions were to be filed so they could be argued 90 days before trial, or by July 2, 2013. R. Vol. I, p. 22. Since summary judgment motions needed to be heard by July 2, 2013, they needed to be filed by June 4, 2013, in order to comply with Idaho Rule of Civil Procedure 56(c).

At the May 9, 2013 motion to compel hearing, the trial court explained its interpretation of the interplay between IRCP 26(b)(4) and the expert disclosure deadline to mean a party is entitled to discover the information allowed under Rule 26(b)(4), but only if requested through an interrogatory, request for production, or deposition. Tr. Vol. I, p.11, L. 1 – p. 14, L. 16. The trial court further explained that the obligation to provide that information was a continuing

obligation that must be supplemented both before and after the expert disclosure deadline. ***Id.*** The trial court reviewed Zylstra's List of Experts and agreed they were insufficient to answer BSU's specific discovery requests seeking disclosure of the expert's opinions. Tr. Vol. I, p. 18, L. 18 – p. 19, L. 8. The trial court then indicated it would not rule on the motion to compel, but believed it put all parties on notice of how it interpreted and would apply the discovery and expert disclosure requirements. At that point, BSU posed the following hypothetical:

> MR. COLLAER: One question I have in clarification, Judge, is the issue that I have is – not to say it happens in this case, but it often does and it may come up in this case, is an issue the plaintiff's prima facie case will require expert testimony. And at the time of close of discovery and time for filing motions for summary judgment, when that time comes, if that opinion has not been disclosed, it would be my position – and I'd welcome your input on this – that if the motion is filed and it raises that point, a disclosure at that point to respond to the motion for summary judgment would engender a motion to strike, which I hope would be granted, and the record would be what it is.

Tr. Vol. 1, p. 24, L. 10-24.

It was clear by this hypothetical, that BSU was concerned Zylstra would fail to supplement his expert disclosures and/or discovery responses to disclose the actual opinions held by his experts prior to the dispositive motion deadline. The trial court indicated that while it would not rule in a vacuum, it would have to be an extraordinary situation for it to allow someone close to trial to change expert opinions such that it would prejudice the other side and it assured the parties that it would enforce the rules. Tr. Vol. I, p. 25, L. 1-22. This colloquy clearly advised and warned Zylstra that if he attempted to introduce new expert opinions regarding a prima facie element of his case after the close of discovery, and after BSU filed its motion for summary judgment, a motion to strike those opinions would be filed which the trial court would entertain absent an extraordinary situation. Considering discovery closed on June 2,

2013, and the last date for filing dispositive motions was June 4, 2013, it was unreasonable for Zylstra to believe that he could supplement his expert disclosures to introduce new and previously undisclosed opinions regarding causation after June 4, 2013.

(4) There was no "implicit agreement" to extend the deadline for Zylstra to disclose expert opinions

Unjustifiably, Zylstra argues there was an "implicit agreement" that discovery was ongoing, presumably to imply that there was an agreement that he could provide new expert opinions after the close of discovery. Appellant's Br., p. 19. He contends that communications between the parties persuaded him that additional discovery would be conducted. ***Id.*** While this contention is unsupported by the record, even if it were true, an agreement to conduct additional discovery does not equate to an agreement that he could disclose new opinions regarding causation after the close of discovery and after the summary judgment motion had been filed. Either way, Zylstra's claim does not stand up to scrutiny.

Zylstra only cites to one email communication as support for his contention of an implicit agreement. Appellant's Br., p. 19; R. Vol. I, p. 706. In that email, dated June 3, 2013, Zylstra simply states that "we need to discuss and make decisions about mediation and further discovery, particularly expert discovery." R. Vol. I, p. 706. While BSU's response to that email is not in the record, Zylstra acknowledges that it did not address the issue of further discovery. Appellant's Br., p. 19. Since that is the only communication relied upon by Zylstra, and BSU did not respond to it, it cannot stand for the proposition that there was an agreement between the parties, implicit or otherwise. This is especially true given the fact BSU filed its motion for summary judgment on June 4, 2013, the day after this email, arguing that Zylstra did not have the requisite medical opinions on causation to prove his prima facie case.

