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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20100101
Kidder County District Court No.: 08-C-028

Kenny Loper,

Plaintiff and Appellant,

v.

William Adams,

Defendant and Appellee.

APPELLANT'S REPLY BRIEF

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

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TABLE OF CONTENTS

Table Of Contents i

Table Of Authorities . ……..…ii

I. Adams will not be prejudiced by a continuance of the trial 1

II. Having been initially treated by Dr. Dunnigan, Loper had no choice other than to await Dr. Dunnigan's opinion report, and should not be penalized by the late report. 2

III. A continuation of trial is a more equitable remedy than is preclusion of a medical expert.....3

IV. Loper's claim must be heard even if there is no medical expert. Adams' Appellee Brief relies on allegations other than facts found in the light most favorable to Loper and thus those allegations must be rejected 5

V. Conclusion 11

TABLE OF AUTHORITIES

North Dakota Cases:

Barsness v. General Diesel & Equipment
383 N.W.2d 840 (ND 1986) 5

Kirton v. Williams Elec. Co-op., Inc.
265 N.W.2d 702, 706, (ND 1978). 5

Klimple v. Bahl
2007 ND 13, 727 N.W.2d 256 8

Luithle v. Taverna
214 N.W. 2d 117 (ND 1973) 5

Miller v. Diamond Resources
2005 ND 150, 703 N.W.2d 316 (2005) 5

Cases From Other Jurisdictions

Betzel v. State Farm Lloyds
480 F.3d 704, 707, C.A.5 2007.....3

Dennie v. Metropolitan Medical Center
387 N.W.2d 401, 405-406, (Minn. 1986) 3

Orn v. Astrue
495 F. 3d 625, 631 (9th Cir. 2007) 2

Smith v. Johnson & Johnson
Slip Copy, 2010 WL 997057, 1-3, (S.D.Miss. 2010) 3

Torres v. Gillick
1999 WL 33104901, 188-189, (Pa.Com.Pl 1999), 45 Pa. D. & C.4th 182 3

Zadigan v. Cole
369 N.J.Super, 123, 848 A.2d 73, 80 (N.J.Super.L. 2004).....3

I. ADAMS WILL NOT BE PREJUDICED BY A CONTINUANCE OF THE TRIAL.

1. Adams was aware from the St. Alexius medical records, and from the May 23, 2008, Loper Deposition (Adams Appendix, pages 43 & 45), that Dr. Dunnigan was the initial Loper treating neurologist. Paragraph 25 of the Adams Brief admits that Adams was aware on August 3, 2009, that Dr. Dunnigan will testify as an expert witness, including "his opinion as to how the injuries occurred … ." Adams was aware from both the Complaint and from the Loper Deposition that Loper's claim is that the two calf impacts on May 16, 2005, injured Loper's back, and that Loper's back and legs grew progressively worse, day by day after May 16, 2005, until Loper collapsed on May 23, 2005. Adams chose not to depose Dr. Dunnigan. Adams chose not to seek an independent medical exam. After Adams received Dr. Dunnigan's written opinion on February 10, 2010, if Adams felt he needed additional time to depose Dr. Dunnigan or arrange for an independent exam of Loper, Adams could have requested a continuance of the trial. Indeed, on February 16, 2010, Loper himself moved for a continuance of the trial to enable Adams to respond to Dr. Dunnigan's opinion letter. Adams' Brief does not set forth any reasons why Adams would be prejudiced by a continuation of the March 24, 2010 trial date.

II. HAVING BEEN INITIALLY TREATED BY DR. DUNNIGAN, LOPER HAD NO CHOICE OTHER THAN TO AWAIT DR. DUNNIGAN'S OPINION REPORT, AND SHOULD NOT BE PENALIZED BY THE LATE REPORT.

2. The opinions of a treating physician are generally afforded more weight than those of other medical experts. Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007).

Having been asked for an opinion both as to degree of permanent impairment and as to causation, and as Loper did not reach the point of maximum medical improvement, Dr. Dunnigan delayed writing an opinion letter. Aside from cajoling with repeated reminders, Loper was unable to convince Dr. Dunnigan to draft his opinion letter within the November 15, 2009, expert opinion deadline. The delay was beyond the control of Loper, and the ultimate penalty of exclusion should not be imposed against Loper.

III. A CONTINUATION OF TRIAL IS A MORE EQUITABLE REMEDY THAN IS PRECLUSION OF A MEDICAL EXPERT.

3. In his Appellant's Brief, Loper quoted from a number of cases which hold that preclusion of a medical expert is a harsh result which should be rarely imposed. Additional cases are as follows:

> We hold that the district court abused its discretion in excluding Betzel's late-designated witnesses. We review such exercises of discretion by considering four factors: "(1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice"… . The first factor plainly favors State Farm. Indeed, Betzel concedes that he offered no explanation to the district court for his failure to timely designate We reverse, nevertheless, because the three remaining factors strongly favor Betzel … . The second factor is the importance of the excluded testimony… . The expert testimony is essential ... . Without his experts, Betzel cannot prove damages….The third factor is the prejudice to State Farm … . What prejudice remains could have been cured with a continuance; that is the fourth factor. Indeed, "we have repeatedly emphasized that a continuance is the preferred means of dealing with a party's attempt to designate a witness out of time." [Citations deleted].

