

SUMMARY STATEMENT

Mortensen v. Baker, Docket No. 48492

This appeal arose from an allegation of medical malpractice. Jana Mortensen sought treatment from Dr. Jeffrey Baker at The Healing Sanctuary, LLC, after a hysterectomy failed to resolve symptoms for ongoing pelvic pain. Mortensen alleged that Dr. Baker prescribed a 14-day course of “ozone treatment” to be self-administered intravaginally at home. Mortensen allegedly breathed in ozone gas while administering the treatment, which she claimed caused her permanent pulmonary and cardiac injuries. Mortensen filed a complaint against Dr. Baker and The Healing Sanctuary (collectively “Dr. Baker”), claiming medical malpractice. Dr. Baker moved for summary judgment, arguing that Mortensen could not prove causation. The district court conditionally granted Dr. Baker’s motion for summary judgment after finding Mortensen had not raised a genuine issue of material fact; however, the court gave Mortensen a specified time to secure expert testimony on causation. Mortensen did not comply with the deadline. The district court entered summary judgment, denying Mortensen’s second request for additional time. The district court also denied her motion to reconsider. Mortensen timely appealed.

The Idaho Supreme Court reversed the district court’s decision granting summary judgment. The Court held that Mortensen’s declaration is admissible in part, because Mortensen can testify to her own personal observations and to statements made by Dr. Baker and his staff. The Court also held that Mortensen’s testimony provided a foundational basis for Dr. Amy Baruch’s opinion. Coupled with Dr. Baruch’s own education, experience, review of pertinent records, and Mortensen’s deposition testimony, Dr. Baruch was qualified to offer an opinion on causation.

******This summary constitutes no part of the opinion of the Court, but has been prepared by court staff for the convenience of the public.******

secure expert testimony on causation. Mortensen did not comply with the deadline. The district court entered summary judgment, denying Mortensen's second request for additional time. The district court also denied her motion to reconsider. Mortensen timely appeals. For the reasons below, we reverse the district court's decision granting summary judgment to Dr. Baker.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background¹

In December 2018, Mortensen was seen by Dr. Baker at The Healing Sanctuary for pain related to what she believed was a urinary tract infection or pain resulting from her hysterectomy. Dr. Baker ordered a urine culture, which came back negative for a urinary tract infection. Even so, Dr. Baker diagnosed Mortensen with a suspected urinary tract infection, and he prescribed Macrobid antibiotics for 30 days.

The antibiotics did not resolve her symptoms, so Mortensen made another appointment with Dr. Baker in January 2019. At this appointment, Dr. Baker prescribed ozone gas as a treatment.² According to Mortensen, Dr. Baker claimed that ozone would "blast" any bacteria causing her infection. Dr. Baker told Mortensen to get the supplies for the ozone treatment "upstairs." Based on Mortensen's account, Dr. Baker did not write an order for the ozone, but he reviewed and electronically signed her medical record. Mortensen went upstairs at The Healing Sanctuary to obtain the ozone treatment supplies.

Once she arrived, Mortensen told the staff that Dr. Baker sent her for ozone treatment. Staff explained she could administer the treatment at home and provided her with an "insufflation bag" that connected to a tube. Mortensen could reuse the same bag and tube throughout her treatment. Staff told her to come into the office daily and refill the bag with ozone. Once filled, Mortensen was to go home, lie down, insert the tube two to three inches into her vagina, and squeeze the gas into her vaginal canal after releasing the stopper. Staff told Mortensen to remain laying down for

¹ Given the posture of this appeal coming to us after a grant of summary judgment, we liberally construe the facts in favor of Mortensen as the non-moving party. *Dep't of Fin., Sec. Bureau v. Zarinegar*, 167 Idaho 611, 629, 474 P.3d 683, 701 (2020). We recognize that affirmative statements and allegations repeated herein are subject to challenge by Dr. Baker at trial.

² This case involves a substance called ozone gas, chemically designated as "O₃." According to materials Mortensen provided the district court, the FDA notes that ozone is a toxic gas without a known medical application. Administration methods include injections into the ligaments, muscles, joints, and "insufflation." Insufflation, the method of administration relevant here, is when ozone is delivered into a bodily cavity through a cannula or a bag.

fifteen minutes and then “go about her day.” Neither Dr. Baker nor the staff gave Mortensen any warnings about possible side effects from the gas.

Mortensen soon noticed, because of the distinct odor of ozone, that once she began treatment at home, the gas leaked from her vaginal canal into the air in the room. As a result, Mortensen claims she inhaled the escaped gas. She also alleges the odor of ozone was detectable for several hours after treatment each day. Even so, Mortensen continued returning to The Healing Sanctuary every morning to get the bag refilled with ozone.

After a short number of self-applied treatments, Mortensen began suffering a sore throat and severe cough. She reported these symptoms to The Healing Sanctuary’s staff. She asked if the gas could cause these symptoms, but was told “no,” and that it was more likely she caught a cold. At a later visit, when Mortensen was having the bag refilled, she reported that a lot of gas was leaking into the air. A nurse remarked, Mortensen “must have a ‘tiny canal,’” but did not otherwise comment on the potential toxicity of ozone. Another nurse told Mortensen it was fine to breathe the gas, saying it would “be good for [her] lungs.” Even still, a staff member commented that she noticed a small hole in the bag while refilling it and noted the gas made her cough for a while.

By February 2019—twenty days after Mortensen began her ozone treatment—Mortensen felt like her lungs were collapsing. She was having severe shortness of breath and a persistent sore throat. In mid-February, she went to Community Care Clinic, an urgent care medical facility, and was prescribed an inhaler and steroid.

At Mortensen’s next visit to The Healing Sanctuary, she told the nurses she had been to Community Care because of her trouble breathing. The staff insisted inhaling ozone did not cause her breathing symptoms. As a result, Mortensen continued treatment for a few more days but stopped after she felt her lung function was declining and she experienced “severe heart and lower body function issues.” Mortensen and her fiancé then researched using ozone in a clinical setting, and Mortensen suspected the gas—not a cold—was causing her health issues.

Following her exposure, Mortensen went to the emergency room for asthma and heart issues several times and has remained under the regular care of Idaho Falls Pulmonary/Sleep and Critical Care Specialists. She was also treated by a pulmonologist in Boise, Idaho, and claims she has persistent chest pain, shortness of breath, a chronic cough, and occasional bloody sputum.

B. Procedural Background

Mortensen filed a complaint against Dr. Baker and The Healing Sanctuary alleging medical malpractice on November 13, 2019. In April 2020, Dr. Baker moved for summary judgment contending there was no genuine issue of material fact because Mortensen had provided no experts who could establish: (1) a violation of the community standard of healthcare practice under Idaho Code section 6-1012³; and (2) causation or damages.

On May 1, 2020, Mortensen responded to Dr. Baker's motion for summary judgment and moved for more time, under I.R.C.P. 56(d). The next month, on June 9, 2020, Mortensen filed sworn declarations from: (1) Jana Mortensen, (2) Dr. Amy Baruch, and (3) Dr. Edmund Schoeffler. Later, on June 16, 2020, Mortensen submitted a second declaration from Dr. Baruch.

On June 22, 2020, the district court entered its memorandum decision and order conditionally granting Dr. Baker's motion for summary judgment, but the court granted Mortensen another 90 days to provide evidence of causation between Dr. Baker's alleged negligent conduct and Mortensen's purported injuries. Within the 90 days, on September 21, 2020, Mortensen filed a supplemental declaration and supplemental response to Dr. Baker's motion for summary judgment. Dr. Baker then filed a supplemental brief responding to Mortensen's filings.

On October 2, 2020, the district court entered an order and judgment granting Dr. Baker's motion for summary judgment and dismissing Mortensen's claim. Mortensen moved for reconsideration and filed additional declarations from Dr. Jess Mandel and Dr. Ronald Balkissoon on October 16. The district court denied her motion for reconsideration. Mortensen timely appealed.

II. STANDARDS OF REVIEW

This Court reviews a challenge to the district court's evidentiary rulings, including whether to exclude expert testimony, under an abuse of discretion standard. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 50–51, 995 P.2d 816, 820–21 (2000). When reviewing a lower court's decision for an abuse of discretion, this Court must analyze “[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4)

³ The defendants' motion for summary judgment included the assertion that Mortensen had no expert to establish the community standard of care as required by Idaho Code section 6-1012; however, the defendants' memorandum in support of summary judgment did not argue this point and focused solely on causation. The district court's later decisions did likewise. We do the same.

reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

“This Court employs the same standard as the district court when reviewing rulings on summary judgment motions.” *Owen v. Smith*, 168 Idaho 633, 640, 485 P.3d 129, 136 (2021) (citing *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 166 Idaho 132, 140–41, 456 P.3d 201, 209–10 (2019)). Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). A moving party must support its assertion by citing particular materials in the record or by showing the “materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact[s].” I.R.C.P. 56(c)(1)(B). “Summary judgment is improper ‘if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented.’” *Owen*, 168 Idaho at 641, 485 P.3d at 137 (quoting *Trumble*, 166 Idaho at 141, 456 P.3d at 210). A “mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment.” *Id.*

“[W]hen reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.” *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596, 485 P.3d 92, 106 (2021) (quoting *Drakos v. Sandow*, 167 Idaho 159, 162, 468 P.3d 289, 292 (2020)).

III. ANALYSIS

Mortensen asserts two arguments on appeal. First, Mortensen argues the district court erred in granting Dr. Baker’s motion for summary judgment by finding that Mortensen and Dr. Baruch’s declarations were inadmissible. Second, Mortensen argues the district court erred by denying her motion for reconsideration and not considering the new evidence presented to support that motion. For the reasons below, we reverse the district court’s decision granting summary judgment against Mortensen.

A. The district court erred in granting summary judgment against Mortensen.

The district court granted summary judgment against Mortensen on her claim of medical malpractice, concluding the declarations Mortensen submitted failed to create a disputed issue of material fact on causation.

Below, in response to Dr. Baker’s motion for summary judgment, Mortensen submitted declarations from three individuals: Dr. Schoeffler, Jana Mortensen, and Dr. Baruch. The district court found Dr. Schoeffler offered no opinion on whether the ozone treatment caused Mortensen’s injuries and that his declaration failed to create an issue of fact on causation. Mortensen does not challenge this conclusion on appeal, so we do not consider it here. But the district court further found that Mortensen’s declaration failed to create a disputed issue of material fact because nothing in the record established she had the training or expertise to even offer an opinion on ozone treatment. Similarly, in evaluating Dr. Baruch’s declaration, the district court found that her testimony presented “no evidence of personal experience, training, or treatment relating to the complications possibly arising from Ozone treatment.”

In a general negligence case, the plaintiff must establish: “(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the resulting injury; and (4) actual loss or damage.” *Johnson v. Wal-Mart Stores, Inc.*, 164 Idaho 53, 56, 423 P.3d 1005, 1008 (2018). Medical malpractice cases, such as the one here, elevate the legal requirement to establish these elements by what this Court has called a “stricter burden of proof.” *Jones v. Crawforth*, 147 Idaho 11, 16, 205 P.3d 660, 665 (2009). This is because Idaho statutes require plaintiffs in these cases to offer evidence of the duty and the breach of that duty through “direct expert testimony of the standard of health care practice of the community. . . .” I.C. § 6-1012; *see also* I.C. § 6-1013 (“The applicable standard of practice and [the medical provider’s] failure to meet that standard must be established. . . by testimony of one (1) or more knowledgeable, competent expert witnesses.”).

That said, “[n]othing in Idaho Code sections 6–1012 or 6–1013 requires that proximate cause be proved by expert testimony—those statutes only address the applicable standard of care and breach of that standard.” *See Sheridan v. St. Luke’s Reg’l Med. Ctr.*, 135 Idaho 775, 785, 25 P.3d 88, 98 (2001). As a result, the Idaho Rules of Evidence govern the admission of testimony to prove proximate cause in medical malpractice cases. *Id.* And “[a]lthough the Idaho Rules of Evidence do not require expert testimony to establish causation in medical malpractice cases, such testimony is often necessary given the nature of the cases.” *Coombs v. Curnow*, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009). Expert testimony is often required because “the causative factors are not ordinarily within the knowledge or experience of laymen composing the jury.” *Flowerdew v. Warner*, 90 Idaho 164, 170, 409 P.2d 110, 113 (1965). When the case involves highly technical

medical questions, the testimony of medical experts is required to establish causation. *Ackerschott v. Mountain View Hosp., LLC*, 166 Idaho 223, 231, 457 P.3d 875, 883 (2020).

Mortensen argues the district court erred in granting Dr. Baker's motion for summary judgment for two reasons: first, she contends her own declaration contained testimony on causation that created a genuine issue of material fact and, second, she asserts that Dr. Baruch's declaration was admissible, and its contents also raised a genuine issue of material fact on causation. Dr. Baker counters that the district court correctly concluded admissible expert testimony must prove causation, and Mortensen's declaration was inadmissible because her opinions lacked foundation, were conclusory, and speculative.

1. Jana Mortensen's declaration and supplemental declaration.

Mortensen first suggests her declaration was admissible and the district court erred in concluding that because she was not a physician, she could not testify that her inhalation of a toxic gas caused her to suffer injury or damage.

"Summary judgment proceedings are decided on the basis of admissible evidence." *Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013). Thus

[t]he admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial.

Fragnella v. Petrovich, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012) (citations omitted). Declarations submitted on summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated." I.R.C.P. 56(c)(4). Also, sworn or certified copies of all papers or parts of papers referred to in the affidavit must be attached to or served with the affidavit. *Id.*

On appeal, Dr. Baker argues the district court properly excluded Mortensen's declaration because she is not an expert and, thus, she was unqualified to testify on causation. Dr. Baker asserts that whether the medical care Mortensen received caused or contributed to any injuries is a matter of science and only a qualified expert witness can offer such testimony. The difficulty here is that the district court gave short shrift to Mortensen's affidavit and failed to make any findings as to what consideration, if any, it accorded to her declarations. The district court simply found that Mortensen, as a lay witness, could not testify to causation. While we generally agree, as we explain below, there are significant portions of Mortensen's declaration and deposition testimony that

cover matters she was fully qualified to testify about pertaining to what she observed and experienced throughout her treatment by Dr. Baker and his staff.

Thus, we disagree with the effect of the district court's decision, which essentially concluded that while Mortensen could testify to her own symptoms, none of her testimony provided foundation for Dr. Baruch's expert testimony. The sum of the district court's decision to exclude Mortensen's declaration is as follows:

Mortensen in her Declaration testifies as to the circumstances of her claim, symptoms experienced, statements from other medical providers, and her opinion regarding the medical care provided by Defendants. Understandably, Defendants object to much of the Declaration.

This [c]ourt agrees that causation in this case must be established by expert testimony. There is nothing in the record to reflect that Mortensen has the training, experience, and medical expertise to offer an opinion as to the ozone treatment and whether it caused any ailments. Furthermore, Mortensen's recitation of "research" is inadmissible hearsay. In short, while Mortensen may testify regarding the treatment provided and her knowledge of her own symptoms, she is not qualified to establish a nexus between the ozone treatment and her alleged injuries.

Accordingly, Mortensen's Declaration fails to create a disputed issue of fact as to causation.

When the district court issued this decision, Mortensen had moved for more time, which the district court granted to allow her 90 days to supplement the record. She later filed a supplemental declaration, attesting to recent testing she had undergone at National Jewish Health in Denver, Colorado. When the 90-day extension lapsed, and the district court issued its revised order, the court concluded that Mortensen's supplemental declaration still failed to raise a genuine dispute of fact because she was not an expert: "As previously indicated, causation in this matter must be established by expert testimony...With this conclusion, the issue now before the [c]ourt is whether the recent declaration of the Plaintiff satisfies the requirement of expert testimony."

The district court determined Mortensen's declaration "contains statements of what Plaintiff was told by medical providers, Plaintiff's explanation of test results, what Plaintiff was told about test results, copies of medical records prepared by third parties, and copies of articles or data regarding ozone prepared by third parties." Finally, the district court determined that Mortensen was "not qualified to testify as to causation and any such testimony lacks foundation."

While we agree Mortensen is not qualified as an expert to offer a medical opinion, we have never held that a party injured by medical malpractice cannot testify to their own symptoms. *See*

Herrett v. St. Luke's Magic Valley Reg'l Med. Ctr., Ltd., 164 Idaho 129, 136, 426 P.3d 480, 487 (2018) (explaining that even though lay witnesses may not testify to medical causation, they can testify to witnessing a deterioration in symptoms). Although the district court made passing reference to the admissibility of such evidence from Mortensen, the court offered no further analysis in that regard.

Mortensen does not argue on appeal, nor did she argue below, that she was qualified to testify as an expert. Indeed, Mortensen must establish causation through expert testimony in this case. See *Holdaway v. Broulim's Supermarket*, 158 Idaho 606, 611, 349 P.3d 1197, 1202 (2015) (explaining the district court did not err in holding plaintiff “may testify as to the pain he feels, where the door allegedly hit his leg, and the sequence of events,” but could not “set forth any opinion as to the cause of the injury that would require medical knowledge outside of the ‘usual and ordinary experience of the average person.’”); *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 846, 934 P.2d 17, 19 (1997) (“a lay person is not qualified to give an opinion about a medical diagnosis.”); *Flowerdew*, 90 Idaho at 172, 409 P.2d at 172 (patient was not qualified to testify that his injury was caused by physician’s treatment). She is, however, qualified to testify about her own personal experiences based on her personal knowledge. As a lay witness, Mortensen’s testimony is governed by Idaho Rules of Evidence 701:

If a witness is not testifying as an expert, testimony in the form of an opinion or inference is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

I.R.E. 701.

Admissibility is a threshold question that the district court must undertake, which requires the district court to examine Mortensen’s declaration under I.R.E. 701. If the declaration contains inadmissible statements, the district court must strike those statements. *Fragnella*, 153 Idaho at 276, 281 P.3d at 113 (holding that the district court did not abuse its discretion in striking portions of an affidavit that lacked foundation). Any portion of Mortensen’s declaration not based on her own personal observation were properly stricken.

But in Mortensen’s first declaration, she stated: “I began suffering from very substantial bleeding, to the extent that Dr. Baker had to order a blood transfusion after he apparently realized

that his experimental drug could not possibly help with the fibroid.” While the first portion of her statement describes an admissible, personal observation, including that she received a transfusion, the second portion as to why she was bleeding is inadmissible as offering medical opinion. This distinction was not noted by the district court. Likewise, Mortensen declared, “[t]he subpar medical care that I was given through the non-existent briefing regarding the toxic nature was a continuation of a bad pattern that started back in October 2017.” This statement is entirely inadmissible as improper lay testimony. However, her next statement that “[m]y last self-administered ‘ozone treatment’ was February 11, 2019,” is clearly admissible. Of note, Mortensen’s first declaration included a narrative statement detailing her day-to-day symptoms:

I have frequent pain, sometimes extreme, palpitations, skipped beats, squeezing, shortness of breath, and general “weirdness.” This often causes fatigue at the same time, and often coincides with my lung pain and shortness of breath. I have daily symptoms, but it goes in cycles so that some days are much worse than others. The changes in my life since that time are severe and depressing as I can no longer support my clients as a social worker as I did prior to the ozone inhalation[.] I have cancelled my gym membership and can no longer do yoga or the activities I loved before like hiking. In addition to that, it is important I mention that in light of my inability to predict the severity of my daily symptoms and the level of suffering, I am unable to continue my work as a social worker. I am in the process of refinancing my house to support my needs and my minor son’s needs while I can no longer be employed at this time.

This entire narrative is admissible. It provides evidence of Mortensen’s injuries and the effect of them upon her life and her finances. Much of Mortensen’s declaration contains factual statements like this one, which are based on her personal knowledge that will not be repeated here.

In her supplemental declaration, Mortensen also testified: “I had absolutely no prior lung issues, other than a dormant case of asthma as a kid, as evidenced by my prior medical history, and now my lungs are in a state where they are inflamed, swollen and full of mucus with serious obstruction on one side a year and half since the [] inhalation of ozone, which has been described to me as indicative of chronic, long term damage.” Everything in this statement is admissible up to her testimony about what a third party described to her; that portion is hearsay.

Apart from her declaration, Dr. Baker deposed Mortensen and she gave the following testimony:

Q. So after the first time that you utilized the medical ozone on January 24th, did you experience any symptoms, any problems, any concerns whatsoever?

A. After the first time?

Q. The first time.

A. Yeah. I started to getting [sic] sore throats rather quickly.

...

Q. Is that the only symptom you had at that time?

A. It was—Yeah. Severe sore throats that first week.

Further into the deposition, Dr. Baker's attorney asked Mortensen if she recalled having symptoms from the ozone treatment on January 30th. Mortensen testified:

A. So the sore throat got really bad, so by that—by like Wednesday, it quickly went from, like, "Oh, bad sore throat," to like, "This is the worst sore throat I've ever" -

It hurt really bad. I couldn't even hardly swallow. But it was still, "This isn't an ozone side effect." She [the nurse]—you know, "This isn't"—anytime I reported anything odd, it was never the ozone.

...

Q. When did the lung stuff come in?

...

A. It was, like, the evening—the evening before I went into Community Care, which the Community Care record is in there, so the date's on there.

So the evening before that, along with the sore throat was like my lungs are closing in on me.

Q. Okay.

A. So –

Q. Can you be more specific in describing that?

A. It was the weirdest thing I've ever felt. It—my lungs—

I just couldn't breathe. It felt like I was breathing through, like a tiny little straw. They just—

Q. So that's the best description you can give me, what you've just said?

A. Like I can't breathe.

Throughout the deposition, Mortensen continued to describe symptoms she experienced, including ongoing sore throat, pain in her lungs, and difficulty breathing. She also recounted visiting urgent care and returning to Dr. Baker's office to explain her symptoms to The Healing Sanctuary staff. This deposition testimony, coupled with Mortensen's Community Urgent Care records that Dr. Baruch reviewed before preparing her declaration, was based on Mortensen's own personal knowledge and should have been ruled admissible by the district court.

An abuse of discretion occurs when the lower court does not perceive the issue as one of discretion. *Lunneborg*, 163 Idaho at 863, 421 P.3d at 194. Likewise, a lower court’s failure to articulate and apply the relevant legal standard is an abuse of discretion. *See Crowley v. Critchfield*, 145 Idaho 509, 513, 181 P.3d 435, 439 (2007).

The district court here did not cite any applicable case law or other legal standards for admissibility when it excluded Mortensen’s declaration. It is impossible from the district court’s pronouncements to deduce what, if anything, was considered as admissible here. The district court found only that Mortensen was not qualified to testify about causation and that her opinions recited research that was inadmissible hearsay. While we agree that some of Mortensen’s statements contain hearsay, speculation, and inadmissible medical conclusions, she also recalled what she experienced and how she felt—and she related those facts throughout her deposition and declarations. These statements are admissible. As a result, the district court abused its discretion by (1) failing to articulate the standards it was relying on and (2) excluding Mortensen’s testimony and declarations with no discussion or reasoning to establish what was inadmissible and what should have been considered for purposes of summary judgment.

That said, Mortensen’s declaration is not, standing alone, sufficient for her claim to survive summary judgment. As Dr. Baker argued, and the district court found, Mortensen cannot testify, absent qualified expert testimony, how ozone caused her injuries. But Mortensen’s factual history can lay the foundation for Dr. Baruch to testify to causation. *See Dlouhy v. Kootenai Hosp. Dist.*, 167 Idaho 639, 647, 474 P.3d 711, 719 (2020) (quoting *Grover v. Smith*, 137 Idaho 247, 252, 46 P.3d 1105, 1110 (2002)) (“An expert’s review of a deposition . . . coupled with the expert’s personal knowledge. . . is sufficient to lay a foundation for the expert’s opinion.”) *Herrett v. St. Luke’s Magic Valley Reg’l Med. Ctr., Ltd.*, 164 Idaho 129, 136, 426 P.3d 480, 487 (2018) (discussing the foundational requirements of Idaho Rule of Evidence 703).

Thus, while we conclude the district court abused its discretion in failing to articulate the portions of Mortensen’s declaration that were inadmissible, we conclude Mortensen’s declaration was only admissible in part. Specifically, Mortensen can testify to her own personal observations and statements made by Dr. Baker or his nurses or staff. These facts, when properly considered, lay the foundation for Baruch’s testimony, discussed below.

