20100101

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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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 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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STATEMENT OF ISSUES

1. Whether the trial court erred in failing to grant Plaintiff's request for an enlargement time in which to disclose Dr. Ralph Dunnigan as a medical expert and to disclose the expert's opinion.
2. Whether the trial court erred in granting summary judgment in favor of Defendant, on grounds that without a medical expert connecting Plaintiff's injuries to Plaintiff's workplace incident, Plaintiff could not establish causation between the workplace incident and his injuries.

STATEMENT OF THE CASE

3. Plaintiff Kenneth Loper ("Loper") was hit in the back by two calves on May 16, 2005, while working as a farm-hand for Defendant William Adams ("Adams"). On August 3, 2009, via an affidavit from his counsel, Loper disclosed his corral safety expert and the expert's report, and disclosed Dr. Dunnigan as his medical expert. The Trial Court's first scheduling order, issued on September 14, 2009, provided that Loper's expert disclosure deadline would be November 15, 2009. The Trial Court set the trial date of March 24, 2010. On February 8, 2010, about six weeks before trial, Loper disclosed the written opinion of Dr. Dunnigan that Loper's injuries were caused by the calf impact while working for Adams. On February 16, 2010, Loper requested an enlargement of time to disclose his medical expert's opinion, and requested a continuance of the trial, if necessary, to enable Adams to respond to Loper's late disclosure of medical expert opinion. Trial Court refused to grant an enlargement of time to disclose Loper's expert opinion, and ruled that Loper would be precluded from introducing a medical

expert. Trial Court also ruled that without a medical expert, Loper, by law, could not establish causal connection between the calf impact and his injuries, and granted summary judgment for Adams. Loper appealed preclusion of his medical expert and granting of summary judgment.

STATEMENT OF FACTS

4. This is an action by a farm hand, Kenneth Loper ("Loper") against his employer for injuries suffered in the course of employment. "I was working with Bill that day. He told me to go up there and work the cows with the Dronens, and that's what I did." Page 108, Appendix ("App") 17. In his deposition of May 23, 2008, Defendant William Adams ("Adams") admitted that on May 16, 2005, Loper worked for Adams as a farm-hand, and Adams instructed Loper to go into a chute that leads from holding pens to a calf catcher on the Dronen farm. Page 22, App. 18. The purpose was to brand and vaccinate calves. Adams admitted that the chute was wide enough for a calf to turn around, that the presence of a person (Ole) in the chute in front of the calf would tend to spook the calf, and that "[a]ny time you chase a calf down an alleyway, he's going to want to turn around … they're always going to want to turn around." Pages 28 & 29, App. 19. Adams was aware of the danger of calves turning around in the chute and running into the back of a worker in the chute, but he did not warn Loper of the danger. Pages 40, 41, 42, App. 20.
5. Adams admitted further that there was a safer alternative to the situation into which Adams placed Loper, and that alternative would have been for Loper to walk a calf down the chute to the calf catcher, then wait with the calf until the calf

catcher was available for the calf, push the calf into the calf catcher, then walk back for another calf. However, "that would have taken twice as long." Page 31, App. 19. When asked, "[w]hat steps did you take to minimize the potential danger to Kenny of a calf turning around in the alleyway and hitting him?" Adams answered, "I guess none." Pages 39 & 40, App. 21, 20.

6. Adams admitted that on two occasions Loper was knocked down by calves that struck Loper, Page 34, App. 22, and "when I seen him, he was on his back." Page 38, App. 21. The first calf to turn around in the chute and hit Loper from behind confirmed Adams' previous knowledge that calves have a proclivity to turn around in the chute, the chute was wide enough for calves to turn around, and that Loper, walking back through the chute, was at danger of being hit from behind. Adams was aware of the first hit, was aware that Loper was knocked onto his back, and was aware that Loper was hurt. At that point, Adams neither instructed Loper to leave his post, nor insisted that safety measures be instituted before Loper continued at his task, to prevent subsequent impacts.

7. A jury may find that Adams, knowing that calves want to turn around and could in the chute where Loper was working, was negligent in ordering Loper initially to work in the chute. A jury would be even more likely to find that after Adams saw the first hit, Adams was negligent in failing to take reasonable precautions to prevent subsequent hits against Loper. The jury could find further that although Loper, as a loyal employee, remained at his post after being hit, Adams' duty to provide Loper with a safe working environment was not diminished.

