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Zylstra v. State Appellant's Reply Brief 1 Dckt. 41421

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAMUEL JOSEPH ZYLSTRA, Plaintiff-Appellant (and Cross-Respondent), vs. STATE OF IDAHO, and BOISE STATE UNIVERSITY, Defendants-Respondents (and Cross-Appellants).	Supreme Court Docket No. 41421-2013 District Court Docket No. CV PI 1203319 (Ada County) APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County, Honorable Cheri C. Copsey, District Judge, presiding.

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III. STATEMENT OF THE CASE

Sam is not offering a new Statement of the Case. For convenience, rather than incorporating by reference the Statement of the Case he submitted with his opening brief, he is including it verbatim herein in its entirety.

A. Nature of Case

Sam Zylstra (hereinafter "Sam" or "Zylstra") was a senior at Boise State University (hereinafter "BSU") in February 2010 when he was injured while wrestling as a heavyweight (285-pound class) for the university's nationally-ranked wrestling team. He suffered a concussion in his first match at the conference championships, was evaluated by a BSU graduate assistant trainer during a requested timeout, and was permitted to continue wrestling. He claims in this lawsuit that he should not have been allowed to continue wrestling and that he suffered grievous further injuries as a result of that additional strenuous physical activity. He made claim against BSU and the State of Idaho (hereinafter "defendants") in October 2010, more than 180 days after suffering injury, and following denial of the claim filed suit against those parties in February 2012.

Defendants denied that Sam was seriously injured during the wrestling tournament and also asserted that his claim was untimely, as it was filed more than 180 days after the initial concussion was sustained. Sam argued that his delay in filing was excused as he was in no condition to discover he had a claim with respect to the post-timeout injuries during the first several months after the tournament, asserting that his claim was, in fact, timely filed under applicable law.

B. Course of Trial Court Proceedings and Disposition

In the spring of 2013 defendants filed a motion seeking an order compelling more complete disclosures regarding Sam's expert witnesses, and a hearing was held, attended telephonically by both of Sam's attorneys on May 9. Tr Vol. 1, pp. 5-31. Defendants argued that Sam's list of expert witnesses, which was timely served on April 8, was inadequate as it did not provide detailed information about the substantive opinions of the experts, their billing rates, or other information required under I.R.C.P. 26. The Honorable Cheri Copsey, noting that the Order governing the case schedule in this case did not require such detail but also noting that there were outstanding unanswered interrogatories requesting such information, declined to rule on the Motion to Compel but warned all counsel of the need to answer and supplement answers to outstanding discovery. Tr Vol. 1, p. 12, L. 11-20; Tr Vol. 1, p. 23, L. 24-25; Tr Vol. 1, p. 24, L. 1-9. Sam's counsel recall that they advised the Court and defense counsel of a scheduled examination of Sam in Seattle in early June by one of his listed experts (the details of this disclosure are disputed, as more fully described below) and believed complete discovery responses regarding expected expert testimony could be provided shortly after that June appointment without running afoul of the judge's warnings.

On or about June 4, 2013, defendants filed a Motion for Summary Judgment, asserting that Sam had failed to provide evidence of medical causation and further asserting that his claim was not timely. In response to this Motion, Sam provided detailed affidavits from his two medical experts, Randall Epperson, Ph.D., and Daniel Brzusek, D.O., stating their opinions that the decision to allow Sam to continue wrestling after his initial concussion had likely caused him

additional damage. R Vol. 1, pp. 000539-000554; R Vol. 1, pp. 000508-000538. Dr. Epperson also opined that Sam's memory was so impaired after the tournament, and his physical symptoms of headaches, nausea, photophobia, and fatigue so severe, that he probably was unable to evaluate whether he had a claim for months afterward. Additionally, Sam provided affidavits from his wife, mother, a close friend and housemate, and that friend's father, reciting their observations of his impairment in those early months. R Vol. 1, pp. 000493-000507.

Following receipt of the affidavits filed in opposition to their Motion, defendants moved to strike the medical affidavits in their entirety and also asked the Court to strike large portions of the lay witnesses' affidavits, primarily on grounds of hearsay. A hearing was held on August 8 at which Judge Copsey ruled that Dr. Brzusek's affidavit was provided too late and would thus be stricken and that while Dr. Epperson's lengthy report of his initial evaluation of Sam had been provided to defense counsel long before their Motion for Summary Judgment was filed, his opinion supporting medical causation was a "new" opinion and should have been disclosed before the motion was filed. She therefore struck his affidavit, which resulted in her granting the Motion for Summary Judgment on the medical causation issue. Tr Vol. 1, pp. 32-117, particularly Tr Vol. 1, p. 71, L. 22-25; Tr Vol. 1, p. 72, L. 1-21. Sam argued that the opinion was not new at all and further argued that defendants had not been surprised or prejudiced by the timing of Dr. Epperson's affidavit. With respect to defendants' assertions that the claim was not timely, Judge Copsey ruled that the lay witness affidavits, while partly inadmissible, were admissible as to the witnesses' personal observations of Sam, and those observations, evaluated in light of precedent, including *Larson v. Emmett Joint Sch. Dist. No. 221*, 99 Idaho 120, 577

P.2d 1168 (1978), justified a jury trial on the issue of whether the delay in filing the claim was excusable. Tr Vol. 1, p. 82, L. 3-18; Tr Vol. 1, p. 100, L. 4-8; Tr Vol. 1, p. 104, L. 3-21.