On July 12, 2013, BSU notified Zylstra that its liability expert had a conflict of interest and had to be withdrawn. R. Vol. I, p. 708. Zylstra argues that this is further evidence of an implicit agreement that expert discovery was ongoing. Appellant's Br., p. 19-20. However, Zylstra argues that he relied upon the alleged implicit agreement to justify disclosing his expert opinions on causation with his opposition to BSU's motion for summary judgment on July 1, 2013. Since BSU did not withdraw its liability expert until after Zylstra filed his opposition, he could not have relied upon that withdrawal when deciding to wait until filing his opposition to disclose his expert's new opinions.

Furthermore, Zylstra's claim of an implicit agreement becomes even more specious when considering BSU's attempts to obtain timely disclosure of his expert's opinions. Zylstra's expert disclosures were originally due on April 3, 2013. R. Vol. I, p. 23. The week prior, Zylstra requested an extension of time to disclose his experts, to which BSU indicated that it could not agree to a lengthy extension. R. Vol. I, p. 123. On April 2, 2013, Zylstra again requested an extension of time to disclose his experts. R. Vol. I, p. 123. BSU agreed to extend the disclosure deadline to April 8, 2013, and specifically indicated that "the expert disclosure must comply with IRCP 26(b)(4)." R. Vol. I, p. 122.

Zylstra provided his List of Experts on April 8, 2013. R. Vol. I, p. 32-38. On April 10, 2013, BSU sent Zylstra a letter requesting immediate supplementation of his disclosures because they did not provide a complete statement of his experts' opinions in compliance with Rule 26(b)(4) or in response to BSU's discovery requests. R. Vol. I, p. 126-127. When Zylstra failed and refused to supplement his expert disclosures, BSU filed a motion to compel seeking a court order requiring him to provide a complete statement of his experts' opinions and the bases for those opinions. R. Vol. I, p. 39-40. During the motion to compel hearing, BSU presented the

court with a hypothetical indicating it would move to strike any new expert opinions submitted after its summary judgment motion was filed. Tr. Vol. I, p. 24., L. 10-24. When Zylstra filed new expert opinions in opposition to BSU's motion for summary judgment, BSU moved to strike those opinions. R. Vol. I, p. 565-577. BSU's conduct clearly indicates that it was, at all times, attempting to obtain a complete statement of Zylstra's experts' opinions in a timely manner and in accordance with the deadlines set forth in the Scheduling Order. BSU's conduct does not support Zylstra's contention that there was an implicit agreement whereby he could submit new and previously undisclosed opinions after the close of discovery or after BSU filed its motion for summary judgment.

D. Any Suggestion of Judicial Bias is Frivolous.

Zylstra asserts that the trial judge was biased as an alternative basis for overturning the district court's decision to strike the Epperson and Brzusek affidavits. A claim of judicial bias, absent a motion to disqualify the judge below, will not be considered on appeal. ***Sanchez v. State***, 2013 WL 6004169,*6 (Ct.App. 2013); ***Johnson v. McPhee***, 147 Idaho 455, 469, 210 P.3d 563, 577 (Ct.App. 2009); ***See also*** ***McPheters v. Maile***, 138 Idaho 391, 396-97, 64 P.3d 317, 322-23 (2003). Zylstra did not file a motion to disqualify the trial judge. Therefore, he cannot claim judicial bias for first time on appeal.

