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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kenneth Loper,	)	
	)	
Plaintiff/Appellant,	)	
	)	Supreme Court No.: 20100101
vs.	)	Kidder County No.: 22-08-C-028
	)	
William Adams,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE MARCH 11, 2010 ORDER AND MARCH 19, 2010 ORDER FOR JUDGMENT ISSUED BY JUDGE GAIL HAGERTY KIDDER COUNTY DISTRICT COURT

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

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I. Whether the district court abused its discretion by excluding Dr. Dunnigan as an expert witness on the issue of causation due to untimely disclosure and denying plaintiff Loper's request for enlargement of time to disclose expert witnesses.

II. Whether summary judgment is appropriate because plaintiff Loper has not established by expert testimony to a reasonable degree of medical certainty his alleged injuries are causally related to the subject incidents.

I. STATEMENT OF THE CASE

2. This case stems from incidents on May 16, 2005 in which plaintiff Kenneth Loper (hereinafter "Loper"), a ranch hand employed by defendant William Adams (hereinafter "Adams"), was knocked down twice by calves while working in a cattle chute with his back to the calves, allegedly causing back injuries. Loper alleges negligent supervision and negligent maintenance of the workplace. App. at 6-7, Complaint and Demand for Jury Trial at ¶¶ 33-40. Loper claims the May 16, 2005 incidents caused a spinal disc rupture, although the rupture was not detected until Loper was hospitalized for a later incident in which Loper injured his back trying to close a gate, which is not alleged to be the fault of Adams. App. at 5-6, Complaint and Demand for Jury Trial at ¶¶ 24-28.

3. This action was commenced by service of a summons and complaint dated January 14, 2008, later filed in the district court on May 27, 2008. App. at 1, 3-8. On July 1, 2009, Adams filed Defendant's Motion for Summary Judgment, arguing among other things, "plaintiff has not established by expert testimony to a reasonable degree of medical certainty his alleged injuries are causally related to the subject incidents", as opposed to the subsequent incident with the gate. Supp. App. at 2. At the time Adams filed the motion for summary judgment, Loper had not disclosed any medical expert witnesses.

4. In response to Adams' motion for summary judgment, Loper argued expert testimony as to the cause of Loper's alleged injuries was not necessary but rather Loper intended to introduce medical records at trial as business records. As discussed more thoroughly below, at the hearing on the motion for summary

judgment, counsel for Loper indicated he might call Dr. Ralph Dunnigan, Loper's treating physician, as an expert medical witness at trial, but that decision had not been made yet. In its order on the motion for summary judgment, dated September 2, 2009, the Court ordered a continuance of the September 14, 2009 trial specifically to permit time for the necessary disclosure of experts and further discovery. App. at 41. At oral argument (Supp. App. at 62-63, 68-69) and the district court's written order on the motion for summary judgment (App. at 40-41), the district court warned Loper's counsel a medical expert on the issue of causation would be necessary at trial based on Klimple v. Bahl, 2007 ND 13, 727 N.W.2d 256 and other applicable North Dakota law.

5. By mistake, no scheduling order had previously been entered in the case and thus there were previously no expert disclosure deadlines. App. at 40-41. On September 14, 2009, following the continuance of trial, the Court approved a trial management schedule stipulated to by the parties, which set the deadline for plaintiff Loper to disclose experts by November 15, 2009 and the deadline for defendant Adams to disclose experts, including providing an independent medical examination report to plaintiff, by January 15, 2010. App. at 42-44.

6. Following the order adopting the stipulated trial management schedule, if Loper intended to call an expert at trial on the issue of causation, he was required to timely disclose such an expert. Loper did not do so. On January 27, 2010, after both expert disclosure deadlines had passed without Loper providing an expert disclosure, Adams filed Defendant's Renewed Motion For Summary Judgment, again arguing Loper had not established by expert testimony to a reasonable

degree of medical certainty that his alleged injuries are causally related to the subject incidents, as opposed to the later incident with the gate. Supp. App. at 71-72. On February 10, 2010, which was almost three months after plaintiff's expert disclosure deadline, almost one month after defendant Adams' expert disclosure deadline, and only a month and a half before the rescheduled trial date of March 24, 2010, counsel for Loper sent to counsel for Adams an e-mail with an attached expert report of Dr. Ralph Dunnigan. Supp. App. at 75; App. at 47-58. The report of Dr. Dunnigan was the first indication to Adams that Dr. Dunnigan was expected to testify at trial that Loper's alleged injuries were caused by the incidents with the calves as opposed to the incident with the gate.

7. Adams responded to the untimely disclosure by filing a motion in limine, seeking to exclude Dr. Dunnigan's report and to preclude Dr. Dunnigan from testifying at trial as an expert witness on the issue of causation. Supp. App. at 73-74. Plaintiff then filed a request for enlargement of time to designate experts and for continuance of trial. Supp. App. at 82-89.

8. By Order dated March 11, 2010, the district court denied Loper's request for an enlargement of time to disclose Dr. Dunnigan as a medical expert on the issue of causation, excluded Dr. Dunnigan's testimony at trial due to the untimely disclosure, and granted summary judgment in favor of Adams because, with Dr. Dunnigan's testimony excluded, Loper could not establish his alleged injuries are causally related to the subject incidents with the calves rather than the later incident with the gate. App. at 59-62.

9. Additional relevant details of the procedural history are provided in the Statement of the Facts below. Adams asserts in this appeal that Loper cannot establish his alleged injuries are causally related to the subject incidents with the calves, as opposed to the later incident with the gate, without expert medical testimony to a reasonable degree of medical certainty. Since Dr. Dunnigan was properly excluded as untimely disclosed, Loper cannot meet his burden of proof on the issue of causation and summary judgment was appropriate. Further, the district court did not abuse its discretion by refusing to continue the trial a second time due to Loper's inexcusable failure to comply with the expert disclosure deadline and resulting prejudice to Adams.

II. STATEMENT OF THE FACTS

A. The Parties

10. Defendant Adams operates a cow-calf ranching operation. Supp. App. at 7, Adams depo. at pp. 5-6. In 2004, Adams hired Loper to work as a ranch hand. Supp. App. at 29, Loper depo. at p. 28. Adams and local rancher Charlie Dronen (hereinafter "Dronen") sometimes share labor on each other's ranches. Supp. App. at 15, Adams depo. at p. 37. In other words, Adams and his employees would work on Dronen's ranch and in exchange Dronen and his employees would work on Adams' ranch without any money being exchanged. Supp. App. at 7-8, 15, Adams depo. at pp. 7-8, 37. On the day of the subject incidents with the calves, Adams and Loper went to work at the Dronen ranch to help with branding and giving vaccines to Dronen's calves. Supp. App. at 26-26, 32, 34, Loper depo. at pp. 14, 18, 42, 49. It is undisputed Adams did not own the subject cattle chute

and the work that day was being directed by Dronen. Supp. App. at 35, Loper depo. at p. 52. Loper has not filed suit against Dronen.

