FILED
08/05/2024
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 24-0356

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 24-0356

MARK MULLEE,

Appellant,

v.

WINTER SPORTS, INC., dba WHITEFISH MOUNTAIN RESORT,

Appellee.

APPELLANT'S OPENING BRIEF

On Appeal From
The Montana Eleventh Judicial District Court, Flathead County
The Honorable Amy P. Eddy, Presiding

Ian P. Gillespie
DRIGGS, BILLS & DAY, P.C.
201 Brooks St., Suite 103
Missoula, MT 59801
Phone: (406) 206-9707
Fax: (406) 206-9707
Email: igillespie@advocates.com
Counsel for Appellant Jason Beck

Mikel L. Moore
MOORE RESOLUTIONS, PLLC
305 Mountain Gateway Drive
Kalispell, MT 59901
Phone: (406) 206-8831
Email: mmoore@mooreresolutionspllc.com

Christopher DiLorenzo
MOORE, COCKRELL, GOICOCHEA & JOHNSON, PC
PO Box 7370
Kalispell, MT 59904-0379
Phone: (406) 751-6000
Email: cdilorenzo@mcgalaw.com
Counsel for Appellee Winter Sports, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Cases

Other Authorities

STATEMENT OF ISSUES

1. The District Court erred in granting Winter Sports, Inc.'s ("WSI") Motion for Summary Judgment and finding, as a matter of law, WSI had no legal duty to maintain the fencing in question.

2. The District Court abused its discretion in excluding Mullee's experts from testifying at trial regarding Mullee's future damages and treatment as those opinions were based upon qualified medical opinions which were stated with a reasonable degree of medical certainty.

3. The District Court erred in denying Mullee's Motion for Summary Judgment as no genuine dispute of fact exists that (I) the fall caused Mullee's claimed injuries; (II) Mullee incurred $164,992.75 in past medical expenses; and (III) Mullee will incur $138,040.00 in future medical expenses.

4. The District Court abused its discretion in allowing WSI's expert, Dr. Irving Scher, to testify at trial because WSI failed to disclose facts supporting his opinions and failed to make him reasonably available for his deposition.

STATEMENT OF THE CASE

On January 16, 2019, Appellant Mark Mullee ("Mullee") was seriously injured while skiing at the ski resort owned and operated by Appellee Winter Sports, Inc. dba Whitefish Mountain Resort ("WSI"). On January 13, 2022, Mullee filed a lawsuit against WSI asserting negligence claims. WSI filed a motion for summary judgment, Mullee filed a motion for summary judgment regarding his injuries and damages, and the parties filed various motions *in limine*. On April 12, 2024, the Court held a hearing on WSI's motion for summary judgment and WSI's motion *in limine* to exclude Mullee's experts. On April 12, 2024, the Court entered summary judgment in WSI's favor and issued various orders on the parties' other pretrial motions. On May 28, 2024, the Court entered final judgment in WSI's favor.

Mullee has appealed the judgment and the following orders: (I) Order re: Defendant's Motion for Summary Judgment; (II) Order re: Mullee's Motion for Summary Judgment on Damages; (III) Order re: Defendant's Motion to Exclude Dr. Donaldson, Reg Gibbs and Ann Adair; and (IV) Order re: Plaintiff's Various Motion *in Limine*. This timely appeal ensues.

STATEMENT OF FACTS

I. Background of the Incident and Facts Pertinent to WSI's Motion for Summary Judgment.

On January 16, 2019, Mullee arrived at WSI's ski resort in the morning to ski with his friend, Leon Sythe ("Sythe"). Mullee Opposition to Motion for Summary Judgment ("Opposition to MSJ") at Exh. 1 at Exh. A at 82:05-09. At the time, Mullee was an advanced skier who had skied on WSI's trails many times before. Mullee Expert Disclosure at Exh. B at p. 2; Opposition to MSJ at Exh. A at 114:09-13, Exh. B at 68:09-14. In Mullee's decades of ski experience, he had never had a ski injury prior to the incident at issue here. Opposition to MSJ at Exh. 1 at Exh. B at 68:15-21, Exh. C at 68:06-09. Mullee had skied countless times with his childhood friends, Les Fenster and Sythe. *Id.* at Exh. 1 at Exh. C at 67:12-20. Both Mr. Fenster and Sythe testified that they had never seen Mullee ski recklessly or out of control. *Id.* at Exh. 1 at Exh. B at 68:15-21, Exh. C at 68:10-19.

Mullee was proceeding up the mountain on a chair lift to ski with Sythe. *Id.* at Exh. 1 at Exh. A at 88:06-08. However, as Mullee testified:

> I got off [Chair] 6, and I remembered that I had forgotten my phone and my water; so I went back down.
> …I always have water with me, always, and so it wasn't in my pocket, and then when I was feeling around, I didn't have my phone. I know I had to contact [Sythe]; so I turned around and proceeded back down.

Id.

//

In order to ski down to retrieve his water and cell phone from his vehicle, Mullee skied on a trail that WSI designated slow zone and a "green" run where children and handicapped people ski. WSI Motion for Summary Judgment at p. 3. This run also ends at the parking lot where Mullee parked his vehicle that morning. *Id.* Skiers, like Mullee, typically ski slower than 10 miles per hour in this area. Opposition to MSJ at Exh. 1 at Exh. D at 36:07-14.

During the period of time leading up to Mullee's injury, WSI had the practice of maintaining the fence, picture below, in the area:

Id. at Exh. 1 at Exh. E, Exh. D at 23:07-24:09, Exh. F at 35:16-19. WSI's ski patrollers testified that the purpose of the fence is to direct people to avoid skiing down the embankment into the rocks and the creek bed, and the potential danger of skiing down there. *Id.* at Exh. 1 at Exh. D at 24:23-25:02, Exh. F at 50:23-51:05, Exh. G at 62:14-15. On the other side of the fence is a steep drop off (as shown in the photograph below), which has large boulders and a creek bed at the bottom.

Opposition to MSJ at Exh. 1 at Exh. I; Mullee Expert Disclosure at Exh. B at p. 3. WSI knows the fence falls over from time to time, which is one reason why patrollers are required by WSI to check it each morning. Opposition to MSJ at Exh. 1 at Exh. G at 70:07-14

Mullee was the only person who actually witnessed the incident. *Id.* at Exh. D at 21:06-09, Exh. J at 60:01-03. Mullee testified that the following occurred:

> I was slowing down because there was ice underneath the new snow. Came into it, and the tunnel was completely icy; so I had no speed whatsoever. Came out of the tunnel, and I remember that it had fresh corduroy, you know … And then I remember pushing off, and that's the last thing – and then I went over.
> …
> I pushed off, caught an edge, and it spun me around – spun me around backwards and over – and I went over the cliff and hit a rock. Now, if the fence was there – a proper fence was there and it wasn't underneath the snow where I landed, then it would have stopped me.
> …
> At the bottom of the ravine, there is a fence down there underneath several inches of snow, that the groomer, I'm sure when they groomed that, hit it and knocked it over, and then there was several inches of snow on it from that night. And I pointed that out to the ski patrol.

They asked, Where's the fence? Over there underneath the snow.

Id. at Exh. 1 at Exh. A at 90:12-20, 92:15-20, 97:16-21. Consistent with Mullee's testimony, the photographs taken by ski patrol on that day show a fence post and debris in the creek area which must have already been fallen down in the creek area due to the snow cover:

Id. at Exh. 1 at Exh. E.