2. *Dr. Baruch’s declaration.*

Next, the district court excluded Dr. Baruch’s declaration, concluding it lacked foundation and was not scientifically sound. On appeal, Dr. Baker contends this was correct because Dr. Baruch’s opinion was speculative and conclusory. Dr. Baker argues Idaho Rule of Evidence 702 imposes a strict requirement and that scientific or other specialized knowledge must help the trier of fact understand the evidence. As we discussed above, Mortensen’s testimony provided a foundational basis for Dr. Baruch’s opinions. Dr. Baruch’s own education, experience, review of pertinent records, and Mortensen’s testimony qualified Dr. Baruch to offer her opinions on causation. The district court erred in ruling otherwise.

The proponent of expert testimony must lay a foundation for the testimony. To that end, “[t]he foundation for the admission of opinion testimony based upon scientific knowledge includes both that the witness is an expert in the field and that there is a scientific basis for the expert’s opinion.” *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 593, 67 P.3d 68, 72 (2003). “This means that courts must review both ‘the expert’s qualifications and the records relied upon by the expert to determine whether the expert can establish the necessary foundation.’” *Secol v. Fall River Med., PLLC*, 168 Idaho 339, 351, 483 P.3d 396, 408 (2021) (quoting *Brauner v. AHC of Boise, LLC*, 166 Idaho 398, 406, 459 P.3d 1246, 1254 (2020)).

Idaho Rule of Evidence 702 provides: “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” I.R.E. 702. This Court has held, “that it is incumbent upon an expert to set forth specific facts upon which an opinion is based.” *J-U-B Engineers*, 146 Idaho at 316, 193 P.3d at 863. Like the admissibility of testimony for lay witnesses, the admissibility standard for experts

is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment. With respect to the threshold issue of admissibility, the liberal construction and reasonable inferences standard does not apply. Instead, the trial court must look at the witness’ affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible.

Mattox v. Life Care Ctrs. of Am., Inc., 157 Idaho 468, 473, 337 P.3d 627, 632 (2014) (citations and internal quotation marks omitted).

On appeal, Mortensen contends that though Dr. Baruch’s testimony was limited to short-term effects from inhaling ozone, she only needed to establish that ozone caused Mortensen some

injury. In that regard, Mortensen argues Dr. Baruch is a qualified expert and her testimony would have assisted the trier of fact in determining the cause of Mortensen's injury.

In addressing Dr. Baruch's declaration, the district court reasoned:

There is nothing in her Declaration to support an inference that [Dr. Baruch's] opinion is based on personal knowledge and experience. Baruch does refer to publications...but her reliance upon such publications is problematic[.] [T]here is nothing in the record to reflect that the publications relied upon by Baruch are 'learned treatises' such that they would be admissible pursuant to Rule 803(18), IRE...

Based on this analysis, the district court found that Dr. Baruch's opinion on causation was "not scientifically sound" and lacked the foundation necessary to make it admissible because she had no personal experience working with ozone treatment. However, as discussed below, there was good reason for her lack of experience: the treatment she was describing has not been medically approved.

"If the reasoning or methodology underlying [an] opinion is not scientifically sound, then the opinion will not assist the trier of fact to understand the evidence or determine a fact in issue." *Swallow*, 138 Idaho at 592, 67 P.3d at 71. "The foundation for the admission of opinion testimony based upon scientific knowledge includes both that the witness is an expert in the field and that there is a scientific basis for the expert's opinion." *Id.* at 593, 67 P.3d at 72.

Because the district court has discretion to determine whether a proper foundation has been laid for the admission of expert testimony, the district court also has discretion to determine whether the witness is qualified as an expert in the field and whether there is a scientific basis for the expert's opinion. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 54, 995 P.2d 816, 824 (2000); I.R.E. 104(a). Thus, this Court reviews a challenge to the district court's evidentiary rulings, including whether to exclude expert testimony, under an abuse of discretion standard. *Id.* at 50–51, 995 P.2d at 820–21.

In her declaration, Dr. Baruch, an Idaho licensed physician, board certified in emergency and integrative medicine, testified her opinions were based on "my review of materials provided to me by Ms. Mortensen's attorney...my education and experience as an Emergency Medicine and Integrative Medicine physician." She then declared:

In my professional opinion, there is no medical indication for ozone therapy as a primary or adjunctive therapy and it is unsafe and unreasonably dangerous. It is a known toxic air pollutant...*I believe the immediate respiratory symptoms that Jana*

Mortensen developed during her treatment with ozone therapy were directly related to the ozone therapy prescribed by Jeffrey Baker MD.

...

Based on my research, studies of ozone therapy for the use of urinary tract infections are limited case studies and do not substantiate its use.

...

The FDA expressly states that a device that generates ozone by design or as a byproduct should not exceed 0.05 ppm by volume of air circulating through the device or cause an accumulation of ozone in excess of 0.05 ppm by volume of air. The ozone that Jana Mortensen received was at a concentration of 40 ppm daily from January 25, 2019—February 14, 2019. She was prescribed 30 days but terminated the therapy after suspecting that her respiratory symptoms were due to the ozone therapy.

...

Jeffrey Baker MD documented in a pre-operative evaluation dated January 16, 2018 that the patient had a history of asthma. A prior asthma diagnosis would have been a clear contraindication to ozone therapy.

...

It is my opinion that her acute respiratory symptoms were directly related to the ozone therapy prescribed by Dr. Baker.

(Emphasis added).

On appeal, Dr. Baker argues these opinions lacked foundation, were speculative, and conclusory. We disagree. The qualifications for an expert witness set out in Rule 702—“knowledge, skill, experience, training, or education”—are disjunctive requirements. I.R.E. 702. A party can lay a proper foundation for an expert witness using any, all, or some combination of these factors.

Dr. Baruch based her testimony on her review of Mortensen’s (1) medical records from The Healing Sanctuary; (2) deposition testimony Mortensen gave describing her symptoms and the timing of those symptoms after receiving ozone treatment; (3) Community Care Urgent Care records; (4) and her own education and experience as an emergency medicine and integrative medicine physician. She also included the FDA’s guidance on ozone use and a publication she relied on to form her opinion: Giuseppe Bonforte, et al., *A Potential Adjunct Approach to Lower Urinary Tract Infections? A Case Series Report* (2013). We also glean from her curriculum vitae submitted as an attachment with her declaration that she has nearly 30 years’ experience in the

medical field, including in international medicine, and as noted, she is board certified in emergency medicine and integrative medicine.⁴

First, to address the publications that Dr. Baruch relied on, the district court found Dr. Baruch's reliance on publications, including the FDA and EPA's website, was insufficient. The district court reasoned, "there is nothing in the record to reflect that the publications relied upon by Baruch are 'learned treatises' such that they would be admissible pursuant to Rule 803(18)[.]" However, under Idaho Rule of Evidence 703, publications need not be deemed "learned treatises" for experts to rely on them:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference on the subject, they need not be admissible for the opinion to be admitted.

While "expert testimony that does nothing more than relay otherwise inadmissible hearsay. . . is barred by I.R.E. 703," *State v. Stanfield*, 158 Idaho 327, 341, 347 P.3d 175, 189 (2015), experts may rely on inadmissible materials if the materials are of the kind other experts in the field would rely on. *See Brauner v. AHC of Boise, LLC*, 166 Idaho 398, 405, 459 P.3d 1246, 1253 (2020). Dr. Baruch's reliance on the FDA and EPA publications specifically identified that ozone has no authorized medical purpose and no approved medical device, thus neither she nor any other medical expert would have access to materials identifying acceptable medicinal uses. The FDA and EPA are the only regulatory agencies that could authorize ozone as a medical treatment and identify the level of ozone, if any, that is safe to breathe. Thus, the district court's conclusion that Dr. Baruch's reliance on these publications was inadmissible was erroneous. These are the type of publications other experts in the field would reasonably rely on—they are the only type of publications that experts *could* reasonably rely on for a treatment that is not medically approved.

Second, the district court did not address the test for qualifications of an expert witness or Dr. Baruch's qualifications as an expert. Instead, after the district court found the publications Dr. Baruch's relied on were not learned treatises, the court simply concluded, "there is no scientific

⁴ Dr. Baruch's international medicine experience includes a course in travel medicine with the London School of Hygiene & Tropical Medicine and a diploma in clinical and tropical medicine and hygiene. She also attended a medical seminar in wilderness medicine in Everest Trek, Nepal, and she completed an internal medicine rotation at the University of Panama in Panama City, Panama.

basis for the expert's opinion, and the reasoning and methodology is not scientifically sound, the opinion is not beneficial to the trier of fact and is inadmissible.”

Applying the correct legal standards for Dr. Baruch's education, specialized knowledge, and nearly thirty years of experience shows she met the test outlined in I.R.E. 702 to establish herself as an expert. *See Brauner v. AHC of Boise, LLC*, 166 Idaho 398, 405, 459 P.3d 1246, 1253 (2020) (explaining a life care planner had the foundation to qualify as an expert to testify about future expenses based on her curriculum vitae detailing decades of work in the field, training, and experience). We conclude that Dr. Baruch, utilizing Mortensen's factual account from her deposition testimony along with her own review of Mortensen's medical records, and the EPA and FDA publications, had sufficient foundation to testify to causation.

The district court based its reasoning for excluding Dr. Baruch's declaration, in part, on this Court's rationale in *Swallow v. Emergency Med of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003). In *Swallow*, this Court held that a medical expert's (Dr. Tommaso) testimony that a Cipro overdose caused the plaintiff's heart attack was inadmissible. 138 Idaho at 598, 67 P.3d at 77. During his deposition, Dr. Tommaso testified he did not know how Cipro could cause a heart attack, but said he was “aware from the PDR [Physicians' Desk Reference] and from the FDA that Cipro can precipitate a myocardial infarction. How it does it, I don't know.” *Id.* at 593, 67 P.3d at 72.

Dr. Tommaso had relied on eleven FDA adverse reaction reports about Cipro to form his opinion. *Id.* at 594, 67 P.3d at 73. In ten of the reports, patients who took Cipro suffered a myocardial infarction; in an eleventh report, the patient committed suicide. *Id.* The FDA adverse reaction reports concluded that the ten instances when Cipro resulted in a patient's myocardial infarction were based “solely upon the temporal relationship between the administration of Cipro and the adverse cardiac event.” *Id.* The ten adverse events had occurred between 1989 and 1997 and the reports did not reveal whether the cardiac events were statistically significant. In sum, the FDA, and by extension Dr. Tommaso, could not speak to whether patients administered Cipro had a greater likelihood of suffering a myocardial infarction than those who suffered the adverse event by chance. *Id.* This Court held that the district court did not abuse its discretion in ruling the doctor's opinion testimony lacked foundation because the doctor failed to explain how Cipro caused a myocardial infarction. *Id.*

There is little relationship between *Swallow* and this case. Of course, causation cannot be established from a mere temporal association—the problem in *Swallow*—correlation does not prove causation. Here, while Dr. Baruch states that Mortensen’s symptoms are “temporally related to the administration of ozone,” that is not the sole fact on which she relied. Unlike *Swallow*, Dr. Baruch did not *conclude* Mortensen’s symptoms were based “solely upon the temporal relationship” between her acute symptoms and inhaling ozone. Instead, Dr. Baruch continued, “[i]t is my opinion that [Mortensen’s] acute respiratory symptoms were directly related to the ozone therapy prescribed by Dr. Baker.” Dr. Baruch bolstered this conclusion with the statement, “[b]ased on my research, studies of ozone therapy for the use of urinary tract infections are limited case studies and do not substantiate its use. The FDA specifically states that ‘ozone is a toxic gas with no known useful medical application in specific, adjunctive, or preventive therapy. . . .’” Dr. Baruch’s statement cited to a footnote referencing an FDA case study. This opinion, supported by empirical data, combined with the other statements in her declaration, are admissible and raise a genuine dispute of material fact on causation. These conclusions were based on her thirty years of medical experience, her review of treatises and FDA information, and her review of Mortensen’s deposition.

For these reasons, we hold the district court abused its discretion when it excluded Mortensen and Dr. Baruch’s testimony. As a result, Dr. Baker was not entitled to summary judgment because the excluded testimony created a genuine issue of material fact.

B. This Court need not resolve the other issues raised by Mortensen on appeal.⁵

This Court need not address Mortensen’s claim that the district court erred in denying her motion for reconsideration because we reverse the district court’s entry of summary judgment. Although Mortensen is not qualified to testify on causation, she can testify about her symptoms. Dr. Baruch’s testimony, based in part on her review of Mortensen’s testimony about those symptoms, raises a genuine dispute of material fact as to whether the ozone treatments caused her injuries. Thus, it is unnecessary to reach the other issues raised by Mortensen concerning whether the district court abused its discretion by (1) ruling that she could not opine on the ultimate issue

⁵ Similarly, because we hold that Dr. Baruch’s expert testimony on causation is admissible, we need not reach Dr. Baker’s argument on cross-appeal that Mortensen waived her right to argue causation could be inferred absent expert testimony.

of fact, (2) denying her request for additional time to gather evidence on causation, and (3) not considering the late submission of declarations from two other doctors.

VI. CONCLUSION

We reverse the district court's decision granting summary judgment in favor of Dr. Baker and The Healing Sanctuary. Neither party requested attorney fees on appeal. As the prevailing party, Mortensen is entitled to costs as a matter of course.

Justices STEGNER and MOELLER CONCUR

ZAHN, J. dissenting

I respectfully dissent from the majority's conclusion that the Dr. Baruch's expert opinion concerning causation had sufficient foundation to be admissible. Dr. Baruch's declaration fails to cite sufficient evidentiary or scientific support for her opinion. As a result, her testimony lacks foundation, is speculative and conclusory, and therefore inadmissible.

The allegations in this case are concerning. I do not discount 21 C.F.R. 801.415(a), which states "[o]zone is a toxic gas with no known useful medical application in specific, adjunctive, or preventive therapy." Nor do I discount Dr. Baruch's statement that "[i]n my professional opinion, there is no medical indication for ozone therapy as a primary or adjunctive therapy and it is unsafe and unreasonably dangerous." However, to be admissible, Dr. Baruch's expert opinion concerning the cause of Mortensen's symptoms must be supported by more than the fact that ozone has no known useful medical application and the temporal proximity between the ozone therapy and Mortensen's symptoms.

Negligence consists of four elements: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage. *Ackerschott v. Mountain View Hospital, LLC*, 166 Idaho 223, 230, 457 P.3d 875, 882 (2020). Plaintiffs in a medical malpractice case have a "stricter burden" with regard to the first two elements because Idaho law requires them to prove duty and breach through "direct expert testimony of the standard of health care practice of the community." *Id.*, quoting I.C. § 6-1012. Idaho law places no stricter burden, however, with regard to the establishing the third element.

The admissibility of expert testimony on the issue of causation is "governed solely by the Idaho Rules of Evidence." *Secol v. Fall River Medical, P.L.L.C.*, 168 Idaho 339, 483 P.3d 396 (2021). To that end, this Court has held that

[a]n expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue. When the expert's opinion is based upon scientific knowledge, there must likewise be a scientific basis for that opinion.

Swallow v. Emergency Medicine of Idaho, P.A., 138 Idaho 589, 592–93, 67 P.3d 68, 71–72 (2003).

In *Swallow*, the plaintiff's medical expert testified that she believed the plaintiff's ingestion of Cipro was causally related to his subsequent heart attack because of the temporal relationship between taking the Cipro and his heart attack, and because of his lack of other risk factors. *Id.* at 595, 67 P.3d at 74. This Court affirmed the district court's decision that the expert's testimony lacked sufficient foundation because it amounted to nothing more than speculation based on the temporal proximity of events. *Id.* at 594–95, 67 P.3d at 73–74.

In contrast, this Court found expert medical opinion testimony admissible when the expert provided a scientific explanation of the effect of the drug in question and how it caused a death. *See Coombs v. Curnow*, 148 Idaho 129, 219 P.3d 453 (2009). In *Coombs*, a young child died after prolonged sedation with Propofol. *Id.* at 134–35, 219 P.3d at 458–59. At trial, it was undisputed that the child died from cerebral edema—the sole issue was the cause of the cerebral edema. *Id.* at 135, 219 P.3d at 459. On that issue, the plaintiffs' medical expert testified “that the long-term, high-dose sedation with Propofol produced hypotension and lipemia, which, in combination with Michael's low hemoglobin levels, resulted in decreased blood flow and oxygen to the brain. The lack of oxygen, in turn, caused the cerebral edema.” *Id.* The district court refused to accept the expert's opinion as reliable because there were no peer-reviewed, published journal articles directly supporting his testimony, and concluded that without the expert's testimony there was no substantial and competent evidence to support the jury's verdict in favor of the plaintiffs. *Id.* at 136, 219 P.3d at 460.

On appeal, this Court stated that the admissibility of an expert opinion depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion. *Id.* at 140, 219 P.3d at 464. This Court concluded that the expert's testimony was sufficiently reliable to sustain the jury's verdict because the expert testified that his opinion was based on basic principles of medicine learned in medical school and while working in the ICU, and was based on his familiarity with Propofol in pediatric patients:

Unlike the situation in *Swallow*, Dr. Hammer did not rely solely on the temporal proximity between the administration of Propofol and Michael's death. Instead, he was able to provide a scientific explanation of the effect Propofol had on Michael

and how it caused his death. He explained the chain of circumstances leading to the cerebral edema and the large role Propofol played in those events. Accordingly, under *Weeks* and *Swallow*, Dr. Hammer's testimony was sufficiently reliable to prove the doctors' negligence proximately caused Michael's death.

Id. at 142–43, 219 P.3d at 466–67.

Turning to this case, I agree with the majority's conclusions that Dr. Baruch was qualified to render an expert medical opinion. I agree that the district court erred when it determined that Dr. Baruch's reliance on a website and publications was "problematic" because she failed to establish that the materials were "learned treatises." I also agree that the district court erred when it rejected Dr. Baruch's opinion, in part, because she "presents no evidence of personal experience, training, or treatment relating to complications possibly arising from ozone treatment."

However, I disagree with the majority's conclusion that Dr. Baruch's opinions had sufficient foundation to be admissible. While Dr. Baruch's declaration contains statements concerning her experience, review of the FDA's website and information gleaned from Mortensen's medical records, it fails to explain how she used that information to arrive at her opinion on causation. In short, although Dr. Baruch references various pieces of information, at no point does she tie them together to explain how she used that information to develop her opinion.

Although there are two declarations from Dr. Baruch in the record, they were both signed on the same day and otherwise appear identical. It therefore appears there is only one declaration from Dr. Baruch, which for unknown reasons was filed twice. I will therefore refer to Dr. Baruch's "declaration," in the singular rather than plural.

The declaration first describes Dr. Baruch's qualifications and the materials she reviewed. Dr. Baruch then discusses Mortensen's medical history related to Dr. Baker's treatment with ozone gas, Mortensen's use of the ozone therapy, Mortensen's development of a severe throat and cough shortly after beginning treatment, and Mortensen's subsequent receipt of a prescription for an inhaler and steroids. Dr. Baruch then states her expert opinions:

Professional Opinions and Basis for these Opinions:

11. In my professional opinion, there is no medical indication for ozone therapy as a primary or adjunctive therapy and it is unsafe and reasonably dangerous. It is a known toxic air pollutant. People exposed to elevated levels of ozone may experience a variety of symptoms, including sore throat, shortness of breath, chest pain and wheezing. These symptoms can last several days. Certain individuals are more susceptible to symptoms, particularly those with preexisting lung disease, such as asthma. *I believe the immediate respiratory symptoms that Jana Mortensen*

developed during her treatment with ozone therapy were directly related to the ozone therapy prescribed by Jeffrey Baker MD. The scope of my engagement in this case is limited to the immediate or short-term symptoms suffered by Jana Mortensen following the administration of the ozone therapy ordered by Dr. Baker. I have not been engaged to, and thus do (sic) attest to any long-term sequelae of which Ms. Mortensen may allege.

12. Based on my research, studies of ozone therapy for the use of urinary tract infections are limited case studies and do not substantiate its use.²

13. The FDA specifically states that “ozone is a toxic gas with no known useful medical application in specific, adjunctive, or preventive therapy. In order for ozone to be effective as a germicide, it must be present in concentration much greater than that which can be safely tolerated by man and animals.” The FDA expressly states that a device that generates ozone by design or as a byproduct should not exceed 0.05 ppm by volume of air circulating through the device or cause an accumulation of ozone in excess of 0.05 ppm by volume of air.

14. The ozone that Jana Mortensen received was at a concentration of 40 ppm daily from January 28th (sic), 2019- February 14, 2019. She was prescribed 30 days but terminated the therapy after suspecting that her respiratory symptoms were due to the ozone therapy. The cumulative exposure from ozone therapy does not account for the addition of ground-level pollution from ozone.

15. There is no documentation in the records from Jeffrey Baker MD of a discussion regarding the risks of ozone administration.

16. Jeffrey Baker MD documented in a pre-operative evaluation dated January 16, 2018 that the patient had a history of asthma. A prior asthma diagnosis would have been a clear contraindication to ozone therapy.

17. *Jana Mortensen’s symptoms are temporally related to the administration of ozone therapy.* Ms. Mortensen’s symptoms are consistent with known side effects, including throat irritation, cough, shortness of breath, burning or discomfort in the chest. Complete health effects are well described on the EPA website: <https://www.epa.gov/ozone-pollution-and-your-patients-health/health-effects-ozone-general-population>.

18. There is no evidence to support the diagnosis of urinary tract infection at the time the ozone therapy was administered. No repeat culture had been obtained and the patient stated that she was otherwise feeling better except for the abdominal pain. It would have been reasonable to pursue additional investigation into the cause of the patient’s symptoms rather than continue therapy for an undiagnosed urinary tract infection.

19. In summary, Jana Mortensen was provided a treatment for an undiagnosed UTI, with unproven benefit and potential serious side effects. *It is my opinion that her acute respiratory symptoms were directly related to the ozone therapy prescribed by Dr. Baker.*

² See, for example: Ozone Therapy: A Potential Adjunct Approach to Lower Urinary Track Infection? A Case Series Report; Giuseppe Bonforte et al. *G Ital Nefrol.* Jul-Aug 2013.

(emphasis added). Dr. Baruch's declaration contains three statements of opinion, italicized above, concerning the cause of Mortensen's symptoms.

The two statements in paragraphs 11 and 19 are nearly identical and opine that Mortensen's symptoms were "directly related" to the ozone therapy prescribed by Dr. Baker. The two statements are conclusory and speculative. Dr. Baruch fails to provide any scientific basis for her conclusion. Dr. Baruch could have supported her expert opinion with references to general medical principles, as the expert did in *Coombs*, or she could have cited to a medical study, journal article or expertise. Dr. Baruch does none of this. Rather, she states that patients exposed to elevated levels of ozone may experience a variety of symptoms and that individuals with a history of asthma are more susceptible to those symptoms but does not indicate the scientific basis for that statement.

Also absent from these two statements is any explanation of the evidence that forms the basis for her opinion. While Dr. Baruch references the concentration of ozone that Mortensen was *prescribed*, Dr. Baruch does not reference any evidence concerning how much ozone Mortensen *inhaled*. There is no evidence that Mortensen inhaled the ozone gas directly from the insufflation bag. Rather, Mortensen testified at her deposition that after releasing the ozone gas into her vaginal canal, the ozone leaked into the air in the bedroom where she administered the gas and she could smell it in the air. Mortensen inhaled the ozone gas from the ambient air in the bedroom. Although Dr. Baruch states that the FDA website indicates that a device that generates ozone should not cause an accumulation of ozone in excess of 0.05 ppm by volume of air, she does not cite any evidence indicating that concentration of the ozone gas that Mortensen inhaled, including evidence that the inhaled gas exceeded 0.05 ppm.

Dr. Baruch also fails to support her expert opinion by eliminating other potential causes of Mortensen's injuries. In *Nield v. Pocatello Health Services, Inc.*, this Court recognized the use of the process of "differential diagnosis" to determine the reliability and admissibility of an expert opinion on the issue of proximate cause in a negligence action. 156 Idaho 802, 827–28, 332 P.3d 714, 739–40 (2014). The first step in differential diagnosis is to compile a list of possible causes. "A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation." *Id.* (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999)). The next step is to eliminate hypotheses

“on the basis of a continuing examination of the evidence so as to reach a conclusion as to the most likely cause of the findings in [a] particular case.” *Id.* at 828, 332 P.3d at 740. A district court is justified in excluding an expert opinion if the expert fails to offer an explanation for why the alternative causes were ruled out. *Id.* (citing *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9th Cir. 2003)). Dr. Baruch failed to take either of these steps, and therefore failed to establish a foundation for her expert opinion through differential diagnosis.

