156 Idaho 204 Supreme Court of Idaho, Coeur d'Alene, September 2013 Term.

Janice BLIZZARD, individually and as parent and legal guardian of Colton Blizzard, a minor child; and Tina M. Sarro, Special Administrator of the Estate of Richard Max Blizzard, Plaintiffs—Appellants,

John Paul LUNDEBY, M.D. and Jane Doe Lundeby, husband and wife and the marital community thereof, and Lake City Surgeons, PLLC, an Idaho limited liability company, Defendants—Respondents.

> No. 39774. | March 27, 2014.

Synopsis

Background: Patient brought action against surgeon for medical malpractice. After patient's death, special administrator of patient's estate added a claim for wrongful death. The District Court, Kootenai County, Charles W. Hosack, J., entered judgment on special jury verdict for surgeon and denied new trial. Special administrator appealed.

[Holding:] The Supreme Court, W. Jones, J., held that on issue of first impression, requirement of probability of more favorable result for new trial is limited to questions the jury answered; overruling *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773.

Vacated and remanded.

West Headnotes (5)

Appeal and Error Grant of new trial

The test for whether a trial court has abused its discretion in ruling on a motion for a new trial based on the insufficiency of the evidence is (1)

whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standard applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason; but there is no further requirement of "a strong showing that the abuse of discretion was unmistakable, indisputable or self-evident." Rules Civ.Proc., Rule 59(a)(6).

5 Cases that cite this headnote

[2] New Trial

Clear, great or overwhelming, or manifest weight or preponderance

A trial judge may grant a new trial based on insufficiency of the evidence where after he has weighed all the evidence, including his own determination of the credibility of the witnesses, he concludes the verdict is not in accord with his assessment of the clear weight of the evidence. Rules Civ.Proc., Rule 59(a)(6).

1 Cases that cite this headnote

New Trial → Weight of Evidence

A trial court must apply a two-pronged test when determining whether to grant a new trial: first, it must consider whether the verdict was against the weight of the evidence, and second, it must consider whether a different result would follow on retrial, which requires more than a mere possibility; there must be a probability that a different result would be obtained in a new trial. Rules Civ.Proc., Rule 59(a)(6).

Cases that cite this headnote

[4] New Trial

₽Discretion of court

On a motion for new trial, it is within the district judge's discretion to set aside a verdict even if there is substantial evidence to support it. Rules Civ.Proc., Rule 59(a)(6).

2 Cases that cite this headnote

[5] New Trial

Sufficiency of evidence

When considering a motion for a new trial based on the insufficiency of the evidence, in deciding whether a different result would be obtained at a new trial, the judge must consider whether it is more probable than not that a different or more favorable result, as rendered by the questions the jury answered and only those questions the jury answered, would be obtained by a new trial; overruling *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773. Rules Civ.Proc., Rule 59(a)(6).

Cases that cite this headnote

Attorneys and Law Firms

**286 Winston & Cashett Lawyers, PS, Coeur d'Alene, attorneys for Appellant. Michael T. Howard argued.

Ramsden & Lyons LLP, Coeur d'Alene, attorneys for Respondents. Terrance R. Harris argued.

Opinion

**287 W. JONES, Justice.

*205 I. Nature of the Case

This is an appeal from a district court order denying Plaintiff's Rule 59(a)(6) Motion for a New Trial in a medical malpractice lawsuit where the jury found that

Defendant, Dr. Lundeby ("Dr. Lundeby"), did not breach the standard of care owed to his patient, Rick Blizzard ("Blizzard"). The district court, although finding the jury's verdict was against the clear weight of evidence, denied a motion for a new trial because it could not say the ultimate outcome would be different if a new trial were granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2008, Rick Blizzard went to Kootenai Medical Center for lower abdominal pain. At the time, Dr. Lundeby was on-call as the general surgeon. Dr. Lundeby performed an exploratory surgery after an endoscopy revealed that Blizzard had a severely obstructed and distended bowel. During the exploratory surgery, Dr. Lundeby removed a portion of Blizzard's colon and created a temporary colostomy.

On June 4, 2008, Dr. Lundeby performed a colostomy reversal, by which Blizzard's colon was intended to be reattached to his rectum via a circular stapler. This procedure was to create a colorectal anastomosis. The day after Blizzard's discharge on June 11, 2009, Blizzard complained of air and fecal material in his urine. On June 13, 2008, Dr. Lundeby performed a second exploratory surgery where he discovered that Blizzard's bladder had been stapled wrongly "through and through" into the anastomosis, creating a fistula—a passageway between two organs that normally do not connect—which was depositing fecal material into his bladder. Over the course of the next two years, Blizzard underwent eight surgical attempts by specialists to repair his bladder and bowel. Blizzard had no insurance and consequently incurred \$852,213 in medical expenses.

On April 13, 2010, Blizzard filed a medical malpractice lawsuit against Dr. Lundeby and Lake City Surgeons. After expending his savings and retirement, incurring a second mortgage on his home, and enduring frustrations with his condition, Blizzard took his life on July 15, 2010. Blizzard's wife, Janice Blizzard, his son, Colton Blizzard, and his sister, Tina Sarro as Special Administrator, filed an Amended Complaint. The Amended Complaint continued the suit for lost wages and medical expenses under Idaho's survival statute and added a claim for wrongful death.

At a jury trial, as to the relevant standard of care, Plaintiffs offered the expert testimony of Dr. Harris who testified that a reasonable surgeon would have taken additional steps to isolate the anastomosis, sought assistance from another surgeon, or aborted the procedure. Essentially, Dr. Harris testified that the standard of care was for Dr. Lundeby to know what he was stapling before he stapled anything. On the issue of standard of care, Dr. Lundeby offered the testimony of Dr. Liu who testified that the surgery was within the standard of care "because in my 16 years of practice ... I've never seen a bladder attached to the rectum in such a fashion."

The jury was presented with two verdict forms. Special Verdict Form A, dealt with whether Dr. Lundeby negligently performed the June 4, 2008, surgery on Blizzard and whether Dr. Lundeby failed to obtain informed consent. If the jury answered "no" to both questions they were not required to proceed to questions of causation and damages.² The jury returned a verdict finding that Dr. Lundeby did not negligently perform the June 4, 2008, surgery or fail to get informed consent; and as such, they did not proceed to the issues of causation and damages. Judgment was entered on November 16, 2011.

**288 *206 On November 30, 2011, Plaintiffs filed a Motion for New Trial pursuant to Rule 59(a)(6) of the Idaho Rules of Civil Procedure. In a decision rendered from the bench on January 31, 2012, the district court denied Plaintiffs' Motion for New Trial on the grounds that even though the jury's verdict as to whether Dr. Lundeby negligently performed the June 4, 2008, surgery was not supported by the weight of the evidence, it could not say that a new trial would produce a different result because the jury did not address causation and damages. In other words, it appears the district court could not say Plaintiffs would prevail on causation and damages even if a different jury found Dr. Lundeby negligent. Plaintiffs appeal.

III. ISSUES ON APPEAL

Whether the district court abused its discretion when it denied Plaintiffs' Motion for a New Trial pursuant to Idaho Rule of Civil Procedure 59(a)(6).

IV. STANDARD OF REVIEW

The parties dispute the standard of review that applies to a review of a district court's denial of a new trial pursuant to Rule 59(a)(6) of the Idaho Rules of Civil Procedure. Plaintiffs argue that the district court's decision is reviewed for an abuse of discretion. Dr. Lundeby argues that this Court should apply a more stringent standard of review. Particularly, Dr. Lundeby maintains that the grant or denial of a motion for a new trial should be upheld unless "the court has manifestly abused the wide discretion vested in it." Dr. Lundeby argues that a manifest abuse of discretion standard should include an added element: that there "be a strong showing that the abuse of discretion was unmistakable, indisputable or self-evident."

[1] We decline Dr. Lundeby's invitation to change the clearly established standard of review for review of a Rule 59(a)(6) motion. A trial court has broad discretion in ruling on a motion for a new trial. *Burggraf v. Chaffin*, 121 Idaho 171, 173, 823 P.2d 775, 777 (1991). The test for whether a trial court has abused its discretion is as follows:

(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standard applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. [(hereinafter "Sun Valley Test")].

Id. (citing Sun Valley Shopping Ctr. v. Idaho Power, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)); see also Sheridan v. St. Luke's Reg'l Med. Ctr., 135 Idaho 775, 782, 25 P.3d 88, 95 (2001).

Dr. Lundeby relies in part on Quick v. Crane, 111 Idaho 759, 769, 727 P.2d 1187, 1197 (1986), for the proposition that a manifest abuse of discretion standard should apply. It is first worth noting that the Quick case involved a Rule 59(a)(5) motion for a new trial on the basis of excessive damages. Id. This Court noted that "[t]here is a qualitative difference between a trial judge's role in deciding whether a new trial is justified based on the insufficiency of the evidence under Rule 59(a)(6), and whether a new trial is justified based on the amount of the jury's award of damages under Rule 59(a)(5)." Id. at 768, 727 P.2d at 1196. Nonetheless, the abuse of discretion review actually utilized in Quick is consistent with the Sun Valley Test.3 The factors relied on by this Court in Quick are covered by the Sun Valley Test. Dr. Lundeby also points to a concurring opinion in Burggraf v. Chaffin, 121 Idaho 171,

823 P.2d 775 (1991), to support a higher standard of review. However, the majority in *Burggraf* clearly articulated the appropriate standard of review with respect to a motion for a new trial. *Id.* at 173, 823 P.2d at 777. After reviewing its decision in *Quick*, this Court articulated and applied the *Sun Valley* Test as the appropriate standard of review, which has since been consistently applied by Idaho appellate courts. *Id.*

**289 *207 V. Analysis

The district court abused its discretion when it denied Plaintiffs' Rule 59(a)(6) motion.

Following the jury's verdict on November 16, 2011, Plaintiffs filed a Rule 59(a)(6) motion for a new trial. The district court ruled that the jury's verdict with respect to Dr. Lundeby's negligence was contrary to the weight of the evidence. The district court noted that the only expert who testified on behalf of Dr. Lundeby was Dr. Liu. Dr. Liu testified as follows: "Nobody has ever made the mistake of stapling a bladder to a rectum. That just doesn't happen; therefore, it's within the standard of care." The district court noted that this was the only reason offered by Dr. Liu and that his reasoning was "nonsensical." However, the district court ultimately denied Plaintiffs' motion for a new trial on the basis that it could not say that a new trial would produce a different result. Particularly, the district court noted that the jury made no determination as to causation and damages. The district court found that another jury could have found that Dr. Lundeby's negligence was not the proximate cause of Blizzard's injuries because of an issue with respect to Blizzard's comparative negligence for his drinking and lifestyle choices, which Dr. Lundeby maintains was the true cause of the fistula.

Plaintiffs argue that the district court erred when it denied their motion for a new trial because the district court went outside the bounds of its discretion when it considered the issue of causation in its ruling. Plaintiffs argue that a court need not determine that the ultimate outcome of a case would be different; rather, a court only needs to consider whether the result, to the extent of the jury's verdict, would be different. Since the jury's result was merely that Dr. Lundeby was not negligent, the Plaintiffs argue the district court need only decide whether that result would be different and not whether a different jury would find causation and damages. Since the jury verdict was based merely on the one question of whether Dr. Lundeby was negligent, and since that one issue was contrary to the weight of evidence, Plaintiffs contend that a new trial

would have a different result. Finally, Plaintiffs maintain that requiring a district court to examine every possible issue and defense would be unduly burdensome and would interfere with the role of a jury to consider those issues and defenses.

Dr. Lundeby argues that in order to find a different result would occur, the district court must conclude that a different jury would find (1) that Dr. Lundeby was negligent; (2) that Dr. Lundeby's negligence exceeded that of Blizzard; (3) that Dr. Lundeby's negligence was the proximate cause of the injury complained of; and (4) that some damage resulted. Dr. Lundeby argues that this Court's decision in Warren v. Sharp, 139 Idaho 599, 83 P.3d 773 (2003), stands for the proposition that a trial court must consider all elements necessary for a party to ultimately prevail on his or her claim. Dr. Lundeby maintains that the district court properly considered all the elements necessary for Plaintiffs to succeed at a new trial, and it determined that Plaintiffs probably would not prevail on a new trial because of issues of causation. Thus, Dr. Lundeby maintains that the district court did not err in denying Plaintiff's motion for a new trial.

[2] [3] [4] Idaho Rule of Civil Procedure 59(a)(6) provides that a "new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons: ... Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law." "A trial judge may grant a new trial based on I.R.C.P. Rule 59(a)(6) where 'after he has weighed all the evidence, including his own determination of the credibility of the witnesses, he concludes the verdict is not in accord with his assessment of the clear weight of the evidence.' "Sheridan v. St. Luke's Reg'l Med. Ctr., 135 Idaho 775, 779, 25 P.3d 88, 92 (2001) (quoting Quick, 111 Idaho at 766, 727 P.2d at 1194). This Court requires a trial court to apply a two-pronged test when determining whether to grant a new trial. Robertson v. Richards, 115 Idaho 628, 653, 769 P.2d 505, 530 (1987). First, a trial judge must consider whether the verdict was against the weight of the evidence. Id. at 654, 769 P.2d at 531. Second, a trial court *208 **290 must consider whether a different result would follow on retrial. Id. The second prong "requires more than a mere possibility; there must be a probability that a different result would be obtained in a new trial." Warren, 139 Idaho at 604, 83 P.3d at 777 (quoting Sheridan, 135 Idaho at 782, 25 P.3d at 95); see also Burggraf, 121 Idaho at 174 n. 3, 823 P.2d at 778 n. 3. But it is within the district judge's discretion to set aside a verdict even if there is substantial evidence to support it. Sheridan, 135 Idaho at 783, 25 P.3d at 96.

On appeal, Plaintiffs present an issue of first impression

in Idaho: whether the result the district court should review is the jury's verdict on each question answered or the ultimate result of the entire case including all issues whether answered by the jury or not. Plaintiffs argue that the district court is required merely to examine the bases on which the jury reached its verdict to determine whether that result would be different. Plaintiffs contend that it would be too burdensome for the district court to reconsider every possible issue and defense to determine whether a new trial would produce a different ultimate result. Plaintiffs contend that because the jury verdict was separated into two forms and the jury did not address issues of proximate cause and damages, the judge was merely required to consider the result as rendered by the jury.

[5] We hold that when considering a motion for a new trial pursuant to I.R.C.P. 59(a)(6), in deciding whether a different result would be obtained at a new trial, the judge must consider whether it is more probable than not that a different or more favorable result, as rendered by the questions the jury answered and only those questions the jury answered, would be obtained by a new trial. It is not required that the trial court conclude that a new result in the whole case would probably occur because as this Court has noted, "[i]t is always possible that a different result 'may' result if a party is given another try at a different jury." Burggraf, 121 Idaho at 174 n. 3, 823 P.2d at 778 n. 3. This Court has also held on multiple occasions that even if substantial evidence supports a jury verdict, a district judge may nonetheless exercise his or her discretion in granting a new trial. Sheridan, 135 Idaho at 782, 25 P.3d at 95; Quick, 111 Idaho at 766, 727 P.2d at 1194.

Dr. Lundeby relies largely on *Warren* to support the requirement that the judge must determine that the ultimate outcome of the case would be different because the *Warren* Court required the trial judge to also consider matters of comparative negligence. In that case, "the jury found there was no negligence on the part of Sharp that

was the proximate cause of Glenn Warren's death." *Id.* at 604, 83 P.3d at 778. This Court held that "the district judge must conclude that the jury on retrial would not only find Sharp negligent, but also find that Sharp's negligence exceeded that of Warren." *Id.* To the extent that *Warren* is inconsistent with this opinion, it is overruled.

We conclude that in the present matter the district court abused its discretion because it failed to apply the applicable legal standards. When considering a motion for a new trial pursuant to I.R.C.P. 59(a)(6), in deciding the second prong of the legal standard, i.e. whether a different result would be obtained at a new trial, the judge must consider whether it is more probable than not that a different result would be obtained only as to the question(s) answered by the jury.

VI. CONCLUSION

The district court's denial of Plaintiffs' motion for a new trial is vacated, and this case is remanded for further proceedings consistent with this Opinion. Costs on appeal are awarded to Plaintiffs as the prevailing party. Neither party requested attorney fees.

Chief Justice BURDICK, Justices EISMANN, J. JONES and HORTON concur.

All Citations

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Footnotes

- For the sake of simplicity, "Plaintiffs" as used in this opinion will refer collectively to the plaintiffs of the Amended Complaint filed after Blizzard took his life.
- Questions of causation and damages were not on Verdict Form A but presumably on other verdict forms—possibly Verdict Form B—that the jury was not required to consider given its answer of Verdict Form A. However, these verdict forms are not in the record on appeal.
- In *Quick,* when extensively discussing the abuse of discretion standard of review, the Court examined the following factors: (1) whether the trial court judge applied the correct standard; (2) "an actual exercise of judgment and a consideration of the facts and circumstances..."; and (3) Whether the judge violated the restraints on his discretion by disregarding relevant factual consideration or principles of law. *Id.* at 772, 727 P.2d at 1200.

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156 Idaho 802 Supreme Court of Idaho, Idaho Falls, November 2012 Term.

Judy **NIELD**, Plaintiff—Appellant,

POCATELLO HEALTH SERVICES, INC., a Nevada corporation, d/b/a **Pocatello** Care and Rehabilitation Center, Defendant–Respondent.

No. 38823–2011. | Feb. 14, 2014.

Synopsis

Background: Patient brought action against rehabilitation center, alleging negligence in providing her with wound care after her discharge from hospital. The District Court, Sixth Judicial District, Bannock County, Robert C. Naftz, J., granted summary judgment in favor of rehabilitation center and dismissed the action based on expert opinions. Patient appealed.

Holdings: The Supreme Court, Burdick, C.J., held that:

- summary judgment affidavit by patient's expert was not required to eliminate every potential alternate source of patient's infection;
- ^[2] court was required to rule on patient's objections to statements contained in summary judgment affidavit by center's expert;
- [3] expert's opinions that depended upon the alleged failure to conduct a methicillin-resistant staphylococcus aureus (MRSA) screen prior to patient's admission to center were speculative and inadmissible; and
- patient's expert was not required to counter every statement in summary judgment affidavit by center's expert in order for his own affidavit to be admissible.

Vacated and remanded.

W. Jones, J., concurred specially with opinion.

J. Jones, J., concurred specially with opinion.

Eismann, J., dissented with opinion.

Horton, J., dissented with opinion.

West Headnotes (23)

[1] Judgment

←Torts

Medical expert's summary judgment affidavit, in which he testified to a reasonable degree of medical certainty that patient had contracted her infections at rehabilitation center, rather than before she was admitted there, was not required to apply differential diagnosis analysis and eliminate every potential alternate source of patient's infection or show that admission to rehabilitation center was the proximate cause of the infection, though affidavit of rehabilitation center's expert listed possible alternate sources of patient's infection; patient's infection diagnosis was known, and the only question was how or where the patient contracted infection, for which expert testimony was not needed.

Cases that cite this headnote

[2] Evidence

←Medical testimony

Differential diagnosis is merely an alternate means used by medical experts to establish causation in a medical negligence case where there are several potential causes of symptoms and there is insufficient scientific basis to conclusively establish any one potential cause.

Cases that cite this headnote

[3] Evidence

← Medical testimony

Where a specific cause of a patient's symptoms can be stated to a reasonable medical certainty by medical expert, there is no place for the alternate means of establishing causation through differential diagnosis, for purposes of determining admissibility of the expert's testimony.

1 Cases that cite this headnote

[4] Evidence

←Medical testimony

For purposes of the differential diagnosis methodology, which can be used to determine admissibility of medical expert testimony on causation, the term "diagnosis" means the determination of a medical condition, such as a disease, by physical examination or by study of its symptoms.

1 Cases that cite this headnote

[5] Evidence

←Medical testimony

Judgment

₽Torts

Differential diagnosis can be utilized at the evidentiary stage of a case to determine whether an expert's opinion constitutes admissible evidence, and may also be employed at the summary judgment and trial stages of a medical negligence action; in those latter stages, the expert presenting differential diagnosis evidence must do so in an adversarial setting.

Cases that cite this headnote

[6] Judgment

←Torts

In determining whether an expert's testimony is admissible at summary judgment stage in a

medical negligence action, the court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible.

Cases that cite this headnote

[7] Health

Proximate cause

While expert testimony can be of assistance to the trier of fact in a medical negligence action in establishing that a disease is infectious and how it might be spread or contracted, expert testimony is not necessary in determining how a particular person contracted the disease; that is largely a factual matter.

Cases that cite this headnote

[8] Health

←Proximate cause

Once medical experts have opined in a negligence action as to the potential sources of an infection, it does not take expert testimony to establish exactly how a particular person contracted a particular infection; fact witnesses can provide the necessary details about sanitary conditions, contact by or with the infected person, wound care received by the infected person, and the like in order to fill in the details.

Cases that cite this headnote

[9] Judgment

₽Defects and objections

District court was required to rule on patient's objections to statements contained in expert's summary judgment affidavit prior to considering the affidavit testimony.

Cases that cite this headnote

[10] Trial

Effect of Failure to Object or Except

Objected-to evidence may not be admitted before the objection is considered and determined.

Cases that cite this headnote

[11] Judgment

←Admissibility

Evidence presented in support of or in opposition to a motion for summary judgment must be admissible; this threshold question of admissibility of evidence must be decided before proceeding to the ultimate issue, whether summary judgment is appropriate.

1 Cases that cite this headnote

[12] Judgment

←Admissibility

Judgment

-Defects and objections

If the admissibility of evidence presented in support of or in opposition to a motion for summary judgment is raised by the court on its own motion or on objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence before proceeding to the ultimate issue, whether summary judgment is appropriate.

1 Cases that cite this headnote

Summary judgment

A trial court's failure to determine the admissibility of evidence offered in connection with a motion for summary judgment is error that may not be remedied on appeal.

1 Cases that cite this headnote

[14] Judgment

←Torts

Medical expert's opinions in summary judgment affidavit, that depended upon the alleged failure to conduct a methicillin-resistant staphylococcus aureus (MRSA) screen prior to patient's admission to rehabilitation center, were speculative and inadmissible in patient's negligence action against rehabilitation center where patient alleged she contracted the MRSA infection; expert stated that it was his opinion patient was not screened for MRSA at intake and that it therefore would be impossible to say whether MRSA had colonized before she was admitted, despite note in hospital discharge summary stating that an MRSA screen was negative, and, while expert listed various possible sources of infection, he did not state that evidence in the record supported the application of any particular possibility or show that any of the possibilities were founded upon or related to actual facts in the record.

Cases that cite this headnote

[15] Evidence

Speculation, guess, or conjecture

Expert opinion which is speculative is inadmissible as evidence.

1 Cases that cite this headnote

[13] Appeal and Error

[16] Evidence

←Medical testimony

An expert opinion in a medical negligence action that merely suggests possibilities, not probabilities, would only invite conjecture and may be properly excluded.

1 Cases that cite this headnote

[17] Judgment

←Torts

Patient's medical expert was not required to counter every statement in summary judgment affidavit by rehabilitation center's expert in order for his own affidavit to be admissible in medical negligence action. Rules of Evid., Rule 702.

Cases that cite this headnote

[18] Evidence

←Medical testimony

There is no requirement that an expert's testimony in a medical negligence action must comply with any standard set out in another expert's testimony; an expert's opinion testimony should be judged on its own merits in determining admissibility and not upon what some other expert claims to be the correct standard. Rules of Evid., Rule 702.

Cases that cite this headnote

[19] Evidence

Necessity and sufficiency

Admissibility of expert testimony does not depend on how many opinions the expert gives; it is the quality of the opinions that counts.

Cases that cite this headnote

[20] Judgment

←Torts

A medical expert need not address every opinion stated by an opposing expert in order for his affidavit to comply with the rules for admission; once the evidence is admitted, it may be insufficient to overcome an opposing party's summary judgment motion, but that is the time for judging whether the expert has covered all of the bases. Rules of Evid., Rule 702.

Cases that cite this headnote

[21] Affidavits

Sufficiency and effect of averments

In determining whether to admit affidavit testimony, the court must determine whether the affidavit alleges facts, which if taken as true, would render the testimony admissible.

Cases that cite this headnote

[22] Evidence

In determining whether expert testimony is admissible, a court must evaluate the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion; admissibility, therefore, depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion. Rules of Evid., Rule 702.

Cases that cite this headnote

[23] Evidence

←Matters involving scientific or other special

knowledge in general

A qualified expert may testify in opinion form where his or her scientific or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Rules of Evid., Rule 702.

1 Cases that cite this headnote

Attorneys and Law Firms

**716 Cooper & Larsen, Chartered, Pocatello, for appellant. Javier L. Gabiola argued.

Duke Scanlan & Hall, PLLC, Boise, for respondent. Keely E. Duke argued.

SUBSTITUTE OPINION

THE ORIGINAL OPINION ISSUED ON THIS DATE IS HEREBY WITHDRAWN.

BURDICK, Chief Justice.

*804 This is an appeal from a judgment dismissing an action wherein the plaintiff sought damages for injuries sustained as a result of contracting certain infections. The district court employed a differential diagnosis analysis and held that plaintiff's medical experts were required to rule out possible sources of the infections, other than the defendant's care. The district court determined that plaintiff's medical experts' opinions were inadmissible because they did not address the other possible sources of the infections that were suggested by defendant's medical expert. We vacate the judgment and remand for further proceedings.

I. FACTUAL BACKGROUND

This action was filed by Judy Nield to recover damages from Pocatello Health Services, Inc., d/b/a Pocatello Care and Rehabilitation Center (PCRC), due to its alleged

negligence in providing her with wound care, which allegedly caused her to become infected with methicillin-resistant staphylococcus aureus (MRSA) and pseudomonas aeruginosa (pseudomonas), ultimately necessitating the *805 **717 amputation of her lower left leg and surgery to repair her right hip implant.

On August 21, 2007, sixty-five-year-old Nield was taken to the emergency room at Portneuf Medical Center (PMC) for pain and swelling in her left leg and pain in her right hip. She had had a bilateral hip replacement in 1994, and since then she had a lack of feeling in her left leg below the knee. In 2005, she dislocated her left hip in a fall, but it went undiagnosed and she continued ambulating by using a cane or walker. In April 2007, her pain increased to the point that she began using a wheelchair. She developed open sores on her lower left leg, and a nurse visited her home to assist with dressing changes. By August 21, Nield's pain was so severe that she could not get out of bed, resulting in her trip to the emergency room. It was noted that she presented "with worsening oozing and redness of her left lower extremity." Upon admission, she was "placed on contact isolation in case she had MRSA." She was administered intravenous antibiotics and wound and blood samples were collected. A laboratory report of a sample collected on August 21, 2007, from "WOUND, LEFT LEG" did not reveal either MRSA or pseudomonas.

On August 23, 2007, a physician was consulted regarding Nield's cellulitis and right hip pain. He noted that "[s]he has a fair amount of cellulitis and open blistering of her left lower extremity" and "[s]he has much less cellulitis and open areas on the right leg but has fair amount of pain both laterally and anteriorly with range of motion of her hip." The physician ordered an aspiration of her right hip to check for infection, but noted: "Unfortunately the results of this aspiration are going to be compromised because of starting the antibiotics. However, if we obtain a considerable amount of white blood cells we can assume that the hip is infected." An aspiration of her right hip was done on August 23, 2007. The laboratory report stated that no organisms were seen after 48 hours. Nield was discharged from the hospital on August 25, and the discharge summary stated that "an aspiration of the right hip showed only white blood cells but did not grow any bacteria." The discharge summary ends with a handwritten note by Dr. Ryan Zimmerman-"MRSA screen negative."

That same day, Nield was admitted to PCRC for the purpose of healing the sores on her left leg so that she could undergo surgery to repair her hip implants. She had four open wounds on her lower left leg that were to be

treated. The wounds were on her left ankle, her left shin, the top of her left foot, and the back of her left calf. Upon her admission, she was not screened for either MRSA or pseudomonas.

A laboratory report of a sample collected on November 9, 2007, from "WOUND, LEFT LEG" revealed both moderate MRSA and moderate pseudomonas. She was placed on intravenous antibiotics and completed that treatment on November 25, 2007. A laboratory report of a sample collected on November 27, 2007, from "WOUND, LEFT LEG" revealed light MRSA and did not reveal pseudomonas. She was then placed on another antibiotic. On December 3, 2007, she left PCRC because her Medicare coverage was expiring.

Nield returned home where she remained until March 20, 2008, when she was admitted to PMC because of a MRSA infection in her left foot that had spread to her ankle bone. She was transferred to a hospital in Utah. On April 2, 2008, Nield's left leg was amputated below the knee due to the infection.

Nield filed suit against PCRC on October 1, 2009, claiming that negligent wound care and unsanitary conditions at its facility violated its duty of care, resulting in the amputation of her leg, impairment of her mobility, and attendant physical pain and suffering. On October 8, 2010, PCRC moved for summary judgment on the ground that Nield could not prove that the MRSA and pseudomonas infections she contracted were caused by its negligence. PCRC supported this motion with the affidavit of Dr. Thomas Coffman, a physician who was board certified in both internal medicine and infectious disease.

Among other things, Dr. Coffman stated:

- (a) MRSA is not more virulent than other strains of staphylococcus.
- **718 *806 (b) A person may be colonized with MRSA but not show signs or symptoms of infection.
- (c) MRSA can be found in health care facilities and outside of health care facilities. MRSA is ubiquitous within skilled nursing facilities and long term facilities.
- (d) MRSA can be transmitted in many ways, including contact with someone who has an active infection, contact with someone who is MRSA colonized but not infected, contact with an object that has been contaminated with MRSA, or breathing in droplets expelled by a MRSA carrier or infected

- person expelled during breathing, coughing or sneezing.
- (e) A resident at a skilled nursing facility such as [PCRC] can become MRSA colonized or infected despite strict adherence to an appropriate infection control policy.
- (f) Wound and fluid cultures are one way to determine if a person is infected with MRSA or pseudomonas.
- (g) People may also be screened for MRSA to identify individuals who are MRSA colonized I have not seen any records of MRSA screening for Ms. Nield prior to her admission to [PCRC]. I note that the August 25, 2007 discharge summary from [PMC] includes a handwritten note that a MRSA screen was negative.... However, there are no records of any MRSA screen.... Based upon the records, it appears Dr. Zimmerman's reference to a negative MRSA screen is referring to the culture taken of Ms. Nield's wound on August 21, 2007, and not an actual MRSA screening. Based on the lack of any MRSA screen report, it is fair to assume that a MRSA screen was not performed. If Ms. Nield was not screened for MRSA, it is not possible to determine if she was MRSA colonized at the time she was admitted to **Pocatello** Care and Rehab on August 25, 2007.
- (h) Like MRSA, people may be carriers of pseudomonas aeruginosa without showing any signs or symptoms of infection.
- (i) Based on the records available, it is not possible to determine with a reasonable degree of medical certainty, whether or not Ms. Nield was MRSA or pseudomonas colonized as of the date she was admitted to [PCRC].
- (j) The August 21, 2007 wound culture does not rule out the possibility Ms. Nield was colonized or infected with MRSA or pseudomonas.... It is possible Ms. Nield had MRSA and/or pseudomonas in her swabbed leg wound, but that the culture did not grow out and identify these bacteria, resulting in a false negative.
- (k) Based upon the records available, my knowledge experience and training, it is not possible to determine whether or not Ms. Nield was MRSA or pseudomonas colonized as of the time she was admitted to [PCRC] on August 25, 2007. As such, it is not possible to determine when, where or how Ms.

Nield became infected with MRSA or pseudomonas.

Dr. Coffman offered no opinion as to whether the amputation of **Nield's** leg was necessitated by MRSA or pseudomonas infections.

Nield moved to strike portions of Dr. Coffman's affidavit on a number of grounds, particularly asserting that critical opinions were based on speculation. In her memorandum submitted in support of the motion to strike, **Nield** stated:

Dr. Coffman again asserts supposition in concluding ... "it appears" that Dr. Zimmerman's reference in his discharge summary ... to a negative MRSA screen refers to the culture taken, "and not an actual MRSA screening based on the lack of any MRSA screen report." Dr. Coffman goes on to speculate, "it is fair to assume that a MRSA screen was not performed." Again, Dr. Coffman speculates, and does not endeavor to produce any facts to ascertain whether a screen and culture were done.

Dr. Coffman goes on to conclude: "If Ms. Nield was not screened for MRSA, it is not *807 **719 possible to determine if she was MRSA colonized at the time she was admitted to [PCRC] on August 25, 2007." This is again supposition and conclusory speculation. Dr. Coffman's speculation is evident by his use of "If" indicative of his conclusory speculations.

Nield also responded to PCRC's summary judgment motion with the affidavits of three experts: Sidney Gerber, a nursing facility expert; Suzanne Frederick, a nursing care expert; and Dr. Hugh Selznick, a medical expert. Each of **Nield's** experts attributed her infections to poor infection control measures by the staff of PCRC.

Gerber submitted an affidavit, which attached and incorporated a more comprehensive report. In his report, he stated that nursing home operators must:

Establish and maintain an infection control program designed to provide a system that monitors, investigates, controls, and prevents the development and spread of disease and infection in the facility, and for a resident to live in a safe, sanitary, and comfortable environment.

Based on his review of PCRC records, as well as survey findings by the Idaho Department of Health & Welfare (IDHW) regarding complaints against PCRC, Gerber opined that PCRC did not comply with applicable safety

and hygienic standards. Among other things, he stated:

According to the [IDHW] survey conducted on January 24, 2008, [PCRC] failed to implement its own policies and procedures regarding proper wound care technique according to accepted standards of practice to prevent the spread of infection. Repeatedly, surveyors observed nurses failing to use proper wound care, i.e. using basic universal precautions of washing or sanitizing their hands while providing treatment to two facility residents, one of which was admitted to the facility with MRSA (Methicillin-resistant

Staphylococcus aureus).... Although Ms. Nield was not one of the residents surveyed, she was discharged home on 12/3/07 with MRSA....

Frederick, the nursing care expert, submitted both an affidavit and a more comprehensive report. The report does not appear in the record as an attachment to her affidavit but, rather, as an attachment to the affidavit of Nield's counsel. The report cited to PCRC's "substandard nursing practices regarding infection control," based upon her review of PCRC's records and the IDHW survey. She recites:

During the inspections, surveyors observed nurses during wound care that failed to follow professional practice standards and facility policies and procedure to prevent infections. The facility was cited for failing to ensure residents received proper wound care according to accepted standard of practice in order to prevent the possible spread of infection. According to the survey documents, nurses repeatedly failed to wash their hands at appropriate times during the wound care procedures and failed to follow proper precautions, including with a resident that had MRSA....The surveyor's description of the nursing staff's actions and breaches of the standard of care

demonstrated the facility's failure to adequately train and supervise the nursing staff in order to prevent the spread of infection such as MRSA. The nurse's failure to wash hands and failure to remove soiled and contaminated gloves prior to touching items and equipment showed that the nurse did not understand basic infection control principles....The nursing staff failed properly communicate the condition of Mrs. Nield's wounds to her physician and the healthcare The nurses failed document Mrs. Nield's wounds completely and accurately....The written record is an extremely important part of communication and the failure to maintain a complete and accurate record prevents the healthcare team from properly evaluating a resident's needs and response to treatment.

Dr. Selznick submitted an affidavit, which attached and incorporated a more lengthy report, dated September 11, 2009. Among other things, he stated in the report:

- (a) MRSA is not a community acquired staph but rather a bacteria often acquired nosocomially or as a result of hospitalization. Methicillin resistant staph is a rather virulent microbe resistant *808 **720 to many antibiotics, including penicillin-related methicillin. The initial staph present, per 08/21/07 wound cultures (coagulase *negative*) was a much less virulent and more susceptible organism.
- (b) There is no evidence, in my opinion, to a reasonable degree of medical certainty, that Ms. **Nield** had MRSA infection prior to entering [PCRC]. Objective evidence for same exists, based on her 08/21/07 left lower extremity wound cultures which confirmed coagulase *negative* staph, not MRSA, whereas subsequent cultures following her hospitalization at [PCRC] did grow out MRSA (11/09/07, 01/18/08, 03/13/08).
- (c) The provided medical records confirmed initiation of wound care at the Portneuf Wound Care & Hyperbaric clinic on 11/09/07 with treatment notes in evidence through 03/20/08. No wound cultures were done at [PCRC] from 08/25/07 until a wound culture was performed at Portneuf Wound Care & Hyperbaric Clinic on 11/09/07 initial

evaluation. This wound culture grew coagulase *positive* staph, which was different from the prior coagulase *negative* staph. Sensitivity patterns confirmed this was a *methicillin resistant Staphylococcus aureus*. Additionally, the 11/09/07 wound culture grew moderate *Pseudomonas aeruginosa*.

- (d) My detailed review of the [IDHW] Summary Statement of Deficiencies, ... confirmed a patient being treated in August of 2007 at the [PCRC] for wound care and "pseudomonas cellulitis of both knees." It is my opinion the objectively confirmed pseudomonas infection of left lower extremity wounds per 11/09/07 culture was indeed contracted at [PCRC]. In addition, allegations outlined in a 02/19/08 letter to the administrator of [PCRC] ... confirmed, "There were four or five other residents in rooms near the identified resident with methicillin resistant staphylococcus aureus infections." The findings of the investigation confirmed and substantiated poor infection control measures by the staff.
- (e) It is highly unlikely, in my opinion, that Ms. **Nield** contracted pseudomonas from any other source other than from her [PCRC] hospitalization given aforementioned positive 11/09/07 culture results. This is a very rare organism to cause total joint infection in general, and given the positive 11/09/07 wound culture for pseudomonas, it is more likely than not, colonization occurred while hospitalized at [PCRC] and ultimately led to her right hip demise. It should be noted that right hip aspiration at the time of her 08/21/07 admission was negative.

Prior to the hearing on its summary judgment motion, PCRC moved to strike portions of Nield's affidavits. With regard to Dr. Selznick's affidavit, PCRC sought to strike as speculative and/or without foundation one full paragraph, one sentence in another paragraph, and two sentences in a third paragraph. In addition, a statement contained in a fourth paragraph was sought to be stricken on the grounds of being conclusory. PCRC did not seek to strike any portion of two medical reports Dr. Selznick had attached and incorporated into his affidavit, consisting of approximately fifty-two pages and containing further medical opinions. PCRC sought to strike the entirety of Frederick's affidavit as being speculative and without foundation and one paragraph of Gerber's affidavit on grounds of speculation and lack of foundation. PCRC did not seek to strike the eight-page report that Gerber attached and incorporated into his affidavit, detailing standards applicable to nursing care facilities

controlling and preventing the spread of infectious diseases, including MRSA, and explaining how PCRC had failed to comply with those standards. PCRC did not seek to strike any portion of Fredrick's report either, which was submitted as an incorporated attachment to the affidavit of Nield's counsel.

The district court, rather than dealing directly with the evidentiary deficiencies asserted by PCRC, determined that Dr. Selznick's entire affidavit was inadmissible under I.R.E. 702 because it did "not contain **721 *809 the reasoning or methodology required to assist the trier of fact in determining whether [PCRC's] actions were a substantial factor in [Nield] contracting MRSA and pseudomonas." The court noted, however, that it did "not mean to suggest that Dr. Selznick does not possess the knowledge, skills or qualifications to address the question of causation." Although the district court mentioned the affidavits of Frederick and Gerber in its memorandum granting summary judgment, it did not analyze either of the affidavits or rule on their admissibility. However, in its memorandum ruling on Nield's motion for reconsideration, the district court erroneously stated it had conducted an analysis of those affidavits and " found [them] to be similarly insufficient in establishing where and how [Nield] contracted MRSA and pseudomonas." The district court made no mention of the reports prepared by Frederick and Gerber.

The district court quoted I.R.E. 702, noting that expert testimony will not be of assistance to the trier of fact and is inadmissible if it is speculative, conclusory or unsubstantiated by facts in the record. On the other hand, the court noted that if an expert's reasoning and methodology are scientifically sound and based on a reasonable degree of medical probability, the testimony will be of assistance to the trier of fact and admissible.

Because Dr. Selznick's and Dr. Coffman's opinions differed as to when and where Nield had likely contracted MRSA, the district court concluded that it was dealing with a "differential diagnosis" case, citing Weeks v. Eastern Idaho Health Services:

Differential diagnosis involved an analysis of all hypotheses that the might explain patient's symptoms or mortality. After identifying all of the potential causes of symptoms, the expert then engages in a process of eliminating hypotheses in order to reach a conclusion as to the most When likely cause. using differential diagnosis a district court is justified in excluding the expert's testimony if the expert fails to offer an explanation why an alternative cause is ruled out.

143 Idaho 834, 839, 153 P.3d 1180, 1185 (2007) (citing *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057–58 (2003)).

Based on its determination that a differential diagnosis analysis was appropriate, the district court determined that Dr. Selznick's affidavit was inadmissible because it did not negate possible alternate sources through which Dr. Coffman suggested Nield may have contracted MRSA—the possibility that Nield may have been a carrier of MRSA, the possibility that the culture of her left leg wound may have produced a false negative, or "the other factors that could have been a substantial factor in causing the infections." It was apparently the district court's view that Nield's affidavits, particularly that of Dr. Selznick, were required to negate the possible sources of infection suggested by Dr. Coffman in order to be admissible under I.R.E. 702. Based on its holding that Dr. Selznick's affidavit was inadmissible, the district court stated, "there is no need for this Court to address the Motions to Strike filed by the Plaintiff." The district court apparently accepted Dr. Coffman's affidavit testimony despite Nield's objections and utilized that testimony in determining the admissibility of Dr. Selznick's testimony.

Having stricken Dr. Selznick's affidavit and assuming it had stricken the other two affidavits, the district court concluded that **Nield** had presented no admissible evidence to counter the statements in Dr. Coffman's affidavit and, therefore, granted summary judgment in favor of PCRC. A judgment dismissing the case was thereafter entered and it is from that judgment that **Nield** timely appealed.

II. ISSUES ON APPEAL

- 1. Whether the district court erred in using a differential diagnosis analysis to determine the admissibility of Dr. Selznick's affidavit.
 - 2. Whether the district court erred in relying upon Dr. Coffman's affidavit.
 - 3. Whether the district court erred in using Dr. Coffman's affidavit as a yardstick for

determining the admissibility of Nield's affidavits.

**722 *810 III. STANDARD OF REVIEW

The summary judgment in this case was premised on the district court's determination that **Nield** had submitted no admissible evidence in opposition to PCRC's summary judgment motion. Thus, we are presented with an evidentiary issue. In this regard, we recently stated:

The admissibility of evidence affidavits contained in and depositions in support of or in opposition to a motion summary judgment is a threshold matter to be addressed by the court before applying the liberal construction reasonable and rule inferences to determine whether the evidence creates a genuine issue of material fact for trial. This Court applies an abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony offered in connection with a motion for summary judgment. A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason.

Gerdon v. Rydalch, 153 Idaho 237, 241, 280 P.3d 740, 744 (2012) (internal quotation marks and citations omitted).

IV. ANALYSIS

A. The district court erred in using a differential diagnosis analysis to determine the admissibility of Dr. Selznick's affidavit.

[1] The district court concluded that it was dealing with a differential diagnosis case involving several potential causes of Nield's symptoms, citing the Weeks case. Nield contends that the court erred in doing so and requiring

that she "eliminate any other causes and show that she could have only gotten MRSA and pseudomonas from PCRC." On the other hand, PCRC asserts that, based on Dr. Coffman's affidavit, there are multiple possible sources of infection and Nield was required in her affidavits to eliminate all possible sources but PCRC.

[2] [3] Differential diagnosis is merely an alternate means of establishing causation where there are several potential causes of symptoms and there is insufficient scientific basis to conclusively establish any one potential cause. Weeks, 143 Idaho at 839, 153 P.3d at 1185. In Weeks, the plaintiff's medical expert was unable to determine to a "reasonable medical probability" the exact effect of certain medications upon a patient's brain. *Id.* The brain injury, which resulted in the patient's death, could have been as a result of the "chemicals themselves, the volume of fluid, or the combination of the two." Id. The expert had no scientific studies upon which to opine as to the effect of the chemicals on the patient's brain. Id. However, there was scientifically reliable evidence regarding the deleterious mechanical effect on the patient's brain of increasing the intracranial pressure. Id. Thus, this Court held that the district court erred in failing to admit the expert's testimony into evidence even though he could not pinpoint the exact cause of the injury. *Id.* at 840, 153 P.3d at 1186. Where a specific cause of a patient's symptoms can be stated to a reasonable medical certainty, there is no place for this alternate means of establishing causation.

[4] This Court has not had occasion to flesh out the parameters of the differential diagnosis methodology. Because of the misconceptions apparent in the district court's decision, we take this opportunity to do so. While we have not previously defined "diagnosis" in this context, we find the Black's Law Dictionary definition to be appropriate: "The determination of a medical condition (such as a disease) by physical examination or by study of its symptoms." BLACK'S LAW DICTIONARY 464 (7th ed.1999). Some federal courts have employed a more expansive definition that incorporates "differential etiology," which is "a term used on occasion by expert witnesses or courts to describe the investigation and reasoning that leads to the determination of external causation, sometimes more specifically described by the witness or court as a process of identifying external causes by a process of elimination." McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1252 (11th Cir.2005). Being the highest court of a sovereign state, we are free to adopt our own concept of differential diagnosis *811 **723 and we decline to follow the more expansive definition employed by some federal courts. In this case, only one cause of symptoms was considered by the

district court—the hypothesis that MRSA and pseudomonas were the cause of Nield's injuries. Dr. Selznick flatly stated that they were the cause of her injuries, while Dr. Coffman did not directly address the issue in his affidavit. The main issues in dispute were when, where, and how Nield may have contracted the infections. Dr. Selznick opined that she could only have contracted the infections at PCRC. Dr. Coffman opined that she could have contracted the infections elsewhere and that it was impossible to determine exactly where that might have been. This dispute, however, is not one that is appropriate for resolution under a differential diagnosis analysis.

[5] [6] Differential diagnosis can be utilized at the evidentiary stage of a case to determine whether an expert's opinion constitutes admissible evidence. It may also be employed at the summary judgment and trial stages. In those latter stages, the expert presenting differential diagnosis evidence must do so in an adversarial setting. However, the admissibility stage is not subject to an adversarial process, such as the district court employed here. In other words, in determining whether an expert's testimony is admissible, "[t]he Court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible." Edmunds v. Kraner, 142 Idaho 867, 871, 136 P.3d 338, 342 (2006). Indeed, that is what the Court did in Weeks. The plaintiff's expert in Weeks was unable to present a diagnosis stating the cause of symptoms to a reasonable medical probability, but avoided summary judgment by employing the differential diagnosis methodology. 143 Idaho at 839, 153 P.3d at 1185. The expert testimony in Weeks was judged, not by material contained in an opposing affidavit, but by material contained in the expert's own affidavit testimony.

Here, Dr. Selznick testified to a reasonable degree of medical certainty that **Nield** contracted her infections at PCRC, rather than before she was admitted there. The district court should have focused on what Dr. Selznick said in his affidavit and incorporated reports, rather than what he did not say or what Dr. Coffman said. If Dr. Selznick's opinion testimony was insufficient, that is a matter for determination in the adversarial summary judgment stage of the proceeding. The district court did not rule that Dr. Selznick was unqualified to address the issue of causation or that he lacked an adequate foundation, but rather, the court based its determination solely on the ground that he did not counter the various possibilities suggested by an opposing expert. When this Court stated in Weeks that a district court is justified in excluding expert testimony if the expert fails to offer an explanation as to why an alternate cause is ruled out, we were not considering the situation where an opposing expert was questioning the testimony of the plaintiff's expert. Rather, we were addressing the situation where the plaintiff's expert could not state an exact cause to a degree of medical probability, raised two possible causes, stated that one was more probable than the other but then observed that both likely played a part. The analysis in *Weeks* was confined to the matters stated in the expert's affidavit, not upon some external testimony.

Dr. Selznick opined that MRSA is an infectious disease, that it is spread by some sort of contact, that Nield did not have MRSA or pseudomonas prior to admission to PCRC, and that she contracted the infections at PCRC as a result of its unsanitary conditions and improper wound care. Since we do know Nield's diagnosis, as presented to the district court on PCRC's summary judgment motion—infection with MRSA and pseudomonas¹—there was no need to go further to *812 **724 "explain the patient's symptoms or mortality," nor was there any requirement to rule out alternate causes of those symptoms.

[7] The district court had the mistaken conception, apparently derived from PCRC's summary judgment memorandum, that expert medical testimony was necessary "in order to establish how and where the plaintiff was infected with MRSA and pseudomonas." Expert testimony certainly can be of assistance to the trier of fact in establishing that a disease is infectious and how it might be spread or contracted. However, expert testimony is not necessary in determining how a particular person contracted the disease. That is largely a factual matter. Here, both Dr. Selznick and Dr. Coffman submitted testimony that MRSA and pseudomonas are infectious and can be spread from person to person. Dr. Selznick offered testimony as to potential sources of contracting the infection, as well as the probable source for Nield's infection. Dr. Coffman offered testimony of a variety of sources through which a person might contract an infection. All of this is within the domain of expert testimony. A layperson would not necessarily know where or how a person might contract an infectious disease.

^[8] Once the experts have opined as to the potential sources of an infection, it does not take expert testimony to establish exactly how a particular person contracted a particular infection. Fact witnesses can provide the necessary details about sanitary conditions, contact by or with the infected person, wound care received by the infected person, and the like in order to fill in the details. In this case, as set forth below, some of those details were

before the district court in the testimony of Nield, Dr. Selznick, Gerber and Frederick.

PCRC contends, and the court below found, that direct expert testimony is required to show proximate cause. However, this Court held to the contrary in *Sheridan v. St. Luke's Regional Medical Center*, 135 Idaho 775, 25 P.3d 88 (2001), a medical malpractice case. In relevant part, the *Sheridan* Court stated:

Unlike the elements of duty and breach of duty, there is no statutory requirement explicitly stating proximate cause in medical malpractice cases must be shown by direct expert testimony. Therefore, testimony admissible to show proximate cause in a medical malpractice case, like any other case, is governed by the rules of evidence regarding opinion testimony by lay witnesses and experts under Idaho Rules of Evidence 701 and 702.

Furthermore, according to our precedent, proximate cause can be shown from a "chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable." *See Formont [v. Kircher]*, 91 Idaho [290], 296, 420 P.2d [661], 667 [(1966)].

Id. at 785, 25 P.3d at 98. The Court's citation to Formont is of particular interest. In that case, the plaintiff had an infection in his leg that went untreated, eventually resulting in the leg's amputation. The district court found that the plaintiff's physician had breached the requisite standard of care and that proper care could have been expected to produce different results, but that there was not enough proof of proximate cause. Formont, 91 Idaho at 295–96, 420 P.2d at 666–67. The question on appeal was whether the trial court erred in finding that the plaintiff failed to establish that the defendant-physician's care or lack of care was the proximate cause of the loss of plaintiff's leg. Id. at 296, 420 P.2d at 667. The Formont Court reversed the district court stating the following rule in support of its decision:

Respondent was not required to prove his case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that he show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. [...] If the rule of law is as contended for by defendant and appellant, and it is necessary to demonstrate conclusively and

beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.

**725 *813 Id. (internal quotation marks and citations omitted). Thus, the district court erred here in holding that expert medical testimony was required in order to establish how and where Nield was infected. This Court's concept of the differential diagnosis methodology does not require such a holding.

Based on its misconception that this was a differential diagnosis case, the district court concluded that Dr. Selznick's affidavit was inadmissible. According to the court:

There is nothing in Selznick's affidavit that addresses the belief that because of the ubiquitous nature of MRSA and pseudomonas the Plaintiff may have been a carrier of MRSA and pseudomonas but was not infected at the time of her admission. Selznick does not explain why the culture of the leg wound would not have produced a false negative and why Plaintiff could *only* have contracted MRSA and pseudomonas while admitted at PCRC.

In evaluating Selznick's affidavit and viewing it in the most favorable light to the Plaintiff, the Court must conclude that the validity of Dr. Selznick's reasoning and methodology regarding how the Plaintiff contracted MRSA and pseudomonas is without merit. Selznick makes a conclusion that because the Plaintiff was negative for MRSA and pseudomonas at the time of her admission to PCRC, but then tested positive for MRSA and pseudomonas prior to her discharge, then she must have contracted MRSA and pseudomonas while at PCRC. He does not address the other factors that could have been a substantial factor in causing the infections. His conclusions are speculative, conclusory, and unsubstantiated in light of the numerous ways the Plaintiff may have contracted these infections. Dr. Selznick failed to identify all of the potential causes of symptoms, eliminating hypotheses in order to reach a conclusion as to the most likely cause.

The district court erred in determining that Dr. Selznick's affidavit was inadmissible because it did not eliminate every potential alternate source of **Nield's** infections.

B. The district court erred in relying upon Dr.

Coffman's affidavit.

[9] It is clear that the district court relied upon statements contained in Dr. Coffman's affidavit in making the determination that Dr. Selznick's affidavit was inadequate. Dr. Coffman stated that there were a number of ways a person could become colonized or infected by MRSA and pseudomonas. In ruling on the admissibility of Dr. Selznick's affidavit, the district court utilized some of Dr. Coffman's statements that **Nield** could have been a carrier of MRSA and pseudomonas, that the 8/21/07 leg wound culture could have produced a false negative and that it was "very possible MRSA and/or pseudomonas were present in the wound that was cultured on August 21, 2007." These three opinions were all based upon Dr. Coffman's supposition that no MRSA screen was performed prior to Nield's admission to PCRC on August 25, 2007. He states that without a screen for MRSA it is not possible to determine if she was MRSA colonized at the time of admission.

Nield filed a motion to strike these statements, contending that they were speculative. She requested that the district court either strike or disregard them. The district court makes mention of the motion to strike the affidavit of Dr. Coffman in the preface of its summary judgment decision, but the decision contains no analysis whatsoever regarding the objections raised to admission of any of his testimony. Indeed, the district court stated that it need not address the motion to strike, having granted summary judgment to PCRC. In its subsequent decision denying reconsideration, the district court states it "correctly determined that the Defendant's expert, Dr. Coffman, presented admissible, credible testimony establishing that the Plaintiff could not demonstrate to a reasonable degree of medical certainty when, where, or how she contracted MRSA or pseudomonas." However, the record contains no support for the district court's assertion that it had ruled on the admissibility of Dr. Coffman's affidavit testimony.2

**726 [10] [11] [12] [13] It is axiomatic that objected-to evidence may not be admitted before the objection is considered and determined. As this Court has frequently held:

Evidence presented in support of or in opposition to a motion for summary judgment must be admissible. *Hecla Min. Co. v. Star–Morning Min. Co.*, 122 Idaho 778, 785, 839 P.2d 1192, 1199 (1992). This threshold question of admissibility of evidence must be decided "before proceeding to the ultimate issue, whether summary judgment is appropriate." *Ryan v. Beisner*, 123 Idaho 42, 45, 844 P.2d 24, 27 (Ct.App.1992).

Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165,

1169 (1999). Or, as stated in *Ryan v. Beisner:*

[I]f the admissibility of evidence presented in support of or in opposition to a motion for summary judgment is raised by the court on its own motion or on objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence before proceeding to the ultimate issue, whether summary judgment is appropriate.

