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IN THE SUPREME COURT OF THE STATE OF IDAHO

LINDA KAYE BLACK, Plaintiff-Appellant, vs. DJO GLABAL, INC., DJO GLOBAL, INC., dba EMPI; and BLACKSTONE CAPITAL PARTNERS, V.L.P., Defendants-Respondents.	Docket Number: 47812-2020 District Court Case No.: CV-2017-7353 **PLAINTIFF-APPELANT'S BRIEF**

COMES NOW, Plaintiff-Appellant, Linda Kaye Black, by and through her attorney, Allen H. Browning, and hereby submits her Brief on Appeal.

STATEMENT OF JURISDICTION

Jurisdiction lies in this Court for appeal from the decision of a district judge pursuant to Idaho Appellate Rule 11.

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INTRODUCTION AND PROCEDURAL HISTORY OF THE CASE

This is a Personal Injury Case filed in the Seventh Judicial District of Idaho, County of Bonneville. Plaintiff, Linda Black, has alleged that she sustained injuries after a defective electro-therapy pad caused severe and unusual burns. Defendants filed a motion for summary judgment on the grounds that Plaintiff could not prove her prima facie case at the summary judgment stage and that Bart McDonald was not qualified to testify as an expert as to whether or not the electro-therapy pads were defective. The District Court granted Defendants' motion and Plaintiff has filed this Brief on appeal.

SUMMARY OF THE ARGUMENT

The Court erred by construing facts in a light most favorable to the moving party.

This portion of Appellant's Brief discusses the district court's errors in viewing the facts before it in light of the moving party when the moving party presented no facts.

The Court erred in excluding the testimony of Bart McDonald

This portion of Appellant's Brief discusses the district court's errors in excluding the testimony of Bart McDonald. 3.

The Court erred in refusing to apply the doctrine of *res ipsa loquitur* to Appellant's case.

This portion of Appelant's Brief discusses the errors of district court in finding that the doctrine of *res ipsa loquitur* must be please as a cause of action and did not apply to Appellant's case.

The Court erred by making a finding that Plaintiff could not prove a *prima facie* case on summary judgment.

This portion of Appellant's brief discusses the district court's errors in making a finding on summary judgment that Plaintiff cannot prove a *prima facie* case.

STATEMENT OF FACTS

1. On or about December 21, 2015, Plaintiff received therapy at Superior Physical Therapy.
2. Her therapy involved the use of electro-therapy pads manufactured and sold by Defendants.
3. Bart McDonald administered the therapy. R. at 141, Para. 10.
4. During the course of the therapy, Bart McDonald noticed a white spot on the right side of Plaintiff's lower back, which he suspected was an electrical burn. R. at 141, Para. 12.
5. Plaintiff was unconcerned at the time of injury, but two hours later the burn became red and inflamed, causing her to return to Superior Physical Therapy where she was advised to seek medical attention. R. at 141, 12-13.
6. The defective pad was assigned a lot number and pads from the same lot number showed the same defects when used. R. at 141, 7-9.
7. The incident pad was thrown in the garbage by accident at Bart McDonald's office. Deposition of Bart McDonald, Pg. 17, L. 8-10.
8. Bart McDonald administered the therapy in a proper manner, following the manufacturer's instructions.
9. Bart McDonald stated in his affidavit that he knows of no other rational explanation why Linda Black received burns other than these electrode pads were defective and that is his opinion to a reasonable degree of medical probability. R. at 141, Para. 15.

ARGUMENT

1. The Court Applied the Incorrect Standards at Summary Judgment.

In a motion for summary judgment, the moving party bears the burden of proving the absence of a material fact. *Sadid v. Idaho State University*, 151 Idaho 932, 938, 265 P.3d 1144, 1150 (2011). "When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party." *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 685, 365 P.3d 1033, 1040 (2016). If the moving party has satisfied its burden, the non-moving party must then come forward with sufficient admissible evidence identifying specific facts that demonstrate the existence of a genuine issue for trial. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). "[a]ll reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party, and disputed facts are liberally construed in the nonmoving party's favor." *Marek v. Hecla, Ltd.*, 161 Idaho 211, 214, 384 P.3d 975, 978 (2016) (citing *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008)). "All doubts are to be resolved against the moving party." *Callies v. O'Neal*, 147 Idaho 841, 846, 216 P.3d 130, 135 (2009) (citing *Collord v. Cooley*, 92 Idaho 789, 795, 451 P.2d 535, 541 (1969)). "Conflicting evidentiary facts, however,[sic] must still be viewed in favor of the nonmoving party." *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 123-24, 206 P.3d 481, 487-88 (2009). "The burden of proving the absence of material facts is upon the moving party. Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. *Venable v. Internet Auto Rent & Sales, Inc.*, 156