Dr. Baruch’s two statements in paragraphs 11 and 19 lack sufficient evidentiary or scientific foundation to demonstrate the validity of her reasoning and conclusion on the issue of causation. Dr. Baruch’s failure to cite any evidence establishing the concentration of the ozone gas that Mortensen inhaled, along with her failure to explain the scientific basis for her conclusion that Mortensen’s symptoms were caused by the ozone therapy renders Dr. Baruch’s opinion on causation speculative and conclusory and therefore inadmissible. The third statement contained in paragraph 17 of Dr. Baruch’s declaration is based entirely on temporal proximity, and similarly lacks any scientific or evidentiary support for her opinion that Mortensen’s symptoms resulted from the ozone therapy.

Unlike the majority, I believe that the facts of this case are quite similar to those in *Swallow*. Dr. Baruch appears to rely primarily on information from the FDA’s website and temporal proximity to conclude that Mortensen’s symptoms must have resulted from the ozone therapy. In *Swallow*, the expert relied on the lack of other risk factors and temporal proximity to conclude that the ingestion of Cipro must have caused the plaintiff’s heart attack. In both cases the expert failed to explain the scientific basis and reasoning for the expert’s opinion on causation. I would affirm the district court’s decision that Dr. Baruch’s expert opinion concerning causation lacked sufficient foundation and was therefore speculative, conclusory and inadmissible.

Justice BRODY CONCURS

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JANA MORTENSEN,

Plaintiff/Appellant,

v.

JEFFREY BAKER, MD, The Healing
Sanctuary, LLC,

Defendants/Respondent.

Supreme Court Case No. 48492-2020

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District of
The State of Idaho, in and for the County of Bonneville,

HONORABLE JOEL E. TINGEY

Michelle R. Points
Points Law, PLLC
Attorney for Appellant
Boise, Idaho

Matthew F. McColl
Vala L. Metz
Quane McColl, PLLC
Attorneys for Respondent
Boise, Idaho

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Appellant Jana Mortensen (“Mortensen”), through her counsel of record, Points Law, PLLC, respectfully submits this brief in reply to the Respondent’s Brief filed by Respondents Jeffrey Baker, M.D. and the Healing Sanctuary, LLC (collectively “Baker”).

Mortensen will not restate the facts and arguments set forth in her opening brief, but will only address those points raised in the Respondents’ Brief that require clarification and/or additional argument.

A. Ozone

As a preliminary matter, Ozone gas is Ozone gas. Baker’s attempt to legitimize its use by labeling it “sterile” Ozone, or “medical” Ozone is disingenuous. The FDA has prohibited the use of Ozone for any medical condition for which there is no proof of safety or effectiveness. R. Vol. 1, p. 199 - 200. Mortensen nor her experts or treating physicians can locate any “proof” that forcing Ozone through a woman’s vaginal canal for treatment of a suspected urinary tract infection is safe or effective, for reasons that should be obvious even to a lay person.

B. Requisite Damage

Baker, in the underlying case and through this appeal, appears to assert that because Mortensen allegedly “cannot prove” that her injury is permanent in nature, that she cannot prevail in this medical malpractice case. *See* Respondents’ Brief, p. 1 (“[t]he damage to Ms. Mortensen’s body; particularly her heart and lungs, is believed to be permanent.”¹) There is no requirement under Idaho law that in order to sustain a motion for summary judgment, or to prevail at trial, that an injury be permanent in nature.

Mortensen alleged in her Complaint that *she believed* her condition was permanent.² Mortensen did not assert this allegation as an expert opinion but rather, on the basis that since

¹ Citing the Mortensen’s allegation contained in her complaint. R., Vol I, p. 13.

² R. Vol. 1, p. 13 (¶ 41).

she inhaled the subject Ozone she suffers from pain in her lungs and chest, as well as difficulty breathing, which symptoms have not subsided.³

C. Mortensen’s Declarations were admissible, and she didn’t waive any argument that she alone could establish the element of causation.

Baker asserts as an “additional issue on appeal” that Mortensen has waived her right to argue that causation can be “inferred” absent expert testimony, as that argument was not timely raised.

In response to Baker’s motion for summary judgment, Mortensen filed her own declaration, as well as the declaration of her retained experts, Drs. Baruch and Schoeffler, each of which were admissible and created an issue of material fact with respect to causation.

Baker is correct that Mortensen assert in the underlying case that she didn’t need an expert to establish causation, but that does not mean that her declarations were inadmissible on the issue of causation, or that she was not “qualified” to testify that she had an adverse physical reaction after she inhaled the subject Ozone, or that her testimony cannot establish at the very least, short term causation and/or damage. *See Nield v. Pocatello Health Servs., Inc.*, 156 Idaho 802, 332 P.3d 714 (2014) (“Respondent was not required to prove his case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that he show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. [...] If the rule of law is as contended for by defendant and appellant, and it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it

³ Baker’s inference that Mortensen’s counsel represented to the District Court that she had retained experts at the status conference held January 134, 2020, is false. *See* R. Vol. I, pgs. 261 – 262 (¶ 2). Sometimes experts commit and change their mind and/or give counsel their opinions but then decide they don’t want to be involved in litigation and/or have taken the position in this case that the facts are so extraordinary that aren’t comfortable offering an opinion. For example, PA Killpack informed Mortensen that she wasn’t suffering from asthma, but damage resulting from inhaling Ozone; a declaration was prepared for PA Killpack but he declined to sign it on the stated basis that he wasn’t familiar with the use of Ozone in this context. *See* R. Vol., p. 206.

would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.” *Id.* at 812, 332 P.3d at 724.⁴

Mortensen inhaled a toxic gas – Ozone - which immediately caused her to suffer from shortness of breath and related symptoms. A jury could reasonably and naturally infer that she suffered from these symptoms as a result inhaling said Ozone.

Mortensen does not dispute long-term injuries due to Ozone inhalation require expert testimony related to the element of causation, but the District Court’s ruling that Mortensen’s testimony was not admissible to establish at the very least, short term injuries, was an abuse of discretion.

With respect to Mortensen’s supplemental declaration, Baker first argues that the medical records weren’t admissible because they were not certified. What Baker neglects to state is that a true and correct copy of the Certification of Medical Records was submitted to the Court following the filing of Mortenson’s supplemental declaration. R. Vol. I, p. 459.

Baker next argues that the records were not self-authenticating because they were prepared in anticipation of litigation. This is a conclusory argument by Baker. Mortensen had substantial physical impairment following her “Ozone treatment” and was seeking medical treatment to address the same, without guidance or advice of counsel. R. Vol. I, p. 458.

Baker next argues that the NJH records were not self-authenticating because they did not fall within the hearsay exception set forth in IRE 803(23) pertaining to tests and test results. The subject records did contain test results, and also contained statements pertaining to Mortensen’s

⁴ See also *e.g.*, *Nield, supra* (“Once the experts have opined as to the potential sources of an infection, it does not take expert testimony to establish exactly how a particular person contracted a particular infection. Fact witnesses can provide the necessary details about sanitary conditions, contact by or with the infected person, wound care received by the infected person, and the like in order to fill in the details.”) *Id.* at 811, 332 P.2d at 724.

then existing physical condition, thus fall within the hearsay exceptions set forth in IRE 803(3) and 803(4), which is exceptions are not addressed by Baker in the Respondent's Brief. Thus, what Mortensen was told by her providers, which is also corroborated by her medical records, is admissible as the information pertained to her existing physical condition. In addition, Baker's argument related to the inadmissibility of expert witness disclosures is irrelevant, as no expert disclosures had been filed in the underlying case or were relied upon by Mortensen.

D. Dr. Baruch's opinions were admissible.

Dr. Baruch testified in her declaration that her opinions were based on her review of the case materials, case studies related to the use of Ozone to treat urinary tract infections, relevant scientific and medical literature on the subject, as well as her education and experience as an Emergency Medicine and Integrative Medicine physician.

Baker's statement that Mortensen "readily admitted" that Dr. Baruch did not have any "relevant experience or training" is false and taken out of context. *See* Respondent's Brief, p. 10. The referenced "admission" actually states: "The Court found Dr. Baruch didn't have any relevant personal experience or training. True. Dr. Baruch doesn't have experience with treating patients with Ozone similar to what was ordered by Dr. Baker in this case, including the volume of Ozone administered. For good reason. It's illegal." R. Vol. 1, p. 417.

Baker's also states that Mortensen "admitted" that the "items" submitted with Dr. Baruch's declaration were "not learned treatises." Mortensen can locate no case law that supports Baker's nor the District Court's position that Dr. Baruch cannot consider or rely upon the published, authoritative materials referenced in her declaration (which included a 13 page publication issued by the Environmental Protection Agency outlining the adverse health effects related to Ozone inhalation and exposure, and a case report on Ozone Therapy), or that references to such material

render her testimony somehow inadmissible. Contrary to Baker's argument, Dr. Baruch didn't testify that she relied solely on the referenced material in forming her opinions, but rather testified that "Ms. Mortensen's symptoms are consistent with the known side effects [of Ozone inhalation] including throat irritation, cough, shortness of breath, burning or discomfort in the chest. Complete health effect are well described in the EPA website..." R. Vol. I, p. 303. Dr. Baruch reviewed the website, but she testified she relied on her education and experience and also researched studies of ozone therapy for the use [in treating] urinary tract infections and found "they are limited to case studies and do not substantiate its use." *Id.* at 302.

In addition to the referenced publication and case study, Dr. Baruch also relied upon CFR Title 21, Volume 8, specifically § 801.415, pertaining to the maximum acceptable level of Ozone for medical devices issue by the U.S. Food & Drug Administration⁵ which establishes in relevant part that Ozone "is a toxic gas with no known useful medical application in specific, adjunctive, or preventive therapy. In order for ozone to be effective as a germicide, it must be present in a concentration much greater than can be safely tolerated by man and animals." R. Vol. 1, p., 302.⁶

Dr. Baruch's CV was attached to her declaration. Dr. Baruch is Board Certified in Emergency Medicine. She opined in her declaration that in her professional opinion "there is no medical indication for ozone therapy as a primary or adjunctive therapy and it is unsafe and unreasonably dangerous." R. Vol. I, p. 301. Dr. Baruch finally opined "[i]t is my opinion that [Mortensen's] acute respiratory symptoms were directly related to the ozone therapy prescribed by Dr. Baker." *Id.* at 303.

⁵ Also attached to the Declaration of Edmund D. Schoeffler, M.D. as Exhibit B. R. Vol. 1, pgs. 199 – 200.

⁶ See also Declaration of Edmund D. Schoeffler; Dr. Baker's records reflect orders for ozone insufflation bags of 750 mls at 30 gamma, then 35 gamma, and then 40 gamma. R. Vol. I, p. 194; *Id.* at 229. 40 gamma per milliliter is the equivalent of 40 ppm.

In sum, Dr. Baruch has the requisite knowledge (and reviewed applicable case material and resources) regarding short term effects of inhaling Ozone and her testimony was admissible on the issue of causation.

E. The District Court abused its discretion in denying Mortensen's second request for additional time.

Baker argues "Mortenson had ample time to oppose summary judgment." Respondents' Brief, p. 32. Baker ignores the fact that Mortensen could not access medical testing and treatment due to Covid and it was not until late August of 2020 until she could be seen or evaluated. R. Vol. 1, p. 320. Mortensen's final test results (specifically her lung biopsy results) would not be available until the week of October 23, 2020, as evidenced by her overseeing physician at National Jewish Hospital ("NJH"), Dr. Balkissoon. R. Vol. I, p. 326. The test results were pending.

Although Baker takes the position that Dr. Pacheco had the final biopsy results prior to that time, that is not accurate. Either Dr. Pacheco was relying on preliminary results or results from samples that did not require the eight-week wait time, because Mortensen's final results were not obtained until the week of October 23, 2020.

What Baker fails to point out is that that Dr. Pacheco states in Mortensen's record with respect to her Ozone inhalation is that "the ozone would very rapidly disseminate, but the initial airborne dose would be quite high" and that "[c]ertainly, the patient's immediate symptoms at the time of sore throat and chest tightness are consistent with what has been described with ozone exposure. Subsequent symptoms of lung burning, shortness of breath, and chest tightness are also consistent with the known effects of ozone exposure." R. Vol. I, p. 339.

Baker next argues that Mortensen didn't need to see another pulmonologist, Dr. Mandel, so there was no need to afford Mortensen more time to respond to the motion for summary judgment. That is not the case. As set forth in Mortensen's declaration of September 18, 2020, Dr. Mandel specializes in chemical inhalation and had published studies specifically on lung damage post inhalation, including ozone inhalation. As of that date, she had already seen Dr. Mandel and he indicated he needed to review the final biopsy results from NJH and then could get a final assessment of Mortensen's condition within a few weeks (near the same time as the final results would be received). R. Vol. I, p. 323.

After reviewing her test results from NJH, Dr. Mandel testified "[i]n my professional opinion, Ms. Mortensen suffered injuries to her lungs as a result of her inhalation of the Ozone ordered by [Dr.] Jeffrey Baker. Her test results from National Jewish Hospital confirm that she suffered such injuries on a more probable than not basis, those injuries were caused by her inhalation of Ozone ordered by Dr. Baker." R. Vol. 1, p. 422. Dr. Mandel could not reach his opinion without reviewing the pending test results from NJH.

In sum, the District Court allowed Mortensen additional time for diagnosis and testing, but did not allow her an additional few weeks to obtain the results of that testing for proper diagnosis.

It was impossible for Mortensen, in her declaration in support of her second motion for 56(d) relief, to set forth what the final results of testing would reveal, and the District Court didn't afford her time to provide that information in response to Baker's motion for summary judgment, which was an abuse of discretion.

F. The District Court abused its discretion in denying Mortensen’s Motion for Reconsideration.

Contrary to the argument asserted by Baker, the declarations of Drs. Balkissoon and Mandel weren’t “late” under IRCP 56, and Baker’s reliance on *Ciccarello v. Davies*, 166 Idaho 153, 456 P.3d 519 (2019), is misplaced.

As set forth in Mortensen’s opening brief, in *Ciccarello*, this Court upheld the district court’s denial of Ciccarello’s motion for reconsideration because Ciccarello filed supplemental expert declarations past the time the respond to defendant’s motion for summary judgment, and did not file a motion for extension of time under 56(d); given that no motion for an extension of time was filed, it was not an abuse of discretion for the district court not to consider said “untimely” declarations. *Id.*, at 162, 456 P.3d at 528.

This Court has found that it is an abuse of discretion not to consider expert declarations in a motion for reconsideration filed after a District Court denies a motion for summary judgment. In *Fisk v. McDonald*, 167 Idaho 870, 477 P.3d 924 (2020), this Court reversed the District Court’s denial of the plaintiff’s motion for reconsideration on the basis that it did not consider an expert declaration filed following that court’s ruling on the defendant’s motion for summary judgment, on the basis that the expert “had actual knowledge of the community standard of care, the district court abused its discretion in concluding that [the expert’s] testimony as to the standard of care was inadmissible at the motion for reconsideration stage. Therefore, the district court erred in denying the Fisk’s motions for reconsideration.” *Id.* at 894, 477 P.3d at 948.

Following Baker’s and the District Court’s line of reasoning, no party could ever file a motion for reconsideration of a ruling on a motion for summary judgment with supporting declarations, which would render IRCP 11.2(b) meaningless.

Moreover, the declarations of Drs. Balkissoon and Mandel were admissible. As set forth in Mortensen's opening brief, p. 15, and contrary to Baker's argument, this case is not "precisely the issue encountered" in *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003). Mortensen will not repeat that analysis here. Mortensen relies on the facts and argument set forth in her opening brief with respect to the admissibility of the subject declarations.

G. Conclusion

Mortensen's statements and records pertaining to her medical history, diagnosis and treatment, which were corroborated by her medical records, are admissible, and fall within exceptions to the hearsay rule.

Mortensen's experts – Drs. Baruch, Balkissoon and Mandel, meet the qualifications of IRE 702 as they are physicians who "possess knowledge, skill, expertise, training or education" to opine on the issue of causation in this case, which will assist the trier of fact to understand the evidence and determine the facts at issue.

Mortensen respectfully requests that this Court reverse the District Court's granting of Baker's motion for summary judgment and remand the case back to the District Court for further proceedings, so that Mortensen may have this case heard by the trier of fact.

Respectfully submitted this 30th day of August, 2021.

POINTS LAW, PLLC

/s/ Michelle R. Points
Michelle R. Points
Attorney for Appellant

CERTIFICATE OF SERVICE –I.R.C.P. 5(f)

I certify that on August 30, 2021, I caused a true and correct copy of this entire document to be served pursuant to I.R.C.P. 5(b) as indicated below:

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/s/ Michelle R. Points
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JANA MORTENSEN,

Plaintiff/Appellant,

vs.

JEFFREY B. BAKER, M.D., an individual,
and THE HEALING SANCTUARY, LLC, an
Idaho Limited Liability Company,

Defendants/Respondents.

Docket No. 48492-2020

District Court Case No.
CV10-19-7290

RESPONDENTS' BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho in and for the County of Bonneville

Honorable Joel E. Tingey, District Justice

Attorneys for Appellant

Michelle R. Points
POINTS LAW, PLLC
199 N. Capitol Blvd., Suite 200
Boise, ID 83702
Telephone: 208.287.3216
mpoints@pointslaw.com

Attorneys for Respondents

Matthew F. McColl
Vala L. Metz
QUANE McCOLL, PLLC
US Bank Plaza
101 S. Capitol Blvd., Ste. 1601
P.O. Box 1576
Boise, Idaho 83701
Telephone (208) 780-3939
mfm@quanelaw.com
vlm@quanelaw.com

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Defendants/Respondents, Jeffrey Baker, M.D. and The Healing Sanctuary, LLC (“Baker” and/or “THS” in the collective) generally agree with Plaintiff/Appellant Jana Mortensen’s (“Mortensen”) statement of the nature of this case. The case arises from a claim of medical malpractice involving Baker’s care and treatment of Mortensen on or around January 2019, to wit, a 14-day course of sterile medical ozone which Mortensen self-administered intravaginally. Mortensen generally alleges that she breathed some amount of the ozone, causing her to suffer permanent pulmonary and cardiac injuries. *See* R. Vol I, p. 13.

B. Course of Proceedings.

Mortensen filed her Complaint on November 13, 2019, and in pertinent part, alleged that “[t]he damage to Ms. Mortensen’s body; particularly to her heart and lungs, is believed to be permanent.” *Id.*

Status Conference and Scheduling Order

A status conference was held in this matter on January 13, 2020. Tr. Vol. I, p. 43. At the time of the conference, Counsel for Mortensen stated that she did not anticipate needing more than six months to prepare her case, explaining that headway had been made on some experts. Counsel for THS noted that the schedule was somewhat expedited and therefore gave the district court and Counsel for Mortensen notice that dispositive issues were anticipated, and that discovery would be developed with an eye toward timely presenting those issues, with the scheduling order in mind. *See id.*

Trial was set to begin on November 16, 2020. R. Vol. I, p. 16. A pretrial conference was to be held on October 15, 2020. *Id.* Pursuant to the Scheduling Order, Mortensen was required to disclose her expert witnesses on or before ninety (90) days before the pre-trial conference, or by July 17, 2020. R. Vol. I, p. 18.

Course of Discovery

Given the allegation advanced in the Complaint that Mortensen was suffering from permanent pulmonary and cardiac injuries, THS undertook discovery aimed at the basis of the allegation. *See* Tr. pp. 7-8. Discovery efforts included asking for the identity and opinions of Mortensen’s experts, obtaining her medical records, and conducting a deposition of Mortensen herself. *See id.* In written discovery served on January 17, 2020, Mortensen represented that she had received medical treatment from at least five (5) medical providers¹ but stated that she had not yet determined whom she would call as an expert witness. R. Vol. I, p. 44. The objective medical testing performed for Mortensen was entirely normal. *See* Pulmonary Function Test, R. Vol. I, pp. 47-49; Cardiac Cath Lab Report, R. Vol. I, p. 50-52; CT Chest High Res WOC, R. Vol. I, pp. 53-54. At the time of Mortensen’s deposition, taken on March 5, 2020, she testified definitively that no healthcare provider had ever told her that she had any pulmonary or cardiac condition other than her preexisting asthma, or that such condition was caused by medical ozone. *See* R. Vol. I, pp. 71; 76; 112; 121. None of the discovery undertaken by Counsel for THS revealed any fact

¹ “Dr. Troy Brumfield (Community Care, Idaho Falls), Dr. Daniel McLaughlin (Southeast Idaho Family Practice, Idaho Falls), providers at Easter Idaho Region[al] Medical Center Emergency Department, Joshua Kilpack at Idaho Falls Pulmonology, Dr. Karen Miller, St. Luke’s Hospital, Boise Idaho.”

supporting that Mortensen had suffered an allegedly permanent injury. Likewise, none of the discovery undertaken by Counsel for THS revealed any qualified expert opinion that such an injury was caused by some amount of sterile medical ozone.

THS' Motion for Summary Judgment

On April 9, 2020, THS filed its Motion for Summary Judgment (“Motion”). R. Vol. I, pp. 24-137. The Motion was based upon the lack of any demonstrable injury to Mortensen coupled with the absence of expert support to address the element of causation, i.e., Mortensen could not establish by expert testimony that a limited administration of sterile medical ozone caused her any permanent injury. *See generally* R. Vol. I, pp. 24-137. The Motion was supported in part by an Affidavit of Counsel, which detailed the discovery efforts undertaken to uncover any injury and/or expert. *See id.*

On May 1, 2020, Mortensen filed her Response to Defendants’ Motion for Summary Judgment (“Response”), and her Motion for Additional Time Under IRCP Rule 56(d) (“First Motion for Additional Time”). R. Vol. II, p. 138-147; p. 149-153, *respectively*. Mortensen filed her own Declaration alongside Declarations of Counsel, Amy S. Baruch, M.D. (“Baruch”), Edmund D. Schoeffler, M.D. (“Schoeffler”), all in support of her Response and First Motion for Additional Time.

In pertinent part, Mortensen argued that Baker was “using [Mortensen] as a guinea pig” and that “it is not surprising at all that [Mortensen’s] local medical care providers hadn’t ever seen such a set of facts, seen symptoms from such an experiment, or had occasion to evaluate or treat the extraordinary damages from which [Mortensen] continues to suffer, in others.” *Id.* at Response,

R. Vol. II, p. 143. Mortensen levied no argument that expert testimony would not be required to establish causation, or that causation was ‘inferable from a chain of circumstances.’ *See generally, id.*

The Declarations of Baruch and Schoeffler filed in support did not provide that they had ever seen such a set of facts, seen symptoms from such an ‘experiment’, or that they had occasion to evaluate or treat the damages from which Mortensen allegedly suffered, in others. *See* R. Vol. II, pp. 170-192 (Baruch); pp. 193-200. Baruch concluded that Mortensen suffered some temporary symptoms associated with inhalation of ozone, relying on a printout from an EPA website. Baruch, an emergency medicine physician, provided Mortensen’s sole causation opinion offered in support of summary judgment as follows:

[p]eople exposed to elevated levels of ozone may experience a variety of symptoms, including sore throat, shortness of breath, chest pain and wheezing. These symptoms can last several days...I believe the immediate respiratory symptoms that Jana Mortensen developed during her treatment with ozone therapy were directly related to the ozone therapy.

R. Vol. III, p..172, ¶11 (emphasis added).

Schoeffler, an ob/gyn, offered no causation opinions. *See* R. Vol. II, p. 180-192; p. 197-200.

Of Baruch’s sole causation opinion, Mortensen explained that:

the scope of [Baruch’s] engagement in this case is limited to the immediate or short-term symptoms suffered by [Mortensen][...] Mortensen has and is diligently trying to get appointments for further testing and treatment with physicians who are more well equipped to provide her with testing appropriate to her unique exposure circumstances and obtain recommended treatment.

R. Vol. II, p. 150. Mortensen further represented that that her “long-term diagnosis and prognosis

[had] been delayed” due to the Covid-19 pandemic.² R. Vol. II, pp. 150-151. In her Declaration, Mortensen stated that her next steps would be to continue testing with St. Luke’s pulmonologist Dr. Karen Miller, see a St. Luke’s cardiopulmonologist, Dr. Jennifer Shalz, continue testing with an Idaho Falls cardiologist, Dr. John Chambers, and to see Dr. Michael Wechsler at National Jewish Health (“NJH”). R. Vol. II, p. 206, ¶¶27-29; 33.