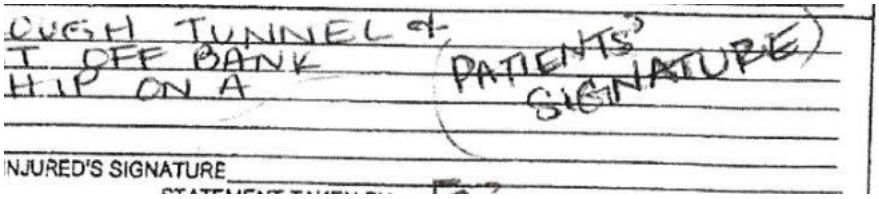
Mullee testified that, prior to falling down the embankment, he was not aware of the degree of the drop off or the rocks and creek below because it is not clear from the ski trail. *Id.* at Exh. 1 at Exh. A at 185:02-06. Mullee's ski partner, Sythe, also testified that he was not aware of the drop off or creek bed below even though he had skied that trail many times before. *Id.* at Exh. 1 at Exh. B at 69:22-70:03. The fall caused Mullee to suffer severe physical injury, including a break to his pelvis,

which resulted in him being air ambulanced to Harborview Medical Center in Seattle for treatment. Mullee Expert Disclosure at Exh. E.

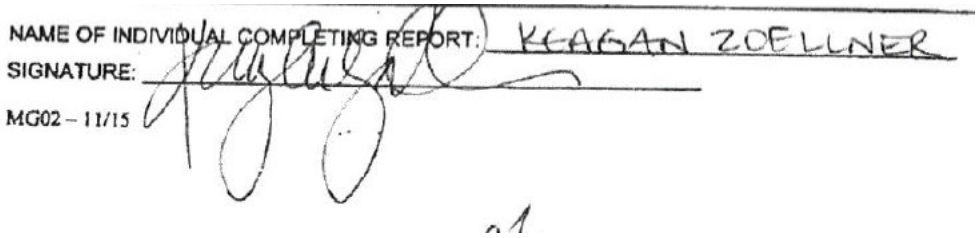
WSI employs ski patrollers who perform checks every morning, and a ski patroller is supposed to check the condition that fence every morning. Opposition to MSJ at Exh. 1 at Exh. D; Exh. E at 30:07-34:15. WSI's ski patroller, Marchand Logan (fka Marchand Dye) ("Marchand"), was assigned to conduct the "Gut Run" check alone the morning of the incident, which included checking "for grooming issues and maintain the fence at the bottom." *Id.* at Exh. 1 at Exh. K at 29:06-10, Exh. M. Marchand does not, in fact, remember checking the fence that morning, and she and others at WSI presume she did since it was part of her morning duties. *Id.* at Exh. 1 at Exh. K at 29:11-25, Exh. G at 57:19-58:03, Exh. F at 36:21-23, 40:14-19. Patrollers make mistakes in their morning checks from time to time. *Id.* at Exh. 1 at Exh. H at 50:02-06.

Several ski patrollers responded to the incident. The Incident Report, which was prepared by ski patroller, Keagan Zoellner ("Zoellner"), states that Mullee was "GOING TOO THROUGH TUNNEL & LOST CONTRL WENT OFF BANK INTO CREEK. HIT HIP ON A ROCK." Mullee Motion for Summary Judgment re: Damages ("MSJ re: Damages") at Exh. 1 at Exh. A. However, Mullee denies such and testified that he refused to sign the incident report because it was inaccurate. Opposition to MSJ at Exh. 1 at Exh. A at 114:21-116:18. WSI contends Mullee did,

in fact, sign the incident report and the faint and almost imperceptible line above "INJURED SIGNATURE" and to the left of "PATIENTS' SIGNATURE" is allegedly Mullee's signature:

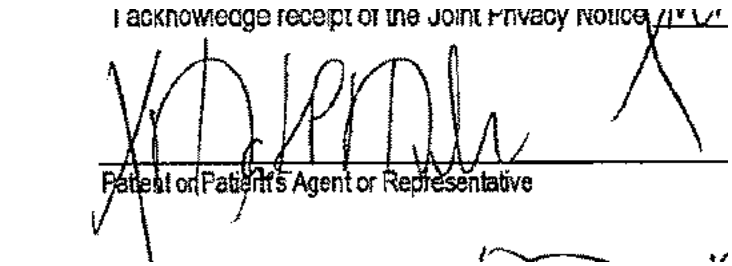


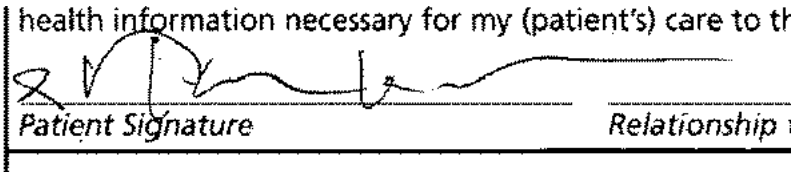
MSJ re: Damages at Exh. 1 at Exh. A. According to Zoellner, this signature is "clear". Opposition to MSJ at Exh. 1 at Exh. F at 27:24-25. In contrast to Mullee's signature, Zoellner's hand-writing on the incident report is very neat and her signature is clear:



MSJ re: Damages at Exh. 1 at Exh. A. Apart from Zoellner who was the patroller who completed the report, none of WSI's employees recall seeing Mullee allegedly sign the incident report. Opposition to MSJ at Exh. 1 at Exh. F at 30:21-24, Exh. D at 19:25-20:03, Exh. G at 73:11-13, Exh. K at 28:23-25. Mullee appeared "lucid" at the time. *Id.* at Exh. 1 at Exh. G at 43:06-13. WSI contends it is common for injured skiers to sign as such, and Mullee's ski expert, Stan Gale, disputes that and, in his report opined that this is not common or best practice for ski patrol. Mullee Expert

Disclosure at Exh. B at p. 3. Moreover, Mullee shortly after leaving the mountain made the below perceptible signatures at the emergency room:





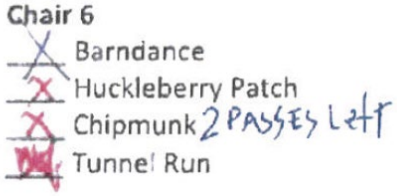
Opposition to MSJ at Exh. 1 at Exh. L. The ski patrollers who responded to the incident have conflicting testimony as to what Mullee said or did not say about what occurred. MSJ re: Damages at Exh. 1 at Exh. A; Opposition to MSJ at Exh.1 at Exh. F at 25:20-26:19, Exh. G at 34:04-17, 34:22-35:04, Exh. K at 28:05-18.

While WSI contends the fence was up at the time Mullee went through the tunnel, even though WSI's patrollers who responded to the scene admitted that it was possible the fence was down at the time. Opposition to MSJ at Exh. 1 at Exh. F at 36:02-05, Exh. G at 57:02-10, Exh. K at 35:02-12. Even though WSI contends that Mullee travelled through the "safety fencing", Marchand and other five ski patrollers responding to the incident did not take photographs documenting the actual location of the fencing poles or netting. *Id.* at Exh. 1 at Exh. E.

//

The Ski Patrol manual WSI provides to all ski patrollers and requires them to read as part of their employment contains a "CONFIDENTIALITY" provision, which states in relevant part: "Be especially censored with written or recorded words, ie. texts, emails, online social media, voice messages, video or audio recordings, etc. which can officially documented [sic] and later used as evidence" and "DO NOT divulge any information that puts WMR or any of its employees at fault". *Id.* at Exh. 1 at Exh. M, Exh. F at 106:22-107:15. As acknowledged by Defendant's president, Nicholas Polumbus, this provision would still bar patrollers from divulging information even if WSI was, in fact, at fault. *Id.* at Exh. 1 at Exh. J at 58:16-20.

