STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DONNA M. SUER, ET AL,

Plaintiff,

vs.

JAMES S. VALENTINE, ET AL,

Defendant.

Case No. **CV 2011 2846**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFFS' MOTIONS TO STRIKE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is presently before the Court on plaintiffs' (Donna Suer, individually and as *guardian ad litem* of Carianne Suer, hereinafter collectively Suers) motion to strike defendants' (James and Savitri Valentine and their daughter Christina Valentine, hereinafter collectively Valentines) motion to strike the Affidavit of Alice Jordan. Jordan's affidavit is part of Valentines' Motion for Summary Judgment, to be heard at a later time. Suers also move to strike the entire motion for summary judgment because oral argument on that motion will be heard eight days beyond the deadline imposed by this Court's Scheduling Order.

Suers filed their Complaint on April 4, 2011, alleging Valentines were negligent in not recognizing their horse (named "Dusty") was dangerous, and that such negligence caused damages to Carianne Suer in excess of $10,000.00. Complaint for Damages, pp. 2-3. Valentines filed their Answer and Demand for Jury Trial on May 25, 2011. On

July 11, 2011, this Court filed its Scheduling Order, Notice of Trial Setting and Initial Pretrial Order (Scheduling Order), scheduling this case for a five day jury trial to begin on May 21, 2012. That Scheduling Order established that "Motions for summary judgment shall be timely filed so as to be heard not later than **ninety-one (91) (thirteen weeks) before Trial.**" Scheduling Order, p. 2, ¶ 1. d. (bold in original).

On February 3, 2012, Valentines filed a motion for summary judgment and supporting brief and affidavits, arguing that no evidence exists regarding Valentines' knowledge of the dangerous propensities of the horse at issue and Suers therefore cannot meet their burden of showing any breach of a special duty owed by virtue of that knowledge. Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment, p. 2. In support of that motion for summary judgment, Valentines submitted the affidavit of Alice Jordan. Jordan was the prior owner of the horse in question ("Dusty"), and sold Dusty to Christina Valentine in 2006 or 2007. Affidavit of Alice Jordan, pp. 2-3, ¶¶ 5-17. Valentines filed a Notice of Hearing scheduling the hearing on their motion for summary judgment for March 5, 2012. Notice of Hearing, p.1.

On February 7, 2012, Suers filed their motion to strike the motion for summary judgment as untimely and their motion to strike the Affidavit of Alice Jordan. Also on February 7, 2012, Suers filed a motion to shorten time on the hearing of their motion to strike. On February 10, 2012, Valentines filed their opposition to the motion to strike and the motion to shorten time. At the beginning of the February 15, 2012, hearing on Suers' motions to strike, the Court granted Suers' motion to shorten time. The Court also rescheduled the hearing on Valentines' motion for summary judgment a day later, on March 6, 2012, due to Suers' counsel not being available on the March 5, 2012, date originally scheduled.

II. STANDARD OF REVIEW.

Evidentiary rulings, such as ones on the motion to strike before the Court, are reviewed under an abuse of discretion standard. *Perry v. Magic Valley Reg'l. Med. Ctr.,* 134 Idaho 46, 50, 995 P.2d 816, 820 (2000).

III. ANALYSIS OF PLAINTIFFS' MOTIONS TO STRIKE.

A. Plaintiffs' Motions to Strike the Affidavit of Alice Jordan.

Reviewing Courts apply the abuse of discretion standard when evaluating whether testimony offered in connection with a motion for summary judgment is admissible. *Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 15, 175 P.3d 72, 177 (2007) (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC,* 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)). In Idaho, a party may wait until hearing on a summary judgment motion to object to an opposing party's affidavits. *Hecla Mining Co. v. Star-Morning Mining Co.,* 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992). In *Shane v. Blair,* 139 Idaho 126, 75 P.3d 180 (2003), the Idaho Supreme Court wrote:

> We have held that the question of admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment. *Rhodehouse v. Stutts,* 125 Idaho 208, 211, 868 P.2d 1224, 12227 (1994). The trial court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible. *Dulaney v. St. Alphonsus Regional Med. Ctr.,* 137 Idaho 160, 163, 45 P.3d 816, 819 (2009). When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard. *Sulaney,* 137 Idaho at 163-64, 45 P.3d at 819-20.

139 Idaho 126, 128, 75 P.3d 180, 182. Rule 56(e) requires affidavits be made upon personal knowledge, "shall set forth such facts as would be admissible in evidence", and affirmatively show the affiant is competent to testify about the matters stated. I.R.C.P. 56(e).