8. Adams said that Loper complained of his lower back immediately after being hit by the calves, and continued to complain about the pain and decreased mobility in subsequent days. Page 43, App. 20. Loper continued to reside at the Adams property and work for Adams as much as he could, which was very little, for the next 6 months. Adams realized Loper was seriously hurt, but yet Loper was willing to work on tasks he could do. At no time after the Loper injury, did Adams believe Loper was able to do more work than he was actually doing. Page 48, App. 23.

9. In his deposition on May 23, 2008, Loper said that twice on May 16, 2005, calves that Loper had delivered to the vicinity of the calf catcher, turned around in the chute as Loper was walking back to bring another calf, and ran into Loper's lower back, knocking him down, causing him serious pain. Pages 58 & 64, App. 24, 25. Loper's pain in his lower back and the weakness in his legs increased every day after the injury, to extent that he was unable to kick start his four-wheeler. On May 23, 2005, as he was routinely closing a gate, Loper's back gave way and he collapsed. Pages 72, 73, 74, 75, App. 26. On that day he was taken to St. Alexius Hospital and was treated by Dr. Ralph Dunnigan. Since the impact, Loper has had continuous pain in his back, weakness in his legs, and radiating pain into his lower legs. Pages 96, 97, 98, 99, App. 27. He has incurred medical bills which are still unpaid, has been unable to work, and faces the likelihood of never working again. Pages 92, 93, 94, 95, 96, App. 28, 27.

10. Plaintiff's expert in livestock handling procedures, Kevin Falk, has rendered an opinion that simple, inexpensive adjustments to the chute system would have

prevented Loper's injuries. These include placing wooden pallets on the inside walls of the chute, narrowing the passageway so a calf could not turn around, or blocking the opening in the chute next to the calf catcher with a wooden board, rather than with a man, and thus avoiding spooking the calf. App. 32. The injury to Loper by having a calf turn around in the chute and running into Loper's back was foreseeable – Adams was aware of the danger – and preventable with easy, common sense adjustments. Yet Adams admitted in his deposition that he told Loper to work in the chute, and took no steps to minimize the dangers to Loper.

11. On July 1, 2009, Adams moved for summary judgment on several grounds: (1) Loper was an experienced ranch-hand and assumed the risks of entering a chute with calves; (2) Because the calf impacts took place on a farm not owned by Adams, Adams had no duty to Loper for the working conditions; (3) Loper did not seek medical attention until a week after the calf impacts, when he turned to close a gate; (4) Loper did not submit expert opinion linking the calf impacts with his injuries.

12. On August 3, 2009, in an Affidavit in Support of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, counsel for Loper affirmed under oath: " …7. Exhibit 14 is the report of Kevin Falk who will testify as an expert witness regarding cattle chute safety, based on photographs taken on the chute system on the Dronen Farm. 8. 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 ..." App. 33, 34. As of the date of the

hearing for summary judgment held on August 21, 2009, Loper had not yet received a written opinion from Dr. Dunnigan. Therefore in oral argument counsel for Loper told the Court: "… in our affidavit … 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." App. 35. Loper also argued that even if Dr. Dunnigan were not available to testify, a jury could causally link impacts to the lower back by two calves with subsequent pain in the lower back, radiating to the legs. App. 36, 37.

13. On September 2, 2009, the Trial Court denied summary judgment and correctly ruled that Adams did have a duty of care to his employee Loper, regardless of whether injuries incurred in conjunction with work took place on property other than owned by Adams. The Court also stated: "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." App. 38-41.

14. On September 14, 2009, the Trial Court set the deadline for "Disclosure of Plaintiff's Experts: November 15, 2009." App. 42. As of summary judgment hearing date of August 21, 2009, Loper had disclosed his cattle chute safety expert and provided the expert's report, and had identified Dr. Dunnigan as his medical expert, with the gist of Dr. Dunnigan's expected testimony. App. 33, 34. Loper did not have a written report from Dr. Dunnigan, did not know the specifics of Dr. Dunnigan's opinion, and thus did not have 100% certainty as to whether Dr. Dunnigan would testify. App. 35.

15. Adams filed a Renewed Motion for Summary Judgment on January 27, 2010, based on the failure by Loper to produce an opinion of a qualified medical expert that it is medically more probable than not that the injuries Mr. Loper has suffered since May 16, 2005, were caused by the impact of calves on May 16, 2005.