In response, THS challenged the admissibility of the Declarations submitted by Mortensen, and the sufficiency of the proffer to controvert the entry of summary judgment, whereas Mortensen offered no opinion or evidence of any permanent injury, only her self-reported symptoms and an admission that she had no long-term diagnosis or prognosis. R. Vol. II, pp. 154-169. THS further argued that Baruch had not demonstrated appropriate foundation for her opinions, nor offered any analysis concluding that Ms. Mortensen had ever been exposed to “elevated levels of ozone.” R. Vol. II., pp. 166-167.

A hearing was held on the Motion on June 17, 2020. Tr. p. 5-30. The district court twice noted that it would take the Motions (for summary judgment and first extension of time) under advisement and issue a written decision. Tr. pp. 28:25-30:1.

Conditional Summary Judgment Order

On June 22, 2020, the district court entered its Memorandum Decision and Order on THS’ Motion for Summary Judgment. R. Vol. III, pp. 306-313. As an initial matter, the district court concluded that causation in the case would have to be established by expert testimony. *Id.* at 309.

² Even though the underlying care was rendered in January 2019 and greater than one year prior to the emergence of the SARS-CoV-2 pathogen in Idaho.

In accordance, the district court determined that Mortensen's own Declaration was insufficient to "establish a nexus between the ozone treatment and her alleged injuries." *Id.* Mortensen had not established any training, experience, or medical expertise to opine about ozone treatment and whether it caused her any ailments. *Id.* Further, Mortensen's recitation of her own "research" was found to constitute inadmissible hearsay. *Id.*

Shoeffler did not offer any causation opinions, and consequently, his Declaration could not give rise to an issue of fact on causation. *Id.* at 310.

The district court found Baruch's limited opinions unfounded in "personal experience, training, or treatment relating to complications possibly arising from ozone treatment." R. Vol. III, p.311. Nothing in her Declaration supported an inference that Baruch's opinion was based on personal knowledge or experience. *Id.* Baruch had referenced publications, including an EPA website. *Id.* However, the district court found such reliance "problematic for two reasons[:]" 1) there was nothing in the record to establish that the publication was a learned treatise and, 2) there was no showing by Baruch that any analysis or conclusion in the referenced publication was based upon circumstances similar to Mortensen's case. "i.e. similar dosages, similar concentrations, similar duration of exposure, etc." *Id.* Accordingly, the district court found Baruch's Declaration inadmissible, as it reflected no scientific basis for her opinions, and lacked scientifically sound reasoning and methodology which would assist the trier of fact. *Id.* at 311.

Finding that Mortensen had failed to marshal expert opinions sufficient to oppose the entry of summary judgment, the district court conditionally granted THS' Motion. *Id.* at 312. However, Mortensen was granted an additional 90-days' time to supplement the record as to causation, or

until September 21, 2020, with the district court observing that “Mortensen indicates difficulty in obtaining medical treatment and medical review of this matter due to the Covid-19 Pandemic.” R. Vol. III, p. 312.

Mortensen’s Supplemental Response and THS’ Supplemental Reply

Mortensen filed her Supplemental Response to Defendants’ Motion for Summary Judgment (“Supplemental Response”) on September 21, 2020. R. Vol. III, pp. 314-319. The Supplemental Response was supported by a second Declaration of Jana Mortensen in Support of Response to Motion for Summary Judgment (“Second Mortensen Declaration”) Vol. III, pp. 320-375. The Second Mortensen Declaration ostensibly attached medical records from NJH, and Mortensen’s own statements about the content of conversations with providers there. *Id.* For example: “[t]he medical team that I saw throughout the week commented on a number of occasions during my visit that they have never seen such an exposure and resultant damages, and because of this, they didn’t have anything to compare it to or test it against.” *Id.* at p. 322, ¶12.

Likewise, Mortensen indicated that she had spoken with an entirely new provider, Dr. Jess Mandel (“Mandel”) with the University of California San Diego. *Id.* at 323, ¶14. Per Mortensen, “[w]ith respect to my diagnosis and treatment, [Mandel] told me “Not to get my expectations too high” that he had never seen this type of Ozone exposure[.]” *Id.* Mortensen represented that she had a follow-up appointment with Mandel on or around “October 9[.]” *Id.*

In connection with her Supplemental Response, Mortensen argued that test results from NJH had demonstrated some lung findings, but requesting that, “[i]n the event the Court does not find these findings to be sufficient to withstand Defendants’ Motion for Summary Judgment, Ms.

Mortensen respectfully renews her motion under IRCP 56(d), which is supported by the records submitted with this supplemental response and the declaration of Ms. Mortensen also filed with this response.” R. Vol. III, p. 317. Mortensen argued that biopsy results were still being reviewed. *Id.* at p. 318.

Plaintiff submitted no affidavit or declaration of any expert in connection with her Supplemental Response. *See generally* R. Vol III, pp. 314-319. Again, Mortensen levied no argument that expert testimony would not be required to establish causation, or that causation was ‘inferable from a chain of circumstances.’ *Id.*

THS filed its Supplemental Reply ISO Defendants’ Motion for Summary Judgment on October 1, 2020 (“Supplemental Reply”). R. Vol. IV, pp 376-397. THS argued that Mortensen’s failure to submit any expert testimony was fatal to her claim. THS further argued that Mortensen’s Second Declaration carried some of the same flaws and defects as the first and was without foundation and further laden with objectionable hearsay, unsworn and uncertified medical records, and the purported results of Mortensen’s own additional ‘research.’ *See id.* at p. 378. Even taking the medical records submitted by Mortensen at face value, THS noted that they failed to create a disputed issue of fact on the element of causation, as they cut against Mortensen’s claim. Notably:

based on these normal test results, it does not appear that the patient has sustained permanent lung damages. Her cyclical symptoms of worsening, characterized as an inability take a deep breath, increased phlegm production, headache, nausea, dizziness, and decreased energy, and specific symptoms occurring at 5:55 pm every night, are not explained by her previous ozone exposure.

Id. at 385 (citing R. Vol. III, p. 339).

Order and Judgment

On October 2, 2020, the district court unconditionally granted THS' Motion for Summary Judgment and entered final judgment dismissing all Mortensen's claims with prejudice. R. Vol. IV, pp. 398-403. In its Order, the district court reiterated its prior conclusion that Mortensen was required to establish the element of causation by expert testimony and that "effects of ozone treatment and possible injuries arising therefrom are not generally known to the layman or potential juror." *Id.* at p. 401. With this conclusion in mind, the district court evaluated the sufficiency of Mortensen's Second Declaration, finding that:

What Plaintiff may have been told about her condition, and what is contained in medical records, are inadmissible hearsay. Furthermore, Plaintiff is not qualified to testify as to causation and any such testimony lacks foundation. In short, there is still no admissible expert testimony that establishes a nexus between the ozone treatment and Plaintiff's alleged injuries. Even assuming documents attached to Plaintiff's declaration could be considered "learned treatises," it would still require an expert witness to relate the findings in the treatises to the facts of this matter and opine that the treatment caused the alleged injuries.

Id. at 402.

The district court further noted that, "Frankly, one would expect that the necessary expert testimony establishing causation would have been marshalled before the lawsuit was filed." *Id.*

Mortensen's Motion for Reconsideration

On October 16, 2020, Mortensen moved the district court to reconsider its entry of summary judgment. R. Vol. IV, pp. 404-420. Mortensen argued that her own Second Declaration was sufficient to give rise to a triable issue on causation because the statements and records therein were subject to hearsay exceptions; and, paradoxically, that she had "not opined on the ultimate

issue of causation” and “did not go to [NJH] to support her claim in this litigation.” R. Vol. IV, pp. 409-414. Mortensen also argued that she should have been granted additional time based upon her purportedly upcoming appointment with Mandell, and a letter she submitted from a Ronald C. Balkissoon, M.D. (“Balkissoon”) which broadly stated that ‘final’ results of her respiratory work up would be available around October 23. *Id.* at pp. 414-415.

Circling back to her underlying Response to Summary Judgment, Mortensen again argued that Baruch’s Declaration was sufficient to oppose summary judgment. However, she readily admitted that it was “True” that Baruch did not have “any relevant personal experience or training” and that the items submitted with Baruch’s Declaration were “not learned treatises” and only intended to edify the district court. *Id.* at 417.

Finally, Mortensen submitted Declarations of Mandel and Balkissoon. R. Vol. IV, p. 421-455; R. Vol. IV, pp. 460-467, *respectively*.

Mandel appended medical records from NJH, and opined in pertinent part that:

Mortensen suffers from airways hyper reactivity and chronic airway inflammation, which findings are consistent with the chronic respiratory issues and/or symptoms of which she complains, which are also consistent with injury to the lung that could result from the inhalation of ozone.

R. Vol. IV, p. 422, ¶6 (emphasis added).

Balkissoon submitted a report dated October 12, 2020. R. Vol. IV, pp. 462-467. The Report contained five findings. R. Vol. IV, p. 462. The first finding was “Irritant induced inducible laryngeal obstruction,” discussed as follows:

Irritant induced inducible laryngeal obstruction. I believe that the ozone well recognized for its ability to aggravate airway disease has contributed to some

ongoing issues with inducible laryngeal obstruction.... Many of these individuals are predisposed by having problems with gastroesophageal reflux disease and possible aspiration as well as chronic rhinitis and postnasal drip. This patient does have evidence of allergies and...her biopsy suggests that she has reflux type changes. I also suspect that she may periodically aspirate into her lungs, which can further cause some irritation and sensitivity of the airways.

Id. (Emphasis added.)

The second finding was “Rule out esophageal spasm.” *Id.*

The third finding was, “No clear evidence of any significant cardiac pathology.” *Id.*

(Emphasis added.)

The fifth finding was “Aggravation of pre-existing asthma and/or reactive airway dysfunction syndrome (irritant induced asthma by ozone).” *Id.* Concerning a possible aggravation of Mortensen’s preexisting asthma, Balkissoon reported that:

Ozone is well recognized to cause an aggravation of underlying asthma and indeed can cause a range of alterations in the airways including fibrosis of bronchioles and alveolar ducts. She continues to show some inflammatory changes that are relatively mild on biopsy from a physiologic point of view she has evidence for borderline airway hyperresponsiveness at the current time but well-preserved lung function and exercise tolerance. Irritant induced asthma can certainly show persistence of neutrophils, lymphocytes and eosinophils, thickening of the basement membrane. The patient demonstrates some but not all of these features in her biopsies. I defer to Dr. Pacheco our occupational environmental medicine expert with regard to the connection to her current symptoms and the ozone exposure that occurred in February 2019.

Id. (Emphasis added.)

Dr. Pacheco’s opinion, which was incorporated by reference into Balkissoon’s Report was that:

...the patient has not sustained permanent lung damage...the current cyclical symptoms of worsening with the inability to take a deep breath, increased phlegm

production, headaches, nausea, dizziness and decreased energy plus specific symptoms occurring at 5:55 p.m. every night could not be explained by her previous ozone exposure.

Id. at p. 463.

THS filed its Opposition on November 12, 2020. R. Vol. V, p. 468-489. THS challenged the new submissions by Balkissoon and Mandel, arguing that their Declarations were unfounded in personal experience, speculative, the opinions conclusory, and ultimately failed to establish a causal connection between medical ozone therapy and the damages alleged by Mortensen. *Id.* at 473-489.

A hearing was held on the Motion on November 19, 2020. Tr. Vol. I, pp. 31-40. The district court appreciated argument by Counsel offered on behalf of Mortensen and THS and noted that it would be taking the matter under advisement and would issue a written decision. *Id.* at 39.

Order Denying Plaintiff's Motion for Reconsideration

On November 25, 2020, the district court issued its written decision. R. Vol. V, p. 514-521. In its Order, the district court observed that a motion for reconsideration is not a “vehicle by which a party can circumvent the time requirement of Rule 56, IRCP, or a court order, and submit new evidence beyond the applicable deadlines.” *Id.* at 515. The district court in reliance upon *Ciccarello v. Davies*, 166 Idaho 153, 456 P.3d 519, 528 (2019), *reh'g denied* (Feb. 10, 2020), declined to consider any additional evidence from Mortensen, as it would render the district court's June 22, 2020, Order granting Mortensen additional time, meaningless, and was “further inconsistent with the language and intent of Rule 56.” *Id.* at 517.

The district court nevertheless concluded that Balkissoon and Mandel's Declarations were

inadmissible as they lacked scientific basis, sound reasoning and methodology. *Id.* The district court further found the statements set forth as to causation were conclusory. *Id.* at 520-521. Even adopting Mortensen’s contention that ozone therapy “does not appear to be a common medical practice, and as such, there may be little experience or research... “[i]n such circumstances, causation may be established through a differential diagnosis whereby all other likely causes of the alleged symptoms are ruled out[.]”” *Id.* at 521 (citing in part *Nield v. Pocatello Health Services, Inc.*, 156 Idaho 802, 810, 332 P.3d 714, 722 (2014)).

Even considering the late Declarations by Balkissoon and Mandel, the district court found it was “left with inadmissible conclusory statements that the ozone treatment was a causative factor.” *Id.* at 521. Mortensen’s Motion was therefore denied, precipitating this appeal. *See id.* at 521.

C. Statement of Facts.

The medical facts engendering this lawsuit are, unfortunately, somewhat divergent from those set forth under Section I. B of the Appellant’s Brief. Be that as it may, the factual nature of the case is largely irrelevant to this appeal.

However, to the extent that the Court entertains Mortensen’s’ own ‘research’ submitted to the district court, it merits mention that Mortensen merely *argues* that she was exposed to “40 ppm” of medical ozone. *See e.g.* R. Vol II, p. 142, fn. 3. By contrast, Mortensen submitted certain of her records from THS reflecting “... an actual visit note [*sic*] from January 24, 2019, [...] confirms I was given “Ozone Insufflation vag w/bag 750 mls @ 30 gamma[.]” R. Vol. II., pp. 204-205, ¶18 (emphasis added). Mortensen has never established that a gamma is the equivalent of

‘ppm’ or parts per million. They are not equivalents.

II. ADDITIONAL ISSUES ON APPEAL

Mortensen Waived her Right to Argue that Causation May be ‘Infered’ Absent Expert Testimony, as the Argument was not Timely Raised.

III. STANDARDS OF REVIEW

An appeal from the grant of a motion for summary judgment is reviewed under the same standard used by the trial court when ruling on the motion. *Phillips v. Eastern Idaho Health Services, Inc.*, 166 Idaho 731, 741, 463 P.3d 365, 375 (2020), reh'g denied (May 29, 2020) (quoting *Arregui v. Gallegos-Main*, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012)). Summary judgment is appropriate when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c); *Phillips*, 166 Idaho at 741, 463 P.3d at 375. “When considering whether the evidence shows a genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences in favor of the nonmoving party.” *Phillips* at 741, 375.

However, the admissibility of expert testimony is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment. *Id.* (quoting *Mattox v. Life Care Ctrs. Of Am., Inc.*, 157 Idaho 468, 473, 337 P.3d 627, 632 (2014) (internal citations omitted). With respect to the threshold issue of admissibility “the liberal construction and reasonable inferences standard does not apply.” *Phillips* at 741, 375. Rather, the trial court must look to the witness’s affidavit or declaration and determine whether it

alleges facts which, if taken as true, would render the testimony of that witness admissible. *Id.* An abuse of discretion standard is applied to the district court's evidentiary rulings in this regard. *Id.*

Motions for reconsideration are reviewed by the trial court under the same standard as the underlying motion. *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). Meaning, if the underlying motion was within the trial court's discretion, so is the motion for reconsideration. *Id.* This Court reviews appeals of decisions on motions for reconsideration by applying the same standard of review as the trial court. *Id.* ("If the decision was within the trial court's discretion, we apply an abuse of discretion standard.")

"The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Puckett v. Verska*, 144 Idaho 161, 166, 158 P.3d 937, 942 (2007) (citing *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 329, 48 P.3d 651, 658 (2002)). It is within the court's discretion to grant or deny a Rule 56(d) continuance. *Taylor v. AIA Services Corp.*, 151 Idaho 552, 572, 261 P.3d 829, 849 (2011); *Carnell*, 137 Idaho at 329, 48 P.3d at 658 ("The decision to extend time to supplement an affidavit is within the sound discretion of the trial court.") This Court reviews a district court's refusal to accept a late affidavit for an abuse of discretion. *See Ciccarello*, 456 P.3d at 528. Therefore, the standard of review to be applied by this Court in connection with the instant issues on appeal, is uniformly an abuse of discretion standard.

To determine whether a trial court has abused its discretion, this Court must consider: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision

by an exercise of reason. *See e.g., Phillips* at 741, 375.

IV. ARGUMENT

A. The District Court Properly Granted THS’ Motion for Summary Judgment Because Mortensen Failed to Produce Admissible Expert Opinions Giving Rise to A Triable Issue on the Element of Causation.

In a medical malpractice case, “plaintiff has the burden of proving not only that a defendant failed to use ordinary care, but also that the defendant’s failure to use ordinary care was the proximate cause of damage to the plaintiff.” *Easterling v. Kendall*, 159 Idaho 902, 367 P.3d 1214, 1226 (2016) (citations omitted). In this case, it was generally undisputed that causation would have to be proven by expert testimony. *See generally* R. Vol. I, pp. 26-38; R. Vol. II, 138-148.³ On June 22, 2020, the district court agreed, ruling that causation “must be established by expert testimony.” R. Vol. III, p. 309. The district court adhered this ruling in its subsequent orders of October 2, 2020, and November 25, 2020. R. Vol. IV, p. 401; R. Vol. V, p. 517. As a corollary, Mortensen was required to submit admissible expert testimony to avoid the entry of summary judgment in favor of THS.

i. The District Court Correctly Concluded that Causation Would Have to be Proven by Admissible Expert Testimony.

The district court’s decision is in keeping with Idaho caselaw precedent. This Court has concluded that “highly-technical medical questions require[] the testimony of medical experts in order for a reasonable jury to find proximate cause.” *Ackerschott v. Mountain View Hosp., LLC*, 166 Idaho 223, 231, 457 P.3d 875, 883 (2020). In *Ackerschott*, a patient presented to defendant

³ Mortensen did not challenge this conclusion until the time of her Reply in Support of her Motion for Reconsideration. *See* R. Vol. IV, p. 491; Tr. Vol. I, p. 33, ll. 12-14.

Redicare, an urgent care facility, complaining of a back injury. 166 Idaho at 228, 457 P.3d at 880. Given Mr. Ackershotts' initial examination, he was urged to go to the emergency department across the street for further care. *Id.* The Ackerschotts agreed, but the patient's wife wanted to drive there, against medical advice, to spare the expense of an ambulance. *Id.* As Mr. Ackerschott was preparing to leave, he heard a 'pop', and immediately felt excruciating pain. *Id.* He was then transported to the hospital by ambulance and underwent emergency surgery. *Id.* It was later discovered that Mr. Ackerschott had suffered a disk herniation in the tenth and eleventh levels of his thoracic spine resulting in permanent paraplegia. *Id.*

Defendant Redicare asserted the affirmative defense of comparative fault in connection with the patient declining ambulance transfer. One issue on appeal was whether Redicare was required to present expert testimony on the causation element of its comparative fault defense. Redicare asserted the jury could conclude the existence of 'but for' causation. This Court disagreed, stating:

The record does not contain any evidence, however, of what impact a quicker departure to the emergency room, including by ambulance, would have had on Shane's spine or whether Shane's refusal was a substantial factor in causing his paralysis.

The jury would have been left to speculate regarding questions such as: whether the spine would have been immobilized prior to transport, what impact transport to the emergency room would have had on Shane's spine, and whether Shane's arrival and treatment at the emergency room would have necessitated movement that would have put the stability of his spine at risk. The jury could not infer what impact such transportation and movement would have had on Shane given the complexity of his spinal condition.

Given the complexity of spinal anatomy and mechanics and the dispute over what caused the disc's protrusion, a jury comprised of lay people was not qualified to determine whether Shane's refusal to go to the emergency room and refusal of transport was a substantial factor in causing his injuries.

Ackerschott at 232, 884.

This Court concluded that Redicare was required to have an expert testify that Mr. Ackershott's failure to go to the hospital via ambulance was a substantial factor leading to his injury. The lack of such expert testimony meant there was not sufficient evidence to justify submitting the comparative fault claim to the jury. *Id.* at 233, 885. This Court explained:

We recognize that in cases like the one before us, “[t]here is no bright-line rule to determine whether expert testimony is required to prove proximate cause. The inquiry is highly dependent on the specific circumstances of each case.” Yet, we hold that in a medical malpractice case like this one, its “highly-technical medical questions require[] the testimony of medical experts in order for a reasonable jury to find proximate cause.”

Id. at 230-31, 882-883 (quoting *Easterling*, 159 Idaho at 917, 367 P.3d at 1228).

Given this Court's conclusion that expert testimony was required to establish whether a patient taking an ambulance to the hospital for treatment of a spine injury was a substantial factor in causing the patient's permanent paralysis in *Ackershott*, the district court's conclusion that Mortensen was required to present expert testimony to establish the element of causation in this case was appropriate. Whether medical ozone, which Mortensen herself admitted none of her Idaho-based healthcare providers had ever heard of causing injury, caused any permanent injury to her heart or lungs is a “highly technical medical question,” that required the testimony of a medical expert in order for a “reasonable jury to find proximate cause.” *See Ackerschott* at 231, 883. Furthermore, there was no evidence offered by Mortensen establishing that she had even suffered an injury, as she readily admitted that her “long-term diagnosis and prognosis [had] been delayed.” R. Vol. II, pp. 150-15. The absence of an identifiable injury made this case a curious

one, and one in which a jury would naturally struggle to infer causation based upon a ‘chain of circumstances,’ where even the fact of damages was in question. *See* Argument IV(E), *infra*.

ii. The District Court Properly Exercised its ‘Gatekeeper’ Role and First Considered the Admissibility of Moretensen’s Declarations Submitted in Connection with Summary Judgment.

The district court properly determined that the admissibility of Mortensen’s declarations was a threshold matter in connection with THS’ motion for summary judgment. R. Vol. III, pp. 309-312. An affidavit or declaration offered to oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. I.R.C.P. 56(c)(4). Rule 104 of the Idaho Rules of Evidence appoints the trial court to a gatekeeper role, with the discretion to determine whether there is a scientific or otherwise proper basis for an expert’s opinion. I.R.E. 104.; *Swallow v. Emergency Medicine of Idaho, P.A.*, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003). As a part of its gate-keeper role, the trial court may determine if proper foundation has been laid for admission of opinion evidence, and “has the discretion to determine both whether the expert is qualified as an expert in the field and whether there is a basis for the expert’s opinion.” *Swallow*, 138 Idaho at 593.

Idaho Rule of Evidence 702 sets forth the technical requirements for the admission of expert testimony, as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702.

Idaho law dictates the exclusion of expert opinions that are “speculative, conclusory, or unsubstantiated by facts in the record,” since any such testimony would be “of no assistance to the jury in rendering its verdict, and, therefore, is inadmissible as evidence.” *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999). Admissibility must be based on the expert’s reasoning and methodology, and not the ultimate conclusions reached. *Nield*, 156 Idaho 802, 816, 332 P.3d 714, 728 (2014) (internal citations omitted). Further, expert opinions, which are speculative or merely suggests possibilities, not probabilities, would only invite conjecture and may be properly excluded. *Id.* at 814, 726 (internal citations omitted). Thus, the district court properly exercised its gatekeeper role, by first reviewing the declarations submitted by Mortensen.

iii. The District Court Properly Exercised its Discretion in Finding Mortensen’s Own Opinions on Causation Inadmissible, as She is Not an Expert.

The district court properly exercised its discretion in concluding that Mortensen’s Declaration was inadmissible to establish the element of causation at summary judgment. Mortensen is not an expert, and therefore not qualified to testify as to causation in this matter. R. Vol. III, p. 309. “In short, while Mortensen may testify regarding the treatment provided and her knowledge of her own symptoms, she is not qualified to establish a nexus between the ozone treatment and her alleged injuries.” *Id.* (Emphasis added.) The district correctly perceived its decision as a discretionary one, and acted within the outer bounds of that discretion, consistent with Idaho caselaw precedent.

A layperson is not qualified to render opinions unless the opinion is rationally based on the

witness's perception and helpful to clearly understanding the witness's testimony or determining a fact in issue. *See* I.R.E. 701(a-b). Even so, any such opinion may not run afoul of the expert testimony requirements of I.R.E. 702 that require scientific, technical, or other specialized knowledge. I.R.E. 701(c). For example, in *Cook v. Skyline Corp.*, 135 Idaho 26, 13 P.3d 857 (2000), this Court held that physical manifestations of emotional distress were medical conditions which required expert testimony. The Court stated:

I.R.E. 701 affords the district court discretion to determine whether a lay witness may testify as to his or her opinion regarding certain matters but testimony offered by a lay person relating to the cause of a medical condition should be disregarded.