As noted above, Mullee testified that it appeared to him at the time that a groomer had knocked down the fence that morning before he arrived. *Id.* at Exh. 1 at Exh. A at 90:12-20, 92:15-20, 97:16-21. Consistent with this, the grooming report from that day marked the "Tunnel Run", which is the area in question, as groomed that morning. *Id.* at Exh. 1 at Exh. N. However, WSI contends its employees later crossed out the marking of the tunnel run and now allege that a groomer did not go through the area that day. *Id.* Below is a the allegedly crossed-out marking:



Id.

After the incident, WSI replaced the blue fencing with larger and sturdier "B-Netting" or "B-Fencing" in that location, as pictured below:

Id. at Exh. 1 at Exh. O, Exh. D at 33:13-34:04; Exh. G at 67:07-17. B-Netting would be more effective at slowing and stopping a skier from falling down the embankment than the snow fencing purportedly in place at the time of the incident. *Id.* at Exh. 1 at Exh. D at 34:02-13. WSI contends that it is not "necessary" to place any fencing that could stop skiers from going off any embankments or drop offs anywhere on the mountain. *Id.* at Exh. 1 at Exh. J at 39:20-24. However, it acknowledges that it is possible to place such a fence there. *Id.* at Exh. 1 at Exh. J at 43:03. WSI knows that skiers, even excellent skiers, lose control, including catch edges, on occasion. Opposition to MSJ at Exh. 1 at Exh. J at 45:04-10; Mullee Expert Disclosure Exh. B at p. 43. A skier can also lose control while skiing even if the skier is not travelling "too fast". Opposition to MSJ at Exh. 1 at Exh. J at 53:05-07.

According to WSI, placing a fence that would stop skiers travelling 8-10 miles

per hour from falling down the steep embankment would cause a greater risk of harm to those skiers than not placing a fence that would stop them from falling down the embankment. *Id.* at Exh. 1 at Exh. J at 46:22-47:14, Exh. P at 55:10-18, Exh. Q at 59:15-60:25. Mullee's ski expert, Stan Gale, strongly disputes this. Mullee Expert Disclosure at Exh. B. WSI's employees admitted that the purpose of the fence was to warn skiers that they should turn right instead of continuing straight and down the embankment where Mullee fell. Opposition to MSJ at Exh. 1 at Exh. F at 32:06-32:09. Mr. Gale strongly disputes this and opined that, in his experience, ski areas regularly place fencing to decelerate or stop skiers and provides numerous examples in his report. Mullee Expert Disclosure at Exh. B.

Defendant has a risk management team and ski patrol team that make collective decisions regarding the placement and maintenance of fences, and those fences are placed to "steer our guests where we would like them to go". Mullee Motion for Summary Judgment re: Affirmative Defenses at Exh. 1 at Exh. F at 26:11-27:09, 32:06-32:09 ("Because that's our reasonable duty, is to guide our guests to make choices to avoid those kind of hazards.").

The District Court granted WSI's motion for summary judgment reasoning it there was no "duty of care on WSI to maintain safety netting on the ski way where Mullee's accident occurred." Appendix at p. 8.

//

II. Background Regarding the Disclosure of Experts Dr. Donaldson, Dr. Adair, and Mr. Gibbs and Mullee's Motion for Summary Judgment on Damages.

After being transported by emergency services, Mullee was diagnosed at North Valley Hospital with a left acetabular fracture (pelvis) of the anterior and posterior column and a pelvic hematoma. Mullee Expert Disclosure at Exh. E at p. 1. Mullee was then transferred by air ambulance to Harborview Medical Center in Seattle, Washington and received an open reduction internal fixation of the left acetabulum. *Id.* Mullee has treated for his injuries and has incurred at total of $164,992.75 in medical expenses. Mullee Motion for Summary Judgment re: Damage ("MSJ re: Damages") at Exh. 1 at Exh. B at pp. 4-7.

Mullee retained Dr. Michelle Donaldson, an orthopedic surgeon, who authored a report summarizing Mullee's treatment of his injuries and opining on Mullee's injuries and future treatment. Dr. Donaldson also opined: (I) Mullee fractured his left hip acetabulum; (II) he required transfer to a major trauma center for operative repair; (III) his fracture has healed; however, he still suffers from chronic pain and stiffness in the left hip; (IV) as a result of his chronic left hip pain and stiffness, he has had to curtail a significant amount of his physical activity; and (V) as a result of his left acetabular fracture, he will have increasing chronic pain. Mullee Expert Disclosure at Exh. E. Dr. Donaldson expressly stated in her report that "[t]his is my opinion to a reasonable degree of medical certainty." *Id.* Dr.

Donaldson also submitted an affidavit, again, affirmatively stating that all her "opinions in that report were stated with a reasonable degree of medical certainty." Mullee Response to Defendant's Motion *in Limine* to Exclude Dr. Donaldson, Reg Gibbs, and Ann Adair ("Response to MIL re: Experts") at Exh. A.

Mullee also retained a life-care planner, Reg Gibbs, who prepared a life care plan which "focuse[d] on the sequelae from Mr. Mullee's injuries sustained in the January 2019 accident. It details the services necessary for him to adapt to them and will help him plan, coordinate, and manage his health care over the remainder of his life." Mullee Expert Disclosure at Exh. H. Mullee also retained an economist, Dr. Ann Adair, who issued an economic estimate of the life care plan and opined that the present value of the life care plan is $138,040.00. *Id.* at Exh. K.

The Court's September 15, 2023 Third Amended Rule 16 Scheduling Order required the parties to disclose any and all expert witnesses by December 22, 2023. Third Amended Scheduling Order. On December 22, 2023, WSI filed its expert disclosure, which did not disclose any medical, life care planning, or economic experts. WSI Expert Disclosure. To date, WSI has not deposed, or requested to depose, any of Mullee's experts or treating physicians. MSJ re: Damages at Exh. 1, ¶ 8; Dkt 21. To date, WSI has not identified any admissible facts which could rebut (I) whether Mullee suffered his injuries as a result of the fall; (II) whether Mullee suffered $164,992.75 in past medical expenses; and (III) whether Mullee will incur

$138,040.00 in future medical expenses. WSI Response to MSJ re: Damages.

The Court entered an order denying Mullee's MSJ re: Damages conclusorily reasoning "there are genuine disputes of material fact as to the amount of harm suffered by Mullee." Appendix at p. 11. The Court also entered a separate order granting Defendant's MIL re: Experts precluding Dr. Donaldson, Reg Gibbs, and Dr. Adair from providing testimony at trial regarding Mullee's future medical treatment and expenses because "the general boilerplate language contained in Dr. [] Donaldson's report is not sufficient". Appendix at p. 14.

III. Background Regarding WSI's Expert, Dr. Irving Scher.

On December 22, 2023, Defendant filed its expert disclosure which identified Dr. Irving Scher as a biomechanical engineering expert. WSI Expert Disclosure at pp. 13-21. The expert disclosure was written and signed by WSI's attorney (not Dr. Scher), and it states the following regarding Dr. Scher:

1. "Dr. Scher may testify regarding the physics of skiing and the mechanics of on-mountain fencing and netting". *Id.* at p. 15.
2. "Dr. Scher conducted a site inspection at the scene of Mr. Mullee's accident in April 2023 and examined exemplar fencing that was used at this location on or around January 16, 2019." *Id.* at p. 16.
3. "[U]nder Dr. Scher's direction, speeds of adult skiers traveling through the tunnel were measured." *Id.* at p. 16.

