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IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 22-0729

JAMIE NORRIS, Plaintiff/Appellant, -vs- RICK L. OLSEN dba A&O SHEET METAL, Defendant/Respondent.	)	**NOTICE OF FILING**

Defendant/Appellee A&O Sheet Metal hereby provides notice of the filing of a supplemental appendix, which includes the district court's November 22, 2022 Order on outstanding motions. The November 22, 2022 is the Order from which A&O Sheet Metal is filing its cross-appeal.

DATED this 22nd day of June, 2023.

/s/ Paul N. Tranel
Paul N. Tranel
BOHYER, ERICKSON,
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Attorneys for Defendant/Respondent

APPELLEE/DEFENDANT RICK L. OLSEN'S, d/b/a A&O SHEET METAL, SUPPLEMENTAL APPENDICES

Supplemental Appendix One
Order Setting Deposition of S. Anthony Siapush (4/1/2022) (Doc. 16)

Supplemental Appendix Two
Order on Outstanding Motions (11/22/2022) (Doc. 38)

Supplemental Appendix One

The Hon. Luke Berger
2 S. Pacific #6
Dillon, MT 59725
Phone: 406/ 683-3745

MONTANA FIFTH JUDICIAL DISTRICT COURT

BEAVERHEAD COUNTY

JAMIE NORRIS, Plaintiff, -vs.- RICK L. OLSEN dba A&O SHEET METAL, Defendant.	Cause No. DV-1-2021-0014420 **THE HON. LUKE BERGER**

ORDER SETTING DEPOSITION OF S. ANTHONY SIAHPUSH

Pursuant to the Discovery Conference held on March 31, 2022, this Court's inherent authority to control discovery, and the Court being fully informed, the Court hereby **ORDERS** as follows:

1. That S. Anthony Siahpush attend his deposition on Wednesday, April 6, 2022, commencing at 9:00 o'clock a.m. (Mountain Time) / 10:00 am (Central Time) at Quinn's Quality Reporting, Ltd., at 5706 South 185th Street, Omaha, Nebraska, as set forth in the February 28, 2022 Notice of Deposition of Anthony Siahpush;
2. That the deposition shall be conducted under the authority of Neb.R.Disc. § 6-330(A) Interstate Depositions and Discovery;
3. That the deposition shall be conducted in accordance with Neb.R.Disc. § 6-330 Depositions Upon Oral Examination;
4. That the deposition shall be recorded stenographically by Quinn's Quality Reporting, Ltd, or a licensed court reporter present with the witness;

5. That the deposition may be video-recorded by Quinn's Quality Reporting, Ltd, or a licensed court videographer present with the witness;
6. That as set forth in this Court's Local Rule 14.2, counsel are permitted to use video conference technology, such as ZOOM, to appear and converse with the witness during the deposition (without any recording);
7. That S. Anthony Siahpush shall provide testimony in accord with Neb.Rev.St. § 25-1223 Trial Subpoena; deposition subpoena; statement required; by whom served; forms, subject to any privilege objections that may be made; and
8. That the court reporter is permitted to position the video conference technology, such as ZOOM, in a location allowing counsel to visually see the witness during the deposition.

Electronically Signed By:
Hon. Judge Luke Berger
Fri, Apr 01 2022 02:41:12 PM

Supplemental Appendix Two

MONTANA FIFTH JUDICIAL DISTRICT COURT, BEAVERHEAD COUNTY

JAMIE NORRIS,

Plaintiff,

vs.

RICK L. OLSEN dba A&O SHEET METAL,

Defendant.

Cause No. DV-21-14420

ORDER ON OUTSTANDING MOTIONS

Before the Court is Defendant A&O's motion to exclude Plaintiff's expert witness, filed on April 29, 2022. Plaintiff Jamie Norris (hereinafter "Norris") filed a response on May 16, 2022. A&O replied on June 1, 2022. Also before the Court is A&O's motion for summary judgment, filed on May 2, 2022. Norris responded on May 26, 2022. A&O replied on June 10, 2022. An oral argument was requested and took place on November 15, 2022.

Norris is represented by Lawrence Henke and David Vicevich with Vicevich Law. A&O is represented by Paul Tranel and Jesse Beaudette with Bohyer, Erickson, Beaudette & Tranel, P.C. These matters are ready for decision.

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BACKGROUND

This case stems from a house fire of Jamie Norris's mobile home located at 569 Vigilante Drive in Dillon, Montana. *See* Compl., Aug. 2, 2021. On October 25, 2020, Norris alleges he arrived home late and discovered his heat and hot water were not working. *Id*., ¶ 7. After unsuccessfully attempting to relight the pilot light to the furnace, he contacted A&O and asked the business to come fix the heat and hot water at his home on October 26, 2020. *Id.*, ¶ 8—9. Austin Hoerning and Luke Huffaker, A&O employees, were sent to Norris's home on an emergency "no heat" service call. *Id.*, ¶ 10. Norris alleges the A&O employees disassembled the furnace inside the home to determine why the furnace was not working, and shortly thereafter left the premises. *Id.*, ¶ 11. While the A&O employees were gone from the mobile home, Northwestern Energy technicians arrived and worked on the main gas supply valve/line coming into the home from the utility service connection, and eventually lit the hot water heater pilot light, however left the disassembled furnace in the care of A&O. *Id.*, ¶¶ 13—14. A&O employees returned to the mobile home later and reassembled the furnace, lit the pilot light to the furnace, and left Norris's home. *Id.*, ¶ 14. Shortly thereafter, a fire started in Norris's home and was later determined to be a total loss. *Id.*, ¶ 15.