With respect to the Affidavit of Alice Jordan, the question for this Court is whether Ms. Jordan is a fact witness or an expert witness. Suers argue Ms. Jordan was identified as a horse behavioral expert who will testify as to "the disposition of stallions which have been gelded and appropriate horsemanship groundwork." Plaintiffs' Brief in Support of Motion to Strike Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Alice Jordan, p. 4. Suers note Ms. Jordan's name was disclosed prior to expiration of the expert witness disclosure deadline, but no other information contemplated in I.R.C.P. 26(b)(4) has ever been provided to Suers. *Id.,* p. 3. Valentines argue "Alice Jordan was purely a fact witness as the prior owner of the horse" and that Ms. Jordan never set forth an opinion in her affidavit. Defendants' Memorandum of Authorities in Opposition to Plaintiffs' Motion to Strike, pp. 5-6 (emphasis in original). Valentines also provide the Court with evidence that Suers had knowledge of Ms. Jordan's having been Dusty's previous owner as early as July of 2011 and again during the deposition of Christina Valentine on September of 2011. Defendants' Memorandum of Authorities in Opposition to Plaintiffs' Motion to Strike, p. 5.

An expert witness is one whose scientific, technical, or other specialized knowledge would assist a trier of fact in understanding evidence or in determining a fact at issue. I.R.E 702. Where a witness is not testifying as an expert, such lay witness may nonetheless testify as to opinions which are:

> (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge.

I.R.E. 701. A witness who is not testifying as an expert must have personal knowledge of the matter. I.R.E. 602.

In the present case, the Affidavit of Alice Jordan sets forth her background with horses, the facts surrounding her acquisition of Dusty, and the gentle nature and absence of aggressive behavior she personally observed this specific horse to have. Affidavit of Alice Jordan, pp. 2-3. Suers only objection to Jordan's affidavit is the absence of materials listed in I.R.C.P. 26(b)(4)(A)(i) and the purported untimeliness of her "opinions disclosed in the November 30, 2011 affidavit". Plaintiffs' Brief in Support of Motion to Strike Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Alice Jordan, pp. 3-5. Certainly those would be valid objections if Jordan were being called to testify as an "expert". While stating the obvious, the Court's expert witness disclosure deadline only applies to "expert" witnesses. Equally obvious is that the requirement that the materials upon which the expert relies be timely disclosed, only applies to experts. While Jordan was disclosed as an expert by Valentines, in her affidavit on summary judgment, Jordan is simply *not* an expert. Jordan expresses no opinions in her affidavit. Suers make no objection that she did not, in fact, have personal knowledge of the horse's behavior she personally witnessed, and thus, Jordan can testify as a fact witness. None of the matters testified to in Jordan's affidavit require scientific, technical, or other specialized knowledge.

At oral argument, counsel for Suers stated that paragraphs 12, 15 and 19 state opinions. Paragraph twelve of Jordan's Affidavit reads: "I was so impressed with Dusty's gentle disposition that I would place my grandchildren, who were approximately five or six years old at the time, onto Dusty and lead them around my property." The only "opinion" in that paragraph would be the "gentle disposition", but that is a description based upon observation. Paragraph fifteen of Jordan's Affidavit reads: "At no time was Dusty ever aggressive towards a mare or exhibited signs that he had been used as a breeding stallion prior to him being gelded." Again, some opinion, but entirely

based upon observation. Paragraph nineteen of Jordan's Affidavit reads: "In my over 38 years of experience in purchasing, training, and selling horses, I found Dusty to be one of the most gentle and well mannered horses I have owned." Once again, some opinion, but based upon observation and experience. Idaho Rule of Evidence 701 controls this issue. That rule is captioned "Opinion testimony by lay witness" and reads:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

None of these paragraphs specified by Suers' counsel at oral argument run afoul of that rule allowing opinion testimony by lay witnesses.

Any expert testimony Jordan may offer at the future trial will be impacted by Valentines' failure to strictly adhere to I.R.C.P. 26(b)(4)(A)(i). However, Jordan's affidavit in support of Valentines' summary judgment motion contains no expert testimony. Valentines note that, ironically, Suers' expert witness disclosure is also deficient as to the materials required to be disclosed in I.R.C.P. 26(b)(4)(A)(i). Defendants' Memorandum of Authorities in Opposition to Plaintiffs' Motion to Strike, p. 9. This is an issue which will affect Suers' expert's ability to testify at trial, but the deficiency is not an issue impacting Suers' motion to strike.