Because Sam had listed only the two medical experts for the issue of medical causation, judgment was entered against him on August 15, 2013. At the conclusion of the oral hearing on August 8 and prior to entry of the judgment, Sam's counsel moved for a continuance of the trial to address the suggestion that defendants had been prejudiced by the timing of Dr. Epperson's affidavit. Tr Vol. 1, p. 115, L. 19-25; Tr Vol. 1, p. 116, L. 1-9. Judge Copsey denied the motion but invited, or seemed to invite, Sam to file "an actual motion because judgment has not been entered." Tr Vol. 1, p. 116, L. 14-23. Noting that the Order governing the case proceedings required any Motion for Continuance to be in writing, Sam's counsel filed a joint written Motion for Continuance/Reconsideration on August 12, before the judgment was entered. R Vol. 1, pp. 000654-000724. Hearing on that motion occurred on October 10, Sam's counsel again attending by telephone, and Judge Copsey denied both a continuance and the request for reconsideration. Tr Vol. 1, pp. 118-167.

C. Statement of Facts

On February 26, 2010, Sam Zylstra was wrestling in his first match at the Pac-10 tournament, held that year in Davis, California. He was thrown to the mat by his opponent, an Oregon State University wrestler he had defeated only a couple of weeks before, and suffered a concussion (his forehead took the brunt of his contact with the mat). His coaches called a timeout to assess the severity of his injury and to determine whether it was safe for him to continue the match. Graduate assistant athletic trainer Andy Chorn, who was designated by BSU

to evaluate wrestlers' injuries, examined Sam during a 90-second timeout, later noting on a report he completed that day that Sam reported a headache and showed signs of confusion and dizziness. R Vol. 1, pp. 000335-000355; R Vol. 1, pp. 000341-000342. Mr. Chorn has testified that Sam's symptoms cleared before the timeout had expired, and he allowed him to continue wrestling. Sam lost that first match but was allowed to participate in the remaining matches of the tournament, one more match that day and two the following day, where he fared well enough to place fifth and qualify for the NCAA Championships. Roughly two weeks after the tournament, when Sam continued to complain of headaches, memory loss, photophobia, and other symptoms of concussion, Doctor Scot Scheffel examined him at the trainer's request and opined that Sam had suffered a "significant concussion." Dr. Scheffel told Sam he would not be cleared to wrestle in the NCAA Championships later that month. R Vol. 1, p. 000492.

Although Sam to this day believes he has no independent recollection of the timeout, or anything that happened for months afterward, he now contends, based on the available evidence, that the trainer should not have allowed him to continue wrestling without physician approval, which was never obtained prior to conclusion of the tournament. He contends that the extreme physical exertion required of him in wrestling after the initial concussion caused further brain injury that caused significant and permanent damage. Nearly four years after the tournament, he still suffers the effects of brain injury, including extreme anxiety, paranoia, and anti-social behaviors that have prevented him from maintaining stable employment and caused severe stress to himself and his family. He was unable to complete his studies or obtain his degree at BSU,

despite good grades prior to his injuries, and he was medically discharged from the ROTC program at the school, terminating his plans to seek a commission in the Army upon graduation.

The crux of this appeal relates to Sam's medical experts' opinions. Both of them opined that Sam should not have been allowed to continue wrestling after his initial concussion, and both opined on the basis of reasonable scientific or medical probability or certainty that allowing him to continue wrestling caused additional, significant damages, stating that it was likely he would have recovered completely from his initial concussion within a couple of weeks if he had not suffered further damage by continued wrestling. As set forth in greater detail in the Argument section, Sam contends that he had adequately and timely disclosed his experts' opinions to defendants.

IV. ADDITIONAL ISSUES PRESENTED ON CROSS-APPEAL

1. Whether the discoverability rule set forth in Idaho Code § 6-905 has been nullified by the tolling provision of Idaho Code § 5-230 with respect to claim notice requirements?

2. What level of incapacity is required to trigger the tolling or discoverability provisions related to claim notice requirements?

V. ATTORNEY FEES ON APPEAL

Sam does not seek attorney fees on this appeal.

VI. ARGUMENT

APPELLANT'S REPLY BRIEF

A. Dr. Epperson's Opinions

In their Response Brief, defendants continue to misrepresent the facts in the record. They stated in the second paragraph at page 6 of their brief that Sam's expert disclosure "identified areas of potential testimony for Epperson and Brzusek but, failed to describe any specific opinions addressing medical causation." In fact, Sam's expert disclosure did not suggest only that Dr. Epperson would testify about causation. It said that his expected testimony was that "defendants breached the applicable standard of care in allowing plaintiff to continue wrestling after his initial brain injury during his first match in the Pac-10 wrestling championships on February 26, 2010, and that it is likely plaintiff suffered multiple lesser brain injuries during subsequent matches, which caused the severe and likely permanent cognitive and behavioral deficits plaintiff suffered." R Vol. I, p. 000064. That summary was consistent with the preliminary opinions expressed in Dr. Epperson's December 2011 report that the extent of the injuries, and their duration, suggested the likelihood of brain injury suffered after Sam's initial concussion.

In the second full paragraph on page 12 of their brief, defendants continue to misrepresent the trial court's ruling on their Motion to Compel. They maintain that the judge warned Sam's counsel that his expert disclosures (as opposed to his interrogatory answers) "were deficient." On the contrary, the judge ruled, consistent with Sam's argument, that the expert disclosures did not require the level of detail required by answers to interrogatories. Tr Vol. I, p.