Betzel v. State Farm Lloyds, 480 F.3d 704, 707, C.A.5 2007.

> At issue in this case is Plaintiffs' failure to timely designate their experts … [T]he undersigned concludes that there was no good cause or explanation for failing to complete the expert designations before the scheduling date. …Plaintiffs give no justifiable reason for failing to comply with this Court's deadline … . Notwithstanding the lack of justification, the Court finds that the "importance of the testimony," does weigh heavily in favor of late designation. Plaintiffs' entire case will fall if they are unable to offer expert testimony. This is a medical products liability action, and expert testimony is required before the case can go forward. The case will not be decided by a jury on its merits if no expert is allowed to testify…The undersigned finds that Defendants will be prejudiced by a late designation, and this factor also weighs against allowing the testimony…Finally, the Court has considered whether or not the prejudice to Defendants may be mitigated by a continuance of the trial and an award of costs to be paid by Plaintiffs…[A] continuance and cost award should mitigate the prejudice to Defendants, and the interests of justice prefer that cases be decided on their merits.

Smith v. Johnson & Johnson, Slip Copy, 2010 WL 997057, 1-3, (S.D.Miss. 2010).

> [B]ecause this is a medical malpractice case, to preclude the plaintiff's expert testimony would be severely damaging, if not fatal, to the plaintiff's case. All of these factors mitigate against precluding the plaintiff from using expert testimony. Therefore, this court feels that a less harsh sanction is warranted ... .

Torres v. Gillick, 1999 WL 33104901, 188-189, (Pa.Com.Pl. 1999), 45 Pa. D. & C.4th 182.

> [W]e caution trial courts from readily excluding expert testimony in malpractice cases for inadvertent failure to disclose that testimony during discovery. Exclusion is justified only when prejudice would result. * * * When the failure to disclose was not willful, courts should consider alternative methods short of exclusion for preventing prejudice, e.g., granting a continuance and assessing costs against the offending party, * * * or limiting the subject matter of the testimony to matters already disclosed * * *. It must not be forgotten during our efforts to ensure compliance with discovery rules that the judicial process is an attempt to seek the truth. We should not

> unduly hamper that search by excluding relevant evidence where other means are available to protect a party from the effects of an inadvertent failure to disclose.

Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 405-406, (Minn. 1986).

> [T]he ultimate sanction for an attorney's procedural violations of dismissal with prejudice must be a recourse of last resort, not to be invoked unless no lesser sanction is adequate in view of the nature of the default, its attendant prejudice to other parties, and the innocence of the sanctioned litigant. We had been particularly indulgent in not barring a late expert's report where the report was critical to the claim or defense, the late report was submitted well before trial, the defaulting counsel was not guilty of any willful misconduct or design to mislead, any potential prejudice to the adverse party could be remediated, and the client was entirely innocent … in appropriate circumstances, trial date certainty must yield to fundamental fairness.

Zadigan v. Cole, 369 N.J.Super, 123, 848 A.2d 73, 80, (N.J.Super.L. 2004).

4. Paragraph 23 of Loper's Appellant's Brief, sets forth the general rule that if the only prejudice to a party from the late disclosure of an expert witness or expert opinion is that the trial must be continued to allow the party time to respond to the newly disclosed expert, the overriding goal of searching for truth requires the trial to be continued for a reasonable time. The extreme sanction of preclusion of crucial testimony for one party far exceeds the inconvenience of the postponed trial for the other party.

IV. LOPER'S CLAIM MUST BE HEARD EVEN IF THERE IS NO MEDICAL EXPERT. ADAMS' APPELLEE BRIEF RELIES ON ALLEGATIONS OTHER THAN FACTS FOUND IN THE LIGHT MOST FAVORABLE TO LOPER AND THUS THOSE ALLEGATIONS MUST BE REJECTED.

