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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-APPELLANT'S  
REPLY BRIEF

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

## **Table of Contents**

TABLE OF AUTHORITIES .....	3
ARGUMENT .....	4
1. Defendants’ Arguments are improper under Idaho Rule of Professional Conduct 3.7[2].....	4
2. Defendant has Failed to Meet their Burden for Summary Judgment.....	6
3. Plaintiff Produced Evidence that a Defect Existed Through Qualified Expert Testimony, Which was Erroneously Disqualified by the District Court’s Abuse of Discretion.....	9
4. Conclusion.....	12

**TABLE OF AUTHORITIES**

**Cases**

*Scanlon v. General Motors Corp., supra*, 326 A.2d at 679 ..... 10

*Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 747, 553 P.2d 1306, 1311 (1976) ..... 10

*Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 748, 553 P.2d 1306, 1312 (1976) ..... 10, 11

*Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 748, 553 P.2d 1306, 1312 (1976)(emphasis added).  
..... 10

*Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 749, 553 P.2d 1306, 1313 (1976). ..... 10

*Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679,  
685, 365 P.3d 1033, 1040 (2016)..... 6

*Marek v. Hecla, Ltd.*, 161 Idaho 211, 214, 384 P.3d 975, 978 (2016) ..... 6

*Sadid v. Idaho State University*, 151 Idaho 932, 938, 265 P.3d 1144, 1150 (2011) ..... 6

*Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010) .. 8, 9

**Rules**

Idaho Rule of Evidence Rule 701 ..... 5

Idaho Rule of Professional Conduct 3.7 ..... 4

At the District Court, and on appeal before this tribunal, the Appellant has clearly and expressly argued that Respondent was not entitled to the remedy of summary judgment because “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.” Amended Memorandum in Support of Motion To Reconsider,” Rec. p. 195.

## ARGUMENT

### 1. Defendants’ Arguments are improper under Idaho Rule of Professional Conduct

#### 3.7[2]

Idaho Rules of Professional Conduct state:

**The tribunal has proper objection** when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. **A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.** It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Idaho Rule of Professional Conduct 3.7[2](emphasis added).

An attorney’s role in court proceedings is to analyze evidence and make argument in favor of evidence submitted by others as an advocate. An attorney of record on a matter may not properly testify as to facts of the case, which he has no personal knowledge of. I.R.P.C. 3.7. He may not authenticate evidence of a technical nature, which would otherwise require an expert witness to introduce, authenticate, and present testimony on. I.R.P.C. 3.7. There are only three narrow exceptions to this rule, none of which apply in this case: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

I.R.P.C. 3.7.

Here, counsel's arguments based upon the Rich-Mar Manual are improper and must be rejected. Defense counsel offered no expert testimony concerning the Rich-Mar Manual, failed to authenticate the manual, and had no opinions concerning the Rich-Mar Manual in the record. The only evidence concerning the Rich-Mar Manual on the record in this matter is the testimony of Bart McDonald. McDonald stated that he is trained to read and interpret the Rich-Mar Manual and the instructions concerning the EMPI carbon electrode pads at issue in this matter. R. at 204. There is no evidence in the record to refute or contest McDonald's testimony. McDonald testified that, from his experience and training, no moisture barrier was required for the type of treatment he performed on Plaintiff. R. at 204. Counsel's arguments must be rejected because he is not qualified to interpret or opine on the contents of a highly technical manual and has no qualifications, education or experience with the machine or the pads to base his argument upon within the record.

Idaho Rule of Evidence Rule 701:

If a witness is not testifying as an expert, testimony in the form of an opinion or inference is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Counsel is attempting to testify from the well in this matter. Counsel is not an expert, and even as a lay witness, could not testify as to the technical aspects of the machines, pads, or therapies used by Bart McDonald, which are the subject of this case. The Court must look to admissible evidence in the record, which is the affidavit of Bart McDonald. R. at 204-206. The manual for the Rich-Mar machine is inadmissible without expert testimony, which the Defense has not offered

here.

This Court reviews this case using the same standard under which it was reviewed at the district court, which is the standard for summary judgment. When considering evidence for summary judgment, "[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)).