123 Idaho at 45, 844 P.2d at 27. The district court erred in failing to rule upon Nield's objections to statements contained in Dr. Coffman's affidavit before relying upon those statements to decide the admissibility of Nield's affidavits. "A trial court's failure to determine the admissibility of evidence offered in connection with a motion for summary judgment is error that may not be remedied on appeal." *Montgomery v. Montgomery*, 147 Idaho 1, 6, 205 P.3d 650, 655 (2009).

[14] [15] Even assuming that the district court had done what it said it did in the decision on reconsideration—actually ruled upon the admissibility of Dr. Coffman's affidavit before striking Dr. Selznick's affidavit and deciding the motion for summary judgment—Dr. Coffman's opinions that depend upon the failure to conduct an MRSA screen are speculative and inadmissible. "Expert opinion which is speculative ... is inadmissible as evidence." Weeks, 143 Idaho at 838, 153 P.3d at 1184. Although Nield did not specifically raise on appeal the district court's failure to act upon the motion to strike portions of Dr. Coffman's affidavit, she submitted substantial argument in her opening brief on appeal that Dr. Coffman's testimony was speculative and should have been disregarded. This was the same basis upon which she based her motion to strike. Thus, we will consider the issue.

As noted above, Dr. Coffman based the above-mentioned opinions upon his conclusion no MRSA screen had been performed prior to Nield's admission to PCRC on August 25, 2007. Dr. Coffman states in his affidavit that, "[b]ased upon the *records available*, it is not possible to determine with a reasonable degree of medical certainty, whether or not Ms. Nield was MRSA or pseudomonas colonized as of the date she was admitted to [PCRC]." (emphasis added). Among the records actually reviewed by Dr. Coffman was a handwritten note on the August 25, 2007 discharge summary saying "MRSA screen negative." Although Dr. Coffman stated that it was not common

practice as of that time to screen incoming patients for MRSA, it appears from his affidavit that this would have been an effective means to determine whether **Nield** was MRSA colonized at the time. He states: "If Ms. Nield was not screened for MRSA, it is not possible to determine if she was MRSA colonized at the time she was admitted to the [PCRC] on August 25, 2007." The opposite would appear to be true. His opinion that she was not screened is based on his speculation that the discharge summary note did not mean what it said—"MRSA screen negative." He concluded that the note was wrong because he did not find a report of the screen in the records he received for review. He says it is "fair to assume that a MRSA screen was not performed," merely because he did not find one. This is pure speculation. Thus, his contentions that **Nield** was not MRSA colonized at the time she went to PCRC. that she may have produced a false negative on the culture that was documented in the record, and that she may have been an MRSA carrier all of which played a significant *815 **727 part in the district court's decision to strike Dr. Selznick's affidavit, are based upon his guess that the note in the file was incorrect in stating that an MRSA screen had been performed and came out negative. A simple telephone call to Dr. Zimmerman, the author of the note, might have sufficed to definitively answer the question.

[16] Nield further contends that Dr. Coffman's testimony is speculative because he could neither rule in, nor out, any particular source of Nield's infections. That is, although he postulated quite a number of potential sources of the infections, he could not state that she contracted the infections from any of the possible sources. "An expert opinion that merely suggests possibilities, not probabilities, would only invite conjecture and may be properly excluded." Slack v. Kelleher, 140 Idaho 916, 923, 104 P.3d 958, 965 (2004). Further, while Dr. Coffman lists the various possible sources of infection, he does not state in his affidavit that evidence in the record supports the application of any particular possibility. In other words, Dr. Coffman opines that a person can contract MRSA through contact with someone who has an active infection, someone who is MRSA colonized but not infected, contact with an object that has been contaminated with MRSA, or breathing in droplets expelled by an MRSA carrier. However, he fails to cite to any evidence in the record indicating that Nield had contact with any of these potential sources. There is nothing in his deposition indicating that he was aware of any contact that Nield had during her stay at PCRC with visitors, staff, other residents, or anyone else. He fails to show in his affidavit that any of the possibilities are founded upon or related to actual facts in the record.3 Further, he contends that MRSA is ubiquitous in skilled nursing facilities and long-term care facilities but not does point to any evidence in the record that this is the case with respect to PCRC. Indeed, in his deposition testimony, he seems to testify somewhat to the contrary:

Q. [Nield's counsel] Did, in your opinion in reviewing all the documents, PCRC violate their infection control policy and procedure?

A. [Dr. Coffman] In what respect?

Q. With respect to the prevention of transmission of MRSA and pseudomonas.

A. Well, we don't—I don't think we have any evidence of transmission of those bugs. In fact, I think in that Health and Welfare thing they referenced a report that is probably somewhere in those two big boxes—although I'm not sure of that—that they didn't have any other cases appear during this time span.

They had some cases that—of people that came in with MRSA, but no—if I'm reading that state report properly, there weren't any other cases that were identified after admission, with the exception of Ms. **Nield**.

In this regard, we have often held that "expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue." *Karlson v. Harris*, 140 Idaho 561, 565, 97 P.3d 428, 432 (2004).

In sum, it was error for the district court to fail to address **Nield's** objections to Dr. Coffman's affidavit before utilizing that affidavit for any purpose in the proceedings.

C. The district court erred in using Dr. Coffman's affidavit as a yardstick for determining the admissibility of Nield's affidavits.

[17] [18] Rather than evaluating Dr. Selznick's affidavit on its own merits, the district court utilized Dr. Coffman's affidavit as the yardstick against which Dr. Selznick's opinions were measured. Because Dr. Selznick did not respond to or rebut every contention *816 **728 in Dr. Coffman's affidavit, the district court determined that Dr. Selznick's affidavit did not measure up to the Rule 702 standard. While an affidavit certainly needs to meet the requirements set out in Rule 702 and the case law decided thereunder, there is no requirement that an expert's testimony must comply with any standard set out in

another expert's testimony. An expert's opinion testimony should be judged on its own merits in determining admissibility and not upon what some other expert claims to be the correct standard.

[19] [20] The district court appears to have granted full credibility to the opinions expressed by Dr. Coffman, despite the fact that the court had made no determination regarding the admissibility of his affidavit testimony and despite the speculative nature of his testimony. Even if Dr. Coffman was the gold standard, it was inappropriate for the district court to use his affidavit as the yardstick to measure Dr. Selznick's testimony or to conclude that, in order to be admissible, Dr. Selznick's affidavit had to counter every statement contained in Dr. Coffman's affidavit. Admissibility of expert testimony does not depend on how many opinions the expert gives. It is the quality of the opinions that counts. A medical expert need not address every opinion stated by an opposing expert in order for his affidavit to comply with I.R.E. 702. Once evidence is admitted, it may be insufficient to overcome an opposing party's summary judgment motion but that is the time for judging whether the expert has covered all of the bases.

[21] [22] [23] In determining whether to admit affidavit testimony, the court must determine whether the affidavit alleges facts, which if taken as true, would render the testimony admissible. *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002). Further:

In determining whether expert testimony is admissible, a court must evaluate the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion. Admissibility, therefore, depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion.

Coombs v. Curnow, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009) (internal citation omitted). A qualified expert may testify in opinion form where his or her scientific or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. I.R.E. 702. Nothing in these rules requires that an expert's opinion testimony, in order to be admissible, must be compared to or measured against testimony submitted by an opposing expert.

When evaluating Dr. Selznick's affidavit testimony, including his appended and incorporated reports, it appears that he reviewed a myriad of records pertaining to Nield's care, and drew medical conclusions based on the records and his medical knowledge and experience. In addition, it should not be forgotten he was Nield's treating physician at times. The district court appears to have found him qualified to testify as an expert. Dr. Selznick stated opinions that are beyond the knowledge of a lay jury and which would certainly have been of assistance in determining some of the facts at issue in the case. For instance, in his September 17, 2009 report Dr. Selznick stated that "MRSA is not a community acquired staph but rather a bacteria often acquired nosocomially or as a result of hospitalization." Nosocomial is defined as "of or being in a hospital or medical facility; esp., of a hospital-acquired disease or infection." WEBSTER'S NEW WORLD DICTIONARY 927 (3rd College Ed.1988).4 In other words, MRSA is not a staph that one generally acquires out in the community, but one that is often acquired in a hospital or *817 **729 medical facility. Other facts or opinions stated by Dr. Selznick in his affidavit, which would be beyond the knowledge of, and of assistance to, a lay jury are: that MRSA is a rather virulent⁵ microbe resistant to many antibiotics; that MRSA and pseudomonas are communicable and may be spread due to poor infection control practices; that PCRC had poor infection control practices; that Nield's medical records indicated she was not colonized with MRSA and pseudomonas when she was admitted to the PCRC on August 25, 2007; and that a culture obtained on November 9, 2007, while Nield was hospitalized at PCRC, disclosed she was infected with MRSA and pseudomonas; and that MRSA and pseudomonas were the cause of Nield's symptoms and injuries. Even if one objects to his ultimate conclusion that Nield contracted both infections at PCRC, these facts would certainly have been of assistance to the trier of fact. So, too, would the reports of Gerber and Frederick regarding the standards applicable to nursing care facilities for prevention and control of infectious diseases and the fact that such practices were not being observed by PCRC. Again, while one may quibble as to the admissibility of the ultimate conclusions made by Gerber and Frederick regarding the source of Nield's infections, information as to sanitary practices and requirements for preventing infection and whether or not they are being observed would certainly be helpful to the trier of fact. Flat-out exclusion of the testimony of these witnesses was not appropriate, particularly because PCRC did not seek it. PCRC specified certain testimony that it wished to have excluded. Instead of responding to PCRC's surgical approach, the district court threw out the entire affidavit of Dr. Selznick without considering whether some of his

testimony may have been admissible. The court apparently intended to do likewise with the affidavits of Gerber and Frederick, as indicated in its statement in the memorandum on reconsideration, but does not appear to have analyzed those affidavits or actually ruled upon their admissibility.

As previously noted, the issue here is not ruling out potential diagnoses, but determining the source of the infections that caused Nield's injuries. There is no dispute as to the diagnosis at issue in the proceedings below—MRSA and pseudomonas infections causing certain injuries. The question to be determined at trial is the source of the infections. Dr. Coffman's affidavit contains information as to potential sources. So do the affidavits of Dr. Selznick, Gerber and Frederick. Lay testimony can fill in the gaps.

In this regard, it might be noted that PCRC's Infection Control Policy and Procedure Manual states: "Hand washing is generally considered the most important single procedure for preventing nosocomial infections." Nield testified, as follows, about complaints she made of the wound care she received at PCRC:

- Q. [PCRC's counsel] And what are those complaints?
- A. [Nield] Those complaints were, number one, they did not wash their hands when they came into the room. A lot of them didn't.
- Q. All of the time or some of the time?
- A. Yeah. It was a regular—yeah. It was a regular thing with them. They would not wash their hands. I would even tell them, "Hey, before you touch me, for my health and your health, wash your hands, you know."
- Q. Would they wash then?
- A. Sometimes they would, sometimes they wouldn't.
- Q. Any other complaints?
- A. Yeah. They wouldn't put gloves on to change the wound.
- Q. Ever?
- A. Some nurses did; some didn't. And I'd say, "You better put gloves on, you know. "Oh, it's okay. It's okay." I said, "No, it's not okay, because you're going to either infect me or you're going to get *818 **730 infected or something. You need to put gloves on.
- "Oh, it's too hard to wrap all of that stuff with gloves

- on, you know." It was amazing. I thought, I don't believe that you would jeopardize your life and my life because you don't like to wear gloves, because it's too hard to put a bandage on. And I would, you know, mention it to the nurses. And they'd go, "Oh, yeah, it happens all the time here."
- Q. What percentage of time were people not washing their hands?
- A. I would say probably a 60 percent chance that they weren't.
- Q. And then what about not gloving up?
- A. Not gloving up? Probably about 60.

Thus, the medical experts lay the groundwork for how these infections can spread. It is not necessary to have expert testimony to establish how the infections may actually have been acquired by a particular patient. On remand, the jury can consider the expert opinions and fact testimony to determine the causation of Nield's infections and consequent injuries.

V. CONCLUSION

The district court abused its discretion by admitting Dr. Coffman's affidavit in evidence without first considering and ruling upon the objections to its speculative nature, by using Dr. Coffman's affidavit as the standard by which to determine the admissibility of Dr. Selznick's affidavit, by excluding the entire affidavit of Dr. Selznick, and by failing to consider and rule upon the admissibility of the Gerber and Frederick affidavits and reports. Further, the court erred by requiring Nield to negate any possible source of her infections other than PCRC. Therefore, we vacate the judgment and remand the case for further proceedings consistent with this opinion. Costs on appeal are awarded to Nield.

Justice W. JONES, specially concurring.

It is with some dismay and regret that I write this separate opinion solely to respond to what I consider the scurrilous and unfounded personal attacks upon the integrity and motivations of the majority in this case, which includes me. Although I feel that such personal attacks are totally inappropriate in a judicial opinion and am torn by whether such attacks even merit or justify a response, after weeks

of reflection and mixed feelings, I feel compelled at least briefly to respond.

First, the dissent by Justice Eismann accuses the majority of lying, misrepresentations and falsification of the record based solely on the misguided belief that the majority for some unexplained reason wants the plaintiff in this case to "win." Speaking solely for myself in this separate opinion, I can assure the reader that at least on my part nothing could be further from the truth, and I firmly believe that is true of the other justices as well. It is astounding and beyond belief to me, who has spent nearly 45 years of my life as an insurance defense attorney battling plaintiffs in personal injury cases, that now I should be castigated for some unexplained reason that I want the plaintiff to "win" this case. Such an assertion is beyond ludicrous. I took a vow when I took this office to decide cases based on the law and legal reasoning. I am proud of my record and invite any reader to research the opinions I have written over the past six plus years and they will see that there is no pattern or indication whatsoever that my opinions favor either the plaintiff or the defense. I am deeply saddened and offended by such unfounded, unsupported allegations. There is not a shred of evidence to support such allegations, apart from the fact that they are totally inappropriate and unfounded in a judicial opinion. I am sad that Justice Eismann's dissenting opinion lowers itself to personal attacks more suited to a school vard argument among teenagers than to a professional legal discourse that should be expected in a judicial opinion.

I can certainly respect the dissenting opinion of Justice Horton, even though I disagree with its conclusion. At least it is founded on a scholarly, judicial approach to a close issue on which there is room for disagreement. Bad judges might make bad law, but at least on my part that is not the situation here. Beyond what I have said I do not feel that any further discussion of personal assertions and attacks is appropriate. Indeed, I struggled *819 **731 a long time to consider whether I am lowering myself to the same level as Justice Eismann by even dignifying the attacks with a response. Enough said. Let's turn to the merits of the case.

I have joined the majority Opinion for one very simple reason. The fact is this case is nothing more than a matter of common sense and basic legal reasoning. I am a strong believer that sometimes the law gets lost in theories, over-analysis, and hyperbole and never sees the forest through the trees. Distilled to its essence, in my opinion this case boils down to a dispute between two respected, licensed and competent physicians over how and where Mrs. Nield contracted the infectious diseases with which

she is afflicted. In my opinion, both physicians are qualified to state their opinions. This is not a matter of "junk science", such as is the subject of the United States Supreme Court decision in *Daubert v. Merrell Dow* Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), which by the way the State of Idaho has never adopted. In this case, both physicians have medical training and expert knowledge regarding MRSA and pseudomonas and where they exist, how they are communicated, their treatment and their effect upon patients. It is agreed these experts do not have exactly the same qualifications or areas of specific expertise, but neither is required for an expert to state his or her opinion. E.g., Weeks v. E. Idaho Health Serv., 143 Idaho 834, 837, 153 P.3d 1180, 1183 (2007) ("A qualified expert is one who possesses 'knowledge, skill, experience, training, or education.' I.R.E. 702. Formal training is not necessary, but practical experience or special knowledge must be shown...."); Warren v. Sharp, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003); West v. Sonke, 132 Idaho 133, 138, 968 P.2d 228, 233 (1998). Certainly, both have substantially more knowledge regarding the medical issues than the average juror and their testimony will undoubtedly be helpful to a jury. I.R.E. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert ... may testify ... in the form of an opinion or otherwise"); Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1998). It is not appropriate for any court, including this one, to weigh those credentials, weigh the credibility of each of the witnesses, or determine which witness is more persuasive. Those are matters exclusively within the province of a jury. That is the essence of my basis for agreeing with the majority opinion. Both the district court and Justice Eismann's dissent seem to disregard the status of this case and the junction at which we are. Nothing has been decided in this case about who should "win" this case, contrary to the assertions in Justice Eismann's dissent. All the majority has decided is that this case merits a jury trial on a genuine issue of material fact that is disputed between the parties and two experts. At least that is the sum total of my intent and expectations in joining the majority. I will not say, and it would be totally inappropriate for me to do so, how I think this case should or will turn out. I can absolutely without any equivocation state that I am not in any way motivated by who should "win" this case. Such an assertion is totally unfounded and offensive to me.

J. JONES, Justice, specially concurring.

I fully concur in the Court's opinion. The Chief Justice has written a well informed and legally sound opinion and

I wholeheartedly agree with it. The question is not whether Ms. Nield will ultimately win or lose but merely whether she is entitled to have a trial on the merits. This is a close question, as the Court fully recognizes, but on a close question the decision should be to allow a litigant to have his or her day in court.

Justice EISMANN, dissenting.

Courts decide cases in one of two ways: (a) they apply the law to the facts and thereby arrive at the result or (b) they determine the desired result and then twist the law and/or the facts to justify it. The error made by the district judge was applying the law to the facts, which produced a result that the majority does not like.

I. To Reach Its Result, the Majority Misstates What the District Court Ruled.

The majority begins its analysis by stating that "[t]he district court determined that Dr. *820 **732 Selznick's affidavit was inadmissible because it did not negate possible alternate sources through which Dr. Coffman suggested Ms. Nield may have contracted MRSA." That statement is simply not true. To show the falsity of the statement, it is necessary to put in context what occurred.

On October 8, 2010, PCRC filed its motion for summary judgment. The basis of the motion was that Ms. Nield could not prove that PCRC's negligence was the cause of her infections. The motion was based upon the affidavit of Doctor Thomas J. Coffman which was also filed on October 8, 2010. Dr. Coffman was certified by the American Board of Internal Medicine in 1987 and by the American Board of Infectious Disease in 1990 and 2001; he was Chief of Staff at St. Luke's Regional Medical Center; he was chair of the St. Luke's Infection Control Committee and co-chair of Infections Control at St. Alphonsus Regional Medical Center, positions he had held for about twenty years; and he had practiced infectious disease medicine since 1990. His affidavit dealt with the possible causes of Ms. Nield's infections.

With respect to MRSA, a summary of what Dr. Coffman stated is as follows:

a) A person may be colonized with MRSA without showing any signs or symptoms of infection, and most people who are colonized do not develop

MRSA infections. The most common area of MRSA colonization is the nostrils, with other areas of colonization being the person's respiratory tract, urinary tract, open wounds, and catheters.

- b) MRSA is ubiquitous within skilled nursing and long-term care facilities, and there are studies indicating that up to 25% of patients in those facilities are MRSA colonized.
- c) MRSA can be transmitted in many ways, including contact with someone who has a MRSA infection, contact with someone who is colonized but not infected, contact with an object that is contaminated with MRSA, or breathing in droplets that were expelled during breathing, coughing, or sneezing by a person who is carrying or infected with MRSA.
- d) It is not possible to stop the spread of MRSA in health care facilities and a resident of such a facility can become colonized or infected despite strict adherence to the appropriate infection control policy.
- e) A person may be screened for MRSA to determine if the individual is colonized. Screening looks for the presence of the organism generally, and the most widely available form of screening in 2007 was nares culturing which looked for MRSA in the person's nostrils. That type of screening could identify 60–70% of the MRSA-colonized individuals, and another 10–15% could be identified through perineal or rectal culturing.
- f) The records do not show that Ms. Nield was screened for MRSA before she was admitted to PCRC. Screening incoming patients at such a care facility was not the standard of care in 2007, and she was not screened when she was admitted to the PCRC. Without her being screened, it is not possible to determine whether she was MRSA colonized when she was admitted to the PCRC on August 25, 2007.

With respect to pseudomonas, a summary of what Dr. Coffman stated is as follows:

- a) People may be carriers of pseudomonas without showing any signs or symptoms of infection, and most people who are colonized do not become infected. Studies show that 10% of the population may be colonized in their colons.
- b) Pseudomonas is commonly found in medical care settings as well as in plants, soil, water, and animals.

- c) Pseudomonas invades nearly all human tissue if weakened, such as open skin.
- d) Pseudomonas can be transmitted through contact with a person who is a carrier or is infected, inhalation of pseudomonas aerosols, contact with water that has been exposed to the bacteria, eating contaminated raw vegetables, and contact with contaminated surfaces.
- e) A person with colonized pseudomonas in his or her colon can transmit the bacteria to an open wound and become infected *821 **733 in numerous ways, including taking a shower with open wounds.
- f) A resident at a skilled nursing facility such as PCRC can become colonized or infected with pseudomonas despite strict adherence to an appropriate infection control policy, and it is not possible to entirely stop the spread of that bacteria in health care facilities.

With respect to the source of Ms. Nield's MRSA and pseudomonas infections, a summary of what Dr. Coffman stated is as follows:

- a) The wound culture done on August 21, 2007, when she was admitted to the the Portneuf Medical Center (Hospital) does not rule out the possibility that she was either colonized or infected with either MRSA or pseudomonas for two reasons:
 - 1) The records do not show that swabs were taken from each of her four wounds. It is possible that she had either or both bacteria in some but not all of her wounds.
 - 2) It is possible that either or both bacteria were present in the wound swabbed, but were not the dominant bacteria and so were not grown out. Considering her circumstances before she was brought to the Hospital (chronic open wounds, unsanitary conditions, high susceptibility to infection, and lack of antibiotic treatment), she would be expected to have a whole host of bacteria in her wet leg wounds, and a wound culture would include possibly dozens and dozens of different microorganisms. With such a wound culture, only the two or three dominant microorganisms would be grown out for identification.
- b) Between Ms. Nield's admission to the PCRC on August 25, 2007, and the wound sample collected on November 9, 2007, that was positive for moderate

- MRSA and moderate pseudomonas, she was potentially exposed to those bacteria when she had contact with visitors, when she left the facility, and when she had contact with outside medical personnel. An unknown but potentially significant number of medical workers are MRSA colonized.
- c) The wound cultures done on November 27, 2007, on January 18, 2008, and on March 13, 2008, did not reveal pseudomonas, indicating that her pseudomonas infection was resolved by her intravenous antibiotic therapy. Those cultures were much less likely to be false negatives because she was on antibiotic treatment, which would have eliminated a vast majority of the microorganisms.
- d) It appears that the pseudomonas detected in the aspiration of her right hip that was done on May 2, 2008, was a different strain than the pseudomonas detected in the wound sample that had been collected on November 9, 2007. The report of the pseudomonas grown from her right hip was described as an extremely rare species that was susceptible only to Imipenem, Meropenem, Ceftazidime and Aztreonam antibiotics. However, the species identified in November 2007 was susceptible to Ciprofloxacin, Gentamicin and Levofloxacin antibiotics.
- e) Based upon the medical records, it is not possible to determine when, where, or how Ms. Nield became infected with MRSA or pseudomonas, and the pseudomonas found in her right hip in May 2008 was most likely acquired after she left PCRC.

Prior to PCRC's motion for summary judgment filed on October 8, 2010, Ms. Nield had received written reports from three experts *822 **734 Suzanne Frederick, a registered nurse from Texas; Sydney K. Gerber, a nursing facility administrator from Texas; and Hugh Selznick, an orthopaedic surgeon from Idaho. The nurse had submitted an 18-page report dated April 19, 2010, and a one-page addendum dated June 10, 2010. The administrator had submitted an undated nine-page report, but it was obviously submitted prior to the motion for summary judgment because the nurse cited it in her report dated April 19, 2010, as a document she reviewed. Dr. Selznick had submitted a 32-page report dated September 17, 2009, and an 11-page supplemental report dated November 25, 2009. All of the reports had been submitted prior to PCRC's motion for summary judgment.

After the motion for summary judgment was filed, Ms. Nield's counsel took the deposition of Dr. Coffman on November 19, 2010. Prior to the deposition, Ms. Nield's counsel obviously knew that Dr. Coffman had been given

Dr. Selznick's report because her counsel questioned him about those areas with which he disagreed with Dr. Selznick. Three of those areas were as follows:

(1) Dr. Coffman disagreed that the need to amputate Ms. Nield's lower leg was caused by a MRSA infection. She had leukocytoclastic vasculitis diagnosed in her foot, which Dr. Coffman stated was "an autoimmune kind of inflammatory condition" and "nobody knows what triggers it truly." He described the condition as follows:

Leukocytoclastic vasculitis is a condition where inflammatory cells are recruited to blood vessels, typically dermal blood vessels, and they cause this intense inflammatory reaction in the vessel wall.

And the vessel becomes more and more narrowed and finally plugs up. And you develop ulceration of this—of the overlying tissue. It just basically loses its blood supply and necrosis. It turns into a big, nasty, blistering open wound. And the depth and the width of it, you know, depends on the cause and the patient and, you know, different factors like that.

In Dr. Coffman's opinion, the fundamental reason she lost her leg was the leukocytoclastic vasculitis that would not go away. As he stated: "I don't think the MRSA really played much of a role. To phrase it another way, if she didn't have leukocytoclastic vasculitis, she wouldn't have lost her leg." The reason for his opinion was: "[T]hey treated her with a super powerful drug for MRSA, it didn't do anything for her foot. And if it was all MRSA, it should have cured it."

- (2) Dr. Coffman disagreed with Dr. Selznick's conclusion that Ms. Nield's pseudomonas that was treated at PCRC was the same infection that was later diagnosed in Ms. Nield's hip. Dr. Coffman explained: "She'd had a pseudomonas cultured apparently from one of her superficial wounds when she was in Pocatello, and then they cultured it from her hip in the spring of 2008, but it was a different pseudomonas in terms of its antibacterial susceptibility panel. So it wasn't the same bug that was in her leg in Pocatello." There was no indication that Dr. Selznick recognized that Ms. Nield's pseudomonas treated at PCRC was susceptible to antibiotics that were different from those to which her later pseudomonas was susceptible.
- (3) Dr. Coffman disagreed that PCRC had violated the standard of care in treating Ms. Nield. In his opinion, it did not.

After deposing Dr. Coffman, Ms. Nield filed affidavits

from her three experts on November 30, 2010. Although Ms. Nield's counsel had questioned Dr. Coffman about his disagreements with statements made by Dr. Selznick in his reports, none of Ms. Nield's experts responded to any of the testimony in either Dr. Coffman's affidavit or his deposition. None of them disputed his testimony regarding potential causes of infection other than PCRC's negligence.

In the reports that they had submitted prior to the motion for summary judgment, Ms. Nield's experts all concluded that Ms. Nield contracted MRSA and pseudomonas as a result of PCRC's negligence based upon the temporal relationship between Ms. Nield's admission to PCRC and the onset of her infection—she did not become infected until after she was in that facility. None of them considered any cause of the infections *823 **735 other than the alleged negligence of PCRC. In their affidavits submitted in response to PCRC's motion for summary judgment, the experts simply restated the conclusions they had made in their reports without addressing anything stated by Dr. Coffman.

In summary, none of Ms. Nield's experts disagreed with Dr. Coffman's statements that are summarized as follows:

- a) It is not possible to stop the spread of either MRSA or pseudomonas in a health care facility despite strict adherence to an appropriate infection control policy.
- b) A person could be colonized with MRSA or pseudomonas without showing any signs or symptoms of infection, and it is not possible to determine whether Ms. Nield was colonized with either MRSA or pseudomonas when she was admitted to the PCRC.
- c) The wound culture done on August 21, 2007, when Ms. Nield was admitted to the Hospital does not rule out that she was either colonized or infected with either MRSA or pseudomonas.
- d) Ms. Nield could have been exposed to the MRSA and pseudomonas bacteria that caused the infections identified in the wound sample collected on November 9, 2007, from contact with her visitors, when she left the facility, or from contact with outside medical personnel. (The record on appeal shows that while she was at PCRC, at least fourteen friends and family members visited her; that she went to the Hospital on August 27, 2007, to have a PICC line installed; that she went to the dentist on October 12, 2007; and that she went to the Hospital gift shop in November 2007 before the

culture. In addition, she was seen and treated by at least three physicians and a nurse practitioner who were not employees of PCRC.)

e) Ms. Nield's wound cultures done on November 27, 2007, on January 18, 2008, and on March 13, 2008, indicated that her pseudomonas infection resolved by her intravenous antibiotic therapy. The pseudomonas detected on May 2, 2008, at the hospital in Utah was a different strain than that for which she was treated at PCRC. (None of Ms. Nield's experts said anything about whether or not they were different strains.)

None of Ms. Nield's experts addressed any of these statements. None of them disputed Dr. Coffman's statements regarding the potential sources of infection other than PCRC's negligence. None of them stated that they had considered the other possible sources of infection mentioned by Dr. Coffman, but they still concluded that the alleged negligence of PCRC was the most likely cause. The only logical conclusion is either that Ms. Nield's counsel did not provide Dr. Coffman's affidavit or deposition testimony to Ms. Nield's experts, which would be highly unlikely, or that her counsel did provide them with those documents and Ms. Nield's experts could not dispute what Dr. Coffman said.

In deciding the issue, the district court relied upon our opinion in *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007), wherein we held that in situations where there is more than one potential cause of an injury, the trial court can exclude an expert's opinion as to causation if the expert did not consider the other potential causes and explain why, in the expert's opinion, one particular cause was the most likely cause.

The district court did not conclude, as claimed by the majority, that Dr. Selznick's affidavit was inadmissible because "it did not negate possible alternate sources through which Dr. Coffman suggested Ms. Nield may have contracted MRSA." The district court did not base its opinion on the failure of Ms. Nield's experts to state that the other possible sources could not have caused her infections. Rather, the district court concluded that the affidavit was inadmissible under *Weeks* because Dr. Selznick failed to even *consider* those other possible sources of infection. The court wrote:

In evaluating Selznick's affidavit and viewing it in the most favorable light to the Plaintiff, the Court must conclude that the validity of Dr. Selznick's reasoning and methodology regarding how the Plaintiff *824 **736 contracted **MRSA** and pseudomonas is without merit. Selznick makes a conclusion that because the Plaintiff was negative for MRSA and pseudomonas at the time of her admission to PCRC, but then tested positive for MRSA and pseudomonas prior to her discharge, then she must have MRSA contracted and pseudomonas while at PCRC. He does not address the other factors that could have been a substantial factor in causing the infections.... Dr. Selznick failed to identify all of the potential causes of symptoms, eliminating hypotheses in order to reach a conclusion as to the most likely cause.

(Emphasis added.)

Thus, the district court did not require Ms. Nield to negate the other potential sources of infection. It required, consistent with Weeks, that her expert Dr. Selznick consider the other potential causes and then state why he believed the negligence of PCRC was the most likely proximate cause, to a reasonable degree of medical probability. The district court did not require that Dr. Selznick be able to state that the other possible causes could not have been the cause in this case. As stated in the above quotation from its decision, the court ruled that "Dr. Selznick failed to identify all of the potential causes of symptoms, eliminating hypotheses in order to reach a conclusion as to the most likely cause." (Emphasis added.)

In denying Ms. Nield's motion for reconsideration, the court found that the affidavits of her other experts were also inadmissible for the same reason. The court wrote:

[T]he opinions of Dr. Selznick were not based on valid methodology or principles and failed to address basic undisputed medical principles with respect to MRSA and pseudomonas....

Likewise, this Court properly exercised its gate-keeping role in regard to the affidavits of Suzanne Frederick and Sidney K. Gerber submitted by the Plaintiff in further support of her burden of proof. This Court conducted the same analysis as explained previously and found these affidavits to be similarly insufficient in establishing where and how the Plaintiff contracted MRSA and pseudomonas.... This Court correctly evaluated the affidavits submitted by the

Plaintiff's experts and determined the causation analyses offered were not based on valid and reliable principles or methodology, and, therefore, unhelpful to the trier of fact.

"The trial court has discretion to decide the admissibility of expert testimony, and on appeal this decision will not be overturned absent an abuse of that discretion." *Clair v. Clair*, 153 Idaho 278, 290, 281 P.3d 115, 127 (2012). "When determining the admissibility of an expert's opinion, the focus of the trial court's inquiry is on the principles and methodology used and not the conclusions they generate." *J–U–B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 315, 193 P.3d 858, 862 (2008). There is no showing that the district court improperly applied our decision in *Weeks* or that it abused its discretion in holding inadmissible the affidavits of Ms. Nield's experts.

II. In Order to Reverse the District Court, the Majority Misstates Our Holding in *Weeks*.

The majority contends that there are "misconceptions apparent in the district court's decision" in its application of *Weeks*. As will be shown, the district court correctly applied our decision in *Weeks*. The majority simply does not want to apply the *Weeks* opinion in this case, and so it redefines "differential diagnosis" in order to reverse the district court.

The majority first states: "While we have not previously defined 'diagnosis' in this context, we find the Black's Law Dictionary definition to be appropriate: 'The determination of a medical condition (such as a disease) by physical examination or by study of its symptoms.' "The majority's statement that we have not previously defined differential diagnosis is simply false. In *Weeks*, we adopted the concept of differential diagnosis utilized by the Ninth Circuit Court of Appeals in *Clausen v. M/V New Carissa*, 339 F.3d 1049 (9th Cir.2003). By doing so, we adopted the definition of differential diagnosis used by the Ninth Circuit in that case.

**737 *825 The majority then says, "Some federal courts have employed a more expansive definition that incorporates 'differential etiology' which is ... a process of identifying external causes by a process of elimination." As will be shown, *all* federal courts, not some, use the term differential diagnosis to also mean differential etiology, and it was that definition of differential diagnosis that we adopted in *Weeks*.

Before addressing what we held in Weeks, it would be

helpful to explain the difference between differential diagnosis as used in medicine and differential diagnosis as used by courts for determining the admissibility of expert testimony as to causation. The medical profession uses a process called differential diagnosis to reach a reasoned clinical decision as to the cause of a patient's symptoms. The medical definition of differential diagnosis is "the distinguishing of a disease or condition from others presenting with similar signs and symptoms." With respect to the practice of medicine, differential diagnosis is used to diagnose a medical condition.

[T]he differential diagnostic exercise involves six steps:

- Making a list of possible diagnoses (internal disorders) that could explain the presenting symptoms or observations;
- Taking a thorough medical history;
- Conducting a careful and complete physical examination;
- Ordering and interpreting the indicated tests;
- Ruling out diagnoses that do not fit the history or findings noted above;
- Arriving at the diagnosis that best fits the first five elements.

Ronald E. Gots, M.D., Ph.D., For the Defense, 26 (July 2005).

Federal Rule of Evidence 702 governs the admissibility of scientific evidence in federal district court. "In Daubert, the Supreme Court charged district courts with the responsibility of ensuring that proferred [sic] scientific evidence is both relevant and reliable." Clausen, 339 F.3d at 1055-56. As a means of ensuring the reliability of expert testimony, all of the federal courts of appeal have adopted the methodology of differential diagnosis as a means for determining the reliability of expert testimony as to specific causation.8 When doing so, many of them used the term "differential diagnosis" analogically to its proper use in a medical context. Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1236 (10th Cir.2004). When referring to an expert opinion as to causation, it would be more accurate to call the methodology "differential etiology" or "differential causation." "Etiology is the study of causation." Myers v. Illinois Cent. R.R. Co., 629 F.3d 639, 644 (7th Cir.2010). As explained by the Eleventh Circuit:

Differential diagnosis involves "the determination of

which one of two or more diseases or conditions a patient is suffering from, by systematically comparing and contrasting their clinical findings." This leads to the diagnosis of the patient's condition, not necessarily the cause of that condition. The more precise but rarely used term is differential etiology, which is "a term used on occasion by expert witnesses or courts to describe the investigation *826 **738 and reasoning that leads to the determination of external causation, sometimes more specifically described by the witness or court as a process of identifying external causes by a process of elimination."

McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1252 (11th Cir.2005) (citation omitted). However, even federal courts that expressly acknowledge the difference between differential diagnosis and differential etiology choose to follow the trend of other courts and use the term differential diagnosis to refer to both concepts. Guinn v. AstraZeneca Pharm. LP, 602 F.3d 1245, 1253 n. 6 (11th Cir.2010) ("Following the trend among federal courts, however, we will use the term differential diagnosis to refer to both concepts.").

Thus, federal courts use differential diagnosis to refer to both the method utilized to clinically diagnosis a patient's symptoms and the method to determine the external cause of the medical condition. That method of reasoning is not limited to reaching an opinion as to the external cause of a medical condition. Bitler, 400 F.3d at 1236 (expert opinion as to cause of gas explosion by use of differential analysis to exclude other potential causes was admissible). In both cases, the expert uses a similar inductive reasoning process—abductive reasoning. " '[A]bductive inferences' are drawn about a particular proposition or event by a process of eliminating all other possible conclusions to arrive at the most likely one, the one that best explains the available data." Id. at 1237 n. 5. The basic difference is that differential diagnosis is a reasoning process to determine the patient's condition in order to determine treatment while differential etiology is a similar reasoning process to determine how the patient's condition came about in order to determine liability. Federal courts call both of them differential diagnosis.

The question, then, is what did we mean in *Weeks* when we adopted the concept of differential diagnosis announced in *Clausen* to determine the admissibility of an expert's opinion? Was it differential diagnosis in the sense of determining what medical condition was causing the patient's symptoms or was it differential diagnosis in the sense of determining what caused the patient's condition? It is obvious that we were referring to what would more correctly be termed differential etiology or differential causation—whether the nurse's negligence was the proximate cause of the patient's death.

In *Weeks*, we adopted differential diagnosis as used by the Ninth Circuit Court of Appeals in *Clausen* when determining the admissibility of an expert's opinion as to the cause of death, not as to diagnosing symptoms. We stated:

The Ninth Circuit allowed for the use of differential diagnosis under Daubert Merrell Iv. Pharmaceuticals. Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)] to establish reliability of an expert's opinion. Clausen, 339 F.3d at 1057-58. Differential diagnosis involves an analysis of all hypotheses that might explain symptoms patient's mortality. Id. After identifying all the potential causes symptoms, the expert then engages in a process of eliminating hypotheses in order to reach a conclusion as to the most likely cause. Id. When using differential diagnosis a district court is justified in excluding the expert's testimony if the expert fails to offer an explanation why an alternative cause is ruled out. Id. The logic of the Ninth Circuit is sound.

Weeks, 143 Idaho at 839, 153 P.3d at 1185.

The issue in *Weeks* was not diagnosing a patient's symptoms. The issue was whether the nurse's negligence was a proximate cause of a patient's death.

"Evelyn Weeks entered the hospital on May 12, 2003, after collapsing at her home.... A CT scan revealed a hemorrhage and hematoma in her brain. Early the following morning a catheter was placed in her head to drain excess fluid from her brain." 143 Idaho at 836, 153 P.3d at 1182. After a lengthy surgery, she was placed in intensive care. Id. While she was in intensive care, it was discovered that a mixture of dopamine, amiodarone, magnesium sulphate, potassium phosphate, and potassium chloride were infusing into the catheter rather than into an intravenous line. Id. Her condition deteriorated and her family gave their consent to take her off life support. She died on May *827 **739 21, 2003. Her heirs filed a wrongful death action on June 30, 2003. The issue in the case was not a dispute over what was causing her symptoms (no heartbeat). She was admittedly dead. The

issue was whether her death was proximately caused by the negligence of a nurse. As this Court stated: "EIRMC admitted that the nursing error violated the standard of care. The issues for trial were *causation* and damages." *Id.* (emphasis added).

The district court held inadmissible the opinion of the plaintiff's expert as to the proximate cause of the patient's death, not an opinion as to the diagnosis of the patient's symptoms. As we stated, "The district court granted EIRMC's motion for summary judgment, concluding that the case required expert testimony to prove causation, and that the Weeks' expert, Dr. Edward Smith, [a board-certified neurosurgeon,] was not competent to testify regarding the effect of the nursing error." Id. (emphases added). The district court held that Dr. Smith was not qualified because there was no research showing that the error by the nurse could cause the injury suffered by the patient. The district court reasoned as follows:

Dr. Smith admitted that no research has been done concerning the exact physiological effects of this type of infusion on the brain. The fact that such research has been performed means that it has not been subjected to peer review and publication. There is no way to know the error rate of conclusions based on unperformed research. No standards exist to govern the use of information that has never been studied. And, conclusions based on unperformed research do not attract usually widespread acceptance within the scientific community.

As shown in the quotation above from Weeks regarding the methodology of differential diagnosis, in holding that the physician's testimony was admissible, we adopted the Ninth Circuit Court's definition of differential diagnosis as set forth in Clausen. The issue in Clausen was not the diagnosis of symptoms. It was whether an expert was qualified to testify that an oil spill resulting from a ship wreck on the Oregon coast was a proximate cause of the destruction of oyster beds. As the court stated, "In this case, involving the destruction of oyster beds which allegedly occurred as a result of an oil spill on the Oregon coast, we must determine the admissibility of expert testimony on the issue of causation." Clausen, 339 F.3d at 1051. Each side had an expert on causation. Both experts agreed "that the deaths were caused by bacterial infection", which "was a direct result of gill lesions the

oysters had developed." Id. at 1053. The issue was what caused the gill lesions that resulted in the bacterial infection. The two experts both identified the same six possible causes and ruled out four of them, but they disagreed as to which of the two remaining suspects was the actual cause. Id. The plaintiffs' expert contended that oil particulates caused lesions in the oysters' gills, leading to the bacterial infection that ultimately caused their deaths. Id. The defendants' expert contended the gill lesions were caused by low salinity in the estuary where the oyster farms were located, which was caused by heavy rainfall that increased the streamflow into the estuary. Id. The defendants' pretrial motion to exclude the plaintiffs' expert's testimony as being unreliable was denied by the trial court. Id. at 1055. The jury believed that expert and awarded the plaintiffs \$1.4 million, and the defendants appealed. *Id*.

The Ninth Circuit began its analysis of the reliability and admissibility of the plaintiffs' expert's testimony by discussing differential diagnosis. *Id.* at 1057. The court noted that "[d]ifferential diagnosis is a common scientific technique, and federal courts, generally speaking, have recognized that a properly conducted differential diagnosis is admissible under *Daubert*." *Id.* It stated, "A whole sub-body of *Daubert* law has developed with respect to the reliability, and admissibility, of differential diagnosis." *Id.*

After quoting a medical definition of differential diagnosis, the *Clausen* court footnoted the quotation with the statement, "Courts that have discussed differential diagnosis have come to use the term in ways that differ slightly from its dictionary definition, and from its usage in the medical community." *Id.* n. 4. The court then explained, "Whereas *828 **740 most physicians use the term to describe the process of determining which of several diseases is causing a patient's *symptoms*, courts have used the term in a more general sense to describe the process by which *causes* of the patient's *condition* are identified." *Id.* (citation omitted).

Thus, the *Clausen* court did not use the Black's Law Dictionary or the medical definition to define differential diagnosis, nor did we when we adopted the concept. Since we adopted the methodology of differential diagnosis as set forth in *Clausen*, we obviously also adopted that court's definition of the term. The use of that methodology to diagnose symptoms was not an issue in either *Weeks* or *Clausen*. In both cases, the methodology of differential diagnosis was used to determine the qualifications of an expert to testify as to the proximate cause of injury.

In applying differential diagnosis to determine the admissibility of expert testimony, the first step is compiling a list of the possible causes. *Id.* at 1057. "A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation." *Id.* at 1058 (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir.1999)). The issue in *Westberry* was the proximate cause of an injury, not the diagnosis of a medical condition.9

The next step is "eliminating hypotheses on the basis of a continuing examination of the evidence so as to reach a conclusion as to the most likely cause of the findings in that particular case. A district court is justified in excluding evidence if an expert 'utterly fails ... to offer an explanation for why the proffered alternative cause' was ruled out." *Clausen*, 339 F.3d at 1058 (quoting *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir.2001)). The issue in *Cooper* was proximate cause of an injury, not diagnosis of a medical condition.¹⁰

Thus, the rule regarding differential diagnosis adopted in *Weeks* was not simply to diagnose what medical condition was causing the patient's symptoms. It was, as in *Clausen*, to determine the reliability and admissibility of an expert's opinion on the issue of proximate cause in a negligence action. In fact, in *Clausen* it was used to determine the reliability and admissibility of an expert's opinion as to the proximate cause of an infection, which is precisely the issue to which the district court utilized differential diagnosis in this case.

In summary, the majority incorrectly states that the district court's opinion exhibited "misconceptions" about differential diagnosis and that in *Weeks* we did not state what we meant by that term. By adopting the Ninth Circuit's logic in *Clausen*, we *829 **741 adopted differential diagnosis as set forth in the opinion, which dealt with causation to determine liability, not the diagnosis of symptoms to determine treatment. The district court accurately analyzed our opinion in *Weeks* and properly applied it in this case. The majority is simply being untruthful when it states that "[t]his Court has not had occasion to flesh out the parameters of the differential diagnosis methodology."

In adopting the Ninth Circuit definition, we concluded, "The logic of the Ninth Circuit is sound." *Weeks*, 143 Idaho at 839, 153 P.3d at 1185. That logic is simply that in order to testify as to causation where there is more than one potential cause, the expert should consider all potential causes and then explain why, in forming his or her opinion, the expert ruled out the other causes as being

the most likely cause. When the author of the majority opinion in this case was a trial judge, he used that reasoning as a basis for holding inadmissible the affidavit of an electrician offered as expert testimony regarding the cause of a house fire, stating, "Finally, Mr. Bidstrup [the electrician] does not explain how he ruled out other possible sources of ignition." *Carnell v. Barker Mgmt., Inc.,* 137 Idaho 322, 48 P.3d 651 (2002) (*Carnell R. Vol. VIII*, p. 1357). The author of the majority does not seek to explain why the methodology he used when a trial judge in the *Carnell* case and the methodology we held was logical in *Weeks* has now become illogical.

Why should an expert be permitted to express an opinion about causation when the expert does not even know of the other potential causes? Why should an expert be permitted to testify about causation when the expert did not even consider the other potential causes? The majority has not even attempted to provide logical answers to these questions.

The district court entered its decision granting PCRC's motion for summary judgment on January 21, 2011. Ms. Nield then filed a motion for reconsideration on February 4, 2011. When considering a motion for reconsideration, the trial court is to consider any new or additional facts that bear on the correctness of the order being reconsidered. Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). "A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact." J.I. Case Co. v. McDonald, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955). In support of her motion for reconsideration, Ms. Nield could have sought to comply with Weeks and present additional affidavits from her experts setting forth that they had considered the other potential causes of Ms. Nield's infections and explaining that they still considered the negligence of PCRC the most likely cause or disputing Dr. Coffman's assertions that there were other potential causes. However, she did not do so. She did not present any additional affidavits. In her supporting brief, she did assert that she "was not required to establish proximate cause by showing that she only contracted MRSA and PA from PCRC." Because it would have been a simple matter to present such additional affidavits, the only reasonable inference is that Ms. Nield's experts did not contest Dr. Coffman's assertion that there were potential causes of Ms. Nield's infections that were unrelated to the alleged negligence of PCRC and that they could not explain why they believed that PCRC's alleged negligence was a more likely cause than were the other potential causes.

The Weeks opinion also stands in the way of the majority's desired result. In order to circumvent that decision, the majority simply mischaracterizes it. By redefining the term differential diagnosis to mean something other than how it was used in Weeks, the majority is, in essence, overruling Weeks sub silentio. As the author of the majority opinion in this case wrote in Union Pac. Land Res. Corp. v. Shoshone Cnty. Assessor, 140 Idaho 528, 96 P.3d 629 (2004):

The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to, unless the reasons therefore have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.... So, where the court has decided a question of law in another case and a like *830 **742 state of facts is subsequently presented, the rule of stare decisis applies and will not be easily changed.

Id. at 533, 96 P.3d at 634 (quoting State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991)). The majority does not contend that the reasons for our adoption of the Ninth Circuit's differential diagnosis analysis in Clausen for determining the admissibility of expert testimony as to specific causation have ceased to exist, are clearly erroneous, or are manifestly wrong. The only apparent reason for redefining differential diagnosis is to find a way to reverse the district court so that Ms. Nield can prevail in this action.

III. In Order to Reverse the District Court, the Majority Mischaracterizes What the District Court Did and then Creates an Illogical Rule that the Admissibility of an Expert's Opinion Can Only Be Determined Based Upon What that Expert Says.

The majority states that "[t]he district court erred in using Dr. Coffman's affidavit as a yardstick for determining the admissibility of Ms. Nield's affidavits." According to the majority, "Even if Dr. Coffman was the gold standard, it was inappropriate for the district court to use his affidavit as a yardstick to measure Dr. Selznick's testimony and to conclude that, in order to be admissible, Dr. Selznick's affidavit had to counter every statement contained in Dr. Coffman's affidavit." That statement simply mischaracterizes what the district court did.

As stated above, Dr. Coffman stated in his affidavit that there were potential causes of Ms. Nield's infections other than the alleged negligence of PCRC, and he listed those potential causes. None of Ms. Nield's experts disputed those portions of Dr. Coffman's affidavit. This is not an issue of weighing the conflicting opinions of experts. With respect to the existence of other potential causes, there was no conflict among the experts. Dr. Coffman made factual statements as to other potential causes, and none of Ms. Nield's experts disputed those statements. For the purpose of summary judgment, those statements must be taken as true. The district court did not use Dr. Coffman's affidavit as a "yardstick" to judge the affidavits of Ms. Nield's experts. Instead, the court merely accepted as true the uncontradicted statements in Dr. Coffman's affidavit regarding the existence of other potential causes of Ms. Nield's infections.

"Decisions by this Court demonstrate that when faced with a motion for summary judgment, the party against whom it is sought may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." Olsen v. J.A. Freeman Co., 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990). In this case, in order to respond to the motion for summary judgment, Weeks required that Ms. Nield provide an expert who either: (a) stated that Dr. Coffman was wrong regarding the existence of the other potential causes of Ms. Nield's infections; or (b) provided an explanation as to why, in the expert's opinion, the other potential causes were not the most probable cause but PCRC's negligence was. Ms. Nield did not do either.

In order to reverse the district court, the majority adopts a rule that matters not contained in an expert's affidavit cannot be considered when determining the admissibility of that expert's opinion. In other words, when determining admissibility, the affidavit must be viewed in a vacuum. The majority's new rule is both illogical and contrary to this Court's existing authority.

Because affidavits supporting or opposing a motion for summary judgment "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," I.R.C.P. 56(e), the rules for the admissibility of an expert's opinion set forth in an affidavit are the same as for an expert's opinion offered during trial. We have held that in both summary judgment and trial, the admissibility of an expert's opinion is not judged in a vacuum, but matters not contained in the expert's opinion

may be considered when deciding the admissibility of that opinion. "The facts upon which a hypothetical question is based must *831 **743 be admitted by the adverse party or be supported in the evidence in the record at the time the question is propounded." State v. Birrueta, 101 Idaho 915, 916, 623 P.2d 1292, 1293 (1981) (citations omitted). Likewise, "[w]e have held that, to be admissible, an expert's testimony must assist the trier of fact to understand the evidence or to determine a fact in issue and that an expert's opinion that is ... unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact." J-U-B Engineers, Inc., 146 Idaho at 316, 193 P.3d at 863 (citation omitted). In both instances, the court would have to look to the facts in the record to determine whether the expert's opinion was admissible.

For example, in Swallow v. Emergency Medicine of Idaho, P.A., 138 Idaho 589, 591, 67 P.3d 68, 70 (2003), a urologist erroneously wrote a prescription Ciprofloxacin (Cipro) at three times the intended dosage, and his patient suffered a heart attack shortly after taking the erroneously prescribed dosage. The patient and his wife filed an action seeking damages for medical malpractice. The patient retained Dr. Tommaso, a cardiologist, and he testified in his deposition that in his opinion the overdose of Cipro caused the patient's heart attack. Id. The defendants moved to exclude Dr. Tommaso's opinion because there was no scientific evidence that Cipro could cause a heart attack (no evidence of general causation). Id. The district court granted the motion and later granted the defendants' motion for summary judgment because with the opinion excluded, there was no admissible evidence showing that Cipro could cause a heart attack. Id. Dr. Tommaso had testified: "We don't know the pathophysiology. I'm aware from the PDR [Physicians' Desk Reference] and from the FDA [Food and Drug Administration] that Cipro can precipitate a myocardial infarction." Id. at 593, 67 P.3d at 72. In upholding the ruling excluding Dr. Tommaso's opinion, we considered evidence to which he did not testify. We looked at the PDR and the adverse reaction reports from the FDA and held that he had misread them and that they did not support his opinion. We looked at the PDR and held, "The PDR does not state that Cipro can cause a myocardial infarction." Id. With respect to the adverse drug reports submitted to the FDA, we stated, "The applicable regulation defines 'adverse drug experience' as '[a]ny adverse event associated with the use of a drug in humans, whether or not considered drug related.' " Id. at 594, 67 P.3d at 73. Dr. Tommaso had agreed that the ten adverse drug experience reports "were based solely upon the temporal relationship between the administration of Cipro and the adverse cardiac event,"

and we held the reports were insufficient to support an opinion as to causation because "there is no showing that ten adverse cardiac events occurring over eight years to patients who had been administered Cipro is a greater incidence of such events than would be expected to occur by chance." *Id.*

Under the majority's new rule, we would have had to reverse the district court in *Swallow* because we would not have been able to look beyond the face of the expert's opinion. He testified that "I'm aware from the PDR and from the FDA that Cipro can precipitate a myocardial infarction," and we would have had to accept that testimony at face value. We could not have questioned whether the PDR and the FDA adverse reaction reports really did show that Cipro can precipitate a heart attack. However, we upheld the exclusion of the opinion because we conducted our review of the PDR and FDA adverse reaction reports and concluded that they did not support the expert's opinion.

"When determining the admissibility of an expert's opinion, the focus of the trial court's inquiry is on the principles and methodology used and not the conclusions they generate." Fragnella v. Petrovich, 153 Idaho 266, 274, 281 P.3d 103, 111 (2012). In the instant case, the district court considered undisputed facts in the record (there were other potential causes of Ms. Nield's infections) and then examined the affidavits of Ms. Nield's experts to see if they utilized the methodology required by Weeks to be able to express an admissible opinion that the alleged negligence of PCRC was the most likely cause of her infections. Because the affidavits did not show that Ms. Nield's experts had followed the methodology required by Weeks, the *832 **744 court correctly held that their opinions as to causation were inadmissible.

The majority now holds, unsupported by any authority, that when determining the admissibility of an expert's opinion, the trial court cannot consider undisputed relevant facts in the record if they are not contained in the expert's affidavit. With respect to the application of the Weeks methodology, the majority would hold that an expert's opinion on causation is admissible even though the expert is unaware of other undisputed potential causes. Under the majority's "new rule", the expert need only engage in the reasoning required by Weeks if the expert admits in his or her affidavit that there are other potential causes that the expert did not consider. What is the logic behind that new rule? What policy is advanced by creating a rule that would make opinions of uniformed experts admissible? Under the majority's new rule, if an expert is aware of other potential causes but does not

admit they exist in the expert's affidavit, then the expert would not have to explain why the expert's chosen cause was more likely than the other potential causes.

