IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-1983
Polk County No. LACL139112

ROBYN MENGWASSER,

Plaintiff-Appellant,

vs.

JOSEPH COMITO and CAPITAL CITY FRUIT COMPANY,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE ROBERT HANSON, JUDGE

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

Six issues remain before the Court; 1) did the District Court abuse its discretion by excluding Dr. Dierenfield's testimony as to his opinions formed as a treating provider for Robyn Mengwasser, 2) did the District Court err by failing to instruct the jury on the "Eggshell" Plaintiff jury instruction as there was substantial evidence in the record to support it and for the jury to infer it, 3) did the District Court err in allowing an inconsistent verdict to stand and in denying the request for the Partial New Trial, as the future damages were required because no testimony could contradict the expert testimony provided by Plaintiff, Plaintiff's experts, and Defendants' expert, 4) did the District Court err by excluding evidence of Robyn Mengwasser's recent medical treatments, 5) did the District Court err in ordering Robyn Mengwasser to pay Defendants' costs under Iowa Code §677.10, and 6) should a partial new trial should be granted or a new trial on all issues?

I. The Trial Court Abused Its Discretion In Limiting The Testimony of Robyn Mengwasser's Treating Provider, Dr. Randy Dierenfield, Under Iowa Rule of Civil Procedure 1.500(2)(c) As It was Timely Provided to The Defendants

Under Iowa law, the courts are committed to a liberal rule on admissibility of opinion testimony. *DeBurkarte v. Louvar,* 393 N.W.2d 131, 138 (Iowa 1986).

Robyn Mengwasser began chiropractic treatment with Dr. Randy Dierenfield in October of 2015. (Second Amd. App. Vol. II, p. 18) (Second Amd. App. Vol. I, 295, Tr. 20:6-8). Robyn Mengwasser filed her petition in this matter on September

27, 2017. (Second Amd. App. Vol. I, pg. 27-31). Nothing in the record reflects that Dr. Dierenfield was an expert retained in anticipation of litigation.

Yet the Defendants persist with the notion that Dr. Dierenfield is a witness required to submit a report under Iowa Rule of Civil Procedure 1.500(2)(b) and the trial scheduling order.

As a treating provider, Dr. Dierenfield's required disclosures fall under Iowa Rule of Civil Procedure 1.500(2)(c). This rule only requires that Dr. Dierenfield prepare a disclosure that states the "subject matter on which the witness is expected to present evidence under Iowa Rules of Evidence 5.702, 5.703, or 5.705" and a "summary of the facts and opinions to which the witness is expected to testify." Iowa R. Civ. P. 1.500(2)(c). Witnesses under this rule were not referenced in the trial scheduling order. (Second Amd. App. Vol. I, pg. 45).

Under Iowa Rule of Civil Procedure 1.500(2)(c) the time for disclosure of expert testimony is not "later than 90 days before trial." Iowa R. Civ. P. 1.500(2)(d)(1). Here, Robyn Mengwasser disclosed Dr. Dierenfield's expected testimony on March 4, 2019, more than 90 days before the June 24, 2019 trial date. (Second Amd. App. Vol. III, p. 4). Thus, Defendants were timely provided with the substance of Dr. Dierenfield's testimony.

Defendants point only to the absence of Dr. Dierenfield's conclusions in Robyn Mengwasser's records as evidence that he is a witness required to provide

reports under Iowa Rule of Civil Procedure 1.500(2)(b). But treating providers are focused on treating patients, and treating providers ordinarily form mental impressions "substantially before he or she is retained as an expert witness, and often before the parties themselves anticipate litigation." *Carson v. Webb*, 486 N.W.2d 278, 280 (Iowa 1992). Such was the case with Dr. Dierenfield who began treating Robyn Mengwasser in October of 2015, nearly two years before Robyn filed her petition in this case. (Second Amd. App. Vol. I, 282 Tr. 7:11-13). Plaintiff is unaware of medical records that contain anything other than a patient's history, objective examinations and observations, diagnosis, and treatment plans.

In summary, the Plaintiff Robyn Mengwasser should have been allowed to present to the jury the opinions and conclusions of her treating provider, Dr. Randy Dierenfield, as to the source of her injuries and her permanent loss of function. Robyn Mengwasser requests a new trial on this issue, and a new trial is warranted as the trial court abused its discretion in excluding the timely provided opinions of Dr. Dierenfield.

II. The District Court erred by failing to instruct the jury on a Prior Asymptomatic Condition, otherwise known as the "Eggshell Plaintiff" jury instruction.