B. <u>The Subject Incidents</u>

11. The specific details of the configuration of the cattle chute and the methods used to work the calves on the day of the subject incidents are irrelevant in this appeal and will not be explained thoroughly in this brief. More details are in the record before the district court in the form of diagrams, photographs, and deposition testimony. Essentially, Loper claims the cattle chute was defective because it allowed calves to turn around and head toward Loper, and the number and location of workers that day allegedly spooked the calves. Loper claims Adams, as Loper's employer, should not have permitted him to work in the cattle chute.

12. Loper's job on the day of the subject incidents was to let one calf at a time into the alleyway from a holding pen and bring it to the other end of the alleyway, where the cattle table is located. Supp. App. at 35, Loper depo. at pp. 42-43. Raymond Olson (Ole), and employee of Dronen, was standing in the alleyway in front of the calf table. Supp. App. at 32-33, Loper depo. at pp. 43-45. Loper would hand each calf off to Ole, who would grab the calf and make sure it went into the calf table**.**

13. Loper testified at his deposition the first incident happened at about 11:00 a.m. on May 16, 2005. Supp. App. at 36, Loper depo. at p. 58. He testified he handed a calf off to Ole and then Loper turned around and proceeded back toward a holding pen to get another calf. Supp. App. at 36-37, Loper depo. at pp. 58-60.

Loper testified he thought Ole securely had the calf but the calf got away from Ole, turned around and headed back toward the holding pen and Loper, who was walking with his back turned to the calf. Id. Loper testified the calf hit him in the lower back with its head and Loper was flipped over the back of the calf and his feet went up over his head. Supp. App. at 37, Loper depo. at pp. 60-61. The calf ran underneath him. Supp. App. at 37, Loper depo. at p. 61. He testified he landed on the ground on his shoulders and felt pain in his lower back. Supp. App. at 37, Loper depo. at pp. 61-62. He got up, shook his head and went to get another calf. Supp. App. at 37, Loper depo. at p. 62. He was on the ground for 15 or 20 seconds. Id. Loper testified everybody laughed and Loper stood up and said, "dang, that hurt." Supp. App. at 37, Loper depo. at pp. 62-63. Loper admits he did not tell anyone at that time that they should change the way they were working the calves. Supp. App. at 37, Loper depo. at p. 63. Adams testified after the first time Loper was knocked down, Loper said he thought he was okay. Supp. App. at 14, Adams depo. at pp. 34-35.

14. The second incident happened the same day at about 1:00 or 2:00 p.m., after lunch. Supp. App. at 37, 39, Loper depo. at pp. 63, 68-69. Loper testified the same thing happened in the second incident. Supp. App. at 38, Loper depo. at p. 64. He brought the calf to Ole and then turned his back to walk toward a holding pen. Id. The calf got away from Ole and turned around, hitting Loper in the back. Id. Loper testified the two incidents took place almost identically. Id. Again, Loper's feet flew out from under him and he landed on the ground. Supp. App. at 38, Loper depo. at pp. 64-65. He testified he remained on the ground

again about the same amount of time, 15 to 20 seconds. Supp. App. at 38, Loper depo. at p. 65. Everyone laughed, including Loper. Supp. App. at 38, Loper depo. at pp. 65-66. Loper continued working cattle after the second incident. Id. After the second incident, Loper did not express to anyone his concern about the way the operation was going. Id. After the second time Loper was knocked down, Adams testified he asked Loper if Loper wanted Adams to take over Loper's job and Loper said no. Supp. App. at 14, Adams depo. at p. 35.

15. They finished work that day at 3:00 or 4:00 p.m. Supp. App. at 39, Loper depo. at p. 69. After that, they went back to Adams' house, Loper showered, changed clothes, and they went back to the Dronen's and ate dinner with the Dronens. Id. Loper did not seek any medical attention after the subject incidents with the calves on May 16, 2005.

C. The Subsequent Incident with a Gate

16. On May 23, 2005, a week after the May 16, 2005 incidents that are the subject of this lawsuit, Loper went out to check cows on Adams' ranch. Supp. App. at 40, Loper depo. at p. 74. He opened a large metal swing gate and checked the cows and the feeder. Id. When he was done, he turned, grabbed the gate, and twisted his trunk. Supp. App. at 40, Loper depo. at pp. 74-75. He heard something pop in his lower back area and he fell to the ground. Supp. App. at 40, Loper depo. at p. 75. It is Loper's belief the incident with the gate is when his disc ruptured. Id. He testified there is no doubt in his mind about that. Id. Specifically, he testified:

A. ….

I was standing on an open gate, and usually just let it swing open. I walked out and checked the feeder, made sure they had salt block, and I come back, and when I went to turn to close the gate, I turned like this to grab the gate.

Q. You twisted? Your trunk twisted?

A. Yes, sir, I twisted to get the gate, and when I did, I heard something pop in my lower back area there and I fell to the ground.

Q. So you audibly heard a pop?

A. Yes.

Q. And you heard it with your ears?

A. Yes.

Q. And you heard it come from your lower back?

A. Yes, sir.

Q. And is it your belief that that's when your disc bulged or ruptured?

A. Yes, sir.

Q. No doubt in your mind about that?

A. No doubt in my mind.

Supp. App. at 40, Loper depo. at pp. 74-75.

17. Loper testified he does not claim in this lawsuit the gate was defective or that Adams was in any way at fault for the incident with a gate. Supp. App. at 41, Loper depo. at pp. 76-77. After the incident with the gate, Loper was immediately taken to St. Alexius Medical Center by ambulance and was diagnosed with a ruptured disc. Supp. App. at 41, Loper depo. at pp. 77-78. During the week between the subject incidents with the calves and the incident

with the gate, Loper did not seek any medical treatment. Supp. App. at 40, Loper depo. at pp. 72-73.

18. Loper testified it is his position in this lawsuit that his ruptured disc and resulting symptoms are related to the incidents with the calves on the Dronen ranch. Supp. App. at 43, 45-46, Loper depo. at pp. 85, 95-97. He testified at his May 23, 2008 deposition however that no medical professional or anyone else has ever told him his symptoms are related to the subject incidents with the calves. Supp. App. at 43, Loper depo. at pp. 85-87. Adams believed this to be true until Loper's extremely late disclosure of Dr. Dunnigan's expert report.