IV. The Majority Erroneously Holds that Expert Testimony Was Not Necessary In This Case.

The majority holds that expert testimony was not necessary as to the cause of Ms. Nield's infections. According to the majority, "Once the experts have opined as to the potential sources of an infection, it does not particularly take expert testimony to establish exactly how a particular person contracted a particular infection."

In holding that expert testimony as to causation was required, the district court ruled as follows:

Our present case requires the testimony of experts to establish proximate cause of the injury suffered by the Plaintiff. The Plaintiff must prove that the Defendant's actions or nonactions were a substantial factor in her contracting MRSA pseudomonas. The process in which people contract infectious diseases is outside the scope of knowledge of a jury and requires the assistance of experts to explain how infections are contracted and spread.

In evaluating that holding, decisions of this Court as to lay testimony regarding causation are relevant. There is no difference from the jury, composed of lay people, deciding the cause of a medical condition without an expert's opinion as to that cause and a lay person testifying as to the cause. "We have previously held that a lay person was not qualified to give an opinion about the cause of a medical condition or disease." *Harrison v. Binnion*, 147 Idaho 645, 651, 214 P.3d 631, 637 (2009); *Accord Swallow*, 138 Idaho at 597, 67 P.3d at 76. When previously addressing whether lay opinion testimony as to medical causation is admissible, we have stated:

Where the subject matter regarding the cause of disease, injury, or death of a person is wholly scientific or so far removed from the usual and ordinary experience of the average person that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease or physical condition.

Evans v. Twin Falls County, 118 Idaho 210, 214, 796 P.2d 87, 91 (1990).

"In a case such as this, where an injury has multiple potential etiologies, expert testimony is necessary to establish causation, even in view of plaintiff's reduced burden to prove causation [in Jones Act cases]." Wills v. Amerada Hess Corp., 379 F.3d 32, 46 (2d Cir.2004). If all of the potential causes of Ms. Nield's infections are equally likely, how could the jury choose one over the others? It would merely be based upon speculation or emotion. If all of the potential causes are not equally likely, then it will take an expert to testify as to which is the most likely. Without that testimony, how could Ms. Nield meet her burden of proving by a preponderance of the evidence that the negligence of PCRC was the proximate cause of her infections? There is no logical basis for the majority's holding.

"The function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of *833 **745 the average juror. Where the normal experience and qualifications of lay jurors permit them to draw proper conclusions from given facts and circumstances, then expert conclusions or opinions are inadmissible." *Warren v. Sharp*, 139 Idaho 599, 606, 83 P.3d 773, 780 (2003) (quoting *Rockefeller v. Grabow*, 136 Idaho 637, 647, 39 P.3d 577, 587 (2001) (citations omitted)). Thus, if expert testimony is not needed to determine the cause of Ms. Nield's infections, then her experts could not testify as to their opinions of the cause.

In this case, even the experts do not agree as to the nature of pseudomonas and MRSA. Dr. Coffman disagreed with Dr. Selznick's statement that pseudomonas was a very uncommon bacteria. Dr. Coffman stated, "I see pseudomonas every day in the hospital.... I mean it's a—people carry pseudomonas just like they can carry staph. So it really is not that rare." He later explained that pseudomonas "just likes to live in water. You know, you go out to the New York Canal and you'll find pseudomonas. It will grow nearly anyplace." He recounted an article about how pseudomonas was even growing in jet fuel and plugged the fuel filter in a jet airplane, causing it to crash. Dr. Coffman also disagreed with Dr. Selznick's statement that "MRSA is not a community-acquired staph but rather a bacteria often

acquired nosocomially or as a result of hospitalization." He said that in the early to mid-1990's, "at the end of the year we'd have six or seven, maybe eight MRSA strains for the whole year in the hospital. Now we get that many a day." Dr. Coffman explained: "Actually, I can show you data from our laboratories here in Boise at least, our two local hospitals, that we have five times as much outpatient MRSA as we do inpatient MRSA.... Anyway, so he's clearly wrong. It is a community-acquired staph. In fact, it's more often now a community-acquired staph than it is hospital-acquired staph." He added that Ms. Nield's "strain is closely associated more with community-associated strain than a hospital-associated strain," based upon "[t]he antibacterial susceptibility profile."

The majority seeks to support its conclusion that expert testimony as to causation is unnecessary in this case with our decision in Sheridan v. St. Luke's Regional Medical Center, 135 Idaho 775, 25 P.3d 88 (2001). That case is inapposite. In Sheridan, the issue of causation was the damages resulting from the failure to treat a medical condition, not the cause of the medical condition. "Specifically, the Sheridans argue St. Luke's and Dr. Jambura negligently treated their son Cal's jaundice and elevated bilirubin levels, leading to permanent and irreparable brain damage." Id. at 778, 25 P.3d at 91. The jury returned a verdict in favor of St. Luke's and Dr. Jambura, and the district court granted the Sheridans' motion for a new trial on the ground of insufficiency of the evidence to justify the verdict. Id. at 779, 25 P.3d at 92. The trial judge's decision to grant a new trial on that ground is discretionary. Id. at 780, 25 P.3d at 93.

St. Luke's was the only appellant. It contended that there was insufficient evidence to show that the negligence of its nurses was a proximate cause of the child's resulting injury from the failure to treat his jaundice, and therefore it was error to grant a new trial and to deny its motion for a directed verdict.

A brief summary of what occurred while Cal was at the hospital is as follows:

Cal Sheridan was born at 11:52 p.m. on March 23, 1995 at St. Luke's. Dr. Jambura examined Cal approximately 10 hours after birth. Within 17 hours of birth, a nurse's chart note indicated the presence of jaundice. The pediatrician, Dr. Jambura, was not notified. The next shift nurse also noted jaundice, approximately 24 hours after birth. Jambura again was not notified. On March 25, 33–34 hours after birth, Dr. Jambura examined Cal, performed a circumcision, and cleared Cal to leave the hospital. At the time of his discharge, the medical chart noted Cal "has moderate

icterus [newborn jaundice] on head, mild icterus on body." The Sheridan's were provided a handout on jaundice. Cal's bilirubin levels were not measured and the parents were not offered any special counseling regarding abnormal jaundice.

Id. at 779, 25 P.3d at 92.

The jaundice was caused by the fact that the child and his mother had different blood *834 **746 types. Id. at 783, 25 P.3d at 96. "Although both [nurses] testified that they would be concerned if the jaundice progressed rapidly—that it was the progress of the jaundice rather than the mere presence of it that would be of concern to them-neither noted on chart any indicia from which the progress could be ascertained." Id. The nurses who noted toward the end of Cal's hospital stay that he was jaundiced did not inquire of the nurses who initially cared for him to determine if the jaundice was becoming more severe. Id. The nurse who cared for him on the morning of his discharge from the hospital "noted that the jaundice was present over his entire body-moderate on head and mild on trunk and extremities—but did not consider this as alarming." Id. None of the nurses informed the pediatrician that Cal had any abnormal symptoms or conditions. Id. There was also "confusion in the chart [that] led the doctors to assume that the blood types were the same when they were not." Id.

In discussing the nurses' negligence in its decision granting the new trial, the district court wrote:

While I think the pediatrician in this case must bear the brunt of responsibility for the mismanagement of Cal's care, in my mind at least some degree of fault is attributed to the failure of the newborn nurses to be the "physician's eyes and ears" at the outset of Cal's life. I am satisfied that if the nurses had sounded the alarm upon the first observation of jaundice, and had pressed for appropriate bilirubin monitoring before he was discharged from the hospital the first time. catastrophe that befell a few days later would have been completely averted.

Id.

Cal was subsequently diagnosed to have "kernicterus, a

form of cerebral palsy associated with a neonatal history of elevated serum bilirubin and consequent jaundice," *id.* at 779, 25 P.3d at 92, although that diagnosis was disputed at trial, *id.* at 782, 25 P.3d at 95. In granting a new trial, the district judge concluded that the clear weight of the evidence supported the diagnosis of kernicterus. *Id.*

There was no contention that the nurses caused the jaundice. The issue was whether their negligence in failing to notify the pediatrician of Cal's worsening condition while he was still at the hospital was a proximate cause of his kernicterus. The pediatrician who saw Cal 78 hours after his discharge from the hospital noted that Cal's jaundice had increased, but did nothing to further investigate the cause of the increase. *Id.* at 779, 25 P.3d at 92.

On appeal, the hospital contended that "the district judge abused its discretion in granting a new trial to the Sheridans because a causal link was not established between the alleged negligence of St. Luke's and Cal's injuries." *Id.* at 783, 25 P.3d at 96. In upholding the district court's conclusion that there was sufficient evidence of a causal link, we stated:

The district judge's conclusion that the causal link had been established was based on expert testimony regarding the standard of care, medical research and knowledge of the impact of high bilirubin levels in a newborn and expert testimony regarding the long term damage that can be caused by those high bilirubin levels. Therefore, we find this conclusion was reached by an exercise of reason.

Id. at 783–84, 25 P.3d at 96–97. Thus, there was expert testimony as to the injury that can be caused by the failure to treat jaundice in a newborn.

The hospital also contended that its motion for a directed verdict should have been granted because "the record contains no medical testimony to link the breach of the standard of care by the nursing staff in the first hospital admission to the damage that may have been caused from hyperbilirubinemia and the diagnosis of kernicterus." *Id.* at 785, 25 P.3d at 98. This Court held that "the testimony and evidence in the record present[ed] a chain of circumstances from which proximate cause can be reasonably and naturally inferred." *Id.* at 786, 25 P.3d at 99. As noted above, there was expert testimony as to the

consequences of failing to treat high bilirubin levels in a newborn. There was also expert testimony that "high bilirubin *835 **747 levels can be successfully treated by the use of bili lights and blood exchange transfusions." *Id.*

In holding that the jury could infer from the chain of circumstances that the nurses' negligence, which led to a failure to treat Cal's condition, was a proximate cause of the kernicterus, which is a form of cerebral palsy associated with a neonatal history of elevated serum bilirubin and consequent jaundice, we stated:

There was testimony that jaundice showing within the first 24 hours is pathologic and requires further evaluation such as a serum bilirubin measurement. Evidence was also presented that high bilirubin levels can be successfully treated by the use of bili lights and blood exchange transfusions. There was no dispute that jaundice appeared in Cal within 24 hours of his birth. Nurses Sater and Brown testified that the hospital nurses breached their standard of care by not notifying Dr. Jambura when the jaundice appeared, not charting with particularity the progression of the jaundice, not noting the possible blood incompatibility problems with the mother and child, and by sending the Sheridans home from the hospital with physiologic information on jaundice (normal jaundice) but not warning them that Cal's jaundice was abnormal. Cal was later re-hospitalized hyperbilirubinemia and was later diagnosed with kernicterus, a form of cerebral palsy associated with a neonatal history of elevated bilirubin, a symptom of which is jaundice. Although the hospital's actions were limited to the first 36 hours of life, and it was days later before the high bilirubin levels were measured, a jury could reasonably and naturally infer from the chain of circumstances that a breach of the standard of care in the first hospital stay proximately caused Cal's injuries.

Id.

The baby in *Sheridan* suffered the type of injury that was the normal progression of his untreated jaundice. Based upon expert testimony as to the diagnosis of his injury, expert testimony that such injury is caused by the failure to promptly treat jaundice such as he had, and expert testimony that the injury can be prevented by prompt treatment, a jury could reasonably infer that the nurses' failure to properly chart the increasing severity of Cal's jaundice and their failure to notify the pediatrician of his condition before his discharge from the hospital was a proximate cause of his subsequent injury. However, the issue in Sheridan was not what caused the jaundice, the medical condition that, when untreated, resulted in the injury. Sheridan does not stand for the proposition that expert medical testimony is unnecessary regarding the external cause of a medical condition.

The majority also cites Formont v. Kircher, 91 Idaho 290, 420 P.2d 661 (1966), in which we reversed the trial court's determination that causation had not been proved. In that case, the plaintiff suffered a compound fracture in which "[t]he bones of the fracture were forced through the clothing and boot which plaintiff was wearing and into the barnyard earth which contained manure and other debris." Id. at 292, 420 P.2d at 663. He was initially treated by a physician, who placed a cast on his leg, and then was treated by the defendant physician. An infection developed in the plaintiff's leg which went untreated, ultimately causing the loss of the leg. The defendant physician knew that infection could develop rapidly with this type of injury, id. at 295, 420 P.2d at 666, but he failed to prescribe antibiotics, id. at 293, 420 P.2d at 664, failed to examine the plaintiff when his wife telephoned and reported symptoms consistent with an infection, id., and failed to take action after examining the plaintiff and noting an odor in the drainage from the under the cast that indicated there was an infection, id. "The trial court in effect did find proximate cause from the chain of circumstances. However, because the defendant did not have the full care of plaintiff, the court concluded there was no proof of proximate cause." Id. at 299, 420 P.2d at 670. We stated that "[t]he principal question presented by this appeal is whether the trial court erred in finding that 'the care or lack of care by the defendant for plaintiff was not established to be the proximate cause of the loss of plaintiff's leg.' "Id. at 296, 420 P.2d at 667. We held that there can be more than one proximate cause and that "[t]he negligence of the defendant concurred *836 **748 in the final result, and the trial court was in error in its conclusion that a causal relationship was not established." Id.

In both *Sheridan* and *Formont*, we held that where there is a failure to treat a medical condition and the patient sustains an injury that is the natural consequence of such failure to treat, the trier of fact can conclude from the chain of circumstances that the failure to treat caused the injury without expert testimony that the medical condition caused the injury. In the present case, the issue is the cause of the medical condition, not whether an untreated medical condition, such as an infection, caused a particular injury.

We have previously held that a lay witness is not competent to testify as to the cause of a medical condition. Harrison, 147 Idaho at 651, 214 P.3d at 637; Swallow, 138 Idaho at 597, 67 P.3d at 76; Bloching v. Albertson's, Inc., 129 Idaho 844, 846, 934 P.2d 17, 19 (1997); Evans, 118 Idaho at 214, 796 P.2d at 91; Flowerdew v. Warner, 90 Idaho 164, 172, 409 P.2d 110, 115 (1965). If a lay person is not competent to testify as to the cause of a medical condition, then the jury is likewise unable to determine the cause of a medical condition without expert testimony as to what was the cause, particularly where there is more than one potential cause. We have never held that a lay person is competent to testify as to the external cause of a medical condition, or that the jury could determine the external cause of the condition without expert testimony.

Under the majority's new rule, opinion testimony as to the cause of Ms. Nield's infections would be inadmissible. The majority would apparently prefer that the jury reach its decision as to the cause of the infections based upon sympathy and the temporal relationship (she became infected while at PCRC).

V. In Order to Hold Dr. Coffman's Opinions Inadmissible, the Majority Ignores Our Prior Precedents, Adopts an Illogical Rule that an Expert's Opinion Cannot Be Based upon Facts Already in the Record, and Assumes the Role of Being Medical Experts.

Ms. Nield filed a motion to strike portions of Dr. Coffman's affidavit, but the district court did not rule on the motion. After granting PCRC's motion for summary judgment, the court stated that "[b]ased on that ruling, there is no need for this Court to address the Motions to Strike filed by the Plaintiff." Ms. Nield filed a motion for reconsideration, but in that motion she did not raise the court's failure to rule on her motion to strike.

This Court's rule has been that it will not decide on appeal issues that were not decided by the district court.

As the author of the majority opinion in this case wrote in *Montalbano v. Saint Alphonsus Regional Medical Center*, "It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." 151 Idaho 837, 843, 264 P.3d 944, 950 (2011); *accord Rhodehouse v. Stutts*, 125 Idaho 208, 213, 868 P.2d 1224, 1229 (1994). In this case, the majority is willing to ignore this rule.

The majority then states, "Although Ms. Nield did not specifically raise on appeal the district court's failure to act upon the motion to strike portions of Dr. Coffman's affidavit, she submitted substantial argument in her opening brief on appeal that Dr. Coffman's testimony was speculative and should have been disregarded." I have attached the entire argument portion of Ms. Nield's brief as Appendix A to my dissent, to show what the majority contends is "substantial argument" challenging the admissibility of Dr. Coffman's affidavit. Interestingly, none of the portions of his affidavit that Ms. Nield labels as speculative were relied upon by the district court in reaching its opinion.

As the author of the majority opinion in this case wrote in *Gallagher v. State*, 141 Idaho 665, 115 P.3d 756 (2005), "In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief." *Id.* at 669, 115 P.3d at 760 (citation omitted). In *Taylor v. AIA Services Corp.*, 151 Idaho 552, 261 P.3d 829 (2011), the author of the majority opinion in this case wrote, "It is well established that this Court *837 **749 will not consider an issue raised on appeal if the error complained of is not identified, or if the issue is not supported by cogent argument and authority, in the opening brief." *Id.* at 568, 261 P.3d at 845.

The portion of the appellant's brief in *Taylor* that was found lacking of sufficient argument to be considered was as follows:

The court erred and abused its discretion when it made the following findings which were not based upon evidence in the record: that the statute of limitations did not apply. [Esposito v.] Noyes, 255 B.R. [588], at 602 [(Bankr.D.Idaho 2000)]; I.C. §§ 5–237; 5–224; 5–237; that Reed was not more innocent; that Reed was not justifiably ignorant, and that Reed was in a position to have intimate

knowledge of AIA's finances (among other findings in both orders not supported by the evidence): and when the court refused to address all of Reed's arguments and objections in both motions. (R. Vol. XLV-XLVI, p. 8838-52, 9014–24.) minimum, for these reasons and all the reasons asserted in this Brief. the court abused its discretion and erred when it did not at least find an issue of fact precluding partial summary judgment in favor of Connie and Beck and when it failed to consider all of Reed's arguments and the evidence submitted in support of those arguments. Should the Court not enter partial summary judgment in favor of Reed, the Court should order all arguments to be considered and fully and fairly evaluated with the evidence on remand.

Id. In holding that the above-quoted portion of the appellant's brief was insufficient for this Court to consider the issues raised, the author of the majority opinion wrote:

As to Reed Taylor's claims concerning ignorance, innocence and knowledge, he appears to be suggesting that there were disputed issues of material fact concerning the justifiable ignorance exception to illegality that should have precluded granting summary judgment. However, this is only a guess, and Reed Taylor provides no argument or any citation to authority on this issue. As to whether the district court refused to address all of Reed Taylor's arguments and objections in "both motions" (presumably Respondents' motion for partial summary judgment and Reed Taylor's motion for reconsideration), Reed Taylor again provides explanation no argument and merely cites to the district court's Opinion and Order granting partial summary judgment

and Opinion and Order denying his motion for reconsideration. Therefore, we decline to consider these issues.

Id.

Thus, to raise an issue, it must be supported by cogent **argument and authority** in the opening brief. As this Court explained in *Minor Miracle Productions, LLC v. Starkey*, 152 Idaho 333, 271 P.3d 1189 (2012):

An appellant's initial brief must include an argument section, which "shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and the record relied upon." Idaho App. R. 35(a)(6). Even in cases where a party has explicitly set forth an issue in its brief, we have held that:

[I]f the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court. *Inama v. Boise County ex rel. Bd. of Comm'rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing).

Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court.

Id. at 337, 271 P.3d at 1193 (emphasis added).

In the argument portion of her opening brief, Ms. Nield did not mention her motion to strike, nor did she state that any portion of Dr. Coffman's affidavit was inadmissible. With reference to Dr. Coffman's affidavit, *838 **750 there was no argument as to its admissibility, nor did Ms. Nield cite any authority supporting any contention that it was inadmissible. Although the majority contends that she "submitted substantial argument in her opening brief on appeal that Dr. Coffman's testimony was speculative and should have been disregarded," analysis will show that her argument would have been insufficient under our standard that existed prior to this case and that the majority raises its own objections to Dr. Coffman's affidavit rather than simply addressing those allegedly raised by Ms. Nield.

Ms. Nield asserted: "Contrary to the accepted negative test results, the District Court, instead, gave the inference

that Ms. Nield was a carrier and was potentially infected with MRSA and PA at the time of her admission. The District Court apparently based its decision on Dr. Coffman's unfounded speculation." Although Ms. Nield does not specify the alleged "unfounded speculation," it is apparently the same as her later reference to "Dr. Coffman's unfounded conclusion that not all of the wounds were cultured and that Ms. Nield may have gotten MRSA or PA from visitors."

With respect to the alleged speculation that not all of Ms. Nield's wounds were cultured, she apparently refers to the culture done at the Hospital before she was admitted to PCRC. Ms. Nield does not provide the facts upon which she bases this assertion. The history and physical report prepared regarding her admission to the Hospital on August 21, 2007, stated: "There was superficial ulcerations around much of the distal lower leg. The largest being posteriorly, approximately 6 to 7 cm. There was granulation tissue and vascular tissue on all of these." A laboratory report of a culture done from a swab taken on the day of her admission stated that the source was "WOUND, LEFT LEG." In his affidavit, Dr. Coffman stated that the laboratory report did not indicate whether swabs were taken from all four of Ms. Nield's wounds instead of just one of them. He stated:

> The August 21, 2007 wound culture does not rule out the possibility Ms. Nield colonized or infected with MRSA or pseudomonas. The records do not indicate whether a swab was taken from each of Ms. Nield's four wounds. It is possible Ms. **MRSA** Nield had pseudomonas in one or more, but not all of her wounds. As such, it is possible the swab was taken from one of the wounds in which she did have MRSA and/or not pseudomonas.

Ms. Nield argued in the district court that although the laboratory report stated that the source of the swab was "WOUND, LEFT LEG" rather than "ALL WOUNDS, LEFT LEG," it was pure speculation to assume that the swabs had not been taken from all of the wounds. According to Ms. Nield, the use of the singular "wound" obviously meant the plural "all wounds," and any assumption to the contrary was pure speculation. She did not present any evidence that the laboratory typically used the singular to refer to the plural, nor did she present any evidence that it was the standard practice of the Hospital

to swab all wounds.

With respect to Dr. Coffman's statement that Ms. Nield may have contracted infections from visitors, Dr. Coffman stated: "Any time Ms. Nield came in contact with a visitor, left the Pocatello Care and Rehab facility, or was seen by a non Pocatello Care and Rehab medical provider, she was potentially exposed to MRSA and/or pseudomonas. An unknown but potentially significant number of medical workers are MRSA colonized." Ms. Nield does not explain why this statement is unfounded speculation, nor does she point to any expert testimony that contradicts it.

Ms. Nield also stated that "[t]he District Court improperly gave PCRC the inference, instead of Ms. Nield, based on the speculation proffered by Dr. Coffman, that the testing done by PMC may have produced a false negative." She does not discuss any facts regarding the false negative or present any argument as to why whatever Dr. Coffman said about it constituted speculation. In his affidavit, Dr. Coffman explained his experience, training, and education regarding how swabs are cultured, which was that not all micro-organisms are grown out. He stated:

Based upon my experience, training and education, a person performing a wound or *839 **751 fluid culture will not identify every micro-organism isolated, instead, will identify only the two three most dominant micro-organisms found in the sample. The dominant isolates are then placed on culture plates and grown out over the course of one or two days to allow for identification. A technician does not culture every micro-organism from a wound or fluid culture because of the fact there could be dozens and dozens of microorganisms from one wound culture.

Dr. Coffman then explained why Ms. Nield's August 21, 2007, wound culture may have produced a false negative due to the multiple micro-organisms that would have been in her wounds. He stated:

It is possible Ms. Nield had MRSA and/or pseudomonas in her swabbed leg wound, but that the culture did not grow out and identify these bacteria, resulting in

a false negative. Due to her condition as of August 21, 2007, (chronic open wounds, unsanitary conditions, high susceptibility to infection and a lack of antibiotic treatment), Ms. Nield would be expected to have a whole host of bacteria within her wet leg wounds. A wound culture taken from one of would include these wounds possibly dozens and dozens of different microorganisms. Faced with such a wound culture, only the or three dominant micro-organisms would be grown out for identification. It is very possible MRSA and/or pseudomonas were present in the wound that was cultured on August 21, 2007, but were not the dominant microorganisms and were not grown out.

Ms. Nield did not present any evidence disputing Dr. Coffman's explanation about how cultures are typically done, nor did she present any evidence that the Hospital did it in some other manner. An expert's explanation of how a procedure is typically done is not speculation. Ms. Nield likewise did not present any evidence disputing Dr. Coffman's statement as to the likelihood of there being many types of micro-organisms within Ms. Nield's wounds, nor did she explain why this would be speculation.

The above are the only parts of Dr. Coffman's testimony about which Ms. Nield could conceivably have presented "substantial argument" in her opening brief. The majority did not address any of those issues that she allegedly raised. Rather, the majority addressed other aspects of Dr. Coffman's testimony that it did not like. The majority has now adopted a "new rule" regarding raising issues on appeal. If an appellant characterizes some parts of an expert's opinion as being speculative, this Court is free to raise other objections to the expert's testimony and decide them. However, I would not recommend that any appellant rely upon this "new rule" as subsequent cases will probably show that it is confined to this case. The majority is now willing to ignore the above-stated rules for appellate review in order to rule that portions of Dr. Coffman's affidavit are inadmissible. As will be shown, the majority's holding that the opinions are inadmissible is clearly wrong.

(a) Lack of screening for MRSA. Ms. Nield was

admitted to the Hospital on August 21, 2007, and she was discharged on August 25, 2007. The typed discharge summary, signed by Dr. Ryan Zimmerman, had on its last page a typewritten note stating, "MRSA screen negative." In his affidavit, Dr. Coffman explained that there are no medical records showing that Ms. Nield was screened for MRSA at the Hospital prior to her admission to PCRC. Therefore she could have been colonized for MRSA at the time she was admitted to PCRC and may have become infected as a result of that colonization. He stated:

13. People may also be screened for MRSA to identify individuals who are MRSA colonized. A MRSA screen, unlike a culture, does not look to detect infection, but rather, looks for the presence of an organism generally. In 2007, the most widely available form of MRSA screening was nares culturing, which looks for MRSA colonization in a person's nostrils. These nares screenings are only able to identify 60–70% of MRSA colonized individuals, while another 10–15% can be identified through perineal or rectal culturing. Screening incoming patients for MRSA was not common practice as of August *840 **752 2007, and was not a part of the standard of care.

14. I have not seen any records of MRSA screening for Ms. Nield prior to her admission to Pocatello Care and Rehab. I note that the August 25, 2007 discharge summary from Portneuf Medical Center includes a handwritten note that a MRSA screen was negative. The August 25, 2007 Discharge Summary is attached hereto as Ex. C. However, there are no records of any MRSA screen. Instead, the only MRSA diagnostic record I have found prior to Ms. Nield's admission to Pocatello Care and Rehab is the August 21, 2007 culture. If a MRSA screen was done, a report would have been produced and made a part of the record. Based upon the records, it appears Dr. Zimmerman's reference to a negative MRSA screen is referring to the culture taken of Ms. Nield's wound on August 21, 2007, and not an actual MRSA screening. Based on the lack of any MRSA screen report, it is fair to assume that a MRSA screen was not performed. If Ms. Nield was not screened for MRSA, it is not possible to determine if she was MRSA colonized at the time she was admitted to **Pocatello** Care and Rehab on August 25, 2007.

All persons with medical degrees do not have the same level of expertise in all areas of medicine. If they did, there would be no need for specialists. Dr. Zimmerman was a family practice resident. There is nothing in the record that shows he knew what a "MRSA screening" was. We cannot assume that he had the same level of expertise in infectious disease as does Dr. Coffman, who

is board certified in that specialty and has practiced it for twenty years.

Dr. Coffman stated, "In 2007, the most widely available form of MRSA screening was nares culturing, which looks for MRSA colonization in a person's nostrils." A physician would not look for MRSA colonization in a person's nostrils by shining a light up the person's nose to see if there are any little critters running around in there. A nares culture would produce medical records because the nostrils would be swabbed and then the swabs cultured in the laboratory to see if they grew MRSA bacteria. Once that was done, there would be a written laboratory report stating the outcome. Dr. Coffman deduced that because there was no laboratory report of a nares culture, none had been performed. The majority's criticism of his conclusion shows that the majority does not understand the concept of deductive reasoning.

The majority also states that it is "pure speculation" that there was no laboratory report just because Dr. Coffman could not find one. A list of the records he received was attached to his affidavit. That list included "Laboratory reports" from the Hospital. A MRSA screen would have produced a laboratory report from the Hospital. Dr. Selznick listed the reports he reviewed. His list did not include any laboratory record indicating a MRSA screen had been done. Ms. Nield certainly did not contend in the district court that Dr. Coffman had not received all of the records or that there was a laboratory report showing the results of the nares culture, nor did she produce the phantom report. The alleged missing report is simply a figment of the majority's imagination and pure speculation.

The majority also states that Dr. Coffman's contention that no MRSA screen had been done "played a significant part of the district court's decision to strike Dr. Selznick's affidavit." That statement is simply untrue. The only possible reference to the lack of MRSA screening in the district court's memorandum decision granting summary judgment was the statement: "While at PMC, at least one of her open wounds was tested for MRSA and pseudomonas, and the test results were negative for infection. At the time, no other testing was done to determine the presence of MRSA." The court never mentioned MRSA screening in its analysis of the admissibility of Dr. Selznick's opinion as to causation. That court's decision was based solely upon the fact that Dr. Selznick failed to conduct the analysis required in Weeks.

(b) Dr. Coffman did not opine as to how Ms. Nield contracted her infections. The majority appears to hold

that Dr. Coffman's testimony is speculative because he could not *841 **753 determine the source of Ms. Nield's infections. It recites that contention by Ms. Nield and then states:

That is, although he postulated quite a number of potential sources of infections, he could not state that she contracted the infections from any of the possible sources. "Expert opinion that merely suggests possibilities, not probabilities, would only invite conjecture and may be properly excluded." *Slack v. Kelleher*, 140 Idaho 916, 923, 104 P.3d 958, 965 (2004).

Assuming that the quotation from *Slack* constitutes the majority's agreement with Ms. Nield's contention, both the majority and Ms. Nield fail to understand the significance of the burden of proof, and the majority's apparent holding contradicts our existing case law.

Ms. Nield had the burden of proving that the negligence of PCRC was a proximate cause of her infections. PCRC was not required to disprove causation or to prove how Ms. Nield became infected. The Slack case does not support the majority's apparent ruling. Ms. Slack sued the Kellehers to recover damages for injuries she had suffered in a traffic accident. "Because there was evidence that Slack had suffered permanent injuries in the accident, her life expectancy was relevant to the issue of damages." *Id.* at 922-23, 104 P.3d at 964-65. Prior to the start of the trial, Kelleher's counsel stated that he had a medical expert who would testify "about general health issues with respect to Slack." Id. at 923, 104 P.3d at 965. "The district court ruled that Kelleher could not introduce evidence that Slack's medical condition may shorten her life expectancy unless such conclusion was supported by expert opinion testimony." Id. Kelleher did not call its medical expert, but argued on appeal that the district court "erred in precluding the expert from testifying about Slack's poor health because it was relevant to her life expectancy." Id. "During the discussion [at trial] regarding the medical expert's expected testimony, Kelleher's counsel did not claim that the expert would testify that in his opinion Slack's medical condition would shorten her life expectancy." Id. We held that the district court did not err because: "Whether or not her heart attack or other medical conditions would shorten her life expectancy are matters beyond the competence of the average layperson or juror. Therefore, Kelleher was required to produce expert testimony that Slack's medical condition would shorten her life expectancy." Id. (emphasis added). The trial court instructs the jury as to a plaintiff's life expectancy based upon mortality tables. Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 59, 995 P.2d 816, 829 (2000). A defendant has the burden of proving that a plaintiff has a shortened life expectancy. Kelleher had the burden of proving that Ms. Slack's life expectancy would be shortened due to her medical conditions. Kelleher's medical expert was not able to so testify, and so general testimony about Ms. Slack's medical conditions would have merely invited the jury to speculate as to whether such conditions would shorten her life expectancy. *Id*.

It is the plaintiff in a negligence action that has the burden of proving causation. Because the defendant does not have that burden, the defendant can offer evidence of other potential causes without having to prove that one of those potential causes was the actual cause. In *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997), the plaintiffs brought an action against Idaho Power Company contending that it was the cause of a fire that occurred on their property. The jury returned a verdict in favor of Idaho Power, and the Lanhams appealed. On appeal, the Lanhams contended that the district court erred in permitting Idaho Power's expert James Ashby to testify that there were various possible causes of the fire and that he could not eliminate any of the possible causes.

He [Ashby] then testified that he had considered a number of possible causes for the fire on the property, including smoking, vehicles on the road through the fire area, campers, arson, a downed power line, and lightning. Given the weather conditions present on the day of the fire, Ashby asserted that he could not eliminate any of these possible causes. He admitted, however, that he had found no physical evidence at the fire scene to support smoking, vehicles, campers, or arson as the cause of *842 **754 the fire. He stated that there was evidence that "a tree limb was down on the power lines, the power lines were down, at least fairly early in the fire," but he found no evidence to indicate that the downed power line actually caused the fire.

Id. at 492, 943 P.2d at 918. We held that the district court did not err in permitting the expert to testify about other possible causes of the fire that he could not rule out. "We hold that the trial court did not err in permitting Ashby to testify about possible causes of the fire. All reasonably likely causes of the fire were relevant because the fire's cause was a central element of both of the Lanhams' causes of action." Id.

The Lanhams also argued that the district court erred in permitting Ashby to testify that lightning could have struck near the area where the fire started. They argued that there was no corroborative evidence of a lightning strike on their property. *Id.* at 494, 943 P.2d at 920. We held that the lack of evidence corroborating a lightning strike was irrelevant to the issue of whether that could

have happened. We stated:

This argument, however, misses the point of Ashby's testimony. He listed several possible causes of the fire and explained why he could not definitively eliminate each of them. When he arrived at lightning as a potential source, he stated that he checked the BLM lightning strike data and that, according to his interpretation, the data indicated that lightning had moved through the general area within twenty-four hours prior to the fire. Thus, he could not rule out, on that basis, the possibility that lightning had caused the fire. He did not, as the Lanhams seem to suggest, testify that lightning had definitely struck the Lanhams' property, nor was he attempting to prove that such a strike had occurred. Ashby simply testified that he could not establish that such a strike had not occurred and thus could not eliminate lightning as a potential cause of the fire. The lack of corroborative evidence is thus irrelevant as to whether sufficient foundation was laid for Ashby's opinion.

Id.

Thus, the defendant is entitled to present evidence of possible causes of injury or damage other than the defendant's negligence even if the defendant cannot point to evidence showing that one or more of those other possible causes was the actual cause. As stated above, the defendant in a negligence action does not have the burden of proving causation. That is the plaintiff's burden. The majority announces a "new rule" that a defendant in a negligence action cannot offer expert testimony of other potential causes of the plaintiff's injury. Such rule is contrary to our ruling in Lanham, and it will tip the scales of justice in favor of Ms. Nield. Even though it is undisputed that there are other potential causes of her infections, the majority will exclude expert testimony of those other causes so that the only potential cause that the jury will hear is PCRC's alleged negligence, thereby depriving PCRC of a fair trial.

(c) Dr. Coffman's affidavit did not recite the specific facts in the record showing Ms. Nield's possible

exposure to the infections. In his affidavit, Dr. Coffman stated:

Any time Ms. Nield came in contact with a visitor, left the Pocatello Care and Rehab facility, or was seen by a non Pocatello Care and Rehab medical provider, she was potentially exposed to MRSA and/or pseudomonas. An unknown but potentially significant number of medical workers are MRSA colonized.

The majority holds that Dr. Coffman "fails to cite any evidence in the record indicating that Ms. Nield had contact with any of these potential sources." That is correct. However, in the memorandum supporting PCRC's motion for summary judgment, its counsel listed citations to the record showing such contacts.

- 9. During her admission at **Pocatello** Care and Rehab, she left the facility on various occasions, which included the following:
 - a. Ms. Nield was taken to Portneuf Medical Center on August 27, 2007 to have a PICC line inserted. See Duke Aff., Ex. 11.
 - **755 *843 b. Ms. Nield left the facility to have dental work done on October 12, 2007. See Duke Aff., Ex. 12.
 - c. Ms. Nield left the facility to visit the Portneuf Medical Center's Gift shop prior to the date her wound culture indicated she had MRSA or pseudomonas. See Duke Aff., Ex. 10, p. 178–179.
- 10. During her admission at Pocatello Care and Rehab, Ms. Nield also had numerous family members and friends visit her including Barbie Girard, Karen Morasko, Gary and Julie Toupe, Kenny and Diane Balls, Mannie Perez, Milt Escobal, Vic and Joan Adams, Janna Leo, Laurie Bills and Jay Cunningham. See Duke Aff., Ex. 10, pp. 142–147.
- 11. Ms. Nield was also seen and treated by numerous medical professionals while she was at Pocatello Care and Rehab, that were not employed by Pocatello Care and Rehab, including Dr. Routson, Dr. Hoff, Dr. Jones, and Nurse Practitioner Diana B. Krawtz. See Duke Aff., Ex. 13.

The exhibits to Ms. Duke's affidavit referenced above were excerpts from Ms. Nield's deposition (Ex. 10), a

radiology report (Ex. 11), a nursing note regarding Ms. Nield (Ex. 12), and doctors' orders related to Ms. Nield's stay at PCRC (Ex. 13). Ms. Nield did not challenge the truthfulness of any of the above statements. Her only challenge was that there was no evidence that "the visitors were MRSA or pseudomonas colonized or infected."

Apparently, the majority is adopting a "new rule" that all of the facts supporting an expert's opinion must be stated in that affidavit, even if they are otherwise set forth in the record and not disputed by the opposing party. Affidavits supporting and opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). We have previously held that an expert's opinion is inadmissible when it is not supported by facts in the record. J-U-BEngineers, 146 Idaho at 316, 193 P.3d at 863. The majority now holds that an expert's opinion is inadmissible because it is supported by facts in the record. The majority's new holding would prevent an expert from expressing an opinion that was not based upon facts that were within the expert's personal knowledge. The majority provides no logical explanation for that new nonsensical rule, and it illustrates the extent to which it is willing to go to justify its reversal of the district court.

(d) Dr. Coffman's statement that MRSA was ubiquitous in facilities like PCRC. In his affidavit, Dr. Coffman stated, "MRSA is ubiquitous within skilled nursing facilities and long term care facilities." Ms. Nield did not move to strike this portion of Dr. Coffman's affidavit, nor did she argue on appeal that it was inadmissible. The majority sua sponte objects to this statement on the ground that there is no evidence that MRSA was ubiquitous at PCRC while Ms. Nield was there.

I doubt that the majority really believes that by donning black robes it has acquired greater expertise in the area of infectious disease than that possessed by a physician who is board certified in that specialty and has practiced it for over twenty years. Nevertheless, the majority does not hesitate to express its own "expert" opinions in this area.

The majority bases its "expert" medical opinion upon the fact that Ms. Nield was the only person who became infected with MRSA while she was at the facility, although there were other patients in the facility who were infected by MRSA but had become infected prior to being admitted. In the majority's "expert" medical opinion, if MRSA was ubiquitous at PCRC, then more patients

would have become infected. The majority apparently rejects any possibility that the lack of patients becoming infected with MRSA while at PCRC had anything to do with the quality of care provided at that facility.

In his affidavit, Dr. Coffman stated that MRSA, the bacteria, was ubiquitous in skilled nursing facilities and long term care facilities. He also stated: "A person may be colonized with MRSA but not show signs or symptoms of infection"; "Most people who *844 **756 are colonized with MRSA do not develop MRSA infections"; "There are studies indicating that upwards of 25% of patients at such facilities are MRSA colonized"; and "There are numerous factors that make certain people more susceptible to developing MRSA infections, including increased age, diabetes, vascular and venous deficiencies, open wounds, previous hospital admissions, compromised immune system and lack of mobility." When Ms. Nield arrived at PCRC, she was 65 years old and had all of those risk factors with the possible exception of a compromised immune system. Ms. Nield's discharge summary from the Hospital stated, "Newly diagnosed diabetes." Her physical history when she entered the hospital stated, "The patient has arterial and venous disease and so this is more of a picture of arterial and venous disease. However, given the patient's poor circulation, she is at high risk for infectious disease and I suspect that there is some component of infectious disease here." She had open wounds, which is why she was admitted both to the Hospital and to PCRC, and she had not been mobile, due to her dislocated hip. She was transported by ambulance to the Hospital after a home health provider discovered her lying in a bed soaked with urine because she could not get up to go to the bathroom.

In addition, the majority implicitly rejects any suggestion that Ms. Nield could have been exposed to MRSA by any of her visitors, all of whom she hugged when they came to visit, or other medical personnel who visited her while at PCRC, or when she left the facility to go shopping or to the dentist. The majority simply lacks the expertise to exclude Dr. Coffman's testimony based upon the majority's "expert" medical opinions.

VI. Conclusion.

In order to reverse the district court, the majority mischaracterizes our *Weeks* opinion and misstates how the district court applied that decision. The majority holds that expert testimony is not required to prove the cause of Ms. Nield's infections, even though in an unbroken string of five cases we have held that lay people are not competent to testify as to the cause of a medical

condition. The majority holds that PCRC cannot offer expert testimony as to other potential causes of Ms. Nield's infections, even though such testimony has previously been held admissible by this Court, and the only apparent purpose for now excluding such testimony is to have the jury make its decision solely upon the fact that Ms. Nield became infected while at PCRC. There is a saying that hard cases make bad law. That saying is incorrect. It is courts that make bad law in the process of deciding cases based solely upon whom they want to win or lose. A court must have the integrity to decide cases by applying the law to the facts. By applying the law to the facts in this case, the district court reached the correct result. I would affirm.

APPENDIX A

ISSUES ON APPEAL

- 1. Whether the District Court erred in misapplying the summary judgment standard by improperly weighing the evidence and failing to give Ms. Nield all reasonable inferences from the record;
- 2. Whether the District Court erred in misapplying the summary judgment standard by requiring Ms. Nield to show that she may have been a carrier of MRSA and PA but was not infected at the time of her admission; requiring Ms. Nield to show why the wound culture would not have produced a false negative; and requiring Ms. Nield to show she could only have contracted MRSA and PA while admitted at PCRC's facility;
- 3. Whether the District Court erred in misapplying the substantial factor test by incorrectly concluding Ms. Nield's experts did not address when, where or how she contracted MRSA and PA and rule out other factors that could have been a substantial factor in causing Ms. Nield to contract MRSA and PA;
- 4. Whether Ms. Nield is entitled to attorney's fees and costs on appeal, pursuant to Idaho Code Section 12–121 and Idaho Appellate Rules 40 and 41.

**757 *845 ARGUMENT

A. THE DISTRICT COURT IMPROPERLY WEIGHED THE EVIDENCE AND FAILED TO GIVE MS. NIELD ALL REASONABLE

INFERENCES FROM THE RECORD, THEREBY MISAPPLYING THE SUMMARY JUDGMENT STANDARD.

The rules applying to a court's determination of summary judgment are as follows:

As we have reiterated in our recent cases, upon a motion for summary judgment, all disputed facts are liberally construed in favor of the non-moving party. The burden of proving the absence of a material fact rests at all times upon the moving party. This burden is onerous because even "[clircumstantial evidence can create a genuine issue of material fact." Moreover, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, a summary judgment must be denied because all doubts are to be resolved against the moving party. The requirement that all reasonable inferences be construed in the light most favorable to the non-moving party is a strict one. Nevertheless, when a party moves for summary judgment opposing party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. Notwithstanding the utility of a summary judgment, a motion for summary judgment should be granted with caution.

McCoy v. Lyons, 120 Idaho 765, 769–70, 820 P.2d 360, 364–65 (1991) [Internal citations omitted][Emphasis added]. Furthermore, it is well-established that on summary judgment, a trial court is not allowed to weigh the evidence and resolve all doubts against the movant:

The trial court, when confronted by a motion for summary judgment, must determine if there are factual issues which should be resolved by

the trier of facts. On such a motion it is not the function of the trial court to weigh the evidence or to determine those issues. Moreover, all doubts must be resolved against the party moving for a summary judgment.

Merrill v. Duffy Reed Constr. Co., 82 Idaho 410, 414, 353 P.2d 657, 659 (1960) [Emphasis added]. See also, American Land Title Co. v. Isaak, 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983) ("A trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues."); Idaho State University v. Mitchell, 97 Idaho 724, 730, 552 P.2d 776, 782 (1976) (citing, Merrill, supra); Meyers v. Lott, 133 Idaho 846, 849, 993 P.2d 609, 612 (2000) ("The district court may not weigh the evidence to resolve controverted factual issues.")). Additionally, "[a] motion for summary judgment should be denied if the pleadings, admissions, depositions, and affidavits raise any question of credibility of witnesses or weight of the evidence." Merrill, supra, 82 Idaho at 414, 353 P.2d at 659.

1. The District Court improperly weighed the evidence and credibility of witnesses.

While admitting that Dr. Selznick was qualified to render his opinions (R., p. 1236), the District Court weighed his opinions and credibility against those submitted by PCRC's expert, Dr. Coffman. The District Court also weighed and assessed the credibility of Mr. Gerber and Ms. Frederick. It is well-settled that a trial court is not allowed to weigh the evidence or assess the credibility of witnesses on summary judgment. The District Court violated this rule, again, evidenced by its own comments:

This Court correctly determined that [PCRC's] expert, Dr. Coffman, presented admissible, credible testimony establishing that [Ms. Nield] could not demonstrate to a reasonable degree of medical certainty when, where, or how she contracted MRSA and pseudomonas.

R., p. 1295 [Emphasis supplied].

The District Court accepted Dr. Coffman's conclusion that he could not determine where Ms. Nield contracted MRSA or PA over Dr. Selznick's conclusion Ms. Nield, to a reasonable degree of probability, contracted MRSA and PA due to PCRC's conduct and omissions *846

**758 This was not the District Court's role; rather, weighing the opinions of Dr. Coffman, Dr. Selznick, Ms. Frederick and Mr. Gerber was the role of the jury. Essentially, the District Court determined Dr. Selznick was less credible than Dr. Coffman, finding Dr. Selznick did not address the issue whether Ms. Nield may have been a carrier of MRSA or PA, but was not infected at the time of her admission; that the testing would not have produced a false negative; and did not address why Ms. Nield could only have contracted MRSA and PA while admitted at PCRC.¹²

Not only did the District Court improperly weigh the evidence and assess the witnesses' credibility, it also wrongly concluded Dr. Selznick, Mr. Gerber and Ms. Frederick did not address the pertinent issues. Dr. Selznick, Mr. Gerber and Ms. Frederick did address how Ms. Nield contracted MRSA and PA. All of them reviewed the testing done at PMC, finding that Ms. Nield was negative for MRSA and PA prior to her admission. All of them properly *relied* upon the negative test results, as they had a right to do, since that was the accepted standard of care for the practice of medicine in **Pocatello**, Idaho. All of them reviewed the records from PCRC of Ms. Nield's treatment and the DHW records to conclude PCRC did not follow infection control procedures. All of them considered that Ms. Nield was housed with residents infected with MRSA and PA, that PCRC failed to follow proper and accepted infection prevention, was cited for its noncompliance by DHW, and that Ms. Nield tested positive for MRSA and PA November 9, 2007, over three months after she was admitted at PCRC. Dr. Selznick, Mr. Gerber and Ms. Frederick utilized and applied the proper methodologies in reaching their conclusions. R., pp. 640–653; pp. 1042–1089; pp. 1096–1106.

The District Court also improperly granted summary judgment, given that *Dr. Coffman admitted he could not rule out where Ms. Nield contracted MRSA and PA.* This means Dr. Coffman could not rule out that Ms. Nield contracted MRSA and PA at PCRC. That admission, which the District Court ignored in weighing the evidence, in and of itself, raised a genuine issue of material fact precluding summary judgment. Moreover, the District Court improperly refused to give Ms. Nield the inference from Dr. Coffman's admission he could not rule out that Ms. Nield got MRSA and PA from PCRC.

Further, from the abundant evidence in the record, PCRC's treatment of Ms. **Nield** was below the standard of care. PCRC and its staff did not wash their hands; they did not properly treat Ms. **Nield's** wounds; they did not properly document Ms. **Nield's** wounds and skin condition; they exposed Ms. **Nield** to MRSA and PA;

and, after three months in PCRC, Ms. Nield was positive for both MRSA and PA. R., pp. 671–673; p. p. 739; p. 750; p. 923–927; p. 931. These facts alone would also preclude summary judgment, and the District Court committed reversible error in granting it.

2. The District Court did not give any reasonable inference to Ms. Nield, let alone every inference.

The District Court did not give the inference from the screening Ms. Nield had taken of her at PMC, prior to her admission to PCRC, that she was negative as a carrier and not infected with MRSA and PA. Contrary to the accepted negative test results, the District Court, instead, gave the inference that Ms. Nield was a carrier and was potentially infected with MRSA and PA at the time of her admission. The District Court apparently based its decision on Dr. Coffman's unfounded speculation. The District Court improperly endorsed that speculation, despite the fact that Dr. Coffman, again, admitted "I can't rule out where she got it [MRSA] from." R., pp. 1013-1014 [Emphasis added]. Further, Dr. Coffman's own affidavit amplifies that he could not determine when, where or how Ms. Nield contracted *847 **759 MRSA or PA: "[I]t is not possible to determine when, where or how Ms. Nield became infected with MRSA or pseudomonas." R., pp. 215 (¶ 28) [Emphasis supplied].

The District Court improperly gave PCRC the inference, instead of Ms. Nield, based on the speculation proffered by Dr. Coffman, that the testing done by PMC may have produced a false negative. Apparently, the District Court accepted Dr. Coffman's unfounded conclusion that not all of the wounds were cultured and that Ms. Nield may have gotten MRSA or PA from visitors. Those are inferences to which PCRC, as the movant, was not allowed under the summary judgment standard. Additionally, those inferences are not supported by the record. Dr. Coffman did not do the testing. He was only speculating about the test results. The record is appropriately silent on the testing done by PMC. It was done. It was proper. It was negative for both MRSA and PA.

Ms. Nield, not PCRC, was entitled to all reasonable inferences, such as: (1) that she was not colonized or infected with MRSA or PA, based on the negative test results from the testing done at PCRC; (2) that the testing did not prove a false negative; (3) that all of her wounds were cultured; (4) that her treating physician, Dr. Selznick, who followed the standard of care, can rely on test results negative for MRSA and PA; (5) that it was documented that Ms. Nield was exposed to MRSA and PA during her stay at PCRC; (6) that PCRC breached the standard of care in failing to adhere to the standard of care

for control of infectious diseases, which was documented by DHW; and (7) that Dr. Selznick had a right to rely on the positive test results of MRSA and PA in November, 2007, to draw the conclusion that PCRC's conduct *was a substantial factor* in causing Ms. Nield's MRSA and PA infections.

The District Court also failed to consider the fact that PCRC never tested Ms. Nield for MRSA and PA prior to or after her admission. Dr. Coffman's defense to that was that Ms. Nield was never screened in her nares or other parts of her body, yet admitted that that was not the standard of care. R., p. 212 (¶ 13); Tr., p. 29, L.14 to p. 30, L. 3. The District Court also should have considered the relevant facts that: (1) PCRC and its medical care providers failed to follow infection prevention protocols, which its providers admitted; (2) PCRC was cited for violating regulations requiring prevention of the spread of disease, while Ms. Nield was a resident there; (3) through Ms. Nield's undisputed deposition testimony¹³, Ms. Nield was housed next to a resident infected with MRSA, and exposed to a resident with PA; and (4) Ms. Nield's testimony that she witnessed nurses leaving the MRSA infected resident's room without washing their hands and failing to wear gloves before coming to her room. This the District Court clearly did not do.

In addition, PCRC's deficiencies were also described by Ms. Nield's experts, Mr. Gerber and Ms. Frederick. Both Mr. Gerber and Ms. Frederick concluded that, upon reviewing the same records Dr. Selznick and PCRC's expert, Dr. Coffman reviewed, PCRC failed to follow infection prevention policies that led to Ms. Nield's contracting MRSA and PA. As stated by this Court in Sheridan v. St. Luke's Reg'l Med. Ctr., 135 Idaho 775, 785–86, 25 P.3d 88, 98–99 (2001):

Furthermore, according to our precedent, proximate cause can be shown from a "chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable."

* * *

[A plaintiff] was not required to prove his case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that he show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. "If the rule of law is as contended for by defendant and appellant, and it is necessary to

demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of *848 **760 negligence in the practice of a profession which is not an exact science." [Internal citations omitted] [Emphasis added].

(quoting, Formont v. Kircher, 91 Idaho 290, 296, 420 P.2d 661, 667 (1966)). The District Court also failed to follow the well-settled principle that the burden of proof in a civil case is by "a fair preponderance of the evidence." Miller v. Belknap, 75 Idaho 46, 52, 266 P.2d 662, 665 (1954). The proper test is whether, reviewing the record and giving Ms. Nield all reasonable inferences therein, Ms. Nield can show, through a chain of circumstances, PCRC's negligence and breach of the standard of care were a substantial factor in her contracting MRSA and PA. Ms. Nield has met this. In fact, on that, Dr. Coffman agrees, because he could not rule out PCRC's conduct as a cause of Ms. Nield's infections. It is patently clear that the District Court improperly granted summary judgment.

B. THE DISTRICT COURT MISAPPLIED THE SUMMARY JUDGMENT STANDARD IN CONCLUDING MS. NIELD WAS REQUIRED TO ESTABLISH SHE WAS NOT INFECTED AT THE TIME OF HER ADMISSION; THAT HER WOUND CULTURES DID NOT PRODUCE A FALSE NEGATIVE; AND THAT SHE ONLY COULD HAVE CONTRACTED MRSA AND PA AT PCRC.

The District Court required Ms. Nield to establish proximate cause, by establishing that she may have been a carrier of MRSA and PA but was not infected at the time of her admission; requiring Ms. Nield to show why the wound culture would not have produced a false negative; and requiring Ms. Nield to show she could *only* have contracted MRSA and PA while admitted at PCRC's facility. R., p. 1235. The District Court committed reversible error, as it failed to follow the substantial factor test.

It is well-settled that the "question of proximate cause is one of fact and almost always for the jury." *Cramer v. Slater*, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009). The District Court misapplied Ms. Nield's burden to establish that jury question. Ms. Nield was not required to establish proximate cause by showing that she only contracted MRSA and PA from PCRC; rather, Ms. Nield need only establish proximate cause, through a chain of circumstances, that PCRC's actions and omissions were *a substantial factor* in bringing about her injuries. *Coombs*

v. Curnow, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009) [Emphasis added]; Weeks v. EIRMC, 143 Idaho 834, 839, 153 P.3d 1180, 1185 (2007). Proximate cause "can be shown by a 'chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.' "Weeks, supra, 143 Idaho at 839, 153 P.3d at 1185, citing, Sheridan, supra, 135 Idaho at 785, 25 P.3d at 98 [Emphasis added].

Additionally, the District Court ignored the substantial factor test when it, improperly, concluded that Ms. Nield may have been a carrier and not infected when she was admitted to PCRC and the testing done by PMC may have produced a false negative. Apparently, the District Court accepted Dr. Coffman's speculation Ms. Nield may have been a carrier, based on the lack of screening. What is patently erroneous is that the District Court accepted this from Dr. Coffman, despite the fact that he admitted it was not the standard of care to do any screening. R., p. 212; Tr., p. 29, L. 14 to p. 30, L. 3. The District Court further accepted Dr. Coffman's unfounded conclusion that not all of the wounds were cultured and that Ms. Nield may have gotten MRSA or PA from visitors. Again, those are inferences to which PCRC, as the movant, was not allowed under the summary judgment standard. Additionally, the record does not support those inferences, since Dr. Coffman did not do the testing, and speculated about the test results. The record is appropriately silent on the testing done by PMC. There is no dispute PMC tested Ms. Nield for MRSA and PA, that it was proper and that she was negative for both MRSA and PA.