Here the Court was required to find, but failed to find, that McDonald's procedures in treating Plaintiff were proper because no evidence was admitted to dispute his testimony. Defendant relies on the Rich-Mar Manual, on its face, with no expert testimony to interpret the contents. Because counsel may not interpret the contents without an expert, argument concerning the contents of the manual must be excluded, and the Court must make the determination at summary judgment that Mr. McDonald's testimony is correct in that no moisture barrier is required when performing the treatment as he did on Plaintiff. For these reasons, Defendant's improper arguments in sections C. (3) on page ten of Respondent's Brief, C.(4) on pages twelve through fourteen (12-14) of Respondent's Brief, section C.(5) on page fourteen of Respondent's Brief, Section IV(A)(1-4) on pages seventeen through twenty-five (17-25) of Respondent's Brief must be rejected.

## **2. Defendant has Failed to Meet their Burden for 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).

Here, Defendants have offered no admissible evidence through testimony, affidavit or otherwise, which proves there is an absence of material fact. The Defendant here has not met its burden because it offered no proof. The Defendant has not provided any expert testimony, and affidavits, or any other admissible evidence contrary to the evidence and expert testimony put on by the Plaintiff in this matter.

Defendant argues that “Neither McDonald’s treatment records nor his Incident Report to EMPI indicated that he moved the electrodes between treatments or used a barrier between Black’s skin and the electrodes as required by the Rich-Mar manual.” Respondent’s Brief, Pg. 11. This is an opinion held by Defendant’s counsel, not by an expert, and cannot refute the statement by McDonald that “From my experience and training no moistened interface is required when administering the treatment I was using for Linda Black.” R. at 204, Para 6.

Defendant’s counsel improperly offered his interpretation of the Rich-Mar manual that “The Rich-Mar Manual contained explicit warnings for when[sic] using carbon electrode pads and when using any pad with current outputs above 40 mA.” Respondent’s Brief, Pg. 13. This statement is also offered without any foundation and Defense Counsel cannot make this statement without an expert opinion.

Defendant argues that “Black never refuted the District Court’s conclusion that there was ‘abnormal use’ of the electrode pads and other ‘reasonable secondary’ causes for Black’s burn;” however, the only evidence in the record is McDonald’s testimony that this was normal use. R. at 204, Paras. 6-7. The Defendant, both in the district court and on appeal, has failed to show through admissible evidence or testimony that McDonald engaged in abnormal use. In order to show that

McDonald engaged in abnormal use, an expert's testimony would be required as Defendant's Counsel lacks the qualifications to make that assertion.

Defendant made the assertion that "EMPI established the absence of evidence of defect," without providing any proof or showing where or how that was allegedly established. Respondent's Brief, Pg. 15. This is a simple conclusory statement and is unsupported by the record. Defense counsel cannot satisfy its burden at summary judgment by simply attempting to show that Plaintiff has not satisfied her burden of proving a *prima facie* case yet, but must have evidence of its own to demonstrate no material question of fact exists. This was not done at the district court.

**"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)(emphasis added).

Here, the District Court took Defense Counsel's arguments at face value without any supporting evidence. Until the Defendant can show that no material fact is at issue, the burden of proof does not shift to the Plaintiff on summary judgment. The district court incorrectly found that Defense counsel had satisfied its burden, without providing any evidence or testimony.

Defendant argues that McDonald's failure to follow the Rich-Mar Manual was the cause of Plaintiff's burns. Respondent's Brief, Pgs. 17-19. This is a conclusory argument made by Counsel without the support of expert testimony in the record. No evidence was presented that McDonald's alleged failure to follow the Rich-Mar Manual burned Plaintiff. The **only** qualified expert testimony in the record is that of McDonald's, which states that the only possible cause of the burn was a defect in the pads. R. at 204-206. At summary judgment it is improper for the Court



to find otherwise. At any stage of the proceedings, it is improper for Counsel to make this argument without the support of expert testimony.

The question for this Court to decide at summary judgment is not whether or not the Plaintiff can prove her *prima facie* case, but whether there is a question of material fact to litigate before a jury. If a triable fact could be dispositive of Plaintiff's case, then that fact is material.

Here, the question as to whether the pad caused Plaintiff's injuries or whether McDonald's use of the pad caused Plaintiff's injuries is a triable issue of material fact, which a jury should be allowed to consider.

At best the Defense has a conflict of facts. Respondent asserts, without any testimony whatsoever, that the electrode pad was not defective. Plaintiff's expert witness says it was defective and that there was no other reasonable explanation for it. R. at 204-206. Defendant has attempted to disprove Plaintiff's expert testimony by offering testimony from counsel, which is beyond the realm of his qualified expertise and is improper.