19. In Appellant's Brief, Loper attempts to portray the incident with the gate as merely a progression of his symptoms following the incident with the calves rather than a separate and distinct event. Id. at ¶ 28. In that regard, Loper argues:

> Loper testified that his movement on May 23, 2005, to close a gate was not unusual and his collapse was only one of a progression of worsening symptoms that began on May 16, 200[5]. For summary judgment the Court must accept the facts that Loper was hit hard in the lower back twice on May 16, 2005, and his condition deteriorated daily until he could no longer stand on May 23, 2005."

Appellant's Brief at ¶ 28.

20. However, this portrayal of the incident with the gate as merely a progression of symptoms is contrary to Loper's own deposition testimony. Loper testified he twisted his trunk when he went to close the gate, heard an audible pop in his lower back area, fell to the ground in pain and had to be taken to the emergency room by ambulance. Supp. App. at 40-41, Loper depo. at pp. 74-77. Loper seeks economic and non-economic damages in this lawsuit relating to a very specific medical condition, namely a ruptured disc at the L5-S1 level. App.

at 6, Complaint and Demand for Jury Trial at ¶ 28. As discussed below, Loper must introduce medical expert testimony to support his claim that his medical condition was caused by calves running into him a week earlier, not the acute event in which Loper twisted his trunk, heard a pop, and fell to the ground in pain. Loper failed to timely disclose such an expert.

D. Relevant Procedural History

21. On February 14, 2008, Adams served on Loper Defendant's Interrogatories And Request For Production Of Documents To Plaintiff (Set No. 1), propounding the following interrogatory in accordance with North Dakota Rule of Civil Procedure 26(b)(5):

> INTERROGATORY NO. 63: Identify by name, address, employer, and field of expertise each and every person whom you expect to call as an expert witness at trial, and state the following:
>
> A. His or her field of expertise;
>
> B. Any subspecialties within his or her field of expertise;
>
> C. The subject matter on which he or she is expected to testify;
>
> D. The substance of the facts and opinions to which he or she is expected to testify;
>
> E. A summary of the grounds for each of the above stated opinions;
>
> F. The title and date of any treatise, book, article, essay, or other writing by the expert relating to the subject matter on which he is expected to testify; and
>
> G. A complete resume of each such expert's educational and employment background.

Supp. App. at 76-78.

22. Loper responded on March 20, 2008 as follows: "Experts have not been selected." Supp. App. at 79-81. Loper has never supplemented his response to the above-quoted interrogatory.

23. By Order dated January 21, 2009, the district court scheduled the trial in this case to begin September 14, 2009. Supp. App. at 1. However, by mistake, the Court did not hold a scheduling conference or enter a scheduling order pursuant to Rule 16 of the North Dakota Rules of Civil Procedure to set case management deadlines, including the deadline to disclose expert witnesses. App. at 41.

24. On July 1, 2009, Adams filed Defendant's Motion for Summary Judgment. Supp. App. at 2-3. Among other things, Adams argued that Loper had not established by expert testimony to a reasonable degree of medical certainty his alleged injuries were causally related to the subject incidents with the calves. Id. In other words, it was Adams' position that Loper cannot prove without testimony from a medical expert that his alleged injuries occurred as a result of the incident with the calves as opposed to the subsequent incident with the gate. Id. At the time Adams filed the motion for summary judgment, Loper had not disclosed any medical expert witnesses.

25. In support of Loper's responsive brief to Adams' initial motion for summary judgment, Loper filed an affidavit of his counsel, dated August 3, 2009, which included, among other things, the following statement:

> Dr, Ralph Dunnigan, the neurologist who treated Loper at St. Alexius beginning May 23, 2005, will testify as an expert witness as to the injuries Loper suffered, his opinion as to how the injuries occurred and the care he provided to Loper. The physician's

> schedule precludes testimony in Steele at trial, but he is willing to undergo a videotaped deposition in Bismarck, to be offered into evidence at trial. Details and dates are to be resolved by counsel.

App. at 34.

26. However, Loper has never argued this purported expert disclosure discloses the fact that Dr. Dunnigan is expected to testify Loper's alleged disc rupture was caused by the incidents with the calves, as opposed to the later incident with the gate.

27. In fact, at the August 21, 2009 hearing on the initial motion for summary judgment, counsel for Loper stated the following:

> THE COURT: Okay. But the question is, do you have anything from a medical standpoint that would tie the injuries that occurred in the chute to the injury that he suffered when the disc ruptured?
>
> MR. TAMM: The medical records of St. Alexius, which can be admitted by an employee of St. Alexius, if necessary, because they're business records, prove –
>
> THE COURT: No. Diagnostic material wouldn't be admitted as a business record.
>
> MR. TAMM: Well, a medical record of what the nurses observed and what was done and what Loper stated is business records which would be admissible. The opinion of a doctor might not be admissible, but medical records are business records and would be admissible by an employee of the hospital as showing this is the medical records on that particular date.
>
> And the testimony of Loper, what was done to him, what he felt in every day starting from May 16th to May 23rd, went in the hospital -- what has happened to him every day since then is admissible because that's something he testified to. He can testify to what he felt. The medical records are admissible. **And we have not decided yet whether Dr. Dunnigan will be an expert witness as a physician or not.**

THE COURT: You haven't disclosed him at this point and trial is less than a month away?

MR. TAMM: We have, in our affidavit of whenever the brief was filed, we indicated that we would be calling Dr. Dunnigan as an expert witness **but that decision has not been made a hundred percent yet at this point.**

Supp. App. at 62-63 (emphasis added).

28. Further, the following discussion occurred between counsel for Loper and the Court:

Mr. TAMM: Your honor, just may I reply on one thing? During the last argument, opposing counsel seemed to be testifying that [Loper's] disc was ruptured on May 23rd. That is not our assertion and we do not believe that's what happened.

THE COURT: Well, but you don't have any evidence that will help the jury make that decision.

MR. TAMM: Correct. Well, aside from [Loper's] testimony. But he seemed to state that the fact that the disc was ruptured on May 23rd, and that's not in our allegation. In fact, we do not believe that happened. The disc was ruptured on May 23rd. I'm simply –

THE COURT: Which means even more likely you need medical testimony.

I don't see this case going forward with him saying I think I might have been injured on the 16th, something else happened on the 23rd, and I want Mr. Adams to be responsible for that. You know, that isn't likely to happen.

MR. TAMM: Well, the connection between what happened to [Loper] on the 16th and there afterwards, that's up to the jury to decide that.