**761 *849 C. THE DISTRICT COURT COMMITTED ERROR IN MISAPPLYING THE SUBSTANTIAL FACTOR TEST BY CONCLUDING MS. NIELD'S EXPERTS DID NOT ADDRESS WHEN, WHERE OR HOW SHE GOT MRSA AND PA AND BY REQUIRING MS NIELD'S EXPERTS TO RULE OUT OTHER FACTORS THAT COULD HAVE BEEN A SUBSTANTIAL FACTOR IN CAUSING HER TO CONTRACT MRSA AND PA.

The District Court erroneously decided, after weighing Dr. Selznick's, Mr. Gerber's and Ms. Frederick's affidavits, that Ms. Nield did not establish a genuine issue of material fact. The District Court not only improperly weighed those affidavits and assessed their credibility, it also misapplied the substantial factor test. The record shows that Ms. Nield established a chain of circumstances and met the substantial factor test.

1. Standard for expert testimony.

Idaho Rules of Evidence 702 and 703 govern the admissibility of expert testimony. Rule 702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 provides, in pertinent part, as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Expert testimony in medical malpractice cases is admissible when:

'[T]he expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect.'

Coombs, supra, 148 Idaho at 140, 219 P.3d at 464 (quoting, Ryan v. Beisner, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct.App.1992)). Admissibility of an expert's opinion "depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion." Id. Moreover, where an expert's reasoning or methodology is scientifically sound and "based upon a 'reasonable degree of medical probability'" and not a

mere possibility, such testimony will assist the trier of fact. *See, Bloching v. Albertson's, Inc.*, 129 Idaho 844, 846–47, 934 P.2d 17, 19–20 (1997) (*quoting, Roberts v. Kit Mfg. Co.*, 124 Idaho 946, 948, 866 P.2d 969, 971 (1993)).¹⁴

In Weeks, supra, a medical malpractice case, this Court held that a district court erred in granting summary judgment, when the district court excluded expert testimony. This Court reasoned that where the expert based his opinions on his experience and research, and made inferences from facts known to him, it was reversible error to grant summary judgment. Weeks, supra, 143 Idaho at 839-40, 153 P.3d at 1185-86. Also in Weeks, this Court followed the well-settled principle that to survive summary judgment, the plaintiff does not need to rule out all factors, but only needs to establish proximate cause by showing, through a chain of circumstances, the defendant's actions and omissions were a substantial factor in bringing about the injuries. Id., 143 Idaho 834, 839, 153 P.3d 1180, 1185 (2007). the [sic] District Court, like the one in Weeks, committed *850 **762 reversible error in weighing and assessing the credibility of Dr. Selznick's, Mr. Gerber's and Ms. Frederick's opinions and ignoring other admissible facts.

2. Ms. Nield submitted admissible expert opinions and other evidence, thereby satisfying the substantial factor test.

The District Court acknowledged that Dr. Selznick was qualified to provide expert testimony. Despite making that finding, the District Court stated Dr. Selznick could not offer opinions that will assist the jury. R., p. 1236. To the contrary, the record shows Dr. Selznick's opinions are admissible under *Coombs* and *Weeks*, such that Ms. Nield met the substantial factor test. First, Dr. Selznick relied upon facts that other experts rely upon; that is, he reviewed Ms. Nield's medical records, including her negative test results in August of 2007, and the positive results taken after her admission in November, 2007; he reviewed the DHW records establishing PCRC's failure to follow infection prevention protocols; he reviewed PCRC's records of its treatment, or lack thereof, of Ms. Nield; and he reviewed the DHW records to find that PCRC was housing MRSA and PA infected residents. R.. pp. 1047-1089. Based on his experience and research, like the expert witness in Weeks, Dr. Selznick properly concluded Ms. Nield contracted MRSA and PA due to PCRC's actions and omissions. Again, Ms. Nield does not have to establish she only could have contracted MRSA or PA from PCRC, only that PCRC's conduct was a substantial factor in causing her injuries. Dr. Selznick's opinions establish Ms. Nield's [sic] met that test, and, at

the very least, raised genuine issues of material fact.

Additionally, the District Court misconstrued its role in deciding the motion for summary judgment. The District Court mistakenly determined it was acting as a "gate keeper" a role associated with Daubert. It is well-established that Idaho has not adopted Daubert. Weeks, supra, 143 Idaho at 838, 153 P.3d at 1184.15 See also, Swallow v. Emergency Med. of Idaho, 138 Idaho 589, 595 n. 1, 67 P.3d 68, 74 n. 1 (2003); State v. Merwin, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1998). I.R.E. 702 and 703 are the standards by which a court is to determine the admissibility of an expert's opinions. The District Court misapplied I.R.E. 702 and 703 by trading the "methodology" or "reasoning" element a physician would use, i.e., review medical records, performing research and basing an opinion on experience with the unfounded speculations of Dr. Coffman, that Ms. Nield may have been a carrier but was not infected, and that her wound culture may have been a false negative. I.R.E. 702 and 703 only required Dr. Selznick, Mr. Gerber and Ms. Frederick to apply their experience and review of records to satisfy the methodology element of the rule, which they all did.

Also, the District Court misconstrued the substantial factor test in requiring Ms. Nield to show she could only have contracted MRSA and PA from PCRC. Presumably, the District Court got this from this Court's decision in *Weeks*, where the Court stated the following dicta in relation to a differential diagnosis case:

The Ninth Circuit allowed for the use of differential diagnosis under Daubert to establish reliability of an expert's opinion. *Clausen*, 339 F.3d at 1057–58. Differential diagnosis involves an analysis of all hypotheses that might explain the patient's symptoms mortality. Id. After identifying all the potential causes symptoms, the expert then engages in a process of eliminating hypotheses in order to reach a conclusion as to the most likely cause. Id. When using differential diagnosis a district court is justified in excluding the expert's testimony if the expert fails to offer an *851 **763 explanation why alternative cause is ruled out. Id.

Weeks, supra, 143 Idaho at 839, 153 P.3d at 1185. This is

not a differential diagnosis case, and Ms. Nield was not required to eliminate any other causes and show that she could only have gotten MRSA and PA from PCRC. Instead, as this Court stated, Ms. Nield only needed to show proximate cause, "[b]y a 'chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.' "Weeks, supra, 143 Idaho at 839, 153 P.3d at 1185. (quoting, Sheridan v. St. Luke's Reg'l Med. Ctr., 135 Idaho 775, 785, 25 P.3d 88, 98 (2001)).

The District Court improperly weighed the evidence when it discounted the opinions of Mr. Gerber and Ms. Fredericks, as well as Ms. Nield's own observations establishing the "chain of circumstances" sufficient to defeat summary judgment. Mr. Gerber and Ms. Frederick concluded, from their review of all of the medical records, state and federal regulations, PCRC's own records and the reports from DHW, that Ms. Nield contracted MRSA and PA due to PCRC's failure to follow infection control. R., pp. 640–653; pp. 1096–1106. Mr. Gerber and Ms. Frederick also concluded PCRC failed to adequately train its medical care providers, and failed to provide an adequate number of staff, which resulted in Ms. Nield contracting MRSA and PA from PCRC.

It must be remembered that Ms. Nield's doctors required PCRC to perform daily wound assessments. PCRC did not comply. PCRC did them weekly and also incompetently as they failed to properly document the size of the wound, what the wound looked like, and any other identification of the wound in the skin assessments/ulcer sore sheets. PCRC completely stopped documentation of two of the wounds on September 18, 2007, and the largest wound on October 22, 2007, a few weeks prior to Ms. Nield testing positive for MRSA and PA. R., pp. 603–639; pp. 648–653; p. 678; pp. 1027–1029; pp. 1095–1097; pp. 1098-1106. Furthermore, PCRC was found to be in violation of state and federal standards by DHW on January 24, 2008. DHW found that the staff at PCRC could not demonstrate proper infection control policies and procedures when handling patients that had MRSA. R., pp. 671-673; p. 750; pp. 923-927; p. 931. All of Ms. Nield's experts—Dr. Selznick, Ms. Frederick and Mr. Gerber considered these facts in reaching their respective opinions.

Additionally, there was undisputed evidence Ms. Nield was housed in a room next to a resident that had MRSA and that another resident was infected with PA. R., p. 921; p. 931; p. 973. Ms. Nield also testified that she witnessed nurses exiting the MRSA patient's room without any gloves on or washing their hands. R., pp. 971–72. These facts are sufficient to preclude summary judgment, as

they establish the chain of circumstances that may lead a jury to conclude Ms. **Nield** was infected with MRSA and PA due to PCRC's conduct and omissions. The records establishes [sic] Ms. **Nield's** case was and is appropriate for a jury to resolve, not the District Court.

D. MS. NIELD IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Ms. Nield is entitled to attorney's fees and costs under Idaho Code § 12–121 and Idaho Appellate Rules 40 and 41. Idaho Code § 12–121 and I.A.R. 41 allow for the award of attorney's fees and costs in a civil action where a matter was defended frivolously, unreasonably and without foundation. I.A.R. 40 allows for the award of costs to the prevailing party on appeal. Ms. Nield submits that PCRC was clearly not entitled to summary judgment, and that the District Court's grant of summary judgment was unreasonable and without foundation. This case is, unequivocally, the epitome of a case that should have been presented to the jury for resolution, not the District Court. For these reasons, Ms. Nield is entitled to an award of attorney's fees and costs on appeal.

CONCLUSION

Based on the foregoing, Ms. Nield respectfully requests that the Court reverse the District Court's grant of summary judgment, *852 **764 and remand the case to the District Court for further proceedings.

HORTON, J., dissenting.

I entirely concur with the legal reasoning contained in Justice Eismann's dissent. I write separately because I am unable—perhaps it is more accurate to say that I am unwilling-to reach Justice Eismann's conclusion as to our colleagues' motives, i.e., that the majority's decision is "based solely upon whom they want to win or lose" and that the majority's description of our holding in Weeks v. E. Idaho Health Servs., 143 Idaho 834, 153 P.3d 1180 (2007) is motivated by a desire "to find a way to reverse the district court so that Ms. Nield can prevail in this action." Thus, I would characterize the majority's description of the perceived limitations of Weeks as "mistaken" or "inaccurate," rather than suggesting that the majority is deliberately "untruthful." In my view, the majority's error is not the product of a preference for one party over the other; rather, the majority's error is a failure to observe the limitations upon an appellate court when reviewing a trial court's discretionary decision.

The majority correctly states and applies our rule that the determination of the admissibility of evidence offered "in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." *J–U–B Engineers, Inc. v. Sec. Ins. Co. of Hartford,* 146 Idaho 311, 314–15, 193 P.3d 858, 861–62 (2008) (citing *Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 13, 175 P.3d 172, 175 (2007)). However, although the majority correctly states the standard of review governing this threshold question of the admissibility of evidence, I believe that it has failed to apply that standard in deciding this case.

Before turning to the somewhat mechanical process of applying the standard of review of discretionary decisions, I think that a few words about the nature of discretionary decisions are in order. A discretionary decision is one where reasonable people may consider the facts and applicable law and reach differing conclusions. Thus, in the context of sentencing—another discretionary function exercised by trial courts—this Court has stated "where reasonable minds might differ, the discretion vested in the trial court will be respected, and this Court will not supplant the views of the trial court with its own." *State v. Windom*, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011) (quoting *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992)).

This characterization of discretionary decisions is scarcely unique to this state. As an encyclopedia of American law explains, "[a] determination that a trial court abused its discretion involves far more than a difference in judicial opinion." 5 Am.Jur.2d Appellate Review § 623 (2007) (citing Saffian v. Simmons, 477 Mich. 8, 727 N.W.2d 132, 135 (2007)). The preeminent legal dictionary provides a similar description: "Judicial and legal discretion. These terms are applied to the discretionary action of a judge or court, and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment...." Black's Law Dictionary 419 (5th ed.1979).

Our recognition that there are categories of judicial decisions broadly falling under the rubric of discretionary decisions for which there may be more than one "right answer" has led this Court to focus on the process, rather

than the result, when reviewing a trial court's decision on a matter committed to its discretion. Thus, this Court has stated:

> We have long held that the appellate should court not substitute its discretion for that of the trial court. Implicit in this principle is the truism that the appellate court should not simply focus upon the results of a discretionary decision below, but rather upon the process by which trial court reached discretionary decision.

Quick v. Crane, 111 Idaho 759, 772, 727 P.2d 1187, 1200 (1986).

**765 *853 As the intensity of Justice Eismann's dissent suggests, whether evidence should or should not be admitted can be the object of substantial disagreement between reasonable people. Perhaps this is the reason that this Court has frequently stated that the trial courts have "broad discretion" in deciding whether or not evidence is admissible. See, e.g., Warren v. Sharp, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003) (citing State v. Howard, 135 Idaho 727, 731, 24 P.3d 44, 48 (2001)). Given the extensive discussion of the decision by both the majority and Justice Eismann, it is worth noting that Weeks explicitly recognized that this "broad discretion" extends to the determination of the admissibility of expert testimony. Weeks, 143 Idaho at 837, 153 P.3d at 1183 (citing Warren, 139 Idaho at 605, 83 P.3d at 779).

It is against this backdrop that I turn to the standard of review which (I feel obligated to reiterate) focuses on *how* the trial judge reached the decision, *not* what that decision was:

"A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason." *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008).

Martin v. Smith, 154 Idaho 161, 163, 296 P.3d 367, 369 (2013).

This appeal from the grant of summary judgment turns upon the single issue¹⁶ of whether the district court erred when, in the district judge's words, he "evaluated the affidavits submitted by the Plaintiff's experts and determined the causation analyses offered were not based

on valid and reliable principles or methodology, and, therefore, unhelpful to the trier of fact." If the final clause were not clear enough, the district court expressly stated that this decision was predicated upon its analysis under Rule 702 of the Idaho Rules of Evidence.

The majority does not suggest that the district court failed to recognize this decision was one of discretion. Given the district court's extensive discussion of *Weeks*, which as previously noted identified the admissibility of expert opinion as committed to the broad discretion of the trial court, and the extensive discussion of the reasons it concluded that Ms. Nield's experts' affidavits failed to meet the requirement of I.R.E. 702, it is evident that the district court recognized that this was a discretionary call.

The second prong of the "three-part test" for abuse of discretion actually contains two discrete inquiries: whether the trial court "acted within the outer boundaries of its discretion" and whether the trial court's decision was consistent "with the legal standards applicable to the specific choices available to it." *Magleby v. Garn*, 154 Idaho 194, 197, 296 P.3d 400, 403 (2013) (citing *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012)). In the context of summary judgment proceedings, the district court faced a binary choice, to admit or exclude the opinions of causation proffered by Ms. Nield's experts. Thus, the determination that the proffered opinions would not assist the trier of fact was within the range of legitimate, available options.

The second aspect of this second prong warrants more discussion, because this is where I believe the majority has first gone astray. The district court determined that the nature of Ms. Nield's lawsuit was such that it "required the testimony of experts to establish proximate cause of the injury suffered by the Plaintiff." Although Ms. Nield has not challenged this threshold legal determination by the trial court in her opening brief, the majority rejects the district court's considered analysis with the conclusion that "expert testimony is not necessary in determining how a particular person contracted the disease." I do not believe this statement by the majority accurately reflects the current *854 **766 state of jurisprudence in Idaho. In fact, in support of this threshold determination that expert testimony was necessary to establish causation, the district court cited our decision in Coombs v. Curnow, 148 Idaho 129, 219 P.3d 453 (2009), where we stated:

Although the Idaho Rules of Evidence do not require expert testimony to establish causation in medical malpractice cases, such testimony is often necessary given the nature of the cases. Expert testimony is generally required because "the causative factors are not ordinarily within the knowledge or experience of

laymen composing the jury."

148 Idaho at 140, 219 P.3d at 464 (quoting *Flowerdew v. Warner*, 90 Idaho 164, 170, 409 P.2d 110, 113 (1965)). *Coombs* is scarcely an outlier. Rather, it is consistent with other decisions from this Court indicating that causation of medical conditions may require the presentation of expert testimony. *See Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 597–98, 67 P.3d 68, 76–77 (2003); *Cook v. Skyline Corp.*, 135 Idaho 26, 35, 13 P.3d 857, 866 (2000); *Evans v. Twin Falls County*, 118 Idaho 210, 214, 796 P.2d 87, 91 (1990). I cannot find error in the district court's determination that the cause of nosocomial infections is a matter "not ordinarily within the knowledge or experience of laymen."

As I can find no error in the district court's determination that causation in this case required the presentation of expert testimony, I turn to the critical decision by the district court that Ms. Nield's experts' affidavits failed to meet the requirements of I.R.E. 702.

The district court explained the standards that it applied in evaluating Ms. Nield's experts' opinions. As these standards are those which this Court has applied, the district court's articulation of the standards that it applied bears repeating:

Rule 702 of the Idaho Rules of Evidence permits the admission of expert testimony only when

the expert is a qualified• expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect.

Ryan v. Beisner, 123 Idaho 42, 47, 844 P.2d 24, 29 (Idaho Ct.App.1992). Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible. *Id.* at 46–47, 844 P.2d at 28-29. The testimony of an expert is speculative when it "theoriz[es] about a matter as to which evidence is not sufficient for certain knowledge." Karlson v. Harris, 140 Idaho 561, 565, 97 P.3d 428, 432 (2004). On the other hand, if an expert's reasoning or methodology underlying the opinion is scientifically sound and "based upon a 'reasonable degree of medical probability' " not a mere possibility, then the testimony will assist the trier of fact. Bloching v. Albertson's, Inc., 129 Idaho 844, 846-47, 934 P.2d 17, 19-20 (1997) (quoting Roberts v. Kit Mfg. Co., 124

Idaho 946, 948, 866 P.2d 969, 971 (1993)).

In deciding whether to admit expert testimony, a court must evaluate "the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion." *Ryan*, 123 Idaho at 46, 844 P.2d at 28. Admitting the expert's testimony depends upon the validity of the expert's reasoning and methodology, not his or her ultimate conclusion. *Id.* at 46–47, 844 P.2d at 28–29. As long as the principles and methodology behind a theory are valid and reliable, the theory need not be commonly agreed upon or generally accepted. *Weeks*, 143 Idaho at 838, 153 P.3d at 1184.

There is simply no error in the legal standards that the district court applied to its decision.

This brings me to the heart of my dissent: in my view, the majority simply does not agree with the reasons that the district court articulated for its decision that Ms. Nield's experts' opinions failed to meet the requirements of I.R.E. 702. In the memorandum opinion denying Ms. Nield's motion for reconsideration *855 **767 the district court quoted from its earlier opinion, explaining:

Dr. Selznick "failed to identify all of the potential causes of symptoms, eliminating hypotheses in order to reach a conclusion as to the most likely cause." Instead, Dr. Selznick simply and improperly concluded

that because the Plaintiff was negative for MRSA and pseudomonas at the time of her admission to PCRC, but then tested positive for MRSA and pseudomonas prior to her discharge, then she must have contracted MRSA and pseudomonas while at PCRC. He does not address the other factors that could have been a substantial factor in causing the infections.

As such, this Court found "the validity of Dr. Selznick's reasoning and methodology regarding how the Plaintiff contract MRSA and pseudomonas [to be] without merit."

(district court citations to earlier opinion omitted).

This statement clearly reflects the district court's application of the legal principle we adopted in *Weeks*. Indeed, the district court's original decision not only cited, but quoted, our holding: "After identifying all of the potential causes of symptoms, the expert then engages in a process of eliminating hypotheses in order to reach a conclusion as to the most likely cause." *Weeks*, 143 Idaho at 839, 153 P.3d at 1185 (citing *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1060 (9th Cir.2003)).

Significantly, the district court then further quoted *Weeks:* "When using differential diagnosis, a district court is justified in excluding the expert's testimony if the expert fails to offer an explanation why an alternative cause is ruled out." *Id.* It is evident, at least to me, that the district judge viewed this case as presenting a situation where, in evaluating the admissibility of expert opinions, *Weeks* provided guidance as to the applicable legal standard governing the decision before him.

"Trial courts are not free to willfully disregard precedent from the appellate courts of this state." *State v. Hanson*, 152 Idaho 314, 325 n. 6, 271 P.3d 712, 723 n. 6 (2012) (citing *State v. Guzman*, 122 Idaho 981, 986, 842 P.2d 660, 665 (1992)). Aside from the failure to anticipate that this Court would overrule *Weeks sub silentio* (a decision, by the way, in which two-thirds of the present majority concurred), I cannot imagine what more the district judge could have done.

This case presented what I view as being a very close call for the district judge. Indeed, had I been in the position of the district judge, I likely would not have stricken Dr. Selznick's opinion. However, this Court should not reverse discretionary decisions when the trial court has identified the applicable legal standards governing a

discretionary decision and rationally explained the manner in which those principles apply to the decision. To do so is to usurp the role of the trial court in exercising considered legal judgment.

Because reasonable minds can—and as is reflected in the sharply diverging views expressed in the majority and Justice Eismann's dissent, do in fact—disagree as to whether the district court properly concluded that Ms. Nield's experts failed to adequately address other potential causes of her MRSA and pseudomonas infections, this is an instance where the standard of review should have dictated affirmance. The district judge recognized the issue as a matter of discretion, the exclusion of the proffered opinions was within the boundaries of his discretion, he recognized and applied the governing legal principles as articulated by this Court, and he did so by an exercise of reason. For these reasons, I would affirm.

All Citations

156 Idaho 802, 332 P.3d 714

Footnotes

- After PCRC submitted its moving papers, Nield's counsel took the deposition of Dr. Coffman. In the course of that deposition, Dr. Coffman opined that Nield may have lost her leg due to leukocytoclastic vasculitis, "an autoimmune kind of inflammatory condition." He first characterized his opinion as "speculation" but then stated, "I think it's very likely that was the cause." However, this cause of Nield's symptoms was not presented to the district court in the summary judgment proceeding and played no part in the district court's analysis. It is something, however, that certainly could have played a role in a trial of the case.
- PCRC harbored the misconception that the district court had actually ruled on the admissibility of Dr. Coffman's affidavit. It entitled a two-page section of its appellate brief, "The District Court did not abuse its discretion in holding Dr. Coffman's testimony was admissible."
- This brings up the question of what documents Dr. Coffman may actually have reviewed. Although he received two boxes of records and attached a list of the documents contained in those boxes to his affidavit, when asked at his deposition if the list of documents in his affidavit was a "current list of the documents that you've received and reviewed in this case," Dr. Coffman replied, "It looks like it, yes. I would say received. I obviously haven't reviewed all of these, but I received them." Nowhere does he explain what documents he did not review so it is impossible to determine what his knowledge of Nield's case actually is.
- In his deposition, when asked if nosocomial refers to a hospital or facility-acquired strain of MRSA, Dr. Coffman responded: "They're calling them health care associated now, rather than nosocomial, because they want to include nursing homes, dialysis centers, you know, Elks Rehab, doctors' offices, you know." He asserted that a community-associated strain of MRSA, which is less resistant to antibiotics than the hospital-associated strain, is becoming more prevalent. On the other hand, Dr. Coffman states in his affidavit that MRSA is "ubiquitous within skilled nursing facilities and long term care facilities." This would certainly implicate acquisition of the infection at a facility like PCRC.
- In this regard, Dr. Selznick's opinion differs to an extent from Dr. Coffman's. Dr. Coffman indicated that "MRSA is not more virulent than other strains of staphylococcus." A medical publication attached to Dr. Coffman's witness disclosure indicates that the relative virulence of MRSA is a controversial issue.

- While at PCRC, Ms. Nield was treated for the pseudomonas infection detected on November 9, 2007. A wound culture done on November 27, 2007, did not reveal any pseudomonas. On December 3, 2007, she left PCRC because her Medicare coverage was expiring and she did not want to risk losing assets in order to qualify for Medicaid. She returned home and was monitored by Creekside Home Health. During a home visit on February 25, 2008, it was discovered that Ms. Nield was "wrapping stones & other stuff into wound to aid in healing." An aspiration of her right hip done in Utah on May 2, 2008, revealed a chronic pseudomonas infection, which Dr. Coffman stated was a different strain of pseudomonas than the strain she had while at PCRC.
- http://www.merriam-webster.com/dictionary/differential% 20diagnosis (last visited January 31, 2014).
- Raynor v. Merrell Pharm. Inc., 104 F.3d 1371, 1376 (D.C.Cir.1997); Granfield v. CSX Transp., Inc., 597 F.3d 474, 486 (1st Cir.2010); McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir.1995); Kannankeril v. Terminix Intern., Inc., 128 F.3d 802, 807 (3d Cir.1997); Westberry v. Gislaved Gummi AB, 178 F.3d 257, 262 (4th Cir.1999); Johnson v. Arkema, Inc., 685 F.3d 452, 468–69 (5th Cir.2012); Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171, 179 (6th Cir.2009); Myers v. Illinois Cent. R.R. Co., 629 F.3d 639, 644 (7th Cir.2010); Bland v. Verizon Wireless, (VAW) L.L.C., 538 F.3d 893, 897 (8th Cir.2008); Clausen v. M/V New Carissa, 339 F.3d 1049, 1057 (9th Cir.2003); Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1236–37 (10th Cir.2004); Guinn v. AstraZeneca Pharmaceuticals LP, 602 F.3d 1245, 1253–54 (11th Cir.2010).
 - An expert may rely upon differential diagnosis to form an opinion as to specific causation, but not as to general causation. *Johnson*, 685 F.3d at 468. "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.* (quoting *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir.2007)).
- In Westberry, the plaintiff contended that the defendant's "failure to warn him of the dangers of breathing airborne talc proximately caused the aggravation of his pre-existing sinus condition." Westberry v. Gislaved Gummi AB, 178 F.3d 257, 260 (4th Cir.1999). The only issue on appeal was whether "the district court abused its discretion in admitting the opinion testimony of Dr. Isenhower concerning the cause of Westberry's sinus problems." Id. The defendant contended that differential diagnosis was not sufficient to establish the reliability of the doctor's opinion. Id. at 262. In beginning its discussion of the issue, the court stated, "Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." Id. The court concluded that "a reliable differential diagnosis provides a valid foundation for an expert opinion." Id. at 263. The court was referring to what is more accurately called differential etiology.
- In Cooper, the plaintiff contended that the "use ofpedicle screw fixation devices to treat spinal injuries ... was responsible for his failed back surgeries and the accompanying deleterious side effects." Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 196 (4th Cir.2001). The plaintiff "retained Dr. Mitchell to serve as his medical expert on specific causation." Id. at 198. The district court granted the defendant's motion to exclude all of the doctor's testimony. Id. at 199. On appeal the plaintiff contended that "Dr. Mitchell conducted a differential diagnosis to determine the cause of his injuries," id. at 200, but the appellate court disagreed, stating that "if an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert's testimony," id. at 202. There was evidence in the record that smoking could also have been a cause of the failed fusion of the plaintiff's vertebra, and "Dr. Mitchell did not identify specifically how he ruled out smoking and other potential causes of the nonunion." Id. at 202–03.
- 11 R., p. 1235.
- The District Court also required Ms. Nield to prove that she only contracted MRSA and PA from PCRC, which is incongruent with the "substantial factor" test case law, as will be discussed in greater detail in the remainder of this brief.
- PCRC never offered any evidence below contradicting Ms. Nield's testimony that she was housed next to, and exposed to residents with MRSA and PA.
- In *Bloching*, this Court disallowed a physician's testimony that was "possible" and not based upon a "reasonable degree of medical probability." *Id.*, 129 Idaho at 846, 934 P.2d at 19. Dr. Selznick based his opinions on a reasonable degree of medical certainty (R., p. 1043; p. 1063–64). Further, Ms. Frederick based her opinions to a reasonable degree of nursing certainty (R., p. 649). Finally, Mr. Gerber based his opinions on a reasonable degree of certainty (R., p. 1106).

- As this Court in *Weeks, supra,* 143 Idaho at 838, 153 P.3d at 1184, stated,
 The Court has not adopted the *Daubert* standard for admissibility of an expert's testimony but has used some of *Daubert*'s standards in assessing whether the basis of an expert's opinion is scientifically valid. *See Swallow v. Emergency Med. of Idaho,* 138 Idaho 589, 595 n. 1, 67 P.3d 68, 74 n. 1 (2003) ("this Court has not adopted the *Daubert* test for admissibility"). The *Daubert* standards of whether the theory can be tested and whether it has been subjected to peer-review and publication have been applied, but the Court has not adopted the standard that a theory must be commonly agreed upon or generally accepted."
- Although the majority explains why it believes the district court erred in relying upon Dr. Coffman's affidavit, Justice Eismann is correct in his observation that Ms. Nield has not raised this as an issue on appeal and that issue is not properly before the Court.
- In a jury trial, the decision to admit evidence may also result in a court exercising a third option—to admit evidence subject to a limiting instruction.

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161 Idaho 179 Supreme Court of Idaho, Twin Falls, November 2015 Term.

David **SAMPLES** and Jayme **Samples**, husband and wife, Plaintiffs—Appellants,

Dr. Ray W. **HANSON**, individually, and BMH, Inc., dba Bingham Memorial Hospital, Defendants–Respondents, and

John Does I–X, individuals and entities presently unknown. Defendants.

Docket No. 41869

Filed: November 1, 2016

Synopsis

Background: Patient brought medical malpractice action against physician and hospital. The District Court, Seventh Judicial District, Bingham County, David C. Nye, J., granted summary judgment in favor of physician and hospital. Patient appealed.

Holdings: The Supreme Court, J. Jones, C.J., held that:

- [1] expert had actual knowledge of applicable local standard of care, and
- [2] patient was not entitled to award of appellate attorney's fees.

Vacated and remanded.

Horton, J., filed dissenting opinion.

West Headnotes (16)

[1] Appeal and Error

Review using standard applied below

On appeal from the grant of a motion for summary judgment, the Supreme Court utilizes the same standard of review used by the district court originally ruling on the motion.

Cases that cite this headnote

[2] Judgment

Existence or non-existence of fact issue

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Cases that cite this headnote

[3] Judgment

Presumptions and burden of proof

When considering whether the evidence in the record shows that there is no genuine issue of material fact when reviewing a summary judgment motion, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party.

Cases that cite this headnote

[4] Judgment

Admissibility

Judgment

→Weight and sufficiency

The admissibility of expert testimony offered in connection with a motion for summary judgment is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment.

Cases that cite this headnote

[5] Judgment

←Admissibility

Judgment

Affidavits, Form, Requisites and Execution of

When deciding whether expert testimony offered in connection with a summary judgment motion is admissible, the liberal construction and reasonable inferences standard does not apply and the trial court must look at the affidavit testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible.

Cases that cite this headnote

[6] Appeal and Error

Evidence and Witnesses in General

The Supreme Court reviews challenges to a trial court's evidentiary rulings under the abuse of discretion standard.

Cases that cite this headnote

[7] Appeal and Error

←Abuse of discretion

The Supreme Court engages in a three-part inquiry when reviewing for an abuse of discretion: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

Cases that cite this headnote

[8] Evidence

←Due care and proper conduct in general

Expert had actual knowledge of applicable local standard of care, and therefore expert's affidavit in support of patient's medical malpractice action against physician and hospital was admissible; although expert was not board-certified surgeon at time of alleged malpractice, as defendant physician was, expert was board-certified surgeon at time of testimony, and expert was hired to replace defendant physician when defendant physician retired. Idaho Code Ann. § 6-1012.

Cases that cite this headnote

[9] Judgment

←Affidavits, Form, Requisites and Execution of **Judgment**

Personal knowledge or belief of affiant

A party offering an affidavit in support of a summary judgment motion must show that the facts set forth therein are admissible, that the witness is competent to testify regarding the subject of the testimony, and that the testimony is based on personal knowledge. Idaho R. Civ. P. 56(e).

Cases that cite this headnote

[10] Judgment

→Matters of fact or conclusions

Statements in an affidavit in support of a summary judgment motion that are conclusory or speculative do not satisfy either the requirement of admissibility or competency. Idaho R. Civ. P. 56(e).

Cases that cite this headnote

[11] Evidence

←Due care and proper conduct in general

In order for a medical expert's testimony to be admissible in a medical malpractice action, a medical expert must show that he or she is familiar with the standard of health care practice for the relevant medical specialty, during the relevant timeframe, and in the community where the care was provided. Idaho Code Ann. § 6-1012.

Cases that cite this headnote

[12] Evidence

←Due care and proper conduct in general

In order for a medical expert's testimony to be admissible in a medical malpractice action, the medical expert must explain how he or she became familiar with the standard of care. Idaho Code Ann. § 6-1012.

Cases that cite this headnote

[13] Evidence

Preliminary evidence as to competency

The Supreme Court does not require that an expert affidavit in support of a medical malpractice action include particular phrases or state that the expert acquainted himself or herself with the applicable standard of care in some formulaic manner in order to establish adequate foundation for admissibility. Idaho Code Ann. § 6-1012.

Cases that cite this headnote

[14] Evidence

←Due care and proper conduct in general

In determining whether a medical expert's testimony in a medical malpractice action is admissible, in addressing the question of

whether the expert has actual knowledge of the applicable standard of care, courts must look to the standard of care at issue, the proposed expert's grounds for claiming knowledge of that standard, and determine, employing a measure of common sense, whether those grounds would likely give rise to knowledge of that standard. Idaho Code Ann. § 6-1012.

Cases that cite this headnote

[15] Costs

←What constitutes frivolous appeal or delay

An award of attorney's fees based on an appeal pursued frivolously, unreasonably, and without foundation is only warranted when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established law. Idaho Code Ann. § 12-121.

Cases that cite this headnote

[16] Costs

Nature and form of judgment, action, or proceedings for review

Physician's position on appeal was not frivolous, unreasonable, or without foundation, and therefore patient was not entitled to award of appellate attorney's fees following grant of summary judgment in favor of physician and hospital in medical malpractice action; although patient prevailed on appeal, physician presented a genuine issue of law as to the prerequisites for an expert to become familiar with the community standard of health care practice in a medical malpractice action. Idaho Code Ann. § 12-121.

Cases that cite this headnote

**944 Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bingham County. Hon. David C. Nye, District Judge.

The judgment of the district court is <u>vacated</u> and the case is <u>remanded</u>.

Attorneys and Law Firms

Featherston Law Firm, Chtd., Sandpoint, for appellants. Brent Featherston argued.

Powers Tolman Farley, PLLC, Twin Falls, for respondents. Jennifer K. Brizee argued.

Opinion

J. JONES, Chief Justice

*180 David and Jayme Samples ("the Samples") appeal a grant of summary judgment in favor of Dr. Ray Hanson and Bingham Memorial Hospital in a medical malpractice action. The district court granted summary judgment after it determined that the Samples failed to establish the necessary foundation under Idaho Code sections 6–1012 and 6–1013 to **945 *181 admit testimony from the Samples' only medical expert. We vacate and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 30, 2009, Mr. Samples was admitted to Bingham Memorial Hospital ("BMH") in Blackfoot with abdominal pain and was found to have acute cholecystitis. On October 2, Dr. Hanson performed a laparoscopic cholecystectomy on Mr. Samples. Dr. Hanson was a member of the American College of Surgeons at the time and board certified as a general surgeon from 1977 until 2008, the year prior to the surgery. During the surgery, Mr. Samples' colon was torn and repaired by Dr. Hanson. Mr. Samples later became hypoxic and experienced respiratory distress. On October 4, Mr. Samples was transferred from BMH to Portneuf Medical Center ("PMC") in Pocatello, Idaho, for a pulmonary consultation.

Dr. Birkenhagen was a practicing surgeon at PMC in 2009 when Dr. Hanson performed the laparoscopic cholecystectomy on Mr. Samples. Dr. Birkenhagen was a member of the American College of Surgeons and board certified at the time. At PMC, Dr. Birkenhagen reopened the surgical site and discovered sepsis. Dr. Birkenhagen removed significant amounts of pus and later operated in order to repair a hole in the colon, which had allowed

stool to leak out of the incision at the surgical site. The sepsis had caused Mr. Samples' respiratory distress.

On September 27, 2011, Samples filed suit against BMH and Dr. Hanson for medical malpractice. The district court issued a scheduling order on January 30, 2013, setting the case for trial in January of 2014 and establishing a deadline of September 16, 2013 for the disclosure of the Samples' experts. The Samples retained Dr. Birkenhagen to testify that Dr. Hanson had breached the local standard of care and caused Mr. Samples' injuries. The names of the Samples' experts, including Dr. Birkenhagen, were not formally disclosed until September 20 and additional information required by the scheduling order was not provided until September 30.

Dr. Hanson filed a motion to strike the late-disclosed experts on September 20. On October 18, Dr. Hanson filed a motion for summary judgment, contending that the Samples had no expert witness testimony to support their claims of negligence and causation. On October 24, the district court sanctioned the Samples pursuant to Idaho Rules of Civil Procedure 16(i) and 37(b)(2)(B) for failure to comply with the scheduling order. The district court limited the Samples to testimony from one expert, Dr. Birkenhagen, and only to opinions that had been disclosed by September 30, 2013, as a sanction for the Samples' failure to comply with the scheduling order and deadlines for Idaho Rule of Civil Procedure 26(b)(4) disclosures.

Dr. Hanson deposed Dr. Birkenhagen on October 29 and shortly thereafter filed a motion to strike, arguing that the requirements of Idaho Code section 6–1013 did not permit Dr. Birkenhagen to testify as to the applicable community standard of health care practice. The district court conducted a hearing on Dr. Hanson's motions to strike and for summary judgment on November 21. The district court noted that because the Samples had only one medical expert and the statute of limitations had already run, granting Dr. Hanson's motion to strike Dr. Birkenhagen would effectively dismiss the Samples' case with prejudice. The district court and the parties agreed to treat the motion to strike as a motion for summary judgment and to continue the matter for two weeks, allowing the Samples adequate time to respond.

On January 3, 2014, the district court granted summary judgment in favor of Dr. Hanson after concluding that the Samples could not establish the necessary foundation required by Idaho Code sections 6–1012 and 6–1013 to admit Dr. Birkenhagen's testimony. Because the district court dismissed the case on the standard of care issue, it did not reach Dr. Hanson's earlier motion for summary judgment on the issue of causation and denied that motion

without deciding the issue on the merits. The Samples timely appealed.

II. STANDARD OF REVIEW

[1] [2] [3]"On appeal from the grant of a motion for summary judgment, this Court **946 *182 utilizes the same standard of review used by the district court Arregui v. originally ruling on the motion." Gallegos-Main, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. "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." Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 163, 45 P.3d 816, 819 (2002).

[4] [5]."The admissibility of expert testimony offered in connection with a motion for summary judgment 'is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment.' "Bybee v. Gorman, 157 Idaho 169, 173, 335 P.3d 14, 18 (2014) (quoting Arregui, 153 Idaho at 804, 291 P.3d at 1003). "When deciding whether expert testimony is admissible, the liberal construction and reasonable inferences standard does not apply." Id. (internal quotations omitted). "The trial court must look at the affidavit 'testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible." " Id. (quoting Hall v. Rocky Mountain Emergency Physicians, LLC, 155 Idaho 322, 325-26, 312 P.3d 313, 316-17 (2013)).

[6] [7]."This Court reviews challenges to the trial court's evidentiary rulings under the abuse of discretion standard." *Hall*, 155 Idaho at 326, 312 P.3d at 317. This Court engages in a three-part inquiry when reviewing for an abuse of discretion: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *McDaniel v. Inland Nw. Renal Care Grp.–Idaho, LLC*, 144 Idaho 219, 221–22, 159 P.3d 856, 858–59 (2007).

III. ANALYSIS

The **Samples** raise three issues on appeal. The first is whether the district court erred in finding that Dr. Birkenhagen was an out-of-area expert. The second is whether the district court erred in concluding that Dr. Birkenhagen failed to familiarize himself with the applicable community standard of health care practice. The third is whether the district court erred in denying the **Samples**' motion for relief from the pretrial order. We need address only the second issue, as the first issue has been rendered moot by our decision on the second issue and the third issue can be sorted out on remand.

A. The district court erred in concluding that Dr. Birkenhagen failed to familiarize himself with the applicable standard of care.

IST. To avoid summary judgment for the defense in a medical malpractice case, the plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice." *Dulaney*, 137 Idaho at 164, 45 P.3d at 820. In medical malpractice cases, Idaho Code section 6–1012 requires a plaintiff to "prove by direct expert testimony that the defendant negligently failed to meet the applicable community standard of health care practice." *Mattox v. Life Care Ctrs. of Am., Inc.*, 157 Idaho 468, 473, 337 P.3d 627, 632 (2014). Idaho Code section 6–1012 defines the applicable community standard of care as:

(a) the standard of care for the class of health care provider to which the defendant belonged and was functioning, taking into account the defendant's training, experience, and fields of medical specialization, if any; (b) as such standard existed at the time of the defendant's alleged negligence; and (c) as such standard existed at the place of the defendant's alleged negligence.

Dulaney, 137 Idaho at 164, 45 P.3d at 820 (internal citations omitted).

[9] [10] Idaho Code section 6–1013 "governs the manner in which such proof must be provided. When offering the opinion testimony **947 *183 of a 'knowledgeable,

competent expert' witness, the plaintiff must lay proper foundation" for the testimony. *Mattox*, 157 Idaho at 473, 337 P.3d at 632. The statute prescribes the foundation required for such testimony:

(a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed....

I.C. § 6–1013. "Rule 56(e) of the Idaho Rules of Civil Procedure imposes additional requirements upon the admission of expert medical testimony submitted in connection with a motion for summary judgment." *Dulaney*, 137 Idaho at 164, 45 P.3d at 820. "The party offering an affidavit must show that the facts set forth therein are admissible, that the witness is competent to testify regarding the subject of the testimony, and that the testimony is based on personal knowledge." *Mattox*, 157 Idaho at 473, 337 P.3d at 632. "Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." *Dulaney*, 137 Idaho at 164, 45 P.3d at 820.

[11] [12] Thus, the medical expert must show that he or she is familiar with the standard of health care practice for the relevant medical specialty, during the relevant timeframe, and in the community where the care was provided." *Bybee*, 157 Idaho at 174, 335 P.3d at 19. "Further, the medical expert must explain "how he or she became familiar with that standard of care." "*Id.* (quoting *Dulaney*, 137 Idaho at 164, 45 P.3d at 820).

The district court concluded the Samples had failed to establish that Dr. Birkenhagen was actually familiar with the local standard of care that applied in Blackfoot in 2009. The district court found that although Dr. Birkenhagen and Dr. Hanson were both board-certified surgeons, Dr. Hanson did not hold himself out to be board certified in 2009 because he allowed his certification to lapse in 2008. Additionally, the district court concluded that although Dr. Birkenhagen worked at BMH in 2011, he made no attempt to familiarize himself with the local standard of care in Blackfoot in 2009 or make any inquiries into whether the local standard of care deviated from the national standard.

[13] The Samples contend that experts are not confined to some formulaic process for becoming familiar with the community standard of health care practice and affidavits are not required to include particular phrases in order to establish adequate foundation under Idaho Code section 6–1013. The Samples are correct. As we recently stated, "[t]his Court does not require that an affidavit include particular phrases or state that the expert acquainted himself or herself with the applicable standard of care in some formulaic manner in order to establish adequate foundation under Section 6-1013." Mattox, 157 Idaho at 473-74, 337 P.3d at 632-33. Although no "magic language" is required to demonstrate the requisite familiarity with the applicable standard of health care practice, the testimony of the proffered expert must meet minimum requirements as a prerequisite to admission of that expert's opinion.

Before proceeding, it is necessary to make some pertinent observations regarding the grounds upon which the district court found Dr. Birkenhagen's knowledge of the standard of care to be lacking. In his affidavit, Dr. Birkenhagen stated, in essence, that the standard of care applicable to Dr. Hanson at the time of the surgery in 2009 was a basic or "universal" standard of care because Dr. Hanson held himself out to be a member of the American College of Surgeons and a board-certified surgeon. The district court observed that "this opinion was offered in the mistaken belief that Hanson was board certified at the time of the surgery. There is no evidence Hanson held himself out to be board certified at the time of surgery."

The issue of whether a national standard of care applies to a board-certified physician, rather than some lesser local standard of care, was extensively addressed by this Court in *Buck v. St. Clair*, 108 Idaho 743, 745, 702 P.2d 781, 783 (1985). In that case, the Court said:

**948 *184 We believe that for board-certified specialists, the local standard of care is equivalent to the national standard of care. Our reasons for this decision are simple: board-certified medical specialists are highly-trained individuals who become certified after completing a rigorous training program. Medical schools are accredited by a national team of physicians and administrators. The residency training programs are approved by a single board of specialists, and a physician is certified as a specialist only after passing a nationally administered exam consisting of both oral and written components. The board-certified specialists practicing within the state are the product of nationally designed education programs. The standard of care familiar to any board-certified physician in this state is a national standard of care. We see no reason to believe

there is a local standard of care which deviates from the national standard of care for board-certified physicians. Our ruling today is limited to board-certified doctors practicing in the same area of specialty.

Id. at 745, 702 P.2d at 783.

After having stated that board-certified specialists were held to a national standard of care because of their rigorous training, the Court said that its holding "is limited to those physicians who hold themselves out as board-certified specialists." *Id.* The limitation to those who hold themselves out as board-certified specialists seems to be at odds with the Court's determination that such specialists are held to a national standard because of their rigorous training. The Court explains the "holding out" limitation by quoting language in Idaho Code section 6–1012:

Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any.

Id. The Court continued:

By enacting this section [I.C. § 6–1012] we believe the legislature, in its wisdom, recognized that the standard of care for nationally board-certified specialists was the same throughout our nation and that one board-certified specialist could testify regarding the standard of care against another nationally board-certified specialist practicing in the same area of medicine.

Id. at 745–46, 702 P.2d at 783–84. It is not clear where the Court found the "holding out" limitation in the statutory language. The statute is merely concerned with training and experience.

A "holding out" limitation would read something into the statute that is not there. It would produce the anomalous result that a physician who was not board certified but held himself or herself out to be would have to comply with that standard, whereas an actual board-certified physician who did not tout his or her qualifications would

be held to a lesser standard. This does not particularly make sense and we, therefore, eliminate the "holding out" requirement with respect to physicians who are actually board certified in a specialty, whether or not they hold themselves out to be. If a person wrongly represents being board certified, he or she ought to be held to that standard. On the other hand, if a person has received the rigorous training and become board certified, he or she ought to live up to that standard.

In any event, Dr. Birkenhagen stated in his affidavit that he was advised that Dr. Hanson "asserts that he is a member of the American College of Surgeons since 1977 and a board certified surgeon from 1977 until his retirement in 2011 when I was hired to replace him." He opined that "a surgeon who holds himself out as a board certified surgeon and a member of the American College of Surgeons thereby holds himself out to adhere to certain standards of care required of members of the American College of Surgeons and board certified surgeons." Dr. Birkenhagen's belief that Dr. Hanson was board certified until 2011 appears to have been based upon Dr. Hanson's 2011 discovery response that he had "[plassed General Surgery Boards three times starting in 1977" and that he was a "[m]ember of the American College of Surgeons, 1977 to present." In December 2013, during litigation over the defendant's motion to strike, which was converted to a motion for summary judgment, Dr. Hanson **949 *185 submitted an affidavit to accompany the Defendants' reply memorandum, stating for the first time in the record that his board certification had expired in 2008 because he was anticipating retirement. Thus, Dr. **Hanson** was board certified for the 30 years preceding the year of the surgery in this case. Presumably, the lack of board certification during the one year between the lapse of his certification and the surgery did not result in a precipitous decline in the standard of surgical performance expected of him because of his past rigorous training or what might have been expected of him as a continuing member of the American College of Surgeons. Even if one were concerned that Dr. Hanson was not a board-certified surgeon at the time of the operation, he was still a member of the American College of Surgeons and Dr. Birkenhagen's affidavit states that the care he rendered to Mr. Samples was violative of that organization's standard of care.

^[14]The issue before this Court is whether Dr. Birkenhagen's affidavit "alleges facts which, taken as true, show the proposed expert has actual knowledge of the applicable standard of care." *Mattox*, 157 Idaho at 474, 337 P.3d at 633. "In addressing that question, courts must look to the standard of care at issue, the proposed expert's grounds for claiming knowledge of that standard,

and determine—employing a measure of common sense—whether those grounds would likely give rise to knowledge of that standard." *Id.* We hold that Dr. Birkenhagen's affidavit does establish that he had actual knowledge of the applicable standard of care and that the district court abused its discretion in concluding that the **Samples** did not lay an adequate foundation to admit his testimony.

There can be no doubt that Dr. Birkenhagen became aware of the standard of care in the vicinity of BMH in April or May of 2011. In his affidavit, Dr. Birkenhagen states that he was employed by BMH to replace Dr. **Hanson** as a general surgeon in August 2011. He states that he had been granted privileges at BMH three to four months earlier. He states the belief that.

the minimum standard of care in Blackfoot, Idaho at Bingham Memorial Hospital was no different in 2009 than when I arrived in 2011, based upon my review of my immediate predecessor, Dr. Ray W. Hanson's qualifications and the standards expected of a similarly qualified surgeon. This opinion is based on the credentials of Dr. Hanson and the fundamental care expected of a surgeon such as Dr. Hanson, providing surgical care in the community of Blackfoot, Idaho.

It is true that Dr. Birkenhagen did not specifically inquire of another physician who was familiar with the standard of care at BMH in October of 2009. However, this case does not present a situation where an out-of-area doctor is required to become familiar with the local standard of care by consulting with a local physician. Dr. Birkenhagen replaced Dr. Hanson as general surgeon at BMH a mere 22 months after the incident at issue. Dr. Birkenhagen practiced in that role at BMH for 25 months until he signed his affidavit on November 19, 2013. In the interim, he fully reviewed the files of BMH and Dr. Hanson regarding the care provided to Mr. Samples. Having been granted privileges at BMH just a year and a half after Mr. Samples' operation and then having served at BMH as Dr. Hanson's replacement for over two years, it would certainly seem to be a matter of common sense that Dr. Birkenhagen would have had ample opportunity to become familiar with the previous standard of care for general surgery at BMH.

Additionally, the standard of care Dr. Birkenhagen attributes to surgeons who are members of the American

College of Surgeons and have been board certified is largely a matter of common sense. He states:

Among other things, this standard of care requires that the surgeon stay with his patient post-surgery and attend to, examine, and follow closely certain indications of infection or complication that will lead to patient sepsis. Those indicators include conducting and reviewing tests including blood work for changes in white blood count and "bands" revealed in the blood work indicative of infection.

The standard of a board certified surgeon and a member of the American College of Surgeons also dictates the use of a full spectrum anaerobic antibiotic during **950 *186 post-surgery recovery of the patient to combat or prevent infection.

When these factors and others indicate post-surgical complications and/or infection, a surgeon, especially one that is board certified and a member of the American College of Surgeons, would be expected to examine and/or reopen the patient's surgical site to rule out infection and/or sepsis. This is especially true in a patient such as David Samples where Dr. Hanson tore the transverse colon while performing a laparoscopic cholecystectomy and, therefore, was aware that stool and other contaminants had been allowed into Mr. Samples' belly.

This standard of care was not met by Dr. Hanson in his treatment of David Samples in 2009. This standard of care is universal of any surgeon, but especially of a board certified surgeon and member of the American College of Surgeons. It also was the standard of care that was in effect in Blackfoot, Idaho upon my arrival in 2011.

Dr. Hanson ignored indications in the blood work including extremely high "bands" of twenty (20) to thirty (30) percent, which is an alarmingly high. Dr. Hanson appears to have turned the patient over to an internist or hospitalist, Dr. Llinas. Dr. Hanson did not reopen Mr. Samples' surgical site, nor did he transfer Mr. Samples to Portneuf Medical Center. The transfer late on October 4th was for pulmonary consult by Dr. Llinas indicating Dr. Hanson was unaware, even at that late date, of Mr. Samples' septic condition.

I was consulted at Portneuf medical Center upon David Samples' arrival. I opened and exposed the surgical site and immediately removed significant puss and found other obvious signs of infection. Mr. Samples was septic a condition that had been developing for some time.

I have reviewed the Bingham Memorial records of David Samples' treatment by Dr. Hanson. It is clear that Dr. Hanson did not know David Samples was septic and infected at the time of his transfer, since he was transferred for a pulmonary consult for respiratory distress. I also note that post-surgery Dr. Hanson's prescribed antibiotics were inadequate to combat the obvious risk of infection. Further, the records from Bingham Memorial Hospital reflect David Samples' blood work following the October 2nd surgery showed white blood count and "band" variation, which should have been obvious indications of infection and sepsis. It does not appear that Dr. Hanson at any time either reviewed the blood work results or, if he reviewed them, ignored the obvious indications of infection.

(emphasis added).

This is not a complicated standard of care. It merely calls for basic post-operative care to ensure that the patient does not suffer infection or complications. It is not a standard of care that requires detailed specialization, intricate treatments, expensive equipment, or detailed knowledge of drug interactions. One would hope that any surgeon, regardless of whether operating in the backwoods or a metropolitan hospital, would monitor the patient post-operatively to ensure a decent recovery without infection or complications. That didn't happen with Mr. Samples, as outlined by Dr. Birkenhagen.

We hold that Dr. Birkenhagen's affidavit sufficiently showed that he had actual knowledge of the applicable standard of care and, therefore, the district court abused its discretion in concluding that the Samples had not laid an adequate foundation for his testimony.

B. Neither party is entitled to attorney's fees on

appeal.
[15] [16] Both parties request attorney fees pursuant to Idaho

12–121 Code section 12-121. Idaho Code section 12-121 provides: "In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties ..." I.C. § 12-121. "To receive an I.C. § 12-121 award of fees, the entire appeal must have been pursued frivolously, unreasonably, and without foundation." Snider v. Arnold, 153 Idaho 641, 645, 289 P.3d 43, 47 (2012). "Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established **951 *187 law." City of Boise v. Ada Cnty., 147 Idaho 794, 812, 215 P.3d 514, 532 (2009). "Ordinarily, attorney fees will not be awarded where the losing party brought

the appeal in good faith and where a genuine issue of law was presented." Nelson v. Nelson, 144 Idaho 710, 718, 170 P.3d 375, 383 (2007).

Here, Dr. Hanson is not the prevailing party on appeal and therefore is not entitled to an award of fees. Although the Samples have prevailed in this appeal, we find that Dr. Hanson presented a genuine issue of law as to the prerequisites for an expert to become familiar with the community standard of health care practice in a medical malpractice action. Therefore, we decline to award the Samples attorney fees.

IV. CONCLUSION

We vacate the district court's grant of summary judgment in favor of Dr. Hanson and remand the case for further proceedings. Costs on appeal are awarded to the **Samples**.

Justices BURDICK and W. JONES concur.

HORTON, J., dissenting.