Cook, 135 Idaho at 35, 13 P.3d at 866 (emphasis added), *citing Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990) (plaintiffs' opinions as to the cause of his high blood pressure inadmissible under I.R.E. 701.); *see also Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997) (lay person not qualified to testify that seizure he suffered immediately after using a blend of pork and beef insulin was caused by insulin).

In conformity with the legal standards stated above, the district court reasoned that:

[t]here is nothing in the record to reflect that Mortensen has the training, experience, and medical expertise to offer an opinion as to the ozone treatment and whether it caused any ailment. Furthermore, Mortensen's recitation of "research" is inadmissible hearsay.

R. Vol. III, p. 309.

Mortensen alleges that medical ozone provided by THS caused her some permanent heart and lung damages. R. Vol. I, p.13, ¶41. How medical ozone could possibly cause heart and lung injuries as alleged, is not a matter which a lay person can fairly conclude in the absence of qualified

expert testimony. Whether the medical care provided by THS caused or contributed to any permanent injury, represents “a matter of science that is far removed from the usual and ordinary experience of the average person.” See *Swallow*, 138 Idaho at 596-97, 67 P.3d at 75. Such testimony can only be offered by an appropriately qualified expert witness, which Mortensen is not. The district court properly exercised its discretion in finding Mortensen unqualified to offer opinions on causation in this matter and ruling her Declaration inadmissible as a result.

iv. The District Court Properly Exercised its Discretion in Finding Baruch’s Declaration Inadmissible as it Lacked Foundation, and the Opinions were Conclusory and Speculative.

Baruch’s opinions lacked foundation, were conclusory and speculative, and were therefore properly deemed inadmissible by the district court. Idaho Rule of Evidence 702 imposes a strict requirement that scientific, technical, or other specialized knowledge must ‘help’ the trier of fact to understand the evidence or to determine a fact in issue. I.R.E. 702. While the test to determine if a witness is qualified as an expert is “not rigid, practical experience or special knowledge must be shown to bring a witness within the category of an expert.” *Phillips*, 166 Idaho 731, 755, 463 P.3d 365, 389 (citing *Weeks v. Eastern Idaho Health Services., Inc.*, 143 Idaho 834, 837, 153 P.3d 1180, 1183 (2007)). In *Phillips*, this Court provided an instructive comparison between the foundational qualifications of expert testimony submitted in opposition to summary judgment, against the requirements set forth in I.R.E. 702.

In *Phillips*, decedent was pulled over by a Bingham County Sheriff’s Deputy. 166 Idaho at 739, 463 P.3d at 373. He was intoxicated and told the deputy that he planned to commit suicide. *Id.* *Phillips* was transported to a jail to perform a breath test, then to the emergency department at

Eastern Idaho Regional Medical Center (“EIRMC”) where he was later discharged after denying suicidal ideation. *Id.* Within 24 hours, Phillips checked into a hotel and committed suicide. *Id.* Phillips’ heirs brought a medical malpractice/wrongful death claim against the healthcare providers who released him. *Id.*

In opposition to a defense motion for summary judgment, plaintiffs sought to admit the testimony of psychiatrist Dr. Moss that Phillips was intoxicated when he left EIRMC. *Phillips* at 754, 388. Plaintiffs asserted Dr. Moss was familiar with rates of alcohol dissipation “as a psychiatrist with extensive experience treating addictions.” *Id.* The defendants opposed the qualifications for Dr. Moss to render an opinion on this issue, arguing that treatment of addiction is fundamentally different from toxicological knowledge and knowledge of alcohol dissipation rates. *Id.* Upholding the district court’s exclusion of Dr. Moss’ testimony as unqualified, this Court explained:

Although Moss’s testimony as to [Phillips’] intoxication levels was included in his expert witness opinion, and timely filed on October 5, 2017, the extent of foundation asserted by the Phillipses for such testimony was Moss’s experience with addiction treatment. Addiction treatment is not the same field of expertise that would qualify Moss to testify “concerning the effects of alcohol on a particular person[.]” given the *technical nature of alcohol dissipation rates and the relevant variables therein*. Accordingly, the district court did not abuse its discretion in finding that Moss was not qualified to testify about alcohol dissipation rates.

Phillips at 755, 389 (internal citations omitted) (emphasis added).

Here, Baruch did not demonstrate that she had the professional qualifications or foundational basis to testify about medical ozone and any physiological impacts it may have had on Mortensen’s heart and lungs, just as Dr. Moss was not qualified to testify about alcohol

dissipation rates and the physiological process at issue in *Phillips*. Baruch's declaration did not demonstrate any specialized experience, education, or training whatsoever in medical ozone therapy and its effects upon the human body. *See generally* R. Vol. II, pp. 170-192. Per her credentials, Baruch is not an industrial hygienist, an epidemiologist, sub-specialized pulmonologist or otherwise an expert in ozone toxicity, pulmonological injury, disease, or impairment. *Id.* Given the technical nature of medical ozone, the minute quantities involved, and its unknown interaction and impact upon the human body, the district court properly ruled that Baruch was without apparent professional credentials, foundation, or basis upon which to offer causation opinions in this case. *See* R. Vol. III, pp. 310-312 ("Baruch presents no evidence of personal experience, training, or treatment relating to complications possibly arising from ozone treatment. There is nothing her Declaration to support an inference that her opinion is based on personal knowledge and experience.")

Absent the proper technical basis to support her opinions, Baruch's causation opinions were speculative or solely based upon a temporal connection, or concurrence of events, and were inadmissible for purposes of summary judgment. The district court relied upon *Swallow*, 138 Idaho at 594, 67 P.3d at 73. In *Swallow*, the plaintiffs' retained cardiologist offered to opine that the patient's antibiotic caused her subsequent heart attack. 138 Idaho at 592, 67 P.3d at 71. The cardiologist based his opinion on an FDA adverse reaction report that *suggested* that some patients taking the same antibiotic went on to have heart attacks. *Id.* There was no further scientific evidence supporting a causal relationship between the antibiotic and the occurrence of heart attacks. Finding that the cardiologist's foundation amounted to nothing more than a temporal

concurrency of events, this Court found that this causation opinion lacked sufficient basis and upheld the trial court's determination it was inadmissible. *Swallow* at 594, 73. The cardiologist had attempted to base his opinion entirely upon a correlation of timing, as opposed to engaging in a factorial analysis indicating causation.

As with the cardiologist in *Swallow*, Baruch's causation opinions in this matter were based solely upon a secondary source of non-medical origin. *See* R. Vol. III, pp. 301-302, ¶11. Baruch, who is an emergency and integrative medicine doctor, based her opinion on general information from the Environmental Protection Agency ("EPA") about prolonged exposure to industrial ozone. Baruch sought to use the EPA information as a stand-in substitute for actual medical analysis. She obliquely concluded that because *elevated* exposures to *environmental* ozone pollution *may* cause respiratory symptoms in the short term for individuals, it *must* have caused the respiratory symptoms Mortensen complained of in the context of an *unknown* exposure to *medical* ozone. There was no explanation from Baruch as to how one proceeds from *may cause* generally, which was the broad-stroked EPA publication policy statement, to *did cause* in this particular case, which is a narrow medical question, considering the dramatically different applications and exposures at issue.

Baruch, in conclusory fashion, stated: "People exposed to *elevated levels of ozone may* experience a variety of symptoms including sore throat, shortness of breath, chest pain and wheezing." R. Vol. III, pp. 301-302, ¶11. There are definitional problems. She did not define or explain what constitutes an "elevated level" of ozone. She did not demonstrate that the medical ozone provided Mortensen would be considered elevated. The EPA website she cited was of no

assistance. It instead confirmed the complex nature of the analysis on determining ozone exposure, which Baruch failed to address. It provides an ozone exposure equation critical to the issue of causation - “Dose= Ambient concentration X Level of exertion (minute ventilation) X Duration of exposure.” R. Vol. II, p. 190. Baruch did not address Mortensen’s alleged exposure; her Declaration simply states that breathing elevated levels of ozone “*may*” cause respiratory symptoms. R. Vol. III, p. 301, ¶11. Baruch went on to equate *any* ozone exposure for Mortensen with ‘immediate’ and short-term symptoms of coughing, throat-irritation, etc. *Id.* Yet the article plainly state that there are “major unanswered questions in the epidemiological literature.” R. Vol. II, p. 191.

Baruch did not demonstrate the requisite professional qualifications and knowledge of medical ozone and its dosing, the physiological processes at play, pulmonological or cardiac disease or injury to render an opinion on causation. Accordingly, the district court found that “there is no showing that any analysis or conclusion in the referenced publications is based upon circumstances similar to this case i.e. similar dosage, similar concentrations, similar duration of exposure, etc.” R. Vol. III, p. 311. The district court properly exercised its discretion when it found Baruch’s opinions as to causation were “not scientifically sound and ultimately [] without the necessary foundation to make [them] admissible.” R. Vol. III, p. 312.

B. The District Court Properly Exeised its Discretion in Finding Mortensen’s Supplemental Declaration Inadmissible.

The district court properly ruled that Mortensen’s Second Declaration failed to create an issue of fact regarding causation, for many of the same reasons as her first. The district court ruled

that much of the Second Declaration was inadmissible as Mortensen “[was] not qualified to testify to causation and any such testimony lack[ed] foundation.” R. Vol. IV, p. 402. (“What Plaintiff may have been told about her condition, and what is contained in medical records, are inadmissible hearsay.”). Mortensen’s medical records alone cannot establish a causal connection.

i. Mortensen’s Medical Records Were Not Certified and Only Portions of the Records Could Arguably Fall under IRE 803(23).

A declaration offered to oppose a summary judgment motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. *See* I.R.C.P. 56(c)(4). Further, sworn or certified copies of all papers or parts of papers referred to in the affidavit must be attached to or served with the affidavit. *Id.* Mortensen’s Second Declaration did not comply with these requirements.

Certified or verified copies of each document were not submitted in connection with the Second Declaration. *See* I.R.C.P. 56(c)(4). Mortensen declared only that she was submitting ‘true and correct copies’ only of her “initial Bronchoscopy Report,” and “a letter...from Dr. Balkissoon.” R. Vol. III, pp. 321-322, ¶¶6,9.

1. The Medical Records from NJH Were Not Self-Authenticating Because they Were Prepared in Anticipation of Litigation.

Tests performed in anticipation of, or for purposes of litigation, are not self-authenticating. *See* I.R.E. 803(23)(C). Mortensen’s medical records are a prime example of why such records are not self-authenticating. In connection with this litigation and for the specific purpose of trying to oppose summary judgment after a grant of additional time, Mortensen provided her history to each

provider at NJH with her one-sided and challenged medical history. The medical records submitted by Appellant with her supplemental response to Respondents' motion for summary judgment were expressly prepared for purposes of this litigation and are therefore not self-authenticating per I.R.E. 803(23)(C).

2. The NJH Records Were Not as a Whole Self-Authenticating Because 803(23) Applies Only to Tests and Test Results.

The district court properly exercised its discretion in finding Mortensen's statements regarding what she was told about her alleged condition and the contents of her medical records were inadmissible hearsay. R. Vol. IV. p. 402. ("What Plaintiff may have been told about her condition, and what is contained in medical records, are inadmissible hearsay."). The medical records submitted by Mortensen fall within the classic definition of hearsay, for they contain information about what the declarant stated (the healthcare provider), the declarant is not present, and has not offered the records. Medical records are unique and different for each patient and the presentation of every medical circumstance. This likely explains why only certain *tests and test results* are recognized to be trustworthy, and therefore self-authenticating under certain conditions. I.R.E. 803(23).

Montana courts applying similar evidentiary rules have consistently ruled that hospital records and medical reports are not self-authenticating documents excepted from the hearsay prohibition. *See Pannoni v. Bd. Of Trustees*, 321 Mont. 311, 323–24, 90 P.3d 438, 448 (Mont. 2004). As stated by the Montana Supreme Court, "[u]nsworn medical reports of a third person not called as a witness and available for cross-examination are hearsay and inadmissible in

evidence.” *Pannoni*, 321 Mont. 311, 323–24, 90 P.3d 438, 448 (Mont. 2004)(omitting internal citations).

The reasoning of this Court recently employed in *Dlouhy v. Kootenai Hospital District*, is also instructive. 167 Idaho 639, 474 P.3d 711 (2020). In *Dlouhy*, plaintiff sought to employ the expert witness disclosure and report of Judy L. Schmidt, M.D. to give rise to triable issues on standard of care in order to avoid summary judgment. *Dlouhy*, 167 Idaho at 648, 474 P.3d at 720. Distinguishing between an expert disclosure and affidavit or declaration, this Court reasoned that:

it is the [expert] witness’ own testimony about the practitioners she consulted with or other sources she reviewed that lays the foundation for her testimony regarding the applicable standard of care. Without such testimony, an expert witness’ opinions on the standard of care are not admissible.

Dlouhy at 649, 721. In so reasoning, the Court observed that Schmidt’s disclosure and report were not expert *testimony*, and that absent some form of testimony, any statement of the standard of care contained therein could not be rightly attributed to her. *Id.* This Court therefore found that, standing alone, Schmidt’s disclosure and report could not be used to establish the standard of care in a medical malpractice case. *Id.*

This reasoning from these authorities is sound and was applied by the district court below. Mortensen sought to admit numerous medical records in this matter by bypassing foundational requirements and trying to avoid the express hearsay provisions of the Idaho Rules of Evidence.⁴ There are numerous expert medical opinions contained within the records, which were prepared for purposes of litigation, and which opinions were the direct subject of dispute. The records were

⁴ See argument at IV(A)(i), *supra*.

without any corresponding expert declaration or affidavit containing the necessary foundation to substantiate them. As a result, the district court properly ruled that the medical records attached to Mortensen's supplemental declaration were inadmissible and failed to create an issue of fact sufficient to oppose summary judgment.

ii. Mortensen's Own Statements and 'Research', Whether Appearing in her Declaration or Incorporated into Medical Records, Were Insufficient to Establish Causation.

Regarding statements made by Mortensen in her first declaration, the district court properly concluded that Mortensen was not competent to render expert opinions in this matter. R. Vol. III, p. 309. The district court held the same concerning Mortensen's statements regarding causation in her Second Declaration. R. Vol. IV, p. 402. The district court ruled that "What [Mortensen] may have been told about her condition, and what is contained in medical records, are inadmissible hearsay." *Id.* Some examples of Mortensen's inadmissible opinions in her Second Declaration included statements like: "while the functional tests showed that my 'function' is largely in the normal range, actual damage to my lungs from the Ozone wasn't detectable until the doctor inserted a camera...;" "my left lung has developed an 80% obstruction compared to the right one ;" and "Apparently, the fact that Ozone inhalation causes pulmonary edema and chronic respiratory issues is well known." R. Vol. III, p. 321, ¶¶6, 7. The district court properly exercised its discretion in finding Mortensen was not qualified to offer opinions on causation and ruling her second Declaration inadmissible as a result. *See* Argument IV(A)(iii), *supra*.

C. The District Court Properly Exercised its Discretion in Denying Mortensen's Second Request for Additional Time.

In connection with her supplemental Response, Mortensen lodged what could perhaps be

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characterized as a conditional renewal of her 56(d) motion. R. Vol. III, p.317 (In full: “In the event the Court does not find these findings to be sufficient to withstand Defendants’ Motion for Summary Judgment, Ms. Mortensen respectfully renews her motion under IRCP 56(d), which is supported by the records submitted with this supplemental response and the [second] declaration of Ms. Mortensen also filed with this response.”) The district court properly exercised its discretion when it determined that Mortensen “had ample time to obtain the necessary [expert] testimony and has participated in a number of examinations and tests,” and that there was no good cause to further delay a ruling on THS motion for summary judgment. R. Vol. IV, p. 402. Mortensen failed to meet her burden of establishing what additional discovery would have revealed and why she was unable to timely respond to Defendant’s Motion after already being given an additional 90 days to do so. Rule 56(d) provides that “If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” I.R.C.P. 56(d).

In connection with her initial 56(d) request for additional time, Appellant represented at paragraphs 33 and 37 of her first declaration filed on June 9, 2020, that she planned to pursue specialist care and treatment from additional pulmonologists at NJH. R. Vol. II, pp. 207-208. Despite having had greater than 90 days, Mortensen presented no affidavit or declaration testimony from anyone at NJH in connection with her Supplemental Response making any causal connection between the ozone exposure and any allegedly permanent cardiac or pulmonary injury. The district court properly concluded that there was not good cause to grant Mortensen a second

extension of time and appropriately denied the ‘renewed’ 56(d) motion.

i. Mortensen Had Ample Time to Oppose Summary Judgment.

The district court appropriately concluded that Mortensen had ample time to oppose summary judgment, and that she had undergone a “number of examinations and tests,” when denying her renewed 56(d) motion. R. Vol. IV, p. 402. Mortensen argued that the second extension was warranted to allow for continued “review [of] her biopsy results.” R. Vol. III, p. 318. However, the biopsy results had already been reviewed and were specifically commented upon by Pacheco who stated: “Transbronchial and endobronchial biopsies reported patchy mild chronic inflammation, which is non-specific.” R. Vol. III, p. 342. (Emphasis added). Pacheco’s opinion reflected that she did not believe Mortensen was suffering any pulmonary injury caused by medical ozone exposure, but that she may have been suffering from mild asthma, likely vocal cord dysfunction, and possible chronic gastroesophageal reflux and/or dysmotility. *Id.* at 339. Mortensen did not set forth what ‘final review’ of the biopsies would have revealed that would have enabled her to offer an expert opinion sufficient to avoid summary judgment. Instead, she provided a letter from Balkissoon that vaguely stated ‘final results’ of Ms. Mortensen’s work up would be ready October 23. R. Vol. III, p. 326. Since the results had already been reviewed by Pacheco, it was unclear what else was needed to make results ‘final.’

Mortensen also sought a further extension of time so she could pursue care and treatment from yet another pulmonologist, Mandel. *See* R. Vol. III, p. 367. Up to that point, Appellant had been under the care and treatment of multiple pulmonologists since the inception of the case. R. Vol. I, p. 6, ¶¶36, 38. Mortensen had pursued repetitive care, treatment, and testing from several

pulmonologists- receiving not only a ‘second opinion,’ but a third, fourth, and fifth opinion. *See* R. Vol. I, p. 6, ¶¶36, 38 (Dr. Alan Salem, Dr. Karen Miller); R. Vol. II, p. 206, ¶28 (Dr. Jennifer Shaltz); R. Vol. III, pp. 302-375 (Dr. Ronald Balkissoon, Dr. Karin Pacheco).

Despite the requirements of Rule 56(d), Mortensen offered no explanation of what additional testing Mandel would perform, how the testing would vary from tests that had already been performed, or what such testing would be expected to show relevant to the claims she was advancing against THS. Mortensen did nothing to differentiate Mandel from her many other pulmonologists. On the point of causation, Mortensen offered only a hearsay statement from Mandel ““not to get my expectations too high” that he had never seen this type of Ozone exposure.” Vol. III, p. 323, ¶14. Mortensen had already been given an additional 90 days to secure an expert opinion on causation and failed to do so. The district court properly denied Mortensen’s conditional and ‘renewed’ motion for an extension of time.

ii. Mortensen Failed to Establish what Additional Information Would Have Been Revealed to Support her Opposition, Were she Granted a Second Extension of Time.

The district court properly concluded that Mortensen had not demonstrated “good cause” to grant her renewed Rule 56(d) motion. R. Vol. IV, p. 402. This Court has provided several key case examples when evaluating a Rule 56(d) motion. In *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380 (2005), plaintiff in an employee termination case requested additional time to respond to a motion for summary judgment claiming the case was complex and there were still outstanding requests for written discovery and depositions. *Jenkins*, 141 Idaho at 238, 108 P.3d at 385. In a supporting affidavit, plaintiff’s counsel stated, “he believed the discovery would produce

additional documents and testimony supporting the Jenkins' theories, and that he required the opportunity to use the responses and testimony in additional discovery in order to thoroughly respond to summary judgment.” *Id.* In evaluating the sufficiency of the supporting evidence, relying on the prior but analogous Rule 56(f), the district court denied the requested extension. This decision was affirmed on appeal by this Court.

The Court in *Jenkins* stated:

Moreover, the district court was soundly within its discretion in denying the motion. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Pursuant to I.R.C.P. 56(f), a party may request from the court more time to respond to a pending motion for summary judgment. However, that party must articulate what additional discovery is necessary and how it is relevant to responding to the pending motion.

It has been noted that a party who invokes the protection of Rule 56(f) must “do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.” Further, in order to grant a motion for additional discovery before hearing a motion on summary judgment, the plaintiff has the burden of setting out “what further discovery would reveal that is essential to justify their opposition,” making clear “what information is sought and how it would preclude summary judgment.”

Jenkins at 239, 386 (citations omitted) (emphasis added).

Per *Jenkins*, outstanding discovery alone does not provide a sufficient basis to delay the entry of summary judgment. As with the plaintiff in *Jenkins*, Mortensen represented that discovery was outstanding, *i.e.*, her desire to obtain ‘final’ results of biopsies. While the results appeared to be, in fact, available, Mortensen stated only that “her medical providers should be afforded

sufficient time to review her biopsy results so that a final assessment of her condition can be made.” R. Vol. III, p.318 (emphasis added). At the time of her second 56(d) motion, Mortensen had the test results. It was not clear from Mortensen’s declaration if any additional tests were outstanding, what “final’ test results would be different from the results she already had submitted and what significance they would have to the issue of causation. Mortensen failed to meet her burden to ‘affirmatively demonstrate’ “what further discovery would [have] reveal[ed] that [wa]s essential to justify [her] opposition,” making clear “what information [wa]s sought and how it would preclude summary judgment.” *Jenkins* at 239, 386.

When the district court issued its second Order on THS’ Motion for Summary Judgment, all objective medical testing to that point showed no damage attributable to medical ozone. R. Vol. III, p. 339; R. Vol. III, p. 342. (“Current testing results indicate normal pulmonary function test, normal exercise tolerance, and an unremarkable chest CT except for a few nodules. The methacholine challenge is minimally positive, and it is hard to know if this reflects new reactivity, or the patient’s underlying bronchial hyperresponsiveness from a prior history of asthma [;]” “Transbronchial and endobronchial biopsies reported patchy mild chronic inflammation, which is non-specific.”).

A similar insufficient showing was demonstrated in *Haight v. Idaho Dept. of Transportation*, 163 Idaho 383, 414 P.3d 205 (2018). In *Haight*, the plaintiff sought to defer summary judgment so that she could seek “the identity of persons authorized by [ITD] to work on Interstate 90 at the time and place of the accident [at issue].” *Haight*, 163 Idaho at 389, 414 P.3d at 211. She asserted that once these persons were identified she would depose them “with regard

to their knowledge of facts relevant to these proceedings.” *Id.* Like the case at bar, however, plaintiff’s counsel in *Haight* failed to specify what the deposition(s) would reveal or how that information would serve to preclude summary judgment. *Id.* Absent even a cursory explanation of what further discovery would reveal, the Court concluded the plaintiff failed to meet her required burden under Rule 56(d). *Id.* Like the plaintiff in *Haight*, there was no evidence before the district court that delaying THS’ motion in order for test results to be further analyzed would have ultimately revealed any information sufficient to create an issue of fact to preclude summary judgment on the element of causation (as opposed to damages).

A final, and perhaps the most apt example, can be seen in *Fagen, Inc. v. Lava Beds Wind Park, LLC*, 159 Idaho 628, 364 P.3d 1193 (2016). In *Fagen*, the plaintiff moved for summary judgment seeking monetary damages for breach of contract. 159 Idaho at 629, 364 P.3d at 1194. The defense filed a motion for a continuance which included the affidavits of counsel and an engineer consultant. *Id.* at 632, 1197. Defense counsel’s affidavit stated there were substantive issues that needed to be explored bearing directly on the issue of damages and affirmative defenses. *Id.* The consultant’s supporting affidavit also stated, “there appears to be a significant discrepancy between the billing tendered by Fagen, Inc. for work on the [contract] and the amount and quality of work undertaken” and that “[f]urther inquiry into this issue is needed in order for the correct amount due [] to be ascertained.” *Id.* (Emphasis added.) In denying the defense motion for a continuance, the consultant’s statements were deemed insufficient by the district court and characterized as “conclusory statements and hypotheses.” *Fagen* at 633, 1198. This Court therefore concluded the defendants had failed to provide any information to show that additional discovery

was needed to contradict the motion for summary judgment. *Id.*

Far less of a showing was made by Mortensen in the record before the district court in her renewed Rule 56(d) Motion. At that time, Mortensen had submitted only her second Declaration. She simply (and perhaps incorrectly) stated that final test results were pending. This was conclusory and failed to explain the connection between those results and her ability to prove the element of causation. The significance of such testing was not explained, nor could it be adduced from the records provided reflecting that her providers had reached the conclusion that her testing and symptoms “are not explained by her previous ozone exposure.”