THE COURT: You have the burden of proof in this case.

MR. TAMM: True. Yes, we do.

THE COURT: And what you're suggesting isn't going to get past a directed verdict.

Okay. I will take the matter under advisement.

Supp. App. at 68-69.

29. In its Order on the initial motion for summary judgment, dated September 2, 2009, the Court ordered a continuance of the trial date because no scheduling order had been issued in the case. App. at 41. Thus, there were previously no deadlines set for expert disclosures or other deadlines. Id. Importantly, the Court explicitly indicated it was granting the continuance to permit the necessary disclosures and further discovery, stating:

> In this case, no scheduling order was entered. It's unclear to me how a trial date was obtained without a scheduling order or note of issue.
>
> Because there was no scheduling order and thus no requirement for completion of discovery or disclosure of witnesses, I am continuing the trial set to begin on September 14. 2009.

App. at 41.

30. In its September 2, 2009 Order, with respect to causation, the district court stated:

> Counsel for Loper seems to suggest that the jury will be able to conclude that Loper's testimony coupled with medical records introduced as business records will establish causation and convince the trier of fact in this matter that the injuries alleged to have occurred on May 16, 2005, were the cause of the injury for which Loper sought medical treatment on May 23, 2005.
>
> The business records exception to the hearsay rule is a broad rule that may allow the introduction of medical records under Section 31-08-01 of the North Dakota Century Code. In this case, it is clear that the main issues to be determined by a jury will be causation, actual and proximate. Loper apparently hopes to be allowed to introduce a medical report which relates to the diagnosis of his May 23rd injury to explain the diagnosis as it relates to his earlier injury. Without use of a medical expert at trial, it will be difficult for Loper to carry the burden of proving the

> cause of his injury. It will also be difficult for a jury to determine causation without explanation by a medical expert. "[E]xpert testimony is required if the issue is beyond the area of the common knowledge or lay comprehension or the issue is not within the ordinary experience of the jurors." Klimple v. Bahl, 2007 ND 13, ¶ 6, 727 N.W.2d 256.

App. at 40-41.

31. Following the continuance of the trial, the parties submitted a stipulation for a trial management schedule, which the Court approved by Order dated September 14, 2009. App. at 42-44. The Stipulation For Trial Management Schedule & Order set the plaintiff's expert disclosure deadline for November 15, 2009 and defendant's expert disclosure deadline for January 15, 2010. App. at 42-43. Trial was rescheduled to begin March 24, 2010. Supp. App. at 54.

32. On January 27, 2010, Adams filed Defendant's Renewed Motion For Summary Judgment because Loper had still not disclosed an expert on the issue of causation. Supp. App. at 71-72. On February 10, 2010, counsel for Loper sent to counsel for Adams an e-mail with an attached expert report of Dr. Ralph Dunnigan. Supp. App. at 75. Adams responded to the untimely disclosure by filing a motion in limine (Defendant's Motion In Limine To Exclude Expert Testimony By Dr. Ralph Dunnigan, Supp. App. at 73-74.), seeking to exclude Dr. Dunnigan's report and to preclude Dr. Dunnigan from testifying at trial as an expert witness. Loper filed a motion for enlargement of time to designate experts and for continuance of trial, (Plaintiff's Request For Enlargement Of Time To Designate Medical Expert And Disclose Opinion Of Medical Expert Under North Dakota Rule 6(b) Of Civil Procedure, And For Continuance Of Trial, Supp. App. at 82-89).

33. In its March 11, 2010 Order, the district court ruled:

> Loper's failure to timely disclose Dr. Dunnigan, or any other witness, does not fall within the excusable neglect provision of Rule 6(b). Loper had adequate time to formally disclose the expert witness both before the Court's September 2, 2009, Order, and within the time set out in the scheduling order. The Court will not grant another continuance, because to do so would be unfair to the defense. Dr. Dunnigan's testimony must therefore be excluded, and Adams's motion in limine is GRANTED.

App. at 61.

34. Further, the district court ruled:

> Loper has failed to timely disclose his expert witness, and is barred from presenting that expert's testimony. An expert would be required to state to a reasonable degree of medical certainty, the cause of Loper's injury. Without an expert, Loper can only speculate, and asks the jury to speculate, that the incident on May 16, 2005, caused his May 23, 2005 injury. The complexity of the injury, as well as the lapse of time between the May 16, 2005 incident and his injury on May 23, 2005, complicate the issue. Loper cannot presumably carry the burden of proving the causation of such a complex injury at trial without the use of an expert. Adams' motion for summary judgment is therefore GRANTED.

App. at 62.

III. ARGUMENT

A. Summary Judgment Standard

35. "Summary judgment is a procedural method for promptly disposing of a lawsuit without a trial if, after viewing the evidence in the light most favorable to the party against whom it is sought and giving that party the benefit of all favorable inferences, there is no genuine dispute as to either the material facts or the inferences to be drawn from the undisputed facts, or if only a question of law is involved." Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 764 (N.D. 1996). Moreover, even if factual disputes exist in a given matter,

"summary judgment is proper if the law is such that resolution of those factual disputes will not change the result." Id.

36. No genuine issue of material fact exists in this case that would preclude summary judgment in favor of Adams. Loper has failed to timely disclose an expert on the issue of causation of Loper's alleged injuries.

B. The District Court Did Not Abuse Its Discretion By Excluding Dr. Dunnigan As An Expert Witness And Denying Loper's Request For Enlargement Of Time To Disclose Expert Witnesses

37. Dr. Dunnigan was properly excluded as an expert witness on the issue of causation of Loper's alleged injuries because the disclosure of Dr. Dunnigan was untimely. Loper's arguments before this Court significantly distort the issue. In Appellant's Brief, Loper makes the argument that Dr. Dunnigan was in fact disclosed as an expert in Loper's counsel's affidavit dated August 3, 2009 (App. at 33-34), submitted in response to the initial motion for summary judgment. Appellant's Brief at ¶¶ 3, 12, 14, 16, 20, 22. Loper asserts it was merely Dr. Dunnigan's expert report that was not disclosed before the expert disclosure deadline. Id. at p. 10. In that regard, Loper argues,

> November 15, 2009, was the first deadline set by the Trial Court for Loper to disclose his experts. The Scheduling Order of September 14, 2009, does not specify that the opinion of Loper's expert has to be produced, only that the expert be disclosed. App. 42, 43. If the Scheduling Order is taken literally, Loper was not in default of expert disclosure, because Loper had disclosed Dr. Dunnigan as his medical expert on August 21, 2009, and the September 14, 2009 Order does not specify that the written opinion of Loper's experts must be disclosed by November 15, 2009. In its Order of March 11, 2010, the Trial Court seemed to interpret the September 14, 2009 Scheduling Order to mean that a written report from Dr. Dunnigan was due on November 15, 2009. App. 59-63. Even if the Trial Court was correct in its interpretation of the

> September 15, 2009 Schedule Order, November 15, 2009, was Loper's first expert disclosure deadline. Where the identity of a medical expert is known, but the opinion has not been received by the first expert disclosure deadline, imposition of the ultimate penalty of exclusion of evidence for the first failure to comply with an expert disclosure deadline is unwarranted.