12, L. 11-20. If defendants were so sure that the judge ruled Sam's expert disclosures deficient, why did they make no effort to include any substantive opinions at all in their expert disclosures despite the fact they had Dr. Epperson's December 2011 report and the above-quoted description of Dr. Epperson's opinions about causation and on April 19, three weeks before defendants filed their own expert disclosures, had received Sam's liability expert's written statement of his opinions, the sufficiency of which they have never disputed? R Vol. I, pp. 149-153.

On page 14 of their response, defendants continue to misrepresent the record regarding Sam's experts and what they were or were not asked to do, and when. In the first paragraph, last sentence, defendants allege that "neither expert was asked to address the causation issue until after BSU filed its motion for summary judgment." In the following paragraph they quote argument of undersigned counsel to apparently support their assertion that the disclosures were deficient, but they miss the point. The judge did not rule that the expert disclosures were deficient but said plaintiff was obligated to provide more information in answering defendants' interrogatories, which the undersigned acknowledged he understood. That acknowledgment is really irrelevant to whether the expert disclosure provided enough information to defendants to apprise them of Dr. Epperson's views on causation, which it did, subject to being amplified when the discovery answers were supplemented, which Sam's counsel intended to do as soon as possible following Sam's meeting with Dr. Brzusek on June 10. Defendants argued that Sam's counsel's statements were an admission Sam "was aware of the medical causation issues in early April, 2013, and that expert testimony would be required to establish a prima facia [sic] case of negligence." What defendants seem unable to grasp is that Sam's counsel was aware of the

medical causation issues before he filed the claim with the State in October 2010 and knew that expert testimony would be required to establish causation. But counsel also believed in early June 2013 that defendants knew what Dr. Epperson's opinion was about causation, if not through his discussion in his December 2011 report then certainly by the disclosure of his expected testimony in April 2013, which belief was bolstered by Mr. Collaer's suggestion at the Motion to Compel hearing on May 9, 2013, that he had no problem with Dr. Epperson's opinion. Tr Vol. I, p. 9, L. 19-23.

At the bottom of page 14, defendants reiterate that the "fact" Sam's "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." First, the allegation that Sam's experts were not asked to provide opinions addressing causation until after the motion for summary judgment was filed is nonsensical and not supported by the record. As indicated in Sam's opening brief, counsel believed defense counsel understood what Dr. Epperson's opinions were on causation and further believed, despite understanding that answers to interrogatories needed to be supplemented to provide greater detail respecting those opinions, that supplementation was not required before Dr. Brzusek's scheduled exam and was not required for any anticipated summary judgment motion, which counsel believed would address only the issue of claim timeliness. In fact, the record cited by defendants to support their allegations, and particularly Dr. Epperson's affidavit, which is misleadingly summarized in footnote 3 on page 14, do not prove that the experts were not asked to provide opinions addressing causation until after the motion was filed.

Dr. Epperson had expressed his opinion on causation to undersigned counsel long before, and counsel had summarized it in the expert disclosure on April 8, 2013. It is true that counsel had not previously requested an elaborate written opinion from Dr. Epperson on causation because he had no obligation to do so, with its significant attendant costs, and because he intended to provide additional detail as soon as Sam had been evaluated by Dr. Brzusek. If undersigned counsel had believed defense counsel did not understand that Dr. Epperson would offer an opinion consistent with the one stated in the expert disclosure, he would have provided more at an earlier date.

Counsel has never suggested that the opinions could not have been "developed and disclosed earlier," but it was believed there was no reason to incur the cost of requesting further written opinions, which are not required by the rules, and it was further believed, unfortunately given the amount of time and effort required to debate this issue, that supplementation of Sam's discovery answers shortly after he was seen by Dr. Brzusek would be sufficient, given counsel's belief that discovery was continuing by implied agreement and that counsel and the Court had heard his comment, over the phone, on May 9 that his client would not be able to see Dr. Brzusek until early June, after which time supplementation would be made. Additionally, despite the defendants' expert disclosure deadline having passed on May 10, Sam had received from defendants' experts no opinions at all on causation by that date, much less one expressing a view on causation different from the one expressed in his expert disclosure. Further, he did not receive defendants' neuropsychologist's report until later in May, and it was forwarded to Dr. Epperson and Dr. Brzusek on June 2, prior to the filing of defendants' motion for summary

judgment, for their review. On May 24 Dr. Brzusek had also provided to undersigned counsel opinions regarding standard of care and causation, consistent with Dr. Epperson's, but counsel had not disclosed those opinions to defendants before they filed their motion on June 4, believing it made sense to await his meeting with Sam and his wife on June 10.

Near the bottom of page 15 of their response brief, defendants repeat the assertion that 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." Even if that were true, which it is not, what would have been wrong with Sam's counsel's waiting to provide "new information" to his experts only after defendants filed their motion if counsel reasonably believed defendants were not contesting his expert's views on causation?

With all due respect to the judge's authority to manage the deadlines in the case, and assuming *arguendo* that Sam's supplementation was "untimely" as alleged by defendants near the middle of page 16 of their response brief, Sam does not agree that the "court would have been forced to vacate the trial." Of course, on the apparent assumption without any proof that defendants were prejudiced by a disclosure on July 1 that was not new, three months before the trial, Judge Copsey asserted at the outset of the hearing on the motion for summary judgment that the only way she could accommodate an untimely supplementation would be to continue the trial. And it was in response to that statement, following a two-hour hearing that culminated in her dismissing plaintiff's claims, that Sam's counsel requested a continuance, despite the fact there had been no showing that defendants were prejudiced in any way by the "late" disclosure,

and there was absolutely no reason to believe that defendants had been prevented from cross-examining Sam's experts fully prior to that time had they wanted to do so.