For some reason, over a dozen cases in Plaintiff's main appeal brief on the issue leads Defendants to believe that Plaintiff's argument is strained and improperly supported. In efforts to state there is no substantial evidence, the Defendants then

actually cite to conflicting evidence of "Eggshell Plaintiff" as if it should go into the Court's analysis at all. (Appellee Brief p. 29). "In *205 determining the sufficiency of the evidence, we give the evidence "the most favorable construction possible in favor of the party urging submission." *Hoekstra v. Farm Bureau Mut. Ins. Co*., 382 N.W.2d 100, 108 (Iowa 1986)." *Greenwood v. Mitchell*, 621 N.W.2d 200, 204-205 (Iowa 2001).

Substantial evidence exists in which a reasonable person could make the decision based on that evidence. *Id.* Viewed from the totality of the circumstances, viewed in the light most favorable to Plaintiff, who requested the instruction, Plaintiff stated sufficient evidence. (Second Amd. App. Vol. I, 117 Deposition of Dr. Harbach p. 50:12-19, p. 52:2-8; 119 p. 57:1-5; 120 p. 62:20-25, p.63:1-25, p.64:1-25; 121 p. 65:1-18; 338 Tr.124:18-21, 339 Tr. 125:10-12, 340 Tr. 126:10-16, 341 Tr. 127:4-11) (Second Amd. App. Vol. II, pgs. 21-22, 447).

The Defendants attempt to distinguish multiple specific cases of Appellant: *Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994), *Waits v. United Fire & Cas. Co*., 572 N.W.2d 565 (Iowa 1997). However, the Defendants fail to distinguish or refute "'Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion.' *Id*. at 920 (quoting *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999)). '[W]e give the evidence the most favorable construction it will bear in favor of supporting the instruction.'

Asher, 846 N.W.2d at 496–97." *Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr*., 935 N.W.2d 1, 14 (Iowa 2019). See also *Thornton v. Am. Interstate Ins. Co*., 897 N.W.2d 445, 473 (Iowa 2017) *Ludman v. Davenport Assumption High Sch*., 895 N.W.2d 902, 919–20 (Iowa 2017).

The fact remains, there was indeed substantial evidence to support the giving of the jury instruction of "Eggshell Plaintiff". Further, the Defendants fail to address: "As a general rule, the "eggshell plaintiff" instruction is applicable "when the pain or disability arguably caused by another condition arises after the injury caused by the defendant's fault has lighted up or exacerbated the prior condition." *Waits*, 572 N.W.2d at 577." *Tibodeau v. CDI, LLC*, 902 N.W.2d 592, *5 (Iowa Ct. App. 2017).

Plaintiff will not waste the Courts time with restating all of the facts supportive of the instruction as it has already been listed. (Second Amd. App. Vol. I, pgs. (Second Amd. App. Vol. I, 117 Deposition of Dr. Harbach p. 50:12-19, p. 52:2-8; 119 p. 57:1-5; 120 p. 62:20-25, p.63:1-25, p.64:1-25; 121 p. 65:1-18; 338 Tr.124:18-21, 339 Tr. 125:10-12, 340 Tr. 126:10-16, 341 Tr. 127:4-11) (Second Amd. App. Vol. II, pgs. 21-22, 447).

The attempts to distinguish made by Defendants to *Benn* and *Waits* seem to be evidentiary in nature as they state Plaintiff did not present evidence and failed to develop evidence respectively. Plaintiff stands by her evidence, and there was in fact

substantial evidence. Since it is construed in favor of Plaintiff, Defendants arguments regarding *Benn* and *Waits* are irrelevant.

Even the case provided by Defendants *Bowers v. Grimley*, 2009 WL 139570 (Iowa Ct. App 2009), is inapplicable as overall caselaw to deny a jury instruction. Clearly at *8-*9, the Court of Appeals did a factual analysis. It did not automatically deny the Plaintiff's motion for new trial without an analysis. Plaintiff stands by her factual evidence in that it provides substantial evidence, and viewed in a light most favorable to her, it was sufficient to provide the instruction.

The Defendants instead attempt to convince the Court that the cases are similar with general statements that the Court of Appeals concluded no evidence was present that plaintiff was "more susceptible". The primary issue with Defendants' contention is that there was evidence presented here, and that the courts tend to err on the side of instructing the jury. *Waits* at 578, *Tibodeau* at *6, *Grebasch v. State*, 674 N.W.2d 682, *4 (Iowa Ct. App. 2003).

Finally, in an example given, the Defendants state that the Court will not introduce on speculation or conjecture, assumingly citing to the following citation: "The trial court, however, must refuse to instruct on "an issue having no substantial evidential support or which rests on speculation." *Clinton Land Co. v. M/S Assocs.*, 340 N.W.2d 232, 234 (Iowa 1983). *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). And yet, this still does not deal with the more recent caselaw

of *Greenwood* and *Eisenhauer*, cited above, and the fact that there is substantial evidence in the record.