Norris filed a Verified Complaint and Demand for Jury Trial on August 2, 2021, alleging two causes of action against A&O. The first count asserts a claim under the Montana Consumer Protection Act, and the second count alleges negligence. Norris disclosed S. Anthony Siahpush, Ron Scott, or Nathan Siahpush from Engineering Specialists Incorporated ("ESI") as expert witnesses in his Witness and Exhibit List filed on January 31, 2022. A&O claims after conversations between counsel, Norris identified S. Anthony Siahpush as the expert to be deposed as he would testify during trial, and the other named experts were not necessary. Def.'s

Br. in Support of Mot. to Exclude Expert Witnesses, 2, Apr. 29, 2022. Siahpush was located in Omaha, Nebraska, so A&O claims after email correspondence between counsel, it was agreed the parties would conduct the deposition of Siahpush via Zoom on April 6, 2022, and a Notice of Deposition of S. Anthony Siahpush was served on February 28, 2022. *Id.* The Notice provided the deposition was to take place via Zoom before a certified reporter and a notary public for the state of Nebraska. *Id.* After Siahpush sent a guaranteed payment letter on March 1, 2022 that stated, "depositions in person or via conference call only," A&O alleges it attempted to clear this up with counsel for Norris as the deposition was planned to take place via Zoom. *Id.*, at 2—3.

This conflict seemed to be resolved, until counsel for Norris contacted A&O's counsel on March 23, 2022 stating he had misunderstood and Siahpush would not appear via Zoom under any circumstances. *Id.*, at 3. Further conversation was held, and counsel for A&O requested Siahpush disclose his location so he could be served with a subpoena. *Id.* Despite multiple attempts, Siahpush was not able to be located to be served and A&O filed a Motion for Emergency Discovery Conference on March 31, 2022. *Id.*, at 5. A discovery conference was held the same day, and on April 1, 2022, this Court issued an Order Setting the Deposition of S. Anthony Siahpush ("Order") stating the deposition be conducted pursuant to Nebraska Rules of Discovery § 6-330(A) and 6-330, and pursuant to this Court's Local Rule 14.2, counsel was permitted to use Zoom to conduct the deposition. *Id.* (citing Order, Apr. 1, 2022). On April 6, 2022, counsel for both parties appeared via Zoom, however Siahpush failed to attend his deposition. *Id.* The current pending motions followed, and oral argument was held on November 15, 2022. The Court will now consider these motions.

DISCUSSION

A&O's Motion to Exclude Norris's Expert Witnesses

Legal Standard

"The district court has inherent discretionary power to control discovery, and that power is based upon the district court's authority to control trial administration." *State ex rel. Guarantee Ins. Co. v. District Court of the Eighth Judicial Dist.*, 194 Mont. 64, 67—68, 634 P.2d 648, 650 (1981). Compliance with discovery rules and order is essential to the "efficient and fundamentally fair administration of justice on the merits." *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court*, 2018 MT 220, ¶ 20, 392 Mont. 458, 426 P.3d 541 (internal citations omitted). Upon a party's failure to comply with Montana discovery rules, a district court may impose sanctions pursuant to Montana Rule of Civil Procedure 37(b), and there is a "strong preference for liberal imposition of sanctions as necessary and proper to remedy, punish, and deter non-compliance with discovery rules and orders." *Id.* (internal citations omitted). A court's decision to grant or deny discovery and impose sanctions for failure to comply with discovery rules generally will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Caras*, 263 Mont. 377, 384, 868 P.2d 615, 619 (1994).

Analysis

In its motion, A&O requests the Court exclude written and oral testimony of all three of Norris's retained expert witnesses "for the failure to obey this Court's discovery order and for the expert's refusal to submit to a remote deposition." Def.'s Br. in Support of Mot. to Exclude Expert Witnesses, at 1.

A&O argues Norris's experts should be excluded because Siahpush's failure to show up for his deposition, and Norris's failure to make his retained expert available for a deposition, violates A&O's right to expert discovery information pursuant to Montana Rule of Civil Procedure 26(b)(4). *Id.*, at 6. More specifically, A&O first claims its motion to exclude should be

granted because Norris and Siahpush failed to comply with the Court's Order requiring Siahpush attend the scheduled deposition. *Id.* A&O argues this failure to comply is a violation of numerous discovery rules, and Montana Rules of Civil Procedure allow for sanctions in situations such as this. *Id.*, at 7 (citing Mont. R. Civ. P 26(b)(4)(A)(ii); Mont. R. Civ. P. 26(e)(2); Mont. R. Civ. P. 30(b)(4); Mont. R. Civ. P. 37(b) & 37(c)(1)). Additionally, A&O argues although excluding expert testimony is a harsh sanction, the Montana Supreme Court has upheld this sanction when it limits opposing counsel's ability to effectively cross-examine the witness. *Id.*, at 8 (citing *Evans v. Scanson*, 2017 MT 157, ¶ 20, 388 Mont. 69, 77, 396 P.3d 1284, 1291; *Montana Power Company v. Wax*, 244 Mont. 108, 112, 796 P.2d 565, 567 (1990)). A&O is allowed to depose Norris's expert pursuant to Montana Rule of Civil Procedure 26(b)(4)(A)(ii), and because of Siahpush's failure to attend his scheduled deposition, A&O's ability to cross-examine Siahpush has obviously been severely limited which supports its request to exclude. *Id.*