Idaho 574, 581, 329 P.3d 356, 363 (2014) (quoting *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003) (internal citations omitted)); *Greenwald v. W. Sur. Co.*, 164 Idaho 929, 942, 436 P.3d 1278, 1291 (2019). Although circumstantial evidence can create a genuine issue for trial, a mere scintilla of evidence is insufficient to demonstrate the existence of a genuine issue of material fact. *Callies v. O'Neal*, 147 Idaho 841, 846, 216 P.3d 130, 165 (2009). Thus, the slightest doubt as to the facts will not forestall summary judgment. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.3d 67, 70 (1996). "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." *Lapham v. Stewart*, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002).

The Defense has supplied no expert witness to testify that there was any other reasonable cause, no evidence by affidavit, and no evidence by deposition. Defense has the burden at summary judgment to show that. They have offered no evidence of any other reasonable source and, under *Friel*, the Court must draw all reasonable inferences and all questions of evidence in favor of the non-moving party, the Plaintiff. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The Court failed to do this. It drew all inferences in favor of the moving party by granting the Defense's motion for summary judgment with no showing of proof and without meeting their burden.

The Court correctly stated that "Black showed no ill effects from those first three days of therapy when the same electrode pads were use[sic]…," but incorrectly states that this "…is evidence that cuts against the idea that it was the electrode pads themselves that were defective rather than the use of the electrode pads." R. at 167. The Court points out the latent defect in the pads, which is that they worked properly for three out of ten times, but failed on the fourth use. This shows that the pads failed more than six uses before they should have been discontinued

and well beyond the expected failure threshold in their specifications. R. at 141. The Court further erred by misconstruing this fact in a light more favorable to the moving party. If the Court had any question as to the evidence it must draw reasonable inferences in favor of the Plaintiff, which would show that this is, in fact, a latent defect in the pad.

The Court, in deciding a motion for summary judgment, must comport with certain standards, as cited above. Those standards include the burdens incumbent upon each party, and how reasonable inferences are drawn. See generally: *Conner, Liberty Bankers Life Ins. Co., Wattenbarger, Marek, Venable, Greenwald, Callies, Zimmerman,* and *Lapham, supra.*

In a motion for summary judgment, "The burden of proving the absence of material facts is upon the moving party. Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist." *Venable* at 581.

In *Murphy v. Union Pac. R.R. Co.,* the Court handled a similar issue. The court below had granted summary judgment against a plaintiff due to the plaintiff contradicting himself in his deposition and affidavit. *Murphy v. Union Pac. R.R. Co.*, 138 Idaho 88, 57 P.3d 799 (2002). The plaintiff in *Murphy* argued that his deposition testimony, in combination with his affidavit, created a genuine issue of material fact regarding causation. *Id*. His deposition testimony indicated that he believed he stepped in or on something, such as uneven ballast or the edge of a tie around which ballast was missing. Murphy's affidavit confirmed that he believed he stepped in one of the uneven areas of the ties and large ballast. Union Pacific contended that Murphy's deposition testimony showed that Murphy did not know what caused him to fall, whether it was his misstep onto an insulator or as a result of negligently maintained ballast and ties. Union Pacific asserted that Murphy's affidavit contradicted his deposition testimony and

was, therefore, insufficient to create a genuine issue of material fact for trial on the issue of causation. Murphy alleged in his verified complaint that Union Pacific's failure to provide an adequate walking path caused his fall. His deposition testimony showed that, while not completely certain of what he tripped on, he believed that uneven ballast or ballast missing from between the ties caused his fall. Murphy's affidavit further indicated that he probably tripped on uneven ties and large ballast rather than on a permanent track fixture such as an insulator. Construing these facts most favorably for Murphy, a reasonable person could find that it is more likely than not that Union Pacific's negligence played some part, however slight, in producing Murphy's injury. *Id* at 92. "On the other hand, a reasonable person could find that Murphy is merely speculating about what caused his fall and that he cannot show that Union Pacific's negligence played a part in his injury. **When reasonable people could reach different conclusions from the pleadings and evidence in the record, summary judgment must be denied.**" *Murphy v. Union Pac. R.R. Co.*, 138 Idaho 88, 91-92, 57 P.3d 799, 802-03 (2002) citing (*Northwest Bec-Corp*., 136 Idaho at 839, 41 P.3d at 267; *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992))(Emphasis added).