The trial court's error in failing to allow the susceptibility "eggshell" instruction affected the ability of the jury to understand the future damages and materially misstated the law. The trial court's rulings prejudiced the Plaintiff and requires a partial new trial. The Appellant/Plaintiff prays that the Court do so now by reversing and remanding the District Court's rulings on a Motion for Partial New Trial and remand this to the District Court for further processing.

III. The District Court erred by failing to Order a Partial New Trial from an inconsistent jury verdict.

Preservation of Error and Standard of Review

This issue was preserved in the Motion for Partial New Trial, and again in the Notice of Appeal. (Second Amd. App. Vol. I, p. 452-461, 468). Apparently, the specificity of Plaintiff's argument offends the Defendants as to preservation of error. However, the Defendants fail to cite to any caselaw to show that this is a distinction that the Court must make.

This is significant, as the for the Appellate Court to hear an argument, the only requirement is that the Appellate Court having been aware that Plaintiff alleges there was an inconsistent verdict. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we

will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). *33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co*., 939 N.W.2d 69, 75 (Iowa 2020).

Indeed, "[t]he claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it. Id." *UE Local 893/IUP v. State*, 928 N.W.2d 51, 60 (Iowa 2019) (citing to *Meier*).

There is no problem with Mengwasser becoming more specific with an issue she properly raised to the Court in the Motion for New Trial. The Court denied the New Trial and did no analysis on the issue. (Second Amd. App. Vol. I, p. 462-464). The issue of inconsistent jury verdicts was preserved

Defendants wish the Court of Appeals to include a copy/paste thought process to its analysis, in that the argument Mengwasser brings must be a copy/paste of her motion for new trial. This removes the entire purpose of the Appellate Court. The lower court considered the inconsistent jury verdict issue and denied the motion for new trial, therefore it was decided, and the issue is preserved for appeal. (Second Amd. App. Vol. I pgs. 463)

As to standard of review, it would seem there is some more confusion as to the applicable standard created by Defendants. Defendants cite to Clinton *Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa

2006), whereas Plaintiff cites to the more recent case that applies *Clinton* and supplants its analysis-- *Pavone v. Kirke*, 801 N.W.2d 477, 496 (Iowa 2011).

Nonetheless, the additional standards stated by Defendants have to do with what the trial court has the option to do when faced with an inconsistent verdict. It is irrelevant, as the trial court denied the motion for new trial based on an inconsistent verdict. Both parties agreed that the standard of review is for errors at law.

Again, the Defendants make another attack claiming labored contentions on meritorious arguments. The Defendants claim the arguments are without merit, when in fact, the Defendants know they have merit.

Argument

a. Sufficiency of Evidence

Plaintiff stands by her evidentiary analysis that the medical experts all argued permanent damage. (Second Amd. App. Vol. I, Deposition of Dr. Harbach 119 p. 57:1-5; 120 p. 62:20-25, p.63:1-25, p.64:1-25; 295 Tr. P. 20:17-19; 331 Tr. 79:6-9; 341 Tr. P. 127:4-11; 338 Tr. 124:18-21; 339 Tr. 125:10-12) (Second Amd. App. Vol. II, pgs. 21-22). Mengwasser's experts agreed. (Second Amd. App. Vol. II, pgs. 21-22). Dr. Harbach agreed. (Second Amd. App. Vol. II, pg. 447). Defendants arguments seem to go to a "statistically" improbable outcome, but in fact Dr. Harbach testified that she had permanent injury from the collision. (Second Amd. App. Vol. II, pg. 447).

The contempt laden words by the Defendants that Mengwasser's argument has no merit and is labored, backfires on the Defendants as they attempt to argue reasonable interpretations. Further, they argue, without caselaw, that because the Collision put Plaintiff in a position that she would not reach naturally on her own, eventually, that there can be no inconsistency in the jury verdict.

This argument ignores the entire point of law, if a person causes damage, they are liable for it. Compensating for damages in law has no meaning if a person can just run someone over with a vehicle and say "well, you would have died by age 90 anyway, so there was no permanent damage".

While it is in the province of the jury to believe all or some of any witness's testimony, the Defendants ignore the argument of Plaintiff that the Jury cannot completely ignore the medical testimony. "Upon our review, we cannot say Foster's medical testimony was "so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in the evidence, or contradictory within itself' " so as to be the subject of rejection by the jury. *Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978)." *Foster v. Schares*, 2009 WL606232, *4 (Iowa Ct. App. 2009).