A&O further cites to a number of cases in support of this argument interpreting Federal Rule of Civil Procedure 37 where courts have imposed sanctions for a party's failure to produce its expert when the lower court has ordered the party to do so. *Id.* (citing *Sali v. Corona Regional Med. Ctr.*, 884 F.3d 1218, 1223 (2018); *Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996); *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986 (6th Cir. 1988)). In addition, A&O argues it was not required to serve Siahpush with a subpoena because there was no indication Siahpush would not attend his deposition without first being served, and it is Norris's obligation as the party who retained Siahpush to make him available to be deposed. *Id.*, at 10—11 (citing *Bailey v. Worthington Cylinder Corp.*, No. 16 CV 7538, 2021 U.S. Dist. LEXIS 197728, at *8 (N.D. Ill. Jan. 19, 2021)).

A&O next argues Norris or Siahpush could have moved the Court for a protective order or filed a motion to quash seeking relief but failed to do so and therefore any objection to the remote deposition is waived. *Id.*, at 11. Under Montana Rule of Civil Procedure 26(c), A&O notes the court where the action is pending can relieve the proposed deponent from his duty to appear, and here, because there was no Court Order doing so, neither Siahpush nor Norris could relieve that duty. *Id.*, at 11—12 (citing *Dambrowski v. Champion Int'l Corp.*, 2000 MT 149, ¶ 39, 300 Mont. 76, 87, 3 P.3d 617, 624). Seeking relief from the Court to dispute the scope or form of the deposition was the avenue Norris and Siahpush needed to take, and because neither of them did, A&O argues this further supports its motion to exclude. *Id.*, at 12.

Next, A&O contends Montana Rules, Nebraska Rules, and this Court's Rules all provide for remote appearances, which has become normalized in the wake of the COVID-19 pandemic. *Id.*, at 13 (citing Mont. R. Civ. P. 30(b)(4); Neb. R. Disc. § 6-330; *Hernandez v. Bobst Grp. N. Am., Inc.*, No. 1:19-cv-00882, 2020 U.S. Dist. LEXIS 190610 (E.D. Cal. Oct. 14, 2020)). Further, A&O argues although Siahpush stated his company policy does not allow for remote depositions, to excuse the violation of this Court's Order by Siahpush failing to attend, Norris must demonstrate the violation was substantially justified or harmless which is not the case here because Norris nor Siahpush at any time provided support as to why ESI does not allow for remote depositions. *Id.*, at 13—14 (citing Mont. R. Civ. P. 37(c)(1)). Further, A&O argues this violation was not harmless as it prejudices A&O by not being able to depose Siahpush. *Id.*, at 14. In addition, it was A&O's position from the beginning the deposition was going to take place remotely and based on communications with Norris's counsel expected this to be acceptable up until March 23, 2022. *Id.* A&O also asserts Siahpush's company policy cannot take precedence over an Order from this Court, and both Montana and Nebraska's discovery rules. *Id.*

Lastly, because Norris explicitly told A&O only Siahpush would be necessary to be deposed and all named experts are affiliated with ESI, A&O requests the Court to exclude all ESI witnesses for their refusal to cooperate with service of the Nebraska deposition subpoena and for violating the Court's Order. *Id.*, at 15.

In response, Norris first argues because Siahpush is a non-party and not a Montana resident, he must be subpoenaed for his deposition. Pl.'s Opp. to Def.'s Mot. to Exclude Expert Witness, 4, May 16, 2022 (citing Mont. R. Civ. P. 45). Norris claims contrary to A&O's argument, Siahpush did not have a duty to appear, and because issuing a Notice of Deposition is procedurally incorrect for a non-party, A&O's Nebraska subpoena request and subpoena were statutorily deficient, and because Siahpush was never served, there was no obligation that he testify. *Id.*, at 4—5 (citing *Knight v. Johnson*, 237 Mont. 230, 773 P.2d 293 (1989)). Next, Norris argues what is required pursuant to Montana and Nebraska law is for the subpoenaed witness to "appear and testify." *Id.*, at 5. Norris points out Siahpush has agreed to appear and testify, either in person or by telephone conference call, and it is unreasonable for A&O's counsel to insist on a deposition "in a means and manner exclusive to his desires and opposed by Mr. Siahpush." *Id.*, at 6. Further, Norris argues nothing in the Nebraska nor Montana Rules require remote depositions to be done via internet connection, and the Nebraska subpoena does not state anything about using Zoom, so it cannot mandate the deposition be conducted over Zoom or other internet transmission. *Id.*, at 7. Additionally, Norris argues A&O references Montana Rule of Civil Procedure 30(b)(3)(B) in support of its argument that an "alternative method" can be used to take a deposition, however the Nebraska rule is more restrictive, allowing for alternative methods of recording testimony but limiting the alternative methods to those under stipulation and with specific requirements not met by A&O. *Id.*, at 7—8 (citing Neb. Ct. R. Disc. § 6-330(b)(4)(B)).