At present, in analyzing Suers' motion to strike, the Court is left to look at Jordan's affidavit "and determine whether it alleges facts which, if taken as true, would render the testimony admissible." *Dulaney,* 137 Idaho 160, 163, 45 P.3d 816, 819. The Court finds this standard has been met, that Jordan has alleged no facts that would render her testimony in her affidavit inadmissible. This Court finds that as to her

affidavit, Jordan is a fact witness. Suers' Motion to Strike the Affidavit of Alice Jordan must be denied.

B. Plaintiffs' Motions to Strike Defendants' Summary Judgment Motion.

Suers next ask the Court to strike the summary judgment as a whole because the Court's Scheduling Order was violated when hearing on Valentines' motion for summary judgment was scheduled for seventy-seven days before trial, not the ninety-one days before trial as required by the Court's Scheduling Order. Plaintiffs' Brief in Support of Motion to Strike Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Alice Jordan, p. 2. Suers claim Valentines have given no explanation for the delay in scheduling the hearing on the summary judgment, and that Valentines' counsel made no communication with Suers' counsel prior to service of the notice of hearing on the motion for summary judgment. *Id.* Suers posit they are prejudiced by such a late summary judgment hearing, arguing the late summary judgment "is an obvious attempt to catch the plaintiffs by surprise, waiting until now to disclose information that was deliberately withheld." *Id.,* p. 3. Suers claim the combination of the summary judgment timing and the failure of Valentines to have provided Ms. Jordan's *curriculum vitae*, fee schedule, or expert report have "placed [Suers] at a disadvantage in preparing their arguments in opposition to the pending summary judgment motion." *Id.,* p. 5. Again, the latter part of that argument assumes that Jordan's affidavit is submitted as an expert, which this Court has found not to be the case.

In response, Valentines argue the summary judgment hearing date was based upon the Court's available hearing dates, and was not scheduled to "ambush" or otherwise prejudice Suers. Defendants' Memorandum of Authorities in Opposition to Plaintiffs' Motion to Strike, pp. 7-8. Valentines note that as required by the Idaho Rules

of Civil Procedure, Valentines served their motion for summary judgment, affidavits in support and brief at least twenty-eight days prior to hearing. *See* I.R.C.P. 56(c); Defendants' Memorandum of Authorities in Opposition to Plaintiffs' Motion to Strike, p. 8. Valentines have *more* than satisfied the requirement imposed by that rule. On February 3, 2012, Valentines filed a motion for summary judgment, supporting brief and affidavits. Also on February 3, 2012, Valentines filed a Notice of Hearing scheduling the hearing on their motion for summary judgment for March 5, 2012. Notice of Hearing, p.1. This gave Suers *an additional three days* under the rule within which to timely respond with their own memorandum and affidavits.

Thus, Valentines have satisfied the deadlines in I.R.C.P. 56(c), but have run afoul of the deadline imposed by this Court's Scheduling Order. Valentines claim: "In no manner has defense attempted to ambush Plaintiffs or otherwise prejudice them to respond to a motion filed 30 days before the hearing date." *Id.* Valentines state good cause exists which would allow the Court to hear the motion for summary judgment on a date less than ninety-one days from the trial date, because counsel for Valentines called for a summary judgment hearing date approximately six months before trial and set the matter for the February 28, 2012, date provided by the Court (which would have only been 82 days before trial), but then Valentines' counsel moved the hearing out one week upon receiving a jury summons. *Id.,* p. 10; Affidavit of Tamela Richards, p. 2, ¶¶ 5-6.

It is essential to look at the purpose behind the deadlines imposed under I.R.C.P. 56 (which Valentines have met) and the purpose behind the deadline imposed by this Court's Scheduling Order. Idaho Rule of Civil Procedure 56(c) requires the party making the summary judgment motion, to serve the motion, supporting affidavits and

memorandum upon the party opposing summary judgment, at least 28 days prior to hearing on the summary judgment motion. I.R.C.P. 56(c). The party opposing then has to respond no later than fourteen days out from that hearing. If, as is often the case (but not the case here), the motion for summary judgment is served on the last possible day under I.R.C.P. 56(c), the party opposing the motion has fourteen days to respond with a brief and affidavits in opposition. Idaho Rule of Civil Procedure 56(c) sets the parameters to avoid the "ambush" Suers now claims. Valentines not only met that rule, but their motion was filed thirty-one days before oral argument was scheduled, giving Suers and additional three days than the minimum provided by I.R.C.P. 56(c).

