

4-15-2010

# Aguilar v. Coonrod Clerk's Record v. 10 Dckt. 36980

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## Recommended Citation

"Aguilar v. Coonrod Clerk's Record v. 10 Dckt. 36980" (2010). *Idaho Supreme Court Records & Briefs*. 1234.  
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LAW CLERK

(VOLUME 10)

Vol 10 4/4

IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

---

**JOSE AGUILAR**, individually, as the  
**Personal Representative of the Estate of**  
**Maria A. Aguilar**, deceased, and as the  
**natural father and guardian of**  
**GUADALUPE MARIA AGUILAR,**  
**ALEJANDRO AGUILAR,** and **LORENA**  
**AGUILAR**, minors and **JOSE AGUILAR,**  
**JR.**, heirs of **Maria A. Aguilar**, deceased,

**Plaintiffs-Respondents,**

**-vs-**

**NATHAN COONROD** and **PRIMARY**  
**HEALTH CARE CENTER**, an Idaho  
corporation, **JOHN** and **JANE DOES I**  
through **X**, employees of one or more of  
the **Defendants,**

**Defendants-Appellants.**

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Appealed from the District of the Third Judicial District  
for the State of Idaho, in and for Canyon County

Honorable GREGORY M. CULET, District Judge

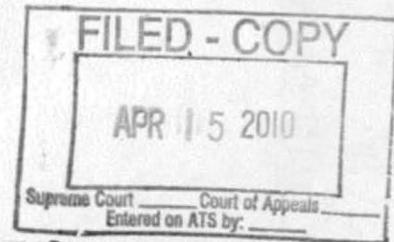
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Steven J. Hippler  
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Attorneys for Appellants

David E. Comstock  
and  
Byron V. Foster

Attorneys for Respondents



36980

IN THE SUPREME COURT OF THE  
STATE OF IDAHO

JOSE AGUILAR, individually, as the )  
Personal Representative of the Estate of )  
Maria A. Aguilar, deceased, and as the )  
natural father and guardian of GUADALUPE )  
MARIA AGUILAR, ALEJANDRO AGUILAR, )  
and LORENA AGUILAR, minors and JOSE )  
AGUILAR, JR., heirs of Maria A. Aguilar, )  
deceased, )

Plaintiffs-Respondents, )

-vs- )

NATHAN COONROD and PRIMARY HEALTH )  
CARE CENTER, an Idaho corporation, JOHN )  
and JANE DOES I through X, employees of )  
one or more of the Defendants, )

Defendants-Appellants. )

Supreme Court No. 36980

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

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**FILED**  
A.M. 4:43 P.M.

MAR 20 2009

CANYON COUNTY CLERK  
K CANNON, DEPUTY

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Attorneys for Defendant Andrew Chai, M.D.

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

JOSE AGUILAR, individually, as the Personal Representative of the Estate of Maria A. Aguilar, deceased, and as the natural father and guardian of GUADALUPE MARIA AGUILAR, ALEJANDRO AGUILAR, and LORENA AGUILAR, minors, and JOSE AGUILAR, JR., heirs of Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R. NEWMAN, M.D. NATHAN COONROD, M.D., CATHERINE ATUP-LEAVITT, M.D. MITCHELL LONG, D.O., COLUMBIA WEST VALLEY MEDICAL CENTER, an Idaho corporation, MERCY MEDICAL CENTER, an Idaho corporation, and PRIMARY HEALTH CARE CENTER, an Idaho corporation, JOHN and JANE DOES I through X, employees of one or more of the Defendants,

Defendants.

Case No. CV05-5781

**AFFIDAVIT OF COUNSEL IN  
SUPPORT OF DEFENDANT  
ANDREW CHAI, M.D.'S MOTION  
IN LIMINE**

ORIGINAL

STATE OF IDAHO )

: ss.

COUNTY OF ADA )

ANDREW C. BRASSEY, being first duly sworn upon oath, deposes and states as follows:

1. I am an attorney at the law firm of Brassey, Wetherell & Crawford, attorneys of record for Dr. Andrew Chai in the above-referenced matter, and I am competent to make this Affidavit and do so based upon my own personal and direct knowledge.

2. Attached hereto as Exhibit "A" is a true and correct copy of Dr. Chai's First Set of Interrogatories to Plaintiffs as sent on October 26, 2006.

3. Attached hereto as Exhibit "B" is a true and correct copy of pages 18-29 of the deposition transcript of Dr. Daniel Brown as taken on April 14, 2008, in Twin Falls, Idaho.

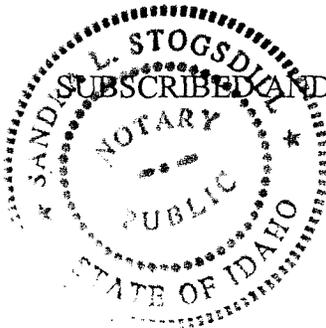
4. Attached hereto as Exhibit "C" is a true and correct copy of pages 24-27 and 114-117 of the deposition transcript of Dr. Paul Blaylock as taken on May 29, 2008, in Portland, Oregon.

5. Attached hereto as Exhibit "D" is a true and correct copy of pages 65-70 of the deposition transcript of Dr. Samuel LeBaron as taken on June 3, 2008, in Stanford, California.

FURTHER YOUR AFFIANT SAITH NAUGHT.

Dated this 20<sup>th</sup> day of March, 2009.

By [Signature]  
ANDREW C. BRASSEY



SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of March, 2009.

[Signature]  
Notary Public for [Signature]  
Residing at Bowle  
Commission expires: 5/27/09

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9th day of March, 2009, I served a true and correct copy of the foregoing **AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT ANDREW CHAI, M.D.'S MOTION IN LIMINE** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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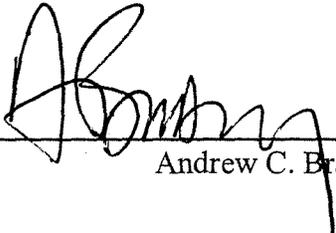
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Attorneys for Defendant Andrew Chai, M.D.

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

JOSE AGUILAR, individually, as the  
Personal Representative of the Estate of Maria  
A. Aguilar, deceased, and as the natural father  
and guardian of GUADALUPE MARIA  
AGUILAR, ALEJANDRO AGUILAR, and  
LORENA AGUILAR, minors, and JOSE  
AGUILAR, JR., heirs of Maria A. Aguilar,  
deceased,

Plaintiffs,

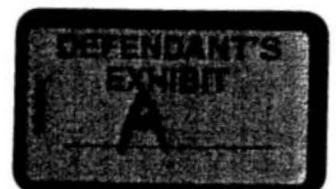
vs.

ANDREW CHAI, M.D., STEVEN R.  
NEWMAN, M.D. NATHAN COONROD,  
M.D., CATHERINE ATUP-LEAVITT, M.D.  
MITCHELL LONG, D.O., COLUMBIA  
WEST VALLEY MEDICAL CENTER, an  
Idaho corporation, MERCY MEDICAL  
CENTER, an Idaho corporation, and  
PRIMARY HEALTH CARE CENTER, an  
Idaho corporation, JOHN and JANE DOES I  
through X, employees of one or more of the  
Defendants,

Defendants.

Case No. CV05-5781

**DEFENDANT ANDREW CHAI,  
M.D.'S FIRST SET OF  
INTERROGATORIES TO  
PLAINTIFFS**



**TO: PLAINTIFFS AND THEIR ATTORNEYS OF RECORD, DAVID E. COMSTOCK AND BYRON V. FOSTER:**

YOU WILL PLEASE TAKE NOTICE That Defendant Andrew Chai, M.D., requests that you answer the following Interrogatories under oath within thirty (30) days from the service hereof, in accordance with the provisions of Rules 26 and 33, Idaho Rules of Civil Procedure.