On page 17 of their brief, defendants quote language from Dr. Epperson's report underlining the language that Sam may have sustained additional concussions, further information would be helpful, the prolonged post-traumatic amnesia suggests the likelihood of subsequent concussions, and the brain dysfunction deficits also suggest more than one concussion. R Vol. I, p. 603. Granted, that language would not be sufficient to withstand a challenge at trial because it did not include the required statement that his opinions were expressed on the basis of reasonable scientific probability or certainty, but he had not been asked to be that precise at that time. Further, and importantly, defendants are being very disingenuous in suggesting they did not or could not understand what his opinion was at that time. He said further information would be helpful, "**but prolonged post-traumatic amnesia for four months suggests the likelihood of subsequent concussions,**" and he stated further that the "**significant current brain dysfunction deficits also suggest more than one concussion.**" (Bold highlighting added). How could defense counsel read that and not believe that Dr. Epperson's opinion back in December 2011 was that it was likely Sam had suffered further injury because of defendants' having allowed him to continue wrestling after his first concussion? What he was saying then is that he would always find additional evidence helpful but that the extent of the brain deficits and the duration of the post-traumatic amnesia was not consistent with a single concussion. And then, of course, a more explicit, but consistent, statement of his views was disclosed in Sam's expert list in April 2013 and then expressed more

definitively, but consistently with his 2011 statements, in his affidavit filed on July 1, 2013, a full three months before trial.

On page 19 of the response brief, defendants argue that Dr. Epperson "did not, and...could not, differentiate between Zylstra's initial concussion or possible subsequent concussion(s) as the cause of his alleged cognitive deficits." In fact, he could. Granted, he could not prove with 100% certainty how Sam would have fared if he had not been allowed to continue wrestling after the initial concussion, but it was probable that he would have recovered fully within two to three weeks based on well-accepted statistical analyses of concussions. That he suffered a very long period of post-traumatic amnesia and significant brain deficits, including short-term memory loss, even to the present time was not consistent with a single concussion and justified the opinion, expressed with reasonable scientific or neuropsychological certainty in Dr. Epperson's June 25 affidavit, that Sam's being allowed to continue wrestling, and the strenuous exertion that involved, with or without experiencing what might justify diagnosis of another concussion, likely caused severe additional damage not explainable by his initial concussion. The science of concussions remains too imprecise to meet the standard defendants are asking the Court to require. Sam is not required to prove precisely when he suffered the additional injury or injuries that led to his prolonged amnesia and disability. Consistent with what is known about the effects of strenuous exertion following too soon after a serious brain injury is sustained, it is enough that his expert can say it is probable that his disability and prolonged amnesia were caused by the strenuous exercise that followed his initial injury, as it is highly probable that he

would have recovered fully from that initial injury within a very short period of time had he been withdrawn from the competition and afforded proper rest for healing and recovery.

In the first full paragraph of page 20 of their brief, defendants argue that undersigned's counsel's characterization of Dr. Epperson's report as "comprehensive" at one time and "preliminary" at another was somehow significant. Those characterizations meant nothing more than that the report was a lengthy detailed report containing a wealth of information and opinions about Sam (hence "comprehensive") that provided ample information for preparing a cross-examination of Dr. Epperson had defendants wanted to depose him before the discovery deadline but was nonetheless "preliminary" in the sense he had not been requested to frame his opinions in December 2011 in a way sufficient to qualify their admissibility for trial (he had not been requested to state his opinions on the basis of reasonable scientific certainty at that time).

B. Dr. Brzusek's Opinions

Dr. Brzusek's opinions on causation were new to defense counsel when disclosed on July 1, 2013,[1] but Sam's counsel did not understand them to be untimely because, as previously noted, he reasonably assumed defendants had heard his disclosure near the end of the hearing on defendants' Motion to Compel on May 9, 2013 (because his co-counsel, Mr. Swindler, had heard it on the phone in Spokane), that Dr. Brzusek could not see Sam until early June. When defendants argue on page 24 that "as of May 9 it was still undecided whether Zylstra would ever

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[1] As noted above, Dr. Brzusek had actually formed opinions on causation previously, based on information provided by undersigned counsel, and he communicated those opinions to counsel on May 24. Counsel had not disclosed them to defense counsel pending Dr. Brzusek's scheduled meeting with Sam on June 10.

see Dr. Brzusek," the reference was to a comment by Mr. Swindler, who it had been decided would argue the motion. The reason Mr. Whitehead spoke up at the end of the hearing was to clarify that unknown, or not recalled, by Mr. Swindler was that by that time Dr. Brzusek had planned to see Sam during the latter's scheduled visit to the Seattle area in early June, which had been communicated to Mr. Whitehead.

Sam's counsel do not know how to respond further to the representation by the Court that there is nothing on the tape recording of the May 9 hearing to support counsel's assertion he disclosed that an appointment for Sam had been planned with Dr. Brzusek in early June. Counsel can only reiterate that as an officer of the Court he takes this matter very seriously and is as certain as he can be that the disclosure was made and that he and Mr. Swindler, in discussing it afterward, concluded that defense counsel must have heard the disclosure and could not reasonably argue in the absence of objection that disclosure of Dr. Brzusek's opinions soon after his meeting with Sam would have been untimely.

