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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO SUPERINTENDENT OF PUBLIC INSTRUCTION SHERRI YBARRA, in her official capacity,

Petitioner,

v.

THE LEGISLATURE OF THE STATE OF IDAHO, BY REPRESENTATIVE SCOTT BEDKE, in his official and representative capacity as SPEAKER OF THE HOUSE OF REPRESENTATIVES, SENATOR BRENT HILL, in his official and representative capacity as SENATE PRESIDENT PRO TEM, and THE IDAHO STATE BOARD OF EDUCATION by DEBBIE CRITCHFIELD, in her official and representative capacity as PRESIDENT OF THE BOARD,

Respondents.

Docket No. 47991-2020

IDAHO STATE LEGISLATURE BY HOUSE SPEAKER BEDKE AND SENATE PRESIDENT PRO TEM HILL MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

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The Legislature of the State of Idaho, by Speaker of the House of Representatives Scott Bedke and President Pro Tempore of the Idaho Senate Brent Hill (the "Legislature") hereby submits this Memorandum in Support of its Motion to Strike the Expert Report of Russell Joki ("Joki Expert Report") and Exhibit 1 of both the Declaration of Marilyn Whitney ("Whitney Declaration") and the Declaration of Sherri Ybarra ("Ybarra Declaration").

I. INTRODUCTION

In support of her Reply Brief filed on Mary 22, 2020, Petitioner submitted the Joki Expert Report and the Whitney and Ybarra Declarations.[1] The Legislature respectfully requests that the impermissible portions of the submittals be stricken. The Joki Expert Report is properly stricken for the reasons that (1) it is improper within the current proceedings and was not requested by the Court, and (2) it asserts impermissible legal opinions that are the province of the Court. Exhibit 1 of the Whitney and Ybarra Declarations are also properly stricken because they contain impermissible hearsay.

II. ARGUMENT

A. The Joki Expert Report is Not Permitted in the Present Original Proceedings for the Issuance of Writs.

The present action is an original proceeding in which Petitioner seeks a writ of mandate or a writ of prohibition upon allegations that Senate Bills 1409 and 1410 are unconstitutional. Verified Petition, Counts II, III and Prayer for Relief. The rules governing special proceedings involving writs are set forth in Rule 5(a) of the Idaho Appellate Rules. Rule 5(a) provides that no response to an application for a writ of mandamus or prohibition is permitted "unless the Supreme Court requests a party to respond to the application before granting or denying the same." Consistent with the rule, the Court issued its Order Re: Briefing and Oral Argument

[1] Petitioner also submitted the Declaration of David H. Leroy in support of her Reply Brief. However, the Leroy Declaration is not part of the Legislature's present Motion.

("Order") on May 1, 2020 specifying that Respondents were to "file Briefs in response to Petitioner's allegations by Friday May 15, 2020." Order at 1. The Court also ordered that Petitioner "shall file a Brief in response to Respondents' Briefs by Friday May 22, 2020 . . . ." *Id.* In accordance with the Court's Order, Respondents filed their response brief on May 15, 2020, with supporting declarations that set forth facts relating to Petitioners' claims. On May 22, 2020, Petitioner filed her reply brief and supporting declarations, but she also submitted an expert report.

Petitioner's expert report is improper and not permitted in these original proceedings. I.A.R. 5(a). It is not authorized by the Court's rules and the Court did not permit the submission of expert reports in its Order. These proceedings are being conducted on an expedited basis, at Petitioner's request, and no opportunity is provided to Respondents to respond to the Joki Expert Report within the limited time permitted under the Court's briefing schedule. Accordingly, the Joki Expert Report is improper and should be stricken in its entirety.

B. The Joki Expert Report Is Also Properly Stricken Because It Proffers Impermissible Legal Opinions.

The entire purpose of the Joki Expert Report is to answer the ultimate legal issue presented to the Court. *Compare* Joki Expert Report ¶ 9 ("I have been asked, by the Petitioner, to provide an academic and professional educator opinion on the contents of those documents and the appropriate division of authority and duties between the State Board of. [sic] Education and the office of the State Superintendent of Public Instruction.") *with* Petitioner's Reply, at 2 ("The instant case provides this Court with both the necessity and the opportunity of defining those respective roles of the Idaho Superintendent of Public Instruction and the Board for the administration of the primary and secondary schools of this State."). As such, it is properly stricken.

Rule 702 of the Idaho Rules of Civil Procedure does not permit expert witnesses to opine on the applicable law; rather it only permits experts to offer opinions that will "help the trier of fact to understand the evidence or to determine a fact in issue." I.R.E. 702; *State v. Pearce,* 146 Idaho 241, 246, 192 P.3d 1065, 1070 (2008). Thus, matters of law are for the Court to determine and are not appropriate subjects for expert opinions. *Ballard v. Kerr*, 160 Idaho 674, 694, 378 P.3d 464, 484 (2016) (upholding trial court decision to exclude expert testimony on legal issue); *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 328, 48 P.3d 651, 657 (2002) ("Witnesses are not allowed to give opinions on questions of law[.]").