In answering these Interrogatories, furnish all information available to you, including information in the possession of your attorneys (and investigators, experts, etc., retained by you and your attorneys), not merely information known of your own personal knowledge. If you cannot answer the following Interrogatories in full, after exercising due diligence to secure the information to do so, so state, then answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information and knowledge you have concerning the unanswered portion.

These Interrogatories are deemed continuing and your answers thereto are to be supplemented as additional information and knowledge becomes available or known to you.

**INTERROGATORY NO. 1:** Please state the name, address, and telephone number of each and every person known to you or your attorneys who has any knowledge of, or who purports to have any knowledge of, any of the facts of this case. By this Interrogatory we seek the names, addresses, and telephone numbers of all witnesses who have any knowledge of any fact pertinent to both damages and liability.

**INTERROGATORY NO. 2:** Please state the name, address, and telephone number of all persons you intend to call as witnesses at the trial of this cause.

**INTERROGATORY NO. 3:** With respect to the persons you intend to call at the trial of this cause, please state the general nature of the facts to which they will testify.

**INTERROGATORY NO. 4:** Please list and identify all exhibits that you intend or expect to introduce into evidence at the trial in the above-entitled matter and state the name and address of the person presently having possession of said exhibits.

**INTERROGATORY NO. 5:** Have you engaged or contacted any experts for consultation or assistance who are expected to testify at the trial of this cause? If so, please state the experts:

- (a) Name, address, and telephone number;
- (b) Educational background starting with college or university experience;
- (c) Any field of specialization, special training, or skills possessed by the expert;
- (d) The specific substance of the expected testimony of the expert;
- (e) All facts, data, knowledge, or information relied upon by the expert in the forming of opinions or testimony, which is the subject of sub-paragraph (d) above.

**INTERROGATORY NO. 6:** Itemize in complete detail any and all monies expended or expenses incurred for hospitals, doctors, chiropractors, osteopaths, therapists, dentists, nurses, x-rays, medicines, care, appliances, or other health care as a result of the incidents alleged in the Complaint and state the name and address of the payee and the amount paid and owed each payee.

**INTERROGATORY NO. 7:** Please state the name, address, and medical or other specialty of all persons who treated Maria A. Aguilar for any injuries or major illnesses prior to June 4, 2003.

As to each such person, please indicate the following:

- (a) The date or dates on which health care treatment was received;
- (b) The type of health care treatment received;
- (c) Whether the health care practitioner provided a report, medical records or documentation concerning the injuries treated.

**INTERROGATORY NO. 8:** State whether you have entered into any settlements with any person or entity or party to this litigation that you have claimed at any time to have been either in whole or in part responsible for any injury or damage received or incurred, which is the subject of this litigation. For purposes of this Interrogatory, a “settlement” includes covenants not to sue, covenants not to execute, releases, “Pierringer” releases and/or “Mary Carter” agreements, verdict sharing agreements or arrangements in any particular, loan receipt agreements, and any other similar documentation. If your answer to this Interrogatory is in the affirmative, please state the following information:

- (a) Identify each person or entity with whom you have settled;
- (b) Date of each settlement;
- (c) The dollar value of each such settlement calculated to its present value;
- (d) Identify all persons who have an original or any copy of such agreement.

**INTERROGATORY NO. 9:** As to each allegation of negligence or fault directed at Defendant Andrew Chai, M.D., (including those allegations stated in the Complaint), state in specific and complete detail each and every fact or item of information known to you which in any way supports the allegations of negligence or fault against Defendant Andrew Chai, M.D. This Interrogatory seeks information as to each specific act or fact known to you which you contend in any way indicates that Defendant Andrew Chai, M.D., was negligent or at fault in any manner.

**INTERROGATORY NO. 10:** As to each act or omission identified in response to Interrogatory No. 10 above, state in full and complete detail how each act proximately caused the injuries and damages alleged to have occurred.

**INTERROGATORY NO. 11:** As to each act or omission identified in response to the foregoing Interrogatory above, identify each expert witness or health care provider who may be

expected to testify that such act or omission failed to comply with the standard of medical practice applicable in this case and state the complete factual basis for the experts' or medical care providers' opinion, including, but not limited to identification of all treatises, medical texts, laboratory and diagnostic materials, and portions of any medical records utilized.

**INTERROGATORY NO. 12:** Have you, your agents, investigators, or anyone acting on your behalf obtained statements of any kind, whether written, recorded, stenographically transcribed, oral, or otherwise, from any person? If so, please state separately for each such person:

- (a) The name, occupation, and address of each such person;
- (b) The type of statement which was taken (whether written, recorded or transcribed);
- (c) The name and address of the present custodian of each such statement;
- (d) The date on which the statement was taken;
- (e) Subject matter of statement, report, or memorandum.

**INTERROGATORY NO. 13:** If you contend that the Defendant Andrew Chai, M.D., or any of his agents or employees have, at any time, made any admissions with regard to the incident or incidents referred to in the Complaint or any manner connected therewith, please state the name of the person making the admission, the name and address of the person or persons to whom the admission was made, and the substance of the admission.

**INTERROGATORY NO. 14:** Please identify any and all diaries, calendars, contemporaneous notes, and journals created by Plaintiffs which were made prior to, contemporaneously with, or after the alleged incidents which are the subject of this litigation.

**INTERROGATORY NO. 15:** Please list any federal, state, or third-party liens filed or lodged against the Plaintiffs with regard to the medical care or services for Maria A. Aguilar.

DATED this 26<sup>th</sup> day of October, 2006.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By Christopher P. Graham for  
Andrew C. Brassey, Of the Firm  
Attorneys for Defendant Andrew Chai, M.D.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of October, 2006, I served a true and correct copy of the foregoing DEFENDANT ANDREW CHAI, M.D.'S FIRST SET OF INTERROGATORIES TO PLAINTIFFS upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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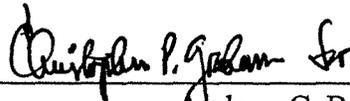
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\_\_\_\_\_  
Andrew C. Brassey

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as	)	
the Personal Representative of the	)	
Estate of Maria A. Aguilar,	)	
deceased, and as the natural father)	)	
and guardian of GUADALUPE MARIA	)	
AGUILAR, ALEJANDRO AGUILAR, and	)	
LORENA AGUILAR, minors, and JOSE	)	
AGUILAR, JR., heirs of Maria A.	)	
Aguilar, deceased,	)	Case No. CV05-5781
Plaintiffs,	)	
vs.	)	
ANDREW CHAI, M.D., STEVEN R.	)	
NEWMAN, M.D., NATHAN COONROD, M.D.,)	)	
CATHERINE ATUP-LEAVITT, M.D.,	)	
MITCHELL LONG, D.O., COLUMBIA	)	
_____	)	

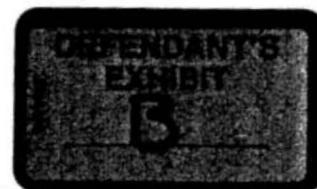
(Caption continued)

DEPOSITION OF DANIEL C. BROWN, M.D.

APRIL 14, 2008

REPORTED BY:

CATHERINE PAVKOV, CSR NO. 638



1 A. No, I don't. To some degree, I  
 2 think that the disclosure is a legal technicality  
 3 which is sort of beyond the scope of what I think  
 4 I'm supposed to understand. This is, in my  
 5 opinion, an issue about medicine, the facts of  
 6 medicine, not the subtleties of the law.

7 Q. Other than the medical records and  
 8 the depositions that were listed in Mr. Foster's  
 9 file, have you reviewed anything else in  
 10 connection with this case?

11 A. Could you be more specific on what  
 12 you intend? That's an awfully broad area.

13 Q. As I understand it, you've seen the  
 14 medical records that are listed by Mr. Foster,  
 15 along with the deposition transcripts, correct?