Next, Norris claims A&O's subpoena is deficient under Nebraska law because it did not include the statutorily required notice nor was a witness fee included in the subpoena as required. *Id.*, at 8—9 (citing Neb. Ct. R. Disc. § 6-330(b)(1)(A); Neb. Rev. St. § 25-1223(7)). In addition, the Nebraska deposition needed to include the method of the discovery, which it did not, and therefore even if Siahpush was served with the subpoena, it is statutorily deficient and unenforceable. *Id.*, at 9. However, Nebraska law requires the proposed deponent be served pursuant to Nebraska Court Rules of Discovery § 6-330(A)(b)(c) and because Siahpush was not served, there was no requirement for him to appear at the scheduled deposition. *Id.*, at 10. Lastly, Norris argues this Court's Order specifically stated the deposition be conducted under Nebraska Rule of Discovery § 6-330(A), and because Siahpush was never served, A&O is the party not in compliance with the Court's Order. *Id.*, at 10—11. Because no rule or statutory violation has occurred, no discovery sanction is warranted, and A&O's motion should be denied. *Id.*, at 11.

In reply, A&O first claims Norris's argument Siahpush should have been served with a subpoena is contrary to this Court's Order and Montana law. Def.'s Reply Br. in Support of its Mot. to Exclude, 3, June 6, 2022. More specifically, A&O notes this Court's Order "clearly directed Norris's retained expert witness to attend his deposition on Wednesday, April 6, 2022," which he failed to do. *Id.* Thus, A&O argues, because the Court ordered the deposition and permitted Zoom technology, a subpoena was not necessary and Norris's reliance on Montana Rule of Civil Procedure 45 is misplaced. *Id.*, at 4. In addition, A&O argues the party designating the expert witness has the duty to ensure the witness's compliance with the court's orders regarding discovery, and it was within the Court's authority under Rule 26(f) to resolve this dispute regarding the method of discovery. *Id.*, at 4—5.

A&O also argues Montana Rule of Civil Procedure 26(b)(4) plainly establishes it is Norris's responsibility to make his retained and identified expert witness available for deposition, and therefore attempts to avoid his discovery obligations by claiming A&O should have subpoenaed Siahpush pursuant to Montana Rule of Civil Procedure 45. *Id.*, at 3—4. A&O contends further "a subpoena is not necessary for a retained and identified expert witness because the party who identifies the expert is obligated to meet the discovery requirements set forth in Rule 26(b)(4)," including answering interrogatories and making the expert available for a deposition. *Id.*, at 5.

Next, A&O claims Norris's subpoena argument fails because Montana law and its discovery rules treat an expert witness different than a lay witness in that Norris was required to provide a timely and sufficient disclosure regarding his experts, is obligated to provide information about his retained expert witnesses pursuant to Rule 26(b)(4), and if Norris failed to comply with these requirements, sanctions are permitted under Rule 37(c)(1). *Id.*, at 7. A&O also points to the record arguing both Norris and Siahpush refused to cooperate with the issuance of a subpoena on numerous occasions, and A&O went to great lengths to attempt to serve Siahpush, which should be taken into consideration. *Id.*, at 7—8. Norris therefore "cannot now in good faith argue that A&O should have served his retained expert with a subpoena." *Id.*, at 8 (citing *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 34, 298 Mont. 213, 222, 994 P.2d 1124, 1130—31).

A&O next asserts Norris's reliance on Nebraska Rules of Civil Procedure is misplaced because this is a Montana case, and therefore Norris's discovery obligations are under Montana Rules of Civil Procedure and this Court's Order. *Id.* A&O claims Norris's argument the Nebraska subpoena was insufficient does not establish his failure to comply with this Court's

Order was either substantially justified or harmless, and these arguments made by Norris should be disregarded. *Id.*, at 9. In addition, A&O claims Norris's argument the Rules do not mandate a Zoom deposition is misplaced because this Court ordered the deposition of Siahpush be taken over Zoom. *Id.* A&O also maintains Norris's failure to seek a protective order or other relief from this Court thereby renders any issues concerning the Notice of Deposition and this Court's Order waived. *Id.*, at 10. Further, A&O notes no genuine reason has been given as to why Siahpush refused being deposed via Zoom. *Id.* Lastly, A&O maintains because Norris specifically designated Siahpush as the expert to be deposed and testify at trial, and Norris failed to comply with this Court's Order and his obligations under Montana Rules of Civil Procedure, these acts warrant an exclusion of all three of Norris's disclosed expert witnesses. *Id.*, at 11—12. Therefore, the Court should grant A&O's motion to exclude. *Id.*

During oral argument, the parties reiterated their positions set forth in their briefs. Counsel for Norris, Mr. Henke, also focused on the language in this Court's April 1, 2022 Order. More specifically, Mr. Henke argued paragraph 2 of the Order, which states the deposition will take place pursuant to Nebraska Rules of Discovery § 6-330(A) provides the authority for how the deposition shall be conducted, which A&O did not follow. *See* Order, at 1. Mr. Henke argued Rule § 6-330(A) requires the subpoena to be served in compliance with Nebraska Revised Statute § 25-1226(1) which in turn requires a deposition subpoena be served either by personal service or certified mail service, which A&O did not do. Therefore, Mr. Henke claims because there was no service, no legal obligation was created for Siahpush to attend the deposition pursuant to Nebraska law which controls per this Court's Order. Pl.'s Opp. to Def.'s Mot. to Exclude, at 10. Mr. Henke also focused on paragraph 7 of the Order during oral argument, which states Siahpush was to provide testimony in accordance with Nebraska Revised Statutes § 25-

1223 and argued A&O also did not follow the requirements pursuant to that statute on similar grounds, because service of the subpoena did not occur, and the subpoena did not contain the necessary information required by the Nebraska statute. *See* Order, at 2.

