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## LAW AND ARGUMENT

### **I. Standard of Review**

Defendant/Appellee Mark Bahl (Bahl), in his brief on appeal, misstates the applicable standard of review on appeal in this case. A grant of summary judgment is a question of law reviewed de novo on appeal. e.g., Perez v. Nichols, 2006 ND 20, ¶ 5, 708 N.W.2d 884. Bahl affirms this is the correct standard of review on appeal from summary judgment. Appellee’s Brief on Appeal, page ix.

However, Bahl later confuses the issue by asserting, “the trial court’s finding that there was no causation is governed by the clearly erroneous standard.” Appellee’s Brief on Appeal, page 5 (citing, Romsos v. Sorbean, 474 N.W.2d 83, 84 (N.D. 1991)). The “clearly erroneous” standard is of no application in this case.

Further, “[s]ummary judgment is inappropriate if a finding of fact must be made.” Brown v. North Dakota State University, 372 N.W.2d 879, 883 (N.D.1985); Johnson v. Mineral Estate, Inc., 343 N.W.2d 778, 780 (N.D. 1984); Dickinson Public School Dist. v. Sanstead, 425 N.W.2d 906, 908-909 (N.D. 1988) (overruled on other grounds) (stating, “[b]ecause this is a summary judgment case, the [Appellees] have placed themselves in a peculiar position by arguing that the ‘finding’ is not clearly erroneous.”)

## II. Admissibility of Medical Expert Testimony

### A. Issue Not Raised Before Lower Court

Bahl cites Vaux v. Hamilton for the legal principle that medical expert testimony “must ‘be as to a definite probability and must not involve, to an excessive degree, the element of speculation or conjecture.’” Appellee’s Brief on Appeal, page 4 (citing Vaux v. Hamilton, 103 N.W.2d 291, 295 (1960)). Vaux is not a summary judgment case. In Vaux, the admissibility of medical expert testimony in a jury trial was at issue on appeal. Further, the objectionable testimony was related to future pain and suffering of one of the plaintiffs in a personal injury action. Vaux, at 295 (emphasis added).

Bahl did not raise the issue of expert testimony admissibility before the lower court. “[The Supreme Court has] repeatedly held that issues not raised in the trial court cannot be raised for the first time on appeal.”

Molitor v. Molitor, 2006 ND 163, ¶ 12, 718 N.W.2d 13 (quoting, Wenzel v. Wenzel, 469 N.W.2d 156, 158 (N.D. 1991) (internal quotations omitted).

This Court has explained:

One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it. The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories.

Heng v. Rotech Medical Corp., 2006 ND 176, ¶ 9, 720 N.W.2d 54  
(citing, Chapman v. Chapman, 2004 ND 22, ¶ 7, 673 N.W.2d 920)  
(internal citations and quotations omitted).

B. Vaux Distinguishable from this Case

Even if Vaux were applied to this case, there is nothing to indicate that Dr. Keim's testimony was "nothing more than mere speculation" and should be ruled as inadmissible. Appellee's Brief on Appeal, page 4. Dr. Keim was not simply a medical expert reviewing the medical records in this case. He was Plaintiff/Appellant Klimple's (Klimple) treating physician and examined Klimple's injuries first-hand on a number of occasions.

Also unlike the medical expert in Vaux, Dr. Keim did not testify as to the permanency of the injury, or whether he believed Klimple would have any future pain and suffering. Permanency of the injury and future pain and suffering are not at issue in this case.

Dr. Keim testified he was unable to determine if Klimple's injury was caused by the accident. However, Dr. Keim was also unable to determine that Klimple's injury was not caused by the accident.

Dr. Keim further testified that, even if Klimple suffered from a pre-existing condition, this condition "[c]ould have been aggravated by the car

accident” and, therefore, could not rule out the accident as a cause of the injury.

Dr. Keim’s testimony as to the cause of the accident was not “speculation.” He simply could not rule out the possibility that Klimple’s injury was either caused or aggravated by the accident. Therefore, his testimony regarding causation was equivocal, or uncertain. Viewed in a light most favorable to the non-moving party, Dr. Keim’s testimony supports the existence of a genuine issue of material fact with regard to causation of Klimple’s injuries.

### **III. Plaintiff’s Ability to Testify to Causation**

Klimple’s own testimony is sufficient to prove causation, even if Dr. Keim’s testimony with regard to causation were deemed inadmissible under the principles of Vaux,

Bahl seeks to discredit Klimple’s citation to Asch v. Washburn Lignite Coal Co. as supporting a plaintiff’s ability to testify to the causation of his injury. Bahl erroneously limits interpretation of Asch to mean that a plaintiff may testify only to the nature and existence of an injury.

Appellee’s Brief on Appeal, page 6 (citing Asch v. Washburn Lignite Coal Co., 186 N.W. 757 (N.D. 1922)).

However, a closer reading of Asch also supports the principle of allowing a plaintiff to testify to causation. “It is proper and indeed necessary to inquire into the nature and extent of the injury complained of . . . that before the injury the plaintiff was healthy and vigorous, and that in consequence of the injury he suffered pain and disease.” Asch, at 765 (emphasis added).

Asch does not foreclose a plaintiff’s ability to testify to causation. Again, under Asch, a plaintiff may testify to his physical condition before an accident or incident and a plaintiff may testify to his condition after an accident or incident. It would be anomalous that a plaintiff would not, then, be allowed to testify, or a jury would not be allowed to infer from said testimony, that the accident caused the injury.

## CONCLUSION

The District Court erred in granting summary judgment against Klimple in finding him unable to prove Bahl's actions were the proximate cause of his injuries, or an aggravation of a preexisting condition, because this issue is a question of fact to be answered by a jury.

Dated this 21<sup>st</sup> day of September, 2006.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that above Appellant's Brief is in compliance with 32(5)(A) and 32(7)(A) of the North Dakota Rules of Appellate Procedure.

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Carey A. Goetz

CERTIFICATE OF ELECTRONIC SERVICE

I certify that on the 21<sup>st</sup> day of September, 2006, I electronically served a copy of the attached Appellant's Brief to the recipient, Bradley Beehler, at his e-mail address published on the North Dakota Supreme Court online directory, which is listed as:

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