16 A. Correct.

17 Q. And have you read all those  
 18 transcripts and all those records?

19 A. Yes.

20 Q. All right. Other than those  
 21 documents, have you physically done any research  
 22 or looked at any other documents in connection  
 23 with this case?

24 A. The answer is yes and no. I haven't  
 25 read any other documents. But to some degree, it

1 professional services.

2 Q. Are you paid a salary?

3 A. No.

4 Q. How are you paid?

5 A. We are paid on the basis of the work  
 6 that we do.

7 Q. You're not paid by St. Luke's?

8 A. Well, St. Luke's does the accounting  
 9 for us. So they collect moneys and they turn  
 10 around and give a portion of the moneys that they  
 11 collect to us.

12 Q. When you -- I'm going to call it a  
 13 paycheck, for lack of anything better to call it --  
 14 when you receive a paycheck, from whom is the  
 15 check written?

16 A. Southern Idaho Cardiology.

17 Q. So is that the name of this group?

18 A. Yes.

19 Q. How many cardiologists are in the  
 20 group?

21 A. A total of four.

22 Q. And, obviously, there's yourself.  
 23 And who are the other physicians?

24 A. Dr. Reed Harris, Dr. David Kemp and  
 25 Dr. Dennis Enomoto.

1 is not uncommon for me to, in an abstract sense, to  
 2 talk to peers about a case in which circumstances  
 3 have occurred to ask their opinion about whether  
 4 or not they think treatment was in bounds or out  
 5 of bounds.

6 Q. Have you done that in this case?

7 A. Yes.

8 Q. And what peers or who have you  
 9 talked to?

10 A. Other physicians in Twin Falls.

11 Q. Cardiologists?

12 A. Yes.

13 Q. Are you in a group practice?

14 A. Yes.

15 Q. And are you actually an employee of  
 16 St. Luke's now?

17 A. Yes.

18 Q. How long have you been --

19 A. Actually, no, we're not an employee  
 20 of St. Luke's. Our practice is affiliated with  
 21 St. Luke's. We're not employees.

22 Q. Tell me what that affiliation is.

23 A. They essentially provide  
 24 administrative services for us. They own the  
 25 assets of the practice and we essentially provide

1 Q. And when you say you talked to your  
 2 peers about this case, are those the peers you're  
 3 talking about?

4 A. Some of them. And there may be  
 5 another one.

6 Q. Who would that be?

7 A. Dr. Stan Mogelson who is another  
 8 cardiologist in Twin Falls.

9 Q. Tell me his last name again.

10 A. Mogelson, M-o-g-e-l-s-o-n.

11 Q. How long have you practiced in Twin?

12 A. Pushing five years.

13 Q. And where were you before that?

14 A. State of Washington. Bellingham, if  
 15 that's of interest.

16 Q. And your CV has been given to us.  
 17 Does it list all the areas or places you've  
 18 practiced?

19 A. Yes, sir.

20 Q. I'm not going to mark it at this  
 21 time, but I'll represent to you, Dr. Brown, that's  
 22 a copy of a CV that I received from Mr. Foster's  
 23 office. Is it accurate?

24 A. The answer is yes.

25 Q. So you've been in Twin five years,

1 meaning you came to Twin when?  
 2 A. 2003.  
 3 Q. Do you remember when in 2003?  
 4 A. June.  
 5 Q. And did you come to work or did you  
 6 join Southern Idaho Cardiology?  
 7 A. Yes.  
 8 Q. Back to my question earlier about  
 9 whether you'd reviewed or researched, reviewed any  
 10 documents, other documents, or researched any  
 11 particular issues. Have you done any kind of  
 12 medical research in connection with your being an  
 13 expert in this case?  
 14 A. Well, to some degree I would  
 15 consider the talking in abstract terms to peers to  
 16 be research.  
 17 Q. Okay.  
 18 A. If you're asking whether I've gone  
 19 to the literature and reviewed, you know,  
 20 exhaustively the literature on pulmonary emboli in  
 21 direct reference to this case, the answer would be  
 22 no.  
 23 Q. Have you done any kind of medical  
 24 research in connection with this case, other than  
 25 speaking to peers?

1 utility of those medical procedures varies  
 2 geographically, actually quite significantly, from  
 3 place to place. Those differences have been  
 4 looked at and have not satisfactorily been  
 5 explained, although people have put forward  
 6 hypotheses on why those differences occur.  
 7 Specifically, what I'm talking to is  
 8 perhaps the rate at which procedures such as hip  
 9 replacement or carotid endarterectomies are  
 10 utilized per thousand population. The standard of  
 11 care, therefore, becomes a term that has to do  
 12 with what a group of physicians in a relatively  
 13 limited geographical area do.  
 14 Now, that being said, there is  
 15 concern on a national level, both from the  
 16 standpoint of the regulators and the federal  
 17 government and also on the basis of professional  
 18 societies, to try to squeeze this regional  
 19 variation out of the standard of practice so that  
 20 the standard of practice becomes more geographic.  
 21 My understanding from a legal sense,  
 22 however, is -- and this is not my area of expertise --  
 23 is that the geography is still the central issue  
 24 in the standard of practice.  
 25 Q. I'll represent to you, Dr. Brown,

1 A. The answer is no.  
 2 Q. Okay. With regard to reviewing any  
 3 other kind of documents, other than the medical  
 4 records and depositions, have you reviewed any  
 5 documents?  
 6 A. No.  
 7 Q. In the disclosures provided to us by  
 8 Mr. Foster, it indicates that you spoke with a Mr.  
 9 Blaylock -- or a Dr. Blaylock, excuse me -- I believe  
 10 on January 29, 2008; is that correct?  
 11 A. You have the date. If that's the  
 12 date, that's correct.  
 13 Q. Let's assume the date is correct.  
 14 A. The conversation did occur.  
 15 Q. All right. And with regard -- when  
 16 I use the term "standard of care," or "standard of  
 17 health care practice," what do those terms mean to  
 18 you?  
 19 A. The standard of care is an  
 20 interesting and difficult notion. It is an  
 21 interesting and difficult notion because to some  
 22 degree in the United States of America physicians  
 23 all read publications that are circulated  
 24 nationally. That being said, if you take a look  
 25 at a variety of different medical procedures, the

1 that in Plaintiffs' Second Supplemental Expert  
 2 Disclosures, that at least my office received in  
 3 early February 2008, that you hold an opinion that  
 4 the standard of care or standard of health care  
 5 practice in Twin Falls, Idaho, is the same as  
 6 Nampa, Idaho. My first question is, do you hold  
 7 that opinion?  
 8 A. Yes.  
 9 MR. LYNCH: I'm going to object to  
 10 that being vague.  
 11 Q. (BY MR. BRASSEY) Well, let me  
 12 rephrase the question. And at least for purposes  
 13 of the question I just asked, Dr. Brown, I want to  
 14 limit that to the standard of health care practice  
 15 or standard of care for a cardiologist.  
 16 A. Yes.  
 17 Q. All right. And is your answer the  
 18 same?  
 19 A. Yes.  
 20 Q. And on what do you base that opinion  
 21 that the standard of practice in Twin Falls is the  
 22 same as Nampa?  
 23 A. Well, I think that there are several  
 24 things that do that. As I said, all of us read  
 25 the same literature. And when I have had the

1 opportunity, which I've had on several occasions,  
2 to have interactions with cardiologists who  
3 practice in the Boise metropolitan area that it's  
4 very clear that we think the same, act the same  
5 and approach patients more or less the same on the  
6 areas of specific discussion that I've had with  
7 them.