I respectfully dissent. Today the Court has ignored the approach we have traditionally taken to the review of discretionary decisions and usurped the discretionary powers of the trial court. In doing so, I believe that the Court has repeated the error that it committed four years ago in Nield v. Pocatello Health Servs., Inc., 156 Idaho 802, 852, 332 P.3d 714, 764 (2014). Then, I summarized my perception of the Court's decision as follows:

The majority correctly states and applies our rule that the determination of the admissibility of evidence offered "in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." J-U-B Engineers, Inc. v. Sec. Ins. Co. of Hartford, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62 (2008) (citing Gem State Ins. Co. v. Hutchison, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007)). However, although the majority correctly states the standard of review governing this threshold question of the admissibility of evidence, I believe that it has failed to apply that standard in deciding this case.

Id. at 852, 332 P.3d at 764. As it did in *Nield*, the Court acknowledges that the admissibility of expert testimony is a threshold issue which is reviewed for abuse of discretion. The Court also correctly recites the long-standing three part test that we employ to evaluate whether a trial court has abused its discretion, i.e., whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *See*, *e.g. Parks v. Safeco Ins. Co. of Illinois*, 160 Idaho 556, 561, 376 P.3d 760, 765 (2016).

The Court's opinion does not conclude that the district court failed to perceive the question of the admissibility of Dr. Birkenhagen's testimony as committed to its discretion. The Court does not hold that the district court's decision fell without the outer boundaries of its discretion. The Court does not identify a failure of the district court to apply the correct legal standards governing its decision. The Court does not suggest that the district court failed to exercise reason in reaching its decision. Instead, the Court has reviewed the facts contained in Dr. Birkenhagen's affidavit and concluded: "We hold that Dr. Birkenhagen's affidavit does establish that he had actual knowledge of the applicable standard of care and that the district court abused its discretion in concluding that the **Samples** did not lay an adequate foundation to admit his testimony."

In short, the Court has considered the same facts as did the district court and reached a different conclusion. The practical result is that the Court has employed a de novo standard of review rather than the deferential standard of review that we have traditionally applied. In doing so, the Court has failed to recognize the district court's "broad discretion" in determining the admissibility of evidence, see, e.g., Warren v. Sharp, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003), overruled on other grounds in *188 **952 Bliz zard v. Lundeby, 156 Idaho 204, 322 P.3d 286 (2014), and has departed from our traditional consideration of the process by which the trial court reached its decision rather than the product of the trial court's decision-making process. In Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986), this Court explained:

We have long held that the appellate court should not substitute its discretion for that of the trial court. Implicit in this principle is the truism that the appellate court should not simply focus upon the results of a

discretionary decision below, but rather upon the process by which the trial court reached its discretionary decision.

Quick v. Crane, 111 Idaho 759, 772, 727 P.2d 1187, 1200 (1986). See also Hudelson v. Delta Int'l Mach. Corp., 142 Idaho 244, 248, 127 P.3d 147, 151 (2005) ("[W]e primarily focus upon the process used by the trial judge in reaching his or her decision, not upon the result of that decision.").

Further, the Court has departed from usual practice in a second manner. When a trial court has erred in making a discretionary decision, this Court does not reverse. As Judge Burnett observed, "When a judge improperly exercises discretion due to a legal error, the appellate remedy ordinarily is not to usurp the judge's authority by exercising such discretion ourselves. Rather, it is to remand the case for reconsideration in light of the correct legal standard." Evans v. Sawtooth Partners, 111 Idaho 381, 387, 723 P.2d 925, 931 (Ct.App. 1986). This Court has likewise held that, "when the discretion exercised by a trial court is affected by an error of law," this Court's "role is to note the error made and remand the case for appropriate findings." Gem State Ins. Co. v. Hutchison, 145 Idaho 10, 15–16, 175 P.3d 172, 177–78 (2007). See also Eby v. State, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010) ("As this is a matter of discretion for the trial court, we vacate and remand to the trial court rather than reversing. 'This Court has held that when the discretion exercised by a trial court is affected by an error of law, our role is to note the error made and remand the case for appropriate findings.") (quoting Gem State Ins. Co., 145 Idaho at 15–16, 175 P.3d at 177–78). Here, the Court has not identified a legal error by the trial court; instead, it has simply reached a different conclusion than did the trial court.

I conclude with a couple of observations. First, I do not think it necessary to explain why I do not believe that the district court abused its discretion. The Court's failure to explain how the district court decision failed to satisfy our three part standard of review speaks for itself. Second, I do not think it necessary to explain why I think that the district court reached the right conclusion. That is because if I had the authority to decide the admissibility of Dr. Birkenhagen's testimony as a matter of first impression, I would deem it admissible. However, the limited authority of an appellate judge considering a decision committed to the discretion of the trial court does not allow me to make that decision.

For the foregoing reasons, I respectfully dissent.

All Citations

161 Idaho 179, 384 P.3d 943

Justice **EISMANN** concurs.

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157 Idaho 385 Supreme Court of Idaho, Boise, January 2014 Term.

In re SRBA, Case No. 39576, Subcase 00–91017 (Basin—Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to 'Refill', Under Priority, Space Vacated for Flood Control). A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, Minidoka Irrigation District, American Falls Reservoir District No. 2 and Boise Project Board of Control, Appellants,

State of Idaho. United States of America. American Falls Reservoir District No. 2, Aberdeen-American Falls Ground Water District, Aberdeen-Springfield Canal Company, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District. Magic Valley Ground Water District, North Snake **Ground Water District**, Black Canyon Irrigation District, New York Irrigation District, Big Wood Canal Company, Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-Operative Ditch Company, Middleton Irrigation Association, Inc., Middleton Mill Ditch Company, Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company,

> Nos. 40974, 40975. | Aug. 4, 2014.

Thurman Mill Ditch Company, Idaho Power

Company, Fremont–Madison Ground Water District, Idaho Irrigation District, United Canal

Company, City of Pocatello, United Water Idaho, Inc., Pioneer Irrigation District, Respondents.

Synopsis

Background: Petitioners sought to designate a basin-wide issue arguing that the issue of storage water refill was an issue of basin-wide significance and should be resolved in a basin-wide proceeding. The Snake River Basin Adjudication (SRBA) Court, Eric J. Wildman, J., granted the petition, and after limiting the proceeding to

the issue of whether Idaho law required a remark authorizing storage rights to refill, under priority, space vacated for flood control, determined that remark was not necessary. Petitioners appealed.

Holdings: The Supreme Court, Burdick, C.J., held that:

[1] the SRBA Court abused its discretion in designating the question in a basin-wide proceeding as to whether Idaho law requires a remark authorizing storage rights to "refill" under priority, space vacated by a reservoir operator for flood control, but

the SRBA Court did not abuse its discretion by declining to address the question of when the quantity element of a storage water right is considered filled, or in stating that such a determination was within the discretion of the Director of the Department of Water Resources.

Vacated.

West Headnotes (7)

Water Law ←Storage of water

"Storage water" is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs.

1 Cases that cite this headnote

Water Law Storage of water

A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam; a water right is defined in terms of the priority, amount, season of use, purpose of use, point of diversion, and place of use. West's I.C.A. § 42–1410.

Cases that cite this headnote

[3] Water Law

Storage of water

Water diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use. West's I.C.A. § 42–202 et seq.

Cases that cite this headnote

[4] Water Law

Storage of water

Water Law

Scope of inquiry on general adjudication

The Snake River Basin Adjudication (SRBA) court abused its discretion in designating the question in a basin-wide proceeding as to whether Idaho law requires a remark authorizing storage rights to "refill" under priority, space vacated by a reservoir operator for flood control; the question the SRBA court designated and answered was not the question the parties actually sought to have answered, that being whether flood control releases counted towards the fill of a water right, and addressing the issue in a basin-wide proceeding did not promote judicial economy.

2 Cases that cite this headnote

[5] Water Law

Scope of inquiry on general adjudication

The designation of a basin-wide issue is within the Snake River Basin Adjudication (SRBA) court's discretion.

1 Cases that cite this headnote

[6] Water Law

Storage of water

Water Law

Scope of inquiry on general adjudication

The Snake River Basin Adjudication (SRBA) court did not abuse its discretion by declining to address the question of when the quantity element of a storage water right is considered filled, or in stating that such a determination was within the discretion of the Director of the Department of Water Resources; the Director's clear duty to act with regard to the duty of direction and control of distribution of the waters from the streams to ditches and canals means that the Director uses his information and discretion to provide each user of the water it is decreed, and implicit in providing each user its decreed water would be determining when the decree is filled or satisfied. West's I.C.A. § 42-602.

2 Cases that cite this headnote

[7] Water Law

Nature and Extent of Rights Acquired Water Law

Storage of water

A water right is a property right; and storage water rights are entitled to the same protection as any other type of property right.

3 Cases that cite this headnote

Attorneys and Law Firms

**794 Barker, Rosholt & Simpson, LLP, Twin Falls, for appellants. Travis L. Thompson argued in case number 40974 for appellant Surface Water Coalition and Albert P. Barker argued in 40975 for appellant Boise Project Board.

Fletcher Law Office, Burley, for appellants American Falls Irrigation District # 2 and Minidoka Irrigation District.

Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent State of Idaho. Michael C. Orr, Deputy Attorney General argued.

U.S. Department of Justice, Colorado, for respondent United States.

Arkoosh Law Offices, Boise, for respondent American Falls Reservoir District No. 2.

Racine Olson Nye Budge & Bailey, Chtd., Pocatello, for respondent Aberdeen–Springfield Canal Company, Bingham Ground Water District, Bonneville–Jefferson Ground Water District, Jefferson–Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District.

McDevitt & Miller, Boise, for respondent Black Canyon Irrigation District, New York Irrigation District.

Hobdey & Hobdey, Gooding, for respondent Big Wood Canal Company.

Sawtooth Law Offices, PLLC, Boise, for appellants in 40975 and respondents in 40974. Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers Co-operative Ditch Company, Middleton Irrigation District, Middleton Mill Ditch Company, Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company, Thurman Mill Ditch Company. S. Bryce Farris argued for appellant in 40975.

James Tucker, Boise, for respondent Idaho Power.

Rigby, Andrus & Rigby, Rexburg, for respondents Fremont–Madison Ground Water District, Idaho Irrigation District, United Canal Company. Jerry R. Rigby argued in 40974.

Beeman & Associates, P.C., Boise, for respondent City of Pocatello.

Givens Pursley, Boise, for respondent United Water Idaho, Inc. Christopher H. Meyer argued.

Moffatt, Thomas, Barrett & Rock, Boise, for respondent Pioneer Irrigation District. Andrew J. Waldera argued in 40974.

Opinion

BURDICK, Chief Justice.

*387 This appeal arises out of the Snake River Basin Adjudication (SRBA) court's decision on the following basin-wide issue: Does Idaho law require a remark authorizing storage rights to "refill," under priority, space vacated for flood control? The SRBA court concluded that a remark was not necessary because a storage water right that is filled cannot refill under priority before affected junior appropriators satisfy their water rights once. The court declined to address when the quantity element of a storage water right is considered filled. Seven Magic Valley irrigation districts and canal companies (collectively the "Surface Water Coalition") appeal this decision in Docket No. 40974. The Boise Project Board appeals this decision in Docket No. 40975. Because both cases appeal the same decision of the SRBA court and have significant overlap, we address them together in this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The basis of this appeal, Basin–Wide Issue 17, arose from several individual SRBA subcases *388 **795 that involved the question of how filling a reservoir after the release of flood control waters should be addressed on the face of partial decrees for storage water rights in the Palisades and American Falls Reservoirs. Both the State and the Bureau of Reclamation (Reclamation) took the position that a remark is necessary on the face of a water right to authorize the right to refill. Reclamation wanted the following remark under the quantity element of its water right: "This water right includes the right to refill under the priority date of this water right to satisfy the United States' storage contracts." The State disagreed with the language of Reclamation's proposed refill remark. It proffered the following alternate remark, arguing that it more accurately reflects Idaho law on storage refill:

This right is filled for a given irrigation season when the total quantity of water that has been accumulated to storage under this right equals the decreed quantity. Additional water may be stored under this right but such additional storage is incidental and subordinate to all existing and future water rights.

As a result of the remarks proposed by Reclamation and the State, a dispute arose over Idaho law on storage refill. Several irrigation districts in the Treasure Valley, whose storage water rights were already decreed without a remark on refill rights, were concerned that the outcome of the storage refill issue might affect their right to the use of storage water. Therefore, Reclamation, the Surface Water Coalition, and the Boise Project Board, among others, filed a petition to designate a basin-wide issue arguing that the issue of storage refill was an issue of basin-wide significance and should be resolved in a basin-wide proceeding. In addition, the Surface Water Coalition asserted that the following two issues should also be addressed as part of the basin-wide proceeding to clarify and guide administration of storage water rights:

- (1) [Whether] [t]he storage right holder determines when to divert water to storage in order to maximize the beneficial use of water under this right.
- (2) [Whether] [t]he beneficial use under this right is fully satisfied when the water stored and available for beneficial use equals the capacity of the reservoir.

The SRBA court entered an order granting the petition and designating the following issue as Basin–Wide Issue 17: "Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control?" The court recognized that the issue was fundamentally an issue of law, noting that "[w]hen asked if the issue could be addressed in a basin-wide setting without the need to develop factual records specific to individual reservoirs, the Petitioners represented that little, if any, factual record development would be necessary." Accordingly, the court limited the scope of the basin-wide proceeding as follows:

[T]he Court will not consider the specific factual circumstances, operational history, or historical agreements associated with any particular reservoir in conjunction with this basin-wide issue. Such specific factual inquiries do not lend themselves to review in a basin-wide proceeding involving many parties and many reservoirs. Rather, the basin-wide issue will be limited to the above-identified issue of law.

The SRBA court declined to address either of the Surface Water Coalition's additional proposed issues pertaining to

how a storage right is initially filled, finding that these issues were not well situated for resolution in a basin-wide proceeding. In declining to address the Surface Water Coalition's issues regarding fill, the court reasoned:

An on-stream reservoir alters the stream affecting the administration of all rights on the source. Accordingly, some methodology is required to implement priority administration of affected rights. Addressing the issue of reservoir fill may require factual inquiries, investigation and record development specific to a given reservoir, including how the State accounts for fill in each individual reservoir under its accounting program. As stated above, such factually specific inquiries do not lend themselves to review in a basin-wide setting involving multiple reservoirs. Furthermore *389 **796 unlike the issue of priority refill which is directly related to the quantity element of a water right, the issue of fill is purely an issue of administration.

Thus, the SRBA court explicitly stated that its designation of Basin–Wide Issue 17 did not include the question of when a water right is initially filled.

After briefing and oral argument, the SRBA court entered its Memorandum Decision on March 20, 2013. In this decision, the court concluded that a remark was not necessary because a storage water right that is filled cannot refill under priority before affected junior appropriators satisfy their water rights once. The court declined to address when the quantity element of a storage water right is considered filled. The Surface Water Coalition and the Boise Project Board timely appealed this decision.

II. ANALYSIS

[1] The rights at issue in this case are storage water rights. Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433,

449 (2007). "One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right." *Id.*; I.C. § 42–202. Historically, water rights have been appropriated in one of two ways in Idaho:

Under the constitutional method of appropriation, appropriation completed upon application of the water to the beneficial use for which the water is appropriated. When following the constitutional method, one must depend upon actual appropriation, that is to say, actual diversion and application to beneficial use. Under the statutory method of appropriation, the appropriation is not complete and a license will not issue until there is proof of application to beneficial use for the purpose for which it was originally intended. Under either the constitutional or statutory of method appropriation, appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho. Since 1971 a party seeking a surface water right must file an application with the IDWR, obtain a permit, and perfect that right by obtaining a license.

United States v. Pioneer Irr. Dist., 144 Idaho 106, 110, 157 P.3d 600, 604 (2007) (internal quotations and citations omitted).

[2] A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam. See Washington Cnty. Irr. Dist. v. Talboy, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935) (holding that when water is stored, it becomes "the property of the appropriators ... impressed with the public trust to apply it to a beneficial use"). A water right is defined in terms of the priority, amount, season of use, purpose of use, point of diversion, and place of use. Olson v. Idaho Dep't of Water Res., 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); see I.C. § 42–1410. The purpose of use element of a storage water right generally contains at least two authorized purposes of use. The first authorizes the storage of water for a particular purpose (i.e., "irrigation storage," or "power storage"). The second authorizes the subsequent use of that stored water for an associated purpose, which is often referred to as the "end use" (i.e., "irrigation from storage," or "power from storage"). Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another. With respect to storage rights for irrigation, for example, it is typical for the "irrigation storage" purpose of use to be a year-round use (January 1 to December 31), and the "irrigation from storage" purpose of use to be limited to the irrigation season (e.g., March 15 to November 15).

[3] Water diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use:

There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir. In a stream if a user does not take out his water, it may diverted by the appropriators, because otherwise it flows on and is dissipated. But the very purpose *390 **797 storage is to retain and hold for subsequent use, direct augmentary, hence retention is not of itself illegal nor does it deprive the user of the right to continue to hold.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 208, 157 P.2d 76, 80 (1945).

This case arose out of disputes over the effect flood control releases have on storage water right holders; specifically, whether a remark authorizing storage water rights to refill space vacated for flood control should be included in storage water right decrees. In answering this question, the SRBA court concluded that a remark was not necessary because a storage water right that has been filled or satisfied cannot refill under priority before affected junior appropriators satisfy their water rights once. While the parties raise numerous issues with the court's decision on this basin-wide issue, two predominate: (1) whether the district court incorrectly held that the basin wide issue, as designated, involved only a question of law; and (2) whether the district court erred in failing to define "fill."

Before addressing the correctness of the SRBA court's decision, it is necessary to clarify what exactly was decided. From the outset, the question the Surface Water Coalition and the Boise Project Board wanted answered was whether flood control releases count against a storage

water right. As the SRBA court noted, "[T]he crux of the issue [is] whether Idaho law authorizes the refill of a storage water right, under priority, where water diverted under that right is released for flood control." The court then went on to designate the basin-wide issue as: "Does Idaho law require a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control?" While it may have seemed that the SRBA court was going to answer the question of whether flood control releases count towards the fill of a water right, the court specifically declined to address the issue of fill—an issue the court found would require factually specific inquiries not well situated for resolution in a basin-wide proceeding. The SRBA court intended Basin-Wide Issue 17 to be a purely legal question and stated that it would not consider "specific factual circumstances, operational history, or historical agreements associated with any particular reservoir." Accordingly, the court struck the Shelley Davis affidavit that the Boise Project Board submitted because the affidavit sought to develop a factual record.

The SRBA court ultimately held that a remark was not necessary under Idaho law because under the prior appropriation doctrine, a storage water right holder could not refill its right under priority once that right had already been satisfied once. Again, it may have seemed that the SRBA court answered the underlying question the parties wanted answered. However, the court went on to clarify that it was not answering the "more important" question of whether "water that is diverted and stored under a storage right counted towards the quantity of that right if it is used by the reservoir operator for flood control purposes." Thus, the SRBA court simply held that where flood control releases already count towards the fill of a water right, that water right cannot be filled a second time following those flood control releases.

On appeal, the parties ask this Court, in various ways, to answer the question of whether flood control releases count towards the fill of a water right. The Boise Project Board, the Ditch Companies, and the Surface Water Coalition all argue that the question of whether and when a storage water right is satisfied or filled when storage space is vacated for flood control purposes is integral to answering Basin—Wide Issue 17. They also acknowledge that this question is at least in part factual in nature. Accordingly, the Boise Project Board argues that the SRBA court erred in precluding the development of a factual record.

It is clear from the record and how the SRBA court framed Basin-Wide Issue 17 that the court intended the issue to be purely legal. The SRBA court framed the issue

as being whether "Idaho law require[s] a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control." The question deals with the quantity element of a water right and essentially asks whether a water right includes the right to *391 **798 refill in priority following flood control or other releases. In its designation order, the court specifically declined to address the issue of fill, an issue which the court noted, would require a factual inquiry.

The only way the basin-wide issue in this case could be interpreted to include a question of fact is if defining "refill" requires a factual determination. The SRBA court took the literal meaning of refill (to fill again), which assumes a right has already been filled or satisfied once. Appellants argue that in the context of storage water rights "refill" has a more nuanced definition that requires first defining when the water right is actually filled or satisfied. The SRBA court believed the issue of when a water right is initially filled was a factual question and explicitly declined to address it as a basin-wide issue. On the other hand, the question of whether Idaho law requires a remark regarding "refill" presents only a question of law, which is in line with the Surface Water Coalition's argument at the hearing on the Petition to Designate Basin-Wide Issue. The Coalition assured the judge that the proposed issue was "a fundamental legal question." Thus, the Coalition completely changed its tune once the issue was designated as a basin-wide issue. While the Boise Project Board never claimed that the issue was purely a legal question, it did assert that the issue could be decided "on a statewide basis rather than a reservoir-by-reservoir basis."

The parties' arguments on appeal—that the basin-wide issue presents a question of fact—ignores their previous assertions regarding the nature of the issue and the court's intent to designate the issue as strictly a legal question. From the outset the court explicitly declined to address the issue of whether water released for flood control purposes counts towards the initial fill of a water right. Thus, the argument that the court should have determined how the fill of a water right is calculated essentially amounts to an argument that the court erred in how it framed the basin-wide issue.

A. Whether the SRBA court erred in its designation of Basin–Wide Issue 17.

[4] The Idaho Rules of Civil Procedure (I.R.C.P.), Idaho Rules of Evidence (I.R.E.), and the Idaho Appellate Rules (I.A.R.) govern litigation in the SRBA. SRBA Administrative Order 1(AO1) provides procedures to supplement the I.R.C.P., I.R.E., and I.A.R. "to the extent

necessary to allow for the fair and expeditious resolution of all claims or issues in the SRBA." AO1 (1)(b). These procedural rules define a basin-wide issue as: "An issue designated by the Presiding Judge as potentially affecting the interests of a large number of claimants to the use of water within the SRBA and the resolution of which will promote judicial economy." AO1 (2)(c).

[5] SRBA Administrative Order 1(16)(a)(*l*) sets forth what should be included in a motion to designate a basin-wide issue and provides that any party to the adjudication "may file a Motion to Designate Basin–Wide Issue if that party believes an issue materially affects a large number of parties to the adjudication." *Id.* It further states that once a motion has been filed, "the motion to designate shall be decided by the Presiding Judge or a Special Master by Special Order of Reference." *Id.* The next section states that "[t]he Presiding Judge may enter a Notice of Intent to Designate Basin–Wide Issue." AO1 (16)(a)(2). The presiding judge is not required to designate an issue as basin-wide. Thus, the designation of a basin-wide issue is within the SRBA court's discretion.

**799 *392 The question the SRBA court designated and answered was the relatively straightforward question of whether a storage water right holder whose right has been satisfied once may refill that right in priority following flood control releases. By declining to address the issue of fill, the SRBA court framed the basin-wide issue to only address the circumstance where water that is stored under a water right, but ultimately released for flood control purposes, counts against the fill of the storage water right. The question of whether in that circumstance, the water right holder may satisfy its water right a second time following the flood control release was not a question anyone appears to have wanted answered.2 Given that Basin-Wide Issue 17 as designated was not the question the parties actually sought to have answered, addressing this issue in a basin-wide proceeding does not promote judicial economy. Accordingly, the SRBA court abused its discretion in designating the question of whether "Idaho law require[s] a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control" as Basin-Wide Issue 17.

To clarify, we are not holding that the SRBA court abused its discretion in declining to designate the question of whether flood control releases count toward the "fill" of a water right as a basin-wide issue. Nor will this Court answer that question on appeal. We agree with the Boise Project Board and the SRBA that the question of when a storage water right is filled presents a mixed question of fact and law. Indeed, the complex and historically dense contents of the Shelley Davis affidavit, along with the

parties' attempts to prove when a storage water right is filled by using reservoir-specific historical practices, support the conclusion that determining when a water right is filled requires the development of a factual record. There is an administrative procedure for fleshing out these factual interpretations if the SRBA court chooses to address the issue of fill on remand. This Court must be especially circumspect when deciding water law issues of with impression potentially far-reaching consequences. Without a complete factual record and no injury alleged we decline to issue an advisory opinion on whether water stored under a storage right counts toward the fill of that right if it is used by the reservoir operator for flood control purposes.

B. Determining when a water right is satisfied is within the Director's discretionary functions.

[6] Next, the Surface Water Coalition and the Boise Project Board argue that the Idaho Department of Water Resources (IDWR) Director's discretionary functions do not include the ability to determine when a water right is satisfied. The IDWR uses an accounting methodology to determine when a storage water right has been filled. In its Order Designating Basin-Wide Issue, the SRBA court determined that this accounting methodology was an administrative function which should be addressed on a case-by-case basis on a fully developed factual record and where the IDWR is a party. The Order also noted that "unlike the issue of priority refill which is directly related to the quantity element of a water right, the issue of fill is purely an issue of administration." Thus, the court stated that the IDWR's methodologies for determining when a water right is filled were beyond the scope of the basin-wide issue.

**800 *393 ^[7] Appellants contend that the IDWR cannot decide whether a storage water right is satisfied using the IDWR's "accounting methodologies" because water rights are property rights and administration should only be governed by water right decrees. They are correct that a water right is a property right. Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). Storage water rights are entitled to the same protection as any other type of property right. Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res. (AFRD# 2), 143 Idaho 862, 878, 154 P.3d 433, 449 (2007). Thus, the main issue is whether the Director is determining water rights, and therefore property rights, when he determines that a water right is "filled," or if the Director is just distributing water.

The IDWR has a statutory duty to allocate water. The Idaho legislature gave the IDWR's Director the power to

make appropriation decisions in Idaho Code section 42–602: "[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the ... facilities diverting therefrom." The Director also "shall distribute water in water districts in accordance with the prior appropriation doctrine." Id. This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.

Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). That statute gives the Director a "clear legal duty" to distribute water. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (abrogated on other grounds by Rincover v. State Dep't of Fin., 132 Idaho 547, 976 P.2d 473 (1999)). However, "the details of the performance of the duty are left to the director's discretion." *Id.* Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

This Court has recognized the Director's discretion to direct and control the administration of water in accordance with the prior appropriation doctrine. In Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 283 P. 522 (1929), downstream natural flow water users sued to enjoin upstream users with junior storage water rights from interfering with the downstream users' rights. The downstream users claimed that they had the right to receive their decreed water whenever they chose and that the upstream users had to fulfill the downstream users' right from the stored water. Arkoosh, 48 Idaho at 388, 283 P. at 523. The original decree made the downstream users the judges of when they could use the water, which the Court noted was too broad in that "their right to receive water at any time they may demand it is a matter finally adjudicated." Id. at 395, 283 P. at 525. At the time the Commissioner of Reclamation occupied a similar position to the current Director, and the Court noted that this was a matter that should be determined by the Commissioner's department.4 Id. at 395, 283 P. at 526. Similarly, this Court has stated that the Director "is charged with the duty of direction and control of distribution of the waters from the streams to the ditches and canals." DeRousse v. Higginson, 95 Idaho 173, 179, 505 P.2d 321, 327 (1973). More recently, this Court further articulated the Director's discretion: "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *AFRD# 2*, 143 Idaho at 880, 154 P.3d at 451. Thus, the Director's clear *394 **801 duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

This Court has also recognized the need for the Director's specialized expertise in certain areas of water law. For example, when analyzing the Director's duties in the context of groundwater pumping levels, this Court stated, "Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated to the IDWA the function of ascertaining reasonable pumping levels." Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). This Court also recognized the Director's broad powers and expertise in administering water rights in the context of granting applications for extensions of time. When holding that the Director properly granted a water right extension application, the Court noted that "[h]e cannot, in other words, be made to predict the future with powers other than his own reason and judgment" and "we ordinarily must vest the findings of the state engineer with the presumption of correctness." Keller v. Magic Water Co., 92 Idaho 276, 282, 441 P.2d 725, 731 (1968). The Court further explained that:

[T]he state engineer is the expert on the spot, and we are constrained to realize the converse, that judges are not super engineers. The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state, and we must extend to his determinations and judgment, weight on appeal.

Id. at 283, 441 P.2d 725, 732 (internal citations and quotations omitted).

Additionally, the Legislature has recognized the need for the Director's expertise. For instance, the Legislature provided that the Director "shall be: a licensed civil or agricultural engineer," a registered geologist, or a hydrologist holding a hydrology degree from an accredited college or university. I.C. § 42–1701(2). The legislature specified that the Director shall have "not less than five (5) years of experience" in one of those professions "and shall be familiar with irrigation and other water use practices in Idaho." *Id.* This reaffirms the need for the Director to have the technical expertise to properly administer water rights.

Here, the Director's duty to administer water according to technical expertise is governed by water right decrees.

The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user. However, it is within the Director's discretion to determine when that number has been met for each individual decree. In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user. Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.

a remark authorizing storage rights to 'refill,' under priority, space vacated for flood control" as Basin–Wide Issue 17. The SRBA court did not abuse its discretion by declining to address when the quantity element of a storage water right is considered filled or in stating that such a determination was within the Director's discretion.

Justices EISMANN, J. JONES, HORTON and SCHROEDER, Pro tem, concur.

All Citations

157 Idaho 385, 336 P.3d 792

III. CONCLUSION

We hold that the SRBA court abused its discretion in designating the question of whether "Idaho law require[s]

Footnotes

In its Order Designating Basin Wide Issue, the court stated that in its view, "the Surface Water Coalition's proposed issues, which both pertain to how a storage right is initially filled, are not well situated for resolution in a basin-wide proceeding." These two issues were:

[Whether] [t]he storage right holder determines when to divert water to storage in order to maximize the beneficial use of water under this right.

[Whether] [t]he beneficial use under this right is fully satisfied when the water stored and available for beneficial use equals the capacity of the reservoir.

Then in its Memorandum Decision, the court stated that the question of whether "water that is diverted and stored under a storage right counted towards the quantity of that right if it is used by the reservoir operator for flood control purposes," is "an accounting issue which this basin-wide proceeding does not address."

Indeed, the SRBA court's summary of the parties' arguments indicates the court understood that the question the parties wanted answered was whether flood control releases count towards the initial fill of a water right:

The Petitioners assert that Idaho law permits a storage right holder to refill his storage right, under priority, when water diverted and stored under that right is used by the reservoir operator for flood control purposes. They assert the right to priority refill is inherent in the nature of a storage water right. Since they assert this is the state of Idaho law, it is their position that no remark is necessary on the face of a storage right to authorize such priority refill. The Petitioners contend that a storage right holder is entitled to put to the storage right's end use that volume of water set forth in the quantity element of the right. If water diverted and stored under a storage right is used for flood control purposes by the reservoir operator, then it is the Petitioners' position that the storage holder is entitled to refill that space, under priority, to ensure a sufficient quantity of storage water to complete the right's end use.

- The legislature also provided for the Director to accomplish water distributions with watermasters who act in accordance with prior appropriation and are supervised by the Director. I.C. § 42–602.
- The Court also stated that "[t]he action of the commissioner in determining when water may be first beneficially used and in delivering or refusing to deliver water may be reviewed and controlled" in an action by an aggrieved party. *Id.* at 395–96, 283 P. at 526.
- At the time, the Director was known as the "State Engineer."

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161 Idaho 817 Supreme Court of Idaho, Boise, December 2016 Term.

AGSTAR FINANCIAL SERVICES, ACA, Plaintiff-Respondent,

GORDON PAVING COMPANY, INC.; Northwest Sand & Gravel, Inc.; Blackrock Land Holdings, LLC; Brandon Hansen, an individual; Brian Hansen, an individual; Carol Hansen GPC Nevada Trust; Craig Hansen GPC Nevada Trust; Canyon Equipment and Truck Service, Inc.; Doe Entities Owned By Brian, Brandon and Craig Hansen, Defendants-Appellants.

Docket No. 43747

|
Filed: February 27, 2017

|
Rehearing Denied April 14, 2017

Synopsis

Background: After foreclosure, mortgagee brought action against guarantors of mortgagee's indebtedness. Default was entered, and guarantors moved to set aside the default. The District Court, Fifth Judicial District, Twin Falls County, Randy J. Stoker, J., denied the motion. Guarantors appealed.

[Holding:] The Supreme Court, J. Jones, Justice Pro Tem., held that indebtedness to mortgagee, which guarantors had guaranteed, was fully satisfied and extinguished in prior foreclosure proceeding.

Reversed.

Eismann, J., filed a dissenting opinion in which Horton, J., concurred.

West Headnotes (9)

Judgment

→Discretion of court

Power of a trial court to grant or deny relief from default is discretionary. Idaho R. Civ. P. 55(c).

Cases that cite this headnote

[2] Judgment

←Invalidity of judgment

When a default judgment is predicated upon an erroneously entered default, the judgment is voidable. Idaho R. Civ. P. 55(c).

Cases that cite this headnote

[3] Judgment

Nature and scope of remedy

Because judgments by default are not favored, a trial court should grant relief from default judgment in doubtful cases in order to decide the case on the merits. Idaho R. Civ. P. 55(c).

Cases that cite this headnote

[4] Judgment

►Necessity for excuse

Judgment

Necessity for showing meritorious cause of action or defense

Two requirements must be met to set aside a default judgment: (1) a party may ask for relief from a default judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect, and (2) the moving party must plead facts which, if established, would constitute a meritorious defense to the entry of default. Idaho R. Civ. P. 55(c), 60(b)(1).

Cases that cite this headnote

[5] Judgment

←Meritorious Cause of Action or Defense

The meritorious defense requirement for setting aside a default judgment is a pleading requirement, not a burden of proof. Idaho R. Civ. P. 55(c).

Cases that cite this headnote

[6] Judgment

←Necessity for stating facts constituting defense

To establish a meritorious defense, a party moving to set aside a default judgment is not required to present evidence in order to have the default judgment set aside. Idaho R. Civ. P. 55(c).

Cases that cite this headnote

[7] Appeal and Error

Relief from default judgment

A trial court's refusal to set aside a default judgment is reviewed under an abuse of discretion standard.

Cases that cite this headnote

[8] Appeal and Error

Relief from default judgment

A trial court's refusal to set aside a default judgment will be upheld if it appears that the trial court (1) correctly perceived the issue as discretionary; (2) acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) reached its

determination through an exercise of reason. Idaho R. Civ. P. 55(c).

Cases that cite this headnote

[9] Guaranty

Payment or Other Satisfaction by Principal

Indebtedness to mortgagee, which guarantors had guaranteed, was fully satisfied and extinguished in prior foreclosure proceeding in which mortgagee obtained title to real property worth more than amount mortgagor owed to mortgagee, and therefore, there was no basis for recovery against guarantors.

Cases that cite this headnote

**1288 Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

The judgment of the district court is <u>reversed</u>.

Attorneys and Law Firms

Robinson & Tribe, Rupert, for appellants. Brent T. Robinson argued.

Givens Pursley LLP, Boise, for respondent. Kersti Kennedy argued.

Opinion

J. JONES, Justice Pro Tem.

*818 Gordon Paving Company, Inc., Northwest Sand & Gravel, Inc., Blackrock Land Holdings, LLC (collectively, "Gordon Paving"), Brandon Hansen, an individual, Brian Hansen, an individual, Carol Hansen GPC Nevada Trust, Craig Hansen GPC Nevada Trust, Canyon Equipment and Truck Service, Inc., and Doe Entities owned by Brian, Brandon, and Craig Hansen (collectively "Guarantors") appeal from the judgment entered following the district court's denial of their motion to set aside default in a breach of personal

guarantee action brought by AgStar Financial Services, ACA ("AgStar").

**1289 *819 I.

FACTUAL AND PROCEDURAL BACKGROUND

Between 2007 and 2008, Gordon Paving borrowed \$10 million from AgStar. In addition to real and personal property collateral, the indebtedness was secured by separate guarantee agreements executed by Guarantors. By 2012, Gordon Paving had defaulted and AgStar sued for foreclosure.

On June 19, 2013, the district court entered a Judgment and Decree of Foreclosure against Gordon Paving. AgStar purchased the real property collateral at a foreclosure sale with credit bids totaling \$7,200,000. Following the sale, AgStar moved for entry of a deficiency judgment for the difference between the unpaid judgment as of the time of the sale and its credit bids for the real property. The district court denied AgStar's motion for a deficiency judgment, finding that the reasonable value of the properties that AgStar purchased by credit bids was nearly two million dollars greater than Gordon Paving's indebtedness. Gordon Paving appealed to this Court. In an Opinion issued on February 24, 2017, we held that Gordon Paving's indebtedness to AgStar had been fully satisfied and discharged. AgStar Financial Services v. Northwest Sand and Gravel, Docket No. 42932, 161 Idaho 801, 391 P.3d 1271, 2017 WL 727771 (2017) $(AgStar\ I).$

On June 1, 2015, AgStar brought the present action against Guarantors, advancing a number of theories, including breach of personal guarantee. On July 8, 2015, AgStar filed its Application for Entry of Default against Guarantors. On July 9, 2015, the district court entered default against all defendants.

On July 15, 2015, Guarantors filed a motion to set aside the default and moved to dismiss the action based on *res judicata*. On October 19, 2015, the district court heard the motions and denied the motion to set aside the default, holding that Guarantors had not shown the existence of a meritorious defense. The district court then entered a judgment against Guarantors on the cause of action based on breach of their personal guarantees. AgStar agreed to dismiss the other claims with prejudice because the judgment on the guarantees represented the total

remaining amount due on Gordon Paving's indebtedness. On November 12, 2015, AgStar moved for an award of attorney fees and costs. On December 18, 2015, the district court awarded AgStar attorney fees and costs after Guarantors failed to file a timely objection. Guarantors timely appealed.

II.

STANDARD OF REVIEW

[1] [2] [3] [4] [5] [6] A court may set aside an entry of default for good cause. I.R.C.P. 55(c). The power of a trial court to grant or deny relief under Rule 55(c) is discretionary. *McGloon v. Gwynn*, 140 Idaho 727, 729, 100 P.3d 621, 623 (2004). "When a default judgment is predicated upon an erroneously entered default, the judgment is voidable." *Id.* Because judgments by default are not favored, a trial court should grant relief in doubtful cases in order to decide the case on the merits. *Jonsson v. Oxborrow*, 141 Idaho 635, 638, 115 P.3d 726, 729 (2005).

Two requirements must be met to set aside a default judgment. Under rule 60(b)(1), a party may ask for relief from a default judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. In addition, the moving party must plead facts which, if established, would constitute a meritorious defense to the entry of default.

Clear Springs Trout Co. v. Anthony, 123 Idaho 141, 845 P.2d 559, 561 (1992). The meritorious defense requirement is a pleading requirement, not a burden of proof. Cuevas v. Barraza, 146 Idaho 511, 518, 198 P.3d 740, 747 (2008). "To establish a meritorious defense, a party moving to set aside a default judgment is not required to present evidence in order to have the default judgment set aside." Id.

[7] [8] "A trial court's refusal to set aside a default judgment is reviewed under an abuse of discretion standard." *Idaho State Police ex rel. Russell v. Real Prop. Situated in Cnty. of Cassia*, 144 Idaho 60, 62, 156 P.3d 561, 563 (2007). "The decision will be upheld **1290 *820 if it appears that the trial court (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its

discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason." *Id.*

III.

ANALYSIS

^[9]The district court determined that the Guarantors had shown excusable neglect sufficient to satisfy Rule 60(b)(1) but that the Guarantors had failed to present a meritorious defense. The question presented on appeal is whether the court erred in concluding the Guarantors had not advanced a meritorious defense. The district court explained its conclusion as follows:

The meritorious defense that is being raised in this case with regard to defendants Brian Hansen: Carol Hansen, GPC Nevada Trust; and Craig Hansen, GPC Nevada Trust, is that the personal guarantee claim should have been raised in the first lawsuit between AgStar and Gordon Paving and others. The court finds, over the objection of these three defendants, based upon the supreme court's ruling in First Security Bank of Idaho versus Gaige, G-a-i-g-e, 115 Idaho 172 [765 P.2d 683], (1988), that the operation of the antideficiency statute as applied to deeds of trust in that case is likewise applicable to the antideficiency statute relating to the mortgage in this case, albeit they are separate and distinct statutes; same principle, in my view, and the Court ruled that the antideficiency statute does not preclude a separate and distinct action by guarantors to enforce a debt. I realize there's some exceptions, some differences in this First Security Bank case because the case never went to an actual deficiency hearing, but doesn't matter. If the statute doesn't apply, it doesn't apply whether it was or wasn't a deficiency. And therefore, as to those three defendants, there is no meritorious defense, as a matter of law, that can be raised, and that is the only meritorious defense that has been raised to set aside the default.

The district court misconceived the basic thrust of the Guarantors' argument. The Guarantors did invoke Idaho Code section 6-108 and also asserted that AgStar's right to recovery on the guaranteed debt was precluded by the doctrine of *res judicata*. However, the district court overlooked how the Guarantors wove those arguments together at the hearing on the motion to set aside the default.

Considered as a whole, the Guarantors' argument was that AgStar was not entitled to recover additional monies from them because the debt they had guaranteed had been fully paid by virtue of the foreclosure. In response to a question from the district court regarding why AgStar could not pursue a personal guarantee, counsel for Guarantors responded "you can't collect twice." He continued:

If you're entitled to a hundred thousand dollars, and you get the hundred thousand dollars from the initial party, the party who's agreed to pay the debt, you can't turn around and sue the guarantors for something that gets you duplication.... If [AgStar had] sold that property for, instead of 7 million, sold it for 9.5 million, we wouldn't be here today. Couldn't be here today because of the fact is that they had sold it, and they bought the property at the sheriff's sale for the 9.5 million. Then the result is they have no underlying debt. Debt's paid. How do they then go after the guarantors for a debt that's been paid.

* * *

So when the court finds that [the property is] worth more than [AgStar is] owed, the result should be the same. How do they now have a debt that they can use and collect from the guarantor? Guarantors? Because they've been paid.

A fair reading of what the Guarantors were asserting is that the district court in *AgStar I* had determined AgStar acquired real property in the foreclosure whose reasonable value exceeded the debt, that AgStar had thus been fully paid and that it was entitled to no further recovery against any of the defendants. The defense would be more properly characterized as a claim of extinguishment of the guaranteed debt by payment, **1291 *821 rather than anything else. This case is somewhat akin to *Maynard*, where this Court, after

observing that the "district court merely mischaracterized the nature of the [defendants'] meritorious defense," took a fresh look at the facts alleged and then put them in proper context. *Maynard*, 152 Idaho at 729, 274 P.3d at 594.

The district court could not have known how we would decide *AgStar I*, but the Guarantors' argument fairly well tracks with the decision made by this Court in that case. In *AgStar I*, we observed:

[Th]e district court determined that by virtue of the foreclosure on the real property, AgStar obtained title to real property worth, at the least, \$1,896,765 more than the amount Gordon Paving owed to AgStar. Stated another way, the reasonable value of the foreclosed properties exceeded AgStar's credit bids by at least \$4,510,105. AgStar did not appeal the district court's valuations.

Id. at 10, 161 Idaho at 809, 391 P.3d at 1279. We continued:

The question before this Court is whether, in spite of the surplus value received by AgStar in the real property foreclosure, AgStar was entitled obtain additional to recovery by realizing upon its personal property collateral. We hold that Gordon Paving's indebtedness to AgStar had been fully satisfied and it was not entitled to seek additional monies from Gordon Paving.

Id. at 11, 161 Idaho at 809, 391 P.3d at 1285. We concluded:

The reasonable value determined by the district court should have been credited against Gordon Paving's outstanding obligation, thereby resulting in full satisfaction of the debt. We hold that AgStar was more than made whole by virtue of the foreclosure and was entitled to no other recovery. Thus, we reverse the district court's decision allowing AgStar to sell the personal property.

Id. at 20, 161 Idaho at 815, 391 P.3d at 1285.

In making its decision in this case, the district court relied on *First Sec. Bank of Idaho*, *N.A. v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988). That case is good law, but it does not have application here. There are two critical differences between this case and *Gaige*. First, in *Gaige* the secured creditor did not seek a deficiency judgment. *Id.* at 173, 765 P.2d at 684. Thus, there was no contested proceeding to determine the reasonable value of the real property and no opportunity to determine whether the amount credited against the debtor's obligation should have been a different amount than First Security's credit bid. Second, there is evidence in the record that First Security, which "was the highest bidder" at the sale, paid very close to market value. *Id.* The bid was not a low-ball bid, as determined by the district court in *AgStar I*.

Based on this Court's decision in *AgStar I*, it is rather apparent that the Guarantors asserted a meritorious defense to AgStar's action against them on the guarantee. Therefore, the district court (unknowingly) abused its discretion and acted inconsistent with applicable legal standards in failing to set aside the default judgment. The indebtedness to AgStar, which the Guarantors had guaranteed, was fully satisfied and extinguished in *AgStar I* and there is no basis for any recovery here against the Guarantors.

The Guarantors seek attorney fees on appeal pursuant to Idaho Code section 12-120(3). The Guarantors have prevailed on appeal and they are entitled to recover their attorney fees under Section 12-120(3).

IV.

CONCLUSION

We reverse the judgment of the district court and award Guarantors their costs and attorney fees on appeal.

Chief Justice BURDICK and Justice W. JONES concur.

Justice **EISMANN**, dissenting.

I cannot concur in the majority opinion because it is contrary to the law.

The issue is whether Guarantors, who guaranteed promissory notes secured by mortgages on real property, can be held **1292 *822 liable on their guaranties when the proceeds of the foreclosure sales of the mortgaged properties is not sufficient to pay the balances owing on the notes secured by those mortgages.

Guarantors do not have the protection of Chapter 6, Title I, of the Idaho Code. Neither Idaho Code section 6-101, which requires the foreclosure of a mortgage in order to recover on a debt secured by that mortgage, nor Idaho Code section 6-108, which limits the amount of a deficiency judgment against the mortgagor, applies to an action to recover against a guarantor of a note that is secured by a mortgage.

In *Jeppesen v. Rexburg State Bank*, 57 Idaho 94, 62 P.2d 1369 (1936), this Court held that a bank could collect against an indorser on a promissory note without first seeking to foreclose the mortgage secured by that note, where the promise to pay on default of the maker was not secured by the mortgage. *Id.* at 101, 62 P.2d at 1372. This Court reasoned as follows:

When a debtor gives a mortgage to secure his debt, he gives his creditor a lien on his property and thereby authorizes him, at maturity of the debt, to proceed in rem against the property for the amount of the debt. This necessarily impairs the debtor's credit to that extent; and it was the evident intention of the Legislature, by enacting section 9-101 [former Idaho Code section 6-101], to require the creditor to proceed for collection of the debt (if not paid in due course) against the property, and to exhaust the security before being allowed to acquire any personal judgment against the debtor.....

Here the *indorser* has not mortgaged any of his property as security, either for the primary obligation, that is, the debt of the maker, or for his secondary obligation as indorser; and so far as *his debt is concerned*, whenever or however it accrued, it is

unsecured by any mortgage on property of any kind.

Id. at 99, 62 P.2d at 1371.

In *First Security Bank of Idaho, N.A. v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988), this Court held that Idaho Code section 45-1512, which limits the amount of a deficiency judgment on an obligation secured by a deed of trust, did not apply to a guarantor of the obligation. *Id.* at 174, 765 P.2d at 685. We declined to legislate from the bench and create a rule protecting the guarantor from the terms of his contractual obligation, stating: "While there may be arguments for extending anti-deficiency protection to guarantors, that action is for the legislature to do, not the court.... We deem it better policy to follow the wording of the statute and leave any expansion of coverage to the legislature." *Id.* at 174–75, 765 P.2d at 685–86.

After our Jeppesen and First Security Bank opinions, the Idaho legislature has not acted to protect guarantors of obligations secured by mortgages or deeds of trust. In this case, the majority steps in to allow guarantors to escape the consequences of their guaranties. As explained in my dissent in AgStar Financial Services, ACA, v. Northwest Sand & Gravel, Inc., the majority does so by creating a fiction that the value of the real property sold constitutes the proceeds from the sale of that property. Using that fiction, the majority holds that the debts that Guarantors guaranteed have been paid in full. As I stated in my dissent in AgStar Financial Services, ACA, v. Northwest Sand & Gravel, Inc.: "I cannot agree with the majority because I believe that the Court should follow the applicable law. I would decide this case simply by following the statute."

Justice **HORTON** concurs.

All Citations

161 Idaho 817, 391 P.3d 1287

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161 Idaho 801 Supreme Court of Idaho, Boise, February 2016 Term.

AGSTAR FINANCIAL SERVICES, ACA, Plaintiff-Appellant-Cross Respondent,

NORTHWEST SAND & GRAVEL, INC., an Idaho Corporation; Gordon Paving Company, Inc., an Idaho Corporation; Blackrock Land Holdings, LLC, an Idaho Limited Liability Company, Defendants-Respondents-Cross Appellants, and

Town and Country Bank, Inc.; and Fire Service of Idaho, Inc., Defendants-Respondents.

Docket No. 42932 | Filed: February 24, 2017

Synopsis

Background: Lender brought action against borrower, alleging default on bond purchase agreements and seeking judicial foreclosure and sale of collateral. After judgment was entered for lender in the foreclosure action and lender purchased the real property collateral, the District Court, Fifth Judicial District, Twin Falls County, Randy J. Stoker, J., denied lender's motion for a deficiency judgment, awarded borrower attorney fees for the deficiency proceeding, allowed lender to sell personal property collateral, and granted post-judgment attorney fees to lender. Lender appealed and borrower cross-appealed.

Holdings: The Supreme Court, J. Jones, Justice Pro Tem, held that:

- [1] deficiency proceeding was not a separate civil action for purposes of awarding attorney fees;
- bond agreement did not bar borrower from being awarded attorney fees; and
- [3] lender was precluded from selling personal property collateral after purchase of foreclosed real property extinguished debt.

Vacated in part, reversed in part, and remanded.

Eismann, J., concurred in part, dissented in part, and filed opinion in which Horton, J., joined.

West Headnotes (20)

[1] Appeal and Error

Authorization, eligibility, and entitlement in general; prevailing party

The district court's decision to award attorney fees is reviewed under the abuse of discretion standard.

Cases that cite this headnote

[2] Appeal and Error

Attorney Fees

When an award of attorney fees depends on the interpretation of a statute, the standard of review for statutory interpretation applies.

Cases that cite this headnote

[3] Appeal and Error

Plenary, free, or independent review

The Supreme Court exercises free review over questions of law.

Cases that cite this headnote

[4] Appeal and Error

Statutory or legislative law

The interpretation of a statute is a question of law over which the Supreme Court exercises free review.

Cases that cite this headnote

Cases that cite this headnote

[5] Mortgages and Deeds of Trust

←Attorney Fees

Because a deficiency proceeding is not an attempt to collect on a judgment, the postjudgment attorney fees provision is not applicable. Idaho Code Ann. § 12-120(5).

Cases that cite this headnote

[6] Mortgages and Deeds of Trust

←Actions and Proceedings

While a deficiency proceeding is separated by time from the proceedings to obtain judicial foreclosure, a deficiency proceeding is not deemed a separate action. Idaho Code Ann. § 6-101(3)(f)(i).

Cases that cite this headnote

Mortgages and Deeds of Trust Actions and Proceedings

Mortgages and Deeds of Trust

←Prevailing parties

Lender's deficiency proceeding against borrower was not separate civil action, and therefore trial court erroneously awarded borrower attorney fees as prevailing party solely based on deficiency proceeding without considering entirety of foreclosure action; trial court specifically retained jurisdiction in foreclosure action to make further orders, and lender's request for deficiency judgment was made by motion in same case and under same case number as foreclosure, rather than by complaint, petition, or application. Idaho Code Ann. §§ 6-101(3), 12-120(3); Idaho R. Civ. P. 3(a).

[8] Mortgages and Deeds of Trust

Stipulation or contract

Bond agreement between lender and borrower did not bar borrower from being awarded attorney fees in lender's foreclosure action, where agreement was silent as to whether borrower was prohibited from award of attorney fees. Idaho Code Ann. § 12-120.

Cases that cite this headnote

[9] Mortgages and Deeds of Trust

Right to Deficiency and Grounds Therefor

Secured Transactions

←Disposition of Collateral

Secured Transactions

Deficiency and personal liability

Lender was precluded from selling personal property collateral after trial court denied motion for deficiency judgment based on reasonable values of real properties foreclosed and purchased by lender exceeding debt owed by borrower; lender chose to pursue foreclosure of real properties and paid \$4.5 million less than what trial court determined to be reasonable value, lender did not appeal trial court's reasonable-value determination, and purchase of foreclosed property put lender almost \$2 million ahead.

1 Cases that cite this headnote

[10] Secured Transactions

Rights and remedies of secured party in general

Secured creditors have a right to recover full recompense from those to whom they have loaned money.

Cases that cite this headnote

[11] Mortgages and Deeds of Trust

Right to Deficiency and Grounds Therefor

Secured Transactions

Election of remedies

Secured Transactions

-Deficiency and personal liability

If a secured creditor proceeds first against the mortgaged real property and the debt is fully satisfied in the foreclosure proceeding, the creditor is precluded from pursuing additional recovery against either secured or unsecured property.

1 Cases that cite this headnote

[12] **Secured Transactions**

-Deficiency and personal liability

When a creditor is fully satisfied by one source of collateral, it may not pursue another.

Cases that cite this headnote

[13] Secured Transactions

-Deficiency and personal liability

No deficiency judgment is available if the creditor fails to dispose of the personal property subject to a security interest in a commercially reasonable manner.

Cases that cite this headnote

[14] Secured Transactions

-Deficiency and personal liability

Where a secured creditor who holds more than

one source of security for the same debt seeks a deficiency judgment after having foreclosed on mortgaged real property and obtained title to such real property by credit bid in the foreclosure sale, a court should utilize its equity powers to consider the debt satisfied where the reasonable value of the real property is litigated and determined to be substantially greater than the debt.

1 Cases that cite this headnote

[15] Secured Transactions

Rights and remedies of secured party in general

Secured Transactions

-Deficiency and personal liability

Where a creditor has several sources of security for a single debt, the creditor must proceed to recover in a reasonable manner and, while a creditor is entitled to full recompense, it is not entitled to place undue financial burdens on its debtor.

Cases that cite this headnote

[16] Appeal and Error

Costs and fees

Defendant waived for appeal its argument that plaintiff's petition for post-judgment attorney fees was untimely, where defendant failed to cite case law or statutory authority to support its claim.

Cases that cite this headnote

[17] Appeal and Error

Defects, objections, and amendments

Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing

and not supported by any cogent argument or authority, it cannot be considered by the court.

Cases that cite this headnote

[18] Appeal and Error

- Defects, objections, and amendments

When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.

Cases that cite this headnote

[19] Appeal and Error

-Briefs and argument in general

Appeal and Error

Citation to facts and legal authority in general

A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.

1 Cases that cite this headnote

[20] Costs

Prevailing or successful party

Costs

Attorney fees on appeal or error

Neither party would be awarded attorney fees or costs on appeal, where each party prevailed in part. Idaho Code Ann. §§ 12-120(3, 5).

Cases that cite this headnote

**1273 Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

The judgment of the district court is <u>vacated</u> in part, <u>reversed</u> in part, and the case is <u>remanded</u> for further proceedings.

Attorneys and Law Firms

Givens Pursley LLP, Boise, for appellant. Kersti H. Kennedy argued.

Robinson & Tribe, Rupert, for respondents. Brent T. Robinson argued.