Id. at p. 9-10.

38. Loper's argument in that regard is a red herring. The issue in this appeal is not whether a party must provide a written report of an expert. Whether and when Dr. Dunnigan prepared a written report is irrelevant in this appeal. What is relevant is whether Loper timely disclosed that Loper intended to call Dr. Dunnigan as an expert witness on the issue of causation, which relates to a key defense and was the primary issue raised in the initial motion for summary judgment. The purported affidavit disclosure does not indicate Dr. Dunnigan was expected to testify that the incidents with the calves, as opposed to the incident with the gate, caused Loper's alleged disc rupture. App. at 34. Disclosing Dr. Dunnigan as a medical expert is not the same thing as disclosing Dr. Dunnigan as an expert on causation. Adams specifically requested in interrogatories, among other things, information regarding the subject matter on which Loper's experts are expected to testify and the substance of the facts and opinions to which they are expected to testify. Supp. App. at 76-78. Such interrogatories are explicitly permitted by North Dakota Rule of Civil Procedure 26(b)(5). Loper responded on March 20, 2008, "[e]xperts have not been selected", and Loper never supplemented his response prior to providing Dr. Dunnigan's expert report. Supp. App. at 79-81.

39. Further, subsequent to Loper's counsel's August 3, 2009 affidavit (App. at

33-34), Loper's counsel specifically stated at the August 21, 2009 hearing that the decision of whether to call Dr. Dunnigan as an expert witness had not yet been made. Prior to the extremely untimely disclosure of Dr. Dunnigan's expert report, counsel for Loper never stated to the district court or to counsel for Adams, "I intend to call Dr. Dunnigan as an expert witness at trial and Dr. Dunnigan is expected to testify Loper's disc rupture was caused by the incidents with the calves as opposed to the incidents with the gate." Loper's reliance on appeal on a vague affidavit that does not in any way mention causation is disingenuous. A review of the August 21, 2009 hearing transcript makes clear Loper's counsel had not yet disclosed, and in fact was unsure of whether he would disclose Dr. Dunnigan as an expert on the issue of causation. Supp. App. at 62-63. In fact, the trial was specifically continued to allow time to disclose additional experts and conduct related discovery. However, following the hearing on the initial motion for summary judgment and the scheduling of applicable deadlines, Loper disclosed absolutely nothing until the very untimely expert report of Dr. Dunnigan, which was disclosed shortly after Adams filed a renewed motion for summary judgment. It should be noted, in response to the renewed motion for summary judgment, Loper did not make a single mention of the August 3, 2009 affidavit (App. at 33-34) but rather raises this argument for the first time on appeal. None of Loper's arguments before the district court suggest the August 3, 2009 affidavit (App. at 33-34) was a sufficient disclosure of Dr. Dunnigan as a causation expert.

40. Loper had a duty to supplement discovery within the deadline set in the

trial management schedule. The deadline was in fact stipulated to by the parties. North Dakota Rule of Civil Procedure 26(e) states in relevant part:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> > (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to
> >
> > * * *
> >
> > (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

41. The North Dakota Supreme Court has stated, "[p]arties must fully, completely, and fairly disclose the subject matter on which their expert witnesses will testify at trial and the substance of their expert witnesses' testimony." Wolf v. Seright, 1997 ND 240, ¶ 17, 573 N.W.2d 161.

42. In Dewitz v. Emery, 508 N.W.2d 334 (N.D. 1993), 39 days before trial, the defendant served the plaintiff with supplemental answers to discovery, for the first time disclosing that the defendant intended to call Charles W. Coons as an additional expert at trial. Id. at 338. The plaintiff moved to exclude Coons from testifying, arguing among other things that the disclosure was not timely. Id. at 339. The trial court excluded Coons from testifying at trial and the decision was upheld by the North Dakota Supreme Court. Id. at 339, 341. The North Dakota Supreme Court stated:

> Rule 26(c) does not establish a fixed time prior to trial within which interrogatories must be supplemented so as to be seasonable. The determination as to seasonableness is necessarily a case by

> case determination, within the sound discretion of the trial judge. **To be seasonable, however, the supplemental response must be made a reasonable time before trial taking into account the purpose of the rule which is the elimination of surprise at trial**.

Id. at 339 (emphasis added)(citing Hudson v. Parvin, 582 So.2d 403, 412 (Miss. 1991); Olson v. A.W. Chesterton Co., 256 N.W.2d 530, 539 (N.D. 1977)).

43. The Court stated the trial court has discretionary authority to determine the proper sanction for a party's failure to seasonably supplement interrogatories. Id. at 339. The Court held, "[a]lthough exclusion of a witness is a drastic measure, we cannot say it was unwarranted in this case. The court acted reasonably in concluding the disclosure was not 'seasonable,' and in concluding the disclosure was not complete." Id. at 340.

44. Loper's late disclosure substantially prejudiced Adams, as recognized by the district court. App. at 61. Loper's disclosure of Dr. Dunnigan as an expert witness was almost three months after plaintiff's expert disclosure deadline, almost one month after defendant Adams' expert disclosure deadline, and only a month and a half before the rescheduled trial date. The expert disclosure deadlines of plaintiff and defendant were staggered by two months to permit defendant time to review plaintiff's expert disclosure, conduct necessary further discovery, and potentially retain and disclose an expert in response. Further, the expert disclosure and other discovery deadlines were set to expire months before trial to permit adequate time for trial preparation. Through Loper's inaction, Adams was led to believe Loper did not intend to call an expert witness at trial on the issue of causation and Adams incurred substantial costs and attorney's fees preparing two motions for summary judgment on that basis. Adams had no

reasonable opportunity prior to trial to seek expert review of Dr. Dunnigan's newly disclosed opinions and potentially retain his own expert in response. In light of Dr. Dunnigan's newly disclosed expert opinions, it was clear Adams would have to follow the deposition of Dr. Dunnigan with an independent medical examination of Loper, which there was simply no time to arrange and obtain a report prior to trial.