8 Q. Have any of those discussions had to  
9 do with treatment of pulmonary embolus?

10 A. No.

11 Q. And these discussions have occurred  
12 in what settings?

13 A. They occur at conferences. They  
14 occur by telephone call. Those are probably the  
15 two most important ways. But they're also written  
16 in the sense that we will share patients with  
17 physicians in the Boise metropolitan area, where  
18 we can't provide services here, and we will get  
19 written reports back from them, which obviously  
20 reflect the standard of care.

21 Q. And is that the basis for you to say  
22 that the standard of health care practice for a  
23 cardiologist in Twin Falls is the same for a  
24 cardiologist practicing in Nampa?

25 A. Yes.

1 A. No.

2 Q. Is it your belief that the standard  
3 of health care practice for a cardiologist in  
4 Boise is the same as for a cardiologist in Twin  
5 Falls?

6 A. The answer is roughly. And the  
7 reason that I say roughly is because there are  
8 services that are provided in Boise that are not  
9 provided in Twin Falls. For example, we don't  
10 have open-heart surgery here, and so the standard  
11 of practice for a cardiologist may be assisting in  
12 taking care of people who have had post open-heart  
13 surgery, where that isn't an element of our  
14 practice here. But that's a nuance.

15 Q. Any other examples that come to  
16 mind?

17 A. There are other things where the  
18 tertiary treatments are provided in Boise that  
19 aren't provided here. Implantation of implantable  
20 defibrillators, various electrophysiologic  
21 ablation procedures, et cetera, et cetera.

22 Q. Do you recall when you were retained  
23 in this case as an expert?

24 A. It was shortly after the  
25 conversation with Dr. Blaylock. So I'd say

1 Q. And --

2 A. There's more to it than that,  
3 however.

4 Q. Well, go ahead and tell me.

5 A. And more to it than that is that our  
6 professional organization, which is called the  
7 American College of Cardiology, essentially  
8 practices or publishes on a periodic basis practice  
9 guidelines. And these practice guidelines are  
10 intended for cardiologists who are taking care of  
11 patients with a specific problem nationwide.

12 Now, it is very important to  
13 understand that the American College of Cardiology  
14 sees guidelines as guidelines, and not purely  
15 standard of practice. And they expect to see,  
16 from case to case, minor variations in the way  
17 that some patients are treated.

18 So in point of fact, not only do I  
19 rely on the communications with my colleagues in  
20 the Boise metropolitan area, but we also both rely  
21 on what our professional society says.

22 Q. Okay. Any other basis for you to  
23 opine that the standard of health care practice  
24 for a cardiologist in Twin Falls is the same as  
25 that for a cardiologist in Nampa?

1 February.

2 Q. Before the conversation with Dr.  
3 Blaylock, had you been retained as an expert?

4 A. Not to my knowledge.

5 Q. Had you been provided any records in  
6 this case before the conversation with Dr.  
7 Blaylock?

8 A. I can't remember whether we talked  
9 about that before. And I -- I'm sorry, my memory  
10 about this is vague, I just don't remember what  
11 the sequence of events was a couple of months ago.

12 Q. Do you know how Dr. Blaylock got  
13 your name?

14 A. Well, it was through Mr. Foster.

15 Q. Okay. And so what I'm trying to  
16 figure out is if you had some contact with Mr.  
17 Foster before that phone call with Dr. Blaylock?

18 A. I just don't remember.

19 Q. Have you ever reviewed cases for Mr.  
20 Comstock or Mr. Foster before this case?

21 A. No.

22 Q. In Plaintiffs' Second Supplemental  
23 Expert Witness Disclosure, it indicates with  
24 regard to Dr. Blaylock's opinions that he  
25 discussed this case and the standard of practice

IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually,  
as the Personal Representative  
of the estate of Maria A. Aguilar,  
deceased, and as the natural  
father and guardian of GUADALUPE  
MARIA AGUILAR, ALEJANDRO AGUILAR,  
AND LORENA AGUILAR, minors, and  
JOSE AGUILAR, JR., heirs of Maria  
A. Aguilar, deceased,

Plaintiffs,  
vs. Case No. CV 05-5781

ANDREW CHAI, M.D., STEVEN R. NEWMAN,  
M.D., NATHAN COONROD, M.D., CATHERINE  
ATUP-LEAVITT, M.D., MITCHELL LONG, D.O.,  
COLUMBIA WEST VALLEY MEDICAL CENTER, an  
Idaho corporation, PRIMARY HEALTH CARE  
CENTER, an Idaho corporation, JOHN and  
JANE DOES, I through X, employees of one  
or more of the Defendants,

Defendants.

---

DEPOSITION OF PAUL BLAYLOCK, M.D.  
TAKEN ON BEHALF OF THE DEFENDANTS  
THURSDAY, MAY 29, 2008



22

1 California Santa Barbara last weekend; but  
 2 publishing, I don't think I've published anything  
 3 for the last four or five years.  
 4 Q. Okay. I also note in your CV an attempt  
 5 to reconstruct your hires or your past years - 2004,  
 6 2005, 2006, and 2007 - consulting with either  
 7 depositions and/or trials with a designation of an  
 8 attorney hiring you, and while that list is somewhat  
 9 self-explanatory, this does not include the cases  
 10 that you've reviewed and did not give a deposition  
 11 in; is that true?  
 12 A. That's correct.  
 13 Q. It also while it has listed there various  
 14 attorneys who have hired you, you note in a couple  
 15 of notes there that this is reconstructed and it's  
 16 the best you can do by the way of memory.  
 17 A. Yes, sir. Missing -- I've reviewed a  
 18 couple of other cases for your firm that's not  
 19 listed, I have reviewed additional cases for Mr.  
 20 Tolman, and I've reviewed some additional cases for  
 21 Mr. Girdy that are not listed; but I think I've only  
 22 been deposed in one additional case of those cases.  
 23 This reflects -- my average as a rule has  
 24 -- for about every case that I'm deposed in, I have  
 25 probably reviewed an equal number of cases. It

24

1 do were in Oregon, and in Oregon it's trial by  
 2 ambush. We do not disclose experts and we do not  
 3 depose experts.  
 4 And so unless the case goes to trial,  
 5 you're never of record, and so the majority of the  
 6 cases that I reviewed for the defense would never  
 7 have made it to a disclosure state.  
 8 Q. I understand. Well, thank you. Now,  
 9 Doctor, it's my understanding that you charge and  
 10 are charging us for this deposition \$600 per hour  
 11 and that you require a 3-hour minimum expert  
 12 deposition fee at the commencement of the  
 13 deposition, and I'm handing you now a check for that  
 14 amount.  
 15 A. Thank you.  
 16 Q. And we will proceed with the -- some of  
 17 the other questions that I have here today.  
 18 You have become familiar with the standard  
 19 of care in this case, in -- particularly in the May  
 20 2003 time frame in Caldwell, Idaho by doing what?  
 21 A. Standard of care in Idaho is like the  
 22 standard of care in every state in the United  
 23 States; it's statutory. I have probably 20 years ago  
 24 reviewed and probably re-reviewed it a few times  
 25 over the years the statute in Idaho as to what the

23

1 works out about two to one that I opined that there  
 2 is no violation of the standard of care or no  
 3 negligence. Probably 15 percent of those cases, I  
 4 will opine that I don't feel qualified to be an  
 5 expert in, and so I don't have an opinion one way or  
 6 the other.  
 7 Q. Okay. Now, it's my understanding -- what  
 8 would you estimate from that reconstructed list and  
 9 otherwise of the percentage of your time that you  
 10 consult for a defendant in a medical malpractice  
 11 case as opposed to a plaintiff?  
 12 A. It's changed through the years. I  
 13 actually sat down a year ago to calculate. The last  
 14 two years, I would say -- I never -- I very rarely  
 15 ever turn down an opportunity to be an expert for  
 16 the defense because I am biased and my loyalties are  
 17 on the medical side. I often turn down cases for  
 18 the plaintiff to review as a rule.  
 19 The last two years have been predominantly  
 20 defense, probably 65 percent. Years -- two years  
 21 preceding that probably was 50/50, and then for many  
 22 years back in the 80s, early 90s, probably was  
 23 predominantly plaintiff; and part of that, Mr.  
 24 Dance, which you already probably know, is that for  
 25 many years, most of the defense cases I was hired to