The Court notes the parties agreed to the terms of the Order before the discovery conference and the issuance of the Order took place. The Court also notes it was clear from the discussions during the discovery conference it expected the deposition to take place via Zoom on April 6, 2022. While this Court made its expectations very clear that a deposition would occur the terms of the Order were not met by A&O. The Order submitted and agreed upon by counsel provided Nebraska law was the controlling authority for the deposition, and Nebraska law requires service of a subpoena to command attendance at a deposition. Neb.Ct.R.Disc. § 6-330(A)(b), (c). The Court agrees with Norris that a Court Order shall be followed, but despite the Court's intent following the terms of the Order is a necessary requirement. The Court recognizes the lengths A&O took to serve Siahpush with the subpoena as well as the acts of Norris and Siahpush. However, because the parties agreed to the terms of the Court's Order which required service, and the fact service was never completed on Siahpush, excluding Norris's retained experts would be an inequitably harsh sanction, and A&O's motion to exclude is denied.

A&O's Motion for Summary Judgment

Legal Standard

Summary judgment is properly granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). A material fact is one which involves the elements of the cause of action or defense to the extent it requires resolution by the trier of fact. *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 15,

323 Mont. 295, 100 P.3d 137. Summary judgment will be properly precluded only if there is a genuine dispute over facts that might affect the outcome of the suit under the governing law. *Broadwater Dev., LLC v. Nelson*, 2009 MT 317, ¶ 15, 352 Mont. 401, 219 P.3d 492 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 202 (1986)). "A dispute is genuine if the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party." *Id.*

The purpose for summary judgment is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the expense and burden of unnecessary trials." *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont. 507, 155 P.3d 1241 (citing *Boyes v. Eddie*, 1998 MT 311, ¶ 16, 292 Mont. 152, 970 P.2d 91; *Kane v. Miller*, 258 Mont. 182, 186, 852 P.2d 130, 133 (1993)). However, the Montana Supreme Court has repeatedly recognized summary judgment as an "extreme remedy," and should thus "never be substituted for a trial if a material factual controversy exists." *Id.* (quoting *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶¶ 24, 25, 304 Mont. 356, 22 P.3d 631); *See also Sands v. Town of W. Yellowstone*, 2007 MT 110, ¶ 16, 337 Mont. 209, 158 P.3d 432. Therefore, the party seeking summary judgment has the initial burden of establishing the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Gonzales v. Walchuk*, 2002 MT 262, ¶ 9, 312 Mont. 240, 59 P.3d 377 (citing *Bruner v. Yellowstone Cty.*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)).

At the summary judgment stage, courts may consider as evidence affidavits made with personal knowledge based on "firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Smith v. Burlington N. & Santa Fe Ry.*, 2008 MT 225, ¶ 39, 344 Mont. 278, 187 P.3d 639 (citing *Hiebert v. Cascade Co.*, 2002 MT 233, ¶ 30, 311 Mont. 471, 56 P.3d 848). Exhibits can be submitted in support of an affidavit so long as they are

"accompanied by an affidavit or sworn discovery response of an individual with personal knowledge of their genuineness, relevance, and content." *Id.* (citing *Hiebert*, ¶¶ 30—32; *Disler v. Ford Motor Credit Co.*, 2002 MT 304, ¶ 11, 302 Mont. 391, 15 P.3d 864). Speculative or unsupported conclusory statements do not raise genuine issues of material fact. *Benson v. Diehl*, 228 Mont. 199, 203, 745 P.2d 315, 317 (1987). A party opposing summary judgment may not merely rely on allegations or denials in its own pleadings; its response must set out specific facts showing a genuine issue for trial. Mont. R. Civ. P. 56(e)(2).

Once the movant's burden to establish an absence of any genuine issue of material fact is met, the nonmoving party "must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact." *Gonzales*, ¶ 9. "Substantial credible evidence" is that which "a reasonable mind might accept as adequate to support a conclusion." *Seltzer v. Morton*, 2007 MT 62, ¶ 94, 336 Mont. 225, 154 P.3d 561 (citing *Satterfield v. Medlin*, 2002 MT 260, ¶ 23, 312 Mont. 234, 50 P.3d 22, overruled on other grounds; *Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134). All reasonable inferences that might be drawn from the offered evidence must be drawn in favor of the nonmoving party. *Hajenga*, ¶ 12.

The Court will not "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses" at the summary judgment stage. *Fasch v. M.K. Weeden Constr., Inc.*, 2011 MT 258, ¶ 17, 362 Mont. 256, 262 P.3d 1117 (quoting *Anderson v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675).