> The problem with testimony containing a legal conclusion is in conveying the witness's unexpressed, and perhaps erroneous, legal standards to the jury. This "invade[s] the province of the court to determine the applicable law and to instruct the jury as to that law."

Ballard, 160 Idaho at 694, 378 P.3d at 484 (quoting *Torres v. Cnty. of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985)). While the present case does not involve a jury, the stated principle of prohibiting an expert from invading the province of the Court still applies.

Here, the constitutional issue presented by Petitioner is a question of law for the Court to decide. *Nye v. Katsilometes*, 165 Idaho 455, 458, 447 P.3d 903, 906 (2019) ("Both constitutional questions and questions of statutory interpretation are questions of law over which this Court exercises free review.") (quoting *Stuart v. State*, 149 Idaho 35, 40, 232 P.3d 813, 818 (2010)). And the Joki Expert Report, rather than attempting to explain evidence presented to the Court, provides his own legal conclusions and speculation as to "the appropriate division of authority and duties between the State Board of Education and the office of the State Superintendent of Public Instruction." Joki Expert Report, ¶ 9; *see also id.* at 9 (Conclusion) ("[T]he House Bills under consideration before this Court result in an unconstitutional transfer of duties of her office to the State Board of Education."). Thus, his entire expert report is an improper attempt to usurp the role of the Court and should be stricken.

Alternatively, if the Court is unwilling to strike the entirety of the Joki Expert Report, the Legislature requests that Paragraphs 20, 21, 22, 24, 25, 29, 30, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 46, 47, 48, 50 and the Conclusion of the Joki Expert Report be stricken because they specifically state improper legal opinions, are speculative and otherwise lack foundation.

1. Paragraphs 20, 21, 33, 34, 35, 37, 38, 39, 41, 44, 46, 47, 48, 50, and the Conclusion Are Improper Legal Opinion.

Joki impermissibly opines on the substantive law by providing his interpretation of Idaho's Constitution:

- Interpreting the standards set by Article IX, Section 2 for the Legislature regarding public schools. Joki Expert Report, ¶ 20
- Opining that the Legislature proposed constitutional amendments that would provide "a legislatively created and politically appointed board for 'The general supervision . . .' of the Founding Fathers' ambitious 'duty' assigned to the legislature for Idaho's public education." *Id.*, ¶ 21.
- "As a member of the Executive Branch of government, the State Superintendent of Public Instruction, like the governor, lieutenant governor, secretary of state, state controller, state treasurer and attorney general, possesses *inherent powers imbued into the office* since its creation." *Id.*, ¶ 33 (emphasis in original).
- "Inherent powers in constitutional executive officers are necessary for the officers to perform their duties. The Idaho Constitution does not enumerate them, though it makes an exception for the Governor in Article IV, Sections 6-11, with a list of enumerated powers. *Id.*, ¶ 34.
- "For other executives, such as the State Superintendent, inherent powers are much like those provided to a judge… ." *Id.*, ¶ 35.
- "The constitutional amendment did not, in any way, minimize the state superintendent of public instruction when it included it, as an Executive Branch ex-officio member." *Id.*, ¶ 37.
- "*Ex-officio*" as used in Article IX, Section 2, "is not a derogatory." *Id.*, ¶ 38.
- "The State Superintendent of Public Instruction also maintains Executive Branch authority in Article IX, Section 7, a status that was not diminished by the 1912 amendment." *Id.*, ¶ 39.
- "As the Executive Officer of the Idaho State Department of Education, the State Superintendent has constitutional authority to establish divisions with specific

educational responsibilities, both inherent powers and constitutional (Article IV, Section 20)." *Id.*, ¶ 41.

- "After having reviewed Petitioner and Respondent documents, I conclude that the Petition and supporting documents filed by the State Superintendent of Public Instruction correctly demonstrates that the House Bills under consideration before this Court result in an unconstitutional transfer of duties of her office to the State Board of Education." *Id.* at 9 (Conclusion).

Joki also opines regarding administrative law by professing to explain the Board's administrative rules and the appropriate procedure for promulgating rules under the Idaho Administrative Procedures Act. *See id.*, at ¶¶ 44, 46, 47, 48, 50.

These opinions address legal issues outside of the factual questions that expert reports properly address and they improperly "invade[s] the province of the court to determine the applicable law." *Ballard*, 160 Idaho at 694, 378 P.3d at 484. Accordingly, Paragraphs 20, 21, 33, 34, 35, 37, 38, 39, 41, 44, 46, 47, 48, 50, and the Conclusion should be stricken.

2. Paragraphs 21, 22, 24, 25, 29, 30, 36, 42, 43 Are Speculative and Lack Foundation.

"Expert opinion must be based upon a proper factual foundation." *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999). Additionally, expert opinion that is "speculative, conclusory or unsubstantiated by facts in the record" is inadmissible. *Id.* "Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded." *Id.* Testimony is speculative when it "theoriz[es] about a matter as to which evidence is not sufficient for certain knowledge." *Karlson v. Harris,* 140 Idaho 561, 565, 97 P.3d 428, 432 (2004).