In *Murphy*, the Idaho Supreme Court has pointed out that these are exactly the issues that a trial is meant to resolve. Where two reasonable people could reach different conclusions from evidence in the record, summary judgment must be denied.

Here, the record shows that Just as in *Murphy*, two reasonable people could reach differing conclusions about the same material facts and summary judgment should have been denied by the district court.

By misapplying the standard for summary judgment, the lower Court engaged in a

reversible error and this case must be remanded to correct the error.

2. Testimony of Bart McDonald

The Court, in it's Memorandum Decision and Order, stated that "There is nothing in the record which identifies McDonald as having any expertise in the design and manufacturing of electrodes…he is not qualified to make the conclusion that the electrodes in this matter were defective…." R. at 165. Mr. McDonald did not make any conclusions as to the "design and manufacturing" of the electrodes, which caused the burns to Plaintiff in this matter. Mr. McDonald's testimony in his affidavit was that "I know of no other rational explanation why [Plaintiff] received these burns other than these electrode pads were defective and that is my opinion to a reasonable degree of medical probability." Mr. McDonald concluded, based upon his education, expertise, and his experience, that having administered this treatment hundreds of thousands of times without seeing burns like Plaintiffs, that the only remaining explanation was that the pads were defective in nature. R. at 141. Plaintiff is not obligated to demonstrate that manufacturing process or the design of the pads were defective in order show an injury from the defective pads. Because of the evidence before the Court, there is a material question of fact as to whether the pads' design or manufacture were the source of the problem and that is a question of fact for the Defense to prove in its defense of the case.

3. Res ipsa loquitur.

Both Defendants and the Court have incorrectly stated that *res ipsa loquitur* is a separate theory of recovery. R. at 166. *Res ipsa loquitur* is a standard of evidence, not a separate theory of recovery and, as such, does not need to be plead in order for it to apply.

*Res ipsa loquitu*r, if applicable to the facts of a particular case, creates an inference of the breach of the duty imposed and replaces direct evidence with a permissive inference of

negligence. *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 (1976); *Harper v. Hoffman*, 95 Idaho 933, 523 P.2d 536 (1974). *Christensen v. Potratz*, 100 Idaho 352, 355, 597 P.2d 595, 598 (1979).

Plaintiff did not need to plead *res ipsa loquitur* as a theory of recovery in order for the doctrine to apply to this case.

"[A] plaintiff must demonstrate that the instrumentality which caused his injury was under the exclusive control and management of the defendant and that the circumstances would permit an average layperson to infer, based upon common knowledge and experience, that the plaintiff would not have suffered those injuries in the absence of the defendant's negligence." *Enriquez v. Idaho Power Co*., 152 Idaho 562, 566, 272 P.3d 534, 538 (2012) The Court stated that "In this case, Black has not established, and cannot establish exclusive control. It is an undisputed fact that the electrode pads were under McDonald's control at the time of the alleged injury." R. at 166. The instrumentality which caused Plaintiff's injury was the defect in the pads and not the pads themselves. R. at 204. While McDonald was in control of the electrode pads at the time of the injury, he was not in control of the pads at the time that the defect in the electrode pads, which caused the injury, was created. It is undisputed that Defendants had exclusive control over the manufacture of the electrode pads and there is nothing in the record from which the Court could have drawn an inference that they were not in exclusive control. This is the reasoning behind lot numbers, as were assigned to the package of pads in this case. 21 C.F.R. 801.3 offers the following definition of a lot or batch: "Lot or batch means one finished device or more that consist of a single type, model, class, size, composition, or software version that are manufactured under essentially the same conditions and that are intended to have uniform characteristics and

quality within specified limits." 21 C.F.R. 801.3 The Code of Federal Regulations also requires that "[t]he label of a device in package form shall specify conspicuously the name and place of business of the manufacturer, packer, or distributor." 21 C.F.R. 801.1(a) The lot numbers allow the product to be tracked to its time and date of manufacture in case a latent defect is discovered at a later time, as it did in this case. It is unreasonable and unrealistic to require the designer of a product to also manufacture and be the end user of the product. The exclusive control of the product during manufacture is the relevant time period as to a manufacturing defect and there is no evidence in the record indicating that the Defendants were not in exclusive control of the product during its manufacture. Defendants have not offered any expert testimony, or any other form of admissible evidence which the Court could have considered, showing that they were not in exclusive control of the product during its manufacture. Drawing all factual inferences in favor of the nonmoving party, the Court is **required** to find that Defendants, as the manufacturers, were in exclusive control of the products throughout its manufacture.