Analysis

In its motion, A&O argues it is entitled to summary judgment for three reasons. First, A&O claims if this Court grants its motion to exclude, Norris's claims fail as a matter of law

because expert testimony is required to determine A&O's actions or inactions caused the fire. Def.'s Br. in Support of Mot. for Summ. J., 4, May 2, 2022 (citing *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 18, 367 Mont. 21, 26, 289 P.3d 131, 136). The Court notes it has denied A&O's motion to exclude, so no further analysis of this argument is needed.

Next, A&O argues it is entitled to summary judgment because Norris's complaint relies on establishing industry standards for HVAC technicians and he did not disclose an opinion from a qualified expert establishing the applicable standard of care for HVAC service technicians under the facts of this case. *Id.*, at 5. To prove his claim for negligence, Norris must establish (1) a duty, (2) a breach of that duty, (3) causation, and (4) damages, and A&O argues in order to establish A&O breached its duty of care, Norris must establish the standard of care by which to measure A&O's actions, which requires expert testimony. *Id.*, at 5—6 (citing *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 29, 356 Mont. 417, 426, 234 P.3d 79, 86; *Dulaney v. State Farm Fire & Cas. Ins. Co.*, 2014 MT 127, ¶ 12, 375 Mont. 117, 121, 324 P.3d 1211, 1214). In addition, A&O argues an expert establishing the standard of care must be qualified based on his or her knowledge, skill, experience, training, or education, and there, "there is no evidence that ESI and the individuals specifically disclosed by Norris are qualified to give opinions on the HVAC industry standards." *Id.*, at 6—7 (citing Mont. R. Evid. 702).

A&O also argues although the Coleman manual exists setting forth procedures regarding the furnace at issue, and while evidence of compliance with the procedures in the Coleman manual may be relevant, "expert testimony is still required to explain the intricacies and nuances of the duty that a professional service provider owed under the particular circumstances of the case." *Id.*, at 7 (citing *Dayberry v. City of E. Helena*, 2003 MT 321, ¶ 19, 318 Mont. 301, 80 P.3d 1218; *Dubiel v. Mont. DOT*, 2012 MT 35, ¶ 18, 364 Mont. 175, 181, 272 P.3d 66, 70). A&O

reiterates expert testimony is required for Norris's claims; however, the experts must be qualified to provide opinions on the standard of care for furnace service technicians under the facts and circumstances of this case, and Norris has failed to provide information about how his retained experts are qualified to provide opinions on the standard of care for furnace service technicians. *Id.*, at 8.

Lastly, A&O argues summary judgment is warranted because the ESI Report provided fails to provide a causal link between A&O's actions or inactions and the cause of the fire, and therefore Norris's claims fail. *Id.* The ESI Report concludes the cause of the fire was due to negligence and A&O's failure to "confirm a complete operational test cycle to ensure proper function of the gas furnace," and that the fire originated "above the fan blower." *Id.*, at 9 (citing Ex. A at NORR 0004). However, A&O argues this is not sufficient to establish causation because there is no opinion in the ESI Report "that factually links the failure to run a test cycle to the cause of the fire," and to simply state the cause was A&O's negligence is not enough. *Id*. Without an opinion on the cause of the fire, Norris cannot meet his burden of proving the element of causation, and therefore A&O's motion for summary judgment should be granted. *Id.*

In response, Norris argues A&O does not provide any authority in its argument an expert is needed to establish the standard of care under these facts, as here the conduct complained of is ascertainable by a layman. Pl.'s Opp. to Def.'s Mot. for Summ. J., 4—5, May 26, 2022 (citing *Brookins v. Mote*, 2012 MT 283, ¶ 63, 367 Mont. 193, 213—14, 292 P.3d 347, 362). Here, Norris argues, it is a simple issue, and both the law and everyday interactions recognize the volatility of natural gas in the presence of fire. *Id.*, at 5—6 (citing *Ambriz v. Petrolane, Ltd.*, 49 Cal. 2d 470, 477, 319 P.2d 1, 5 (1957)). In addition, Norris argues A&O has failed to identify caselaw supporting its argument that failing to follow the manufacturer's relighting instructions

for a gas furnace is comparable to professional negligence requiring an expert on the standard of care. *Id.*, at 6. Norris also argues expert testimony is not required when the facts show A&O violated supervision regulations set forth by the State of Montana. *Id.*, at 7. Further, Norris claims deviation from the manufacturer's procedures has been established through Olsen's testimony, which then can be judged against the written instructions in the Coleman manual in restarting the furnace. *Id.* (citing *Dalton v. Kalispell Reg'l Hosp.*, 256 Mont. 242, 247, 846 P.2d 960, 962 (1993)).

Next, Norris argues A&O's motion to exclude is irrelevant because no expert testimony is needed to establish the standard of care in this case. *Id.*, at 8. Norris claims no expert is needed because: (1) Hoerning testified he left the pilot light on and didn't check the gas line for leaks; (2) Hoerning testified he disassembled the gas appliance and left it disassembled with the open flame inside, violating the manufacturer's instructions on relighting the appliance; (3) Hoerning testified he did not follow the manufacturer's relighting instructions; (4) Olsen testified he did not meet the supervision requirements of Montana regulations for apprentice plumbers; and (5) Hoerning testified he was supervising a helper the day of his services on Norris's gas appliance, all of which do not "turn on a standard peculiarly within the knowledge of only an expert." *Id.*, at 8—9 (citing *Durbin v. Ross*, 276 Mont. 463, 474, 916 P.2d 758, 765 (1996)).