On page 28 of their response brief, defendants make the curious argument that Sam could not have relied on their July 12 withdrawal of their liability expert to justify disclosing his expert opinions on causation on July 1. Sam obviously could not have relied on something that happened on July 12 to justify any prior action. Sam's counsel was relying on his perception from undocumented conversations with defense counsel and the aforesaid "alleged" disclosure of Sam's inability to provide Dr. Brzusek's opinions until after his June 10 appointment, and perhaps the sense defendants would want to depose Sam's experts, to justify his belief that discovery was still considered open by both sides. That was obviously foolish in retrospect. The

e-mail undersigned counsel sent Mr. Collaer on June 3 asking for a call to discuss further discovery and mediation was evidence that the belief was genuine, whether wise or not. The reference to defendants' July 12 withdrawal of their liability expert and announcement of substitution, without any reference to the supposed closing of discovery, was suggested by Sam as further evidence that his assumption of an implicit agreement to continue discovery was reasonable, not that he had relied on the withdrawal before it had occurred.

C. Judicial Bias

Sam is aware of the case law defense counsel cites for the proposition that a claim of judicial bias will not be considered on appeal absent a motion to disqualify the judge. Sam asks the Court to clarify that this rule must have exceptions for cases like this where there has been no trial and no evidentiary hearing and where the claim of judicial bias is based on a ruling on a dispositive motion that ends the case. Until the ruling was made on Sam's motion for reconsideration, and the transcript was ordered and reviewed, it would have been difficult to evaluate whether the judge was, in fact, biased. And at that point, it would seem to have been a useless act, and a waste of judicial and attorney resources, to file a motion to disqualify the judge who had just dismissed the case.

With respect to the merits of the claim of judicial bias, at page 30 defendants quote from *Liteky v. United States,* 510 U.S. 540, 555-556, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474, 490-491 (1994) for the proposition that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion...and can only in the rarest circumstances evidence the degree of favoritism or antagonism required...." In fact, Judge Copsey's ruling striking Sam's experts'

affidavits could be construed as biased on the merits for ignoring, *inter alia*, the prior expressions of Dr. Epperson's opinions on causation, notably, the expert list submitted on April 8, but it was the way the ruling was announced and justified, with repeated references to the communication of Dr. Epperson's opinions as being made 'just before trial,' that struck counsel as evincing bias when he reviewed the transcript, as well as a number of other facets of the judge's articulation of her ruling on the motion and on defendants' subsequent request for costs, already discussed in Sam's opening brief, including her gratuitous recitation of facts that had no bearing on the motion for costs but constituted fact-finding on issues that had not been the subject of testimony or argument.

On page 31 defendants again assert that the court "stated that Zylstra's expert disclosures and discovery responses were insufficient." Sam has no quarrel with that statement as to discovery responses, but defendants' repeated assertion that the trial judge had agreed with them that the expert disclosures were insufficient by themselves is simply not reflected by the record. Judge Copsey spent a lot of time comparing the federal and state disclosure rules and announced that in her opinion the state rules do not yet require the level of detail that is required in discovery answers with respect to experts' opinions. Tr Vol. I, p. 11, L. 1-25; Tr Vol. I, p. 12, L. 1-20.

Defendants also argue on page 31 that because the trial judge ruled in Sam's favor on some issues, she cannot be found to have been biased. Sam would not argue that a review of all the judge's rulings in that regard is irrelevant, but the fact remains that the primary favorable ruling issued in Sam's favor on the timeliness of his claim is virtually meaningless when her

prior ruling striking the affidavits of his medical experts ended the case for him. Sam remains convinced that the trial judge for unknown reasons did not display the kind of disinterest and impartiality that is required.

APPELLANT'S/CROSS RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-APPEAL

Judge Copsey was right to deny defendants' motion for summary judgment on the issue of claim timeliness because the record raised genuine issues of material fact as to whether Sam Zylstra was competent to submit a claim to the State more than 180 days before he did so. Sam submits that the answer is "no," and the answer is the same however the issue is framed and whatever statutory or other legal analysis is applied. A jury could reasonably decide on the facts that he filed his claim with the state, as required by Idaho Code § 6-905, within 180 days of the date the claim reasonably should have been discovered, thus making the claim timely. A jury could also reasonably decide if a different test is applied that Sam was "insane" within the meaning of Idaho Code § 5-230 at the time his cause of action accrued justifying tolling of the period for filing his claim until his insanity ceased, which under the facts in the record was within 180 days of the claim's submission, also making it timely.

Defendants argue for the insanity test under Idaho Code § 5-230 as discussed in *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986), versus the accrual test suggested by a line of cases including *Mallory v. City of Montpelier*, 126 Idaho 446, 885 P.2d 1162 (Ct. App. 1994) that emphasize the date on which the claimant has obtained knowledge of key facts putting him

on "inquiry notice" as the date the clock starts running toward the 180-day deadline. This Court does not appear to have resolved the appropriate analysis for determining this issue, particularly the scope of the insanity test, but Sam respectfully suggests that his claim should be considered timely under any test that has been considered and that he is entitled to have a jury decide whether he was so incapacitated for a period of time following his injuries at the wrestling tournament that it would be a grave injustice to hold that his claim should be barred merely for being filed more than 180 days after the incidents that caused the damages for which he seeks recovery.

The parties disagree substantially about Sam's condition prior to his submission of his claim, despite defendants' curious assertion at the hearing on their motion for summary judgment that "what they're [Sam's counsel] also trying to argue is he's not really insane or really all that incompetent." Tr Vol. I, p. 91, L. 7-9. On the contrary, Sam's counsel have argued that Sam was incapacitated in a significant way from the time of the wrestling tournament in February 2010 well past the date when he submitted his claim to the State. In fact, Sam is still incapacitated in a significant way, collecting social security disability for brain injuries that were preventable, unable to hold a job, and subject to outbursts of anger and other unpredictable behavior consistent with frontal lobe damage to his brain.