16. On February 8, 2010, Dr. Dunnigan, the neurologist who initially treated Loper, and who had been disclosed as Loper's medical expert on August 21, 2009, submitted an opinion letter which includes the following:

> Assuming Mr. Loper was hit hard in the small of the back by two calves on May 16, 2005, a week before I first examined him, and assuming that he had no other trauma to his back for at least several months before the calf impact, and none between the May 16 impact and my examination and the MRI taken during his May 23, 2005, hospitalization, it is medically more likely than not that the pain and suffering Mr. Loper has experienced in his lower back and the weakness in his legs since May 16, 2005, was caused by the trauma of the calf impacts. Even though Mr. Loper's legs gave way while he was turning to close a gate on May 23, 2005, by history his pain and difficulties had started days prior. App. 47.

17. The TABS to Dr. Dunnigan's opinion are excerpts from the St. Alexius medical records which verify that on May 23, 2005, when he first sought medical care, Mr. Loper told intake personnel, nurses, and doctors that the pain and leg weakness he suffered began after being hit by the calves on May 16, 2005. App. 47.

18. On February 11, 2010, Adams moved to exclude the expert testimony of Dr. Dunnigan. On February 16, 2010, Loper filed a memorandum of law objecting to Adams' renewed motion for summary judgment, a memorandum objecting to Adams' motion in limine, and a request for enlargement of time to disclose Dr.

Dunnigan's expert opinion, and for continuance of the trial, if Adams needed more time to respond to Dr. Dunnigan's opinion letter. Adams objected to Loper's request for enlargement of time for expert disclosure and continuance of trial.

19. On March 11, 2010, the Trial Court denied Loper's request for enlargement of time to disclose the opinion of Dr. Dunnigan "because to do so would be unfair to the defense. Dr. Dunnigan's testimony must therefore be excluded … ." The Court also ruled that "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 … 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. 59 – 63. Loper timely appealed the decision Order of March 11, 2010, and the Order for Judgment of March 19, 2010. App. 65.

LEGAL ARGUMENTS

A. AN ENLARGEMENT OF TIME TO DISCLOSE AN EXPERT OPINION SHOULD BE GRANTED WHERE A TRIAL DATE CAN BE CONTINUED TO GIVE THE OPPOSING PARTY TIME TO RESPOND TO THE EXPERT OPINION.

20. North Dakota Civil Procedure Rule 6(b) provides: "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 … 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; … ." Although Dr. Dunnigan was named as Loper's medical expert on

August 3, 2009, (App. 33 – 34), failure to file final disclosure of Dr. Dunnigan as a medical expert, and the contents of his report by November 15, 2009, was because Dr. Dunnigan was initially waiting for Mr. Loper to attain maximum medical improvement before writing a report, and then was delayed in writing his expert report due to his busy client schedule. App. 45, 46.

21. On May 23, 2005, Loper was brought to the nearest hospital, St. Alexius, after Loper's legs collapsed. Dr. Dunnigan happened to be the neurologist on call and examined and subsequently treated Loper. App. 47 – 58. "Generally, the opinions of examining physicians are afforded more weight than those of non-examining physicians, and the opinions of examining non-treating physicians are afforded less weight than those of treating physicians." Orn v. Astrue, 495 F.3d 625, 631-32 (9th Cir. 2007). As the initial examining and treating physician, Dr. Dunnigan is the neurologist best able to assess the source of the injury, based on Loper's condition when he was first treated on May 23, 2005. Loper did not have any control over which neurologist would examine him when he was brought to St. Alexius. Because examining and treating physicians are given more weight as experts, Loper was virtually required to request Dr. Dunnigan to be his medical expert, and Loper had no control over the amount of time it would take Dr. Dunnigan to produce a report and render an opinion. There was an excessive delay in obtaining a report from Dr. Dunnigan, but despite repeated requests, Loper was powerless to prevent the delay.

22. 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.

23. Cases which discuss failure to timely disclose expert witnesses generally focus on the prejudice to the opposing party, rather than on the reasons for the delay. If the only effect of granting an extension is a delay in trial date, and if no prior extensions have been requested, generally a court will grant the extension of time to disclose experts or expert opinion. Several examples follow:

> This cause is before the court upon plaintiffs' motions for extension of time to provide expert witness disclosures and to file a motion for summary judgment [DE # 29, 30] and defendants' motions *in limine* to exclude the opinions of plaintiffs' belatedly-disclosed experts [DE # 32, 33]. The court will grant in part plaintiffs' requested extensions, and therefore deny defendants' motions to exclude the opinions of plaintiffs' experts.

Bolander v. Taser Intern., Inc., Slip Copy, 2008 WL 5483345 (S.D.Fla., 2008).