4. "Dr. Scher has conducted an accident reconstruction and biomechanical engineering analysis relevant to Mr. Mullee's ski accident using standard mechanical and biomechanical engineering techniques that make use of the laws of physics." *Id.* at p. 16.

5. "Dr. Scher will teach the jury regarding skiing kinematics and skier speeds. His research and those of the international community will be compared to the measurements taken under his direction in the subject tunnel." *Id.* at p. 18.

6. "Dr. Scher has studied the loads (i.e. force and torque) needed to break poles used in ski fencing systems, including SPM polycarbonate poles." *Id.* at p. 18.

7. "Dr. Scher will teach the jury regarding kinematics related to someone contacting snow fencing and, specific to this ski accident, what would have happened if Mr. Mullee contacted different components of the subject fence. This is based on his experience testing snow sports equipment and the principles of mechanical engineering, including the laws of physics." *Id.* at p. 19.

8. "Dr. Scher will teach the jury how snow fences operate and the mechanics of these fences. All fence systems have a finite amount of energy they can attenuate." *Id.* at p. 21.

On July 10, 2023, long before the expert disclosure deadline, Mullee sent WSI discovery requests which sought (I) a detailed description of every opinion the expert may offer; (II) the subject matter on which the expert is expected to testify; (III) a summary of the grounds for each opinion, and (IV) all reports and statements from any expert. Mullee's Various Motions *in Limine* at Exh. C. In responding to these requests, WSI did not produce any additional information beyond referring to its filed expert disclosure. *Id.* To date, Defendant has not disclosed Dr. Scher's measurements, including any measurements and calculations from the site inspection, or any substantive biomechanical analysis.

WSI and Dr. Scher have also failed to provide any availability for Dr. Scher's deposition within a reasonable amount of time or good cause why the deposition could not promptly take place. Specifically,

1. Mullee requested to depose Dr. Scher on December 22, 2023, the same day WSI filed its expert disclosure. grounds for each opinion, and (IV) all reports and statements from any expert. Mullee's Various Motions *in Limine* at Exh. B.
2. On December 26, 2023, WSI stated it would "check with … Dr. Scher regarding [his] availability." *Id.*
3. On December 29, 2023, WSI stated "Dr. Scher advised me that he will not have any until February 2024. I'll follow up with him on what dates he may

be available in February and provide those to you." *Id.*

4. On January 15, 2024, Mullee again reached out to WSI regarding Dr. Scher's availability in February 2024. *Id.*

5. On January 17, 2024, WSI responded stating it still did not have dates and then suggested that Dr. Scher might not be available in February despite the WSI's December 29, 2023 email. *Id.*

6. On January 25, 2024, Mullee again requested Dr. Scher's availability for February 2024. *Id.*

7. On January 25, 2024, WSI responded and still could not provide any dates for Dr. Scher in February, but proposed March 26-29 or April 2-3, which are more than 2 months after the close of discovery and 3 months after the disclosure deadline. *Id.*; Third Amended Scheduling Order.

The District Court denied Mullee's motion *in limine* to exclude Dr. Scher from testifying at trial due to an inadequate disclosure and failing to make Dr. Scher reasonably available for a deposition. Appendix at p. 16.

STANDARDS OF REVIEW

1. Summary judgment rulings are subject to de novo review for conformance with applicable M. R. Civ. P. 56 standards and requirements. *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶ 13, 411 Mont. 269, 525 P.3d 1183.

2. A district court's decision on a motion *in limine* is an evidentiary ruling that this Court reviews for an abuse of discretion. An abuse of discretion occurs when a district court acts arbitrarily, without conscientious judgment, or exceeds the bounds of reason. *Stand Up Montana v. Missoula Cnty. Pub. Sch.*, 2023 MT 240, ¶ 16, 414 Mont. 229, 539 P.3d 1117.

SUMMARY OF ARGUMENT

First, the District Court erred in finding that WSI had no legal duty to maintain the fence in question. WSI did, in fact, have such a duty and genuine disputes of fact exists as to whether (I) the fence was up at the time Mullee arrived; and (II) assuming *arguendo*, if the fence was up at the time Mullee arrived, whether WSI used an appropriate fence in the area.

Second, the District Court abused its discretion in precluding Mullee's medical expert, life-care planner, and economist from offering opinions at trial regarding Mullee's future treatment and damages. Such opinions may be offered as Dr. Donaldson unequivocally stated they were made with a reasonable degree of medical certainty. The District Court's order excluding the opinions engaged in the same improper word-choice scrutiny which this Court has found inappropriate for evaluating medical expert opinions.

Third, the District Court erred in denying Mullee's Motion for Summary Judgment on the issues of his injuries and certain special damages. WSI failed to create any genuine dispute of fact whatsoever as to whether the fall caused Mullee's injuries, and Mullee's past and future medical expenses. Despite WSI failing to create any genuine dispute of fact, the District Court denied Mullee's motion.

Lastly, the District Court abused its discretion in allowing Dr. Scher to testify at trial. WSI failed to disclose the substantive basis for Dr. Scher's opinion and also

failed to make Dr. Scher reasonably available for his deposition.

ARGUMENT

I. The District Court Erred in Granting WSI's Motion for Summary Judgment Because WSI Had a Legal Duty to Maintain the Fence in a Dangerous Area on a Beginner Trail.

A. Summary Judgment Standard

Summary judgment is appropriate when the moving party demonstrates an absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704 (citation omitted). Reasonable inferences are to be drawn in favor of the non-moving party. *Fisher v. Swift Transp. Co. Inc.*, 2008 MT 105, ¶ 12, 342 Mont. 335, 181 P.3d 601 (citation omitted). "It is the exceptional negligence case that may be properly disposed of by summary judgment", including negligence actions for ski area liability. *Mead v. M.S.B., Inc.*, 264 Mont. 465, 470, 872 P.2d 782 (1994); *see also Fisher,* ¶ 12; *Hinkle v. Sheperd Sch. Dist. #37*, 2004 MT 175, ¶ 23, 322 Mont. 80, 93 P.3d 1239. "Negligence involves questions of fact, and where a factual controversy exists, summary judgment is never to be used as a substitute for trial." *Mead*, 264 Mont. at 470. "Only where reasonable minds cannot differ may the court, as a matter of law, decide the cause of an accident." *Id.* "When considering a summary judgment motion, a court may not "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of

witnesses." *Tacke v. Energy West, Inc.*, 2010 MT 39, ¶ 16, 355 Mont. 243, 227 P.3d 601.

B. Montana Skier Responsibility Act ("MSRA")

MCA §§ 23-2-731 *et seq.* is often referred to as the MSRA. MCA § 23-2-733 acknowledges that ski area operators of a "duty of reasonable care" to skiers and lists a non-exhaustive list of duties ski area operators owe.

In *Brewer v. Ski-Lift, Inc.*, the Montana Supreme Court rejected the ski area operator's argument that the MSRA passed all risk of injury on the skier and that the ski area operator could not be found negligent under the MSRA because such an interpretation would violate the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and Article II, § 4 of the Montana Constitution. 234 Mont. 109, 762 P.2d 226 (1988). This is because protecting the ski area from their own liability bore no relationship to protecting them from inherent risks in the sport of skiing.