Next, Norris argues no standard of care testimony is required for HVAC service technicians. *Id.*, at 10. More specifically, Norris argues the conduct complained of is readily ascertainable by a layperson, and a jury is capable of determining whether Hoerning, Olsen, and A&O violated common sense safety or Montana regulations or statutes. *Id.*, at 12 (citing *Moore v. Does*, 271 Mont. 162, 165, 895 P.2d 209, 210 (1995) (internal citations omitted); *Dalton*, 256 Mont. at 246, 846 P.2d at 961—62). Lastly Norris argues the ESI Report sufficiently establishes

causation, and regardless, causation is a question of fact not susceptible to summary judgment here. *Id.*, at 13 (citing *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 360, 916 P.2d 122, 133 (1996)). Therefore, A&O's motion for summary judgment should be denied. *Id.*

In reply, A&O argues first that Norris's reliance on the Dillon Fire Department Report in arguing A&O caused Norris's home to burn down is misplaced because it does not state the cause of the fire is related to A&O's actions or inactions, and regardless it is not admissible evidence. Def.'s Reply Br. in Support of Mot. for Summ. J., 3, June 10, 2022. A&O also notes the furnace at issue has certain safety devices designed to shut off the gas in the event of high temperatures, and there is no admissible evidence explaining what caused the high levels of heat to the wood framing in Norris's home that then caught fire considering these safety devices. *Id.*, at 6. Further, A&O argues there is no admissible evidence explaining what A&O did or did not do that caused the high levels of heat to the wood framing that caught fire. *Id.*

A&O next maintains an expert is needed because what caused the high levels of heat to the wood framing in light of the safety features in the furnace is beyond the scope of a juror's common knowledge or understanding. *Id.* In addition, A&O argues although the ESI Report references "standards of practice for training HVAC and technicians," Norris's experts were retained as an origin and cause expert of the fire, not as qualified HVAC technicians which is required here. *Id.*, at 7. A&O next claims the issue whether Norris's experts are qualified is for the Court to decide, and Norris has not provided any admissible evidence demonstrating his retained experts are qualified to provide opinions on the standard of care for HVAC technicians. *Id.*, at 8 (citing *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 16, 380 Mont. 204, 209, 354 P.3d 604, 608). A&O asserts Norris's "common sense" arguments fail because there is no admissible evidence indicating the cause of the fire was as simple as he suggests, and there is no evidence

establishing fire and a natural gas mixture is what caused Norris's home to burn down. *Id.*, at 9. Further, A&O reiterates Norris has not met the elements of causation and an expert is needed to explain to the jury "how A&O's action or inaction breached a duty and caused a fire to start," and the cases Norris relies on are easily distinguishable from this case. *Id.*, at 10. In addition, A&O recognizes the only action it should have taken was replace the eyeglass cover to the furnace after relighting the pilot light, but there is no expert or admissible evidence demonstrating the failure to replace the eyeglass cover caused the fire. *Id.*, at 11.

Next, A&O maintains an expert is needed because Norris's complaint relies on establishing the standard of care applicable to A&O, and it is beyond a juror's common knowledge to know "whether A&O had a duty to inspect the internal functions of the furnace," or "whether observing a 'complete operational test cycle' may or may not have prevented the fire from starting. *Id.*, at 12. Therefore, A&O argues proving Norris's allegations requires specialized knowledge. *Id.* Lastly, A&O claims Norris's arguments regarding the supervision of A&O employees is irrelevant because it still fails to address causation. *Id.*, at 13. Even if Norris could establish negligence *per se*, causation is still a required element which A&O maintains Norris has not established. *Id.* Therefore, A&O argues where a plaintiff fails to meet any one of the four elements of negligence, summary judgment in favor of the defendant is proper. *Id.*, at 14 (citing *Peterson v. Eichhorn*, 2008 MT 250, ¶ 24, 344 Mont. 540, 189 P.3d 615, 621).

It is well known to prove a claim for negligence, the plaintiff must prove: (1) duty; (2) breach of duty; (3) causation; and (4) damages. *Dubiel*, ¶ 12. Typically, negligence claims are not susceptible to summary judgment because they are fact driven. *Willden v. Neumann*, 2008 MT 236, ¶ 14, 344 Mont. 407, 189 P.3d 610. However, if a plaintiff "fails to offer proof of any

one of the elements of a negligence claim, the negligence action fails and summary judgment in favor of the defendant is proper." *Dubiel*, ¶ 12 (citing *Eichhorn*, ¶ 24).

Here, Norris argues the standard of care, the determination that A&O breached its duty of care, and the determination A&O's breach caused the fire does not need expert testimony because the conduct complained of is readily ascertainable and within the jury's capability to understand. Pls.' Opp. to Def.'s Mot. for Summ. J., at 4. Norris contends the conduct complained of is readily ascertainable because it is common knowledge that "you do not leave an open flame inside a gas appliance without verifying that when the gas comes on it doesn't explode." *Id.*, at 5.