> The defendants in this case have filed a motion seeking to exclude the testimony of plaintiff's expert, Phillip Leon Davidson, on the grounds that the plaintiff's expert disclosure did not comply with Fed.R.Civ.P. 26(a)(2)(B). Plaintiff has responded in opposition to the motion… . Plaintiff concedes that he has complied only with Fed.R.Civ.P. 26(a)(2)(A), requiring the disclosure of the expert's identity, and not with Rule 26(a)(2)(B), which also requires disclosure of the expert's written report….While the motion to exclude contends that the defendants will be prejudiced if the plaintiff is allowed to present the testimony of its expert, … the Court finds that the extreme sanction requested by defendants is not warranted. However, the Court will extend the discovery deadlines, and continue the trial of this case.

Martin v. City of Trenton, Tennessee, Not Reported in F.Supp.2d, 2002 WL 34395773 (W.D.Tenn, 2002).

> The court finds that, although the defendant is prejudiced by the plaintiff's late disclosure…. The delay in disclosure here was not willful… . Also, there have been no previous extensions of time for the plaintiffs to disclose experts … . On balance, the court concludes that the policy preference for providing a trial on the merits in this complex matter outweighs any prejudice which the defendant has suffered. The court finds that the defendant has not been unduly prejudiced by the late disclosure. Preclusion of Dr. Litsky would be a disproportionate sanction … . The defendant is entitled to depose Dr. Litsky, and may have to re-depose the plaintiffs' orthopedic expert. After completing the depositions of the plaintiffs' experts, the defendant is entitled to extensions of time in order to disclose its own experts, … . A new schedule and new trial date will be needed.

Wegryn v. Smith & Newphew, Inc., Not Reported in A.2d, 2009 WL 4684806 (Conn.Super. 2009).

> Fed. R. Civ. P 16(b) requires that the district court enter a scheduling order setting deadlines for, *inter alia*, completion of discovery. This Court's most recent Case Management Order set March 2, 2007, as the deadline for

> plaintiff to identify any expert witnesses who may be used at trial and provide reports pursuant to Fed.R.Civ.P. 26(a)(2)(B) … . As preclusion of plaintiff's experts would effectively extinguish plaintiff's claim, while the prejudice to defendants of extending the deadlines in the Case Management Order would be minimal given the current procedural posture of this matter, the Court will deny defendants' motion for preclusion. However, plaintiff's counsel is forewarned that further disregard of his obligations to this Court will result in sanctions.

Britt v. Buffalo Mun. Housing Authority, Not Reported in F.Supp.2d, 2008 WL 788636 (W.D.N.Y. 2008).

> Rule 6(b) allows for the court to enlarge time, provided the moving party shows cause and the failure to comply with the deadline was the result of excusable neglect. Fed.R.Civ.P. 6(b) … . To determine whether neglect was excusable, courts generally consider the following factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and, (4) whether the movant acted in good faith. Bateman v. U.S. Postal Serv., 231 F.3d 1220, 123-24 (9th Cir.2000). Realty World will be granted a limited extension of time to designate these experts … . However, … the court, to avoid prejudice to plaintiff, will grant plaintiff ample opportunity to depose that expert and designate any rebuttal experts.

Attebery v. Placer Sierra Bank, Not Reported in F.Supp.2d, 2007 WL 3231721 (E.D.Cal., 2007).

> Plaintiff's failure to submit expert reports by June 20, 2006, violates Fed.R.Civ.P. 26(a)(2)(B). The failure subjects Plaintiff to sanctions under Fed.R.Civ.P. 37(c)(1). His violation is excusable, if he has substantial justification or the failure was harmless. The Court considers his failure to comply with Rule 26(a)(2)(B) harmless, because it can be cured without delay to the trial schedule of February 20, 2007,-more than five months away. Because Plaintiff should be allowed time to submit complete expert reports, a motion to exclude experts and their reports is premature at this time, and is therefore be denied. Defendant's alternative motion for an extension of time to disclose its

> own expert witnesses is granted to give it time to procure experts after Plaintiff discloses his revised report.

Allenbrand v. Louisville Ladder Group, LLC, Not Reported in F.Supp.2d, 2006 WL 2663529 (D.Kan 2006).