As Judge Copsey correctly ruled, the lay witness affidavits filed by Sam in opposition to defendants' motion contained a considerable amount of admissible evidence of the witnesses' personal observations of Sam's level of functioning in the months following his injuries. While it is true that some of defendants' witnesses who interacted with Sam during that time believed

he was functioning normally, the evidence of the witnesses who spent the most amount of time with him, and who knew him best, tells a very different story. As outlined by Judge Copsey during the hearing on the motion for summary judgment, Helen Zylstra, Sam's mother, swore by affidavit that in the months following the tournament Sam was very anxious, paranoid about things, and just didn't seem like himself, and the court admitted those statements. Tr Vol. I, p. 75, L. 10-13. The statements of Sam's housemate and friend, Jeff Dolifka, reporting he was shocked by Sam's appearance and behavior and characterizations of him as "alternatively loud and depressed, coherent and violent – sometimes violent and angry" were also admitted. Tr Vol. I, p. 76, L. 21-25. Jeff's father's observation that Sam seemed depressed was also deemed admissible. Tr Vol. I, p. 77, L. 14-20. And Sam's wife Stephanie's observations of an occasion when Sam had returned from school angry because of a headache and frustrated because he could not keep up with his homework, were also held admissible, as were her statements that he had dropped out of school and been terminated from the ROTC program and her observation about his short-term memory loss. Tr Vol. I, p. 78, L. 23-25; Tr Vol. I, p. 79, L. 1-11.

Despite defendants' recitation of Sam's ability to drive a car, engage in other activities of daily living, go to school, etc., Sam's lay witness testimony clearly raised genuine issues of material fact about the extent of his incapacity. The evidence was that he may have attended some classes but could not concentrate and did not complete his assignments, eventually withdrawing from school. The evidence was that he drove his car but often did not know why or where he was driving and would return to his apartment. The evidence was that he could tell his wife he had been injured at the tournament yet not remember telling her or anyone else a short

time after doing so. He suffered from raging headaches, photophobia, nausea, sleeplessness, and severe nosebleeds. And, importantly, there is no evidence that he had any understanding more than 180 days before he submitted his claim that he had displayed signs of concussion during his timeout and that the viable claim he had against the State related to injuries he sustained after the initial concussion.

A. Insanity Test

Defendants insist that Sam's claim is untimely unless he can prove he was "insane" at the time his cause of action accrued. If there were no issue about capacity or competence, or discoverability of the claim (see below), there would be little doubt that the cause of action accrued when Sam was allowed to continue wrestling after showing classic signs of having suffered a concussion just before the timeout was called in his first match at the tournament. That occurred on February 26, 2010. The analysis as to whether he was insane at the time he was allowed to continue wrestling will require this Court to decide the scope of insanity within the meaning of that term as used in Idaho Code § 5-230, but Sam submits that he certainly wasn't competent or consciously aware of everything that was happening to him at that time or for a long period of time thereafter. He has testified that he does not remember the timeout or what happened during the timeout, and he does not believe he has any independent recollection of what happened for at least several months thereafter. He acknowledges that he may have understood he was injured at the tournament, based on what people told him and how he felt, but he doesn't believe he remembered independently what happened.

Defendants correctly cite *Doe v. Durtschi* as holding that Idaho Code § 5-230 "applies to all procedures integral to commencing actions against private or public defendants, including the notice procedure of I.C. § 6-906." *Durtschi, supra*, 110 Idaho at 479. It is important to note that this statute seems to have always before been construed in connection with statutes of limitation for filing suit, which in the instant case was complied with; that is, Sam filed suit against the defendants within the statutorily prescribed time period of two years after his cause of action accrued. There was nothing about the statutory language itself that suggested it should apply to a limitation placed on submission of a claim against the State, but in *Durtschi* the claim had not been timely submitted, and because this Court felt barring the minor's claim would be unjust under the circumstances, it applied the tolling provision of I.C. § 5-230 to extend the time for submitting the claim as well as the time for filing suit. The *Durtschi* holding suggests the need to apply the tolling statute in a way that preserves legitimate claims and to ensure that an incapacitated claimant is not barred from making a claim by any requirement of the claims process until the incapacity can fairly be said to have been removed. That reasoning should apply to Sam's claim as well.

Defendants cite cases from other states that have no binding authority in Idaho for the proposition that "insanity" should be allowed only for those persons who are unable to protect their legal rights because of an overall inability to function in society, *McCarthy v. Volkswagen of Am., Inc.*, 55 N.Y. 2d 543, 450 N.Y.S. 2d 457, 435 N.E. 2d 1072 (1982), or when they are unable to manage their business affairs or comprehend legal rights or liabilities. See *O'Neal v. Division of Family Services, State of Utah*, 821 P.2d 1139, 1142 (Utah 1991). In the absence of

Idaho precedent, Judge Copsey in her ruling looked to an Alaska case for guidance, *Adkins v. Nabors Alaska Drilling, Inc.*, 609 P.2d 15 (1980), which involved a serious head injury similar to the one Sam suffered in the instant case. The affidavit testimony in *Adkins* suggested that the claimant suffered from post-traumatic amnesia, a partial loss of memory, and difficulty concentrating, among other disabilities, just as here, and also noted evidence that he was able to work for a while after his accident, travel, pursue a worker's compensation claim and retain an attorney. By analogy to their arguments in this case, defense counsel would have undoubtedly argued in *Adkins* that the claimant was functioning normally in society, managing his own affairs successfully, and could not be considered insane under a tolling statute, but the court in *Adkins* believed the evidence of disability or incapacity was sufficient in that case to raise genuine issues of material facts as to whether the claimant should be considered insane. Consistent with the spirit of *Durtschi*, this Court should find that the question of insanity should be left to a jury to decide as a question of fact.