Opinion

J. JONES, Justice Pro Tem.

*803 AgStar Financial Services, ACA (AgStar) appeals from the district court's award of attorney fees under Idaho Code section 12-120(3) to Northwest Sand & Gravel, Inc., Gordon Paving Company, Inc., and Blackrock Land Holdings, LLC (collectively, Gordon Paving), following a deficiency proceeding. Gordon Paving's cross-appeal asserts that the district court erred in three respects: (1) by permitting AgStar to sell personal property serving as collateral for Gordon Paving's debt to AgStar after the district court determined that AgStar was not entitled to a deficiency judgment; (2) by awarding AgStar post-judgment attorney fees pursuant to Idaho Code section 12-120(5); and (3) allowing AgStar's claim of exemption to a royalty check. We vacate in part, reverse in part, and remand for further proceedings.

I.

FACTUAL AND PROCEDURAL BACKGROUND

AgStar is a financial services company that offers financing to agricultural and industrial operations. Gordon Paving was in the business of mining and selling gravel and sand used primarily for paving.

On December 10, 2007, Gordon Paving borrowed \$9 million from AgStar, issued a bond in AgStar's favor, and secured the obligation with various pieces of equipment and personal property and by mortgaging its interest in a commercial real estate parcel and five gravel pits. Between 2007 and 2010, the bond purchase agreement was amended three times, and Gordon Paving borrowed an additional \$1 million through a second bond purchase

agreement. The second bond purchase agreement was secured by the same real and personal property as the first bond purchase agreement.

On June 28, 2012, AgStar filed suit, claiming that Gordon Paving had defaulted on the bond purchase agreements. AgStar sought judicial foreclosure and sale of the real and personal property collateral. On June 19, 2013, the district court entered judgment in favor of AgStar in the foreclosure action and ordered the sale of the collateral. The district court determined that Gordon Paving owed AgStar \$9,387,069.17. The district court later determined that AgStar was entitled to a prepayment penalty of \$366,648 under the bond agreements. On September 30, 2013, **1274 *804 the district court awarded AgStar \$59,623.51 in attorney fees and costs incurred in connection with the foreclosure action. The district court calculated the interest accrued on the debt through November 21, 2013, as \$209,280.21.

On November 21, 2013, AgStar purchased all of the real property collateral at a foreclosure sale by way of five separate credit bids totaling \$7,200,000. On February 12, 2014, AgStar moved for entry of a deficiency judgment of \$2,455,972.89, which represented the difference between the amount of the unpaid judgment at the time of the sale and AgStar's credit bids.

On August 28, 2014, the district court issued a memorandum opinion denying AgStar's motion for deficiency judgment. The district court concluded that AgStar had not proven that the reasonable value of the foreclosed properties was less than the balance owed under the foreclosure decree, explaining that the reasonable value of the foreclosed properties "totaled at least \$11,710,105 at the time of the entry of the decree and that the amount owed by that decree, if prepayment penalty and attorney fees are included, was at most \$9,813,340."

On September 4, 2014, AgStar moved the district court for an order directing Gordon Paving to transfer the titles of various vehicles that Gordon Paving had pledged as collateral for the bond obligations to AgStar and for a comfort order allowing AgStar to sell the personal property collateral at auction. On September 15, 2014, Gordon Paving submitted a memorandum in opposition to AgStar's motion. Gordon Paving argued that because the district court had already determined that AgStar had received real property worth more than the debt owed under the foreclosure judgment and denied AgStar a deficiency judgment, AgStar was estopped from selling any further collateral because Gordon Paving's debt was extinguished.

The district court held a hearing on AgStar's motion on September 18, 2014. The district court held that AgStar was entitled to sell the personal property pledged as collateral to secure Gordon Paving's indebtedness despite having obtained the real property for credit bids of \$4.5 million less than market value.

On September 11, 2014, Gordon Paving moved for an award of attorney fees, asserting that, as the prevailing party in the deficiency proceeding, it was entitled to attorney fees under Idaho Code section 12-120(3). On September 24, 2014, AgStar filed a motion to disallow Gordon Paving's request for attorney fees. AgStar argued that provisions of the bond purchase agreements prohibited Gordon Paving from receiving attorney fees, that Gordon Paving was not the prevailing party, and that Idaho Code section 12-120(3) was not applicable because a deficiency proceeding is a post-judgment proceeding governed by Idaho Code section 12-120(5). Following a hearing on November 10, 2014, the district court found that Idaho Code section 12-120(3) entitled Gordon Paving to an award of attorney fees it had incurred in the deficiency proceedings. On November 18, 2014, the district court entered a judgment in favor of Gordon Paving against AgStar for \$25,277.17.

After receiving the district court's judgment in its favor, on November 21, 2014, Gordon Paving attempted to garnish royalties that TKT Excavation & Trucking owed to AgStar for gravel extraction. On December 8, 2014, AgStar filed a claim of exemption in which it asserted that the funds were "proceeds of collateral subject to AgStar's security interest." On February 9, 2015, the district court held a hearing on the issue and held that AgStar was entitled to the claimed exemption.

On November 21, 2014, AgStar sought an award of post-judgment attorney fees and costs incurred from June 19, 2013 through November 22, 2014, and for the district court to amend the Judgment and Decree of Foreclosure accordingly. On December 5, 2014, Gordon Paving objected to AgStar's request. Gordon Paving argued that AgStar's petition was untimely and that the claimed fees were **1275 *805 unreasonable. On February 9, 2015, the district court held a hearing on the issue. The district court concluded that attorney fees were appropriate under Idaho Code section 12-120(5) and granted in part and denied in part AgStar's petition for post-judgment fees.

AgStar timely appealed from the district court's award of attorney fees to Gordon Paving in connection with the deficiency proceeding. Gordon Paving timely cross-appealed from the district court's order allowing

AgStar to sell the personal property collateral, the district court's grant of post-judgment attorney fees and costs to AgStar, and the district court's order upholding AgStar's claim of exemption.

II.

STANDARD OF REVIEW

[1] [2] [3] [4]."The district court's decision to award attorney fees is reviewed under the abuse of discretion standard." *Stout v. Key Training Corp.*, 144 Idaho 195, 196, 158 P.3d 971, 972 (2007). "However, when an award of attorney fees depends on the interpretation of a statute, the standard of review for statutory interpretation applies." *Id.* "This Court exercises free review over questions of law." *Fields v. State*, 149 Idaho 399, 400, 234 P.3d 723, 724 (2010). "The interpretation of a statute is a question of law over which this Court exercises free review." *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cnty.*, 159 Idaho 84, 86, 356 P.3d 377, 379 (2015).

III.

ANALYSIS

AgStar argues that a deficiency proceeding is a post-judgment proceeding subject to Idaho Code section 12-120(5) and not a separate action from the initial foreclosure proceeding; therefore, Idaho Code section 12-120(3) does not apply. Alternatively, AgStar contends that even if Idaho Code section 12-120(3) is applicable, the provisions of the underlying bond agreement prohibit Gordon Paving from collecting attorney fees. Gordon Paving's cross-appeal claims that: (1) the district court erred by permitting AgStar to take possession and sell personal property collateral to satisfy the foreclosure judgment after the district court had denied AgStar's request for a deficiency judgment; (2) the district court erred in awarding AgStar post-judgment attorney fees because AgStar's petition was untimely; and, (3) the district court erred when it upheld AgStar's claim of exemption. We address these issues in turn.

A. The district court abused its discretion when it awarded attorney fees under Idaho Code Section 12-120(3) without first determining the prevailing party in the entire action.

On November 10, 2014, the district court held that Gordon Paving was entitled to attorney fees under Idaho Code section 12-120(3) as the prevailing party in the deficiency proceeding. The district court reasoned:

This is a unique issue. The deficiency part of this case was clearly separately—separate from the initial foreclosure action. Just as much as AgStar has certainly prevailed on their claim for obtaining a judgment and [I] awarded some, I don't remember what it was, 60, \$70,000 in fees, I think this is a separate and distinct part of this case, and it is within my discretion to treat it as such, just as much as I would treat it like a counterclaim. I realize it's not a counterclaim. It is independent, and under the unique circumstances of this case [I] consider the defendants the prevailing party, and therefore, because this is clearly commercial transaction under 12-120, subsection 3, they are entitled to award of fees and costs for having defended this case.

AgStar argues that Idaho Code section 12-120(5) should apply to deficiency proceedings. Alternatively, AgStar contends that a deficiency judgment hearing is merely a supplemental proceeding in the foreclosure action and that Idaho's "one action rule" establishes that a deficiency motion is not a separate "action" for purposes of Idaho Code section 12-120(3). Finally, AgStar argues that provisions of the bond agreements between AgStar and Gordon Paving prohibit awarding attorney fees to Gordon Paving.

**1276 *806 i. Idaho Code section 12-120(5) is not applicable to deficiency proceedings.

^[5]We do not find AgStar's contention that Idaho Code section 12-120(5) applies to deficiency proceedings to be persuasive. Idaho Code Section 12-120(5) provides: "In all instances where a party is entitled to reasonable attorney's fees and costs under subsection (1), (2), (3) or

(4) of this section, such party shall also be entitled to reasonable postjudgment attorney's fees and costs incurred in attempting to collect on the judgment." I.C. § 12-120(5) (emphasis added). In a deficiency proceeding, the creditor is not attempting to collect on a foreclosure judgment; rather, a motion for a deficiency judgment is a request for the court to recalculate the amount of debt owed based on the original foreclosure judgment less any amount realized by the disposition of collateral. If the creditor is successful in the deficiency proceeding, the creditor may then attempt to collect the deficiency amount from other non-exempt, non-collateral property owned by the debtor. Because a deficiency proceeding is not an attempt to collect on the judgment, Idaho Code section 12-120(5) is not applicable.

ii. A deficiency proceeding is not a separate action.

[6] Idaho Code section 12-120(3) provides:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

I.C. § 12-120(3) (emphasis added). Idaho Rule of Civil Procedure 3(a) explains: "A civil action is commenced by the filing of a complaint, petition or application with the court." I.R.C.P. 3(a). Idaho's "one action rule," Idaho Code section 6-101(1) provides:

There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the

sale, and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; (and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt), and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued.

I.C. § 6-101. Idaho Code section 6-101(3) provides: "As used in this section, an 'action' does not include any of the following acts or proceedings: (f) For the exercise of any right or remedy authorized by: (i) The Idaho uniform commercial code, title 28, Idaho Code, except the securing of a judgment on the secured debt, including a deficiency judgment, in a court in Idaho...." I.C. § 6-101(3)(f)(i). We recognize that a deficiency proceeding is separated by time from the proceedings to obtain judicial foreclosure; however, Idaho Code section 6-101(3)(f)(i) makes it clear that it is not deemed a separate action.

^[7]The district court specifically retained jurisdiction in the foreclosure action "for the purpose of making such further orders as may be necessary or desirable." AgStar's request for deficiency judgment was made by way of its Motion for Entry of a Deficiency Judgment, 2 not by way of filing a complaint, petition, or application with the court. It was **1277 *807 brought in the same case under the same case number as the original foreclosure action.

We conclude that the district court erred by applying an erroneous legal standard when it determined that the deficiency proceeding was a separate civil action under Idaho Code section 12-120(3) and awarded Gordon Paving attorney fees as the prevailing party solely based on the deficiency proceeding and without considering the entirety of the action.³ *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) ("the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis"). We therefore vacate the judgment awarding attorney fees to Gordon Paving and remand for the district court to determine which party, if any, prevailed in this action.

iii. The district court did not err when it held the bond agreement did not bar Gordon Paving from being awarded attorney fees.

^[8]Although we have vacated the award of attorney fees, we address AgStar's contention that the bond agreement bars an award of attorney fees to Gordon Paving, as that issue may arise on remand. The district court held that the bond agreement did not bar the award of attorney fees to Gordon Paving following the deficiency proceeding. The bond purchase agreement states:

Upon the occurrence of an Event of Default ... Investor may pursue all rights and remedies available under each or any of the Bond Security Documents, as well as any rights and remedies at law, or in equity, which it deems advisable for the protection of its interests to collect and enforce payment, and such rights and remedies shall be cumulative, The Issuer shall pay all expenses, court costs reasonable attorneys' fees incurred in connection with or arising out of any default hereunder.

The district court concluded:

[The] reason that I find that it does not apply is that it would be, in my view, unconscionable to have a clause that allows a prevailing party in a case—I'll look into the prevailing party analysis here in a minute—a prevailing party have to pay their own fees. Then the other side, as a nonprevailing party, could collect their fees. That is the interpretation that has sort of been given to this clause, and I just don't accept that, and I'm not going to enforce that.

AgStar contends that the plain language of the bond agreement prohibits the award of attorney fees to Gordon Paving. AgStar argues that a contract that contains an attorney fee provision establishes the right to such fee, and if a contract limits or disallows an award of fees, Idaho Code section 12-120 cannot override that provision.

AgStar points to the Idaho Court of Appeals' decision in *Chittenden & Eastman Co.*, wherein the court upheld a contract provision limiting the amount of attorney fees to 15% of the amount of the claim. *Chittenden & Eastman Co. v. Leasure*, 116 Idaho 981, 982, 783 P.2d 320, 321 (Ct. App. 1989). Further, AgStar cites to *Moore v. Omnicare, Inc.*, wherein this Court honored a contract provision that required each party to bear its own attorney fees. *Moore v. Omnicare, Inc.*, 141 Idaho 809, 818, 118 P.3d 141, 150 (2005). AgStar concludes that in the present case "Gordon Paving has contracted away all statutory rights to an award of attorney fees and costs."

Although we disagree with the district court's view that the agreement was unconscionable, we agree with its ultimate conclusion. This Court has consistently held that freedom of contract is "a fundamental concept underlying the law of contracts and is an essential element of the free enterprise system." *Zenner v. Holcomb*, 147 Idaho 444, 452, 210 P.3d 552, 560 (2009) (quoting *808 **1278 *Steiner Corp. v. American Dist. Telegraph*, 106 Idaho 787, 791, 683 P.2d 435, 439 (1984)). Thus, we have indicated that we will give effect to parties' agreements that are inconsistent with statutory provisions relating to awards of attorney fees.

In Farm Credit Bank of Spokane v. Wissel, 122 Idaho 565, 836 P.2d 511 (1992), the district court denied both parties' requests for attorney fees, holding there was no prevailing party in the action. Id. at 567, 836 P.2d at 513 (1992). The district court did not consider the contractual attorney fee provision contained in the lease. Id. The lease provided: "In the event that the Lessor does find it necessary to bring suit or action under the terms of this lease, then the Lessee hereby agrees to pay the Lessor's reasonable attorney fees and costs of suit incurred in said suit or action." Id. at 568, 836 P.2d at 514. Over a vigorous dissent from Justice Johnson, this Court held that the district court correctly concluded that there was no prevailing party; however, we vacated the judgment of the district court and remanded for a determination of the appellants' entitlement to attorney fees and costs pursuant to the conditions contained within the provision of the lease. Id. at 569, 836 P.2d at 515.

Two years later, in *Post v. Murphy*, 125 Idaho 473, 873 P.2d 118 (1994), this Court again considered the issue of awarding contractual attorney fees to a non-prevailing party and reached the same conclusion as the majority in *Farm Credit*. In *Post*, a restrictive covenant provided: "In the event that the Grantors shall employ legal counsel in connection with or to enforce these covenants and restrictions, then the persons with respect to which such employment occurs shall pay all costs incurred, including

reasonable attorneys' fees." *Id.* at 475, 873 P.2d at 120. This Court held: "Under *Farm Credit*, unless the contractual attorney fees provision specifically requires such, no 'prevailing party' requirement will be imposed on a contractual right to recover fees." *Id.* at 477, 873 P.2d at 122.

We are not asked, however, to decide whether AgStar is entitled to an award of attorney fees incurred in connection with the deficiency proceeding. Instead, the pertinent inquiry is whether the bond agreement prohibits an award of attorney fees to Gordon Paving. Because the bond agreement is silent as to this issue, we conclude that it does not. For that reason, we hold that the district court did not err when it concluded that the bond agreement did not bar the award of attorney fees to Gordon Paving.

B. The district court erred when it allowed AgStar to continue to sell the personal property collateral to satisfy the foreclosure judgment.

^[9]On September 18, 2014, the district court determined that AgStar was entitled to sell personal property collateral to satisfy Gordon Paving's debt, despite its earlier determination that AgStar was not entitled to a deficiency judgment.⁵ The district court concluded that "a creditor has the right to exhaust all of [its] collateral, irrespective of market values ... until the judgment is satisfied."

Gordon Paving contends that the district court erred by allowing AgStar to continue to sell personal property collateral after the district court denied AgStar's motion for deficiency judgment. Gordon Paving contends that the debt was satisfied in the foreclosure. AgStar responds that the plain language of Idaho's anti-deficiency statute only bars recovery of a deficiency judgment greater than the difference between the debt and the fair market value of the property sold; it does not bar a secured creditor from liquidating collateral in a serial fashion until the debt is fully satisfied.

As we previously noted, AgStar foreclosed its mortgage against Gordon Paving's real **1279 *809 property and purchased all of the property at a foreclosure sale on November 21, 2013, for credit bids totaling \$7,200,000. Then, AgStar sought a deficiency judgment of \$2,455,972.89. Following a hotly contested proceeding where both parties submitted expert testimony regarding the reasonable value of the real estate, the district court entered its memorandum decision in which the court meticulously sorted through the evidence to determine whether AgStar was entitled to additional monies. The district court concluded:

In summary, the Court finds that the reasonable values of the foreclosed properties totaled at least \$11,710,105 at the time of entry of the decree⁶ and that the amount owed by that decree, if prepayment penalty and attorney fees are included, was at most \$9,813,340. The burden of proving a deficiency lies with the plaintiff. Overall, Agstar has not proven by a preponderance of the evidence that the reasonable values of the foreclosed properties totaled less than the balance owed determined by the decree. Accordingly, AgStar's motion for deficiency judgment is DENIED.

(Emphasis added). Thus, the district court determined that by virtue of the foreclosure on the real property, AgStar obtained title to real property worth, at the least, \$1,896,765 more than the amount Gordon Paving owed to AgStar. Stated another way, the reasonable value of the foreclosed properties exceeded AgStar's credit bids by at least \$4,510,105. AgStar did not appeal the district court's valuations.

The question before this Court is whether, in spite of the surplus value received by AgStar in the real property foreclosure, AgStar was entitled to obtain additional recovery by realizing upon its personal property collateral. We hold that Gordon Paving's indebtedness to AgStar had been fully satisfied and it was not entitled to seek additional monies from Gordon Paving.

This case does not present a situation where entirely separate secured transactions were entered into between the parties. There was one transaction which was initiated when the parties entered into a bond purchase agreement on December 10, 2007. That agreement provided for an indebtedness in the initial amount of \$9 million, which was subsequently increased by \$1 million pursuant to a second agreement. Both agreements called for securing the indebtedness by a mortgage on Gordon Paving's real property, a security interest in Gordon Paving's principals. From the record, it appears that the real property was Gordon Paving's principal asset and the primary source of security for the debt. There was a single debt with three sources of security for payment.

^[10]There is scant authority dealing with this fact situation. However, the Court can look to closely related fact

situations to draw some conclusions. It should first be said that secured creditors have an undoubted right to recover full recompense from those to whom they have loaned money. However, both the Idaho Legislature and this Court have also been cognizant of the rights of debtors and reluctant to allow creditors to obtain excessive recompense.

[11]It has been contended that the following comment made by Judge Burnett in *Quintana v. Anthony*, 109 Idaho 977, 980, 712 P.2d 678, 681 (Ct. App. 1985) precludes relief for Gordon Paving:

Idaho Code **§** 6-101 supplemented by I.C. § 6-108, the deficiency limitation statute, during the Great Depression. The statutory scheme responded to a haunting spectre of mortgage debtors defaulting on loans, losing their property in distress sales and encountering massive deficiencies. These statutes have protected debtors by sheltering unmortgaged property from potential execution until mortgaged property **1280 *810 has been sold in a judicially supervised foreclosure.

It is unclear how this comment supports AgStar's case. It merely states that a creditor who holds a debt secured by a mortgage must proceed against the mortgaged real property before resorting to collection proceedings against unmortgaged property. That is true but it is rather beside the point here because, if the creditor proceeds first against the mortgaged real property and the debt is fully satisfied in the foreclosure proceeding, the creditor is precluded from pursuing additional recovery against either secured or unsecured property.

The case does demonstrate how the courts have employed equity in resolving issues like that presently before this Court. It should be noted that the court in *Quintana* was not dealing with a real estate mortgage. Rather, the question was whether real property subject to a vendor's lien could be foreclosed upon in the same manner as a mortgage, specifically whether the mortgagee could execute on property not subject to the vendor's lien before foreclosing the lien on the real property. *Id.* at 979, 712 P.2d at 680. The court recognized that:

A vendor's lien, like a mortgage, is a security device. But unlike a mortgage, which arises from agreement of the parties, a vendor's lien arises by operation of law, unless waived. It is a codified creature of equity.... Accordingly, the vendor's lien is "not a specific and absolute charge on the realty but a mere equitable right to resort to it [i.e. the property] on failure of payment by the vendee."

Id. at 980, 712 P.2d at 681. The court continued, "[n]evertheless, the legislative policies underlying our mortgage foreclosure statutes should guide the court's exercise of its equitable powers when enforcing a vendor's lien." Id. Judge Burnett's comment followed this observation, and the comment was followed by the court's finding that the protections provided to mortgagors by Sections 6-101 and 6-108 should apply equally in the situation of vendor's liens—"[i]n our view, parallel protections are appropriate and may be provided in equity, where sellers of real property assert the existence of vendors' liens." Id. Thus, while the mortgage statutes do not apply to the situation of vendor's liens, the courts have the equitable power to provide those protections and the court did so in Quintana.

This Court had the opportunity to discuss the legislative purpose of Idaho Code section 6-108 in *Eastern Idaho Production Credit Assn. v. Placerton, Inc.*, 100 Idaho 863, 606 P.2d 967 (1980). In that case, we observed that the statute "was added by the Idaho legislature in 1933 to afford greater protection to the large number of debtors facing the prospect of defaulting on their mortgage debts." *Id.* at 869, 606 P.2d at 973. We stated that "[t]he legislative purpose behind this type of statute is explained by Professor Osborne:"⁷

The mortgagee is not entitled to recover more than the full amount of his mortgage debt. When the mortgagee buys in the property at less than its actual value and gets a judgment [for deficiency] he is getting something more than a full recovery and getting it at the expense of the mortgagor. His profit is the difference between the actual value of the property and the price at which it is bid in. Such a profit usually accrues even in ordinary times, and in a depression it becomes so great as to be shocking. Taking into account the difficulties of boosting the amount that the property will fetch so as to close the gap, it is not difficult to understand why legislatures in the thirties turned to a new technique.

Instead of measures attempting to insure an adequate sale price of the property, the price obtained through the sheriff's sale was abandoned as a test of the deficiency. For it was substituted the "fair value," or some similar standard, of the premises.

Id. at 869–70, 606 P.2d at 973–74. Although the Osborne quote did not specifically address the situation where the mortgage indebtedness is also secured by personal property, it said that the mortgage creditor "is not entitled to recover more than the full amount of his mortgage debt." In this case, **1281 *811 the full amount of the mortgage debt, which is the same debt secured by the security interest, was determined by the district court to be, at most, \$9,813,340. The reasonable value of the foreclosed real property was determined, after a contested hearing, to be at least \$11,710,105. To allow AgStar to recover, at the least, \$1,896,765 more than the full amount of the mortgage debt, would certainly appear to be contrary to the Osborne quote approved by the Placerton Court.

In a decision issued by the Court of Appeals in 1986, *First Sec. Bank of Idaho v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986), the court was dealing with a situation where First Security's loan to the Stauffers was secured both by a mortgage on their real property and a security interest in their personal property. The court, speaking through Judge Walters, reiterated Judge Burnett's comment and then said:

I.C. § 28-9-501(4) provides for an action solely upon the personal property security agreement. First Security admits that it must give "credit" for the fair market value of the real property pursuant to I.C. § 6-108 as interpreted in *Eastern Idaho Production Credit, supra.* See also Ferry v. Fisk, 54 Cal.App. 763, 202 P. 964 (1921) (voluntary credit may extinguish debt).

Id. at 138, 730 P.2d at 1058. This seems to assume that a defaulting debtor is entitled to a credit against a debt secured both by real and personal property in the amount of the fair market value of real property, as determined by the court in a deficiency proceeding.

[12] The Court provided some guidance regarding the recovery of a deficiency on personal property collateral in

Mack Fin. Corp. v. Scott, 100 Idaho 889, 606 P.2d 993 (1980). Mack Financial sold a number of trucks to Scott's company on a group of conditional sales contracts. Id. at 890, 606 P.2d at 994. When Scott's company defaulted, Scott surrendered the trucks to Mack in February 1970. The trucks remained at Mack's property until they were sold at public auction nearly two years later. Scott owed Mack \$127,600 but only \$44,700 was received at the auction, leaving a deficiency somewhat in excess of \$85,000. Scott contended that Mack had not repossessed and sold the trucks in a commercially reasonable manner and, therefore, was not entitled to a deficiency judgment. Id. The district court

found that Mack's unexcused delay of nearly two years between its repossession of the collateral and its sale of the collateral at public auction resulted in a reduced price as a consequence of depreciation and constituted a commercially unreasonable disposition of the collateral in violation of the requirements of I.C. § 28-9-504(3).

Id. at 893, 606 P.2d at 997. Therefore, the district court denied Mack a deficiency judgment, which this Court affirmed. *Id.* While this is fairly routine application of Idaho law, the Court's next holding is much more pertinent to the current discussion. Scott had also given his personal guarantee of the indebtedness. The question became whether Mack could pursue its personal guarantee against Scott even though it had lost the right to seek a deficiency under the security interest. The Court stated the question:

The question to be decided is whether an unconditional guarantor may avail himself of the defense of the commercial unreasonableness of the creditor's disposition of collateral securing the obligation in an action by the creditor against the guarantor. The courts which have addressed the question have held that where the actions of the creditor impair the value of the collateral in its possession which secures an obligation guaranteed by a guarantor, either absolute or conditional, the guarantor will be discharged to the extent of the loss occasioned by the creditor.

Id. at 894, 606 P.2d at 998. The Court concluded:

We hold ... that the justified denial of a deficiency judgment against the principal obligor discharged the guarantor from liability for any such deficiency. Under these circumstances Mack is precluded from re **1282 *812 covering under the guaranties whether they are characterized as absolute or conditional.

Id. at 896, 606 P.2d at 1000. The fact situation here is obviously different but what is similar is that when AgStar sought a deficiency judgment in a contested proceeding that resulted in a final determination that the reasonable value of the foreclosed property greatly exceeded the outstanding indebtedness, it lost any right to claim any further deficiency and the ability to seek further recovery under the personal guarantee. In *Mack*, the Court was dealing with the same debt and two sources of security. In this case, we are dealing with the same debt and three sources of security. When a creditor is fully satisfied by one source, it may not pursue another.

Another important aspect of the *Mack* case is that the Court did not rely upon any provision of the UCC or any other statute to determine that Mack was not entitled to enforce its guarantee. While the Court denied the deficiency judgment based upon the UCC, the denial of recovery of additional funds under the guarantee was solely based on the equitable powers of the Court and not upon any statute. In this case, where the district court denied a deficiency because AgStar received the full value of Gordon Paving's debt plus almost \$2,000,000 in the foreclosure, a determination that AgStar did not appeal, it would be incorrect to hold that AgStar's debt had not been fully satisfied.

Another case that provides some enlightenment is *Portland Cattle Loan Co. v. Biehl*, 42 Idaho 39, 245 P. 88 (1925), where this Court stated upon a rehearing:

The complaint originally stated a cause of action in claim and delivery, but, by the supplemental complaint, it was alleged by the mortgagee that, subsequent to the institution of the action in claim and delivery, it had foreclosed its mortgage on a portion of the mortgaged chattels and had taken a deficiency judgment for the entire balance of its secured debt. While it would seem that the mortgagee was not entitled to a deficiency judgment against the mortgagor until it had subjected all the mortgaged property to the payment of the mortgage debt, the fact remains that judgment was actually made and entered for the deficiency.

The judgment left nothing to be adjudicated, and constituted a determination that the mortgage security had been exhausted. The deficiency judgment determined the rights of the mortgagee under the mortgage, and, while the judgment stands, appellant cannot go behind it and claim that, under the mortgage, it is entitled to the possession of the remainder of the mortgaged property. 5 Cal. Jur. 107; Ex parte Braun, 196 P. 499, 51 Cal.App. 202. The deficiency judgment for the sum remaining due, after crediting the sum received from a sale of a portion of the mortgaged chattels, deprives appellant of any right to the possession of any of the chattels covered by the mortgage and not disposed of at foreclosure sale.

Id. at 47–48, 245 P. at 90. At that time the single-action statute applied both to real and personal property. The Court noted that "C.S. § 6949, provides that: 'There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property.' " Id. at 44, 245 P. at 89.9 Nevertheless, this case is of interest because it holds that where a creditor forecloses against a portion of its security and obtains a deficiency judgment, it cannot then seek to recover against the additional security that was not sought in the first instance. Again, this is not the precise situation currently before the Court, but it gives an indication of how the Court has sought to provide a certain measure of equitable protection to debtors in the past.

Another somewhat related instance is where real property is sold on a title-retaining contract. Such a contract generally provides for an executed deed to the property to be placed in escrow and for the escrowholder to furnish the deed to the contract buyer upon payment of the purchase price. In the **1283 *813 event of a default, the contract generally provides that the escrow will be closed and the deed returned to the contract seller, who would then retake possession of the property. In those instances where a substantial part of the contract price has been paid, defaulting buyers justifiable complain that they have lost both the property and a good portion of the purchase price.

The courts have been attentive to the unfortunate plight of such contract buyers and adapted the doctrine of unjust enrichment to this situation to protect a defaulting buyer's interest. This remedy was explained by the Court of Appeals in *Hines v. Wells*, 120 Idaho 177, 814 P.2d 437 (Ct. App. 1991), as follows:

Where a forfeiture occurs under an installment land sale contract—the seller retaining both the payments

and the property—the defaulting purchaser may seek restitution for that part of the forfeiture deemed to constitute an "unconscionable penalty." ... Central to the equitable remedy of restitution is the principle against unjust enrichment. ... In order to establish his or her claim to restitution, the purchaser must show that the value of the property reverting to the seller, together with payments made under the contract, is disproportionate to the seller's actual damages.... The measure of "actual damages" allowed the vendor is, primarily, the difference between the contract price and the value of the property at the time of breach.

Id. at 179, 814 P.2d at 439 (internal citations omitted). In other words, the seller of the property was not entitled to recover more than the actual amount of damages sustained in this type of secured transaction. Again, this conclusion is not a result of any statutory protection for debtors but, rather, an application of equitable principles by the courts.

The foregoing cases demonstrate that equitable principles are the key to resolving the question of whether or not a deficiency is appropriate upon foreclosure of various types of security interests. The hallmark of these cases is that they arrived at a reasonable resolution after balancing the equities between the creditor and debtor. In the situation of a mortgage foreclosure, the Legislature has dictated that a court consider the "reasonable value" of the property at issue in determining whether or not to grant a deficiency judgment. I.C. § 6-108. It should be noted that the Legislature adopted this section on an emergency basis during the depth of the Great Depression in 1933 as a means of protecting mortgagors. See 1933 Idaho Sess. Laws, ch. 150, P. 229. Since that time, the courts have often conflated "reasonable value" with "market value." However, the Legislature obviously knew there was a difference. Real property values in the Depression were severely depressed, resulting in mortgagors "encountering massive deficiencies," as noted by Judge Burnett in *Quintana* and by the *Placerton* Court's Osborne quote. At the time of the enactment of Section 6-108, it is highly likely that the reasonable value of real property would substantially exceed the market value. A reasonable value would take into consideration the market value of the property, but also factors such as the reasonableness of the creditor's actions in setting up and conducting the sale, the prevailing market conditions in the economy, whether a credit bid was shockingly low, and so on.

On the other hand, a reasonable value provides substantial protection for creditors in normal times. A forced judicial sale that is not based upon market conditions will often produce a lesser purchase price than the appraised market value. Except where the creditor is the purchaser at a forced judicial sale, the creditor should not be stuck with a market value figure when seeking a deficiency judgment. The creditor should be able to show that the purchase price paid by a third party at the sale was less, even substantially less, than would have been realized in an arm's-length market value transaction. The reasonable value language in Section 6-108 can make adjustments for sale conditions and provide protection for both creditors and debtors depending on the market conditions that prevail. A reasonable value determination allows the court to consider these matters, make a reasoned determination of the value the creditor actually received by virtue of its credit bid, and make an equitable decision.

were foreclosed under the same statute until adoption of the UCC in 1967. However, under the UCC the same basic principles continued to apply to a creditor's effort to obtain a deficiency after the disposition of personal property subject to a security interest. Presently, no deficiency is available if the creditor fails to dispose of the personal property in a commercially reasonable manner. This is a continuation of the equitable treatment of the issue that stems from our earlier history. Again, it balances the equities between the parties in coming to a reasonable resolution.

[14]Where a secured creditor who holds more than one source of security for the same debt seeks a deficiency judgment after having foreclosed on mortgaged real property and obtained title to such real property by credit bid in the foreclosure sale, the Court should utilize its equity powers to consider the debt satisfied where the reasonable value of the real property is litigated and determined to be substantially greater than the debt.10 It must be remembered that where the creditor acquires the property through a credit bid, the creditor has absolutely no incentive to offer anywhere near a market value price. A credit bid in these circumstances is an artificial price that is often designed to allow the creditor to then pursue additional value through other sources, such as guarantees and security interests in personal property. Here, as noted by the district court, "AgStar's credit bids were based upon an appraisal report completed by Brent Stanger who was employed by AgStar." In the deficiency proceeding,

the district court considered Stanger's valuations and found them to be much too low. For example, the court noted that Stanger had valued the Twin Falls County gravel pits for Gordon Paving in 2005 and then valued them for AgStar in 2012, about a year before entry of the foreclosure decree. According to the court:

The Court is not convinced that the value of these four pits has plummeted from the \$7,000,000 value attributed to them by Stanger in 2005 to a value of \$4,240,000 based upon his revised 2012 appraisal. The Court rejects Mr. Stanger's opinion expressed in this trial as to the value of these pits. The Court finds the reasonable value of the Twin Falls pits at the time of sale is <u>at least</u> \$7,000,000 as it was in 2005.

It is inequitable to allow a mortgagee to acquire foreclosed real property with an unrealistically low credit bid and then use that sale price as a credit against the overall debt so as to permit additional recovery, even when the court has determined in a contested proceeding that the creditor realized substantially more than the total amount of the debt at the foreclosure sale. The reasonable value of the real property, as determined in a final order in the contested deficiency proceeding, should be credited against the debt to reduce or eliminate it. When a debt has been fully satisfied by one source of security, whether in monetary recovery or in kind recovery of property, the debt should be considered extinguished and the creditor should be unable to seek additional recovery. If a creditor is able to use an unrealistically low credit bid to determine how much should be credited against the overall debt, there is nothing to stop the creditor from putting in a low-ball bid so as to collect a windfall.

AgStar had the option of going directly against the guarantors to recover the entire amount of the indebtedness. The guarantee contract allowed AgStar to do that. However, had it done so and received full payment from the guarantors, it would not have been allowed to proceed against the real and personal property. The debt would have been fully paid.

In this instance, AgStar bid the property in at \$7,200,000 and then sought a deficiency. It was not forced to do so. It chose to do so. AgStar placed at issue the reasonable value of the property and had the obligation to show that the amount it paid was reasonable. It was unable to do so. Despite the opportunity to justify the credit bids it

submitted, it turns out that it paid \$4,510,105 less than what the district court determined to be the reasonable value of the property. AgStar took a chance and received a determination **1285 *815 that Gordon Paving's obligation had been fully paid. It did not appeal the court's determination of the reasonable value of the property and is collaterally estopped¹¹ from claiming that the property was worth less than the value determined by the district court. Thus, the adjudicated reasonable value should be credited against Gordon Paving's indebtedness as of the time of the execution sale. That would effectively extinguish the debt, precluding AgStar from pursuing additional payments from any source.

This outcome is not based upon any direct application of Idaho Code section 6-108. While it is true that Section 6-108 has the effect of limiting the amount of any deficiency, it also has the incidental purpose of assisting courts in determining whether a creditor has submitted a reasonable credit bid for the property, i.e. one bearing a reasonable relationship to the actual value of the property, as well as determining how much should be credited to the debtor's outstanding obligation. Where a trial court determines the reasonable value of the real property and such decision becomes final, that is the amount that is to be credited against the debt.

During a contested deficiency proceeding, both sides can address all aspects of the sale in determining the reasonable value of the property. The hotly contested deficiency proceeding in this case allowed both parties to fully explore valuation issues, as each side brought in multiple experts to address the pertinent issues playing into the appraisal figures they gave.

[15] In light of the foregoing, we hold that where a creditor has several sources of security for a single debt, the creditor must proceed to recover in a reasonable manner and that, while a creditor is entitled to full recompense, it is not entitled to place undue financial burdens on its debtor. In this case, AgStar took a chance when it sought a deficiency judgment against Gordon Paving even though it had come out almost two million dollars ahead by virtue of the real property foreclosure. Despite that, it sought a deficiency of almost two and a half million dollars, which would have disadvantaged Gordon Paving to the tune of about four and a half million dollars. AgStar failed in its quest for the deficiency when the district court ruled that it had received value of almost two million dollars over the amount owed, including interest, prepayment penalty, costs, and attorney fees. A creditor in AgStar's position could certainly appeal the district court's valuation of property in a deficiency proceeding, but AgStar failed to do so here. The reasonable value

determined by the district court should have been credited against Gordon Paving's outstanding obligation, thereby resulting in full satisfaction of the debt. We hold that AgStar was more than made whole by virtue of the foreclosure and was entitled to no other recovery. Thus, we reverse the district court's decision allowing AgStar to sell the personal property.

C. This Court does not reach the issue of the district court's award of post-judgment attorney fees to AgStar because Gordon Paving does not support its claim with sufficient argument or authority.

claim with sufficient argument or authority.
[16] [17] [18] [19] Gordon Paving argues that AgStar's petition for post-judgment attorney fees was untimely. However, Gordon Paving fails to cite case law or statutory authority to support its claim. "We will not consider an issue not supported by argument and authority in the opening brief. Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (internal quotations and citations omitted). "When issues on **1286 *816 appeal are not supported by propositions of law, authority, or argument, they will not be considered. ... A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." Gem State Ins. Co. v. Hutchison, 145 Idaho 10, 16, 175 P.3d 172, 178 (2007) (quoting Anson v. Les Bois Race Track, Inc., 130 Idaho 303, 304, 939 P.2d 1382, 1383 (1997)); see also I.A.R. 35(a)(6).

D. Because we remand the case on the issue of the district court's award of attorney fees following the deficiency judgment, this Court does not reach the exemption issue.

Gordon Paving argues that the district court erred by allowing AgStar to claim exemption on the TKT Trucking royalty check after Gordon Paving attempted to garnish the royalties to satisfy its judgment for attorney fees in connection with the deficiency proceedings. Because we have vacated that judgment for attorney fees, we do not address this issue.

E. We do not award either party attorney fees or costs on appeal.

[20] AgStar requests attorney fees on appeal under Idaho Code sections 12-120(3) or 12-120(5). Gordon Paving

requests attorney fees under Idaho Code section 12-120(3). Although Gordon Paving has prevailed on its cross-appeal, AgStar prevailed on the attorney fee issues it raised on appeal. Each party prevailed in part. Therefore, we do not award either party attorney fees or costs on appeal.

IV.

CONCLUSION

We reverse the district court's order allowing AgStar to sell the personal property collateral to satisfy the foreclosure judgment. We vacate the district court's November 18, 2014, judgment awarding attorney fees and costs to Gordon Paving. We remand for the district court to determine attorney fee and cost issues and to take other action consistent with this Opinion. We do not award attorney fees or costs on appeal.

Chief Justice BURDICK and Justice W. JONES concur.

Justice EISMANN, concurring in part and dissenting in part.

I concur in the majority opinion except with respect to Part III.B., in which I respectfully dissent. Under Idaho law, AgStar could continue selling personal property collateral to satisfy the unpaid amount of its debt.

Idaho Code section 6-108 limits deficiency judgments; it does not purport to limit collecting against collateral. It states:

No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the

decree upon the taking of evidence of such value.

Collecting against collateral governed by the Idaho Uniform Commercial Code is expressly excluded from the provisions of Chapter 1, Title 6, of the Idaho Code. Idaho Code section 6-101(3) states:

As used in this section, an "action" does not include any of the following acts or proceedings:

....

- (f) For the exercise of any right or remedy authorized by:
 - (i) The Idaho uniform commercial code, title 28, Idaho Code, except the securing of a judgment on the secured debt, including a deficiency judgment, in a court in Idaho;

Idaho Code section 6-101(1) begins, "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter." (Emphases added.) Exercising a remedy under the Idaho Uniform Commercial **1287 *817 Code that does not seek either a judgment on a secured debt or a deficiency judgment is expressly stated not to be an action. A judgment on a secured debt would be a judgment for the amount owing on that debt. It would not include a judgment ordering the debtor to turn over collateral because that judgment would not be on the secured debt. The debt and the collateral are two separate things. Therefore, any such remedy is excluded from the provisions of Chapter 1, Title 6, Idaho Code.

Idaho Code section 6-101(3) cannot be circumvented by contending that the value of the real property purchased at the foreclosure sale should be credited against the amount owing. That holding is contrary to the provisions of Idaho Code section 6-101(1).

When the mortgaged property is ordered sold, Idaho Code section 6-101(1) states that "the court may, by its judgment, direct ... the application of the proceeds of the sale to the payment of the costs of the court and the

expenses of the sale, and the amount due to the plaintiff." The word proceeds means "the amount of money received from a sale." Black's Law Dictionary 1222 (7th ed. 1999). That definition is consistent with Idaho Code section 6-102, which states, "If there be surplus money remaining after payment of the amount due on the mortgage, lien or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court." A credit bid is considered to be the same as a cash bid. Fed. Home Loan Mortg. Corp. v. Appel, 143 Idaho 42, 45, 137 P.3d 429, 432 (2006). As this Court stated in the Federal Home Loan Mortgage case, "There is no reason why the holder of the deed of trust note should not be able to purchase the property at a trustee sale by bidding in all or part of the amount owing pursuant to the note.... His bid, if successful, immediately reduces or eliminates the debtor's obligation." Id.

When a mortgagee makes a credit bid, the amount of that bid is the proceeds of the sale. In order to obtain its desired result, the majority ignores Idaho Code section 6-101(1) and creates the fiction that the proceeds from the sale of real property are the value of the real property sold. I cannot agree with the majority because I believe that the Court should follow the applicable law. I would decide this case simply by following the statute.

The mortgagor has a statutory remedy if the mortgaged property is sold for significantly less than its fair market value. Pursuant to Idaho Code section 11-401, the mortgagor has a right of redemption. If the mortgagor could find a purchaser who was willing to pay what the mortgagor claims the property is worth, the mortgagor could sell its right of redemption to that purchaser.

Justice **HORTON** concurs.

All Citations

161 Idaho 801, 391 P.3d 1271

Footnotes

- The record does not contain an order regarding the prepayment penalty and the judgment of foreclosure was not subsequently amended. The district court's memorandum opinion of August 28, 2014, recited its earlier determination of AgStar's entitlement to a prepayment penalty in its description of the procedural posture of the case.
- The motion is not contained within the record. The register of actions reflects the title of the document. Likewise, the district court's decision on the subject was captioned "Memorandum Opinion re Plaintiff's Motion for Deficiency

Judgment."

- Although not a subject of this appeal, we note that the district court awarded attorney fees and costs to AgStar on September 30, 2013. The basis for the award is unclear from the record. If the award was made under Idaho Code section 12-120(3), it would likewise have been made in error.
- 4 "This Court applies contract principles to interpret restrictive covenants." *Adams v. Kimberley One Townhouse Owner's Ass'n, Inc.*, 158 Idaho 770, 773, 352 P.3d 492, 495 (2015) (citing *Sky Canyon Props. v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013)).
- There does not appear to be any dispute that the value of the personal property is much less than the approximately \$2.5 million difference between Gordon Paving's debt under the bond agreements and the \$7,200,000 in credit bids AgStar made to purchase the real property collateral.
- The district court appears to have misspoken here with regard to actual valuation dates. The court's memorandum decision indicates that most of the property valuations were made as of the date of the foreclosure sale, despite the reference here to the time of the decree. The court did observe that Idaho Code section 6-108 calls for the reasonable value to be stated in the foreclosure decree. However, neither party has raised an issue in this appeal regarding the proper time of the valuation of the property parcels so there is no need to address the matter.
- G. Osborne, Handbook on the Law of Mortgages § 335 (2d ed. 1970).
- Section 28-9-504(3) has since been replaced, but current provisions of the UCC provide basically the same remedy where collateral is not disposed of in a commercially reasonable manner. See I.C. §§ 28-9-625 to 628.
- This language was codified in Idaho Code section 6-101 and remained in effect until 1967 when "or personal property" was stricken to reflect the fact that the Legislature had adopted the UCC to apply to personal property. 1967 Sess. Laws, ch. 272, § 1, pp. 745, 747.
- This would not apply where the purchaser at the foreclosure sale is not the secured creditor or an affiliated buyer, as there is less incentive and opportunity for overreaching.
- It appears that the five elements of collateral estoppel, as outlined in *Berkshire Invs. LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012), are present here—(1) AgStar had a full and fair opportunity to litigate the reasonable value of the foreclosed real property; (2) that same issue is presented here; (3) the reasonable value issue was decided in the deficiency proceeding; (4) neither party has appealed the reasonable value determination made by the district court and it cannot be raised at this late stage; and (5) AgStar was a party to the deficiency proceeding.

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163 Idaho 378 Supreme Court of Idaho, Boise, December 2017 Term.

STATE of Idaho, Plaintiff-Respondent, v. Justin Keith AUSTIN, Defendant-Appellant.

Docket No. 44276

Filed: March 6, 2018

Synopsis

Background: Defendant was convicted in the District Court, Fourth Judicial District, Ada County, Michael Reardon, J., of driving under the influence (DUI). Defendant appealed.

Holdings: The Supreme Court, Brody, J., held that:

- blood alcohol concentration test results, while sufficient for State to show defendant was above the legal blood-alcohol limit at the time the test was administered, could not be the sole basis for excluding extrapolation evidence offered by defendant in defense of DUI charge, abrogating *State v. Tomlinson*, 159 Idaho 112, 357 P.3d 238,
- trial court's error in precluding defendant from presenting evidence contrary to blood alcohol level test results was not harmless.

Vacated and remanded.

West Headnotes (6)

Criminal Law Admissibility

The admission of expert testimony is reviewed for abuse of discretion.

Cases that cite this headnote

[2] Criminal Law

←Discretion of Lower Court

The Supreme Court considers an appeal from a lower court's discretionary decision based on three factors: (1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the bounds of that discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason.

Cases that cite this headnote

[3] Courts

Highest appellate court

←Intermediate appellate court

Precedent from the Supreme Court and the Court of Appeals is binding upon the district courts in Idaho.

Cases that cite this headnote

[4] Automobiles

Evidence of Sobriety Tests

Criminal Law

←Intoxication

Blood alcohol concentration test results, while sufficient for State to show defendant was above the legal blood-alcohol limit at the time the test was administered, could not be the sole basis for excluding expert extrapolation evidence offered by defendant in defense of driving under the influence (DUI) charge; the test results did not act to remove the violation's nexus to driving, or mandate an unassailable conclusion not open to defense, abrogating *State v. Tomlinson*, 159 Idaho 112, 357 P.3d 238.

18-8004(1)(a).

Cases that cite this headnote

[5] Criminal Law

Exclusion of Evidence

Trial court's error in precluding defendant from presenting evidence contrary to blood alcohol level test results was not harmless, in prosecution for driving under the influence (DUI); while the trial court was following precedent, it conceptually agreed that its ruling limited defendant's ability to present a defense, a substantial right, and because the State charged defendant on alternative DUI theories, impairment and the per se theory, and jury instructions were provided on both, there was no indication on which theory defendant was convicted. Idaho Code Ann. § 18-8004(1)(a).

Cases that cite this headnote

[6] Criminal Law

Rulings as to Evidence in General

A judgment may not be disturbed on appeal due to error in an evidentiary ruling unless the error affected the substantial rights of a party.

Cases that cite this headnote

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Michael Reardon, District Judge.

The district court's judgment of conviction is vacated.

Attorneys and Law Firms

Eric D. Fredericksen, State Appellate Public Defender, Boise, for appellant. Reed Anderson argued.

Hon. Lawrence G. Wasden, Idaho Attorney General,

Boise, for respondent. Theodore S. Tollefson argued.

Opinion

BRODY, Justice

*779 This case addresses whether a defendant accused of DUI can present expert testimony regarding his alcohol concentration at the time he was driving. In April 2015, an Ada County Sheriff's Deputy pulled Justin Keith Austin over for failure to use a turn signal. During the stop, the deputy detected the smell of alcohol, and Austin's appearance further led the deputy to believe he was driving under the influence. After performing a field sobriety test, he arrested Austin and approximately thirty minutes after the initial stop conducted two breath tests that demonstrated alcohol concentrations above Idaho's legal limit. Austin claimed that his consumption of three drinks in a short period of time just before the stop contributed to a rising alcohol concentration as he waited for the breath tests, and sought to introduce expert testimony to that effect. The district court granted the State's motion in limine to exclude expert testimony as to his actual alcohol concentration as irrelevant under the DUI statute's "per se" provision as interpreted by Idaho precedent. On appeal, Austin challenges the decision to grant the State's motion, and alternatively challenges the DUI statute as overbroad or void for vagueness where there is no time limit within which approved alcohol concentration testing must be done to be used as evidence of a crime. The district court did precisely what it is required to do when confronted with the motion in limine. It applied binding case law to grant the motion in limine. We now clarify the law and are compelled to hold that the district court's decision to grant the State's motion in limine constituted an abuse of discretion because it was not consistent with the legal standard we now clarify. We vacate the judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Just after midnight on April 5, 2015, Ada County Sheriff's Deputy Richardson observed a vehicle make a left-hand turn to exit a service station without using a turn signal so he conducted a traffic stop. Upon contacting the driver, Justin Keith Austin, Deputy Richardson observed "bloodshot, glassy eyes and a strong odor of alcohol coming out of the vehicle." Austin informed Deputy Richardson that he had recently consumed three alcoholic drinks, and Deputy Richardson then had him perform a

field sobriety test. He failed. Deputy Richardson then performed two breath tests on Austin, which showed an alcohol concentration of 0.085 percent for the first test and 0.086 percent for the second. Deputy Richardson conducted the breath tests just over thirty minutes after the initial stop. The State charged Austin under both of Idaho Code section 18-8004's DUI theories: that he drove or was in physical control of a motor vehicle either (1) while under the influence of alcohol or drugs (the "impairment theory"), or (2) with an alcohol concentration of 0.08 percent or more (the "per se theory").

introduce Austin sought to expert testimony demonstrating that his recent and rapid consumption of alcohol just before being pulled over-three drinks immediately before driving-would have resulted in Austin's alcohol concentration rising for the thirty-minute period from when he was pulled over to when he was tested. In essence, his claim was that his alcohol concentration was not over the legal limit at the time he was physically driving. Austin disclosed to the State a letter from his expert Loring Beals, a clinical toxicologist, that stated, "Based on his gender, height and weight (175 lbs.) I calculate that at the time he was stopped his alcohol concentration would have been around .06 to .065 rising to the higher level by the time he was actually tested a half hour later." The State filed a motion in limine seeking to exclude any testimony attempting to extrapolate Austin's alcohol concentration at the time he was driving, or any testimony that Austin's alcohol concentration was rising between the traffic stop and the breath test.

On March 9, 2016, the district court held a hearing on the motion. Before trial, on March 14, 2016, the court issued its ruling on the motion, stating that extrapolation evidence was irrelevant to the per se theory under binding Idaho precedent, but that Austin *780 could present this evidence to attempt to rebut the State's impairment theory. Austin decided not to call his expert witness. The jury convicted Austin. He timely appealed.

II. STANDARD OF REVIEW

[1] [2] The admission of expert testimony is reviewed for abuse of discretion. *State v. Faught*, 127 Idaho 873, 875, 908 P.2d 566, 568 (1995). This Court considers an appeal from a lower court's discretionary decision based on three factors: "(1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the bounds of that discretion and consistent with

the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason." *State v. Pratt*, 128 Idaho 207, 211, 912 P.2d 94, 98 (1996).

III. ANALYSIS

A. The district court abused its discretion when it granted the State's motion in limine to exclude expert extrapolation evidence as irrelevant to a per se DUI violation.

Austin contends the district court abused its discretion by not applying the applicable legal standards or exercising reason in its decision in this case. He claims that the district court misapplied Idaho precedent by reading the relevant holdings' interpretations of the per se rule as not requiring the State to prove Austin had an alcohol concentration of 0.08 percent while driving, but merely at the time of the test. The State argues that the district court correctly interpreted precedent, which dictates that the only relevant alcohol concentration for a per se violation is that at the time of the test, not when he was driving.

Idaho Code section 18-8004(1)(a) states:

It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

Two Idaho cases interpreting this statute primarily informed the district court's decision in this case. First, in June 2012, this Court decided *Elias-Cruz v. Idaho Department of Transportation*, 153 Idaho 200, 280 P.3d 703 (2012). In *Elias-Cruz*, an Idaho State Trooper stopped an underage driver for speeding and subsequently administered breath tests. *Id.* at 201, 280 P.3d at 704. The tests showed an alcohol concentration of 0.021 and 0.020 percent. *Id.* Under Idaho law, an underage driver can have

her license suspended for a breath test demonstrating an alcohol concentration of at least 0.02 percent. I.C. § 18-8004(1)(d). Elias-Cruz sought to introduce evidence of the testing equipment's margin of error to prove her actual alcohol concentration could have been under the legal limit. *Elias-Cruz*, 153 Idaho at 202, 280 P.3d at 705. This Court stated:

Where the prosecution elects to use the per se method, the question is what the alcohol level was at the time the sample was taken. "The lapse of time prior to the extraction of samples goes to the weight to be afforded the test results and not to their admissibility." For that reason, it is appropriate to admit results drawn an hour or more after the alleged offense without having to actually extrapolate the evidence back to the time of the alleged offense.

Id. at 203, 280 P.3d at 706 (quoting State v. Robinett, 141 Idaho 110, 113, 106 P.3d 436, 439 (2005)). The Court further held that, after the 1987 amendment to the DUI statute, "a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements." Id. at 204, 280 P.3d at 707. The 1987 amendment also defined an "evidentiary test for alcohol concentration," which negated Elias-Cruz's proffered defense—demonstrating the machine's margin of error. Id.

The upshot of *Elias-Cruz* and the 1987 amendment was thus a twofold change in ***781** how the State could demonstrate a DUI violation under the statute's per se portion: (1) it no longer required the State to determine the level "of alcohol concentration in the blood," and (2) a test that comports with the statutory requirement, irrespective of margin of error, is sufficient to show a violation. *Id*.

Three years later—incidentally, two days after Austin was arrested in this case—the Court of Appeals decided State v. Tomlinson, 159 Idaho 112, 357 P.3d 238 (Ct. App. 2015). In Tomlinson, the Court of Appeals stated that "[t]he state is not required to extrapolate the result of an evidentiary test-whether it be for blood, breath, or urine—back to a time when the defendant was driving." Id. at 121–22, 357 P.3d at 247–48 (citing Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706; Robinett, 141 Idaho at 112, 106 P.3d at 438). The court then went one step further. Not only was the State not required to extrapolate alcohol concentration back to the time a defendant was driving or in control of a vehicle, the court determined that "the alcohol concentration in a defendant's blood, breath, or urine at the time he or she was driving is irrelevant." Id. at 122, 357 P.3d at 248.