The MRSA was subsequently amended since *Brewer* to, *inter alia*, include a list of duties for ski area operators. The Montana Supreme Court again addressed the MRSA in *Mead* where a ski area operator argued that the listed duties in MCA § 23-2-733[1] were the exclusive duties it owed the injured skier. 264 Mont. at 474.

[1] While this version of MCA § 23-2-733 was subsequently amended, *Mead* is still the law in interpreting MCA § 23-2-733 as to whether that section contains an exhaustive list of duties for ski area operators. *See Koepeikin v. Moonlight Basin Management, LLC*, 981 F.Supp.2d 936, 942

The *Mead* Court rejected the ski area operator's argument on two grounds:

> [I] In neither the original enactment of § 23–2–733, MCA (1979), nor in the 1989 amendment of that statute, did the Legislature provide that a ski area operator's only duties were those provided in that section and that there was no duty of due care owed by operators to skiers. That duty is, however, imposed by § 27–1–701, MCA. In fact, the 1989 amendment appears to reinforce that duty when it states that the statutorily enumerated duties must be "consistent with the duty of reasonable care owed by a ski area operator to a skier...." [and]
>
> [II] [A]n interpretation of a statute which gives it effect is preferred to one which renders it void. Section 1–3–232, MCA. Were we to accept the interpretation of § 23–2–733, MCA (1989), which is suggested by defendant, it would be immune from liability for its negligent or intentional acts if not itemized in that section. The Skier Responsibility Act would then suffer from the same constitutional infirmity which we addressed and have previously discussed in *Brewer.*

Mead, 264 Mont. at 474. The *Mead* Court also rejected the ski area's argument that the skier's assumption of the risk and comparative negligence by losing control barred the skier's claim as a matter of law. *Id.* at 477-79.

In 2013, the U.S. District Court, District of Montana relied on *Mead* and *Brewer* and held that immunizing a ski area operator "for its negligent or intentional acts" "would contradict the statute's plain language and render the statute unconstitutional." *Kopeikin v. Moonlight Basin Mgmt., LLC*, 981 F. Supp. 2d 936, 941 (D. Mont. 2013); *see also Waschle ex. rel. Brikhold-Waschle v. Winter Sports,*

(D. Mont. 2013) (interpreting the version of MCA § 23-7-733 at issue in the above-captioned matter and noting "[t]he legislature has amended Montana's skier responsibility statutes twice since *Mead***.** In general, however, the operative provisions of the statutes remain largely unchanged.").

Inc., 144 F.Supp.3d 1174, 1181 (D. Mont. 2015) ("Winter Sports, as a ski area operator, owed [plaintiff] a duty or reasonable care."); *Meyer v. Big Sky Resort*, CV 18-2-BU-BMM, 2019 WL 6251800, *2 (D. Mont. Nov. 22, 2019).

In 2019, the U.S. District Court, District of Montana in *Meyer v. Big Sky Resort* held that, despite the MSRA, a "ski area operator may violate its duty of reasonable care if it has the ability to eliminate a risk, through specific warnings or otherwise, and fails to do so." 2019 WL 6251800 at *3 (citing *Waschle.*, 144 F.Supp.3d at 1181). Whether a particular measure employed by a ski area would have prevented the injury is an issue for the jury, which the jury may consider "based upon reasonable inferences drawn from the facts." *Meyer*, 2019 WL 6251800 at *3 (citing *Hoar v. Great E. Resort*, 506 S.E.2d 777, 786 (Va. 1998) and *Graven v. Vail Assocs., Inc.*, 909 P.2d 514, 520-21 (Colo. 1995)); *see also Waschle*, 144 F. Supp.3d at 1181 ("whether [plaintiff] was skiing within his ability at the time of the accident is a question of fact to be resolved by the jury.").

C. Legal Duty

To assert a negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *Dubiel v. Montana Dept. of Transp.*, 2012 MT 35, ¶ 12, 364 Mont. 175, 272 P.3d 66. "[D]uty 'is measured by the scope of the risk which negligent conduct foreseeably entails.'" *Camen v. Glacier Eye Clinic, P.C.*, 2023 MT 174, ¶ 25, 413 Mont. 277, 539 P.3d 1062 (quoting

Estate of Stever v. Cline, 278 Mont. 165, 173, 924 P.2d 666 (1996)). "The existence of a duty turns primarily on foreseeability." *Id.* (quoting *Eklund v. Trost*, 2006 MT 333, ¶ 40, 335 Mont. 112, 151 P.3d 870). This Cout has adopted § 298 of the Restatement (Second) of Torts (1965), pertaining to duty and "the higher degree of care required of individuals in the face of a known danger." *Id.* "Following the evidentiary presentations regarding the standard of care, it became 'a matter of law for the court to determine the proper standard of care applicable to the case and instruct the jury on that standard.'" *Id.*, ¶ 29. In determining foreseeability, the Court inquires "whether the defendant could have reasonably foreseen that his or her conduct could have resulted in an injury to the plaintiff." *Fisher,* ¶ 21. A plaintiff is a foreseeable plaintiff if she or he is within the "foreseeable zone of risk" created by the defendant's negligent act. *Id.*

In addition to the primary issue of foreseeability, courts can weight policy considerations for and against the imposition of liability, which include (1) the moral blame attached to the defendant's conduct; (2) the desire to prevent future harm; (3) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost and prevalence of insurance for the risk involved. *Estate of Strever*, 278 Mont. at 173.

D. Argument

As discussed above, the MSRA cannot absolve WSI of its own negligence without violating the Equal Protection clauses of the U.S. and Montana Constitutions. *See Mead*, 264 Mont. at 474. As such the Court must construe the MRSA to not immunize Defendant for its own negligent acts. *See id.* Here the District Court erred in finding that, as a matter of law, WSI did not have any legal duty to maintain the fencing in that area.

This Court should find that WSI had a duty to properly maintain the fence because Mullee was injured in an area where WSI knew there was a heightened danger on beginner trial. *See* MCA § 27–1–701; Opposition to MSJ at Exh. 1 at Exh. D at 24:23-25:02, Exh. F at 50:23-51:05, Exh. G at 62:14-15; Mullee Motion for Summary Judgment re: Affirmative Defenses at Exh. 1 at Exh. F at 26:11-27:09, 32:06-32:09. Moreover, the danger of the drop off is not clear to skiers. Opposition to MSJ at Exh. 1 at Exh. A at 185:02-06, Exh. B at 69:22-70:03. Mullee has two arguments to establish liability regarding this duty: (Argument One) WSI failed to ensure the fence was up at the time Mullee arrived; either by knocking the fence over with a snow groomer or failing the check the fence on the ski patrol morning check; and (Argument Two) assuming *arguendo*, the fence was up at the time Mullee arrived, WSI should have used a more effective fence to catch or decelerate Mullee.