5. In paragraphs 13–14 of his Appellee Brief, Adams admits that Loper was hit twice in the lower back by calves on May 16, 2005, landed on the ground on his

back, and said he was hurt. In paragraphs 16–18 of this Brief, Adams refers to May 23, 2005 when Loper turned to close a gate fell to the ground, and was taken to St. Alexius Hospital. In paragraphs 19-20 of his Brief, Adams argues that Loper's back injury must have occurred in closing a gate, rather than from the calf impacts. The thrust of Adams' Brief is that there is no obvious factual connection between the May 16 calf impacts and Loper's back injuries which were initially examined by a health care profession on May 23. Therefore, argues Adams, a physician's expert opinion is required to make the connection between the calf impact of May 16 and the back injury first diagnosed May 23. While Adams' argument may be appropriate in a post trial brief, because it attempts to convince a trier of fact that the Adams' version of events is more plausible than is Loper's version of events, it must be disregarded in a motion for summary judgment where all inferences are to be drawn in favor of Loper. This is a negligence action. The North Dakota Supreme Court has repeatedly held that where there exists the "slightest doubt" as to a factual dispute, summary judgment should be denied in a negligence action. Kirton v. Williams Elec. Co-op., Inc., 265 N.W.2d 702, 706, (ND, 1978). See Miller v. Diamond Resources, 2005 ND 150, 703 N.W.2d 316 (2005), Barsness v. General Diesel & Equipment, 383 N.W.2d 840 (ND 1986), and Luithle v. Taverna, 214 N.W.2d 117 (ND 1973), and the cased cited therein for the Court's admonitions against summary judgment in negligence actions.

6. As set forth in paragraph 8 of the Loper Brief, Adams admitted in his deposition that Loper complained of his lower back immediately after the calf impact and

continued to complain about pain and decreased mobility in subsequent days. Pages 39–41 of the Appendix to the Adams Brief recite that Loper told everyone during supper at the Dronen residence on May 16 that his back was hurting from the calf impacts earlier that day. Pages 39-41 further recite that the pain in Loper's lower back and the weakness in his legs increased daily after the calf impacts, that his movement on May 23, 2005, to close a gate was routine, without particular effort, and that his collapse after closing the gate was merely the culmination of a series of worsening symptoms which began with the calf impacts one week earlier. This version of events is well documented in the depositions and transcripts that Adams provided to both trial and appellate courts. As it is the version most favorable to Loper, for purpose of summary judgment, the following must be assumed true: Loper was hit hard in the lower back by calves on May 16, 2005. He had no other trauma to the lower back. His pain and leg weakness grew worse every day from May 16 until he fell on May 23. All medical symptoms to his back began with the calf impacts.

7. Paragraph 18 of Adams' Brief states: "He [Loper] 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." This is untrue. A reading of Page 43 of the Adams Appendix reveals that Loper testified only that no medical professional has told Loper that Loper's gout is related to the accident. Loper testified that his understanding is that "my disc was ruptured and it's pinching that nerve back there. It's traumatized. When the calves hit me, it traumatized it so bad, the muscles, and the nerves, that it just takes time to get

well." Adams Appendix, page 46. In Page 45 of the Adams Appendix, page 95 of the Loper deposition, counsel for Adams three times tried to have Loper agree that Loper's primary problem is his knee and ankle. Each time Loper replied that his lower back is his primary problem.

8. Adams' version of events is that even though Loper was hit by calves on May 16, 2005, the impacts were not significant. Loper sought no immediate medical care and continued working as usual until May 23, when he twisted his trunk closing a gate, felt his back give out, fell down and sought medical care. If the Adams version of events is accepted, then under the Klimple v. Bahl, 2007 ND 13, 727 N.W.2d 256 test, a medical expert may well be needed to connect Loper's injuries, received on May 16, 2005, with symptoms which did not become apparent until May 23, 2005.

9. If, however, the Loper version of events - that Loper felt pain and weakness in the area hit immediately after the impact, which pain and weakness increased daily, culminating in the collapse of May 23 – is accepted, then the Klimple test would not require Loper to use a medical expert to link the calf impact with the subsequent pain. Expert testimony is not needed to link hard impacts to the lower back with subsequent pain and weakness in the area of the impacts. A jury does not need to know whether the calf impacts caused a disc to bulge, or rupture, or aggravated a previously existing condition. Loper claims, and there is no evidence to the contrary, that his back was in good condition and he was able to work before the impacts, but that his back has been in continuous pain, making him unable to work, after the impacts.

10. A jury is able to comprehend that a back will be sore in the vicinity of a hard traumatic impact. Because Loper's version of events, which shows a clear causal connection, day by day from May16 through May 23, 2005, between the calf impacts and the increasing back pain and leg weakness, must be accepted as fact for summary judgment, the Klimple test does not require expert testimony for a jury to conclude there is a causal connection between the calf impacts and the back pain.

V. CONCLUSION

11. The testimony of Dr. Dunnigan must be admitted into evidence. Even if it is not, the facts, viewed most favorably to Loper, show a causal connection between the calf impacts when Loper was working for Adams, and the subsequent pain and weakness Loper has felt in the area of the calf impact. Summary judgment must be reversed.

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Dated this 22nd day of June, 2010.

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The following document was electronically served on this date to Scott K. Porsborg at sporsborg@smithbarkke.com.

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