25

1 standard of care is so that would be one of the  
 2 phases.  
 3 Number two, I have lectured to Idaho  
 4 physicians and nurses off and on at the ACEP,  
 5 American College of Emergency Physician,  
 6 conferences, both regionally as well as nationally,  
 7 for 20 years, so that's probably being familiar with  
 8 that standard of care for -- we've had doctors from  
 9 Idaho and nurses from Idaho that come to practice in  
 10 Oregon and with me at Southwest Washington and with  
 11 me at Oregon, two states I practice in, and so the  
 12 standard of care I've gleaned from their experience  
 13 and how they practice with me, that would be another  
 14 reason.  
 15 Over the years I've reviewed several cases  
 16 from Idaho. I'm sure 20 or 30 over the years. I am  
 17 familiar with the community standard of care, I'm  
 18 familiar with the uniqueness of the statute in  
 19 Idaho, which is -- there's only 3 states in the  
 20 country that have a statute like Idaho's where the  
 21 standard of care is not necessarily a national  
 22 standard of care, so I'm familiar with it through  
 23 that; and then I'm also familiar with the standard  
 24 of care by each case, whether I'm on the plaintiff's  
 25 side or I'm on the defense side. I speak with a

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1 local person who either practices or is familiar  
 2 with the standard of care for a particular city or  
 3 hospital.  
 4 In this case my notes reflect that I have  
 5 spoken with a Dr. Dan Brown and I have spoken with a  
 6 Dr. Dean Lapinel and, let's see, I believe those  
 7 were the only two -- oh, I spoke with a Dr. Kenneth  
 8 Braumwell, so I've spoken with three physicians in  
 9 this case.  
 10 Q. Did you rely upon your conversations with  
 11 Dr. Dean Lapinel?  
 12 A. You know, because I've told Mr. Tolman and  
 13 Mr. Girdy, it's -- I know it's a hoop you have to  
 14 jump through, but did I rely on what they said the  
 15 standard of care was, did it change my opinions as  
 16 to what the standard of care -- I already knew what  
 17 the standard of care was, so, in part, I guess I  
 18 affirmed what the standard of care was, but in terms  
 19 of relying on their opinions as to the development  
 20 of the standard of care, no, I did not.  
 21 I didn't quite finish my answer. One more  
 22 source of my being familiar with the standard of  
 23 care is the numerous depositions that I have read  
 24 through the years of Idaho physicians who opine that  
 25 the standard of care in Boise is the same as the

27

1 standard of care in Portland, that the standard of  
 2 care for a particular medical condition like a  
 3 pulmonary embolus is the same in Napa as it is in  
 4 Boise and as it is in any small community in the  
 5 United States; so there are multiple sources of my  
 6 familiarity with the standard of care.  
 7 Q. Have you been to or lectured in the June -  
 8 - May-June 2003 time frame in the Caldwell, Idaho  
 9 area?  
 10 A. No.  
 11 Q. Have you visited the hospital in Caldwell?  
 12 A. You know, I've done two -- when I moved to  
 13 Portland, I came through Idaho, and I went through  
 14 several -- I didn't have any money when I finished  
 15 my internship and I slept in hospitals on my way to  
 16 Portland, Oregon and I do remember sleeping in a  
 17 hospital in Pocatello and I did sleep in another  
 18 hospital in a small town in Idaho in their call room  
 19 one night, but I don't remember which one it was, so  
 20 I don't want to misrepresent that I haven't been  
 21 there, but I don't recall that I have.  
 22 Q. And you certainly wouldn't have been there  
 23 in the time frame of 2003?  
 24 A. No.  
 25 Q. All right. And it's my understanding from

28

1 your discussions with attorneys that you have had  
 2 some experience with the Boise standard of care; is  
 3 that true?  
 4 A. Yes.  
 5 Q. And you've had some experience in other  
 6 areas of Idaho, have you specifically had experience  
 7 in the Caldwell, Idaho area?  
 8 A. Only in the sense that through the years  
 9 I've lectured to doctors and nurses that are from  
 10 small towns in Idaho. I think Caldwell has probably  
 11 been the source of some of the attendees at the  
 12 Oregon ACEP meeting, which is every February and  
 13 it's usually at Sun River or the Inn of the Seventh  
 14 Mountain and we have a lot of Idaho docs and nurses  
 15 that come to that, because it's a ski seminar.  
 16 One of the first questions I always ask is the  
 17 standard of care regarding the issues in a  
 18 particular case is what's the capabilities of the  
 19 hospital and where the community practices: Do they  
 20 have a CT, do they have an MRI, do they have a D-  
 21 Dimer, do they have a V/Q scan, do they have a CT  
 22 angiogram capability.  
 23 If they don't have those capabilities, the  
 24 standard of care would vary, it would differ; if  
 25 they do have those capabilities, then the standard

29

1 of care would be the same, whether it's in a large -  
 2 - whether it's in Boise or whether it's in Napa.  
 3 Q. Okay. In your conversations with Dr.  
 4 Lapinel, did he disclose to you any of his medical  
 5 conditions?  
 6 A. You mean personally?  
 7 Q. Yeah.  
 8 A. I gleaned from his deposition that he had  
 9 burned-out of being an ER doc. So I guess in that  
 10 sense, it was a public disclosure.  
 11 I'm looking at my notes from the phone  
 12 calls. I don't think -- let's see, he's a board  
 13 certified ER doc. I don't see that we discussed his  
 14 personal health in my phone notes.  
 15 Q. Okay. And Kenneth Braumwell, as I  
 16 understand it, is a pediatric/adult emergency  
 17 medicine, does that affect standard of care, are you  
 18 familiar with pediatric emergency care physicians?  
 19 A. He's double-boarded in ER, and he's --  
 20 like I'm double-boarded as well, and he's double-  
 21 boarded in peds. I practice at a level-one trauma  
 22 center out of Emanuel, which is the pediatric  
 23 hospital here in Portland, and three of my partners  
 24 were double-boarded in ER and peds. Currently two of  
 25 my partners at St. V's are double-boarded in the ER

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1 make notes of?  
 2 A. I made these notes while we were talking.  
 3 It's just -- I'm just doodling thoughts about  
 4 certain things we had discussed. It certainly  
 5 doesn't reflect the entirety of our conversation.  
 6 Q. Let me ask you this: What did you need to  
 7 talk to Dr. Brown to figure out or have knowledge --  
 8 attempt to have knowledge of the standard of care  
 9 that would apply to Dr. Chai at the time and place  
 10 of his care and treatment of Mrs. Aguilar?  
 11 A. No. He only confirmed everything I  
 12 already knew.  
 13 Q. And from what source do you believe you  
 14 already had knowledge of the standard of care of Dr.  
 15 Chai?  
 16 A. Well, if you read my note, it says the  
 17 standard of care is the same in the state of Idaho  
 18 for diagnosing and treating pulmonary embolus. It  
 19 doesn't differ in Napa as it does in Boise. It's th  
 20 e whole state; diagnosing and treating PE is the sam  
 21 e.  
 22 And then he went on to say, quote, "The  
 23 duty of the cardiologist is the same duty as any pri  
 24 mary care physician, ER, internist, family practice,  
 25 that is to diagnose correctly and to treat the