24. While the submission of Dr. Dunnigan's medical opinion report to counsel for Adams was over two months after the scheduled disclosure date for Loper's expert, Adams had not been prevented from engaging his medical expert and conducting his Independent Medical Examination ("IME") of Loper in the interim. If the Trial Court had continued the trial date, Adams would not have been prejudiced by the late submission of Dr. Dunnigan's report. Dr. Dunnigan indicates he prefers to offer his testimony via videotape. If the trial date had been continued, the deposition of Dr. Dunnigan could have been postponed, to enable counsel for Adams to consult with medical experts as to how to cross-examine Dr. Dunnigan and his opinion letter of February 8, 2010. If the Court had granted a postponement of the trial, Adams would have had more time to obtain his own expert to conduct an IME, and prepare a report. If the trial date had been continued, and counsel for Adams had sufficient time to prepare for the deposition of Dr. Dunnigan and to obtain its own expert, then Adams would not have been prejudiced, and the Request for Enlargement of Time should have been granted. Granting Loper's request to admit the testimony and report of Dr. Dunnigan would have delayed the trial several months but would not have prejudiced Adams. However, denying Loper's request to admit a medical expert severely curtails his ability to let the jury know the injury Loper suffered, and what constitutes fair compensation for that injury. The competing equities so

favor admission of Dr. Dunnigan's opinion, that it was an abuse of discretion by the Trial Court to preclude Dr. Dunnigan's testimony.

25. If the Supreme Court overrules summary judgment and remands to the Trial Court, then Adams will have ample time to respond to Dr. Dunnigans's report prior to the rescheduled trial, and thus Dr. Dunnigan's report must be admitted in any future proceedings.

B. SUMMARY JUDGMENT IS NOT APPROPRIATE IN NEGLIGENCE ACTIONS

26. It is hornbook law that as summary judgment precludes a plaintiff from his day in court and presenting evidence to a jury, all facts and inferences that may be derived from those facts must be viewed in light most favorable to the plaintiff. A typical formulation is as follows:

> In determining whether summary judgment was appropriately granted, we view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences that can reasonably be drawn from the evidence. Anderson v. Selby, 2005 ND 126, ¶ 7, 700 N.W.2d 696; Johnson, at ¶ 9. Negligence and proximate cause are fact questions unless the evidence is such that reasonable minds can draw but one conclusion, and negligence actions are generally not appropriate for summary judgment. Makeeff v. City of Bismarck, 2005 ND 60, ¶ 12, 693 N.W.2d 639; Long v. Jaszczak, 2004 ND 194, ¶ 25, 688 N.W.2d 173; Azure v. Belcourt Pub. Sch. Dist., 2004 ND 128, ¶ 9, 681 N.W.2d 816.

Miller v. Diamond Resources, Inc., 2005 ND 150, ¶ 8, 703 N.W.2d 316, 319-320.

27. The North Dakota Supreme Court has repeatedly held that summary judgment is particularly ill-suited for negligence actions:

> We have often stated that negligence actions ordinarily should not be disposed of by summary judgment. E.g., VanVleet v. Pfeifle, 289 N.W.2d 781, 784 (N.D.1980). Even if there is no dispute as to the evidentiary facts, if there is any doubt as to the existence of a genuine issue of material fact, or if differing inferences can be drawn from the undisputed evidence, there is a jury question, and summary judgment is improper where questions of negligence are in issue. Kirton, *supra*, 265 N.W.2d at 706; Johnson v. American Motors Corp., *supra*, 225 N.W.2d at 58. Where there exists the "slightest doubt" as to a factual dispute or "genuine issue of fact," summary judgment should be denied in a negligence action. Kirton, *supra*, 265 N.W.2d at 706.

Barsness v. General Diesel & Equipment Co., Inc., 383 N.W.2d 840, 845 (N.D. 1986).

> Although a motion for summary judgment under Rule 56 may be made in any civil action, it is not commonly interposed, and even less frequently granted, in negligence actions. It is not surprising that summary judgment is seldom sought or granted in negligence actions. Judge and jury each have a specialized function in negligence actions and particular deference has been accorded the jury in this class of cases in light of its supposedly unique competence in applying the reasonable man standard to a given fact situation. The language used by courts in denying summary judgment in negligence actions often is strong. The remarks of Chief Judge Parker in Pierce v. Ford Motor Company, (190 F.2d, 910 [4th Cir. 1951], cert. denied 72 S.Ct. 178, 342 U.S. 887, 96 L.Ed. 666), are typical: 'It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented.'

Luithle v. Taverna, 214 N.W.2d 117, 121-122 (N.D. 1973).