The Joki Expert Report repeatedly speculates as to legislative intent regarding certain bills and constitutional provisions. For example, his report states:

- "These six standards would soon vex the newly established Idaho legislature, forcing it to propose amendments to the Idaho Constitution…" Joki Expert Report, ¶ 21.

- Opining that the use of "duty" only once in the Idaho Constitution, indicated the "the importance of public education," and that this "duty" was "possibly becoming an irritation for the new legislatures as they responded not only to in-state frustrations, but to a fourth educational factor that was sweeping the nation." *Id.,* ¶ 22.

- "[T]he Idaho legislature realized that its constitutional duty in Article IX … was on a very slippery slope, riddled with inequities, and with fingers being pointed at them to do something." *Id.*, ¶ 24.

- "The solution? Establish a buffer for its legislative failure by creating a State Board of Education." *Id.*, ¶ 25.

- "If the intent of HJR 30 was to supersede the role of the State Superintendent of Public Instruction, it certainly would have included *continuous and expansive funding* of the State Board." *Id.*, ¶ 29 (emphasis in original)

- "[T]he *Sixth Biennial Report* includes this telling admission … that may explain the legislative intent of HJR 30 as an agency charged *with general supervision as per Article IX, Section 2*." *Id.*, ¶ 30 (emphasis in original).

- "The initial version of Article IX, Section 2 created an Executive Branch board to oversee public education, a concept that the legislature could have seen as preempting its duty."). *Id.*, ¶ 36.

No foundation is laid to establish Joki's personal knowledge concerning these statements. Similarly, Joki lacks foundation to assert in Paragraph 42 that the Superintendent "generously offered mediation" to the Board and that the Board rejected this offer in Paragraph 43.

Paragraphs 24, 25, 29, 30, 36, 42, 43 are "speculative, conclusory, or unsubstantiated by facts in the record" and, therefore should not be considered by the Court in this proceeding. *See Adams v. State*, 158 Idaho 530, 538, 348 P.3d 145, 153 (2015) (affirming district court's exclusion of expert affidavit that was speculative and conclusory).

C. Exhibit 1 to the Ybarra Declaration and Exhibit 1 to the Whitney Declaration Are Inadmissible Hearsay.

Both the Ybarra Declaration and the Whitney Declaration attach Exhibits summarizing purported conversations and meetings that each declarant alleges to have had with different legislators, their staff, and staff within the Department of Education. Ybarra Decl. Ex. 1;

Whitney Decl. Ex. 1. The Exhibits are properly stricken because they consist of impermissible hearsay.

Idaho Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *See* I.R.E. 602. These requirements "are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

Throughout the exhibits, the declarants attempt to introduce out-of-court statements by others, seeking to establish the truth of the matter asserted, without satisfying or even addressing any form of exception to the hearsay rules. *See* I.R.E. 801, 802, 803. Both exhibits are replete with hearsay, often including hearsay within hearsay. For example, Exhibit 1 to the Ybarra Declaration summarizes eleven conversations between February 19, 2020 and April 3, 2020, that she had with over a dozen different individuals, including Legislators, Legislative Services Office ("LSO") staff, Department of Education staff and the President of the Board. *See* Ybarra Decl., Ex 1. She recounts what these various individuals told her, sometimes purporting to quote them directly, often including double hearsay. *See, e.g., id.* at Feb. 28, 2020 Meeting Summary (Ybarra recounts that Will Goodman told her about rumors he had heard and statements that Representative Horman allegedly made to him); and April 1, 2020 Meeting Summary (Ybarra recounts a conversation with President Critchfield in which President Critchfield in turn recounts a conversation she had with Senator Crabtree). Similarly, Exhibit 1 to the Whitney Declaration summarizes eighteen conversations Whitney had between January 21, 2020 and March 2, 2020, with numerous Legislators, LSO staff, and Department of Education staff, detailing the specifics of what these individuals allegedly told her. *See* Whitney Decl., Ex 1.

Declarations such as these, concerning statements allegedly made by a third party offered for the truth of the matter asserted, are plainly hearsay and do not fall within any hearsay exceptions. I.R.E. 801(c) (Hearsay "means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."); I.R.E. 802 (hearsay inadmissible unless otherwise provided); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003-04 (9th Cir. 2002) (affidavit recounting statements made to affiant by a third party was inadmissible hearsay).

Accordingly, Exhibit 1 to the Ybarra Declaration and Exhibit 1 to the Whitney Declaration are inadmissible hearsay and should be excluded.

III. CONCLUSION

For the reasons stated herein, the Legislature requests the Court to strike and not consider the Joki Expert Report, Exhibit 1 to the Ybarra Declaration, and Exhibit 1 to the Whitney Declaration in deciding the merits of the Petition.

Respectfully submitted this 28th day of May, 2020.

HOLLAND & HART LLP

By */s/ William G. Myers III*
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2020, I filed the foregoing electronically via iCourt, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service:

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