45. Loper's proposed solution to the obvious prejudice to Adams by the disclosure on the eve of trial was for the district court to enlarge the time for Loper to disclose experts and to continue the trial to a later date. With respect to Loper's request for enlargement of time to disclose Dr. Dunnigan as an expert on causation, North Dakota Rule of Civil Procedure 6(b) states:

> Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request for enlargement is made before expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after expiration of the specified period permit the act to be done **if the failure to act was the result of excusable neglect**; but it may not extend the time for taking any action under Rules 4(e) (7), 52(b), 59(c), (i) and (j), and 60(b), except to the extent and under the conditions stated in them.

N.D.R.Civ.P. 6(b) (emphasis added).

46. Rule 6(b) provides for enlargement of time under two circumstances: 1) when a request for enlargement of time is made before the expiration of the time to perform an act, and 2) when a request for enlargement of time is made after the expiration of the time to perform an act. In this case, plaintiff did not seek an enlargement of time to disclose Dr. Dunnigan as an expert witness until almost three months after the deadline. Thus, the second part of Rule 6(b) applies, which

only permits enlargement of time "if the failure to act was the result of excusable neglect". In this case, plaintiff's failure to timely disclose Dr. Dunnigan as an expert on causation was not the result of excusable neglect.

47. The North Dakota Supreme Court has explained the excusable neglect standard:

> Excusable neglect is a fluid concept, encompassing "both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." Accord Pioneer Inv. Servs. Co. v. Brunswick Assocs. LP, 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (discussing "excusable neglect" concept); Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 403 (8th Cir. 2000). The Eighth Circuit has interpreted "excusable neglect" to mean a " 'good faith and some reasonable basis for noncompliance with the rules.' " Ivy v. Kimbrough, 115 F.3d 550, 552 (8th Cir. 1997) (quoting Adams v. AlliedSignal Gen. Aviation Avionics, 74 F.3d 882, 887 (8th Cir. 1996)). In most instances, ignorance of the rules, or mistakes construing the rules, are insufficient to establish excusable neglect. Ceridian Corp., at 403. However, the rules do provide some flexibility for a court "to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." See Pioneer, at 388.

Leftbear v. State, 2007 ND 14, ¶ 9, 727 N.W.2d 252. Whether a party's failure to take action within a specified time is the result of excusable neglect is within the sound discretion of the trial court and is reviewed by the North Dakota Supreme Court under an abuse of discretion standard. Alerus Financial, N.A. v. Lamb, 2003 ND 158, ¶ 9, 670 N.W.2d 351.

48. Plaintiff's reasons for not providing a timely disclosure are contained in an affidavit of his counsel, submitted to the district court. Supp. App. at 90-92. In the Affidavit of Rudra Tamm In Support Of Plaintiff's Request For Enlargement Of Time, plaintiff's counsel states he first contacted Dr. Dunnigan in October 2006, more than three years prior to trial, to request an expert medical report.

Supp. App. at 90, ¶ 5. Plaintiff's counsel states the delay in preparation of the report was due to the fact that in October 2006, plaintiff had not reached maximum medical improvement and Dr. Dunnigan delayed writing a report due to a heavy workload. Supp. App. at 91, ¶¶ 6-8.

49. These reasons do not constitute excusable neglect. Regarding plaintiff reaching maximum medical improvement, Dr. Dunnigan's opinion is based solely on his review of plaintiff's initial treatment records from the day plaintiff was brought to the emergency room when his back gave out while opening a gate. Whether plaintiff has reached maximum medical improvement is irrelevant to whether plaintiff's injuries were caused by the incident with the calves as opposed to the later incident with the gate. With respect to Dr. Dunnigan's busy schedule, it is unlikely Dr. Dunnigan was unable to prepare and submit a report in more than three years.

50. Further, at no time did plaintiff ever previously inform Adams' counsel or the district court that he had made the decision to disclose Dr. Dunnigan as an expert on the issue of causation or that Dr. Dunnigan was in the process of preparing an expert report. The issue of plaintiff not having an expert on the issue of causation was a key issue in the initial summary judgment and was discussed at the August 21, 2009 hearing, during which the district court warned plaintiff's counsel that plaintiff would need an expert witness on the issue of causation to meet his burden of proof at trial. Following the initial continuance of trial, the parties stipulated to the expert disclosure deadlines. The agreed upon deadline for plaintiff to disclose experts came and went without plaintiff requesting an

extension from the Court or even notifying Adams' counsel that he would be disclosing Dr. Dunnigan but that there was a problem obtaining an expert report.

51. Taking plaintiff's counsel's reasons for the untimely disclosure as true, plaintiff knowingly allowed the expert disclosure deadline to pass without taking any action to receive an extension, which is inexcusable. Based on the initial summary judgment motion, plaintiff was well aware that the issue of causation is a key defense being asserted by Adams, i.e. that Loper is unable to show the cause of his alleged injuries was the incident with the calves, as opposed to the later incident with the gate. Assuming plaintiff's counsel's affidavit (Supp. App. at 90-92) is accurate, plaintiff has long intended to call Dr. Dunnigan as an expert witness on the issue of causation, yet plaintiff waited until his expert disclosure deadline passed and Adams' expert disclosure deadline passed without disclosing Dr. Dunnigan, or even notifying Adams' counsel of a reason for the delay. By his silence, plaintiff led Adams and his counsel to believe plaintiff did not intend to call Dr. Dunnigan as an expert witness on the issue of causation. Adams proceeded with discovery and trial preparation in light of that justified belief.

52. Loper argues Adams was not prejudiced by the late disclosure. Appellant's Brief at ¶¶ 22-24. However, Adams was most certainly prejudiced. Adams' counsel prepared a renewed motion for summary judgment with the understanding that plaintiff did not intend to call an expert witness as to causation. Adams incurred attorney's fees and costs associated with that renewed motion. Further, Adams did not have an independent medical examination performed on

Loper and did not retain or disclose his own medical expert to review Dr. Dunnigan's opinions.

53. Loper argues it was an abuse of discretion for the district court not to grant a continuance of the trial to allow Adams to take the deposition of Dr. Dunnigan and perform other necessary discovery to alleviate some of the prejudice caused by the late disclosure. Appellant's Brief at ¶¶ 20-25.

> "A motion for a continuance will only be granted for good cause shown. Absent an abuse of discretion, [the North Dakota Supreme] Court will not overturn a trial court's decision regarding a motion for a continuance. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner."

Alerus Fin., N.A. v. Lamb, 2003 ND 158, ¶ 6, 670 N.W.2d 351.