28. The Statement of Facts, beginning in Paragraph 4 above, was taken largely from the deposition of Adams, and shows that the testimony of the defendant himself is sufficient to show all the elements of a tort claim are present in Loper's Complaint. Adams admits that he saw Loper lying on his back after being hit by a calf on May 16, 2005, that Loper stated he was hurt after the calf impacts, and that Loper's pain grew worse in subsequent days. The deposition testimony of Loper was more specific that his back pain and leg weakness began after the calf impact on May 16, 2005, and grew worse everyday thereafter. 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, 2009. 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. The Court must also accept Loper's assertion that he has continued to have pain and weakness where he was hit by the calves in his lower back since the calf impacts.

C. THE CAUSAL LINK BETWEEN THE CALF IMPACTS AND LOPER'S INJURIES MAY BE ESTABLISHED WITHOUT A MEDICAL EXPERT AND THUS SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

29. If the Supreme Court affirms the Trial Court's preclusion of Dr. Dunnigan's testimony, Loper's testimony and the St. Alexius medical records are sufficient to establish tort liability and damages without a medical expert. Therefore Adams' Motion for Summary Judgment should have been denied.

30. The Trial Court based both its September 2, 2009 Order and its March 11, 2010 Order, partially on Klimple v. Bahl, 2007 ND 13, 727 N.W.2d 256. Klimple sets forth the general rule that "there generally is no requirement in ordinary negligence cases for expert testimony to establish the elements of the tort." *Id*, 2007 ND 13, § 6, 727 N.W.2d 256. In its Order of March 11, 2010, the Trial Court asserted "Klimple contains facts similar to the case at hand." App. 61. That assertion was erroneous, in that the facts of Klimple were unique and dissimilar to the case at bar. Klimple was precipitated by a car accident in which Mr. Klimple felt his left wrist "slap" against the car door. He felt no pain at the time. Several days later he was diagnosed as having tendonitis. Eventually the diagnosis was changed to a longitudinal fracture of his lunate bone of his left wrist and the presence of Kienbock's disease. There was divergent medical testimony as to what causes Kienbock's and whether it can be induced or aggravated by trauma. Keinbock's is a disease, and if medical experts are uncertain as to what causes Keinbock's or whether trauma can aggravate it, a jury would not be expected to make that determination without expert testimony. Also in Klimple the physician who testified was never asked the question in standard format (approved in Kunnanz v. Edge, 515 N.W.2d 167, 172-73 (N.D.1994) whether it was medically more likely than not that the accident caused or aggravated Kimple's Keinbock's disease.

31. In the case at bar, there is no dispute that Loper was hit in the lower back by calves on May 16, 2005, that he felt immediate pain where he was hit, and continues to have pain at that location. A jury can understand the causal

connection between a severe blow to the lower back which caused immediate pain at the location of the blow, with long lasting pain and weakness in the same location, without knowing the specific medical term for the injury. If, for example, Loper had asserted that the impact to his lower back caused a decrease in his vision, a jury would have needed medical testimony to explain the connection between an injury to the back and loss of vision. But a jury does not need an expert to explain that a blow to the spine in the lower back may cause pain and weakness in the portion of the back that was hit. "Witnesses who are not experts in medicine may still testify regarding the seriousness of wounds when the facts testified to are such that "[a]ny reasonable person with common sense is capable of expressing a view on such matters without first having to be qualified or treated as an expert witness." State v. Schimetz, 328 N.W.2d 808, 815 (N.D.1982). State v. Miller, 530 N.W.2d 652, 656 (N.D.1995).

32. [¶ 14] In Asch v. Washburn Lignite Coal Co., 48 N.D. 734, 735, 186 N.W. 757, Syll. 6 (1922) (emphasis added), this Court held that "[t]he injured person is a competent witness to testify to his feelings, pains, and symptoms, as well as to all the characteristics of the injury, so far as the same are perceptible to the senses, and *do not require the exercise of scientific skill and knowledge.*" *See also* Cain v. Stevenson, 218 Mont. 101, 706 P.2d 128, 131 (1985) [Emphasis in original].

Klimple v. Bahl 727 N.W.2d 256, 2007 ND 13, [¶ 14].