^[3]In light of the *Tomlinson* decision, the district court understandably excluded the expert testimony. "The district court correctly observed that precedent from this Court and the Court of Appeals is binding upon the district courts in Idaho." *State v. Grist*, 147 Idaho 49, 53, 205 P.3d 1185, 1189 (2009) (citing *State v. Guzman*, 122 Idaho 981, 986, 842 P.2d 660, 665 (1992)).

[4] Austin argues that the prohibition against presenting any extrapolation evidence to defend against a per se DUI violation violated his due process right to present a defense in this case. He contends that the Tomlinson decision inappropriately extended this Court's *Elias-Cruz* decision. Austin claims that while Elias-Cruz dealt with hypothetical machine error—which is specifically addressed and disallowed as a defense under Subsection (4) of the DUI statute—Tomlinson's extension of that case to suggest that a driver's condition while driving is wholly irrelevant to the crime of DUI was error. The State counters that evidence of a driver's condition while driving is irrelevant once an approved test comes back demonstrating someone is over the legal limit, no matter when it is conducted, and that the statute is clear in that command: "Contrary to Austin's argument on appeal, the plain language of the statute does not require a defendant to have a blood alcohol level of 0.08 'while' driving."

Condensed to only the "per se" portion, the statute reads as follows (ellipses omitted for readability):

It is unlawful for any person who has an alcohol concentration of 0.08 or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle.

I.C. § 18-8004(1)(a). The State claims that the operative language is the "analysis" portion. The State further claims that some amount of common sense and prosecutorial discretion would prohibit unreasonable prosecutions, stating during the hearing, "Yeah, I mean, theoretically you could try to prosecute someone [for an approved test over the limit two days after driving]—I seriously doubt that any prosecutor in his right mind would try that. But what I'm—the point is that there's no—there's no time limit in Idaho." The State presumably then would read the statute as demanding guilt by imputing some level of alcohol intake prior to the operation of a vehicle in a specific case, followed by a statutorily-compliant alcohol-concentration test over the limit at *some* point following the traffic stop—bound only by prosecutorial discretion. We disagree.

The statute as written prohibits a person with an alcohol concentration of 0.08 percent or greater to drive or be in physical control of a vehicle. It also allows the state to demonstrate a person is over the legal limit by an "analysis of his blood, urine, or breath." I.C. § 18-8004(1)(a). Further, the statute relieves the State of a requirement to extrapolate back to the moment someone was driving or in control of the car. In other words, the test results are sufficient for the State to show a driver is above the legal limit. The test result, however, does not act to remove the violation's nexus to driving, nor does it *782 mandate an unassailable conclusion not open to defense. The Tomlinson decision erroneously extended the irrelevancy of a driver's actual alcohol concentration while driving—not required in the State's case-in-chief and not admissible as it relates to a machine's margin of error—to deny a defendant's right to present contrary evidence in his defense. Although the district court understandably relied on Tomlinson, its decision was not consistent with legal standards. Thus, the district court abused its discretion in granting the State's motion in limine and denying Austin's expert testimony as it related to the statute's per se section.

^[5] [6] Additionally, the State erroneously argues that excluding the expert testimony was harmless since it claims "Austin still would have been convicted under the impairment theory of DUI." "A judgment may not be disturbed on appeal due to error in an evidentiary ruling unless the error affected the substantial rights of a party." White v. Mock, 140 Idaho 882, 891, 104 P.3d 356, 365 (2004). The district court conceptually agreed that its ruling limited Austin's ability to present a

defense—certainly a defendant's substantial right—but followed precedent. The State charged Austin alternatively under both DUI theories, and the court provided jury instructions on both. There is no indication of which theory the jury convicted him. The inability to present an available defense to the per se violation in this case was not harmless.

Austin alternatively argued that the statute is unconstitutionally vague. Given our analysis above, the Court need not reach the constitutional question in order to decide this appeal.

IV. CONCLUSION

For the foregoing reasons, Austin's conviction below is vacated and the case remanded for further proceedings consistent with this opinion.

Chief Justice BURDICK, Justices JONES, HORTON and BEVAN concur.

All Citations

163 Idaho 378, 413 P.3d 778

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Robinett v. LoanCare, LLC, D.Idaho, April 25, 2018

160 Idaho 810 Supreme Court of Idaho, Boise, April 2016 Term.

 $Robert\ Aron\ KANTOR, \\ Plaintiff-Counterdefendant-Respondent, \\$

Sondra Louise KANTOR,
Defendant–Counterclaimant–Appellant

Docket No. 41946 | Filed: September 13, 2016

Synopsis

Background: Former husband brought action against former wife for breach of a property settlement agreement arising out of wife's refusal to sign documents in connection with a proposed short sale of certain jointly owned real property, and wife counterclaimed for breach of contract and breach of fiduciary duties. After wife failed to comply with an order requiring her to re-obtain her interest in the property from her boyfriend, and then convey that interest to husband so he could pursue a loan modification, the Fifth Judicial District Court, Blaine County, Robert J. Elgee, J., dismissed wife answer and counterclaim, and awarded judgment to husband. Wife appealed. Husband moved for attorney fees, and the District Court, Elgee, J., awarded fees. Wife appealed.

Holdings: The Supreme Court, Horton, J., held that:

- trial court improperly rewrote property settlement agreement when it ordered wife to convey her interest in the real property to husband;
- trial court could not dismiss wife's answer and counterclaim as a sanction for her failure to comply with the order; and
- husband did not breach property settlement agreement by making minimum payments on wife's credit card accounts.

Affirmed in part, reversed in part, and remanded.

West Headnotes (22)

[1] Contracts

←Ambiguity in general

Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.

Cases that cite this headnote

[2] Appeal and Error

Discretion of lower court; abuse of discretion

Supreme Court reviews orders imposing sanctions for abuse of discretion.

Cases that cite this headnote

Appeal and Error Abuse of discretion

The test for determining whether a judge abused his or her discretion is: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with applicable legal standards; and (3) whether the court reached its decision by an exercise of reason.

Cases that cite this headnote

[4] Appeal and Error

Review using standard applied below

When Supreme Court reviews a district court's ruling on a motion for summary judgment, it

employs the same standard properly employed by the district court when originally ruling on the motion.

Cases that cite this headnote

[5] Judgment

←Absence of issue of fact

Summary judgment is proper when there is no genuine issue of material fact and the only remaining questions are questions of law.

Cases that cite this headnote

[6] Appeal and Error

Summary Judgment

In reviewing a district court's ruling on a motion for summary judgment, Supreme Court liberally construes all disputed facts in favor of the nonmoving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion.

Cases that cite this headnote

[7] Appeal and Error

Summary judgment

Supreme Court may affirm a grant of summary judgment on alternative grounds that were presented to but not relied upon by the district court.

Cases that cite this headnote

[8] Constitutional Law

Resolution of non-constitutional questions before constitutional questions

As a general rule, Supreme Court will avoid constitutional questions when the case can be decided on other grounds.

Cases that cite this headnote

[9] Divorce

Rights in property in general

In action for breach of property settlement agreement between former husband and wife, trial court improperly rewrote agreement when it ordered wife to convey her interest in certain jointly owned real property to husband so that he could pursue a loan modification; agreement stated only that the property would be sold as soon as reasonably possible and that, in the event husband obtained refinancing of any debts, wife would "co-operate in any manner needed to conclude such refinancing after review of the refinancing documents and terms by her attorney and/or accountant," and husband did not obtain refinancing but was merely pursuing it.

Cases that cite this headnote

[10] Contracts

Rewriting, remaking, or revising contract Contracts

Terms implied as part of contract

When parties to a contract have not agreed to a term essential to determine their rights and duties, the court supplies a term reasonable in the circumstances; however, courts do not possess the roving power to rewrite contracts in order to make them more equitable.

2 Cases that cite this headnote

[11] Contracts

Unreasonable or Oppressive Contracts

Contracts

←Unconscionable Contracts

Equity may intervene to change the terms of a contract if the court finds unconscionable conduct serious enough to justify its interference; it is not sufficient, however, that the contractual provisions appear unwise or their enforcement may seem harsh.

1 Cases that cite this headnote

[12] Contracts

Rights and Liabilities on Breach

A district judge presiding over a contract dispute is not a czar empowered to resolve the litigation by fashioning remedies that he or she deems to be in the parties' best interests.

Cases that cite this headnote

[13] Divorce

←Jurisdiction and venue

Trial court in former husband's action against former wife for breach of a property settlement agreement could not dismiss wife's answer and her counterclaim alleging breach of contract and breach of fiduciary duties on the ground that entry of a supplemental decree in the underlying divorce action, which incorporated the property settlement agreement into the decree, deprived trial court of jurisdiction; trial court had subject matter jurisdiction over traditional contract actions and claimed breaches of fiduciary duties regardless of what happened in the divorce action.

Cases that cite this headnote

[14] Pretrial Procedure

←Disobedience to order of court or other misconduct

Trial court in former husband's action against former wife for breach of a property settlement agreement could not dismiss wife's answer and her counterclaim alleging breach of contract and breach of fiduciary duties as a sanction for her failure to comply with court order requiring her to re-obtain title to certain jointly owned real property from her boyfriend, to whom she had quitclaimed her interest; trial court rejected use of its contempt powers because it recognized that wife lacked ability to comply with order, and trial court failed to consider the factors required to be considered prior to a dismissal with prejudice as a sanction, and made no finding that wife acted in bad faith.

Cases that cite this headnote

[15] Constitutional Law

→Punishment

Contempt

←Ability to obey

Imposition of contempt sanctions upon a person who is unable to comply with the order which was violated is a violation of that person's due process rights. U.S. Const. Amend. 14.

Cases that cite this headnote

[16] **Pretrial Procedure**

Dismissal or default judgment

Pretrial Procedure

←Dismissal or default judgment

Pretrial Procedure

←Dismissal

Pretrial Procedure

Dismissal or default judgment

Due to the extreme nature of a dismissal with prejudice sanction, the trial court must consider three factors; the two primary factors are a clear record of delay and ineffective lesser sanctions, which must be bolstered by the presence of at least one aggravating factor, including delay resulting from intentional conduct, delay caused

by the plaintiff personally, or delay causing prejudice to the defendant.

Cases that cite this headnote

[17] **Appeal and Error**

Rulings by Lower Court

The record on appeal from a dismissal with prejudice as a sanction must show the trial court considered the necessary factors, including a clear record of delay, ineffective lesser sanctions, and an aggravating factor; the consideration of these factors must appear in the record in order to facilitate appellate review.

Cases that cite this headnote

[18] Contracts

€—Questions for Jury

Claims for breach of contract are to be decided by a jury, not by the trial court taking it upon itself to force the parties to a resolution that it deems to be in the parties' best interests.

Cases that cite this headnote

[19] Divorce

⊕Other particular provisions in general

Former husband did not breach property settlement agreement that required him to pay former wife's credit card debt by making minimum payments on the accounts; agreement did not require him to pay the debt within a certain time, and such an obligation was not a term essential to determine the rights and duties of the parties, such as would enable trial court to supply such a term.

1 Cases that cite this headnote

[20] Contracts

Time for performance where no time is specified

Where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance.

1 Cases that cite this headnote

[21] **Divorce**

€Estoppel

Any error by trial court in dismissing former wife's claim against former husband for violation of a term of property settlement agreement that required husband to provide wife with a password for a vacation company in which husband and wife owned an interest was invited by wife and, thus, was not reversible error, where dismissal was based on the representation by wife's former counsel that the issue was no longer in dispute between the parties.

Cases that cite this headnote

[22] Appeal and Error

←Invited, induced, or encouraged error **Appeal and Error**

Consent, acquiescence, or participation in error

One may not successfully complain of errors one has consented to or acquiesced in; in other words, invited errors are not reversible.

Cases that cite this headnote

**1082 Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Blaine County. Hon. Robert J. Elgee, District Judge.

The judgment of the district court is <u>affirmed</u> in part, <u>reversed</u> in part, and the case is <u>remanded</u> for further proceedings.

Attorneys and Law Firms

Thompson Smith Woolf & Anderson, PLLC, Idaho Falls, for appellant Sondra Kantor. Marty R. Anderson argued.

Ludwig Shoufler Miller Johnson, LLP, Boise, for respondent Robert Kantor. Scot M. Ludwig argued.

Opinion

HORTON, Justice.

*812 This is one of two consolidated cases that Robert and Sondra Kantor appealed to this Court; the other is *Kantor v. Kantor*, Docket No. 42980. This appeal is from the district court's dismissal of Sondra's claim that Robert breached a Property Settlement Agreement (PSA) as a sanction, its grant of summary judgment against her, and its award of attorney fees to Robert. We affirm in part, reverse in part, and remand the case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert and Sondra were married for forty-three years before they divorced in 2012. As part of their divorce settlement, Robert and Sondra entered into the PSA on April 25, 2012. The PSA divided the parties' property, including their interests in a number of business entities. The PSA did not result in an entirely clean break between the parties, as a number of Robert and Sondra's joint business ventures remained intact. A judgment of divorce was entered on April 30, 2012. This judgment did not incorporate the PSA.

Although this opinion will refer to other portions of the PSA, the following terms are of particular importance to this appeal:

5. REAL PROPERTY: The parties own real property located at 265 Golden Eagle Drive, Hailey, Idaho.

- **5.01** This real property shall be sold as soon as reasonably possible.
- **5.02** Pending the sale or disposition of this real property, Robert shall maintain the property and pay all utilities provided to the property....
- **5.03** Each party shall provide to the other any information either party receives that **1083 *813 may be relevant to the ownership, sale, rental or other disposition of said property.

...

28. DEBTS AFTER SIGNING OF AGREEMENT:

... In the event Robert shall obtain refinancing of any debts for which Sondra has liability, Sondra shall co-operate in any manner needed to conclude such refinancing after review of the refinancing documents and terms by her attorney and/or accountant.

29. MISCELLANEOUS PROVISIONS: ...

28.03 [sic] If action is instituted to enforce any of the terms of this Agreement, then the losing party agrees to pay to the prevailing party all costs and attorneys' fees incurred in that action.

This case initially related to the parties' efforts to sell the community residence which was the subject of Section 5 of the PSA (the property). The parties owed Bank of America approximately \$3.4 million on a note secured by the property and another bank \$1 million on a home equity line of credit (HELOC), which was secured by a second priority interest in the property. At the time, Bank of America was subject to a consent judgment in an action brought by the Department of Justice. That consent judgment required Bank of America to provide relief to qualifying customers in the form of loan forgiveness and restructuring of debts. The other bank completely forgave the parties' debt on the HELOC. This litigation results from Robert's efforts to seek debt forgiveness and/or restructuring of the \$3.4 million obligation to Bank of America which was secured by the property.

In late September of 2012, the parties contracted to sell the property in a short sale for \$2.4 million in a cash transaction scheduled to close within 30 days, contingent upon Bank of America's approval of the short sale. The parties were asked to sign a document that extended the period for the contingency to be satisfied to October 5, 2012. Sondra evidently perceived this as an opportunity to apply leverage to secure Robert's compliance with other terms of the PSA, and she sent him an email indicating that she would not extend the contingency until a number

of demands were satisfied.

On October 11, 2012, Robert responded to Sondra's demand by filing a complaint seeking contract damages and injunctive relief due to her failure to sign the extension agreement. Sondra signed the required document later the same day. In November of 2012, Sondra answered Robert's complaint and counterclaimed for breach of contract, an accounting relating to the parties' assets, and fraud. In that same month, the short sale fell through. This was through no fault of the parties; rather, Bank of America had failed to obtain a required appraisal.

In February of 2013, the Kantors entered into a second agreement with the prospective purchasers to sell the property for \$2.4 million. Although Bank of America initially approved this short sale in late March, whereby it would have waived a deficiency in excess of \$1.4 million, on April 3, 2013, it revoked that approval because Robert was pursuing a loan modification that had potential to result in even more of the parties' debt being forgiven.

In March, Robert moved for partial summary judgment, seeking a declaration that Sondra had breached the PSA by failing to timely sign the extension document and dismissal of Sondra's counterclaims for breach of contract and fraud. Robert's motion was heard on June 24, 2013. The district court granted summary judgment dismissing Sondra's breach of contract (Count I) and fraud (Count III) counterclaims and held that Sondra was obligated to sign the short sale extension document. Robert had argued that the attorney fees he had incurred were damages resulting from Sondra's failure to sign the short sale extension. The district court then ruled:

So her not signing did not cause the contract—and I want that underlined, did not cause contract damages. It did provoke a claim for fees, I'll rule on that, but that's **1084 *814 a judge issue, it's not a jury issue, so this issue won't go to the jury. That's an issue for the Court to determine who the prevailing party is and whether someone gets fees under a contract, under the divorce contract, or by statute or for some other reason.

On July 18, 2013, Robert moved for an award of attorney fees and costs totaling \$19,334.53 based upon the attorney fees provision of the PSA.

This action then morphed into a dispute over Robert's efforts to obtain a loan modification from Bank of America. On August 7, 2013, the district court entered its order permitting Sondra to amend her counterclaim. On August 9, 2013, Sondra filed an amended answer and counterclaim alleging that, among other things, Sondra had been damaged by Robert's attempts to obtain a loan modification. The same day, both parties sought injunctive relief. Sondra asked the district court to prohibit Robert from further pursuit of the loan modification and to require him to participate in the short sale of the property. Robert asked that Sondra be prohibited "from contacting Bank of America regarding the current financing" of the property.

The parties' respective motions for injunctive relief came before the court on September 12, 2013. There, Robert contended that a loan modification could reduce the parties' \$3.4 million debt to \$1.5 million. Three witnesses testified, including Sondra. She testified to her trepidation about pursuing the loan modification, expressing concern about letting Robert stay in the property indefinitely and the potential tax consequences of debt forgiveness. Following a recess, the parties announced a stipulation withdrawing their respective motions. Sondra agreed not to contact Bank of America in the four-month period before the scheduled trial, and Robert agreed to diligently pursue a loan modification from Bank of America. The Court entered an order consistent with the parties' stipulation on October 16, 2013.

On October 9, 2013, Robert filed a Motion to Compel Recording of Quitclaim Deed in which he asked that Sondra be required to quitclaim her interest in the property to him. In his supporting affidavit, Robert asserted that Bank of America required that Sondra quitclaim her interest in the property "to complete their loan modification review." Sondra took prompt action to defeat the district court's ability to grant such relief. The next day, Sondra quitclaimed her interest in the property to her boyfriend, Al LaPeter, in exchange for \$100 "subject to" the obligation to Bank of America.²

On October 17, 2013, Sondra submitted the PSA to the magistrate court in the parties' divorce action and requested that it be incorporated in a supplemental judgment. Proceedings related to this motion gave rise to the companion case in Docket No. 42980.

Robert's motion came before the district court for hearing on November 15, 2013. The district court stated: "What appears to me to be evident is that she has moved her interest away from herself in order to prevent the Court from ordering a transfer of the property to Mr. Kantor."

The court then made it clear that it intended to exercise control over the parties to achieve an end that it perceived to be in the parties' best interests:

I've got a lot of cards that I can play in this. I can say that people that want to play, I can see how this works, and I can impose sanctions. I can throw out people's defenses. I can throw out their cases. I can award attorney's fees. I've got a lot of arrows, and I don't want to sling them at anyone. I want to try and get what's best for both parties.

I told [Sondra's attorney] in chambers, I said if this goes forward, because the parties were having a discussion about it, it is absolutely not going to harm—to the extent I can prevent it, it's not going to harm Mrs. Kantor. Any benefit that would flow to Mr. Kantor is going to flow half to her because that's the purpose of the order. Whether you call it an order of sale or a contract agreement to sell the property, **1085 *815 whatever you call it, that's the purpose of it is to benefit both parties and to benefit them equally.

The district court then observed: "I can't order Mr. LaPeter to quitclaim the property back to Mrs. Kantor, but I can order that to the extent possible she has to obtain the property from Mr. LaPeter, obtain a quitclaim deed, and record a quitclaim deed to Mr. Kantor." The district court entered an order to this effect on November 20, 2013.

On November 18, 2013, Sondra delivered a quitclaim deed to Robert's attorney. This document was of little practical value in light of her earlier quitclaim deed to LaPeter. The same day, LaPeter sent an email to the parties' attorneys notifying them that he would not sign a deed to the property.

On November 20, 2013, Robert filed a motion asking for an order that Sondra be declared in contempt for her actions which frustrated his ability to secure a loan modification and imposing civil sanctions. This motion resulted in a bizarre and disturbing response from the district court. On the same date, the district court sent a lengthy email to the lawyers for the parties and the judge assigned to the Kantors' divorce action. This email stated, in part:

So with the consent and stipulation of Sondra, Mr. Kantor has pursued a loan modification, which, if successful, would result in B of A simply reducing the loan balance, and the information presented to the court is that it would be in the neighborhood of \$1M or possibly more.... Mr. Kantor has argued he is on the brink of a successful loan modification arrangement with B of A, and has sought a Quitclaim Deed from

Sondra in order to accomplish this goal, for the apparent benefit of both parties. After he filed a motion with this Court requesting the Court order Sondra to quitclaim the property to Bob, on October 10 of 2013, despite the **contractual agreement** to sell the house, Sondra deeded the house to a friend/confidant/person she apparently has a close relationship with, one Al LaPeter. This, obviously, frustrates the contractual obligation of Sondra to sell, which would ordinarily simply result in a cause of action for money damages; however, in this context it has also (arguably) frustrated Mr. Kantor's ability to lower the debt, and sell the house, and also provide both Bob and Sondra Kantor a significant monetary gain.

...

On November 15, after quite a bit of discussion in chambers, and some argument on the record, the Court entered an order directing Sondra to use her best efforts to re-obtain title from Al LaPeter and Ouit Claim her interest in the property to Bob Kantor by 10am Monday November 18 so that Bob could pursue a loan modification. By doing so, the Court was hopeful it could alleviate Sondra's concerns regarding "bank fraud", and, despite Sondra's efforts to the contrary, fulfill all of the contract objectives and allow Sondra to achieve some economic benefit in the process.... The Court notes from an exhibit C attached to Mr. Kantor's affidavit (a letter from [Sondra's attorney]-who now represents both Sondra and Al LaPeter) that Mr. LaPeter wishes to inspect the Kantor residence as a tenant in common, requests unqualified access to the property, and that he intends to use the property in accordance with his rights as a property owner.

•••

I will tell you right now that I will not be party to a contempt proceeding, and why I have, or will, choose an alternate process. [Sondra's lawyer] knows full well I cannot get at Mr. LaPeter by contempt proceedings. Mr. LaPeter is not a party to the case, and he has not been ordered to do, or not do, anything. Likewise, Sondra Kantor has a built-in defense. She can argue that she begged and pleaded for Mr. LaPeter to OuitClaim his interest back to her, and that he has refused, and there is nothing the Court can do about it. She is probably right. There is no reason to proceed along contempt lines. In addition, it is clear to me that I am probably operating at the outer limits of my authority by even ordering Sondra Kantor to execute a quitclaim deed to Bob Kantor for purposes of a loan modification when the Court's jurisdiction over the property is tenuous at best, particularly **1086 *816

when the PSA is not merged into the decree, (at least not yet.) I tried to make the contract workable, but I cannot if one party chooses to deliberately frustrate its objectives.... I wish the parties to know, in advance, exactly what I intend to do if Sondra and Mr. LaPeter choose to continue on the present course. Sondra Kantor chose to quitclaim the property to Mr. LaPeter, for whatever reasons. She also has a pending counterclaim. If she chooses to resist the Court's current order, either because she is unable to obtain title from Mr. LaPeter, or because she chooses not to execute a satisfactory quitclaim deed to Bob Kantor I will immediately. summarily dismiss counterclaim. Summarily. I will not even await nor require a motion from Bob Kantor.... She will not be allowed to ignore the Court's order, either explicitly or implicitly, and maintain a counterclaim. It will be dismissed with prejudice, as a sanction, for the reasons set forth in this email, and Bob Kantor may apply for attorney fees as the prevailing party in the pending case against Sondra, and the case will be over. OVER!!

...

Mr. Kantor could apply to the magistrate court for an order merging and incorporating the PSA into the decree of divorce. If that is accomplished, that court unquestionably has jurisdiction over the property, and is probably well within its authority to compel deeds between parties, regulate negotiation of the secured debt on the property, hold parties in contempt as necessary in order to enforce its orders....³

(bold, italics, capitalization, "QuitClaim" in original).

In short, the district court recognized that it had issued an order of dubious legality that could not be enforced by way of contempt, yet insisted that if it were not honored the district court would sanction Sondra without notice or an opportunity to be heard.

Sondra responded with an affidavit filed on November 22, 2013, in which she observed:

23. This Court is not in the real estate business. I respectfully submit the Court has no business trying to re-write the PSA with respect to the home. In my opinion, there is no hope for a profit. Our agreement was to get rid of the home by sale and get out of the debt. That was our intent. Bob filed this suit to enforce that very intent and it has evolved into him seeking a loan modification with the Court's indulgence. The Court has acknowledged it is out on a limb but inexplicably keeps pursuing Bob's agenda.

24. The property was not sold by me for only the sum

of \$100 as represented by the Court. Mr [sic] LaPeter bought the property SUBJECT TO the existing loan of approximately \$3.7M including arrearages....

The affidavit was not well-received by the district court. The following day (a Saturday), the district court sent out another lengthy email, again including the magistrate judge assigned to the divorce action⁴ among the recipients. If possible, this email was even more extraordinary than its predecessor. The district court stated, in pertinent part:

A short sale has no monetary benefit to either party, though it does relieve both from the dangers of a deficiency action. A loan modification, on the other hand, brings a possibility of economic gain for both parties. Maybe, maybe not. Bob has 65 days to try, and he has been successful already in negotiating a substantial forgiveness of secured debt with another bank. There is little downside to allowing a loan modification **effort**. Sondra avers that Mr. LaPeter took the property subject to the debt, and because of the loan balance he overpaid. That's nonsense. Let me know when he starts making loan payments. I **1087 *817 doubt he has obligated himself to Bank of America in any fashion.

..

In short, at the moment, Sondra's equity in the house is zero, and she has little to lose by standing by to see if a loan modification is possible.

The first principle here, which Sondra Kantor seems to ignore, is that when you dance with a gorilla you dance as long as the gorilla wants to. The gorilla here is the Bank of America. There is a second gorilla waiting in the wings, and that is the court. Nothing happens here without bank approval. NOTHING. There is no equity of Sondra that is at risk. The fact is the house is in significant default and is subject to being taken by the bank whenever it chooses to do so, and both parties, within 120 days or so, are at risk of a deficiency. That is an inescapable fact.

•••

The Court is in no better position to order a short sale than a loan modification. If it doesn't work, and work soon, the Court has many other options, depending on what the parties choose. That brings up the alternative, which is the Court's power to run things. (The second gorilla in the wings.)

..

<u>Court's exercise of sanctions if the present order is</u> ignored:

As noted before, the Court has tried to facilitate the contract between the parties, so that a sale pursuant to contract may be possible. At present that is not possible, both because of the debt against the house and Sondra's quitclaim deed to Mr. LaPeter. The Court can do nothing about the first matter, but it can about the second. When the issue first came up that Sondra had deeded the house away, the Court's first reaction was that she was attempting to put the house beyond the Court's (and Bob Kantor's) ability to do anything with it, and more importantly, do anything with the debt, (including, most likely, even seeking a short sale.) That suspicion appears to be confirmed. It is clear Sondra wants a short sale, so apparently the plan is to try to push for that, whereby Mr. LaPeter would presumably tender a quitclaim deed in order to accomplish that goal, when and if those two decided that it was convenient or advisable to do so. As I mentioned in the earlier email, I cannot force Sondra to force Mr. LaPeter to do anything. But if Sondra thinks she will be able to put the property beyond the Court's control, essentially ignoring her contract obligations, and most certainly thumbing her nose at the court, and yet she will be entitled to maintain her counterclaim in the same court, she is sadly mistaken. If those facts or suspicions were not enough, the Court's decision to threaten the sanction of dismissal of the counterclaim was cemented when the Court learned of Mr. LaPeter's threats to exercise his rights as a "co-tenant". That, in my view, was an attempt to pour gas on a burning fire, and that prompted my remark about some viewing this legal process as a sporting proposition. Not me. If there is no deed to Bob Kantor carrying Sondra's interest, along with Mr. LaPeters [sic], back to Bob Kantor, and soon, her case goes out the window. Their choice.

(bold, italics, underlining in original).

On December 10, 2013, a hearing was conducted on the district court's proposed sanctions. There, the district court made some interesting observations regarding its powers:

So I don't believe I'm rewriting the contract. I believe that I am threatening a sanction against her if she continues to make a sale impossible.

As to the contempt issue, I don't have to—I'm not required to pursue or allow a contempt obligation—or a contempt proceeding. The contempt power is the Court's to use or to not use. Contempt remedies are ordinarily fines or jail. They involve different, quirky

procedural rules. They involve different burdens of proof. They involve rights of the alleged contemnor, things like rights to remain silent. That's an unwieldy process in this context.

In my view, Ms. Kantor is defying the Court, whatever way you put it, and to me it's just like someone declining to produce **1088 *818 records or discovery or answer questions at a deposition or to do something like that. If the Court says, no, you produce these things or you answer these questions, and someone says, no, I won't, the Court doesn't have to say, you, you're in contempt and go through a contempt process. The Court can say, look, you're defying my order to do or not do something in a procedural order or whatever you want to call it, you're defying my order to do or not do something in the course of the case, and I get to choose the sanction.

She has moved the title of the property over to a third party deliberately There's no question she moved the title over to a third party deliberately, and in my view, she has done that to frustrate the process. She knows full well contempt won't work because, just as she put in her affidavit, oh, I used my best efforts, Mr. LaPeter won't give me the property back. And that's why I put in the email I choose not to go down that route. I can't hold Mr. LaPeter in contempt. I doubt very seriously if I could hold Ms. Kantor in contempt because I would be ordering to obtain title back from Mr. LaPeter. So I think contempt is useless—or contempt proceedings are useless under the circumstances.

Following this hearing, the district court entered an order consistent with its earlier email, modified by its recognition that a new magistrate judge was going to entertain Sondra's request to merge the PSA into the earlier divorce decree. Specifically, the district court gave Sondra until three days after the ruling on the merger motion to obtain a quitclaim deed from LaPeter and enjoined her from deeding her interest in the property to any other person. It further ordered that the proposed dismissal of Sondra's counterclaim would be with prejudice as to her ability to pursue a contract action before the district court. The district court recognized that if the magistrate court ordered the PSA merged, then the magistrate court might consider her claims in proceedings before that court.

On December 18, 2013, Robert moved for dismissal of Sondra's counterclaim based upon allegations that Sondra had contact with Bank of America in violation of the district court's order of October 16, 2013. On December 20, 2013, the magistrate court entered a supplemental decree of divorce that merged the PSA into the decree of

divorce. On December 20, 2013, Sondra moved for dismissal of the district court action, asserting that the district court lacked subject matter jurisdiction. She did not comply with the district court's order of December 10, 2013.

The parties' pending motions came before the district court for hearing on January 13, 2014. On January 23, 2014, the district court issued its memorandum opinion dismissing Sondra's counterclaim. There the district court stated:

Sondra's Amended Answer and Counterclaim are hereby dismissed for two reasons. The first reason is as a sanction for failure to abide by, at a minimum, the Court's December 10, 2013 order requiring her to re-obtain title to the real property from Al LaPeter to Sondra so that a sale of the property could be pursued, as previously agreed to by the parties in the marriage settlement contract. The second reason for dismissal is because Sondra requests dismissal, albeit on the grounds this Court lacks subject matter jurisdiction.

...

Accordingly, this dismissal is <u>without prejudice</u> to Sondra's pursuing these same claims (raised in her district court counterclaim) before [the magistrate judge assigned to the divorce action]. This dismissal is a bar, and is <u>with prejudice</u>, to Sondra raising any of these same claims in district court as breach of contract action with a claim for money damages, with or without a claim for a right of trial by jury.

(underlining original). On the same day, the district court entered judgment in favor of Robert and dismissing Sondra's counterclaim. Sondra timely appealed.

On February 4, 2014, Robert moved for an award of attorney fees, to which Sondra objected. The motion came before the district court for hearing on April 7, 2014. The district court determined that Robert had prevailed to the extent that it had granted **1089 *819 summary judgment holding that Sondra was obligated to sign the short sale extension document, explaining:

So while he didn't prevail on a claim for monetary damages because of the way the short sale failed, it appeared to be the bank's error, not something that Ms. Kantor caused. But he still got the attorney's fees or he still was a prevailing party because he was required to file to get her to sign, or

to get her to deliver the documents that he needed. So on that part I thought he was the prevailing party and I still do.

After that point in the litigation, the district court determined that there were mixed results which did not justify an award of attorney fees:

Perhaps I should say there wasn't a prevailing party.

•••

Mr. Kantor didn't prevail either. So she prevailed as much as he did. It really went out of here as a tie. Nothing got done after the amended counterclaim was filed. Nothing got definitively. I didn't make any determinations that either party really won or didn't win anything.

So when I say each party prevailed in part, that's because the rule says that the court can make that determination. I really probably should have said that there wasn't a prevailing party either way.

Relying upon the attorney fees provision of the PSA, the district court then awarded Robert the \$19,334.53 in attorney fees that he had requested following the grant of partial summary judgment. Sondra timely appealed.⁵

II. STANDARD OF REVIEW

[1] [2] [3] "Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact." *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). "This Court reviews other orders imposing sanctions for **abuse of discretion**." *Telford v. Nye*, 154 Idaho 606, 609, 301 P.3d 264, 267 (2013). "The test for determining whether a judge abused his or her discretion is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *Id.* at 610, 301 P.3d at 268.

[4] [5] [6] [7]. When this Court reviews a district court's ruling on a motion for summary judgment, it employs the same standard properly employed by the district court when originally ruling on the motion." *Chandler v. Hayden*, 147 Idaho 765, 768, 215 P.3d 485, 488 (2009). "Summary judgment is proper when there is no genuine

issue of material fact and the only remaining questions are questions of law." *Id.* "This Court liberally construes all disputed facts in favor of the nonmoving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion." *Id.* This Court may affirm a grant of summary judgment on alternative grounds that were presented to but not relied upon by the district court. *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 217–18, 177 P.3d 955, 964–65 (2008).

III. ANALYSIS

^[8]Sondra contends the district court erred by: (1) exercising equitable powers to re-write the PSA; (2) exercising jurisdiction after the magistrate court's order merging the PSA into the judgment in the divorce action; (3) imposing sanctions against Sondra; (4) violating her constitutional rights to **1090 *820 access the courts and to a jury trial; (5) granting partial summary judgment in Robert's favor on various issues relating to Robert's duties under the PSA unrelated to the sale of the property; and (6) awarding Robert attorney fees.

A. The district court erred by re-writing the parties' agreements when it required Sondra to convey her interest in the property to Robert.

Section 5 of the PSA provided:

- **5.** <u>REAL PROPERTY</u>: The parties own real property located at 265 Golden Eagle Drive, Hailey, Idaho.
 - **5.01** This real property shall be sold as soon as reasonably possible.
 - **5.02** Pending the sale or disposition of this real property, Robert shall maintain the property and pay all utilities provided to the property....
 - **5.03** Each party shall provide to the other any information either party receives that may be relevant to the ownership, sale, rental or other disposition of said property.

Paragraph twenty-eight of the PSA provided: "In the event Robert shall obtain refinancing of any debts for which Sondra has liability, Sondra shall co-operate in any manner needed to conclude such refinancing after review of the refinancing documents and terms by her attorney and/or accountant." As previously noted, on September 12, 2013, Sondra agreed to not interfere with Robert's

efforts to secure a loan modification:

Sondra Kantor, or her representative that she has control of, will not contact the B of A about this loan modification or short sale process between now and trial. The short sale will not be pursued between now and trial. And the loan modification will be undertaken as diligently as possible with B of A by Robert Kantor between now and trial.

^[9]These are the circumstances that led to the district court's order that Sondra convey her interest in the property to Robert. Sondra argues that the district court effectively rewrote the PSA when it required Sondra to convey her interest in the property to Robert in order to allow him to pursue the loan modification.

[10] [11] [W]hen parties to a contract have not agreed to a term essential to determine their rights and duties, the court supplies a term reasonable in the circumstances." Hull v. Giesler, 156 Idaho 765, 778, 331 P.3d 507, 520 (2014). However, "courts do not possess the roving power to rewrite contracts in order to make them more equitable." Losee v. Idaho Co., 148 Idaho 219, 223, 220 P.3d 575, 579 (2009). "Equity may intervene to change the terms of a contract if the court finds unconscionable conduct serious enough to justify its interference." Id. "It is not sufficient, however, that the contractual provisions appear unwise or their enforcement may seem harsh." Id.

We must emphasize that Robert's complaint alleged only a breach of contract based upon Sondra's failure to sign the extension agreement in connection with the first failed short sale. The complaint sought contract damages and injunctive relief, asking either that Sondra be ordered to execute all necessary documents to effectuate that sale or that Robert be given authority to sign on her behalf.

Although the PSA provided that Sondra would "co-operate in any manner needed" to obtain refinancing, her duty to do so arose only "[i]n the event" that Robert obtained refinancing. Robert did not obtain refinancing; he pursued refinancing. The district court's order requiring Sondra to transfer her interest in the property to Robert based upon the court's promise that it would make sure that "[a]ny benefit that would flow to Mr. Kantor is going to flow half to her" cannot be justified by the language of the PSA or the September 12, 2013 stipulation.

[12] The district judge's actions in this case reflect little recognition of the bounds **1091 *821 on judicial authority. A district judge presiding over a contract dispute is not a czar empowered to resolve the litigation by fashioning remedies that he or she deems to be in the parties' best interests. The district court erred by requiring Sondra to transfer her interest in the property to Robert.

B. The district court abused its discretion by dismissing Sondra's case as a sanction.

The district court dismissed Sondra's answer and counterclaim for two reasons: (1) "as a sanction for failure to abide by, at a minimum, the Court's December 10, 2013 order requiring her to re-obtain title to the real property from Al LaPeter to Sondra so that a sale of the property could be pursued, as previously agreed to by the parties in the marriage settlement contract" and (2) "because Sondra requests dismissal, albeit on the grounds this Court lacks subject matter jurisdiction."

[13] The district court's second ground for dismissal of Sondra's counterclaim merits only brief discussion. This was an action for breach of contract and a counterclaim alleging breach of contract and breach of fiduciary duties. "State courts have subject matter jurisdiction over traditional contract actions, a garden variety matter of state common law." *Borah v. McCandless*, 147 Idaho 73, 79, 205 P.3d 1209, 1215 (2009) (quoting *Sinclair & Co., Inc. v. Gurule*, 114 Idaho 362, 364, 757 P.2d 225, 227 (Ct.App. 1988)). Likewise, a district court has subject matter jurisdiction to resolve claimed breaches of fiduciary duties. *Bach v. Miller*, 144 Idaho 142, 144–45, 158 P.3d 305, 307–08 (2007). The void Supplemental Decree entered in the parties' divorce action did nothing to deprive the district court of this jurisdiction.

[14] The district court's dismissal of Sondra's counterclaim as a sanction requires substantially more discussion. Robert defends the district court's action, citing *Greenhow v. Whitehead's, Inc.*, 67 Idaho 262, 175 P.2d 1007 (1946), for the proposition that "dismissal of an action is an appropriate means of a court enforcing its orders." Robert also points to the trial courts' inherent power to assess sanctions for bad faith conduct in litigation.

We initially note that the district court did not identify the source of its authority to impose the sanction. It decided not to use one inherent power of the trial courts: the power to impose sanctions for violations of court orders by way of contempt. *State v. Juarez*, 159 Idaho 91, 94, 356 P.3d 384, 387 (2015). The district court rejected use of its contempt powers because to do so would require

that it comply with "quirky procedural rules." We must observe that the "unwieldy" rules that the district court eschewed exist to protect the alleged contemnor's constitutional right to due process of law. *Matter of Williams*, 120 Idaho 473, 478, 817 P.2d 139, 144 (1991).

Robert is correct that "this Court has recognized that trial courts also have an 'inherent authority to assess sanctions for bad faith conduct against all parties appearing before it." "State v. Rogers, 143 Idaho 320, 322, 144 P.3d 25, 27 (2006) (quoting In re SRBA Case No. 39576, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995)). In In re SRBA Case No. 39576, we cited to Chambers v. NASCO, Inc., 501 U.S. 32, 50, 111 S.Ct. 2123, 2135–36, 115 L.Ed.2d 27, 48–49 (1991), for this proposition. Notably, the United States Supreme Court cautioned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." Id. at 44, 111 S.Ct. at 2132, 115 L.Ed.2d at 44–45. In our review of the record, we have been able to identify little "restraint and discretion" on the part of the district court.

[15] The district court rejected use of its contempt powers in part because Sondra had a "built-in defense." The district court's discussion of this "built-in defense" evidenced its recognition that it may have been impossible for Sondra to comply with its order and that a court may only find a person in contempt "only if the contemnor had the present ability to comply with the order violated." State Dep't of Health & Welfare v. Slane, 155 Idaho 274, 278, 311 P.3d 286, 290 (2013) (quoting Camp v. East Fork Ditch Co., Ltd., 137 Idaho 850, 865, 55 P.3d 304, 319 (2002)). Imposition of contempt sanctions upon a person who is unable to comply with the order **1092 *822 which was violated is a violation of that person's due process rights. Rodriguez v. Robbins, 804 F.3d 1060, 1075-76 (9th Cir. 2015), cert. granted sub nom. Jennings v. Rodriguez, -U.S. —, 136 S.Ct. 2489, 195 L.Ed.2d 821 (2016) (citing Turner v. Rogers, 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011)).

Despite this constitutional limitation on its authority, the district court determined that Sondra would be punished if she did not comply with its order. In doing so, the district court likened the proposed sanctions to those that may properly be imposed for violation of discovery orders. In this, the district court erred.

In *Talbot v. Ames Const.*, 127 Idaho 648, 904 P.2d 560 (1995), this Court engaged in a lengthy discussion of the inherent powers of the courts to impose sanctions. We noted that "among the inherent powers of the judicial branch is the authority vested in the courts to protect and maintain the dignity and integrity of the court room and to

achieve the orderly and expeditious disposition of cases." *Id.* at 652, 904 P.2d at 564 (citing *Chambers*, 501 U.S. at 43, 111 S.Ct. at 2132, 115 L.Ed.2d at 43–44). However, we also noted that we have "adopted rules to provide guidance to the courts in the exercise of these inherent powers." *Id.* Although the district court discussed its power to sanction parties who violate discovery orders, it failed to acknowledge that this Court adopted Idaho Rule of Civil Procedure 37, which describes the circumstances and procedures whereby sanctions may be imposed.

[16] [17] The district court's sanction of dismissing Sondra's counterclaim was not within the boundaries of its discretion and was inconsistent with the applicable governing legal standards. "Due to the extreme nature of a dismissal with prejudice sanction, the trial court must consider three factors." Lee v. Nickerson, 146 Idaho 5, 9, 189 P.3d 467, 471 (2008). "The two primary factors are a clear record of delay and ineffective lesser sanctions, which must be bolstered by the presence of at least one 'aggravating' factor, including: 1) delay resulting from intentional conduct, 2) delay caused by the plaintiff personally, or 3) delay causing prejudice to the defendant." Id. (quoting State Ins. Fund v. Jarolimek, 139 Idaho 137, 139, 75 P.3d 191, 193 (2003)). "The record must show the trial court considered the necessary factors." Id. "[T]he consideration of these factors must appear in the record in order to facilitate appellate review." Jarolimek, 139 Idaho at 139, 75 P.3d at 193 (quoting Ashby v. Western Council Lumber Production, 117 Idaho 684, 686, 791 P.2d 434, 436 (1990)).

Here, the district court did not mention these factors as we have required. Likewise, the district court did not make a finding that Sondra had acted in bad faith. Instead, the district court entered an order that it acknowledged may well not have been within its authority to make and then punished Sondra for violating the order, despite recognizing that she may not have been able to comply with it. Judges may not use their inherent authority to impose sanctions as a salve for feelings wounded by those who, to use the words of the district court, "thumb their noses" at them. We conclude that the district court abused its discretion by dismissing Sondra's counterclaim.

[18] This is not to suggest that there is no remedy for Sondra's behavior. Robert may well have a claim or claims that Sondra breached the PSA and/or the stipulation of September 12, 2013. However, claims for breach of contract are to be decided by a jury, not by the trial court taking it upon itself to force the parties to a resolution that it deems to be in the parties' best interests. On remand, the district court should freely consider granting the parties leave to amend their pleadings to

reflect the present status of their controversy in light of Sondra's transfer of her interest in the property.

C. Sondra has not shown that the district court erred in its grant of summary judgment.

Sondra asserts that the district court erred in granting summary judgment on issues regarding credit card payments, "the Exclusive Resorts password," and airlines miles. These issues are addressed in turn.

[19] [20] The PSA provided that "Robert shall pay the following debts," which included items B and C on an attached Property Debt **1093 *823 Schedule. Items B and C were Sondra's Bank of America American Express and Visa credit cards. The district court ruled that Robert did not violate the PSA by making minimum payments on these accounts. Sondra contends that the district court should have imposed a "reasonable time" for payment and she argues it was unreasonable for Robert to make minimum payments because it will take him thirty-five years to pay off her credit card debt at that rate. As previous noted,

Courts do not have the power to rewrite contracts in order to make them more equitable. Shawver v. Huckleberry Estates, L.L.C., 140 Idaho 354, 362, 93 P.3d 685, 693 (2004). A court can reform a contract when a term is unconscionable, but cannot reform a term simply to make a contract fairer. See id. at 365, 93 P.3d at 696. However, when parties to a contract have not agreed to a term essential to determine their rights and duties, the court supplies a term reasonable in the circumstances. Restatement (Second) of Contracts § 204 (1981). "Where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending performance." Weinstein v. Prudential Prop. & Cas. Ins. Co., 149 Idaho 299, 318, 233 P.3d 1221, 1240 (2010) (quoting Curzon v. Wells Cargo, Inc., 86 Idaho 38, 43, 382 P.2d 906, 908 (1963)).

Hull v. Giesler, 156 Idaho 765, 778, 331 P.3d 507, 520 (2014). The district court did not err by failing to require Robert to pay off the credit card debt within a specified time. Such an obligation is not "a term essential to determine the rights and duties" of the parties. The PSA simply states Robert shall pay the debt. As our discussion of the district court's efforts to coerce Sondra's cooperation with a loan modification for the benefit of the parties reflects, the district court's duties do not include the responsibility to provide Sondra with a better contract

than the one she bargained for.

[21] [22] Next, the PSA provided that Robert was to provide Sondra with a password for Exclusive Resorts, a vacation company that Robert and Sondra had an ownership in. During the course of litigation Sondra claimed that Robert had failed to provide her with the password. However, Sondra's prior counsel represented this "issue is not in dispute between the parties anymore" and the district court dismissed her claim based on this representation. On appeal, Sondra asserts "[t]he district court also granted summary judgment to Robert on the Exclusive Resorts password in error." "Idaho law is well established that 'one may not successfully complain of errors one has consented to or acquiesced in. In other words, invited errors are not reversible." "Thomson v. Olsen, 147 Idaho 99, 106, 205 P.3d 1235, 1242 (2009) (quoting State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985)). To the extent that the district court erred in dismissing the Exclusive Resorts password issue, it was invited error.

Finally, under paragraph 15 of the PSA and a subsequent agreement on September 26, 2012, Robert was supposed to transfer airline miles to Sondra. Sondra argues "[t]he district court wrongfully concluded it granted summary judgement on usage of community airline miles" issue. Sondra cites to discrepancies in the district court's summary judgment ruling, where it initially represented that it was granting summary judgment on the airlines issue but later said Sondra could bring up issues relating to the airline miles and the September 26, 2012, agreement in her amended answer and counterclaim. The district court appears to have dismissed the airline miles issue as advanced in Sondra's initial counterclaim of November 21, 2012,8 but gave leave to Sondra to advance a claim that Robert was contravening the September 26, 2012, agreement by placing unreasonable restrictions on Sondra's use of her airline miles in her amended answer and counterclaim. Sondra claims that the district court wrongfully concluded the airline miles issue was dismissed when it had explicitly ruled that Sondra could amend her counterclaim to advance the claim.

Sondra is correct in pointing out that the district court did rule that she could proceed **1094 *824 with her claim regarding the airline miles. However, Sondra does not challenge the district court's determination that she could proceed with this claim in her amended counterclaim. She only points out discrepancies in its ruling. Thus, although Sondra styles her argument as a claim that the district court erred by granting summary judgment, she has not really argued that an error occurred. It is clear from the record that, but for the imposition of sanctions, the district court was willing to permit her to proceed with this claim.

In light of our reversal of the district court's order imposing sanctions, she will be free to proceed with this claim.

D. We do not address whether the district court abused its discretion by awarding Robert attorney fees

The district court awarded Robert \$19,334.53 in attorney fees under the PSA for the "snapshot in time" before Sondra amended her counterclaim. On appeal, Sondra argues the district court erred in awarding attorney fees. Although we are skeptical of the district court's approach, we do not reach this issue. This case will be remanded for resolution of Sondra's counterclaims against Robert and any additional claims that he might advance against her. Until such time as the parties' respective claims are resolved, there is no prevailing party and the award of attorney fees is vacated. Upon completion of the case, the district court may then determine who prevailed in this litigation. Bedke v. Pickett Ranch & Sheep Co., 143 Idaho 36, 41, 137 P.3d 423, 428 (2006); Todd v. Sullivan Const. LLC, 146 Idaho 118, 126, 191 P.3d 196, 204 (2008).

In light of the history of the litigation in these companion cases, this Court believes that assignment of a new judge on remand will "eliminate any concern of bias. Therefore, this Court orders that the case on remand be assigned to a new district judge." *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 424, 283 P.3d 728, 741 (2012).

E. We do not award either party attorney fees because of the mixed results of the consolidated cases.

Sondra requests attorney fees under Idaho Code section 12–121 and the terms of the PSA. Robert requests attorney fees pursuant to the PSA. The PSA and Idaho Code section 12–121 allow an award of attorney fees to the prevailing party. In the consolidated cases Robert prevailed on his jurisdictional challenge in Docket No. 42980. However, Sondra prevailed in challenging the district court's imposition of sanctions in Docket No. 41946. Considering the mixed results of the consolidated cases, we hold that there has been no prevailing party on appeal. *See Costa v. Borges*, 145 Idaho 353, 359, 179 P.3d 316, 322 (2008); *Van Brunt v. Stoddard*, 136 Idaho 681, 690, 39 P.3d 621, 630 (2001). Therefore, we do not award costs or fees to either party.

IV. CONCLUSION

We reverse the district court's dismissal of Sondra's counterclaim, affirm the district court's rulings on summary judgment, and remand the case for further proceedings. On remand, a new judge shall be assigned to preside over all further proceedings in this case. We do not award costs or fees.

Chief Justice J. JONES and Justices EISMANN, BURDICK and W. JONES concur.

All Citations

160 Idaho 810, 379 P.3d 1080

Footnotes

- Bank of America's policies did not permit a debtor to pursue a short sale and loan modification at the same time.
- We do not suggest that this transfer actually created any obligation on Mr. LaPeter's part to satisfy the debt to Bank of America.
- 3 Given this statement, it should come as little surprise that the district court subsequently affirmed the magistrate court's judgment of contempt in Docket No. 42980.
- The magistrate judge assigned to the divorce action recused himself on November 25th, the first business day after the district court sent the email of November 23rd. Although the reason for recusal is not in the record, it can be inferred that the magistrate judge recused himself because of the district court's exparte communications.
- 5 Although Robert filed a cross-appeal, the parties subsequently stipulated to a dismissal of the cross-appeal.
- 6 We do not address this claim other than to note that it has no merit. In the companion case arising from the divorce action, we held that the magistrate court did not have the authority to amend the judgment of divorce by incorporating the PSA because more than nineteen months had passed between the entry of judgment and the Supplemental Decree incorporating the PSA. Our opinion in the companion case under Docket No. 42980 adequately addresses this issue.
- We will not address Sondra's constitutional claims because we decide this appeal on different grounds. As a general rule, we will avoid constitutional questions when the case can be decided on other grounds. See, e.g., Garrity v. Bd. of Comm'rs of Owyhee Cnty., 54 Idaho 342, 357, 34 P.2d 949, 956 (1934).
- 8 The district court's order granting summary judgment dismissed the airline miles issue by dismissing all of count one of Sondra's counterclaim.

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What you might want to know about appellate review of abuse of discretion

Presentation to the Appellate Practice Section

Jim Jones

June 14, 2018

What is an abuse of discretion?

Pro se Appellate Handbook--"An appellate court uses this standard of review where a party may argue that a lower court's decision was greatly unsound, unreasonable or illegal."

Ninth Circuit excerpt (attached)

Three-part inquiry

An oft-raised issue--56 times in Supreme Court opinions published from 1-1-17 to 5-16-18 (see attached list)

Factors to consider.

Illustrative cases (attached):

Blizzard v. Lundeby, 156 Idaho 204 (2014)

Nield v. Pocatello Care Center, 156 Idaho 802 (2014)

Samples v. Hanson, 161 Idaho 179 (2016)

In re SRBA, 157 Idaho 385 (2014)

Agstar Financial Services v. Gordon Paving Company, 161 Idaho 817 (2017)

Agstar Financial Services v. Northwest Sand & Gravel, 161 Idaho 801 (2017)

State v. Austin, 413 P 3d 778 (2018)

Kantor v. Kantor, 160 Idaho 810 (2016)

Frantz v. Hawley Troxell, 161 Idaho 60 (2016)

161 Idaho 60 Supreme Court of Idaho, Boise, September 2016 Term.

Martin FRANTZ, Plaintiff—appellant, v. HAWLEY TROXELL ENNIS & HAWLEY LLP, Defendant—Respondent.

Docket No. 43576

Filed: November 2, 2016

Synopsis

Background: Debtor, who hired attorney as expert witness in unrelated legal malpractice action, brought action against attorney's law firm, which represented creditor in debtor's bankruptcy proceeding, alleging legal malpractice and breach of fiduciary duty. The District Court, First Judicial District, Kootenai County, John T. Mitchell, J., 2015 WL 4698991, dismissed. Debtor appealed.

Holdings: The Supreme Court, J. Jones, C.J., held that:

- District Court did not abuse its discretion by dismissing action on the basis that bankruptcy proceeding was pending between the same parties for the same cause, and
- law firm was entitled to attorney fees on appeal pursuant to statute, allowing award of attorney fees to prevailing party where action was pursued frivolously.

Affirmed.

West Headnotes (7)

[1] Courts

Pendency and Scope of Prior Proceeding

The trial court's determination of whether to proceed with an action where a similar case is pending in another court is discretionary. Idaho R. Civ. P. 12(b)(8).