54. A continuance would only be necessary because of plaintiff's knowing violation of the scheduling order to Adams' detriment. The trial had already been continued once for the same reason, to allow time to disclose experts and conduct expert discovery. Loper has not explained why it is an abuse of discretion for the trial court to refuse to continue the trial twice for the same reason, i.e. plaintiff's failure to comply with the expert disclosure requirements. It is certainly not "arbitrary, unreasonable, or unconscionable" for a district court to refuse to continue a trial a second time when a party fails to make use of the extra time given by one continuance already. If this Court accepts Loper's position, district courts would as a matter of law be required in all cases to grant multiple continuances of trial when a party continually fails to make timely disclosures. This policy would not be a prudent use of judicial resources and would reward parties who fail multiple times to comply with discovery requirements. It was

within the sound discretion of the district court not to continue the trial a second time to correct Loper's untimeliness.

55. It should also be noted, Loper's counsel's failure to cooperate in discovery was not limited to failure to disclose experts. In the record on appeal (Supp. App. at 93-94) are letters from defendant's counsel to plaintiff's counsel requesting updated authorizations to obtain plaintiff's current medical records. The authorizations previously provided by plaintiff expired. The letters are dated June 25, 2009 and August 6, 2009 respectively. Plaintiff never provided the requested updated authorizations and thus Adams was without the benefit of plaintiff's current medical records for trial, or to prepare for a deposition of Dr. Dunnigan. Plaintiff's failure to act in this case has resulted directly in prejudice to Adams.

56. For the foregoing reasons, Dr. Dunnigan was properly excluded as an expert witness on the issue of causation.

C. A Medical Expert Is Required For Loper To Prove Causation Of His Alleged Injuries

57. With Dr. Dunnigan's opinion on causation excluded, Loper did not bring forth any expert testimony on the issue of causation. When expert testimony is required for plaintiff to prove his claims and plaintiff fails to disclose an expert, the court must grant summary judgment. See Burgad v. Marcus, 345 F.Supp.2d 1036 (D.N.D. 2004). In Klimple v. Bahl, 2007 ND 13, ¶ 6, 727 N.W.2d 256, this Court stated:

> Unlike professional malpractice actions, there generally is no requirement in ordinary negligence cases for expert testimony to establish the elements of the tort. See Johansen v. Anderson, 555 N.W.2d 588, 594 (N.D. 1996). In some circumstances, however, expert testimony may be required to resolve issues in an ordinary

> negligence action. See Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 535 (N.D. 1993); Day v. General Motors Corp., 345 N.W.2d 349, 358 (N.D. 1984). This Court has indicated expert testimony is required if the issue "is beyond the area of common knowledge or lay comprehension," Leno v. Ehli, 339 N.W.2d 92, 99 (N.D. 1983), or the issue "is not within the ordinary experience of the jurors." Holecek v. Janke, 171 N.W.2d 94, 103 (N.D. 1969).

58. Klimple v. Bahl is directly on point. The Klimple case arose from an automobile accident. Id. at ¶ 2. The plaintiff alleged his left wrist and palm were fractured. Id. After the accident, a physician diagnosed the plaintiff as having preexisting Kienbock's disease. Id. at ¶ 3. "Kienbock's disease is the death of a small bone in the wrist from an unknown cause…." Id. at ¶ 6. "In his deposition, Klimple testified his condition became worse after the accident". Id. at ¶ 10. "A physician testified in a deposition that he could not say 'with any reasonable degree of certainty' whether the Kienbock's disease was, or was not, caused by the car accident, but that preexisting Kienbock's disease '[c]ould have been aggravated by the car accident.'" Id. at ¶ 10. The district court granted summary judgment and the North Dakota Supreme Court affirmed because the plaintiff could not prove, in the absence of medical testimony "to a reasonable degree of medical certainty", that the Kienbock's disease was proximately caused or aggravated by the accident, which were the only claims made by the plaintiff. Id. at ¶¶ 1, 3, 6, 11, 12.

59. As in Klimple, expert medical testimony is required for Loper to support his allegation that he suffered a specific injury that is not commonly understood. In that regard, the Klimple court held that expert testimony is required if the issue is beyond the area of common knowledge or lay comprehension, or the issue is

not within the ordinary experience of the jurors. Id. at ¶ 6 (citations omitted). It cannot be disputed that the issue of whether Loper's alleged back injuries were caused by the subject accident or another cause such as lifting the gate is beyond the area of common knowledge or lay comprehension and is not within the ordinary experience of the jurors. Thus, expert medical testimony is required to establish the causal link.

60. "Expert medical opinions [must] be expressed in terms of reasonable medical certainty, not mere possibilities." Id. at ¶ 12 (citing Kunnanz v. Edge, 515 N.W.2d 167, 172 (N.D. 1994); Nelson v. Trinity Med. Ctr., 419 N.W.2d 886, 892 (N.D. 1988); Smith v. American Family Mut. Ins. Co., 294 N.W.2d 751, 763-64 (N.D. 1980); Dehn v. Otter Tail Power Co., 251 N.W.2d 404, 412 (N.D. 1977); Holecek v. Janke, 171 N.W.2d 94, 100 (N.D. 1969); Grenz v. Were, 129 N.W.2d 681, 689 (N.D. 1964); Vaux v. Hamilton, 103 N.W.2d 291, 295 (N.D. 1960)). "[T]he test for admissibility is whether the expert's testimony demonstrates the expert is expressing a medical opinion that is more probable, or more likely than not." Klimple v. Bahl, at ¶ 12 (citation and quotations omitted).

> A doctor's testimony can only be considered evidence when he states that the conclusion he gives is based on reasonable medical certainty that a fact is true or untrue. A doctor's testimony that a certain thing is possible is no evidence at all. His opinion as to what is possible is no more valid than the jury's own speculation as to what is or is not possible. Almost anything is possible . . . .

Id. at ¶ 14 (emphasis in original)(citation omitted). Further, this Court has noted it could not "equate suspicion with reasonable medical certainty." Smith v. American Family Mut. Ins. Co., 294 N.W.2d at 763.

61. After the subject incidents with the calves, Loper did not seek medical attention and thus there is no evidence of an injury to Loper's spine prior to the later incident with the gate. Supp. App. at 40, Loper depo. at pp. 72-73, 78. There is clearly a link between the incident with the gate and Loper's ruptured disc. Loper heard a pop while turning to open the gate and immediately dropped to the ground in pain. However, without the testimony of Dr. Dunnigan, there is no established link (much less established to a reasonable degree of medical certainty) between the subject incidents with the calves and Loper's alleged ruptured disc.