B. Accrual Test: When Should Sam's Claim Reasonably Have Been Discovered?

Idaho case law establishes that a cause of action generally accrues on the occurrence of the wrongful act, which in this case would be on February 26, 2010, when Boise State's assistant trainer allowed Sam to continue wrestling after he had suffered a concussion. The claim notice statute, Idaho Code § 6-905, provides that all claims against the State for injury arising from act or omission of the State or an employee of the State shall be presented and filed within 180 days "from the date the claim arose or reasonably should have been discovered, whichever is later."

Sam contends in this case that the claim should not have been discovered, could not have been discovered by him, and was not discovered until much later, certainly no earlier than May 2010, which made his presentation and filing of claim on October 22, 2010, timely.

One of the seminal cases on this issue was *Mallory v. City of Montpelier*, *supra*, a 1994 Court of Appeals decision cited prominently by defendants in their brief. That case involved a young woman who was injured when sliding into second base during a softball game. Five days after her accident, she and her husband returned to the softball diamond to investigate the accident and concluded it might have been caused by iron or steel bolts that secured the bases to the ground, which suggested a claim against the City. She eventually presented a claim against the City 182 days after her accident but only 177 days after their inspection of the field and discovery of the bolts.

Citing this Court and its decision in *McQuillen v. City of Ammon*, 113 Idaho 719, 747 P.2d 741 (1987) and *Newlan v. State*, 96 Idaho 711, 535 P.2d 1348 (1975), in the context of how to interpret the statutory language "reasonably should have been discovered," the *Mallory* court quoted this Court's holding that "knowledge of facts which would put a reasonably prudent person on inquiry is the equivalent to knowledge of the wrongful act and will start the running of the [180]-day period." *Mallory*, 126 Idaho at 448. In justifying rejection of Ms. Mallory's claim, the court stated there was "no question regarding a latent injury, the extent or existence of which is unknown at the time of the "wrongful act,"" and said that "no other facts were hidden from Mallory that subsequently became known and, therefore, put her on inquiry notice of the City's role in her injury." *Id.*, at 448. The court explained that the "statute does not begin

running when a person fully understands the mechanism of the injury and the government's role, but rather when he or she is aware of such facts that would cause a reasonably prudent person to inquire further into the circumstances surrounding the incident." *Id.*, at 448.

Defendants argue the applicability of the *McQuillen/Mallory* rule, stating Sam was put on inquiry notice sufficient to start the 180-day period running from the time of the initial concussion or at the latest from March 10, 2010, when he was informed by Dr. Scot Scheffel that he had suffered a significant concussion, a fact Sam reportedly repeated to others in ensuing weeks. But defendants do not persuasively explain how or why a reasonably prudent person (assuming, *arguendo*, Sam could in his concussive state be assumed to have been such), armed with the facts known to Sam, would have inquired further into the circumstances surrounding "the incident." Unlike Mallory when she was injured, Sam at the time of the trainer's decision to allow him to continue wrestling did not know he had suffered a concussion or that the trainer had observed in him classic signs of concussion during the timeout when it was feasible, and necessary, to shut him down. As to Sam the injury was, unlike Mallory's, hidden or latent, and more to the point, even after he was told after the tournament he had suffered a concussion, the facts known to the trainer during the timeout were hidden from Sam for many months.

Even ignoring the evidence that Sam had no independent memory of the timeout or anything that happened after the timeout for months thereafter, begging the question whether he should or could have reasonably discovered his claim even if the trainer had told him immediately after the timeout what had happened during the timeout, it makes no sense, and is unjust, to apply the inquiry notice standard against Sam as of February 26. And when he was

told on March 10 by Dr. Scheffel that he had suffered a significant concussion, he was not told that he had shown signs of concussion during the timeout and therefore had no reason to inquire further. Again, even giving him much more credit than is due for having the capacity to evaluate what had happened to him, in the absence of information about the trainer's observation of concussive symptoms during the timeout, Sam had no reason to inquire further, as he certainly would not have blamed the university for the only injury he could have known he had suffered, one that was due solely to the efforts of his wrestling opponent.

There is simply no credible evidence in the record that anyone told Sam for at least several months (probably not until the summer of 2010, at the earliest), that he had shown signs of concussion during the timeout, without which information he had no reason or basis for investigating his accident further. If he truly understood, despite evidence of significant post-traumatic amnesia, short-term memory loss, raging headaches, severe nosebleeds, confusion, fatigue, and photophobia, that he had suffered a concussion at the tournament, he certainly had no way of knowing for months after the tournament that he likely suffered additional injuries from being allowed to continue wrestling. Further, he had no reason to believe that he had a claim against the State because as of May, when he mentioned to Dale Dolifka, the Alaska lawyer, that he wondered whether the liability waivers he had signed precluded his making a claim, there is no evidence that he understood even at that time (within the 180-day period before he filed his claim) that his ongoing injuries were caused by his post-timeout wrestling. There is certainly no evidence that anyone had told him about his symptoms of concussion during the timeout more than 180 days before he submitted his claim, and in the absence of knowledge that

the duration of his injuries was highly unusual for a single concussion, there is no basis for concluding that he should have conducted further investigation into his injuries, or that any reasonably prudent person would have done so, with ample reason to believe that the initial concussion explained his symptoms and that because they were caused by an opponent in the heat of athletic competition, he would have had no viable legal claim against anyone. He truly did discover what was almost certainly the real cause of his ongoing, long-lasting physical and mental complaints only when he finally understood that the trainer's decision to allow him to continue wrestling after observing signs of his concussion gave rise to a legal claim for which the liability waivers did not apply. So contrary to defendants' repeated assertions at pages 9 and 11, there most certainly is a dispute whether Sam was on inquiry notice when he sustained his initial concussion, or at the moment he continued wrestling.