Cases that cite this headnote

[2] Appeal and Error

←Abuse of discretion

In making a determination of whether a trial court abused its discretion, the Supreme Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Cases that cite this headnote

[3] Attorney and Client

Duties and liabilities to adverse parties and to third persons

District Court did not abuse its discretion by dismissing legal malpractice action brought by debtor, who hired attorney as expert witness in unrelated matter, alleging that it was conflict of interest for attorney's law firm to represent creditor in debtor's bankruptcy proceeding, on the basis that bankruptcy proceeding was pending between the same parties for the same cause; appeal from order, affirming bankruptcy court's attorney fees award against debtor as pursuit of sanction for motion disqualification of law firm, was pending, sanction order was based on debtor's claim that attorney-client relationship existed between debtor and attorney, and existence of attorney-client relationship was integral to debtor's legal malpractice claim. Idaho R. Civ. P. 12(b)(8).

Cases that cite this headnote

[4] Judgment

Finality of determination

An essential element required for issue preclusion to apply is that there was a final judgment on the merits in the prior litigation.

Cases that cite this headnote

[5] Evidence

Proceedings in other courts

Supreme Court would take judicial notice of decision and order entered in federal district court, affirming bankruptcy court's attorney fees award against debtor as sanction for pursuit of motion for disqualification of law firm that represented creditor shortly before trial, in debtor's legal malpractice action against law firm, alleging it was conflict of interest for firm to represent creditor.

Cases that cite this headnote

[6] Costs

Nature and form of judgment, action, or proceedings for review

Law firm was entitled to attorney fees on appeal pursuant to statute, allowing award of attorney fees to prevailing party where action was pursued frivolously, in legal malpractice action brought by debtor who hired law firm's attorney as expert in unrelated matter, alleging that it was conflict of interest for firm to represent creditor in debtor's bankruptcy proceeding; debtor did not show that district court incorrectly applied well-established law, debtor did not add any new analysis to issues raised at trial court, and record was deficient of evidence supporting existence of attorney-client relationship. Idaho Code Ann. § 12-121.

3 Cases that cite this headnote

[7] Costs

←What constitutes frivolous appeal or delay

Attorney's fees statute for civil actions allows an award of attorney fees to a prevailing party on appeal where the action was pursued, defended, or brought frivolously, unreasonably, or without foundation; such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law. Idaho Code Ann. § 12-121.

3 Cases that cite this headnote

**1231 Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Hon. John T. Mitchell, District Judge.

The orders of the district court are affirmed.

Attorneys and Law Firms

Frantz Law, PLLC, Post Falls, for appellant. Jonathan Frantz argued.

Paine Hamblen, LLP, Spokane, Washington, for respondent. John C. Riseborough argued.

Opinion

J. JONES, Chief Justice

*61 Counsel for appellant Martin Frantz ("Frantz") hired attorney Merlyn Clark as an expert witness in an unrelated matter in 2009. Clark was and is a partner with respondent law firm Hawley Troxell Ennis & Hawley LLP ("Hawley Troxell"). In 2010, Frantz' creditor, Idaho Independent Bank ("Bank"), hired Hawley Troxell to represent it in a contract action against Frantz. In 2011, while that matter was pending, Frantz filed for bankruptcy. Hawley Troxell continued to represent the Bank as a creditor in the bankruptcy, including in an adversary proceeding the Bank filed against Frantz in 2013.

Frantz alleged in the adversary proceeding that Clark's interactions with Frantz in the 2009 matter created an

attorney-client relationship and that it was therefore a conflict of interest for Clark's firm to represent the Bank against Frantz. Frantz also alleged that Hawley Troxell improperly used confidential information Clark acquired in the 2009 matter. The bankruptcy court concluded that there was no attorney-client relationship between Clark (or Hawley Troxell) and Frantz. The adversary proceeding was later dismissed as moot.

Frantz subsequently brought the instant case against Hawley Troxell in Idaho district court, alleging legal malpractice and breach of fiduciary duty. The district court denied pro hac vice admission to attorney Jeffrey Katz, Frantz' chosen counsel. The district court also dismissed the complaint on the grounds of judicial estoppel, lack of standing, and abatement. Finally, it awarded Hawley Troxell attorney fees under Idaho Code sections 12–120(3) and 12–121. Frantz appealed **1232 *62 the denial of pro hac vice admission, the dismissal of his complaint, and the award of attorney fees. By stipulation, the Court subsequently dismissed the appeal as to the award of attorney fees.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, Frantz hired Bruce Owens and Regina McCrea of Owens & Crandall, PLLC, to represent him in an unrelated legal malpractice action against the firm of Witherspoon, Kelley.1 Clark was retained as an expert witness in the case in 2009.2 Frantz alleged that Clark's role was "to provide consultation and expert testimony." He further alleged that "Clark reviewed the record in the fraud case, which included documents regarding financial information for Mr. Frantz' business entity.... Clark prepared a 21-page preliminary report.... Clark also provided oral advice on the matter." Additionally, Frantz asserted that "Frantz paid Hawley Troxell's bill for Clark's services in the case, which included reviewing documents, preparing the report, and providing advice." The 2009 malpractice claim settled without Clark issuing a final written report, being deposed, or testifying. Frantz argues in this appeal that because Clark "consulted on areas of the case outside of [his] expert testimony," his "role morphed from that of a testifying expert to that of consulting expert thereby forming an attorney-client relationship with Mr. Frantz."

In 2010, the Bank retained Hawley Troxell to sue Frantz

for his failure to pay off a loan that had matured. Clark did not participate in that action. In 2011, while that action was pending, Frantz petitioned for bankruptcy. Hawley Troxell continued to represent the Bank in Frantz' bankruptcy case. The bank filed a claim for \$6,400,000 against Frantz' bankruptcy estate. In 2013, the Bank filed an adversary proceeding against Frantz in the bankruptcy, alleging that Frantz had fraudulently represented the value of his assets, including the assets at issue in the case in which Clark had served as an expert witness.

In the adversary proceeding, Frantz moved to disqualify Hawley Troxell from representing the Bank, alleging that Frantz was a former client of the firm and that the firm possessed confidential information based on its prior representation of Frantz. Frantz hired Jefferey Katz, an Illinois attorney, as an expert witness in the disqualification hearing, but the bankruptcy court did not allow expert testimony at the hearing. Frantz also hired Katz to represent him "in any future litigation" charging Hawley Troxell with malpractice related to the alleged prior representation.

In December 2014, U.S. Bankruptcy Judge Terry Myers denied the motion to disqualify Hawley Troxell, finding and concluding that Clark's "role in the malpractice litigation was solely that of a testifying expert witness" and that no attorney-client relationship was formed. In May 2015, Frantz sought, and the bankruptcy court granted, a waiver of discharge as to all creditors and debts, including the Bank and its loan. This apparently mooted the adversary proceeding. However, the record on appeal does not include a final judgment from either the adversary proceeding or the broader bankruptcy case.

Represented by Katz, Frantz filed the instant malpractice case against Hawley Troxell in February 2015. The next month, Katz directly contacted Mr. Jack Gustavel, the Bank's CEO, regarding this malpractice case. Gustavel did not respond to Katz' email. Frantz also contacted Gustavel, describing a proposal to end the suit the Bank had filed against him in 2010. It appears that Frantz **1233 *63 and Katz wanted the Bank to join Frantz' malpractice case against Hawley Troxell as a co-plaintiff. Any settlement proceeds would be paid first to the Bank in the amount necessary to extinguish Frantz' debt to the Bank and the rest would go to Frantz. The Bank did not accept Frantz' offer.

In April 2015, Frantz moved for pro hac vice admission of Katz. Hawley Troxell opposed the motion, arguing that Katz had violated Idaho Rule of Professional Conduct ("I.R.P.C.") 4.2 by making unauthorized contact with the

Bank, a party represented by Hawley Troxell.³ The opposition was based on the idea that a foreign attorney who either does not know or is not willing to follow Idaho's ethics rules should not be admitted pro hac vice.

After presiding over hearings on Frantz' pro hac vice motion and Hawley Troxell's motion to dismiss, the district court issued a Memorandum Decision and Order Granting Defendant's Motion to Dismiss or Abate, and Order Denying Plaintiff's Motion for Pro Hac Vice Admission on July 29, 2015. The court granted the motion to dismiss on two alternate grounds. First, the court concluded that dismissal was appropriate because judicial estoppel operates to preclude Frantz from having standing to pursue the instant action. Specifically, the court concluded that Frantz had failed to disclose the potential cause of action as an asset in his bankruptcy petition and that that failure meant the cause of action became property of the bankruptcy estate, which only the bankruptcy trustee had standing to assert. Second, the court concluded that dismissal was appropriate under I.R.C.P. 12(b)(8) because there is "another action pending between the same parties for the same cause." The court concluded that claim preclusion and issue preclusion would both apply here but for the lack of a final judgment from the bankruptcy court appearing in the record. Instead, the court concluded that the issue of Hawley Troxell's alleged legal malpractice was a matter properly pending before the bankruptcy court.

Next, the district court denied Frantz' motion for pro hac vice admission of Katz. The court did not decide whether Katz had violated I.R.P.C. 4.2 by improperly contacting the Bank, but it did find that Katz was likely to be a trial witness in the case based on his email to Gustavel. The court concluded that under I.R.P.C. 3.7 it would not be proper for Katz to represent Frantz.⁴ The court found that "it would be improper to allow admission pro hac vice of an out of state attorney who would, if appointed, violate the Idaho Rules of Professional Responsibility.... It would be irresponsible of this [c]ourt to knowingly put Katz in that position." Accordingly, the court denied Frantz' motion for pro hac vice admission.

Hawley Troxell subsequently sought attorney fees and costs under Idaho Code sections 12–120(3) and 12–121. On the record at a hearing on the motion, the district court awarded fees under both sections, concluding that the gravamen of Frantz' claim was a commercial transaction supporting a fee award under section 12–120(3) and that Frantz' pursuit of his claim was frivolous, supporting a fee award under section 12–121. The court awarded Hawley Troxell fees and costs in the amount of \$21,185.60. Frantz timely appealed the district court's

dismissal of his complaint, the denial of pro hac vice admission for Katz, and the award of attorney fees.

While the case was pending, Frantz moved to dismiss the issues related to the district court's award of attorney fees based on a stipulation signed by counsel for both parties. The Court entered an order granting the motion to dismiss and denying Frantz' separate motion to amend his opening brief to request attorney fees.

**1234 *64 II.

ISSUES PRESENTED ON APPEAL

- 1. Whether the district court abused its discretion by dismissing Frantz' complaint.
- 2. Whether the district court erred by denying Frantz' motion for pro hac vice admission of Katz.
- 3. Whether Hawley Troxell is entitled to attorney fees on appeal under Idaho Code section 12–121.

III.

STANDARD OF REVIEW

[1] [2] The trial court's determination under I.R.C.P. 12(b)(8) whether to proceed with an action where a similar case is pending in another court is discretionary." *Klaue v. Hern*, 133 Idaho 437, 439, 988 P.2d 211, 213 (1999). "In making a determination of whether a trial court abused its discretion, this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Kugler v. Nelson*, 160 Idaho 408, 413, 374 P.3d 571, 576 (2016).

IV.

ANALYSIS

A. The district court did not abuse its discretion by dismissing Frantz' complaint.

[3]The district court dismissed Frantz' complaint on two grounds, concluding both that Frantz lacked standing because he was judicially estopped from bringing the complaint and that dismissal was appropriate under I.R.C.P. 12(b)(8) because there was another action pending between the same parties for the same cause. We affirm the district court's dismissal under I.R.C.P. 12(b)(8).

The district court analyzed whether either claim preclusion or issue preclusion supported dismissal, but it concluded that neither applied here because the record lacks a final judgment from the bankruptcy court resolving the present claims or issues. However, after concluding that the claims here were properly before the bankruptcy court, the court also concluded that "[t]he same parties in the present case are ... litigating (and have litigated) the same issues in the bankruptcy case." Accordingly, the court dismissed this action under I.R.C.P. 12(b)(8).

Frantz argues that the disqualification motion before the bankruptcy court is sufficiently distinct from the malpractice and breach of fiduciary duty claims he brought here that they cannot be considered the "same cause" under I.R.C.P. 12(b)(8). He urges the adoption of jurisprudence from other states holding that where the remedies are not substantially the same or the questions presented are not identical, abatement cannot apply. He also suggests that abatement here would deprive him of his right to a jury trial, given that the disqualification motion before the bankruptcy court was decided by a judge. Further, he points out that the burdens of proof are different: "[t]he burden of disqualification consists of an intricate weighing of prejudice versus the legal system's while malpractice requires simply preponderance of the evidence." Finally, he asserts that because the adversary proceeding was dismissed as moot, there will never be a final judgment on the merits. Frantz fails to frame any of these arguments in terms of the applicable standard of review. That is, he does not articulate how he believes the district court's decision was an abuse of discretion.

^[4]Hawley Troxell argues that the district court's dismissal under I.R.C.P. 12(b)(8) was proper both because issue preclusion applies⁵ and because another action is pending between the same parties for the same cause. It asserts that the issue of whether **1235 *65 Clark formed an attorney-client relationship with Frantz was pending

before the bankruptcy court, given that the bankruptcy court had conducted a two-day evidentiary hearing on that very issue. Indeed, the bankruptcy court even decided that precise issue in the adversary proceeding, concluding specifically that "an attorney-client relationship was not created." However, the record does not disclose a final judgment from that proceeding. The existence of an attorney-client relationship is essential to Frantz' present claims of legal malpractice and breach of fiduciary duty. *Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012) (listing elements of a legal malpractice claim as including "the existence of an attorney-client relationship"). Frantz alleged in his complaint that Hawley Troxell owed Frantz a fiduciary duty based on the existence of an attorney-client relationship.

Frantz has failed to show that the district court abused its discretion by dismissing Frantz' complaint under I.R.C.P. 12(b)(8). It is true that there is little Idaho case law interpreting or applying I.R.C.P. 12(b)(8). Indeed, the authorities Frantz relies on in suggesting a particular interpretation of the Rule were decided in other states. But given the lack of binding precedent interpreting the rule, Frantz has not shown that the district court acted outside the bounds of its discretion. Frantz fails to frame his argument in terms of the applicable standard of review. He does not appear to argue that the district court did not correctly perceive the issue as one of discretion. Nor does he seem to suggest that the court acted outside the bounds of its discretion. Thus, the analysis of Frantz' argument will explore whether he has shown that the district court did not reach its decision by an exercise of reason.

^[5]Dismissal is appropriate under I.R.C.P. 12(b)(8) when there is "another action pending between the same parties for the same cause." The district court acknowledged the existence of the bankruptcy case and the adversary proceeding, and it concluded after extensive analysis that the bankruptcy court had jurisdiction over the subject matter of the adversary proceeding, including the disqualification motion. The court noted that neither claim preclusion nor issue preclusion could apply at the time of its decision because there was no evidence before the court of a final judgment in the bankruptcy proceeding. Absent a final judgment, it was reasonable for the court to perceive that the bankruptcy case remained pending. Furthermore, during oral argument of this case before the Court, counsel for both parties acknowledged that the bankruptcy court had awarded attorney fees against Frantz as a sanction for his pursuit of the motion for disqualification and that Frantz had appealed the sanction order to the Ninth Circuit Court of Appeals.6 Counsel for Hawley Troxell expressed the belief that the appeal dealt only with the issue of a sanction and not with the

bankruptcy court's finding of no attorney-client relationship. Frantz' counsel advised this Court that the appeal is currently "pending" and conceded that since the sanction order was based on the claim that an attorney-client relationship existed, that issue would likely be considered in the determination of the appeal. Thus, the very issue at the heart of this case is also integral to the pending appeal before the Ninth Circuit.

**1236 *66 The court further found that "the matter before the bankruptcy court involves the same parties, Hawley Troxell being in privity with a party to the bankruptcy litigation, [the Bank], as counsel in that case, and the same issue, whether an attorney-client relationship existed between Frantz and Merlyn Clark of Hawley Troxell."

Frantz' arguments that abatement should not apply are all based on policy considerations or inapplicable judicial decisions. There appears to be no way to regard his briefing as challenging whether the district court reached its decision by an exercise of reason. Even if his arguments did somehow raise such a challenge, it would nonetheless fail because Frantz has not shown that the district court did not reach its decision by an exercise of reason. Accordingly, we affirm the district court's dismissal of Frantz' complaint under I.R.C.P. 12(b)(8).

The district court also dismissed Frantz' complaint on the basis of judicial estoppel, concluding that the complaint asserted causes of action that were property of the bankruptcy estate and that Frantz lacked standing to bring them. Because we affirm the district court's dismissal under I.R.C.P. 12(b)(8), we do not reach this issue.

B. Whether the district court abused its discretion by denying Frantz' motion for pro hac vice admission of Katz is moot.

Although it recognized the issue was moot in light of its dismissal, the district court nonetheless considered and then denied Frantz' motion to admit Katz pro hac vice. The court found that Katz would likely have to testify in this case about the email that he had sent to the Bank regarding the claims at issue here, which would make it improper under I.R.P.C. 3.7 for Katz to represent Frantz at trial. The court did not decide whether Katz's communication with the Bank constituted unauthorized contact in violation of I.R.P.C. Ultimately, the Court concluded

that it would be improper to allow admission pro hac vice of an out of state attorney who would, if appointed, violate the Idaho Rules of Professional Responsibility, possibly for unauthorized contact, ... but without a doubt as to the prohibition of likely being a witness in a matter. It would be irresponsible of this Court to knowingly put Katz in that position.

Accordingly, it denied the motion.

On appeal, Frantz vaguely attempts to argue that the district court somehow abused its discretion by deciding this issue without applying case law from other jurisdictions. Because the issue is moot in light of the fact that we affirm the district court's dismissal of his claims, we will not consider this issue.

C. Hawley Troxell is entitled to attorney fees on appeal under Idaho Code section 12–121.

^[6]Hawley Troxell seeks attorney fees on appeal under Idaho Code section 12–121, suggesting that Frantz' appeal merely invites the Court to second-guess the district court. Frantz' reply on this issue states only that "as for attorney fees on appeal, this appeal is not merely asking this Court to second guess the district court. The opinions of the district court were not well reasoned in light of the arguments herein. As such, no attorney fees should be granted on appeal either."

[7] Section 12–121 allows an award of attorney fees to a prevailing party where "the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." Idaho Military Historical Soc'y v. Maslen, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014). "Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law." Snider v. Arnold, 153 Idaho 641, 645-646, 289 P.3d 43, 47-48 (2012). Further, attorney fees on appeal have been awarded under Section 12-121 when appellants "'failed to add any new analysis or authority to the issues raised below' that were resolved by a district court's well-reasoned authority." Wagner v. Wagner, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016) (quoting Castrigno v. McQuade, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

On appeal, Frantz has failed to show that the district court incorrectly applied well-established law, so *Snider* applies. Frantz has also failed to add any new analysis or **1237 *67 authority to the issues that were raised at the

trial court and resolved by the court's well-reasoned authority, so *Castrigno* applies. Either provides a sufficient basis for applying Section 12–121. Furthermore, the record is woefully deficient of evidence supporting the existence of an attorney-client relationship between Frantz and Hawley Troxell, although the case was not decided on that basis below. And, because Frantz chose to litigate the issue of whether or not an attorney-client existed between he and Hawley Troxell in bankruptcy court and received an adverse ruling that appears to be sound, issue preclusion would likely apply but for the lack of clarity as to the finality of that ruling. Accordingly, we award Hawley Troxell attorney fees on appeal.

CONCLUSION

For the foregoing reasons, we affirm the district court's order dismissing Frantz' complaint. Hawley Troxell is awarded attorney fees and costs on appeal.

Justices EISMANN, BURDICK, W. JONES and HORTON concur.

All Citations

161 Idaho 60, 383 P.3d 1230

V.

Footnotes

- Frantz' complaint in that case alleged that Witherspoon, Kelley had committed legal malpractice by allowing the statute of limitations to run on a fraud claim Frantz intended to assert against a real estate agent on an unrelated transaction.
- Frantz represents both in his complaint and in his appellant's brief that "Frantz hired Merlyn Clark," but McCrea declared before the bankruptcy court that "Owens and I retained Merlyn Clark." Although Clark was clearly hired for the benefit of Frantz, it is not clear from the record what role Frantz personally played in selecting or hiring Clark. Ultimately, however, who hired Clark is immaterial.
- Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The parties dispute whether Katz' contact with Gustavel violated this Rule, but, as described herein, we do not reach this issue.
- Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness, subject to exceptions that do not apply in this case.
- An essential element required for issue preclusion to apply is that "there was a final judgment on the merits in the prior litigation." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). Because the record does not disclose a final judgment from either the adversary proceeding or the broader bankruptcy case, issue preclusion cannot yet apply.
- The Court takes judicial notice of the Memorandum Decision and Order entered by U.S. District Judge Edward J. Lodge on August 31, 2016, affirming the bankruptcy court's sanctions award "in its entirety." As recited by Judge Lodge, Judge Myers' "decision assessed \$49,477.46 against [Martin and Cynthia Frantz] and their attorney, Jonathan Frantz, jointly and severally, for filing motions to disqualify [Hawley Troxell] and expert witnesses (DQ Motions) shortly before trial. The Bankruptcy Court determined the DQ Motions were meritless and were filed in bad faith to delay trial, to increase litigation costs, and to concomitantly increase the potential of settlement." In the latter regard, based upon attorney Frantz' argument in the adversary proceeding that "[w]e pursued the disqualification as a probe so that [Mr. Katz] could wrap his head around the issues and really understand what happened and to see how [Hawley Troxell] would defend themselves," Judge Myers concluded that "the use of the motion to disqualify [Clark] was a test of [Hawley Troxell] in order to evaluate an anticipated collateral malpractice suit." Judge Lodge concluded that "Judge Myers' finding that the DQ Motions were brought for the improper purpose of evaluating a potential malpractice suit against [Hawley Troxell] is supported by the record."

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- *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001).
- Findings of fact after a bench trial. See Huhmann v. Fed. Express Corp., 874 F.3d 1102, 1106 (9th Cir. 2017); Oswalt v. Resolute Indus., Inc., 642 F.3d 856, 859 (9th Cir. 2011); Twentieth Century Fox Film Corp. v. Entertainment Distributing, 429 F.3d 869, 879 (9th Cir. 2005); Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003), clarified by 366 F.3d 731 (9th Cir. 2004) (order); see also Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 384 (9th Cir. 1994) ("In reviewing a bench trial, this court shall not set aside the district court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous.").

D. Abuse of Discretion

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." Rabkin v. Oregon Health Sciences Univ., 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); see also In re Korean Air Lines Co., Ltd., 642 F.3d 685, 698 n.11 (9th Cir. 2011). Under the abuse of discretion standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. See Estate of Diaz v. City of Anaheim, 840 F.3d 592, 601 (9th Cir. 2016) (under abuse of discretion standard, the court reverses only when convinced that the reviewed decision lies beyond the pale of reasonable justification under the circumstances); McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 953 (9th Cir. 2011); Valdivia v. Schwarzenegger, 599 F.3d 984, 988 (9th Cir. 2010) (citing SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001)); Harman v. Apfel, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse of discretion standard is possible only "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances"). The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. See Hung Lam v. City of San Jose, 869 F.3d 1077, 1085 (9th Cir. 2017); Kode v. Carlson, 596 F.3d 608, 612-13 (9th Cir. 2010) (per curiam); Grant v. City of Long Beach, 315 F.3d 1081, 1091 (9th Cir. 2002), amended by 334 F.3d 795 (9th Cir. 2003) (order).

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A district court abuses its discretion when:

- District court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. See Reed v. Lieurance, 863 F.3d 1196, 1208 (9th Cir. 2017) (district court abused discretion in excluding certain testimony); Jeff D. v. Otter, 643 F.3d 278, 283 (9th Cir. 2011) (citing Casey v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004)).
- District court rules in an irrational manner. See Chang v. United States, 327 F.3d 911, 925 (9th Cir. 2003); see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner).
- District court makes an error of law. See Koon v. United States, 518 U.S. 81, 100 (1996); Strauss v. Comm'r of the Soc. Sec. Admin., 635 F.3d 1135, 1137 (9th Cir. 2011) (citing Koon); Forest Grove School Dist. v. T.A., 523 F.3d 1078, 1085 (9th Cir. 2008) (applying Koon); United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (applying Koon). Thus, the court abuses its discretion by erroneously interpreting a law, United States v. Beltran-Gutierrez, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, Richard S. v. Dep't of Dev. Servs., 317 F.3d 1080, 1085-86 (9th Cir. 2003). See also Fox v. Vice, 563 U.S. 826, 839 (2011) (recognizing trial court has wide discretion "but only when, it calls the game by the right rules").
- Record contains no evidence to support district court's decision, see Oregon Natural Res. Council v. Marsh, 52 F.3d 1485, 1492 (9th Cir. 1995), or bases its ruling on a clearly erroneous assessment of evidence, see Am. Beverage Ass'n v. City & Cty. of San Francisco, 871 F.3d 884, 889 (9th Cir. 2017).

E. Arbitrary and Capricious

Review of agency determinations is limited to whether the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if it was taken without observance of procedure required by law. 5 U.S.C. § 706(2)(A); see also Nat'l Mining Ass'n v. Zinke, No. 14-17350, 2017 WL 6327944, at *13 (9th Cir. Dec. 12, 2017); Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1132 (9th Cir. 2011) ("Review under

I-8 2017

1. Medical Recovery Services, LLC v. Ugaki-Hicks

Supreme Court of Idaho, Boise, April 2018 Term. May 02, 2018 --- P.3d ---- 2018 WL 2034701

LITIGATION - Judgment. Supreme Court would presume that missing exhibit supported magistrate court's finding that exhibit was inadequate to satisfy default-judgment rule.

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. When the Supreme Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry is: (1...

...require such an instrument. When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry is: (1...

2. Litke v. Munkhoff

Supreme Court of Idaho, Moscow, April 2018 Term. April 27, 2018 --- P.3d ---- 2018 WL 1975605

TORTS - Damages. Evidence supported non-economic damages that was more than 11 times the economic damages for dog bite victim whose face was partially torn off.

...New Trial in General 30 3608 Discretion of Lower Court; Abuse of Discretion 30 3608(1) k. In general. The standard of review

...court's decision to grant or deny a new trial is abuse of discretion. Idaho R. Civ. P. 59(a) [8] 30 Appeal and...

3. State v. Cota-Medina

Supreme Court of Idaho, Boise, April 2018 Term. April 26, 2018 --- P.3d --- 2018 WL 1956291

FAMILY LAW - Juvenile Justice. Evidence supported findings on statutory factors that weighed in favor of waiver of juvenile jurisdiction over 17-year-old juvenile.

...upheld on appeal so long as it was not an abuse of discretion. [2] 211 Infants 211XVI Rights and Privileges as to Adult... ...juvenile into adult court will not be regarded as an abuse of discretion when the court: (1) perceived the issue as one of...

4. Irish v. Hall

Supreme Court of Idaho, Moscow, April 2018 Term. April 26, 2018 --- P.3d ---- 2018 WL 1958003

TORTS - Defamation. Council member's changing of home wireless internet designation, which incorporated name of former mayor, was not political criticism and hyperbole.

...Court reviews the denial of attorney fees below for an abuse of discretion. [4] 237 Libel and Slander 237I Words and Acts Actionable...

...Court reviews the denial of attorney fees below for an abuse of discretion." In re Estate of Wiggins , 155 Idaho 116, 124, 306...

5. Matter of Doe

Supreme Court of Idaho. April 24, 2018 --- P.3d ---- 2018 WL 1915786

FAMILY LAW - Child Custody. Abuse of discretion standard governs review of a decision to accept or reject the Department of Heath and Welfare's proposed permanency plan.

...(2) in a matter of first impression, the abuse of discretion standard should govern review of a magistrate court's decision

to...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. The Supreme Court reviews the discretionary decisions of a trial court for abuse of discretion. [3] 30 Appeal and Error 30XVI Review 30XVI(K) Review...

6. Davison v. Debest Plumbing, Inc.

Supreme Court of Idaho, Boise, December 2017 Term. April 24, 2018 --- P.3d ---- 2018 WL 1915996

REAL PROPERTY - Contractors and Developers. Homeowners satisfied Notice and Opportunity to Repair Act (NORA) when plumbing subcontractor received actual notice of leaking bathtub claim.

...award of attorney fees will not be disturbed absent an abuse of discretion. Idaho Code Ann. § 12-121 Idaho R. Civ. P... ...I.R.C.P. 54(e)(1) will not be disturbed absent an abuse of discretion." Idaho Military Historical Soc'y, Inc. v. Maslen , 156 Idaho 624...

7. State v. Hall

Supreme Court of Idaho, Boise, August 2017 Term. April 11, 2018 --- P.3d ---- 2018 WL 1734661

CRIMINAL JUSTICE - Indictment and Information. Temporary absence of grand jury foreman's signature or presence of incorrect date on indictment did not deprive capital defendant of due process.

...a trial court's evidentiary rulings, an appellate court applies an abuse of discretion standard. [36] 110 Criminal Law 110XXIV Review 110XXIV(N) Discretion...

...be disturbed on appeal when there has been a clear **abuse** of **discretion**. [39] 110 Criminal Law 110XVII Evidence 110XVII(D) Facts in...

8. Medical Recovery Services, LLC v. Neumeier

Supreme Court of Idaho, Boise, December 2017 Term. April 05, 2018 415 P.3d 372 2018 WL 1631562

Background: Collection agency filed collection action against debtor for unpaid medical bill. Magistrate court entered summary judgment in favor of debtor. Collection agency appealed. The District Court, 17th Judicial District, Bonneville County, Joel E. Tingey, D.J., affirmed. Collection agency appealed. Holdings: The Supreme Court,...

...Supreme Court reviews an award of prejudgment interest under the abuse of discretion standard. [15] 219 Interest 219III Time and Computation 219 39...

...of review when it reviewed the magistrate's decision for an abuse of discretion. MRS contends that this was an error, and that de...

9. Nielson v. Talbot

Supreme Court of Idaho, Boise, January 2018 Term, April 04, 2018 415 P.3d 348 2018 WL 1614900

Background: Property owners brought action for quiet title against neighbors, alleging that neighbors' shed, carport, and driveway extended over property line and onto owners' property. Owners brought separate action against prior owners of their property, alleging that prior owners were obligated to defend title of property that they had...

...30 3249 Counsel 30 3252 k. Disqualification. The three part abuse of discretion test applies when an appellate court reviews a trial court's...

...to disqualify counsel carries the burden of demonstrating that an **abuse of discretion** occurred, and a failure to do so is fatal to...

10. Petrus Family Trust Dated May 1, 1991 v. Kirk

Supreme Court of Idaho, Boise, February 2018 Term. April 04, 2018 415 P.3d 358 2018 WL 1616014

Background: Secondary purchaser of home filed action against home builder, vendor of home, and other defendants, asserting claims against the builder for conspiracy to defraud and breach of the implied warranty of habitability arising from damage to home caused by water infiltration allegedly due to construction defects. The District Court,...

...of the trial court and subject to review for an abuse of discretion. [19] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

...of the trial court and subject to review for an abuse of discretion." Kosmann v. Gilbride , 161 Idaho 363, 366, 386 P.3d...

11. State v. Johnson

Supreme Court of Idaho, Boise, November 2017 Term. March 16, 2018 163 Idaho 412 414 P.3d 234

CRIMINAL JUSTICE - Instructions. Trial court's comment to the jury panel, that there had been a previous trial and appeal, did not constitute fundamental error.

...for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer; the standard, more accurately stated, is...

...for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is...

12. State v. Austin

Supreme Court of Idaho, Boise, December 2017 Term. March 06, 2018 163 Idaho 378 413 P.3d 778

CRIMINAL JUSTICE - Driving While Intoxicated. Blood alcohol content test results did not operate to mandate against defendant's right to present contrary evidence in his defense of DUI charge.

...k. Admissibility. The admission of expert testimony is reviewed for **abuse of discretion**. [2] 110 Criminal Law 110XXIV Review 110XXIV(N) Discretion of...

...decision to grant the State's motion in limine constituted an abuse of discretion because it was not consistent with the legal standard we...

13. In Re SRBA Case No. 39576 Subase No. 37-00864

Supreme Court of Idaho, Boise, December 2017 Term. March 02, 2018 --- P.3d ---- 2018 WL 1124264

This is an appeal from the Snake River Basin Adjudication ("SRBA"). Gary and Glenna Eden (the "Edens") sought to file a late notice of claim for their Water Right No. 37-864 which was not claimed during the pendency of the SRBA and therefore was decreed disallowed. In the SRBA, the Edens alleged that the SRBA's Final Unified...

...Where discretionary grounds are invoked, the standard of review is **abuse of discretion**." Berg v. Kendall , 147 Idaho 571, 576, 212 P.3d...

14. Medical Recovery Services, LLC v. Lopez

Supreme Court of Idaho, Boise, January 2018 Term. February 14, 2018 163 Idaho 281 411 P.3d 1182

Background: Creditor, who was the prevailing party in its action to collect a debt, filed an application for an award of postjudgment fees. The magistrate court denied the application. Creditor appealed the decision, and also requested attorney fees and costs on the appeal to the district court. The District Court, Lincoln County. John K....

...court's decision to award attorney fees is reviewed under the abuse- of- discretion standard; however, when an award of attorney fees depends on...

...court's decision to award attorney fees is reviewed under the **abuse of discretion** standard." Stout v. Key Training Corp ., 144 Idaho 195, 196...

15. Hull v. Giesler

Supreme Court of Idaho, Boise, December 2017 Term. January 18, 2018 163 Idaho 247 409 P.3d 827

COMMERCIAL LAW - Experts. Expert testimony concerning reasonable development costs was not based on specialized knowledge and was not helpful to court sitting as fact finder.

...testimony will only be overturned if the appellant shows an abuse of discretion. [8] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 When the Supreme Court reviews an alleged abuse of discretion by a trial court: the sequence of inquiry is: (1...

16. Johnson v. Crossett

Supreme Court of Idaho, Boise, December 2017 Term. January 10, 2018 163 Idaho 200 2018 WL 341651

BUSINESS ORGANIZATIONS - Limited Liability Companies. Purported members of a limited liability company (LLC) who had oral operating agreement but did not sign written agreement were not members.

...New Trial in General 30 3608 Discretion of Lower Court; Abuse of Discretion 30 3608(2) k. Grant of new trial. (Formerly 30k977(3)...

...New Trial in General 30 3608 Discretion of Lower Court; Abuse of Discretion 30 3608(3) k. Denial of new trial. (Formerly 30k977(5)...

17. In re: SRBA Case No. 39576 Subcase Nos. 65-23531 and 65-23532

Supreme Court of Idaho, Boise, November 2017 Term. January 02, 2018 163 Idaho 144 408 P.3d 899

REAL PROPERTY - Water. Doctrine of claim preclusion barred intervenor irrigation district from seeking to litigate issues from previous general adjudication.

...P.3d at 796. We held that there was no abuse of discretion. Id. at 393, 336 P.3d at 800. In reaching...

18. Clark v. Jones Gledhill Fuhrman Gourley, P.A.

Supreme Court of Idaho, Boise, August 2017 Term. December 27, 2017 163 Idaho 215 409 P.3d 795

LEGAL SERVICES - Liens. Implied tort cause of action under attorney-lien statute was not needed to ensure effectiveness of statute.

...of the trial court and subject to review for an abuse of discretion. [33] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

...of the trial court and subject to review for an abuse of discretion." Kosmann v. Gilbride , 161 Idaho 363, 366, 386 P.3d...

19. Lincoln Land Company, LLC v. LP Broadband, Inc.

Supreme Court of Idaho, Twin Falls, November 2017 Term. December 26, 2017 163 Idaho 105 408 P.3d 465

COMMERCIAL LAW - Implied Contracts. Lessor did not confer benefit to sublessee, to which lessee subleased rooftop space, and, thus, it could not recover for unjust enrichment.

...Supreme Court reviews an award of attorney fees for an abuse of discretion. [9] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 To prove an "abuse of discretion," the Supreme Court looks to three factors: (1) whether the...

20. Mortensen v. Berian

Supreme Court of Idaho, Pocatello, September 2017 Term. December 21, 2017 163 Idaho 47 408 P.3d 45

REAL PROPERTY - Easements. Evidence was sufficient to support finding, in dispute between owners of property served by ditch, and owners of property on which ditch was located, that ditch was not abandoned.

...address the matters to be considered when evaluating a claimed abuse of discretion. Idaho Code Ann. § 6-202 [21] 386 Trespass 386II...

...court, which will not be disturbed on appeal absent an abuse of discretion. Idaho Code Ann. § 6-202 [23] 102 Costs 102X...

21. Nettleton v. Canyon Outdoor Media, LLC

Supreme Court of Idaho, Boise, October 2017 Term. December 21, 2017 163 Idaho 70 408 P.3d 68

LABOR AND EMPLOYMENT - Hours and Wages. Genuine issue of material fact existed as to whether employee's commissions were contingent on servicing client accounts, precluding summary judgment.

...D)13 Summary Judgment 30 3556 k. Discretion of lower court; abuse of discretion. (Formerly 30k989 On review of an order of summary judgment...

22. State v. Montgomery

Supreme Court of Idaho, Boise, September 2017 Term. December 21, 2017 163 Idaho 40 408 P.3d 38

CRIMINAL JUSTICE - Discovery. Rule requiring disclosure of the names of "all persons" having knowledge of relevant facts who may be called as witnesses at trial includes rebuttal witnesses.

...decision to allow the investigating officer to testify constituted an abuse of discretion because it did not apply the legal standard we have...

23. Wechsler v. Wechsler

Supreme Court of Idaho, Pocatello, September 2017 Term. December 06, 2017 162 Idaho 900 407 P.3d 214

LITIGATION - Attachment and Garnishment. Appointment of ancillary receiver to take and keep possession of judgment debtor's property in Idaho was not **abuse** of **discretion**.

...and keep possession of husband's property in Idaho was not abuse of discretion; (3) orders granting wife's motion to compel and appointment...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 The test to determine whether a trial court...

24. Schweitzer Basin Water Company v. Schweitzer Fire District

Supreme Court of Idaho. November 28, 2017 163 Idaho 186 408 P.3d 1258

LITIGATION - Writs. Fire district's lack of jurisdiction to order private water company to repair and remedy homeowners' fire hydrants warranted writ of prohibition.

...statute on attorney fees in civil actions are reviewed for abuse of discretion. Idaho Code Ann. § 12-117 [8] 30 Appeal and... ...civil actions are reviewed by the Supreme Court for an abuse of discretion. Idaho Code Ann. § 12-117 [20] 30 Appeal and...

25. Searle v. Searle

Supreme Court of Idaho, Pocatello, September 2017 Term. November 08, 2017 162 Idaho 839 405 P.3d 1180

FAMILY LAW - Child Custody. Evidence did not support magistrate judge's finding that modification of custody order was in best interest of child.

...court's child custody decision will not be overturned absent an abuse of discretion. [3] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 A trial court does not abuse its discretion...

26. State v. Gibbs

Supreme Court of Idaho, Boise, August 2017 Term. November 06, 2017 162 Idaho 782 405 P.3d 567

CRIMINAL JUSTICE - Sentencing. Trial judge had **discretion** to extend defendant's probation sua sponte, even though prosecution decided to not pursue probation violation allegations.

...A district court's decision to extend probation is reviewed for abuse of discretion. [3] 110 Criminal Law 110XXIV Review 110XXIV(N) Discretion of...

...not reverse such a decision in the absence of an abuse of discretion. Idaho Code Ann. §§ 20-221(1) 20-222(2...

27. Washington Federal v. Hulsey

Supreme Court of Idaho, Boise, June 2017 Term. October 31, 2017 162 Idaho 742 405 P.3d 1

REAL PROPERTY - Mortgages and Deeds of Trust. Bankruptcy court's lift of automatic stay to allow foreclosure did not preclude debtor from contesting deficiency in later proceeding.

...award attorney fees is a discretionary call, subject to the abuse of discretion standard of review. [15] 30 Appeal and Error 30XVI Review...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 To determine whether a trial court abused its...

28. State v. Folk

Supreme Court of Idaho, Boise, June 2017 Term. September 20, 2017 162 Idaho 620 402 P.3d 1073

CRIMINAL JUSTICE - Sex Offenses. Whether defendant's touching of child was intended to gratify his sexual desires was question for jury, in trial for sexual **abuse** of child.

...value of the evidence outweighs its prejudicial effect for an abuse of discretion. Idaho R. Evid. 403 [7] 110 Criminal Law 110XVII Evidence...

...value of the evidence outweighs its prejudicial effect for an abuse of discretion." State v. Kralovec , 161 Idaho 569, 574, 388 P.3d...

29. State v. Anderson

Supreme Court of Idaho, Boise, May 2017 Term. September 12, 2017 162 Idaho 610 402 P.3d 1063

CRIMINAL JUSTICE - Witnesses. Victim's mental illness did not render her unavailable to testify so as to permit admission of preliminary hearing testimony in domestic battery case.

...the trial court's evidentiary rulings, the appellate court applies an **abuse** of **discretion** standard. [2] 110 Criminal Law 110XXIV Review 110XXIV(N) Discretion...

...is evidentiary in nature and is, therefore, reviewed under an abuse of discretion standard. Idaho R. Evid. 804(a)(4) [7] 110 Criminal...

30. Hammer v. Ribi

Supreme Court of Idaho, Boise, June 2017 Term. August 25, 2017 162 Idaho 570 401 P.3d 148

TORTS - Assault and Battery. Proof of a violent overt action is not a required element of civil assault.

...denial of motion to compel mental examination was not an abuse of discretion. Vacated and remanded. West Headnotes [1] 30 Appeal and Error...

31. State v. Fisher

Supreme Court of Idaho, Boise, May 2017 Term. July 17, 2017 162 Idaho 465 398 P.3d 839

CRIMINAL JUSTICE - Sentencing. A determinate life sentence for the crime of murder in the second degree was not excessive.

...k. In general. When considering whether the sentence was an abuse of discretion, the Supreme Court considers: (1) whether the trial court correctly...

...171, 178 (2013) . When considering whether the sentence was an **abuse of discretion**, "this Court considers: (1) whether the trial court correctly perceived...

32. Krinitt v. Idaho Department of Fish and Game

Supreme Court of Idaho, Boise, June 2017 Term. July 11, 2017 162 Idaho 425 398 P.3d 158

LITIGATION - Sanctions. District Court did not **abuse** its **discretion** by failing to dismiss summary judgment motion, as sanction for scheduling order violation.

...to impose sanctions for noncompliance with pretrial orders under an abuse of discretion standard. Idaho R. Civ. P. 16(i) (2015). [4] 30...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 To determine whether a district court abused its...

33. Windom v. State

Supreme Court of Idaho, Boise, June 2017 Term. July 10, 2017 162 Idaho 417 398 P.3d 150

CRIMINAL JUSTICE - Postconviction Relief. Trial court abused its discretion when it denied defendant's motion to amend his petition for postconviction relief to add a claim under Miller v. Alabama.

...to add another cause of action is governed by an abuse of discretion standard of review. [5] 30 Appeal and Error 30XVI Review...

...to add another cause of action is governed by an **abuse of discretion** standard of review." Thomas v. Med. Ctr. Physicians, P.A. , 138...

34. State v. Lankford

Supreme Court of Idaho, Boise, April 2017 Term. July 03, 2017 162 Idaho 477 399 P.3d 804

CRIMINAL JUSTICE - Discovery. Defendant was entitled to new trial based on State's failure to disclose and to correct false testimony regarding witness's motive for testifying.

...of a motion for new trial is reviewed for an abuse of discretion. [24] 110 Criminal Law 110XXIV Review 110XXIV(N) Discretion of...

...of a motion for new trial is reviewed for an abuse of discretion." State v. Stevens , 146 Idaho 139, 144, 191 P.3d...

35. Ellefson v. Palmer

Supreme Court of Idaho, Boise, April 2017 Term. June 30, 2017 162 Idaho 393 397 P.3d 1152

LITIGATION - Trial. Trial court did not abuse its discretion by granting a new trial on driver's personal injury claim after jury returned verdict of "no injury."

...on the insufficiency of the evidence is reviewed for an abuse of discretion. Idaho R. Civ. P. 59(a)(6) [2] 30 Appeal... ...argument that the additur was arbitrary, excessive, or otherwise an abuse of discretion. [12] 30 Appeal and Error 30VII Transfer of Cause 30VII...

36. Green River Ranches, LLC v. Silva Land Company, LLC

Supreme Court of Idaho, Twin Falls, May 2017 Term. June 29, 2017 162 Idaho 385 397 P.3d 1144

AGRICULTURE - Animals. Dairy that managed cattle herd converted at least \$413,953 in herd owner's feed when commingled feed was depleted beyond that used for owner's herd.

...so dairy failed to demonstrate considering all parties was an abuse of discretion, since trial court did not limit its analysis to whether...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 30 Appeal and Error 30XVI Review 30XVI(D...

37. State v. Flores

Supreme Court of Idaho, Idaho Falls, May 2017 Term. June 20, 2017 162 Idaho 298 396 P.3d 1180

CRIMINAL JUSTICE - Probation. Trial court lacked authority on defendant's motion to reinstate its jurisdiction over defendant after it had relinquished its jurisdiction.

...Court reviews a trial court's decision to relinquish jurisdiction for abuse of discretion. Idaho Code Ann. § 19-2601(4) [2] 110 Criminal...

...1] [2] "[W]e review a decision to relinquish jurisdiction for abuse of discretion." State v. Latneau, 154 Idaho 165, 166, 296 P.3d...

38. City of Blackfoot v. Spackman

Supreme Court of Idaho, Twin Falls, May 2017 Term. June 20, 2017 162 Idaho 302 396 P.3d 1184

REAL PROPERTY - Water. City could use its water permit for groundwater recharge without first filing for

transfer.

...record as a whole; or (e)arbitrary, capricious, or an abuse of discretion. If the agency action is not affirmed, it shall be...

39. Hauser Lake Rod and Gun Club, Inc. v. City of Hauser

Supreme Court of Idaho, Wallace, April 2017 Term. June 09, 2017 162 Idaho 260 396 P.3d 689

GOVERNMENT - Attorney Fees. Joint board comprised of county board of commissioners and city council members was political subdivision under attorney's fees statute.

...Agency 15A 754 . 1 k. In general. When reviewing for an abuse of discretion, the Supreme Court evaluates whether an agency: (1) correctly perceived...

...I.C. § 67-5279(2) (4) . When reviewing for an abuse of discretion, we evaluate whether the agency: (1) correctly perceived the issue...

40. Portfolio Recovery Associates, LLC. v. MacDonald

Supreme Court of Idaho, Boise, January 2017 Term. June 01, 2017 162 Idaho 228 395 P.3d 1261

COMMERCIAL LAW - Affidavits. On summary judgment motion, affidavit of creditor's document control officer was not admissible under business records exception to hearsay rule.

...the Sears credit card statements. As such, it was an abuse of discretion for the magistrate court to consider the credit card statements...

41. Henrie v. Corporation of President of Church of Jesus Christ of Latter-Day Saints

Supreme Court of Idaho, Boise, April 2017 Term. May 31, 2017 162 Idaho 204 395 P.3d 824

TORTS - Negligence. Church did not owe general duty to volunteer to prevent his severe knee injury that he sustained while working on cleanup project.

...the trial court's evidentiary rulings, the Supreme Court applies an abuse of discretion standard. [4] 30 Appeal and Error 30XVI Review 30XVI/D...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 To determine whether a trial court has abused...

42. Green River Ranches, LLC v. Silva Land Company, LLC

Supreme Court of Idaho, Twin Falls, May 2017 Term. May 26, 2017 162 Idaho 184 395 P.3d 804

AGRICULTURE - Animals. Evidence was sufficient to support finding that owner of bankrupt dairy was personally liable for purchase of 116 cows.

...Sanctions in General 30 3259 k. Discretion of lower court; abuse of discretion. (Formerly 30k984(1) 30 Appeal and Error 30XVI Review 30XVI(D...

...the discretion of the trial court and subject to an abuse of discretion standard of review. [7] 30 Appeal and Error 30XVI Review...

43. Arnold v. City of Stanley

Supreme Court of Idaho, Boise, February 2017 Term. May 12, 2017 162 Idaho 115 394 P.3d 1160

REAL PROPERTY - Zoning and Planning. Denial of property owners' building permit application was not

subject to judicial review under Local Land Use Planning Act.

...substantial and competent evidence, and was arbitrary, capricious, and an abuse of discretion; and (4) the Council's denial of Permit Application 831 prejudiced...

44. Quigley v. Kemp

Supreme Court of Idaho, Boise, February 2017 Term. May 11, 2017 162 Idaho 408 398 P.3d 141

HEALTH - Malpractice. Patient was required to disclose name of non-testifying expert who provided information to her testifying expert concerning local standard of care.

...reviewing a trial court's grant of a protective order is abuse of discretion. [3] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

...will only be reversed when there has been a clear abuse of discretion. [4] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

45. American Semiconductor., Inc. v. Sage Silicon Solutions, LLC

Supreme Court of Idaho, Boise, February 2017 Term. April 28, 2017 162 Idaho 119 395 P.3d 338

TORTS - Appeals. Court would decline to consider new theory that former employer interfered with new employer's expectancy of contracting with former employer.

...person asserting error in an evidentiary ruling to show an abuse of discretion. [14] 30 Appeal and Error 30XVI Review 30XVI(D) Scope...

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 30 Appeal and Error 30XVI Review 30XVI(D...

46. State v. Dalv

Supreme Court of Idaho, Boise, February 2017 Term. April 12, 2017 161 Idaho 925 393 P.3d 585

CRIMINAL JUSTICE - Indigents. Denial of motion to substitute counsel was not **abuse** of **discretion** in prosecution for lewd and lascivious conduct with a minor.

...(1) denial of motion to substitute counsel was not abuse of discretion; (2) denial of motion to continue sentencing hearing was not abuse of discretion; and (3) court was not required to hold hearing...

...deny a motion to substitute counsel is reviewed for an abuse of discretion. [4] 110 Criminal Law 110XIX Continuance 110 586 k. Discretion...

47. State v. Wisdom

Supreme Court of Idaho, Boise, Concordia, February 2017. April 11, 2017 161 Idaho 916 393 P.3d 576

CRIMINAL JUSTICE - Restitution. State presented sufficient evidence of causation to support award of restitution.

...State prove causation? 3.Does the restitution award constitute an abuse of discretion? III. STANDARD OF REVIEW [1] [2] [3] [4] [5] When...

...M.L.'s injury. Third is that the restitution award constitutes an **abuse of discretion** due to Wisdom's financial circumstances. A.Wisdom failed to preserve...

48. State v. Bailey

Supreme Court of Idaho, Boise, February 2017 Term. April 10, 2017 161 Idaho 887 392 P.3d 1228

CRIMINAL JUSTICE - Sentencing. Trial court did not abuse discretion in denying motion to reduce indeterminate life sentence imposed upon guilty plea to lewd conduct.

...prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court. [17] 350H Sentencing and Punishment 350HXII...

...motion, then the issue of whether the sentence was an abuse of discretion would be moot. "Thus, in those cases where only the...

49. State v. Garner

Supreme Court of Idaho, Boise, January 2017 Term. February 28, 2017 161 Idaho 708 390 P.3d 434

CRIMINAL JUSTICE - Probation. Substantial evidence supported determination that probationer willfully violated terms of probation for stalking.

...reviews a trial court's decision to revoke probation under an abuse of discretion standard. [5] 110 Criminal Law 110XXIV Review 110XXIV(N) Discretion...

...review a district court's decision to revoke probation under an abuse of discretion standard. Id. "In determining whether the district court abused its...

50. AgStar Financial Services, ACA v. Gordon Paving Company, Inc.

Supreme Court of Idaho, Boise, December 2016 Term. February 27, 2017 161 Idaho 817 391 P.3d 1287

COMMERCIAL LAW - Guaranty. Underlying guaranteed debt was extinguished by prior foreclosure sale.

...to set aside a default judgment is reviewed under an abuse of discretion standard. [8] 30 Appeal and Error 30XVI Review 30XVI(D...

...to set aside a default judgment is reviewed under an **abuse** of **discretion** standard." Idaho State Police ex rel. Russell v. Real Prop...

51. Watkins Company, LLC v. Estate of Storms

Supreme Court of Idaho, Boise, January 2017 Term. February 24, 2017 161 Idaho 683 390 P.3d 409

REAL PROPERTY - Appeals. Landlord failed to preserve claim that district court **abused** its **discretion** when it apportioned attorney fees based on its familiarity with the case.

...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 To determine whether the trial court abused its...

...Sanctions in General 30 3259 k. Discretion of lower court; abuse of discretion. (Formerly 30k1024.1 Factual findings that are the basis for an...

52. AgStar Financial Services, ACA v. Northwest Sand & Gravel, Inc.

Supreme Court of Idaho, Boise, February 2016 Term. February 24, 2017 161 Idaho 801 391 P.3d 1271

COMMERCIAL LAW - Secured Transactions. Lender was barred from selling personal collateral after lender foreclosed and purchased real properties with reasonable value of more than debt.

...court's decision to award attorney fees is reviewed under the **abuse of discretion** standard. [2] 30 Appeal and Error 30XVI Review 30XVI(D...

...court's decision to award attorney fees is reviewed under the abuse of discretion standard." Stout v. Key Training Corp. , 144 Idaho 195, 196...

53. State v. Meyer

Supreme Court of Idaho, Boise, November 2016 Term. February 03, 2017 161 Idaho 631 389 P.3d 176

CRIMINAL JUSTICE - Instructions. Jury instruction on the defense of necessity was not warranted in possession of marijuana prosecution for defendant who alleged he used marijuana to treat a chronic pain.

...395 (1996) . This Court reviews the district court's decision for **abuse of discretion**. Id. V. Analysis A.The district court correctly concluded that...

54. Union Bank, N.A. v. JV L.L.C.

Supreme Court of Idaho, Coeur d'Alene, August 2016 Term. January 27, 2017 163 Idaho 306 413 P.3d 407

REAL PROPERTY - Mortgages and Deeds of Trust. Lienholder that claimed a priority interest in property being foreclosed upon was not entitled to judgment on the pleadings.

- ...the trial court's evidentiary rulings, the Supreme Court applies an abuse of discretion standard. [21] 30 Appeal and Error 30XVI Review 30XVI(D...
- ...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 When determining whether a district court abused its...

55. State v. Kralovec

Supreme Court of Idaho, Boise, December 2016 Term. January 23, 2017 161 Idaho 569 388 P.3d 583

CRIMINAL JUSTICE - Assault and Battery. Evidence was sufficient to support defendant's conviction for battery on a peace officer arising from struggle in jail holding cell.

- ...review trial transcripts and exhibits before sentencing was not an **abuse of discretion**. Affirmed. West Headnotes [1] 110 Criminal Law 110XXIV Review 110XXIV...
- ...value of the evidence outweighs its prejudicial effect for an abuse of discretion. [7] 110 Criminal Law 110XX Trial 110XX(C) Reception of...

56. Green v. Green

Supreme Court of Idaho, Boise, December 2016 Term. January 23, 2017 161 Idaho 675 389 P.3d 961

ESTATE PLANNING AND PROBATE - Trusts. Siblings failed to establish that grantors' son exerted undue influence on grantors when they amended their trust.

- ...evidence in general. (Formerly 30k970(2) An appellate court applies an **abuse of discretion** standard when reviewing a trial court's determination of the admissibility...
- ...General 30 3139 Discretion of Lower Court 30 3141 k. Abuse of discretion. (Formerly 30k946 To determine whether a trial court abused its...