The purpose behind the requirement in this Court's Scheduling Order that motions for summary judgment be heard at least ninety-one days before trial is inherently to protect the Court's calendar and its ability to deliberate on the motion itself if it is taken under advisement. The Court has up to thirty days to consider a motion under advisement, or the Court cannot cash its next paycheck. Idaho Constitution, Article V, Section 17; I.C. § 59-502. If the Court takes a motion for summary judgment under advisement for the full thirty days, the parties are now down to two months before trial by the time the decision on summary judgment is announced. By having Valentines' motion for summary judgment heard seventy-seven days before trial as opposed to ninety-one days before trial, the only one prejudiced is the Court, and that prejudice is simply the reduction in the number of days the Court can, as a practical matter, deliberate over the decision. If any *party* is prejudiced by that reduction in time, it would be the moving party, the Valentines in the present case, due to the Court having a reduced amount of time to deliberate on their motion.

The timelines imposed by I.R.C.P. 56(c) may be altered when "good cause" is shown. *Sun valley Potatoes, Inc. v. Roshalt, Robertson & Tucker,* 133 Idaho 1, 981

P.2d 236 (1999). Even if it were appropriate for this Court to apply the "good cause" standard to this Court's deadline imposed by its Scheduling Order, Valentines have shown "good cause" due to counsel's obligations regarding jury duty. Additionally, Suers have not demonstrated any prejudice.

Importantly, Rule 1 of the Idaho Rules of Civil Procedure sets forth the scope of the Rules and states the Rules "shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." I.R.C.P. 1(a). The harmless error rule states:

> The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

I.R.C.P. 61. It follows that, absent setting forth some form of actual prejudice suffered, Suers cannot now receive the relief they seek. Suers received the summary judgment filings in excess of twenty-eight days before the hearing thereon; and hearing on the motion for summary judgment is scheduled to take place eleven weeks before trial. It is only the Court who will suffer any modicum of prejudice, as the Court must decide a dispositive issue in a time period shorter than that it set aside for itself in its Scheduling Order.

Finally, as pointed out by counsel for Valentine at oral argument, Suers have not moved for a continuance of the summary judgment proceedings as is allowed under I.R.C.P. 56(f). Instead, Suers have chosen to simply move to strike Valentines' motion for summary judgment in its entirety. The most important reason this Court must deny Suers' motion to strike Valentines' motion for summary judgment is there is simply no basis under the Idaho Rules of Civil Procedure for moving to strike an opponent's motion in its entirety. All that is allowed in this regard is a motion to strike any insufficient defense, any redundant, immaterial, impertinent, or scandalous matter from

a pleading. I.R.C.P. 12(f). Obviously that is not the situation here and Suers have not filed their motion to strike under that rule. Suers cite I.R.C.P. 16(i), 26(b)(4), 26(e) and 37(e), as the rule basis for their motion to strike. Plaintiffs' Motion to Strike Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Alice Jordan, p. 1. Idaho Rule of Civil Procedure 16(i) provides the court "may make such orders…as are just", specifically listing the permissible sanctions listed under I.R.C.P. 37(b)(2)(B), (C) and (D) (none of which are applicable here), "if a party's attorney fails to obey a scheduling or pre-trial order". Idaho Rule of Civil Procedure 26(b)(4) only applies to expert witnesses, and this Court has found Jordan's affidavit is not expert testimony. Idaho Rule of Civil Procedure 26(e) discusses the duty to supplement all discovery, but Suers only claim this was violated in the context of expert witness disclosure. Plaintiffs' Brief in Support of Motion to Strike Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Alice Jordan, pp. 4-5. There is no rule basis for Suers' motion to strike Valentines' summary judgment motion.

C. Plaintiffs' Request for Fees.

Suers "…move this Court, pursuant to Rules 16(i), and/or 37(b), Idaho Rule of Civil Procedure, for an award of expenses, including attorney fees, incurred by defendants in obtaining the Order requested." Plaintiffs' Motion to Strike Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Alice Jordan, p. 1. Suers' brief shows this request is premised on the claim that Jordan is an expert witness. Plaintiffs' Brief in Support of Motion to Strike Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Alice Jordan, p. 6. The Court has discussed above why Jordan is a fact witness. That, coupled with the fact that Suers have not prevailed on any part either of their motions to strike, causes Suers' claim for fees to be without merit.

IV. CONCLUSION AND ORDER.

For the reasons stated above, Suers' Motion to Strike the Affidavit of Alice Jordan must be denied and Suers' Motion to Strike Valentines' Motion for Summary Judgment must be denied.

IT IS HEREBY ORDERED Suers' Motion to Strike the Affidavit of Alice Jordan is DENIED.

IT IS FURTHER ORDERED Suers' Motion to Strike Valentines' Motion for Summary Judgment is DENIED.

Entered this 15th day of February, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Jeffrey R. Owens	667-1939	Todd R. Startzel	509-624-2081

_____
Jeanne Clausen, Deputy Clerk