With regard to Argument One, a genuine dispute of fact exists that the fence

was down at the time Mullee arrived in the area before his fall. This Court should find that WSI had a reasonable duty of care to (I) not knock the fence over with a snow groomer; and (II) check the fence in the morning to ensure it was up when the area opened. Numerous facts support this:

a. Mullee, the only person present and witness to the fall, testified that the fence was not up when he arrived. Opposition to MSJ at Exh. 1 at Exh. A at 90:12-20, 92:15-20, 97:16-21.

b. Consistent with Mullee's testimony, photographs taken by ski patrol that day show fence posts and debris down in the creek area that are covered with snow and must have been down in that area before due to the covered snow. *Id.* at Exh. 1 at Exh. E.

c. Marchand does not, in fact, remember if she checked the fence that day even though she responded to the incident shortly after she purportedly checked the fence. *Id.* at Exh. 1 at Exh. K at 29:11-25.

d. Mr. Gale opined that in his decades of experience in ski patrol, he had never witnessed a skier break a fence/pole; let alone a skier travelling at the slow speed Mullee testified he was traveling at. *Id.* at Exh. B at p. 32.

e. Mullee in his deposition testimony and by refusing to sign the Incident Report adamantly disputes the contents of that report and what the ski patrollers stated how Mullee was skiing that day. *Id.* at Exh. 1 at Exh. A at 114:21-116:18.

f. The groomer's report shows that a groomer did mark that area as groomed on that day, which supports the fact a groomer broke the fence. *Id.* at Exh. 1 at Exh. N.

g. Even WSI's patrollers who responded to the scene admitted that it was possible the fence was down at the time. *Id.* at Exh. 1 at Exh. G at 57:02-10, Exh. F at 36:02-05, Exh. K at 35:02-12, 91:09-11.

h. Mr. Gale opined that C-Netting/snow fencing (which was supposed to have been in place on that day) would have caught Mullee, which is further evidence that the fence was in fact down at the time Mullee arrived. Mullee Expert Disclosure at p. 37.

Regarding Argument Two, a genuine dispute of fact exists that, even if the fence was up at the time Mullee arrived, WSI should have and could have used a more effective fence that would have stopped a skier moving a slow pace, like Mullee was that day. Numerous facts support this:

a. Mr. Gale opined the industry standard of care is for ski areas to place safety fences on trails like the trail where Mullee was injured and these fences are not designed solely as directional markers. *Id.* at Exh. B pp. 32-33. Fencing is designed to "decelerate, catch, often entangle, and stop a skier from going off cliffs and into hazardous areas like creek beds". *Id.* at Exh. B at p. 36. B-Netting would not increase the risk of injury and could have been employed

on the date Mullee was injured. *Id.* Exh. B at p. 36. Ski areas regularly use permanent fences in locations such as where Mullee was injured. *Id.* at Exh. B at p. 37.

b. WSI, in fact, maintained a fence where Mullee went off the trail. Opposition to MSJ at Exh. 1 at Exh. E.

c. WSI, in fact, installed a more effective B-netting fence after Mullee's incident. *Id.* at Exh. 1 at Exh. O, Exh. D at 33:13-34:13; Exh. G at 67:07-17.

d. WSI knew the danger that the drop off presented skiers. Opposition to MSJ at Exh. 1 at Exh. D at 24:23-25:02, Exh. F at 50:23-51:05, Exh. G at 62:14-15; Mullee Motion for Summary Judgment re: Affirmative Defenses at Exh. 1 at Exh. F at 26:11-27:09, 32:06-32:09

The District Court and WSI also misconstrue Mullee's position and incorrectly contend that Mullee intends to burden WSI with maintaining "safety netting … all over the 3,000 acres of terrain". Appendix at p. 8. Instead, Mullee contends that WSI should have a reasonable duty of care to maintain safety netting on the beginner trail with a dangerous hazard (i.e. the steep drop off) which was known by WSI but not apparent to skiers. *See Milus v. Sun Valley Co.*, No. 49693, 2023 WL 8722470, at *5 (Idaho 2023), *reh'g granted* (Mar. 4, 2024) ("Milus presented a declaration by a ski area safety expert that snowmaking equipment should not be placed in the middle of a beginner level trail such as Lower River

Run.").

Courts in other states have found that ski areas, like WSI, had a reasonable duty of care regarding fencing on ski trails. In *Shaheen v. Boston Mills Ski Resort*, the Court of Appeals of Ohio reversed the trial court's order granting summary judgment in favor of the defendant ski resort where the plaintiff was injured when she collided with a fence while skiing on the ski resort's property. 85 Ohio App. 3d 285, 287, 619 N.E.2d 1037 (Ohio Ct. App. 1992). The plaintiff brought suit against the resort in negligence, alleging breach of duty to keep its premises free from hazards and defects and presented expert testimony which concluded that the fencing was unsafe and the accident was foreseeable. *Id.* The Court remanded the case for trial because:

> We note that while there is evidence that fencing is commonly used in ski areas, there is also evidence that this particular fencing was unsafe. A weighing of this evidence remains for the jury.

Shaheen, 85 Ohio App. 3d at 288–89.

In *Brown v. Steven Pass, Inc.*, the Court of Appeals of Washington reversed the trial court's granting of summary judgment in the defendant ski area's favor where the plaintiff, an advanced skier, was skiing down a run that was "not difficult", lost control by catching an edge, and collided with a snow fence. *Brown v. Stevens Pass, Inc.*, 97 Wash. App. 519, 521, 984 P.2d 448 (Wash. Ct. App. 1999). The skier testified:

> I lost an edge on the ice underneath the powder. And I did not fall down but I did change direction and had lost control.... I was trying to regain control.... I think I was in the process of falling. It was like I was trying to stop. I saw the fence and I thought, well, if I hit the fence, you know, I'll just, it will just catch me, and like you see in the Olympics, the guys hit the fence and they get up and they go.

Id. The skier also testified that his "speed was slow enough so that [he] thought contact with any of the types of fences [he] had seen at ski areas could not possibly result in any harm." *Id.* The *Brown* Court remanded the case for trial because:

> Although the evidence is undisputed that in order for the snow fence here at issue to perform its intended function, its posts had to be embedded in concrete, and that over a million skiers had escaped injury arising from collisions with this particular fence in the ten years since it was erected, a rational trier of fact could determine, based on evidence in the record or reasonable inferences arising therefrom, that the concrete was obscured by snow or the danger it posed in the event of collision with a concrete-embedded post was not otherwise apparent to skiers and that the resort operator's failure to pad the fence posts unduly enhanced the risk of injury to skiers.

Brown, 97 Wash. App. at 526.

Moreover, this Court has repeatedly acknowledged that the greater the danger the greater the duty by the defendant. *Camen*, ¶ 25. Here, WSI knew of the danger and skiers were not aware of the degree of the danger beyond the fencing. This case is an example of the high degree of danger presented as Mullee suffered life altering and permanent injuries here. As Mullee's longtime friend, Les Fenster testified "[Mullee] even personally discussed with me the thought of killing himself, so … he's come a long ways, right, compared to what – but he's still not able to do the

stuff he did for sure". Opposition to MSJ at Exh. 1 at Exh. C at 69:22-70:23; Mullee Expert Witness Disclosure.

Lastly, the four factors used by this Court in *Estate of Strever v. Cline* favor imposing a duty on ski areas to maintain a fence in a beginner run near a known danger. Reasonable minds can attach moral blame to WSI for failing to properly maintain a fence where a known danger is present to its clientele. This would also prevent future major injuries, potentially of children who often ski on that run. Moreover, the burden on WSI is relatively low as WSI already attempts to maintain a fence in that location and, in fact, installed a more effective fence after Mullee's incident. In addition, Mr. Gale noted that ski areas often install fencing for safety and prevent skiers from falling off embankments and sometimes install permanent fencing structures. Lastly, WSI has presented no evidence that it could not procure insurance. *See Brewer*, 234 Mont. at 115.

Thus, this Court should reverse the District Court order entering summary judgment in WSI's favor and remand this case for trial.

II. The District Court Abused Its Discretion in Excluding Mullee's Experts Because Dr. Donaldson's Opinions Were, in Fact, Stated with a Reasonable Degree of Medical Certainty.