Even if the Court decides to consider Zylstra's new argument, he has not satisfied the legal standard for proving judicial bias. In ***Bach v. Bagley***, this Court explained that "unless there is a demonstration of 'pervasive bias' derived either from an extra judicial source or facts and events occurring at trial, there is no basis for judicial recusal." 148 Idaho 784, 792, 229 P.3d 1146, 1154 (2010) citing ***Liteky v. United States***, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). This Court quoted with approval the following language from ***Liteky***:

> It is enough for present purposes to say the following: First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion ... and can only in the rarest circumstances evidence the degree of favoritism or antagonism required.... Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of the trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.... A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

Id., quoting ***Liteky***, 540 U.S. at 555-556, 114 S.Ct. at 1157, 127 L.Ed.2d at 490-91. Therefore, the standard to prove judicial bias, "based simply on information that [the judge] has learned in the course of judicial proceedings, is extremely high." ***Id.***

Zyltra's claim of judicial bias is based only on the judicial remarks made during the various hearings and the fact he was not allowed to introduce new expert opinions to oppose summary judgment. The remarks upon which Zylstra relies do not demonstrate any judicial bias. They are all trivial in nature and had no bearing on the district court's decision to strike the expert affidavits or grant summary judgment. Some of the remarks had even been corrected by the district court during the hearings. For example, Zylstra contends the district court was biased because it stated there was 120 days to provide notice of a tort claim under the Idaho Tort Claims Act rather than 180 days. Appellant's Br., p. 25. However, during the summary judgment hearing, the district court corrected itself when it stated: "And for the record. I keep saying 120. I apologize. It's 180." Tr. Vol. I, p. 99, L. 2-3.

Also, Zylstra contends that the district court's statements that trial was six weeks away is evidence of bias because the trial was actually seven weeks and four days away. Appellant's Br., p. 25. However, the district court corrected itself on this statement as well: "And like I said, I don't think it's appropriate to have experts meeting with your client for the first time after discovery and just – really just prior to trial. Trial – the jury trial date – the summary judgment hearing was August 8th, seven weeks and a few days before trial." Tr. Vol. I, p. 165, L. 8-14.

Zylstra takes exception to the district court characterizing seven weeks as being "just prior to trial." Appellant's Br., p. 26. Yet, the fact is, seven weeks before trial is really "just prior to trial." This is especially true considering the case had been pending for seventeen months and Zylstra knew, or should have known, that medical expert opinions were necessary to establish causation not only for liability, but also to show the deadline for filing his notice of tort claim should be tolled.

Moreover, viewing the record as a whole, the district court actually gave Zylstra favorable rulings. First, it did not enter a ruling on BSU's motion to compel even though it stated that Zylstra's expert disclosures and discovery responses were insufficient. Tr. Vol. I, p. 18, L. 18 – p. 19, L. 8; p. 23, L. 24 – p. 25, L. 9. Second, the district court also ruled in Zylstra's favor on the motion to strike portions of his lay witness affidavits. Tr. Vol. I, p. 72, L. 22 – p. 80, L. 8. Finally, the district court ruled in Zylstra's favor on a significant issue on summary judgment, finding an issue of fact existed as to whether the deadline for filing his notice of tort claim should be tolled. In fact, the district court explained that it "went out on a very long limb to deny summary judgment on that issue." Tr. Vol. I, p. 140, L. 3-5.

When reviewing the record as a whole it is evident the district court was not biased in any way. The district court rendered procedural, admissibility, and substantive rulings in Zylstra's

favor throughout the proceedings. The evidence of bias relied upon by Zylstra is either inaccurate and/or trivial and had no bearing on the outcome of the case. There has certainly been no demonstration of a " pervasive bias" by the judicial remarks made by the district court.

VI. CONCLUSION

For the reasons outlined above, the ruling of the district court striking the affidavits of Drs. Epperson and Brzusek offered in opposition to BSU's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 3 day of February, 2014.

ANDERSON, JULIAN & HULL LLP

By _____
Phillip J. Collaer, Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of February, 2014, I served a true and correct copy of the foregoing **RESPONDENTS/CROSS-APPELLANTS STATE OF IDAHO, BOISE STATE UNIVERSITY'S RESPONSE BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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