Consistent with caselaw precedent found in *Jenkins, Haight, and Fagen*, Mortensen’s second Declaration offered only conclusory statements that were insufficient to show what specific information was being sought, and how that information would have precluded summary judgment. Importantly absent from Mortensen’s moving papers were any affidavits or declarations from a qualified expert explaining the significance of her biopsy testing or offering any opinions on the issue of causation. Simply put, Mortensen failed to meet her burden under Rule 56(d). As a result, the district court properly exercised its discretion in denying her renewed Rule 56(d) motion.

D. The District Court Properly Denied Mortensen’s Motion for Reconsideration.

The district court properly exercised its discretion when denying Mortensen’s motion for reconsideration. While the district court should consider new admissible evidence that bears on the correctness of an order, “this rule was not designed to allow parties to bypass timing rules or fail to conduct due diligence prior to a court’s ruling [...]” *Ciccarello*, 166 Idaho 153, 456 P.3d

519, 528 (2019), *reh'g denied* (Fed. 10, 2020) (citing *International Real Estate Solutions, Inc. v. Arave*, 157 Idaho 816, 819, 340 P.3d 465, 468 (2014)); R. Vol. V, p. 516. Mortensen late-submitted the declarations of Mandel and Balkissoon, in contravention of Idaho Rules of Civil Procedure 16 and 56. Even considering the submissions, in an exercise of discretion and based upon sound reasoning, the district court found them inadmissible in connection with summary judgment. Therefore, the district court properly exercised its discretion in denying Moretnensen's Motion for Reconsideration.

i. The District Court Properly Declined to Consider the Late Declarations of Mandel and Balkissoon.

The district court properly exercised its discretion when it declined to consider Mortensen's late Declarations submitted in connection with her Motion for Reconsideration. The district court drew heavily from *Ciccarello* in doing so. See R. Vol. IV, pp. 515-517 (quoting *Ciccarello v. Davies*, 166 Idaho 153, 456 P.3d 519, 528 (2019), *reh'g denied* (Feb. 10, 2020)). In part, the district court provided:

[T]his Court has discretion whether or not to accept the untimely [second and third expert declaration]. A rule to the contrary, requiring a court to accept facts not filed before summary judgment is heard but more than 50 days late, cuts against the nature of the proceeding, to determine whether the matter should proceed to trial...A rule to the contrary. Also risks incentivizing gaming of summary judgment proceedings by the parties, encouraging them to try to file "just enough" disclosure to beat summary judgment with the knowledge that, if the offered evidence were not enough, they could simply supplement the facts.

As indicated by the district court, because the declarations provided by Ciccarello's experts were untimely for consideration at summary judgment per Idaho Rule Civil Procedure 56(b)(2), it was not required to consider them in ruling on the motion for reconsideration. While this Court has explained that when considering a motion for reconsideration the trial court should take into account any new facts presented by

the moving party that bear on the correctness of the order...this rule was not designed to allow parties to bypass timing rules or fail to conduct due diligence prior to a court's ruling. Rather, the purpose of a motion for reconsideration is to reexamine the correctness of an order.

Id.

The district court noted that the hearing on THS' motion for summary judgment was held on June 17, 2020, its order following on June 22, 2020. R. Vol. V, p. 517. The district court explained that it had allowed Mortensen ninety (90) days to supplement the record, or up to September 20, 2020. *Id.* The district therefore rightly declined to consider Mortensen's late submissions, explaining that "to do so would render the Court's [June 22] order meaningless, and is further inconsistent with the language and intent of Rule 56." *Id.* This decision was entirely consistent with the precedent in *Ciccarello*, and the district court arrived at its decision by an exercise of reason.

ii. The District Court Properly Exercised its Discretion in Finding the Late Declarations of Mandel and Balkissoon Inadmissible.

While properly refusing to consider the declarations of Mandel and Balkissoon, the district court still went through the analysis to show that, even had it considered the opinions of Mandel and Balkissoon, the opinions were conclusory, without scientific basis, and therefore inadmissible. R. Vol. V, pp. 520-21. For example, the opinion offered by Mandel was essentially that "inhalation of ozone, *in any amount*, was a cause of Plaintiff's alleged injures" i.e., that ozone is 'hazardous' and thus *always* injurious. R. Vol. V, p. 520. Many other prescription medications and medical treatments may be considered 'hazardous,' and can even prove fatal– nevertheless under certain conditions are safe and therapeutic at an appropriate or correct dosage, concentration, etc. This

was precisely the issue encountered in *Swallow*, 138 Idaho 589, 67 P.3d 68, making it the perfect comparison, and therefore properly relied upon by the district court. R. Vol. V, p. 517.

In *Swallow*, the prescription medication at issue was the antibiotic Ciprofloxacin (“Cipro”). *Swallow*, 183 Idaho at 591, 67 P.3d at 70. *Swallow* was seen in an emergency department by Dr. Blahd, who consulted with a urologist on *Swallow*’s behalf. *Id.* The consultant recommended that *Swallow* be prescribed Cipro to be taken at a rate of 1500 milligrams per day (either 750 milligrams twice a day or 500 milligrams three times a day). *Id.* Dr. Blahd administered an intravenous loading dose of Cipro, then incorrectly directed *Swallow* take three 500-milligram tablets three times per day, effectively *tripling* his dose. *Id.* The following day, and after taking the Cipro, *Swallow* suffered a heart attack. *Id.* In pursuit of his claims against Dr. Blahd, *Swallow* attempted to admit the testimony of a Dr. Tommaso. *Id.* Dr. Tommaso offered to opine that Cipro had a role in causing *Swallow*’s heart attack. He relied upon the Physician’s Desk Reference (“PDR”), and an FDA adverse reaction report. *Id.* The PDR simply stated that “some unknown number of people, constituting less than 1%... had a subsequent myocardial infarction that may or may not have been related to taking the Cipro.” *Swallow* at 593-594, 72-73. Dr. Tommaso testified of the FDA adverse reaction report that “physicians or other health care providers submit these reports to the FDA when they suspect that there is a causal relationship between a drug and an adverse event.” *Id.* at 594, 73. The district court reasoned as follows:

There is no scientific evidence before me that has been tested, published, peer-reviewed or otherwise shown to be reliable which establishes that *Cipro in any amount can cause heart attacks*. Thus, the proffered testimony and evidence, regardless of other possible objections, really amount to nothing more than speculation based on a temporal concurrence of events. A jury does not need the

“assistance” of this type of “expert” testimony to draw the same speculative conclusion that Cipro caused the myocardial infarction in this case.

Id. (Emphasis added.)

The *Swallow* Court found that the district court did not abuse its discretion in ruling that Dr. Tommaso’s opinion testimony was inadmissible. There had been no showing that Cipro could cause a myocardial infarction, only a temporal ‘concurrency of events’ between the taking of Cipro and Swallow’s heart attack. *Id.* Finding *Swallow* instructive, the district court herein explained that in order to find Mandel and Balkissoon’s opinions admissible, “there must be a scientific basis for the testimony including scientifically sound reasoning and methodology.” R. Vol. V, p. 517.

The district court employed the recent decision of *Eldridge v. West*, 166 Idaho 303, 311-312, 458 P.3d 172, 180-181 (2020), observing that this Court had found testimony from a treating physician stating that his actions did not cause the alleged injury, conclusory and inadmissible, whereas there was no evidence supporting the assertion. *Id.* From *Eldridge*:

A statement is conclusory if it does not contain supporting evidence for its assertion. In reading the two affidavits of West and Turpin, it is clear that paragraphs 4, 5, and 6 in each are conclusory. West’s first affidavit stated, in relevant part.

...

5. In providing care and treatment for Mr. Eldridge’s right hip, there is nothing I did or allegedly failed to do that caused the damages alleged in the Eldridge’s Complaint.

....

Similarly, Turpin’s almost identical affidavit stated,

...

5. In providing care and treatment for Mr. Eldridge’s right hip, there is nothing I did or allegedly failed to do that caused the damages alleged in the Eldridge’s Complaint.

....

The affidavits of West and Turpin are undoubtedly conclusory. There is nothing in

either that explained the basis for the conclusions: [...] “there is nothing I did or allegedly failed to do that caused the damages alleged in the Eldridge’s complaint. There is no distinction between the affidavits because their statements are identical. More importantly, there is nothing provided to explain these conclusions.

Id. (citing *Eldridge*, 458 P.3d at 180-181) (internal citations omitted).

Balkissoon and Mandel presented no evidence tested, published, peer-reviewed or otherwise shown to be reliable to establish that the medical ozone at issue was injurious. As discussed by the district court:

There is nothing in Baruch’s Declaration which identifies her experience with ozone. There is no analysis as to the quantity of ozone which may have been inhaled by Plaintiff, the duration of exposure, and the scientific basis for any alleged injury. This is also true for the declarations submitted in support of the motion for reconsideration, even if the Court were to consider those declarations.

For example, the Declaration of Jess Mandel, M.D. does not identify any clinical experience with ozone nor is there any attempt to identify the quantities of ozone inhaled, the duration of exposure, and how such quantities and duration could cause the alleged injury.

Id.

The district court’s analysis was well reasoned. Neither Balkissoon or Mandel professed nor presented *any* ‘evidence of personal experience, training, or treatment relating to complications possibly arising from ozone treatment.’ Further, with respect to information underlying their opinions, there was a distinct void. They did not provide any analysis comparing this case to any other previously encountered or discussed in medical literature, or their own experience, let alone comparing it to cases involving ‘similar dosages concentrations, duration of exposure’ etc. They simply stated:

- “It is *well known within the scientific community that ozone is a toxic gas, which is*

unsafe and unreasonably dangerous- particularly if inhaled...”

- “I believe that the *ozone [is] well recognized for its abilities to aggravate airway disease... ozone is well recognized to cause an aggravation of underlying asthma and indeed can cause a range of alterations of the airways... patient demonstrates some but not all of these features in her biopsies. I defer to Dr. Pacheco ...with regard to the connection to her current symptoms and the ozone exposure that occurred in February 2019.*”

R. Vol. IV, p.422, ¶5; R. Vol. IV, p. 462., ¶¶1, 5 (emphasis added).

There was no assessment of the ‘hazard’ allegedly encountered by Mortensen. There was no information whatsoever within the declarations concerning dosages, concentrations or any other factor impacting Mortensen’s alleged exposure. The district court’s conclusion that the Declarations of Mandell and Balkissoon were unfounded and the opinions conclusory, and therefore inadmissible, was well-reasoned, consistent with caselaw established in *Swallow* and *Eldridge*, and therefore well within the bounds of the district court’s discretion.

- iii. The District Court Correctly Observed that, if a ‘Rare Occurrence’ Case, Mandel and Balkissoon Were Required to Engage in a Differential Diagnosis, Which They Failed to do.

Mortensen cited *Weeks v. Eastern Idaho Health Services*, for the proposition that her case was ‘a rare occurrence’ and that Balkissoon had conducted a differential diagnosis sufficient to establish the element of causation. 143 Idaho 834, 153 P.3d 1180 (2007). The district court considered the argument and recognized that “ozone treatment for a urinary tract infection does not appear to be a common medical practice, and as such, there may be little experience or research addressing possible adverse effects.” R. Vol. V, p. 521. Nevertheless, the district court noted that there was “no analysis provided which ruled out all the various possible causes of Plaintiff’s

symptoms leaving ozone as the most likely source of the alleged injuries. Again, the Court is left with inadmissible conclusory statements that the ozone was a causative factor.” *Id.* Even applying the reasoning in *Weeks* to Mortensen’s submissions, the district court properly concluded the opinions expressed by Mandel and Balkissoon were inadmissible. *Id.*

In *Weeks*, a family sued a medical center based upon allegations that patient, who had a brain hemorrhage, died after medications intended to be given via intravenous line were mistakenly administered via catheter into her brain. *Weeks*, 143 Idaho at 836, 153 P.3d at 1182. The *Weeks* Court observed that, while the Court had not adopted the *Daubert* standard for admissibility of an expert’s testimony in total, the Court does employ some of *Daubert*’s standards to assess whether the basis of an expert’s opinion is scientifically valid. *Id.* at 838, 1184 (comparing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-95, 113 S. Ct. 2786, 2796-97, 125 L.Ed.2d 469, 482-84 (1993); *State v. Merwin*, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1998)). Under *Daubert*, Idaho courts will consider: (1) whether the theory can be tested, and (2) whether it has been subjected to peer-review and publication. *Id.*

At issue in *Weeks* was the testimony of neurosurgeon Dr. Smith. Dr. Smith testified that the infusion to decedent’s brain was a substantial factor in causing her death to a reasonable probability, but he was unable to determine the exact effect of the medication on the brain. *Weeks*. at 839, 1185. Instead, he testified that the mechanical fluid buildup could not be parceled out from the chemical components of the fluid, and that either the chemicals themselves, or the volume of fluid, or some combination, caused the patient’s death. *Id.* The Court observed that, while the precise effects of the medication cocktail being administered to the brain had, understandably,

never been tested, nor subjected to peer-review and publication, Dr. Smith was clear that the fluid buildup alone would have deleterious effect. *Id.* Dr. Smith demonstrated a proper foundation for his opinions based upon experience and research as follows:

Monitoring and interpretation of intracranial pressure; Not again! (about a patient dying from an erroneous intrathecal injection of vincristine intended for intravenous use); and *Ventricular size and isotope cisternography in patients with acute transient rises of intracranial pressure*. While there is no exact known effect of the combination of chemicals infused into Evelyn’s brain, there is scientifically reliable evidence regarding the effect or increased intracranial pressure.

Id.

The *Weeks* Court went on to observe that the case constituted a ‘rare occurrence’ and leaving a void of medical testing and peer-reviewed research. Of ‘rare occurrence’ cases, the Court explained that:

where there are few opportunities for scholarly research, the lack of published studies should not bar otherwise scientifically valid testimony. *Id.* In these ‘rare occurrence’ cases, the differential diagnosis should be employed to establish the reliability of an expert’s opinion. *Id.* Such an approach “involves an analysis of all hypotheses in order to reach a conclusion as to the most likely cause.” When using differential diagnosis, a district court is justified in excluding the expert’s testimony if the expert fails to offer an explanation why an alternative cause is ruled out.

Id. (Emphasis added.)

In this case, Balkissoon’s opinions were inapposite to Dr. Smith’s in that he obliquely opined that, “ozone [is] well recognized for its abilities to aggravate airway disease.” R. Vol. IV, p. 462, ¶1. This statement removed Balkissoon’s proffer from the ‘rare occurrence’ category and required that he provide some foundation for his opinions. Considering Balkissoon’s theory that ‘ozone aggravates airway disease,’ Balkissoon had not demonstrated that this can be proven via

testing. Nor had he demonstrated that the theory has been subjected to peer-review, or published. Even making the contrary assumption, that exposure to ozone constitutes a ‘rare occurrence’ - Balkissoon was then required to engage in a differential diagnosis, which he failed to do.

Balkissoon suggested ozone could have exacerbated Mortensen’s preexisting vocal cord dysfunction. R. Vol. IV, p. 462. (“I believe that the ozone [] has contributed to some ongoing issues[.]”). There were no diagnostic criteria provided for such condition, or how exacerbation or contribution could be determined. *Id.* In fact, Balkissoon had found that Mortensen had “ongoing issues” with vocal cord dysfunction secondary to observed gastroesophageal reflux disease, suspected aspiration, chronic rhinitis, and postnasal drip. *Id.* He still had to rule out esophageal spasm (and apparently, aspiration). *Id.* There was no attempt to explain the significance of Mortensen’s course of minute medical ozone exposure to her vocal cord dysfunction in light of her *actual* pre-existing and ongoing diagnoses, and those issues were not ruled out. Under the differential diagnosis analysis, Balkissoon was required to distinguish or rule out these alternative causes of Mortensen’s vocal cord dysfunction and explain how he reached the conclusion that medical ozone was ‘a substantial factor in causing her vocal cord dysfunction to a reasonable probability’. Merely stating that ozone may have contributed to her preexisting problem was unfounded. The district court appropriately concluded that Balkissoon did not properly conduct a differential diagnosis because there was “no analysis ruling out all the various possible causes of [Appellant’s] symptoms leaving ozone as the most likely source of the alleged injuries.” R. Vol. V, p. 521. The opinion was properly deemed inadmissible in connection with summary judgment per *Swallow* and per *Weeks*.

Of Mortensen’s alleged “irritant induced asthma by ozone,” Balkissoon readily admitted that he was not an expert and deferred to his colleague, Pacheco. *Id.* Even considering Balkissoon’s ‘deference’ to Pacheco, her opinions failed to support Mortensen’s claim. *See* Vol. V, p. 520 (“Interestingly, Pacheco did opine that Plaintiff’s current symptoms “could not be explained” by ozone exposure”). Balkissoon’s opinions were properly viewed as inadmissible by the district court in connection with Mortensen’s Motion for Reconsideration as they failed to analyze the differential and properly rule out alternative causes of Mortensen’s complaints.

Likewise, Mandel’s own opinions remove his proffer from the ‘rare occurrence’ category. *See* R. Vol. IV, p. 422, ¶5 (“It is well known within the scientific and medical community that ozone is a toxic gas, which is unsafe and unreasonably dangerous[.]”) Even adopting the contrary assumption, and that this case constitutes a rare occurrence subject to differential diagnosis- Mandel engaged no differential. *See generally id.* at 421-423. Instead, and without basis, Mandel offers that:

Test results from National Jewish Hospital in August of 2020 confirm Ms. Mortensen suffers from airways hyperreactivity and chronic airway inflammation [“asthma”], which findings are consistent with the chronic respiratory issues and/or symptoms of which she complains, *which are also consistent with injury to the lung that could result from the inhalation of ozone.*

Ms. Mortensen suffered injuries to her lungs as a result of her inhalation of the ozone ordered by Jeffrey Dr. Baker [*sic*].

Id. at 422-423, ¶¶6-7 (emphasis added).

Mandel asserted that test results from National Jewish Hospital “confirm Ms. Mortensen suffers from airways hyperreactivity and chronic airway inflammation...” *Id.* No relevant tests from National Jewish Hospital were identified as being diagnostic, nor were the results of such

unknown tests discussed by Mandel to reach any conclusion. While Balkissoon deferred to his colleague Pacheco on this point, his explanation made it clear that ‘airway hyperactivity and chronic airway inflammation’ were not confirmed in testing at NJH. Pacheco had questioned whether Plaintiff was even suffering from some new asthma or exacerbation:

The methacholine challenge is minimally positive, and it is hard to know if this reflects new reactivity, or the patients underlying bronchial hyperresponsiveness from a prior history of asthma... Her current cyclical symptoms... are not explained by her previous ozone exposure.

R. Vol. III, p. 339.

Ignoring any multitude of competing possibilities, Mandel’s assertion that Mortensen’s alleged asthma is *consistent* with injury stemming from ozone therapy ignored the fact of Mortensen’s preexisting asthma. He did not rule out or differentiate in any way Mortensen’s ‘bronchial hyperresponsiveness from a prior history of asthma’ noted in the records upon which he apparently relied, Pacheco’s. Setting aside Mortensen’s preexisting asthma, Mandel offered that asthma *could* result from the inhalation of ozone, he offered no reason to conclude that it did. Mandel engaged in no discussion of Mortensen’s health history beyond the simple fact that she encountered medical ozone in an unknown amount. He did not describe previous testing for Mortensen. He did not analyze the testing performed nor results of those tests. Mandel merely suggested a possibility and ignoring any other.

Simply put, Mandel offered no explanation of the pertinent scientific principles at play, did not apply those principles to the formulation of his opinion, he did not offer a reason or method underlying his conclusions. Mandel provided only conclusions, and thus by definition his opinions

were conclusory. The district court appropriately exercised its discretion in finding that Mortensen's late Declarations, even if considered, were inadmissible and therefore incapable of unwinding the summary judgment granted in favor of THS.

E. Mortensen Waived her Right to Argue that Causation May be 'Inferred' Absent Expert Testimony, as the Argument was not Timely Raised.

Mortensen suggests that causation can be 'inferred by a chain of circumstances.' This argument was late and should be considered waived for purposes of appeal. *See* Tr. Vol. I, p.33. ll. 12-23. An issue may be waived on appeal if it is raised for the first time on a motion for reconsideration and not addressed by the district court. *AlSCO, Inc. v. Fatty's Bar, LLC*, 166 Idaho 516, 525, 461 P.3d 798, 807 (2020). None of Mortensen's underlying briefing on summary judgment contains any argument that causation can be inferred. *See* R. Vol, II, pp. 138-148; R. Vol. III, pp. 314-319. Mortensen waited until the last possible moment and raised it for the first time in her Reply to Defendants' Opposition to Plaintiff's Motion for Reconsideration. R. Vol. V, p. 493. Before, Mortensen had not disputed that she would have to prove causation by expert testimony. *See* R. Vol, II, pp. 138-148; R. Vol. III, pp. 314-319. Mortensen's untimely argument should be deemed waived in accordance with relevant authority from this Court established in *AlSCO, Inc. v. Fatty's Bar*.

V. CONCLUSION

The district court properly granted THS' Motion for Summary Judgment after Mortensen had, cumulatively, 165 days to fully respond. The district court properly determined that causation had to be proven by expert testimony in this medically complex case. The district court correctly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August, 2021, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following, by the method indicated below:

Michelle R. Points
POINTS LAW, PLLC
199 N. Capitol Blvd., Suite 200
Boise, ID 83702
Telephone: 208.287.3216
mpoints@pointslaw.com
Attorney for Plaintiff

- U.S. Mail, postage prepaid
- Hand-Delivered
- Email
- Electronic iCourt service

/s/ Vala L. Metz

Vala L. Metz

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Docket No. 48492-2020

IN THE SUPREME COURT OF THE STATE OF IDAHO

JANA MORTENSEN,
Plaintiff/Appellant

vs.

JEFFREY BAKER, M.D., The HEALING SANCTUARY, LL,C
Defendants/Respondents

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of
In and for the County of Bonneville, State of Idaho

The Honorable Joel E. Tingey

ATTORNEY FOR APPELLANT

Michelle R. Points, ISB No. 6224
Points Law, PLLC
199 N. Capitol Blvd., Suite 200
Boise, Idaho 83702
Telephone: (208) 287-3216
Facsimile: (208) 629-2157
Email: mpoints@pointslaw.com

ATTORNEYS FOR RESPONDENTS

Terrence S. Jones, ISB No. 5811
Vala L. Metz, ISB No. 8978
Quane Jones McColl, PLLC
101 S. Capitol Blvd., Suite 1601
Boise, Idaho 83701
Telephone: (208) 780-3939
Facsimile: (208)780-3930
Email: tsj@quanelaw.com;
vlm@quanelaw.com

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I. STATEMENT OF THE CASE

A. Nature of the case

This is a medical malpractice case. This is an appeal from Judgment that was entered following the District Court's granting Defendant/Respondent's Jeffrey B. Baker, M.D. and The Healing Sanctuary, LLC's (collectively "Baker") Motion for Summary Judgment.

That motion was based on Baker's argument that Plaintiff/Appellant Jana Mortensen ("Mortensen") could not establish the element causation. Specifically, that Baker did not *cause* Mortensen *any* physical damage in treating her suspected urinary tract infection with Ozone gas.

This "treatment" involved Mortenson obtaining Ozone gas from The Healing Sanctuary staff, which gas stored in an insufflation bag that she was to come in and get filled on a daily basis, take home and "self-administer" by squeezing the bag, forcing the Ozone gas into her vagina via a tube she inserted into her vaginal canal.

Mortensen's inhalation of the Ozone during her course of "treatment" caused her to suffer from immediate and long-term damage.

B. Statement of Facts

On December 20, 2018, Mortensen went to see Dr. Baker for symptoms related to what she believed might be a urinary tract infection, or possibly symptoms related to a recent hysterectomy she had undergone in the Spring of 2018. R., Vol. 1, p. 8, ¶ 10.

The urine culture taken on the December 20, 2018, visit didn't show a urinary tract infection. However, Dr. Baker went ahead and prescribed Mortensen an antibiotic; Macrobid (100 mg capsule, daily for 30 days). *Id.*, ¶ 11.