62. Loper argues even if Dr. Dunnigan's opinion on causation is excluded, Loper's own testimony on his alleged pain and suffering is sufficient to establish causation. Appellant's Brief at ¶¶ 31-34. Essentially, Loper argues he has felt pain and weakness since the impacts by the calves and lay jurors can understand the causal connection between the impact by the calves and subsequent back and leg pain. Id. However, Loper's alleged suffering comes from a very specific medical condition: a rupture of the spinal disc at the L5-S1 level. App. at 6, Complaint and Demand for Jury Trial at ¶ 28. There are at least two events that could have caused that medical condition in whole or in part: 1) the incidents with the calves, or 2) the subsequent incident with the gate. The incidents with the calves involved alleged ramming of Loper's back and the incident with the gate involved twisting of Loper's back. There was no medical treatment or evaluation of Loper between the two events. Loper intends to argue to the jury that his ruptured disc is solely the result of the ramming incidents with the calves.

A lay person cannot determine without the aid of an expert which of the two different events, if either, caused or contributed to a ruptured disc. Certainly, lay jurors can understand trauma to a back can cause back pain. However, lay jurors cannot determine which of two different types of trauma, which were very close in time, caused or contributed to a specific medical condition. Without a medical expert on causation, the jury would be forced to simply speculate as to causation of Loper's alleged injuries.

63. In Halvorson v. Sentry Ins., 2008 ND 205, 757 N.W.2d 398, which is highly analogous to the current case, this Court affirmed summary judgment dismissing a breach of contract claim for no-fault benefits. Id. at ¶ 1. In that case, about a month after a motor vehicle accident, the plaintiff sought medical care, reporting back pain and "pain all over" and stated she had been in a car accident and had hurt her muscles. Id. at ¶ 2. The plaintiff sought but was denied no-fault benefits from the defendant's insurance carrier. Id. She brought a lawsuit against the defendant for breach of contract for failure to pay no-fault benefits for her "hip and spine injuries resulting from the accident." Id. After some discovery, the defendant moved for summary judgment, which the district court granted, concluding the plaintiff failed to raise a genuine issue of material fact as to the cause of her injuries. Id. The only evidence the plaintiff produced regarding the cause of her injuries were statements of the plaintiff in her medical records relating her pain after the accident. Id. at ¶¶ 4, 7. The plaintiff argued this was sufficient to show causation and that she did not have to provide medical expert testimony to survive summary judgment. Id. at ¶¶ 4, 6. However, this Court

disagreed, finding the plaintiff did not present any competent admissible evidence establishing a causal link between her injuries and the accident and thus summary judgment was appropriate. Id. at ¶ 8. The plaintiff's own statements relating her injuries to the accident was insufficient to withstand summary judgment on the issue of causation and she did not show proper foundation for admission of the medical records in any event. Id. This Court affirmed the district court's grant of summary judgment.

64. Similarly, in the current case, Loper's claims should be dismissed because he has not and cannot establish a causal link between his alleged injuries and the subject incidents. The district court clearly warned Loper's counsel that failure to introduce expert testimony regarding causation to a reasonable degree of medical certainty could result in dismissal of the case. Even with ample time to disclose a medical expert on causation following the continuance of the trial, Loper failed to disclose a medical expert on the issue of causation.

65. Loper also argues in the event this Court upholds the exclusion of Dr. Dunnigan, that Loper's medical records are admissible as business records and they allegedly establish causation of Loper's injuries. Loper's position in that regard is highly flawed. The business records exception to the hearsay rule is based on North Dakota Century Code section 31-08-01, which states:

> A record of an act, condition, or event is competent evidence insofar as relevant, if:
>
> > 1. The custodian or other qualified witness testifies to its identity and the mode of its preparation.
> >
> > 2. It was made in the regular course of business, at or near the time of the act, condition, or event.

> 3. The sources of information and the method and time of preparation, in the opinion of the court, were such as to justify its admission.
>
> For the purpose of this section, the term "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

66. Further, Rule 803(6) of the North Dakota Rules of Evidence, entitled "Records of Regularly Conducted Business Activity" states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

67. Loper relies on case law regarding admission of medical bills relating to past economic damages for medical expenses, not case law regarding medical records that contain doctor's opinions on causation of injuries, which is a key issue in this case that requires expert testimony. Appellant's Brief at ¶¶ 35-36.

68. In Patterson v. Hutchens, 529 N.W.2d 561 (N.D. 1995), the North Dakota Supreme Court explained the applicable standard:

> In Munro v. Privratsky, 209 N.W.2d 745, 752 (N.D. 1973), this court held that, under the Business Records Act, the trial court did not abuse its discretion in failing to receive as part of a treating doctor's business records, a letter from another doctor, who, because he was dead, could not be cross-examined, and the letter contained "findings and conclusions which, if received, would become a part of the record without affording Munro an opportunity to cross-examine on the very matters in issue."

> Because Mead drew his conclusions from just two meetings with Patterson, the trial court may have had little confidence in the trustworthiness of Mead's opinions. "If the expert is available and the diagnostic opinion is of a kind competent physicians may disagree upon, the judge has discretion to require the expert to testify to ensure trustworthiness through cross-examination, particularly if the medical issue is crucial, and the patient's liberty is at stake." 4 Weinstein's Evidence, supra, ¶ 803(6)[06], p. 803-223.
>
> Mead was not at the trial for cross-examination about the opinions he put in Patterson's medical records. The opinions Mead expressed were "of a kind competent physicians may disagree upon." The medical propriety of the hysterectomy performed by Hutchens and addressed in Mead's recorded opinions was a crucial issue in the case, being one of the "very matters in issue." We conclude that the trial court did not abuse its discretion in refusing to admit into evidence the medical records containing Mead's opinions.

Id. at 565.

69. In any event, the only medical records in the record on appeal are the records attached to Dr. Dunnigan's report (App. at 50-58), and those records do not contain any opinions, expert or otherwise, that Loper's back injuries were caused by the incidents with the calves as opposed to the incident with the gate. Loper testified at his May 23, 2008 deposition that no medical professional has ever told him his symptoms are related to the subject incidents with the calves. Supp. App. at 43, Loper depo. at pp. 85-87. Thus, even if the medical records are admissible under the business records exception, the records do not provide the necessary expert opinion on causation.

IV. CONCLUSION

70. For the foregoing reasons, Adams requests the Court deny Loper's appeal and uphold summary judgment in favor of Adams.

Dated this 9th day of June, 2010.

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CERTIFICATE OF COMPLIANCE

71. The undersigned, as attorneys for the defendant/appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 10,307.

Dated this 9th day of June, 2010.

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72. I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was on the 9th day of June, 2010, mailed to the following:

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