There should have been future damages and the trial court erred at law in denying the motion for new trial requested by Mengwasser for inconsistency.

b. Consistency of verdict.

In an ad hominem attack, the Defendants state that Mengwasser has made "particularly baseless" contentions on inconsistency of the verdict. Despite this incredibly strong language, the Defendants somehow fail to point out or provide caselaw to say that Plaintiff is not requesting appropriate relief. According to Defendants, without proper support, the *only* way for a verdict to be inconsistent is through *Bryant*. However, they then contradict themselves by saying "an example of an inconsistent verdict". (Appellee Brief p. 37).

After this "baseless" accusation by Defendants against Mengwasser, they then say, without caselaw support, there is nothing inconsistent about past pain and suffering, past medical treatment, and future damages and future pain and suffering. Despite a misstatement of Plaintiff's arguments, and instead of citing caselaw to support that assertion, Defendants instead attempt to distinguish the same caselaw that Plaintiff cited providing her assertion that medical testimony cannot be discounted out of hand as to future damages. *Foster* at *3. Defendants fail to provide anything to say Plaintiff is not asking for appropriate relief.

It is quite notable the inconsistencies in the Defendants' arguments, when relating to the inconsistencies in jury verdicts. In a final attempt to dispute Mengwasser's arguments, the Defendants then argue the facts of the case and the medical testimony. Mengwasser stands by the discussion she had relating to the testimony being agreed upon as to the fact that there was a future damage. (Second

Amd. App. Vol. I, p. 395 Tr. 139:13-15; 401 Tr. 162:6-25; 402 Tr. 163:1-25; 405 Tr. 178:21-22)

The lack of a finding of future pain and suffering and future loss of function of mind and body is in conflict with the evidence and is inconsistent with the verdict. All the doctor's agreed, Mengwasser had a permanent injury, which means there must be either some future pain and suffering, or future loss of function of mind and body.

The trial court's error in failing to grant a partial new trial on the issue of logical inconsistency prejudices Appellant. The Appellant/Plaintiff prays the Court reverse and remand this matter for a Partial New Trial to remedy this error.

IV. The trial court erred in granting the Defendants' Second Motion in Limine by excluding evidence of Plaintiff Robyn Mengwasser's recent medical treatment.

Defendants claim in their brief that the Plaintiff failed to preserve error. However, error is preserved if the "motion in limine is resolved in such a way it is beyond question whether or not the challenged evidence will be admitted during trial…" *State v. Tangie,* 616 N.W.2d 564, 569 (Iowa 2000).

Defendants' filed a second motion in limine that unequivocally requested that the trial court exclude evidence of Robyn Mengwasser's recent medical treatment. The trial court unequivocally sustained the Defendants' second motion in limine as to that issue. (Second Amd. App. Vol. I, p. 275 Tr. 37:1-25; 276 Tr. 38:1-25; 277 Tr. 39:1-25; 278 Tr. 40:1-25). Thus, error was preserved on that issue.

Defendants' further contend that excluding these records constituted harmless error. This is inconsistent with the report of their own expert, Dr. Harbach, who concluded that Robyn Mengwasser suffered permanent injury in the September 2015 collision when he ascribed a permanent impairment rating to Robyn. (Second Amd. App. Vol. II. p. 447) (Second Amd. App. Vol. I, p. 119 Deposition of Dr. Harbach p. 57:1-25; 120 p. 63:16-20).

Evidence of Robyn Mengwasser's recent medical treatment was in no way prejudicial to the Defendants. The trial court abused its discretion in granting the Defendants' motion in limine seeking to exclude that evidence.

V. The trial court erred when it granted the Defendants' Application for Taxation of Costs Under Iowa Code §677.10 because videographer and videoconferencing fees are not mentioned in Iowa Code §625.14, nor were costs related to two of the experts necessary to the jury's decision.

Robyn Mengwasser preserved error as to this issue by resisting the Defendants' Application for Taxation of Costs in its entirety in her Resistance to Application for Taxation of Costs filed on July 11, 2019. (Second Amd. App. Vol. I, pg. 445-448).

Defendants cite case law that warn against searching for legislative intent beyond the express language of a statue for their position that videographer and videoconferencing fees are allowable as expenses pursuant to Iowa Code §625.14. *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 211 (Iowa 2001). Robyn Mengwasser agrees with this advice.

The plain language of Iowa Code §625.14 does not include reference to videographer and videoconferencing fees. If the legislature deemed these important, then surely the legislature is capable of adding videographer and videoconferencing fees to the statutory language. As the statute now reads, videographer and videoconferencing fees are not to be included as a taxable expense. Thus, the district court's award of should be reduced accordingly.