As her symptoms did not resolve, Mortensen made another appointment with Dr. Baker, which took place on January 9, 2019. No urinalysis was completed. During that visit Dr. Baker

suggested that Mortensen get “Ozone” treatment, which he claimed would “blast” any bacteria that was causing the urinary tract infection. *Id.*, ¶ 13; *see also* R., Vol. 1, pg. 202.

Dr. Baker told Mortensen to go “upstairs” to get supplies for the Ozone treatment. Dr. Baker wrote no order for this treatment (including no order as to concentration, dosage or duration). *Id.*, ¶ 14; R., Vol. 1, pg. 202.

Dr. Baker provided Mortensen with no instruction on what Ozone gas treatment was, how to administer the “treatment”, how long the treatment would need to be administered, or what the potential side effects of the treatment were. *Id.*, ¶ 15; R., Vol. 1, pg. 202.

Mortensen did as Dr. Baker instructed and a few days later went to The Healing Institute to the location she believed had the Ozone treatment supplies, again without any order from Dr. Baker. R., Vol. 1, pg. 203.

Upon arrival, Mortensen informed the staff (who she believed to be nurses) that Dr. Baker had sent her to get Ozone treatment for a urinary tract infection. *Id.*, R. Vol. 1, p. 90.

Staff informed Mortensen that insurance did not cover the cost of the treatment, and that the best “deal” was a 30-day treatment supply of the Ozone gas for \$150.00. *Id.*

Mortensen was told by staff that she could simply administer the Ozone treatment at home. Mortensen was provided by staff, an “insufflation bag” that connected to a tube. *Id.* Mortensen was told by staff that she was to use the same bag and tube during her entire course of treatment; to come into their office each day and get the bag filled up with Ozone gas, to go straight home, to insert the tube two to three inches into her vagina, to lay down and then squeeze the gas into her vaginal canal after releasing the stopper. Mortensen was told to lay in place for fifteen minutes and then “go about her day.” Mortensen was provided with no

warnings or precautions whatsoever related to this treatment by Dr. Baker or the staff at the Healing Sanctuary. R., Vol. 1, p. 9; R., Vol. 1, p. 91.

Mortensen did exactly as she was instructed. She went into the Healing Sanctuary every morning at approximately 10:00 a.m. to get the bag filled with Ozone gas. Upon commencing treatment at home, it became immediately apparent that a substantial amount of gas would escape the vaginal canal into the air, in the space in her home in which Mortensen was self-administering treatment; the odor of the Ozone gas was very distinct and could be detected in Mortensen's home several hours after treatment each day. *Id.*, p. 10; R., Vol. 1, p. 95 – 96.

Shortly after commencing the Ozone gas treatment, Mortensen began suffering from a sore throat and severe cough. She promptly reported these symptoms to the staff at Healing Sanctuary, and specifically asked them if they could be attributable to the Ozone gas. They responded “no” - that Mortensen had most likely “caught a cold.” *Id.*; R., Vol. 1, p. 97 – 98.

In a subsequent visit to the Healing Sanctuary to get here insufflation bag filled with the Ozone gas, Mortensen reported that to staff that during her “treatment” a lot of the gas was coming out into the air. In response, one nurse told Mortensen that she must have a “tiny canal” (referring to her vaginal canal) but said nothing related to the toxicity of the Ozone gas. *Id.*

During the same visit, another nurse stated that it was fine to breath in the Ozone gas and that it would probably “be good for [her] lungs.” *Id.*

One staff member (who again Mortensen believed to be a nurse), told Ms. Mortensen that she did notice a tiny hole in another bag she was filling up for her, and it did cause her (the nurse) to cough for a while. *Id.*

Staff all maintained that breathing in the Ozone was perfectly fine, if not beneficial, to Mortensen. *Id.*

On February 12, 2019 (twenty days following her commencement of “treating” with Ozone gas) Mortensen felt like her lungs were “collapsing”; she had severe shortness of breath for several hours. *Id.*, p. 11.

The next morning, she went to Community Care (Urgent Care) clinic and was prescribed an inhaler and steroid. *Id.*; R., Vol. 1., p. 98 – 99.

On her next visit to the Healing Sanctuary to fill up her bag with Ozone gas, Mortensen informed the nurses there that she had to go to Community Care because she was having such severe difficulty breathing. They again maintained her breathing issues were not attributable to her inhalation of the Ozone gas. *Id.*; R., Vol. 1, p. 100.

Mortensen continued treatment for a few more days but then stopped treatment after she felt was a complete breakdown of her lung function, and also was experiencing severe heart and lower body function issues. *Id.*

Given her deteriorating health, Ms. Mortensen and her fiancé began researching the use of Ozone gas in the clinical setting, and in a short amount of time it became very apparent that Mortensen was not suffering from cold symptoms, but from Ozone gas toxicity and resulting damage. *Id.*

Of course, after researching the harmful, lethal, attributes of Ozone gas, Mortensen immediately stopped using it. Mortensen had inhaled Ozone gas for approximately 14 days at a concentration of 40g or 40ppm. *Id.*

The Center for Disease Control has set 5 ppm as the upper limit of “Immediately Dangerous to Life or Health” Ozone gas concentration; publications also establish that 50 ppm

for 60 minutes would likely be fatal to humans.¹ Mortensen was prescribed 40 ppm for 30 days. *Id.*, p. 203.

In April of 2016, the FDA prohibited the medical use of Ozone for any medical condition for which there is no proof of safety or effectiveness. *R.*, Vol. 1, p. 199 – 200.

Prior to Mortensen’s exposure to Ozone gas, she was a very happy, healthy, athletic, energetic, mindful, hard-working, active woman; sustainably in “perfect health.” Following her Ozone “treatment” she is under the care of several specialists; she has consistent chest pain, shortness of breath, a chronic cough, and occasional bloody sputum. Mortensen can no longer run her customary 5-mile route – she cannot even walk to the end of the street; she is in constant physical, mental and emotional pain. *R.*, Vol. 1, p. 206 – 207.

C. Course of Proceedings

Mortensen filed her Complaint in this case on November 13, 2019, which asserted claims of medical malpractice against Baker. *R.* Vol. 1, pgs. 7 – 15.

1. Defendants’ Motion for Summary Judgment

Baker filed their Motion for Summary Judgment on April 9, 2020. The basis of that motion, in sum, was that the Ozone Mortensen “allegedly” inhaled could not have, and did not, cause her to suffer *any* physical injury. In support of their motion, Baker relied upon

¹ <https://www.cdc.gov/niosh/idlh/10028156.html>; Immediately Dangerous to Life or Health Concentrations (IDLH); Revised IDLH: 5 ppm; Basis for revised IDLH: The revised IDLH for Ozone is 5 ppm based on acute inhalation toxicity data in humans [Deichmann and Gerarde 1969; Kleinfeld et al. 1957].

Mortensen's responses to discovery, her deposition testimony, and her then existing medical records.²

In response to Baker's motion, Mortensen submitted the Declaration of Amy S. Baruch, M.D. The scope of Dr. Baruch's engagement was limited to the immediate, or short-term symptoms/injuries suffered by Mortensen: "following the administration of the Ozone therapy ordered by Dr. Baker. I have not been engaged to, and thus do attest to any long-term sequelae of which Ms. Mortensen may allege." R. Vol. 1, p. 301, ¶ 11.

In her declaration, Dr. Baruch summarized Mortensen's relevant medical history and finally opined "Jana Mortensen was provided a treatment for an undiagnosed UTI, with unproven benefit and potential serious side effects. It is my opinion that her acute respiratory symptoms were directly related to the Ozone therapy prescribed by Dr. Baker." *Id.*, ¶ 19.³

Also submitted in response to Baker's motion was the Declaration of Counsel and Mortensen, which attached several of Mortensen's medical records, all of which list the myriad of respiratory symptoms from which she suffered following her exposure to and inhalation of the Ozone gas "ordered" by Dr. Baker. *See, e.g.*, R. Vol. 1, p. 261-298.

² Although Baker subsequently, repeatedly argued that the medical records Mortensen submitted in response to Baker's motion were not admissible and/or were comprised of hearsay, Baker apparently believed they *were* admissible as Baker relied on them to support their motion. Therefore, Baker waived and/or is estopped from asserting that Mortensen's medical records were not admissible.

³ In response to Baker's motion, Mortensen also submitted the declaration of Edmund D. Schoeffler, M.D., who opined that the Ozone therapy prescribed by Dr. Baker for Mortensen is outside of the standard of care. R., Vol. 1, p. 193 – 200. Specifically, Dr. Schoeffler testified: "[i]t is my opinion that Dr. Baker's treatment of Ms. Mortensen, including but not limited to failure to counsel, failure to obtain informed consent, failure to instruct regarding administration, and the ordering of Ozone therapy, all fell below the standard of care for an OB/GYN physician. This deviation from the standard of care represents medical negligence." *Id.*, ¶ 7. Both Dr. Schoeffler and Defendant Dr. Baker are Board Certified OBGYN physicians.

Finally, Mortensen submitted a motion for additional time under IRCP 56(d) based on the fact that she was attempting to be seen by a number of out-of-state specialists who could conduct case appropriate examination and testing, but was unable to secure said examinations and testing due to the restrictions put in place by the Covid 19 pandemic. R., Vol. 1, p. 149 – 153.

In reply, Baker took issue with Mortensen’s “self-serving” declaration, alleged that Dr. Baruch lacked sufficient qualifications and expertise for her causation opinions to be admissible, and also alleged that Dr. Baruch’s opinions were nothing more than a “temporal” finding; i.e. that simply because Mortensen suffered from respiratory symptoms following her inhalation of Ozone – that such a conclusion *can’t* constitute causation. R. Vol. 1, p. 154 – 169.

2. The District Court’s ruling on Baker’s Motion for Summary Judgment

This District Court entered its Memorandum Decision (“Decision”) on Baker’s motion on June 22, 2020, granting that motion, and also granting Mortensen’s motion for additional time (90 days) to supplement the record as to causation. R., Vol. 1, p. 306 – 313.

In its Decision the District Court held that the declarations of Mortensen and Dr. Schoeffler did not create an issue of fact on causation. *Id.*

With respect to the Declaration of Dr. Baruch, the District Court found that Dr. Baruch presented “no evidence of personal experience, training, or treatment relating to the complications possibly arising from Ozone treatment. There is nothing in her Declaration to support an inference that her opinion is based on personal knowledge and experience. Baruch does refer to publications ... but her reliance upon such publications is problematic” because the publications aren’t learned treatises and there is no analysis in the publications that were based upon circumstances similar to this case. R., Vol. 1, p. 312.

The Court went on to hold that “[b]ased on the record, the Court finds that Baruch’s opinion as to causation is not scientifically sound and ultimately is without necessary foundation to make it admissible.” *Id.*

3. Mortensen’s Supplemental Response to Baker’s Motion for Summary Judgment.

Mortensen filed her Supplemental Response to Baker’s Motion for Summary Judgment, supported by the declaration of Mortensen, which included several of her medical records from National Jewish Hospital (“NJH”) that contained several findings of lung damage due to inhalation injury; injury that resulted from her inhalational exposure to Ozone. R., Vol. 1, p. 314 – 375.⁴

In her Supplemental Response, Mortensen also renewed her IRCP 56(d) motion, as her lung biopsy had been completed at NJH, but was still being processed, thus no final and/or conclusive findings determined.⁵ In addition, Mortensen was being seen by Dr. Jess Mandel at University of California San Diego, and his assessment could not be completed, due to the pending biopsy results from NJH. R., Vol. 1, p. 323.

In Reply to Mortensen’s Supplemental Response, on October 1, 2020, Baker argued, in sum, that the declaration of Mortensen and the medical records submitted with the Supplemental Response, were not admissible and that she therefore failed to create an issue of material fact as to causation. R., Vol. 1, p. 378. Baker also asserted that Mortensen was not entitled to IRCP 56(d) relief because no physician from NJH had submitted an affidavit. *Id.*

⁴ As Mortensen was continuing to undergo testing at NJH, her records were contemporaneously available through her patient portal, but were not finalized so that they could be certified by NJH.

⁵ R., Vol. 1, p. 326.

The District Court, *the following day* (October 2, 2020), entered an Order granting Baker’s Motion for Summary Judgment, finding that there was no admissible evidence to create an issue of material fact to preclude summary judgment on the issue of causation. The District Court also denied Mortensen’s motion for additional time under IRCP 56(d). R., Vol. 1, p. 402. The District Court entered Judgment on that same date. R., Vol. 1, p. 398.

4. Mortensen’s Motion for Reconsideration.

Mortensen filed her Motion for Reconsideration on October 16, 2020. R., Vol. 1, p. 404.

In support of that motion, Mortensen filed the Declarations of Drs. Ronald. C. Balkissoon and Jess Mandel. R., Vol. 1, p. 421 – 455; 460 – 467.

Mortensen argued in her Motion for Reconsideration that the Declaration Dr. Baruch, was admissible, that the statements contained in Ms. Mortensen’s declarations fell within several exceptions to the hearsay rule (as did the contents of her medical records, which authentication certification was also filed with the Court⁶), and that the additional declarations of Drs. Balkissoon and Mandel further confirmed that the Ozone “ordered” by Dr. Baker caused damage to Mortensen’s lungs. R., Vol. 1, p. 404 – 467.

II. ISSUES PRESENTED ON APPEAL

- A. Whether the District Court erred in granting Defendant’s Motion for Summary Judgment by finding that Mortensen’s and her expert’s declarations were not admissible and/or did not create an issue of material fact with respect to the element of causation.
- B. Whether District Court erred in denying Mortensen’s Motion for Reconsideration by not considering additional evidence presented in support of that motion.

⁶ R., Vol. 1, p. 458.

III. STANDARD OF REVIEW

When reviewing a district court's grant of summary judgment, the Supreme Court uses the same standard properly employed by the district court originally ruling on the motion. *Goodman Oil Co. v. Idaho State Tax Comm.*, 136 Idaho 53, 55, 28 P.3d 996, 998 (2001).

Summary judgment is appropriate when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Idaho R. Civ. P. 56. When considering a motion for summary judgment, the both the district court and this Court are required to liberally construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Construction Management Systems, Inc. v. Assurance Co. of America*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001).

When reviewing the district court's decision to grant or deny a motion for reconsideration, the Supreme Court uses the same standard of review as the lower court in ruling on the motion. *Frangnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

When reviewing the trial court's evidentiary rulings, this Court reviews those decisions for an abuse of discretion. *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163-64, 45 P.3d 816, 819-20 (2002) (citation omitted). When reviewing a lower court's decision for an abuse of discretion, this Court must analyze " whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (citing *Hull v. Giesler*, 163 Idaho 247, 250, 409 P.3d 827, 830 (2018)).

IV. ARGUMENT

A. The District Court erred in granting Baker’s Motion for Summary Judgment by finding that Mortensen’s declaration and Dr. Baruch’s declaration were not admissible.

Again, Baker’s Motion for Summary Judgment was based on the argument that Mortensen could not establish that the Ozone provided by Baker (even if she did in fact inhale it) caused her any injury or damage. R., Vol. 1, p. 36.

As set forth above, in response to Baker’s motion, Mortensen submitted her own declaration, the Declaration of Amy S. Baruch, M.D. and the Declaration of Edmund D. Schoeffler, M.D.

1. Mortensen’s declaration contained admissible testimony related to causation and created an issue of material fact on that issue.

The District Court didn’t consider the contents of Mortensen’s declaration on the stated basis that “[t]here is nothing in the record to reflect that Mortensen has training, experience, and medical expertise to offer an opinion as to Ozone treatment and whether it caused any ailments.” R., Vol. 1, p. 309. The District Court went on to hold that “Mortensen’s Declaration fails to create a disputed issue of fact as to causation.” *Id.* In sum, the District Court held that because Mortensen was not an expert, her testimony related to causation would not be considered.

Although the District Court held that “while Mortensen may testify regarding the treatment provided and her knowledge of her own symptoms, she is not qualified to establish a nexus between the Ozone treatment and her alleged injuries” (R., Vol. 1, p. 309) – the District Court did not appear to consider the content of Mortensen’s declaration at all.

Mortensen inhaled a toxic gas; Ozone. She testified in her declaration that her inhalation of the Ozone made her sick, she had difficulty breathing, had an extreme sore throat, and suffered from pain in her heart and lungs. R., Vol. 1, p. 203, ¶ 11. In addition, Mortensen

testified that following her stopping “treatment” she saw Josh Killpack PA-C in the Spring of 2019, who prescribed her “several inhalers to alleviate my extreme shortness of breath and ‘asthma’ symptoms, which I took for a few months. They did nothing, as it was described to me [by PA Killpack] – **this wasn’t ‘technically’ asthma, it was damage that resulted from inhaling Ozone.**” (R., Vol. 1, p. 206, ¶ 25)(emphasis added).^{7 8}

“Unlike the elements of duty and breach of duty, there is no statutory requirement explicitly stating proximate cause in medical malpractice cases must be shown by direct expert testimony.” *Nield v. Pocatello health Services, Inc.*, 156 Idaho 802, 812, 332 P.3d 714, 724 (2014).

Notwithstanding this controlling case law, the District Court held that “causation in the case **must** be established by an expert.” R., Vol. 1, p. 309.⁹ Put another way, the District Court

⁷ PA Killpak’s statements to Mortensen fall within exceptions to hearsay under IRE 803 and 804;

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; or their source.

⁸ PA Killpack of course would have been listed as a non-retained expert in Mortensen’s expert disclosure and would have been called as a non-retained expert at trial, subject to cross examination.

⁹ Mortensen is aware that in most professional malpractice cases, an expert affidavit is required to establish a breach of the standard of care and causation, however, there is a recognized exception to this rule is where the alleged malpractice is so obvious that it is within the ordinary knowledge and experience of laymen. *See, e.g. Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89, 996 P.2d 303, 308 (2000).

held that because Mortensen was not a physician, she could not testify that her inhalation of a toxic gas caused her to suffer some injury and/or damage; that her testimony in this regard was not admissible. This blanket holding by the District Court was in error.

The District Court should have considered Mortensen's testimony that she inhaled Ozone and it caused her injury and/or damage, that her medical records confirmed that she suffered injury due to Ozone inhalation, and that her then treatment provider PA Killpack confirmed to her that her damage resulted from her inhaling Ozone, again, which medical records and statements fall under exceptions to the hearsay rule; IRE 803(3) and 803(4).

In its Order, the District Court failed to address any argument raised by Mortensen with respect to hearsay exceptions.

The District Court abused its discretion in disregarding Mortensen's Declaration in its entirety; Mortensen's declaration was admissible, and also established issues of material fact regarding causation.

2. Dr. Baruch's Declaration was admissible, and its contents raised issues of material fact with respect to causation.

"In determining whether an expert's testimony is admissible "[t]he Court must look at the affidavit or deposition testimony and determine whether it alleges facts, which taken as true, would render the testimony admissible." *Edmunds v. Kraner*, 142 Idaho 867, 871, 136 P.3d 338, 342 (2006). Expert testimony in medical malpractice cases is admissible when: "[t]he expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially

outweighed by its prejudicial effect.” *Nield* at 850, 332 P.3d 762, citing *Coombs v. Curnow*, 148 Idaho 129, 140, 219 P.3d 1180, 1185 (2009).

In ruling on Baker’s Motion for Summary Judgment, the District Court held that Dr. Baruch “presents no evidence of personal experience, training, or treatment relating to complications possibly arising from Ozone treatment. There is nothing in her Declaration to support an inference that her opinion is based upon personal knowledge and experience.” R., Vol. 1, p. 311.

In addition to her education and experience as a physician Board Certified in both Emergency Medicine and Integrative Medicine, Dr. Baruch reviewed studies of Ozone therapy for use on urinary tract infections, FDA and EPA studies and publications on Ozone, and also reviewed Mortensen’s records including the concentration and duration of Ozone she was prescribed by Baker. R. Vol. 1, p. 300, ¶ 3; *Id.*, p. 302, ¶¶ 12, 13.

In her Declaration, Dr. Baruch referred to two publications; a 2013 Study of Ozone therapy for use in urinary tract infections, and the other an EPA article explaining the health effects of Ozone inhalation. Regarding the referenced study, Dr. Baruch testified that the case studies “do not substantiate its use.” R., Vol. 1, p. 302, ¶ 17.¹⁰

Although Dr. Baruch’s testimony was limited to the short-term effects of Mortensen’s inhalation of the Ozone, in order to defeat Defendant’s motion for summary judgment, the test isn’t *to what extent* Mortensen’s suffered injury as a result of her inhalation of Ozone but only that the Ozone caused her *some injury*.

¹⁰ Dr. Baruch’s reference to the EPA study was for the Court’s edification, and to support her conclusion that Mortensen’s symptoms were consistent with the *known* side effect of Ozone inhalation, which include throat irritation, cough, shortness of breath, and burning or discomfort in the chest. *Id.*

Dr. Baruch testified “[i]n my professional opinion, there is no medical indication for Ozone therapy as a primary or adjunctive therapy and it is unsafe and unreasonably dangerous.” R., Vol. 1 p. 301, ¶ 11. “I believe **the immediate respiratory symptoms that Jana Mortensen developed during her treatment with Ozone therapy were directly related** to the Ozone therapy prescribed by Jeffrey Baker MD.” *Id.* (emphasis added).

The fact that Dr. Baruch stated in her declaration that Mortensen’s symptoms were temporally related to the administration of Ozone therapy, does not render her opinion inadmissible, as argued by Baker in briefing on their Motion for Summary Judgment, which was adopted by the District Court, relying on *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003).

This case factually distinguishable from *Swallow*. In *Swallow*, the testimony of Dr. Tommaso, a cardiologist, was held inadmissible. Dr. Tommaso had opined that an overdose of Cipro caused the Plaintiff’s heart attack. When deposed, Dr. Tommaso testified he didn’t know how Cipro could cause a heart attack, that he was “aware from the PDR and from the FDA that Cipro can precipitate a myocardial infarction. How it does it, I don’t know.” *Id.* at 593, 67 P.3d 72. The PDR did not state that Cipro could cause a heart attack, and the FDA “adverse reaction” reports were only based on a temporal relationship, not cause and effect. *Id.* at 594, 67 P.3d 73.

Contrary to the facts in *Swallow*, proximate cause in this case is not complicated, particularly causation of short-term injuries – you inhale a toxic gas, you suffer respiratory injury and symptoms of that injury.

Also contained in Dr. Baruch’s declaration is quote from to 21 CFR 801.415, a regulation of the FDA, that: “Ozone is a toxic gas with no know useful medical application in specific, adjunctive, or preventative therapy. In order for Ozone to be effective as a germicide, it

must be present in a concentration much greater than that which can be tolerated by man and animals.” R., Vol. 1, p. 302, ¶ 13.

Dr. Barach goes on to state in her declaration:

The FDA expressly states that a device that generates Ozone by design or as a byproduct should not exceed 0.05 ppm by volume of air circulating through the device or cause an accumulation of Ozone in excess of 0.05 ppm by volume of air.

The Ozone that Jana Mortensen received was at a concentration of 40 ppm daily from January 28th, 2019 – February 14, 2019. She was prescribed 30 days but terminated the therapy after suspecting that her respiratory symptoms were due to Ozone therapy.

R., Vol. 1, p. 302, ¶¶ 13, 14. The amount and/or concentration of Ozone given to Mortensen by Baker was in violation of the referenced CFR.

Dr. Baruch is a qualified expert in this case, as evidenced by her curriculum vitae. R., Vol., 1, p. 175 – 177. Dr. Baruch’s testimony would have assisted the trier of fact, and the facts upon which she bases her opinion are the same type of facts on which other experts would rely; Mortensen inhaled a toxic gas, which is well recognized as toxic gas – which has no known useful medical application and cannot safely tolerated by humans; which causes injury if inhaled.

The District Court’s non-admission of Dr. Baruch’s testimony was premised on its finding that Dr. Baruch lacked experience administering Ozone to patients, or treating patients with Ozone exposure similar to that subject of this litigation. Notwithstanding the obvious – that the acts taken by Baker in this case were arguably criminal – to require an expert to have experience or training *specific* to the facts of this case is not necessary, particularly when evaluating the admissibility of expert testimony.

There is no lack of studies that unequivocally find that find Ozone is a toxic gas that is not safe and unreasonably dangerous, particularly if inhaled. The “rare occurrence” in our case is a physician sending a patient home with an insufflation bag full of 40 ppm of Ozone which she

is to self-administer through inserting a canula in her vaginal canal to treat a suspected urinary tract infection. This brings into the fold that line of cases that hold “[p]roximate cause can be shown by a chain of circumstances from with the ultimate fact required to be established is reasonably and naturally inferable.” *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007), citing *Sheridan v. St. Luke’s Reg’l Med. Ctr.*, 135 Idaho 775, 785, 25 P.3d 88, 89 (2001).