The dissent in Klimple cited decisions from other jurisdictions which:

> have concluded plaintiffs' and other lay witnesses' testimony is competent to establish causation regarding various illnesses and injuries. Choi v. Anvil, 32 P.3d 1 (Alaska 2001); Dodge-Farrar v. American Cleaning Services Company, Inc., 137 Idaho 838, 54 P.3d 954 (Ct.App.2002); *see* 2 Wigmore, Evidence § 568(1), at 780-83 (Chadbourn Rev.1979); *see also* 66 A.L.R.2d 1082, 1126 § 8 (1959). The Alaska Supreme Court held: "Our case law requires expert testimony only when the nature or character of a person's injuries require the special skill of an expert to help present the evidence to the trier of fact in a comprehensible format." Choi, 32 P.3d at 3. … [¶ 29]. "Whether a breach of a duty is the proximate cause of an injury depends on the facts and circumstances of each case and is a question of fact for the trier of fact." Rued Ins., Inc., v. Blackburn, Nickels & Smith, Inc., 543 N.W.2d 770, 773 (N.D.1996). "The existence of proximate cause is a fact question unless the evidence is such that reasonable minds can draw but one conclusion." *Id*. at 774. Issues of negligence, proximate cause, and comparative fault are therefore questions of fact for the trier of fact. Butz v. Werner, 438 N.W.2d 509, 516 (N.D.1989). Summary judgment is rarely appropriate on the issue of proximate cause which is so dependent on the development of the facts and the evidence. *See* Kimball v. Landeis, 2002 ND 162, ¶ 7, 652 N.W.2d 330.

Klimple v. Bahl, 2007 ND 13, ¶ 28, 29, 727 N.W.2d 256, 266,267 [Maring, J.].

33. Loper has established via sworn depositions: that Adams owed Loper a duty of providing a reasonably safe place to work; that the chute system in which Adams told Loper to work was not reasonably safe; that Adams knew of dangers of calves turning around in the chute and admitted he did not inform Loper of the dangers; that, as would have been reasonably anticipated, a calf did turn around in the chute and hit Loper in the back on two occasions, knocking Loper down; that Loper has been in pain where he was hit and, despite his best efforts to the

contrary has been unable to work since the impacts; that Loper has incurred substantial medical bills since the impacts; that Loper has lost wages since the impacts; and that Loper suffered and continues to suffer pain and suffering in the area of the impact. All these elements are within the area of common knowledge or lay comprehension. All these elements may be proven at trial without medical expert witnesses.

34. Whether the impacts from the calves caused or aggravated a L5-S1 disc bulge, or whether the impacts led to pinched nerves which are causing leg weakness and radiation of pain into the legs, is useful information for treatment of Loper's injuries, and, if admitted into evidence, may affect the dollar amount of a jury verdict, but expert testimony as to the precise changes in Loper's body caused by the impact from the calves is not necessary to prove the elements of the tort in this action. A jury is able to understand that the trauma of a frightened calf running into the lower back of an unsuspecting tort victim can cause pain and disability in the area hit by the calf, which were not present before the impact, but which have been continually present after the impact, without knowing the medical terminology or the precise nature of the injury. Juries were able to determine the legally required causation between a traumatic blow and the pain and suffering felt by a tort victim in the vicinity of the blow, and award damages in the 19th Century, before the advent of x-ray and MRI imagining enabled a physician to determine precisely what damage was caused by the blow. Juries are still able to make the same causal connection between a traumatic blow and pain and

weakness in the vicinity of the blow without advanced medical imaging and a physician's interpretation of the image.

D. LOPER'S MEDICAL RECORDS ARE ADMISSIBLE AS BUSINESS RECORDS EVEN IF THE RECORDS CANNOT BE INTRODUCED VIA DR. DUNNIGAN'S TESTIMONY

35. In North Dakota, medical records of a plaintiff may be introduced into evidence as a business record, via either a certified copy, testimony of an appropriate employee of the hospital, or via the plaintiff, after plaintiff has laid a foundation by testifying as to when he was in the hospital.

> Section 31-08-01, N.D.C.C., and its companion provision, Section 31-08-01.1, N.D.C.C. (both provisions being relevant portions of the North Dakota Business Records Act) provide for the admission of business records if they meet the requirements set forth in the Act. The term 'business' as used in the foregoing section, pursuant to the provisions of the Act, includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not. This clearly does not exclude hospital records … . While there is ample authority for the admissibility of hospital records generally under the Business Records Act, or similar Acts, the individual entries, however, are subject to scrutiny and may be excluded or eliminated from such records on the basis that these entries are otherwise not admissible. *See* 40 Am.Jur.2d Hospitals and Asylums ss 442, 443, pages 882 to 886. Self-serving statements in a hospital record, if offered to establish how the injury occurred or to establish liability, are not admissible unless the statement is relevant and helpful to or serves as an aid in the diagnosis and treatment of the patient's injury. *See* 32 C.J.S. Evidence § 728, pages 1038 and 1039.