Next, the testimony of Messrs. Bawab and Woodhouse was not a necessary expense to this proceeding in light of the fact that the Defendants' expert, Dr. Harbach, determined that Robyn Mengwasser suffered permanent injury as a result of the September 2015 collision. (Second Amd. App. Vol. II, pg. 447).

Therefore, the Plaintiff Robyn Mengwasser requests that this Court subtract all costs associated with Messrs. Bawab and Woodhouse in the trial court's November 10, 2019 order regarding pending post-trial motions.

VI. The new trial should be a partial new trial

The Defendants seem to ask the Court to make a determination of facts that the Jury *could* have compromised liability for reduced damages without any basis to show those facts actually exist. Both parties agree that generally a new trial is on all issues. *Bryant v. Parr* 872 N.W.2d 366, 380 (Iowa 2015). The problem with Defendants argument is that it ignores the Iowa Supreme Court's ruling in *Bryant* that "In applying these principles to personal injury cases" if there is no evidence in

the record that the fault was compromised for reduced damages, then liability won't be resubmitted on remand and a partial new trial is all that is applicable. *Id.* The Court cites to *Thompson v. Allen*, 503 N.W.2d 400, 401 (Iowa 1993), the same purported caselaw that Defendants rely upon. *Bryant v. Parr* 872 N.W.2d 366 (Iowa 2015).

Instead of agreeing to this premise, the Defendants instead try to shift a burden on Plaintiff by misconstruing existing caselaw. *Thompson* by no means requires that the party requesting the retrial meet any affirmative burden of proving there was no compromise. *Thompson* at 401-402. Quite the contrary, in fact. "In this case, we find no evidence that the determination of fault was compromised by the determination of damages." *Id.* at 402. Further, *Bryant*, a more recent case, has solidified this fact into the existing correct law.

Defendants instead ask that a burden be placed and then supports their propositions that a burden exists without citing any caselaw. If this appeal was to change caselaw, Defendants should have routed this to the Iowa Supreme Court, but as such, their proposition remains baseless in Iowa law.

As stated in Plaintiff's main Appeal Brief, testimony from a Crash Reconstructionist was elicited by both parties, and the jury determined liability and fault. Defendants have no caselaw support and no factual support to extend that the jury verdict was a compromise. There are no jury questionnaires or affidavits

submitted with Appellee's Brief. There instead were verdict forms stating unequivocally that Mr. Comito was at fault, and awarding damages. (Second Amd. App. Vol. I, pg. 437)

As a last-ditch effort, again with no caselaw support, the Defendants state that it would be impossible to have a retrial as fault, causation, and damages are intertwined. The Defendants, however, do not address that the Court did it in *Bryant, Thompson* and their progeny, without any complications. Indeed, there would be no jury trials on damages alone in our system if it was so complicated that liability could not be automatically established.

A new trial is not required to determine if there was any liability for Plaintiff's injuries by Defendant or that there was injury, as the Jury has already determined that there was. Therefore, the case should be remanded for a Partial new trial.

CONCLUSION

Plaintiff would ask the Court of Appeals to take note of how often in this brief it has been incumbent on Plaintiff to point out how the Defendants have failed to Shepardize, misconstrue caselaw, and overall create caselaw burdens and requirements where none exist. Plaintiff can only presume this was done accidentally with the intent to convince the Court of Appeals the Plaintiff's meritorious arguments are instead "specious".

When confronted with truth, law, and fact, the Defendants' ad hominem arguments backfire.

It is clear Defendants have failed to prove that Plaintiff did not preserve error on all issues. Plaintiff has in fact shown that there was an abuse of discretion in failing to allow the treating physician to testify in all matters of his treatment. In connection, and as well, recent and current medical treatment should have been allowed to be provided to the jury for its determination.

The trial court should have also instructed on the eggshell plaintiff rule as it correctly stated the law and there was substantial evidence in the record to support it. Further, in connection with this, there were inconsistencies in the jury verdict.

Plaintiff has shown there was error in the application of costs assessed to Plaintiff. Finally, any remand by the Court of Appeals should be for a partial new trial.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 4,063 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

/S/ Zachary Priebe

CERTIFICATE OF SERVICE

We, Jeff Carter, Zachary Priebe, John Q. Stoltze, members of the Bar of Iowa, hereby certify that on the 15th day of September, 2020, we electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a), this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/S/ Zachary Priebe

CERTIFICATE OF FILING

We hereby certify that on the 15th day of September, 2020, we electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a) this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/S/ Zachary Priebe