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1 marked.  
 2 MR. DANCE: Killing trees.  
 3 BY MR. BRASSEY:  
 4 Q. What did Dr. Brown tell you of why he  
 5 knows what the standard of care was for Dr. Chai in  
 6 May of 2003 in Napa, Idaho?  
 7 A. Well, I'll just kind of tell you what I  
 8 gleaned from my notes. Dr. Brown is a -- double-  
 9 boarded in internal medicine and cardiology, I  
 10 documented that he went to UCLA, the University of  
 11 California, to get his training, he documented that  
 12 he practices at Twin Falls, which is the same -- my  
 13 note reflects the same standard of care as Napa and  
 14 Boise, and he informed me that Napa - I hadn't  
 15 looked it up on a map yet - is a suburb of Boise,  
 16 and that it was larger than Twin Falls, where he had  
 17 practiced.  
 18 Q. And here's my question: What information  
 19 did Dr. Brown give you to tell you he knew the  
 20 standard of care in Napa for a cardiologist in May  
 21 of 2003?  
 22 A. Other than -- he told me that he knew what  
 23 the standard of care was for Twin Falls for Boise  
 24 and for Napa and that it was the same.  
 25 Q. Did he tell you how he knew that, that's

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1 patient's medical condition and to treat it appro  
 2 priately," end of quote, exactly the same thing I  
 3 just said.  
 4 MR. LYNCH: Excuse me, is that a reference  
 5 to a conversation? I'm lost here. Dr. Brown --  
 6 with Dr. Brown --  
 7 THE WITNESS: Dr. Brown and me. The  
 8 conversation between the two of us on 1-29-08.  
 9 MR. LYNCH: And that's --  
 10 THE WITNESS: And I put it in quotation  
 11 marks, both of these, because that's what he said.  
 12 MR. LYNCH: And that's separate from any  
 13 conversations you had with Dr. Braumwell, Kenneth  
 14 Braumwell and Lapinel?  
 15 THE WITNESS: Kenneth Braumwell and I  
 16 talked on 11-14-07.  
 17 MR. LYNCH: And that -- those notes are on  
 18 a yellow piece of paper?  
 19 THE WITNESS: Yes, sir.  
 20 MR. LYNCH: Are they a part of what's  
 21 something that's been marked?  
 22 MR. DANCE: As part of 7.  
 23 MR. LYNCH: Part of 7, okay, excuse me.  
 24 THE WITNESS: I think Mr. Dance didn't  
 25 miss -- he didn't miss anything. He got them all

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1 my question.  
 2 A. We may have discussed it. My notes don't  
 3 reflect that.  
 4 Q. Do you recall it?  
 5 A. I know that we talked for several minutes  
 6 about several things.  
 7 MR. FOSTER: Let me refresh your  
 8 recollection.  
 9 THE WITNESS: I usually write down at the  
 10 top when the conversation begins, and I usually  
 11 write down when the conversation ends so I can opine  
 12 fairly accurately how long the discussion took place  
 13 as I did on 11-14, that discussion took 48 minutes.  
 14 BY MR. BRASSEY:  
 15 Q. You didn't do that with Dr. Brown?  
 16 A. I didn't, but my recollection was it was  
 17 over a 30-minute conversation, and we talked about a  
 18 lot of things.  
 19 Q. Such as?  
 20 A. Talked about background, I talked about  
 21 where he's practiced, I talked about what his  
 22 certification was, I talked about -- my notes  
 23 reflect that we talked about the standard of care,  
 24 we talked about the standard of care for a  
 25 cardiologist, we talked about tests that should have

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DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF CANYON

JOSE AGUILAR, individually	)	
as the Personal Representative	)	
of the Estate of Maria A.	)	
Aguilar, deceased, et cetera,	)	
et al.,	)	
	)	
Plaintiffs,	)	No. CV 055781
vs.	)	
	)	
ANDREW CHAI, M.D., STEVEN R.	)	
NEWMAN, M.D., NATHAN COONROD,	)	
M.D., MITCHELL, LONG, D.O.,	)	VOLUME I
and PRIMARY HEALTH CARE CENTER	)	
an Idaho Corporation, et al.,	)	
	)	
Defendants.	)	

DEPOSITION OF SAMUEL LEBARON, M.D.

Date and Time:       Tuesday, June 3, 2008  
                          8:40 a.m. - 11:40 a.m.

Location:             Stanford School of Medicine  
                          1215 Welch Road, Modular G  
                          Stanford, CA 94305

Reporter:             HOWARD SCHROEDER, CSR  
                          Certificate No. 1123



1 Q BY MR. DANCE: OK. Doctor, so that we  
2 begin and I understand your knowledge and  
3 background here. We've just brought up  
4 deposition, Exhibit 5 that related to -- well, it  
5 was the 5th supplemental expert witness report,  
6 but it's really technically, I think Exhibit 4, is  
7 it not? This last one on your conversation with  
8 Dr. Roach?

9 A Yes.

10 Q And was Dr. Roach an ER doctor?

11 A I'm not aware that he was an ER doctor.

12 Q OK. So you have spoken to no physician  
13 who is an Idaho physician practicing or who has  
14 purported knowledge of the local standard of care  
15 at West Valley in Caldwell, Idaho, in May of '03?

16 A Only the -- only insofar as the fact that  
17 I asked Dr. Roach, by the way, do you know I'm  
18 just curious, do you know whether the standard of  
19 care issues are different for any of the other  
20 doctors? I told him I'm just curious.

21 You know, in your every day work as a  
22 family physician, I said to him, we've been  
23 talking -- we've been focusing on family medicine.  
24 But I'm just curious about the other disciplines.  
25 And it was his opinion that no, he was not aware

1 we may all have opinions on a number of subjects.

2 A Yeah.

3 Q But the point is, you do not intend to  
4 testify if Dr. Newman was functioning as an  
5 emergency room physician on the only time he  
6 visited this patient.

7 You do not profess expertise in the  
8 subject of emergency room physician and the  
9 standards applicable on that visit in Idaho to Dr.  
10 Newman; is that correct?

11 A Yes, I don't -- I don't express expertise  
12 in family medicine. So it's only opinions.

13 MR. FOSTER: You misspoke.

14 MR. DANCE: Yeah, I think you misspoke.

15 MR. FOSTER: You said family medicine.

16 Q BY MR. DANCE: You meant emergency room  
17 medicine, did you not?

18 A Thank you. For saving me from my  
19 misspeaking.

20 You're correct. I do not intend to  
21 profess expertise as an emergency physician. So  
22 it would only be if I'm -- if I'm asked for my  
23 opinions of Dr. Newman in his capacity as a family  
24 physician, whatever setting he's in, I would  
25 certainly give those opinions. But --

1 of any -- any differences in the standard of care  
2 with that sole exception, then I would agree. I  
3 haven't spoken with any other physician.

4 Q OK. So it's my understanding, though,  
5 that you're not here prepared to express an  
6 opinion on an emergency room physician; is that  
7 correct?

8 A That's correct. With the caveat that I  
9 expressed here that he is, after all, a board  
10 certified family physician. So as you can see,  
11 I'm commenting on the conduct of a family  
12 physician. But I recognize, of course, I'm not a  
13 board certified emergency physician.

14 Q So to the extent Dr. Newman was acting on  
15 the only visit that he saw this patient as an  
16 emergency room physician, you do not have any  
17 opinions with respect to Dr. Newman?

18 MR. FOSTER: Object to the form.

19 THE WITNESS: Well, I do have opinions.  
20 I recognize that my opinions may well be  
21 discounted. So all I can say is I certainly have  
22 opinions.

23 Q BY MR. DANCE: Oh, yeah. And I don't --  
24 I don't -- I don't -- I don't intend for either  
25 you or me to rule on what a judge may rule. And

1 Q OK.

2 A That's all.

3 MR. DANCE: I don't have any further  
4 questions.

5 MR. BRASSEY: Can we take a quick break?

6 MR. DANCE: Sure.

7 (Whereupon, a recess was taken from  
8 10:32 a.m. had 10:38 a.m.)