A. Legal Standard

"District courts should 'construe liberally the rules of evidence so as to admit all relevant expert testimony.'" *McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222,

¶ 23, 380 Mont. 204, 354 P.3d 604. (quoting citing *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 23, 367 Mont. 21, 289 P.3d 131). "The expert's testimony then is open for attack through "the traditional and appropriate" methods: "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Id.*

In *Henricksen*, this Court found that "the following criteria to determine whether a sanction regarding a purportedly-deficient expert disclosure is an abuse of discretion or too severe: '1) whether the consequences imposed by the sanctions relate to the extent and nature of the actual discovery abuse; 2) the extent of the prejudice to the opposing party which resulted from the discovery abuse; and 3) whether the court expressly warned the abusing party of the consequences.'" *Henricksen v. State*, 2004 MT 20, ¶ 58, 319 Mont. 307, 84 P.3d 38.

In *Beehler*, the Montana Supreme Court found that the district court committed reversible error where it focused on the semantical arguments of defense counsel regarding a medical expert's stated opinions even though the expert's testimony and opinions, in fact, were stated with a reasonable degree of medical certainty. The *Beehler* Court reasoned:

> It is well-noted that doctors are not lawyers and imposing strict legal terminology requirements improperly places form over substance. We have previously found that "the probative force of the opinion 'is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis.'" *Ford,* ¶ 42 (quoting *Miller v. Natl. Cabinet Co.,* 8 N.Y.2d 277, 168

> N.E.2d 811, 813, 204 N.Y.S.2d 129 (1960)). Dr. Joseph's use of "speculate" or "suspicion" does not defeat the probative value of his opinion.

Beehler, ¶ 37 ("Regarding [a medical expert's] word choice, we must not let scrutiny of an expert's phrasing cloud the substantive appraisal of their testimony.") (citing *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 42, 365 Mont. 405, 282 P.3d 687).

B. Argument

Here, the District Court abused its discretion in precluding Dr. Donaldson, Mullee's life care planner, and economist[2] from testifying regarding Mullee's need for future medical treatment and expenses. Dr. Donaldson's opinions regarding future medical treatment where unequivocally stated "with a reasonable degree of medical certainty" in her timely disclosed report. Mullee Expert Disclosure at Exh. E; *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 41-43, 365 Mont. 405, 282 P.3d 687 (equating more probable than not, or more likely than not, standard of admissibility of expert medical opinion with reasonable medical certainty standard); *Allers v. Willis*, 197 Mont. 499, 505, 643 P.2d 592 (1982). That alone should satisfy the Court and the defense that her opinions are, in fact, made with a reasonable degree of

[2] With regard to Mullee's life care planner, Reg Gibbs, and economist, Ann Adair, Mullee agrees that they are not medical professionals. But Mr. Gibbs is a qualified life-care planner. Mullee Expert Disclosure at Exh. G. Dr. Adair is a qualified economist. Mullee Expert Disclosure at Exh. J. Since Dr. Donaldson's opinions regarding Mullee's future care and treatment are admissible and made with a reasonable degree of medical certainty, Mr. Gibbs and Dr. Adair may still testify on Mullee's future treatment within the scope of their respective fields.

medical certainty and allow Dr. Donaldson to provide her opinions. Nonetheless, after WSI challenged the admissibility of Dr. Donaldson's testimony, out of an abundance of caution, Dr. Donaldson also signed an affidavit re-affirming that she opines, with a reasonable degree of medical certainty that:

a. As a result of Mullee's left acetabular fracture, he will have increasing chronic pain and over time will need the hardware removed in the socket of his hip, followed by a left hip replacement as a result of post-traumatic osteoarthritis.

b. Mullee will require a revision to the hip replacement as hip replacements typically lasts 15-20 years presuming his life span continues for that long.

c. Mullee will require a right hip replacement sooner as a result of the ski-related injury due to additional stress that injury has caused to his right hip.

Mullee Response to MIL re: Experts at Exh. A. The District Court erred by ignoring the substance of Dr. Donaldson's actual opinions and scrutinizing her word choice, which is exactly what this Court has advised district courts against when evaluating medical expert opinions. *See Beehler*, ¶ 37.

Moreover, the three factors this Court considers in whether a sanction is appropriate regarding disclosed expert opinions clearly weighs against the exclusion of Dr. Donaldson's opinions (and as a result of the opinions of Mullee's life care planner and economist). *See Hendricksen*, ¶ 58. Specifically:

a. The sanction of excluding Mullee's experts from testifying at trial regarding

future treatment and undermining his claim for $138,040.00 future medical expenses is too severe. First, Dr. Donaldson's report is clear her opinions are made with a reasonable degree of medical certainty. Second, Dr. Donaldson promptly clarified any ambiguity in the report by signing the affidavit.

b. WSI has suffered no unfair prejudice. WSI chose to file a motion *in limine* nit picking the language of her report instead of deposing Dr. Donaldson or any of Mullee's treating physicians. *See Hendricksen*, ¶ 60 ("Any prejudice suffered by Kristin was minimal because she was well-aware Dr. Price was listed as an expert witness and she had ample time to depose him.").

c. Lastly, the District Court's scheduling order did not give sufficient warning of the imposed sanction. *See Hendricksen*, ¶ 60 ("In its scheduling order, the court generally warned that noncompliance with the order's provisions could result in the imposition of sanctions. However, no more specific warning was ever given.").

Thus, this Court should reverse the District Court's order and allow Mullee's experts to testify about Mullee's future need for medical treatment and future medical expenses at trial.

III. The District Court Erred in Denying Mullee's Motion for Summary Judgment on the Issues of Mullee's Injuries and Certain Damages.

A. Legal Standard

Qualified medical expert testimony is required to prove or challenge (once an

offer of proof is made) whether an incident caused the plaintiff's injuries. *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 23, 410 Mont. 239, 518 P.3d 840 (citing *Hinkle v. Shepherd Sch. Dist.*, 2004 MT 175, ¶¶ 35-38, 322 Mont. 80, 93 P.3d 1239 (qualified expert testimony required for proof of factual issues beyond the common knowledge and experience of lay persons including causation of alleged bodily and mental injury); *Henricksen*, ¶ 70. Similarly, qualified expert testimony is required to challenge proffered proof of future medical treatment and/or the necessity of past medical treatment. *See Hinkle*, ¶¶ 35-38.

B. WSI Failed to Create Any Genuine Dispute of Fact Regarding Mullee's Injuries or Future Damages and Treatment.

Mullee timely disclosed the treatment, care, and opinions of his treating providers and his retained experts, who establish that:

(I) The incident caused Mullee to suffer a left acetabular fracture (pelvis) of the anterior and posterior column and a pelvic hematoma and chronic pain and stiffness in the left hip;

(II) The incident will cause Mullee to incur all future medical treatment and expenses as identified in Dr. Donaldson's report and Mr. Gibbs' life care plan;

(III) The incident will cause Mulle to incur the $138,040.00 future medical expenses identified in Dr. Adair's report; and

(IV) The incident caused Mullee to incur $164,992.75 in past medical expenses.

WSI has not disclosed any retained or hybrid medical experts or proffered any facts

attempting to rebut these opinions.