As noted above, there is really no evidence that Sam was aware that his being allowed to continue wrestling was the cause of his ongoing injuries more than 180 days before he submitted his claim, but defendants have bent over backwards to suggest he was on inquiry notice in April (anything before April 25 was more than 180 days before he filed). In so doing, defendants have repeatedly misrepresented the record in almost comical ways. In the middle paragraph of page 23 of their brief, defendants noted the evidence that Sam had advised Dale Dolifka he did not believe he could pursue a lawsuit against BSU because he had signed a liability waiver. Noting as well that this meeting had occurred in "early May" (there is no evidence it occurred in early May, but it did occur in May), defendants conclude that showed Sam had first considered litigation "sometime before early May." In the first paragraph of page 24, defendants have

miraculously converted "before early May" to April of 2010 that Sam had concluded the liability waiver might bar his claims. No matter that there is no evidence he met with Dale Dolifka in "early" May, no matter that there is no evidence even if he had that he had thought about that issue on any prior day, no matter that any prior day still could have been in earlier May or sometime in April between the 25th and 30th, defendants want to bootstrap themselves from the account of Sam's meeting with Dale Dolifka in May to persuade this Court that Sam knew enough to sue the State more than 180 days before he submitted his claim. And defense counsel made the same arguments at the hearing on their motion for summary judgment, trying to extrapolate from a poorly recalled (by both Sam and Mr. Dolifka) meeting in May that it reveals evidence that Sam somehow should have reasonably discovered his claim, and had so discovered it, prior to April 25. Tr Vol. I, p. 85, L. 5-10, 13-21; Tr Vol. I, p. 99, L. 12-19.

In support of her decision denying defendants' motion on the timeliness of the claim, Judge Copsey referenced *Larson v. Emmett Joint School Dist. No. 221*, 99 Idaho 120, 577 P.2d 1168 (1978), Tr Vol. I, p. 101, L. 2-22, finding that it was consistent with the Alaska case, *Adkins*, *supra*. Tr Vol. I, p. 102, L. 3-11. Defendants argue that *Larson* has effectively been overruled by this Court's decision in *Durtschi*, *supra*, overruling *Callister* (*Independent School District of Boise City v. Callister*, 97 Idaho 59, 539 P.2d 987 (1975)), asserting that because *Larson* did not "depart from" *Callister*, it should be considered overruled also, as the *Larson* court did not consider applicability of the tolling statute, Idaho Code § 5-230. But Sam submits that *Larson* has not been overruled and, as Judge Copsey suggests, it is instructive on the scope of the incapacity that would be sufficient to toll a limitations period, and she ultimately decided

that the issue of Sam's incapacity is really a jury question and not one for her to rule on at summary judgment. And because Ms. Larson was arguing a physical incapacity to comply with the notice requirements, Sam's claim of mental incapacity is much stronger and even under the insanity standard should justify decision by a jury of Sam's peers.

At the bottom of page 20 of defendants' brief, they argue that a plaintiff's experience of "symptoms or problems which included periods of memory loss or neurosis does not, unless the memory loss arose at the time their claim accrued, create an issue of fact for the jury." Sam's claim meets that requirement. He submits, though, that the requirement defendants suggest is illogical and unjust, as incapacity should not depend entirely on memory loss at a particular point in time but rather on all the circumstances affecting a claimant for a period of time after an injury that would reasonably justify a failure to comply with a short limitations period, but Sam meets even the test defendants propose. And although defendants cherry-picked certain of Sam's behaviors they argue prove he was able to manage his personal affairs prior to April 25, 2010, the lay witness testimony presented on Sam's behalf, relied on by Judge Copsey, certainly raised genuine issues of material fact about his ability to manage his personal affairs. The people closest to him, including his fiancée, mother, and good friend and housemate, who spent much more time with him than any of defendants' witnesses, clearly disagree that he was managing his personal affairs in any satisfactory way.

VII. CONCLUSION

For the foregoing reasons, Sam submits that defendants' response brief does not make the case for affirming the trial court's ruling striking his experts' affidavits and dismissing his claims. The judgment of the trial court dismissing the claims should be overturned. The trial court's decision denying defendants' motion for summary judgment on the timeliness of Sam's claim should be affirmed. The record raises genuine issues of material fact regarding timeliness that must be decided by a jury.

In accordance with the foregoing, Sam requests that his claims be reinstated, the case remanded to the district court for trial, and that a new trial judge be assigned for all further proceedings.

[END]

DATED this 4th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2014, I caused to be filed with the Clerk of the Idaho Supreme Court, Appellant's Reply Brief And Cross-Respondent's Brief (original and 7 copies). I further certify that I served two true and correct copies of the foregoing Appellant's Reply Brief And Cross-Respondent's Brief to Phillip Collaer by the method indicated below, and addressed to the following:

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- ☐ U.S. Postal Service, certified or registered mail, return receipt requested
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- ☐ Facsimile
- ☐ Electronic Service
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