Focusing specifically on causation, Norris's expert ESI Report states the failure of A&O to "stay after reignition of the pilot light to ensure the blower fan was operational and the thermostat would shut off maximum gas flow once temperature was reached resulted in high levels of heat to the wood framing…" *See* Def.'s Br. in Support of Mot. for Summ. J., Ex. A at NORR 0003. The Report goes on to state A&O's "failure to follow the standard of practice to confirm operation of the furnace and gas line, a life and safety matter, was the cause of this fire which started less than an hour after they left." *Id.* Further, the Report states the cause of the fire was "disregard, negligence, and failure of the experienced plumper [sic] with A&O Sheet Metal & Plumbing to confirm a complete operational test cycle to ensure proper function of the gas furnace, gas valve/regulator, and control to confirm that the fan blower would function properly and shut off the furnace with a system malfunction." *Id.*, at NORR 0004. Norris argues this reasoning sufficiently establishes causation, and during oral argument Mr. Henke stated no one touched the furnace other than A&O employees since it was working in the previous days, and therefore it is more likely than not something Hoerning did or did not do caused the fire.

For the causation element, a defendant's negligence is the direct cause of the plaintiff's injury "if there is an uninterrupted chain of events from the negligent act to the plaintiff's injury." *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 26, 296 Mont. 25, 987 P.2d 351. In these cases, "proof of causation is satisfied by proof that a party's conduct was a cause-in-fact of the damage alleged." *Busta*, 276 Mont. at 371, 916 P.2d at 139. A party's act is the cause-in-fact of an event if "the event would not have occurred but for that conduct." *Id.* The only statement in the ESI Report seemingly establishing causation is that A&O did not run and complete an operational test cycle. However, the Court agrees with A&O that nothing in the ESI Report specifically factually links how failing to run an operational test cycle would cause high levels of heat to the wood framing above the fan which is where the ESI Experts concluded the fire started. There is no evidence had A&O run an operational test cycle the fire would have been prevented, or that the fire would not have started but for A&O's failure to run the test cycle.

Norris has argued proving causation is simple because you do not "mix fire and natural gas together in an untested mixture," however the Court agrees there is no evidence the cause of the fire was this simple. During oral argument, Mr. Tranel, counsel for A&O, went through the workings of the furnace and its complexities, including the limit switches next to the gas valve that are designed to shut off gas to the furnace in the event the furnace gets too hot. In addition, there is a blower motor in the furnace that is equipped with a thermal switch that will shut the motor off if the blower motor reaches a certain temperature. Norris's experts in the ESI Report stated the fire originated around the wood framing near the blower motor compartment, but as A&O pointed out, there is no evidence that suggests what caused the high temperatures around that area in light of the safety devices that are designed to shut the furnace off if high temperatures are reached.

As stated above, Norris states causation has been met because A&O employees were the only ones working on the furnace before the fire started approximately an hour after they left, so it is more likely than not something the A&O employees did or did not do caused the fire. The ESI Report also focuses on the fact the fire started shortly after A&O employees left. However, the Court is unpersuaded by this argument, as causation by chronology alone is mere speculation. Mere speculation or unsupported conclusory statements do not raise genuine issues of material fact. *Benson*, 228 Mont. at 203, 745 P.2d at 317. In addition, Norris argues the Dillon Volunteer Fire Department's report states the acts or omissions of A&O caused the fire. The Court finds this report is inadmissible evidence and cannot be considered because it was not authenticated by a sworn affidavit or discovery response as required. *See Disler v. Ford Motor Credit Co.*, 2000 MT 304, ¶ 11, 302 Mont. 391, 15 P.3d 864; *Alfson v. Allstate Prop. & Cas. Inc. Co.*, 2013 MT 326, ¶ 14, 372 Mont. 363, 366, 313 P.3d 107, 109; *Burlington N. & Santa Fe Ry.*, ¶ 47. Furthermore, this assertion by Norris is a simplistic view of the situation involving the Dillon Fire Department and not supported by the report. The report states "[i]t appears that the fire had started near the furnace as that was where the most significant damage had occurred", notes a failure of equipment or heat source as a "cause of ignition", and notes there was work done on the furnace but *never* mentions A&O nor gives a conclusion on the cause of the fire.

Finally, this Court believes there is a distinction between the simplistic definition of cause and the legal determination of causation in negligence.

As stated previously, when a plaintiff cannot meet any one of the elements of negligence, the negligence claims fails and summary judgment in favor of the defendant is warranted. *Dubiel*, ¶ 12 (citing *Eichhorn*, ¶ 24). Here, the Court finds Norris cannot prove causation, as the reasoning is speculative, and the ESI Report does not sufficiently establish the

fire was caused by any of A&O's actions or inactions. Therefore, summary judgment in favor of A&O is proper.

For the foregoing reasons,

IT IS ORDERED AS FOLLOWS:

1. Defendant's Motion to Exclude Plaintiff's Expert Witnesses is DENIED.
2. Defendant's Motion for Summary Judgment is GRANTED.
3. The Clerk of Court will please file this order and distribute a copy to all parties.

Electronically Signed By:
Hon. Judge Luke Berger
Tue, Nov 22 2022 04:44:24 PM

CERTIFICATE OF SERVICE

I, Paul N. Tranel, hereby certify that I have served true and accurate copies of the foregoing Notice - Other to the following on 06-22-2023:

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Electronically Signed By: Paul N. Tranel
Dated: 06-22-2023