9 MR. BRASSEY: Are you done?

10 MR. DANCE: I'm done.

11 EXAMINATION

12 BY MR. BRASSEY:

13 Q Doctor, I'm Andy Brassey. I represent  
14 Dr. Chai, a cardiologist. I just have a few  
15 questions for you. As I looked at your  
16 disclosures that we've discussed today and that  
17 have been marked as exhibits, it did not appear to  
18 me as though you have any intention of offering  
19 standard of care opinions as to Dr. Chai.

20 A The way you put it, I would say that's  
21 correct.

22 Q Well, do you have any intention of  
23 offering standard of care opinions as to Dr. Chai,

1 the cardiologist?  
 2 A To answer that, I need to ask for some  
 3 clarification.  
 4 If I'm asked -- if I'm asked do you have  
 5 any opinion at all, does that constitute a  
 6 standard of care opinion?  
 7 Q Let's go about it this way. You're not a  
 8 cardiologist?  
 9 A No.  
 10 Q Have you and never have been?  
 11 A That's correct.  
 12 Q As I understand it in looking at your  
 13 disclosures and listening to your testimony today  
 14 you've made no inquiry as to the standard of care  
 15 that would have been applicable to Dr. Chai on --  
 16 in late May of 2003 when he saw this patient,  
 17 correct?  
 18 A Only with the caveat that I mentioned in  
 19 discussion with Dr. Roach.  
 20 Q That the standard of care as to other  
 21 physicians?  
 22 A Yes.  
 23 Q That comment?  
 24 A When I asked him his opinion about the  
 25 statement of care issue for the other doctors

1 practiced by a cardiologist?  
 2 A Well, again, only to the extent that it  
 3 would overlap with my general training.  
 4 Q I don't mean to beat this to death but I  
 5 don't see -- I mean, there's no disclosure to you  
 6 testifying about cardiology matters.  
 7 And Byron, if you want to jump in, fine.  
 8 If you're going to ask him about this, I guess I'm  
 9 going to think about it.  
 10 MR. FOSTER: Well, the only thing that I  
 11 think to be fair to all of you that he will  
 12 testify about is that pursuant to what he has  
 13 learned as a family practice physician and the  
 14 issues in this case, he may be called upon. And I  
 15 don't know, because we've got several other  
 16 witnesses to talk about this.  
 17 But he may be called upon to say that  
 18 with regard to the development of a differential  
 19 diagnosis and the diagnosis of and treatment for  
 20 pulmonary emboli, those cross specialty lines.  
 21 But whether or not that constitutes whether he can  
 22 testify about what Chai should have done  
 23 technically, I don't know.  
 24 But I realize that opens up a whole can  
 25 of worms. But he's not our main witness on

1 aside from that discussion, you're correct, I do  
 2 not.  
 3 Q And with regard to Dr. Roach, you have no  
 4 knowledge as to what knowledge he may have  
 5 concerning the standard of care applicable to a  
 6 cardiologist in late May of 2003 in Napa, Idaho?  
 7 A Actually it is what he said to me, which  
 8 is what his experience practicing as a family  
 9 physician and interacting with other family  
 10 physicians and subspecialists, including  
 11 cardiologists, pulmonologists, et cetera, in those  
 12 communities, he told me that was his  
 13 understanding.  
 14 Q You have no expertise in cardiology?  
 15 A Correct. Not beyond my general training  
 16 in family medicine.  
 17 Q All right. And you answered -- as I  
 18 understand it, you answered Mr. Dance's question  
 19 you had no expertise in emergency room medicine,  
 20 correct?  
 21 A That's right. Beyond -- beyond my  
 22 general training as a family physician.  
 23 Q All right. And I understand you're  
 24 answering my questions about cardiology in that  
 25 same vein. You have no expertise for the medicine

1 standard of care for a cardiologist. But I think  
 2 in this specific situation, when we're talking  
 3 about diagnosis and treatment of pulmonary emboli  
 4 that principles apply to whatever specialty he may  
 5 be talking about.  
 6 THE WITNESS: Please nudge me if you  
 7 want me to shut up, but I just want to say I don't  
 8 mean to be coy or difficult. I just wanted to be  
 9 clear that if somebody asks, do you have an  
 10 opinion, of course I have an opinion. You know,  
 11 I'd have to be kind of goofy to not have an  
 12 opinion about other physicians outside of my  
 13 specialty.  
 14 But as you and Mr. Dance have pointed  
 15 out, I certainly do not hold myself out to be a  
 16 specialist in cardiology or in emergency medicine.  
 17 Q BY MR. BRASSEY: And let me ask one  
 18 further question.  
 19 You don't have any expertise in the  
 20 medicine practiced by a cardiologist -- and let  
 21 me, with this caveat, I understand as a family  
 22 practitioner you deal with cardiac issues. My  
 23 question is more directed or specific to you don't  
 24 hold yourself out as an expert cardiologist?  
 25 A That's true. I understand you're setting

1 aside so to speak the general training in family  
2 medicine. My understanding is you're asking me  
3 about training or expertise beyond the general  
4 training as a family physician. And I agree,  
5 that's correct.

6 Q You have none other than what you've just  
7 said?

8 A That's right, yes.

9 Q When you were asked questions by  
10 Mr. McCollum about medical causation, when you  
11 answered those questions, tell me what you mean by  
12 "medical causation".

13 A What I was referring to was behaviors,  
14 either omission or commission, that in my opinion  
15 lead to harm to a patient or contribute to it  
16 substantially.

17 Q In Exhibit 3, I believe, it's the fourth  
18 supplemental expert disclosure. Is that three?

19 MR. DANCE: Um-hum. It is.

20 Q BY MR. BRASSEY: You were read a  
21 statement by Mr. McCollum on page 3 that says, it  
22 starts out, it's the second full paragraph, to  
23 comply with the standard of care. And then you  
24 were asked questions about medical causation.  
25 Does that statement mean there was no medical

1 Q Well, let me ask about June 4. What  
2 would have the treatment have been?

3 A OK. Obviously the answer would vary of  
4 course depending on the presentation of the  
5 patient. But so it does help to specify which  
6 date.

7 So focusing on June 4th, I believe --  
8 correct me if I'm wrong -- but I believe the  
9 hypothetical was that he has in his hands results  
10 of a positive D-dimer. Is that also a part of  
11 your question?

12 Q Not really.

13 A Oh, because when I answered that question  
14 I thought that Mr. McCollum had included having a  
15 D-dimer in there. But I may be wrong.

16 Q If he did, I'll include it. I just don't  
17 remember.

18 A OK. Anyway, I think the most important  
19 thing to say is in the emergency room the  
20 general -- the general approach as you all know is  
21 both diagnostic and supportive initially, meaning  
22 that there's a parallel process of clarifying what  
23 the diagnosis is, while at the same time  
24 identifying areas in which the patient is unstable  
25 or at Imminent risk of becoming unstable.

1 causation before May 30, 2003?

2 A A good question. Yeah, I appreciate that  
3 question. As I -- as I read the phrase by the  
4 time I realize that is a little -- could be a  
5 little vague in how that's interpreted. I did not  
6 mean that to imply -- I'm sorry, let me begin  
7 again. I did not mean the phrase "by the time" to  
8 mean at that time. I meant it to imply in the  
9 time during the time period up to and including  
10 that date of May 30th. Did I answer your  
11 question?

12 Q I think so.

13 With regard to the treatment that you  
14 would have expected for Mrs. Aguilar in this case  
15 when you said you would have sent her to the  
16 emergency room in an ambulance, what would that  
17 treatment have consisted of, do you know?

18 A In the emergency room?

19 Q Correct. Or in the hospital. I'm not  
20 going to confine it to the emergency room. What  
21 I'm getting at is you opined at certain times her  
22 life could have been saved. My question is what  
23 was that process?