Defendants were in exclusive control of the electro pad during its manufacture and Plaintiff has alleged a manufacturing defect. As the Court noted, Bart McDonald "has the experience to note when an electrode visually appears abnormal." R. at 165. Bart McDonald did not notice any abnormality or defect of the electro-therapy pad prior to its use. R. at 204. The defect only became apparent after the pad had been used, which is, more likely than not, a latent defect of the pad resulting from a faulty manufacturing processes. Defendants need not be in exclusive control of the defective pad from the very beginning of its existence until its end, but only during the times in which the defect was created.

"[I]t is also necessary that the cause of the injury point[s] to the defendant's negligence."

S. H. Kress & Co. v. Godman, 95 Idaho 614, 617, 515 P.2d 561, 564 (1973) (citations omitted). In other words, "[t]he mere happening of an accident does not dispense with the requirement that the injured party must make some showing that the defendant against whom relief is sought was in some manner negligent, where there are other probable causes of the injury." *Christensen*, 100 Idaho at 355, 597 P.2d at 598. Therefore, to proceed under *res ipsa loquitur*, a plaintiff must demonstrate that the instrumentality which caused his injury was under the exclusive control and management of the defendant and that the circumstances would permit an average layperson to infer, based upon common knowledge and experience, that the plaintiff would not have suffered those injuries in the absence of the defendant's negligence. *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 566, 272 P.3d 534, 538 (2012). An essential element in the application of *res ipsa loquitur* is the conclusion that the occurrence in the ordinary course of things would not happen unless someone had been negligent. *Hale v. Heninger*, 87 Idaho 414, 422, 393 P.2d 718 (1964); Restatement (Second) of Torts, § 328D, comment c. It is also necessary that the cause of the injury point to the defendant's negligence. Restatement (Second) of Torts, *supra*, comments e, f, and g; Prosser, Torts, § 39 (4th ed. 1971).

Plaintiff showed that no other instrumentality could have caused her injuries. R. at 204. "Under Idaho law, an implied warranty may be breached by a latent defect that could not have been discovered during an inspection at delivery." *Millenkamp v. Davisco Foods Intern., Inc.*, 562 F.3d 971, 982 (9th Cir. 2009); *Silver Creek Seed, Ltd. Liab. Co. v. Sunrain Varieties, Ltd. Liab. Co.*, 161 Idaho 270, 279, 385 P.3d 448, 457 (2016). Idaho Code Section 28-2-725(2) expressly states that, "where a warranty explicitly extends to future performance of the goods," the breach occurs at the time of such performance. Idaho Code Section 28-2-

725(2). While a buyer must inspect its contracted-for goods at the time of delivery to find patent defects, that same buyer is allowed a reasonable time after inspecting and accepting the goods to discover latent defects. Idaho Code § 28-2-608; *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 982 (9th Cir. 2009) The electrotherapy pads were impliedly warranteed to perform properly for ten (10) uses before requiring replacement. R. at 204. The pads failed after only three (3) applications, creating a breach of their implied warranty to work for ten (10) applications. R. at 204. The pads should show no ill-effects until they have been used at least ten (10) times and if they begin to perform poorly prior to that threshold, then that is proof of a defect in the pads.

The Court mistakenly considered, against all admissible evidence in the record, that "[McDonald] needed a moistened interface between Black's skin and the pads, which he did not have." R. at 169. Bart McDonald is trained in administering therapy with electro therapy pads, visually inspecting them for abnormalities, and in reading the manual and applying its instructions. R. at 203-204. In Mr. McDonald's experience, no moistened interface is required to prevent burns when using the specific waveform for treatment used on Linda Black. R. at 204. In approximately 296,400 other administrations of similar therapy with similar pads, the only other burns were caused by electrode therapy pads from the same lot, 501659, as the pads which injured Linda Black. R. at 205. Bart McDonald administered the therapy in accordance with the Rich-Mar manual. R. at 205. No admissible evidence through affidavit, expert testimony, or any other means was submitted to the Court by the Defendants. Because of this, no other reasonable alternative cause can be shown for the burns suffered by Linda Black.

In this case there are no other probable explanations for the cause of Plaintiff's injuries

outside of the negligence of Defendants. *S. H. Kress & Co. v. Godman*, 95 Idaho 614, 617, 515 P.2d 561, 564 (1973). Plaintiff established that there was no alternative cause to her injuries and the Defendants provided no facts, no admissible evidence, and no expert testimony to challenge those facts put before the Court by affidavit. R. at 203-206.