Jahner v. Jacob, 233 N.W.2d 791, 799-800 (N.D. 1975).

36. The following quotation holds that while the "reasonable medical certainty" standard (which does require expert testimony) applies to establish future medical

services, or a prognosis of future permanent impairment, it does not apply to introduction of past medical records:

> [I]n Klein v. Harper, 186 N.W.2d 426, 431-432 (N.D.1971), another negligence action for injuries sustained as the result of a car accident, this court held that there was sufficient foundation to admit into evidence the plaintiff's medical bills without supporting medical testimony. The defendant contended that foundation was lacking for the admission of doctor bills, two hospital bills, and 14 receipts for the purchase of drugs because the plaintiff did not introduce "evidence to show that the treatment indicated was necessitated by the collision, ... and that there is no showing of what treatment was given or for what condition." The plaintiff had identified these items, testified as to the injury he suffered to his low back and stomach resulting from the collision, and testified as to his numerous visits with doctors, chiropractors, and specialists for treatment of the injuries. We concluded that the plaintiff's testimony "clearly connects the requirement for the medical services with the alleged tortious conduct of [the defendant] as a proximate cause. Thus there is evidence that the medical services were rendered because of the injury of which he complains and that the services were necessary; ..." Klein v. Harper, *supra.*...
>
> We decline to impose the "reasonable degree of medical certainty" standard to medical expenses that have already been incurred … .
>
> In this case, ... Erdmann testified that the medical bills at issue were incurred by him after the accident … . We conclude that an adequate foundation existed for admission of Erdmann's medical bills and that the trial court did not abuse its discretion in allowing the bills into evidence … . The bills having been properly admitted in evidence, the question whether the medical expenses were necessitated by the accident became one for the jury.

Erdmann v. Thomas, 446 N.W.2d 245, 247, 248, 249, 250 (ND 1989).

37. Loper's testimony as to how he felt before May 16, 2005, how he was hit in the back on May 16, 2005, how he felt afterwards, what happened on May 23, 2005,

before he was admitted to a hospital, and what has happened thereafter, is sufficient to establish causation between Adams' assigning Loper to work in the chute and Loper's condition and inability to work thereafter. Introduction of Loper's medical records, as a business record of what transpired at St. Alexius, will help the jury understand Loper's subsequent pain and medical treatment in his lower back, the area of the calf impact.

CONCLUSION

38. Even though Dr. Dunnigan had been disclosed as Loper's medical expert, his opinion was not disclosed until after the Expert Witness scheduling deadline of the Trial Court. Admission of the late disclosure would not prejudice Adams, if the trial date were postponed several months, and there was no reason that the trial could not be continued. While admission of the Dunnigan opinion will not prejudice Adams, preclusion of Dr. Dunnigan's testimony will severely prejudice Loper. It was in the discretion of the Trial Court whether to admit into evidence the late-filed opinion of Dr. Dunnigan, but considering the impact on both parties, the equities in favor of admission of the medical expert are so much greater than the equities precluding the admission of the evidence, that it was an abuse of discretion for the Trial Court to preclude admission.

39. If Dr. Dunnigan's testimony will be admitted, then the Court must overrule summary judgment, because Dr. Dunnigan specifically wrote that it is medically more likely than not that Loper's injuries were caused by the calf impacts while Loper was employed by Adams. Even if Dr. Dunnigan's testimony is not admitted, a jury does not need a medical expert to establish causation between

two hard blows to the lower back and subsequent pain and weakness in the vicinity of those blows. The St. Alexius medical records, which document the treatment to Loper's back, will be admissible as business records regardless of Dr. Dunnigan's testimony. Because a jury can understand and determine causation between two blows and subsequent pain and weakness in the vicinity of the blows, that issue must be decided by the jury and summary judgment must be overruled.

40. If summary judgment is overruled, there will be ample time before a new trial date for Adams to depose Dr. Dunnigan and obtain his own medical expert. Therefore, even if the Supreme Court rules that the Trial Court was initially justified in precluding Dr. Dunnigan's opinion (which was submitted about six weeks before trial), Adams will have more than ample time to rebut the Dunnigan testimony before the new trial date. For that reason, the opinion testimony of Dr. Dunnigan must be allowed in any future trial in this matter.

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Dated this 10th day of May, 2010.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.:
Kidder County District Court No.:

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

APPELLANT'S BRIEF AND APPENDIX

Dated this 10th day of May, 2010.

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