For these reasons Defendant's arguments must be rejected here.

**3. Plaintiff Produced Evidence that a Defect Existed Through Qualified Expert Testimony, Which was Erroneously Disqualified by the District Court's Abuse of Discretion.**

At Summary Judgment, the moving party has the burden to make a *prima facie* showing of entitlement to judgment as a matter of law, or that no issue of material fact exists, by advancing sufficient, admissible, evidentiary proof. If that burden has been met, then the Plaintiff has the burden to refute that proof. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010).

The district court was incorrect in finding that there was no issue or material fact

concerning whether the electrode pads were defective. Plaintiff is not required to prove a *prima facie* case at summary judgment, as the burden of proof rests clearly on the moving party.

Even so, Plaintiff put on enough evidence to show that she could prove a *prima facie* case at trial.

“A *prima facie* case may be proved by direct or circumstantial evidence of a malfunction of the product and the absence of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability of the defendant.” *Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 747, 553 P.2d 1306, 1311 (1976)

**“Testimony of the user or operator of the product as to the circumstances of the event is sufficient to establish malfunction.”** *Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 748, 553 P.2d 1306, 1312 (1976)(emphasis added).

“Of additional relevance are the age of a product and the length of its use, the severity of its use, the state of its repair, its expected useful life **and the fact that the source of the malfunction is an enclosed system relatively immune from tampering or alteration once the product leaves the manufacturer's control.**” *Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 748, 553 P.2d 1306, 1312 (1976)(emphasis added).

"The product itself must be of a type permitting the jury, after weighing all the evidence to infer that in the normal course of human experience an injury would not have occurred at this point in the product's life span had there not been a defect attributable to the manufacturer." *Scanlon v. General Motors Corp.*, *supra*, 326 A.2d at 679.

“A plaintiff need not exclude every possible cause but only reasonably likely causes.”  
*Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 749, 553 P.2d 1306, 1313 (1976).

In sum, a Plaintiff may prove a *prima facie* product liability case through circumstantial  
Plaintiff-Appellant’s Reply Brief

evidence, such as the testimony of the user or operator, showing that the device in question could be defective. Plaintiff must also rule out other reasonable causes of the defect. These elements must be proven enough to permit a jury to infer that in the normal course of human experience, the injury would not have occurred absent a defect.

Here, Plaintiff introduced the testimony of Bart McDonald, who was also the operator and end user of the electrode pads. McDonald's testimony was that he could find no other explanation for Black's injuries other than a defect with the electrode pads from that lot, which he discontinued the use of, on his patients. R. at 205-206. Under *Farmer* this is exactly the type of testimony required to show that a defect in the pads caused the burn. *Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 748, 553 P.2d 1306, 1312 (1976). The District Court, in failing to recognize this, abused its discretion by disqualifying McDonald from testifying about manufacturing or electrical engineering knowledge, which was not required or what McDonald had testified to. McDonald is not required to testify as to the manufacturing processes or to any type of electrical engineering knowledge in this matter to prove that a defect existed in the electrode pads. His testimony that he was the user and operator of the Rich-Mar Unit and the electrode pads, had used them hundreds of thousands of times before for the same procedure without incident, and that no other cause could be identified as causing Plaintiff's burns other than defective pads, satisfies the analysis from *Farmer*. McDonald was qualified to make those statements. The District Court erred and abused its discretion when finding that he was not able to make those statements and that ruling must be reversed.

There is no evidence before the Court that the electrode pads were mishandled or subjected to any abnormal conditions or use. The electrode pads arrived in sealed packaging from the factory and the pads themselves were relatively immune from tampering or alteration once the product

leaves the manufacturer's control. There is no evidence before the Court to conclude that the pads had been tampered with after leaving the factory.

At summary judgment all inferences are to be made in favor of the non-moving party. Here the only evidence before the Court shows that there was a defect in the electrode pads, with no evidence offered by the Defendant to oppose that. For these reasons, Defendant's arguments must be rejected.

**4. Conclusion.**

The Court abused its discretion by improperly disqualifying Bart McDonald's testimony, erred when it considered improper argument from counsel below, and erred when considered inadmissible evidence presented by the Defendant. 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 through qualified expert testimony. 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 2<sup>nd</sup> day of October, 2020.



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BROWNING LAW  
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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 2nd day of October, 2020.



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