Because Defendants were in exclusive control over the manufacturing of the faulty electrode pad and, without negligence in manufacturing of the electrode pad, no injury would have occurred, and no other reasonable alternative for Linda Black's injuries exist, the Court erred by ruling that *res ipsa loquitur* did not apply to this case.

4. Plaintiff's *Prima Facie* Case.

Plaintiff has shown that no other reasonable secondary causes could have caused the injuries to Plaintiff or that there was any abnormal use, eliminating other sources of liability. R. at 204-205. Defendants proffered no evidence to dispute this fact and were not qualified as experts themselves to dispute this fact in their memorandum or at argument. On summary judgment, the Court is required to make all reasonable inferences in favor of the non-moving party and to decide all factual and evidentiary disputes in favor of the non-moving party. *Sadid v. Idaho State University*, 151 Idaho 932, 938, 265 P.3d 1144, 1150 (2011); *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 685, 365 P.3d 1033, 1040 (2016); *Marek v. Hecla, Ltd.*, 161 Idaho 211, 214, 384 P.3d 975, 978 (2016) (citing *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008)); *Callies v. O'Neal*, 147 Idaho 841, 846, 216 P.3d 130, 135 (2009) (citing *Collord v. Cooley*, 92 Idaho 789, 795, 451 P.2d 535, 541 (1969)); *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 123-24, 206 P.3d 481, 487-88 (2009); *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994).

The Court chose to use its own standard, that Plaintiff was required to prove her *prima facie* case for negligence on summary judgment, and made each inference in favor of the Defendants instead of the non-moving party. The Court stated that "The record before the Court supports a reasonable finding that there was a secondary cause that could have caused Black's injury." R. at 167. There is nothing in the record which indicates any secondary cause to Plaintiff's injury outside of the defective electro therapy pad. Therefore, there was no basis for the Court to infer any "reasonable finding" in favor of the Defendants. Defendants did not assert any grounds entitling them to judgment as a matter of law and there was a triable issue of disputed fact as to the cause of Plaintiff's burns. Defendants had the burden of proof to demonstrate that they were entitled to Summary Judgment as a matter of law and that no triable issue of fact remained for the jury, which they failed to meet.

Defendants further attempted to offer the product manual, in part, for the machine used by McDonald through affidavit of counsel on August 29, 2019 and then a different part on October 11, 2019, the day **after** the Court heard the Motion for Summary Judgment on October 10, 2019. R. at 85-99; R. at 157-162. Idaho Rule of Civil Procedure 7(b)(3)(A) requires that "A written motion, affidavit(s) supporting the motion, memoranda or briefs supporting the motion, if any, and, if a hearing is requested, the notice of hearing for the motion, must be filed with the court and served so as to be received by the parties at least 14 days prior to the day designated for hearing." IRCP 7(b)(3)(A). Under IRCP Rule 7, the submission of Defendant's supplemental affidavit in support of their motion for summary judgment was untimely and should not have been considered by the Court. The Rich-Mar Manual for the machine used by Mr. McDonald did not fall under any of the twelve (12) types of self-authenticating documents under Idaho Rule of Evidence 902 and could not be submitted without expert testimony. I.R.E. 902; R. at 157-162.

Because the manual, in relevant part, was submitted after the hearing, Plaintiff could not object to its inadmissibility in a timely manner. The manual itself confirms that Mr. McDonald used the proper settings for the treatment he administered and there is no evidence in the record by which the Court could infer otherwise or any admissible evidence offered by the Defendants to dispute Mr. McDonald's statements. The Court's conclusion that there was "abnormal use of the electrode pads [sic] but also a reasonable possibility of a second cause" was not based upon evidence in the record, but was purely speculation by the Court. R. at 169, The Court erred by not excluding the untimely filing of the Rich-Mar Manual as an exhibit and as to its inadmissibility under the Idaho Rules of Civil Procedure as well as finding any secondary cause of Plaintiff's injuries.

5. <u>Conclusion.</u>

The Court applied the incorrect standards on summary judgment, considered inadmissible evidence in decision, and misapplied the doctrine of *res ipsa loquitur*. Plaintiff provided undisputed evidence that there are no reasonable alternative causes to her burns from the defective electro therapy pads, that there was no abnormal use of the pads, and that there are no secondary sources of liability. The Court must reverse the lower Court's ruling granting summary judgment in favor of the Defendants and remand this case for further proceedings.

DATED THIS 13th day of July, 2020.

BROWNING LAW
Allen H. Browning
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this day I served a true and correct copy of the foregoing document in accordance with Rule 5(b) of the Idaho Rules of Civil Procedure on the following by the method of service indicated:

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DATED this 13th day of July, 2020.

Brenda Green
Legal Assistant