WSI mistakenly argued that Mullee has "transparently intended to invert the burden of proof" by seeking to obtain summary judgment on the issues of his injuries, past medical expenses, future treatment and expenses. The simple fact is Mullee proffered undisputed evidence on these issues through qualified expert opinions. MSJ re: Damages pp. 3-4; Mullee Expert Disclosure. In its response, WSI failed to identify a single fact, document, or line of deposition testimony which would create a genuine dispute of fact on these issues. WSI Opposition to MSJ re: Damages; *see Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901 (1995) ("the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist.").

Nonetheless, the District Court denied Mullee's motion for summary judgment on these issues even though WSI failed to meet its burden at summary judgment by providing "material and substantive evidence" to raise a genuine issue of material fact in response to Mullee's statement of undisputed facts. *See Bruner*, 272 Mont. at 264.

Thus, this Court should reverse the District Court and find that no genuine dispute of fact exists: (I) the fall caused him to fracture his left hip acetabulum and chronic pain in his left and right hips; (II) Mullee incurred $164,992.75 in past medical expenses; and (III) Mullee will incur $138,040.00 in expenses for future

treatment.

IV. The District Court Abused Its Discretion in Allowing Dr. Scher to Testify at Trial.

A. Legal Standard

"A party to civil litigation may discover from an opposing party information concerning any expert the party intends to call as a witness." *Sharbono v. Cole*, 2015 MT 257, ¶ 12, 381 Mont. 13, 355 P.3d 782. Rule 26, M. R. Civ. P., provides in part:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Mont. R. Civ. P. 26(b)(4); *Higgins for Benefit of E.A. v. Augustine*, 2022 MT 45, ¶ 10, 407 Mont. 308, 503 P.3d 1118. The "spirit" of the civil rules requires "liberal disclosure" of witnesses. *Superior Enterprises v. Montana Power Co.*, 2002 MT 139, ¶ 18, 310 Mont. 198, 49 P.3d 565. The underlying purposes of Rule 26 are to eliminate surprise and to promote effective cross-examination of experts. *Henricksen*, ¶ 57. A court should examine the adequacy of an expert disclosure in light of those underlying purposes. *Hawkins v. Harney*, 2003 MT 58, ¶ 24, 314 Mont. 384, 66 P.3d 305. "[A]ll parties are required to provide full expert disclosures under Rule 26, and are required to comply with orders of the district court concerning expert disclosure." *Sharbono*, ¶ 29. "[D]istrict courts have the discretionary power

to impose sanctions appropriate to the case and to the discovery conduct at issue. A party who makes incomplete and evasive disclosures or who attempts to hide the true testimony of any expert does so at that party's peril." *Id.*

B. Argument

Here, the District Court abused its discretion in allowing Dr. Scher to testify at trial because (I) WSI provided an inadequate disclosure of his purported opinions and the bases for such and (II) WSI failed to make Dr. Scher available at any point of time over the course of months for his deposition.

With regard to (I), the disclosure, prepared and signed by counsel, is inadequate because:

- It does not contain any information Dr. Scher gathered at his site inspection or the testing he purportedly performed at the site inspection, including Dr. Scher's measurements of skier speed;
- It does not contain any calculations Dr. Scher employed to reach his conclusions;
- It fails to identify the specific laws of physics Dr. Scher used to reach his conclusions;
- It contains no substantive or specific information or reports summarizing Dr. Scher's "accident reconstruction and biomechanical engineering analysis".
- It does not identify "skiing kinematics and skier speeds" Dr. Scher will

purportedly "teach the jury".

- It does not identify the "amount of energy" the poles of the fence in question can "attenuate".
- It does not identify the findings from Dr. Scher's studying of "the loads (i.e. force and torque) needed to break poles used in ski fencing systems, including SPM polycarbonate poles."

In short, the disclosure fails to adequately state the substance of facts underlying Dr. Scher's opinions. *Cf. Grajeda v. Vail Resorts Inc.*, No. 2:20-CV-00165, 2023 WL 4803755, at *5 (D. Vt. July 27, 2023) (trial court noting in a different ski injury case involving Dr. Scher that the defense provided "qualitative analysis", details of the "computer model he created" in the case, and "photogrammetric analysis").

This inadequate disclosure was aggravated by the fact that WSI and Dr. Scher have provided no availability within a reasonable period of time for his deposition within discovery or even before the pretrial motions deadline. Mullee Various Motions *in Limine* at Exh. B; Third Amended Scheduling Order; *see Higgins*, ¶ 12 (noting prejudice where expert's deposition was as when "discovery deadlines had long passed and the pretrial motion deadline was a week away."). To date, all Defendant has produced regarding Dr. Scher is a disclosure authored by counsel which states Dr. Scher's purported opinions without any scientific and specific biomechanical analysis. Dkt 24. To date, the only documents WSI has produced

which were actually created and authored by Dr. Scher are Dr. Scher's CV, fee sheet, and list of prior cases. WSI Expert Disclosure at Exh. B.

In *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, the Montana Supreme Court has held that the district court did not abuse its discretion in precluding defendant's experts from testifying at trial where, due to the deficient disclosure, plaintiff "could not anticipate the particular approach that [defendant's] proposed experts would take or **the data** on which they would rely without a full disclosure provided by [defendant], pursuant to M.R. Civ. P. 26(b)(4)(A)(i), and a reasonable opportunity to depose them after the disclosure." *Sunburst Sch. Dist. No. 2*, 2007 MT 183, ¶ 72, 338 Mont. 259, 165 P.3d 1079 (emphasis added); *see also Sharbono*, ¶ 26 ("A finding of 'discovery abuse' is more properly relegated to such practices as providing cryptic disclosures with no meaningful information").

Thus, the Court should find the District Court abused its discretion and order that Dr. Scher be precluded from testifying at trial because of WSI's inadequate disclosure and failure to make Dr. Scher reasonably available for his deposition.

CONCLUSION

For the forgoing reasons, this Court should vacate the judgment, reverse the District Court's Order granting WSI's motion for summary judgment, and remand the case for trial.

In addition, the Court should reverse the District Court's Order precluding Mullee's experts from testifying on Mullee's future damages at trial and allow Mullee to present such testimony at trial.

Moreover, the Court should reverse the District Court's Order denying Mullee's Motion for Summary Judgment re: Damages and remand with instructions that the District Court find that Mullee suffered his claimed injuries, past medical expenses, and future medical expenses as a matter of law.

Lastly, the Court should reverse the District Court's Order denying Mullee's Motion *in Limine* regarding Dr. Irving Scher and remand with instructions that Dr. Scher should be precluded from testifying at trial.

DATED this 5th day of August, 2024.

DRIGGS BILLS & DAY, P.C.
Attorney for Appellant Mark Mullee

By: /s/ Ian P. Gillespie
Ian P. Gillespie

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to M. R. App. P. 11, this brief is proportionately spaced, 14-point font, and contains 9,978 words, as counted by the undersigned's word processing software, excluding any Caption, Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and/or any Appendix.

DATED this 5th day of August, 2024.

DRIGGS BILLS & DAY, P.C.
Attorney for Appellant Mark Mullee

By: /s/ Ian P. Gillespie
Ian P. Gillespie

CERTIFICATE OF SERVICE

I, Ian Philip Gillespie, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-05-2024:

Christopher Cameron Di Lorenzo (Attorney)
PO Box 7370
Kalispell MT 59901
Representing: Winter Sports, Inc., Whitefish Mountain Resort
Service Method: eService

Mikel L. Moore (Attorney)
305 Mountain Gateway Drive
Kalispell MT 59904
Representing: Winter Sports, Inc., Whitefish Mountain Resort
Service Method: eService

Electronically Signed By: Ian Philip Gillespie
Dated: 08-05-2024