The Court in *Sheridan* “reasoned that a jury could reasonably and naturally infer, without the aid of expert testimony, that a breach of the standard of care during the first hospital stay was a proximate cause of the child’s injuries from the chain of circumstances.” *Id.*, citing *Sheridan* at 786, 25 P.3d at 99. The Court went on to hold that “[t]he district court erred in failing to admit Dr. Smith’s testimony as to the mechanical effects of the infusion because he based his testimony upon sound scientific principles.” *Id.* at 840, 153 P.3d 1186.

Counsel for Mortensen could locate no caselaw that supports the proposition that the admissibility of an expert testifying on the issue of causation must be measured by whether the expert has been trained on the specific factual scenario in the case in which they offer their opinion, or that the expert has to have had actual experience in treating “complications” of the specific factual scenario in the case in which they offer a causation opinion. That was the “test” the District Court applied in this case with respect to the admissibility of Dr. Baruch’s opinions, which was in error.

This case is also similar to *Nield, supra*, in which this Court held: “[Plaintiff] was not required to prove his case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that he show a chain of circumstances from with the ultimate fact required to be established is reasonably and naturally inferable.[...] If the rule of law is as contended for by the

defendant and appellant, and it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.” *Id.* (citations omitted).

Dr. Barach’s declaration and the opinions contained therein are admissible. Because Mortensen got past “the threshold” with Dr. Baruch’s declaration, Baker’s motion should have been denied because Dr. Baruch testified Mortensen was injured by inhalation of the Ozone prescribed by Dr. Baker - the issue of proximate cause should have gone to the trier of fact. *See, e.g., Nield, supra* at 811, 332 P.3d at 723; *see also, Cramer v. Slater*, 146 Idaho, 868, 875, 204 P.3d 508, 515 (2009) (the question of proximate cause is on of fact and almost always for the jury).

Dr. Barach’s declaration got past the admissibility threshold and the District Court abused its discretion in holding otherwise.

B. The District Court abused its discretion in holding that Mortensen’s Declaration filed with her Supplemental Response was inadmissible in its entirety.

As previously noted, the District Court conditionally granted Baker’s Motion for Summary Judgment, and pursuant to Mortensen’s Motion for Additional Time Under IRCP 56(d) (R., Vol. 1, p. 149), the District Court allowed Mortensen an additional ninety (90) days from the date of the decision to supplement the record as to the issue of causation. R., Vol. 1, p. 312.

Mortenson timely filed her Supplemental Response, which was supported by her declaration and her medica records from NJH. R., Vol. 1, g. 320 – 375. Baker filed their Supplemental Reply on October 1, 2020. The following day, the Court issued its Order granting Baker’s Motion for Summary Judgment. R., Vol. 1, p. 400 – 403.

In that Order, the District Court held that, with respect to Mortensen's Declaration, "[w]hat Plaintiff may have been told about her condition, and what is contained in her medical records, are inadmissible hearsay. Furthermore, Plaintiff is not qualified to testify as to causation and any such testimony lacks foundation." R., Vol. 1, 402.

The District Court conducted no analysis of *why* the statements made to Mortensen by her health care providers at NJH (which were corroborated by the corresponding medical records) did not fall within the hearsay exceptions found in IRE 803(4) and 803(23).

The District Court abused its discretion in not considering the Mortensen's Declaration filed in support of her Supplemental Response.

Although the District Court did not address the arguments made by Baker in their Supplemental Reply, it appeared to have at least summarily reviewed it, thus for the purposes of this appeal, Mortensen will address the arguments raised by Baker in that reply.

1. The contents of Mortensen's Declaration filed in support of her Supplemental Response to Baker's Motion for Summary Judgment were admissible and sufficient create an issue of material fact with respect to causation.

Mortensen's declaration attached as exhibits, several of her relevant medical records from her recent extended visit to the NJH. R., Vol. 1, p. 320 – 375.

The records attached to Mortensen's declaration included assessments by her medical providers and test results, all of which unequivocally found – and diagnosed - inhalation exposure to Ozone insufflation, lung abnormalities including edema, erythema, friable mucosa, inflamed mucosa, a partially obstructed bronchomalacia in the left tracheobronchial tree, inhalation injury (damage to the respiratory tract/lung tissue from a chemical irritant carried into the airway during inhalation), tracheobronchial injury (caused by inhalation of noxious gases); and included scientific explanations of how said inhalation causes cellular damage and the loss

of hypoxic pulmonary vasoconstriction. R., Vol. 1, p. 327 – 344. That is, the medical records submitted with Mortenson’s declaration, established causation – the inhalation of Ozone caused her referenced injury and/or damages.

As would be described in Mortensen’s forthcoming expert witness disclosure, the non-retained medical providers that conducted the above referenced testing and assessments at NJH regarding Mortensen’s condition were expected to testify (and made available for cross-examination) consistent with those records that were submitted to the District Court.

2. The statements contained in Mortensen’s Declaration fell within several exceptions to the hearsay rule, as did the contents of the medical records.

Baker first asserted that certified copies of medical records are *required* before the Court can rely on the contents of those records, citing IRCP 56(c)(4). That rule provides that “[a]n affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit must be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.”

In Mortensen’s sworn declaration, she attached a true and correct copy of her initial Bronchoscopy report from NJH. Thus, the record attached complied with the rule. *See also* R., Vol. 1, p. 456 - 459 (the records that were attached to the Declaration of Ms. Mortensen filed September 21, 2020, were downloaded from her patient portal at National Jewish Health).¹¹

At the time Mortensen filed her Supplemental Response, she was yet unable to obtain declarations from her treating physicians given her pending biopsy results, ergo why she

¹¹ In addition, *see* Certification of Medical Records from NJH, dated October 9, 2020. R., Vol. 1, p. 459.

requested additional time under IRCP 56(d) in that Supplemental Response; the final results of her biopsy were not going to be available until approximately October 23, 2020 (the eight-week mark) – approximately thirty days after the initial deadline to supplement. R., Vol. 1, p. 326. In addition, Mortensen was scheduled to see Dr. Jess Mandel on or about October 9, 2020, who is at the University of California San Diego and specializes in chemical inhalation injury.¹²

With respect to Baker’s argument that Mortensen’s statements related to diagnosis and treatment, those fall within the hearsay exceptions outlined in IRE 803(4) and 803(23), and contrary to the District Court’s Order, they were and are admissible.

3. Mortensen did not opine on the ultimate issue of causation in her Declaration in support of the Supplemental Response.

Baker next argued in their reply that Mortensen was not competent to render medical causation opinions. R., Vol. 1, p. 380. Defendants are correct. However, Mortensen can make statements related to what was conveyed to her by medical professionals (particularly when corroborated by entries made by those same medical providers, in her medical records). As set forth above, these statements fall under several exceptions to the hearsay rule, including but not limited to: IRCP 803(3) then existing mental, emotional or physical condition; IRCP 803(4) statement for purposes of medical diagnosis or treatment; IRCP 803(6) records of regularly conducted activity (including opinions and diagnoses made at or near the time by, or from information transmitted by, a person of knowledge); IRCP 803(23) medical or dental tests and test results for diagnostic or treatment purposes.

¹² R., Vol. 1, p. 323; *see also* R., Vol. 1, 345 – 366 (UpToDate article re: Inhalation Injury in which Dr. Mandel contributed).

4. Mortensen did not go to National Jewish Health only to support her claim in this litigation.

Baker next argued in their reply, that “tests performed in anticipation of, or for purposes of litigation, however, are not self-authenticating, citing IRE 803(23)(C). R., Vol. 1, p. 382. Specifically, Baker argued that the medical records submitted by Mortensen with her Supplemental Response were *expressly* prepared for purposes of litigation and are therefore not self-authenticating. *Id.* The premise of Baker’s argument is false.

Mortensen went to NJH seeking evaluation and treatment. She anticipated (and was hopeful) that her medical care providers there could determine what caused her injuries and thereafter render an appropriate plan of care. Her evaluation and treatment at that facility was not “procured” in anticipation of, or for the purpose of litigation.

Mortensen conducted her own research, made her own contacts, scheduled her own visits and underwent all testing and evaluations on her own. For Baker to call into question the “veracity” of the various providers that Mortensen saw, or the test results or findings, was entirely without basis. R., Vol. 1, p. 458.

Baker then took the apparent position that because their *motion was pending* at the time Mortensen was seen at National Jewish Health, the test results or assessments made, are not credible or somehow *not* objective; that they *cannot be* self-authenticating. R., Vol. 1, p. 382.

There is absolutely no basis for Baker’s position that the “medical records submitted by [Mortensen] with her supplemental response were expressly prepared for the purposes of this litigation and are therefore not self-authenticating.” R., Vol. 1, p. 382.

The medical records submitted by Mortensen in her Supplemental Response are admissible and support a finding that there is sufficient evidence to establish the inhalation of

Ozone caused her documented injuries, or at the very least, those records and statements made to her by her health care providers, establish an issue of fact on that issue.

5. The District Court erred in granting Baker’s Motion for Summary Judgment following Mortensen’s Supplemental Response, including denying her renewed request for additional time under IRCP 56(d).

On October 2, 2020, the day after Baker filed their supplemental reply brief, the District Court entered an Order granting Baker’s Motion for Summary Judgment notwithstanding Mortensen’s supplemental response, and also denied Mortensen’s request for additional relief under IRCP 56(d).

In that Order, the District Court held that “[w]hat Plaintiff may have been told about her condition, and what is contained in medical records, are inadmissible hearsay. Furthermore, Plaintiff is not qualified to testify as to causation and any such testimony lacks foundation.” R., Vol. 1, pg. 402.

With respect to Mortensen’s renewed motion for relief under IRCP 56(d), the District Court stated “... the record reflects that Plaintiff had ample time to obtain the necessary testimony and has in fact participated in a number of examinations and tests. There is no good cause to further continue Defendants’ pending motion for summary judgment.” R., Vol. 1, p. 402.

In Mortensen’s declaration filed in support of her Supplemental Response, she testified “[b]ased on my several discussions with providers and staff [at] National Jewish Health in Denver, the hospital was essentially closed to all patient[s] that were not critical, for a period of months due to Covid 19, and it wasn’t until late August that I could be seen or evaluated.” R., Vol. 1, p. 321, ¶ 3.

Mortensen completed a week-long evaluation during the week of August 23 – 28, and her test results, including the results of her lung biopsy, were not finalized. *Id.*, ¶¶ 4, 5, and 6.

The District Court previously allowed Mortensen additional time (90 days) to undergo evaluation and testing so that she could supplement her response to Baker’s Motion for Summary Judgment, but did not afford her additional time requested in her Supplemental Response to submit the *results* of that evaluation and testing, which was conducted during that 90 day window. In sum, the District Court held “I will let you get the evaluation and testing but I’m not letting you submit declarations from those who can testify pertaining to the results of that evaluation and testing.”

The District Court entered Judgment dismissing Mortensen’s Complaint with prejudice on the same date. R., Vol. 1, p. 398.

The District Court erred in granting Baker’s Motion for Summary Judgment and in denying her request for additional time to submit the forthcoming test results that could be filed with the declarations of her providers (such as Drs. Balkissoon and Mandel).

C. The District Court abused its discretion in denying Mortensen’s Motion for Reconsideration.

Following the District Court’s entry of Judgment, on October 16, 2020, Mortensen filed her Motion for Reconsideration. R., Vol. 1, p. 404 – 405. The motion was supported by the Declaration of Jess Mandel, M.D. and Declaration of Ronald C. Balkissoon, M.D.

A district court has no discretion on whether to entertain a motion for reconsideration pursuant to I.R.C.P. 11.2. *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of the interlocutory order. *Id.* (citations omitted). However, a motion for reconsideration need not be supported by any new evidence or authority. *Id.*; *Johnson v. Lambros*, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006).

On November 25, 2020, the District Court entered its Order denying Mortensen’s Motion for Reconsideration. R., Vol. 1, p. 514 – 522. In that Order, the District Court declined “to consider any additional evidence submitted by Plaintiff after September 20, 2020. To do so would render the Court’s prior order meaningless, and is further inconsistent with the language of intent of Rule 56.” R., Vol. 1, p. 517.

Although the District Court recognized “that ozone treatment for a urinary tract infection does not appear to be a common medical practice, and as such, there may be little experience or research addressing possible adverse effects” the District Court went on to opine that “[i]n such circumstances, causation may be established through a differential diagnosis whereby all other likely causes of the alleges symptoms are ruled out ...” R., Vol. 1, p. 522.

Notwithstanding the District Court’s holding that it would not consider the declarations of Drs. Mandel and Balkissoon, after discussing *some* of the contents of those declarations, it held that “there is no analysis ruling out all various possible causes of Plaintiff’s symptoms leaving ozone as the most likely source of the alleged injuries.” R., Vol. 1, p. 522.

1. The District Court abused its discretion in not considering the Declarations of Drs. Mandel and Balkissoon in support of Mortensen’s Motion for Reconsideration.

As set forth above, Mortensen, in her Supplemental Response, requested additional time for the final results of her lung biopsy (which were pending) so that she could submit the declarations of Drs. Balkissoon and Mandel. The District Court denied this request.

In its Order denying that request, the District Court held “[i]n the pending motion for reconsideration, the Court declines to consider any additional evidence submitted after September 21, 2020.” R., Vol. 1, p. 517. In so ruling, the District Court relied on the case of *Ciccarello v. Davies*, 166 Idaho 153, 456 P.3d 528 (2019). *Ciccarello* is factually distinguishable from this case, and actually supports Mortensen’s position.

In *Ciccarello*, this Court upheld the district court’s denial of Ciccarello’s motion for reconsideration because Ciccarello filed supplemental expert declarations past the time the respond to defendant’s motion for summary judgment, and did not file a motion for extension of time under 56(d); given that no motion for an extension of time was filed, it was not an abuse of discretion for the district court not to consider said “untimely” declarations. *Id.*, at 162, 456 P.3d at 528.

In this case Mortensen did move for addition time under IRCP 56(d), which the District Court initially did grant, but upon her renewed request for additional time (a matter of a few weeks, given the relevant test results were pending), denied her request. This begs the question, what good did it do to allow Mortensen more time for evaluation and testing, if the results of the evaluation and testing can’t be admitted?

The District Court’s refusal to consider the declarations of Drs. Mandel and Balkissoon was an abuse of discretion.

2. The Declaration of Dr. Mandel was admissible and established the element of causation.

With respect to his qualifications, Dr. Mandel is a Board-Certified pulmonologist (a physician who specializes in the respiratory system), who is a Chief of the Division of Pulmonology, Critical Care and Sleep Medicine, as well as a professor of medicine at U.C. San Diego Health. *R.*, Vol. 1, p. 422.

Mortensen also submitted an UpToDate¹³ article Dr. Mandel contributed to on the topic of inhalation injury (including pathophysiology, clinical features, diagnosis, initial and

¹³ UpTo Date has been described as one of the most trusted clinical decision support resources in the world. Per it’s website “Our more than 7,100 physician authors, editors, and peer reviewers use their deep clinical domain expertise to critically evaluate available medical literature to produce original content in a succinct, searchable format that can be quickly and easily accessed at the point of care.”

subsequent management, and special considerations of inhalation injury, which article references 82 articles and studies on the subject) as well as Dr. Mandel's profile (including education and experience) were submitted to the District Court. R., Vol. 1, p. 344 – 370; *see also* R., Vol. 1, p. It is hard to imagine anyone that is more qualified than Dr. Mandel to render an expert opinion on causation in this case.

Recall, in her declaration, Dr. Barach testified pertaining to the issue of dosages in terms of the FDA's limitation of .05 ppm ("shall not exceed"), that the Ozone provided to Mortensen had the concentration of 40 ppm, and that Ozone is a toxic gas with no known useful medical application. Dr. Mandel's declaration confirmed there is no FDA approved therapeutic role for inhaled Ozone. R., Vol. 1, p. 422.

Dr. Mandel (who again has contributed to numerous publications on the subject) confirmed that it is "well known within the scientific and medical community that Ozone is a toxic gas, which is unsafe and unreasonably dangerous – particularly if inhaled." *Id.*

As one of her treating physicians, Dr. Mandel reviewed records from the NJH, which records included the results of evaluation and several tests (including lung biopsies) performed and/or conducted on Mortensen over the course of a week. R. Vol. 1, p. 421. Based on his review, Dr. Mandel opined that the "[t]est results at National Jewish Hospital in August of 2020 confirm Ms. Mortensen suffers from airway hyper reactivity and chronic airway inflammation, which findings are consistent with chronic respirator issues and/or symptoms of which she complains, which are also consistent with injury to the lung that could result from the inhalation of Ozone." R., Vol. 1, p. 422.

Dr. Mandel unequivocally testified in his declaration: "[i]n my professional opinion, Ms. Mortensen suffered injuries to her lungs as a result of her inhalation of the Ozone ordered by

[Dr.] Jeffrey Baker. Her test results from National Jewish Hospital confirm that she suffered such injuries and on a more probable than not basis, those injuries were caused by her inhalation of Ozone ordered by Dr. Baker.” *Id.*¶ 7.

3. The Declaration of Dr. Balkissoon was admissible and established the element of causation

Dr. Balkissoon is a Board-Certified pulmonologist with the NJH. R., Vol. 1, p. 460.

NJH is the leading respiratory hospital in the county.

Dr. Balkissoon oversaw Mortensen’s evaluation at NJH and is one of her treating physicians (a non-retained expert). Dr. Balkissoon reviewed Mortensen’s battery of test results and consulted with her several treatment providers at NJH, based on which he arrived at the following impressions which are relevant to the issue of causation in this case (*see* R., Vol. 1, p. 462 – 467):

“Irritant induced laryngeal obstruction. I believe that the Ozone is well recognized for its abilities to aggravate airway disease has contributed to some ongoing issues with inducible laryngeal obstruction¹⁴...

“Aggravation of pre-existing asthma and/or Reactive airway dysfunction syndrome (irritant induced asthma by Ozone. Ozone is well recognized to cause an aggravation of underlying asthma and indeed can cause a range of alterations of the airways including fibrosis of bronchioles and alveolar ducts ... she has evidence for borderline airway hyperresponsiveness at the current time ... Irritant induced asthma can certainly show persistence of neutrophils, lymphocytes and eosinophils, thickening of the basement membrane. This patient demonstrates some but not all of these features in her biopsies. I defer to Dr. Pacheco our occupational environmental medicine expert with regard to the

¹⁴ Inducible laryngeal obstruction (ILO) describes an inappropriate, transient, reversible narrowing of the larynx in response to external triggers. Numerous other terms have been used to describe this ILO, including paradoxical vocal fold motion, laryngeal dyskinesia, vocal cord dysfunction (VCD), and periodic occurrence of laryngeal obstruction. Emphasis added. <https://www.uptodate.com/contents/inducible-laryngeal-obstruction-paradoxical-vocal-fold-motion>.

connection to her current symptoms and the Ozone exposure that occurred in February of 2019.”

On page 2 of Dr. Balkissoon’s report, he summarizes his consultation with Dr. Karin

Pancheco:

Dr. Pacheco from our Occupational Environmental Lung Disease group opined that the patient did indeed have an inhalation exposure to Ozone insufflation in early 2019 with persistent chest tightness, lung constriction, and dry cough. She made note of the normal lung function exercise test and chest CT and minimal bronchial hyperactivity based on methacholine challenge. She noted the evidence for edema and erythema found throughout the tracheobronchial tree. **She opined that the patient’s immediate symptoms at the time of the sore throat and chest tightness were consistent with previous descriptions of the effects of Ozone exposure. The subsequent symptoms of lung burning, shortness of breath, and chest tightness also are consistent with the known effects of Ozone exposure and she noted that since being out of that exposure, her symptoms have gradually improved.** It was her opinion that the patient had not sustained permanent lung damage. She felt the current cyclical symptoms of worsening with inability to take a deep breath, increased phlegm production, headaches, nausea, dizziness and decreased energy plus specific symptoms occurring at 5:55 p.m. every night could not be explained by her previous Ozone exposure.

Emphasis added.

Put another way, Mortensen was suffering from other symptoms, which could not be explained by Ozone exposure, but the symptoms related to her lungs, were explained as due to Ozone exposure. In this regard, this case is similar to *Weeks, supra*.

In *Weeks*, the district court found that the plaintiff’s expert (Dr. Smith) did not qualify as an expert and that his testimony was not admissible to prove causation.¹⁵

In *Weeks*, Dr. Smith (the plaintiff’s expert) “testified that the infusion was a substantial factor in causing Evelyn’s death to a reasonable degree of medical probability, but he was unable

¹⁵ The patient in *Weeks* died as a result of a chemical infusion to her brain.

to determine the exact effect of the medication on Evelyn's brain. He testified that the mechanical aspect of fluid buildup could not be separated from the chemical aspect of the composition of the fluid, and he was not certain whether the chemicals themselves, the volume of fluid, or the combination of the two caused her death." *Id.* at 839, 153 P.3d 1185. Dr. Smith testified that "[n]o research has been done based upon this exact type of occurrence ... However, Dr. Smith was clear that infusion of this volume of fluid, whether over an eight-hour period of time or a period of a few minutes, would cause a deleterious effect "just from the fact of fluid going when it should be going out." *Id.* at 839, 153 P.3d 1185.

Of particular importance in the *Weeks* case was the Court's analysis regarding the "lack of research." "In instances of 'a rare occurrence' where there are few opportunities for scholarly research, the lack of published studies should not bar otherwise scientifically valid testimony." *Id.* Similar to this case, it is a rare occurrence that a physician would treat a suspected urinary tract infection by ordering the patient push a toxic gas through a tube inserted in their vagina.

In this case, as noted above, the District Court apparently held that in order for Dr. Balkissoon's opinions to be admissible he had to conduct a differential diagnosis. He did. In looking at the totality of Mortensen's complaints, under "Impression" Dr. Balkissoon ruled out significant cardiac pathology, underlying autoimmune disease as a cause of her back pain, that they need to "rule out" esophageal spasm as a cause of her chest pain – but with respect to her lungs he found irritant induced inducible laryngeal obstruction and aggravation of pre-existing asthma and/or reactive airway dysfunction syndrome (irritant induced asthma by Ozone). *R.*, Vol. 1, p. 462. Dr. Balkissoon conducted a differential diagnosis that the District Court held was "lacking."

Dr. Balkissoon reached these conclusions based on sound scientific principles after review of Mortensen's medical tests and after consulting with her several providers at NJH.

The District Court abused its discretion in not considering (and/or appreciating) the declarations of Drs. Mandel and Balkissoon filed in support of Mortensen's Motion for Summary Judgment.

V. CONCLUSION

Mortensen's statements and records pertaining to her medical history, diagnosis and treatment, which were corroborated by her medical records, are admissible, and fall within confines of several hearsay exceptions.

Mortensen's experts – Drs. Baruch, Balkissoon and Mandel, meet the qualifications of IRE 702 as they are physicians who “possess knowledge, skill, expertise, training or education” to opine on the issue of causation in this case, which will assist the trier of fact to understand the evidence and determine the facts at issue.

Based on the foregoing, Mortensen respectfully requests that this Court enter an Opinion finding that District Court erred in granting Baker's Motion for Summary Judgment based on Mortensen's original and supplemental response to that motion, in denying Mortensen's renewed request for additional time under IRCP 56(d), and in denying Mortensen's Motion for Reconsideration, and remand the case back to the District Court for further proceedings, so that Mortensen may this case heard by the trier of fact.

Respectfully submitted this 24th day of May, 2021.

POINTS LAW

/s/ Michelle R. Points
Michelle R. Points
Attorneys for Appellant

CERTIFICATE OF SERVICE –I.R.C.P. 5(f)

I certify that on May 24, 2021, I caused a true and correct copy of this entire document to be served pursuant to I.R.C.P. 5(b) as indicated below:

<u>Served</u>	<u>Party</u>	<u>Counsel</u>	<u>Means of Service</u>
<input checked="" type="checkbox"/>	Defendants	Terrence S. Jones Vala L. Metz QUANE JONES McCOLL, PLLC US Bank Plaza 101 S. Capitol Blvd., Ste. 1601 P.O. Box 1576 Boise, Idaho 83701 Telephone (208) 780-3939 tsj@quanelaw.com vlm@quanelaw.com	<input type="checkbox"/> U.S. Mail, Postage Paid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Fax Transmittal <input type="checkbox"/> Email <input checked="" type="checkbox"/> iCourt Portal

/s/ Michelle R. Points
Michelle R. Points