24 A You're referring to June 4th  
25 specifically?

1 So if a patient has recently or is  
2 currently unstable, those of course would be areas  
3 that would attract a lot of attention. To give  
4 examples, if a patient is tachycardiac, if they're  
5 experiencing -- recently have experienced chest  
6 pain or shortness of breath, those obviously would  
7 be both objects of diagnosis as well as potential  
8 support.

9 Because as you all know, part of the job  
10 and part of the value of the emergency setting is  
11 to prevent imminent -- well, acute arrest or acute  
12 collapse of a system.

13 Once the diagnosis is made, then of  
14 course as you know, there are a variety of options  
15 available to treat a pulmonary embolus. Once the  
16 embolus has been identified, the size and nature  
17 of the embolus, and depending on how stable or how  
18 at risk the patient is, may involve a surgical  
19 procedure. It may involve anticoagulation,  
20 thrombolysis and so on.

21 And my experience is those treatment  
22 options are dictated very much by the specific  
23 information that's obtained at that time.

24 Q So it's those three options, surgery,  
25 anticoagulation -- and what was the third?

Andrew C. Brassey (ISB No. 2128)  
Bradley S. Richardson (ISB No. 7008)  
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**F I L E D**  
A.M. 4:43 P.M.

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Attorneys for Defendant Andrew Chai, M.D.

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

JOSE AGUILAR, individually, as the Personal Representative of the Estate of Maria A. Aguilar, deceased, and as the natural father and guardian of GUADALUPE MARIA AGUILAR, ALEJANDRO AGUILAR, and LORENA AGUILAR, minors, and JOSE AGUILAR, JR., heirs of Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R. NEWMAN, M.D. NATHAN COONROD, M.D., CATHERINE ATUP-LEAVITT, M.D. MITCHELL LONG, D.O., COLUMBIA WEST VALLEY MEDICAL CENTER, an Idaho corporation, MERCY MEDICAL CENTER, an Idaho corporation, and PRIMARY HEALTH CARE CENTER, an Idaho corporation, JOHN and JANE DOES I through X, employees of one or more of the Defendants,

Defendants.

Case No. CV05-5781

**MEMORANDUM IN SUPPORT OF  
DEFENDANT ANDREW CHAI,  
M.D.'S MOTION IN LIMINE**

ORIGINAL

COMES NOW Defendant Andrew Chai, M.D., by and through his counsel of record, Brassey, Wetherell & Crawford, and hereby moves the Court to preclude any and all evidence as to the issues raised in Defendant Chai's Motion in Limine and with respect to his joinder in the Co-Defendants' Motion in Limine.

**I.**

**INTRODUCTION**

The Court should prohibit Plaintiffs, their counsel, representatives and witnesses, from making or referencing, directly or indirectly, whether during voir dire, opening statement, witness testimony, objections, arguments, closing statement, or in any other proceeding whatsoever, the following issues: (1) testimony by Plaintiffs' experts Dr. Daniel Brown, Dr. Paul Blaylock, and Dr. Samuel LeBaron regarding the standard of care for Defendant Chai; (2) proceedings before the Idaho medical malpractice screening panel and its corresponding report; (3) reference to insurance or the insurance industry; (4) evidence or testimony regarding Plaintiffs' or the decedent's alleged grief, pain or anguish; (5) testimony from Plaintiffs' loss counselor; (6) testimony by paramedics Carol Bates and Michelle Giokas; (7) testimony by Eliserio Marquez, Edelmira DeValle, and Jennifer Aguilar; (8) the coroner's record and testimony by Bill Kirby; and (9) learned treatises unless proper foundation is laid.

**II.**

**PERTINENT FACTS AND PROCEDURAL HISTORY**

This a complex medical malpractice action. Defendant Andrew Chai is a cardiologist, and was practicing in Nampa, Idaho, in May of 2003. Plaintiffs allege that the decedent died from issues associated with a pulmonary embolism.

On October 26, 2006, Defendant Chai propounded his First Set of Interrogatories to Plaintiff. *See* Exhibit "A" of Affidavit of Counsel, filed contemporaneously herewith. In doing so, Dr. Chai requested the following information from Plaintiffs regarding their experts:

- INTERROGATORY NO. 5:** Have you engaged or contacted any experts for consultation or assistance who are expected to testify at the trial of this cause? If so, please state the experts:
- (a) Name, address, and telephone number;
  - (b) Educational background starting with college or university experience;
  - (c) Any field of specialization, special training, or skills possessed by the expert;
  - (d) The specific substance of the expected testimony of the expert;
  - (e) All facts, data, knowledge, or information relied upon by the expert in the forming of opinions or testimony, which is the subject of sub-paragraph (d) above.

*See* Exhibit "A" of Affidavit of Counsel.

Since that time, Plaintiffs have disclosed two experts that intend to testify that Dr. Chai breached the applicable standard of health care practice. These experts are cardiologist, Dr. Daniel Brown, in Twin Falls, and emergency room physician Dr. Paul Blaylock, in Portland, Oregon.

On April 14, 2008, Defendants took the deposition of Dr. Brown. *See* Exhibit "B" of Affidavit of Counsel. At that time, defense counsel inquired as to how Dr. Brown became familiar with the applicable standard of health care practice. Essentially, Dr. Brown alleged that he became familiar with the applicable standard by reading medical literature, interacting with Boise cardiologists, and by reviewing practice guidelines from a professional society. *See* p.25-28 of Exhibit "B" of Affidavit of Counsel.

The relevant exchange between defense counsel and Dr. Brown regarding this issue is as follows:

Q. And on what do you base that opinion that the standard of practice in Twin Falls is the same as Nampa?

A. Well, I think that there are several things that do that. As I said, all of us read the same literature. And when I have had the opportunity, which I've had on several occasions, to have interactions with cardiologists who practice in the Boise metropolitan area that it's very clear that we think the same, act the same and approach patients more or less the same on the areas of specific discussion that I've had with them.

Q. Have any of those discussions had to do with treatment of pulmonary embolus?

A. No.

Q. Well, go ahead and tell me.

A. And more to it than that is that our professional organization, which is called the American College of Cardiology, essentially practices or publishes on a periodic basis practice guidelines. And these practice guidelines are intended for cardiologists who are taking care of patients with a specific problem nationwide.

Now, it is very important to understand that the American College of Cardiology sees guidelines as guidelines, and not purely standard of practice. And they expect to see, from case to case, minor variations in the way that some patients are treated.

So in point of fact, not only do I rely on the communications with my colleagues in the Boise metropolitan area, but we also both rely on what our professional society says.

Q. Okay. Any other basis for you to opine that the standard of health care practice for a cardiologist in Twin Falls is the same as that for a cardiologist in Nampa?

A. No.

*See* p.25, L.20-p.26, L.10 and p.27, L.4-p.28, L.1 of Exhibit "B" of Affidavit of Counsel (emphasis added).

Dr. Brown also testified during his deposition that he was practicing in Bellingham, Washington, and not in Idaho in May of 2003. *See* p.21, L.11- p.22, L.4 of Exhibit "B" of Affidavit of Counsel. The relevant questions to Dr. Brown and his answers concerning this fact state:

Q. How long have you practiced in Twin?

A. Pushing five years.

Q. And where were you before that?

A. State of Washington. Bellingham, if that's of interest.

...

Q. So you've been in Twin five years, meaning you came to Twin when?

A. 2003.

Q. Do you remember when in 2003?

A. June.

*See* p.21, L.11-15 and p.21, L.25-p.22, L.4 of Exhibit "B" of Affidavit of Counsel (emphasis added).

On May 29, 2008, Defendants took the deposition of Dr. Blaylock. *See* Exhibit "C" of Affidavit of Counsel, filed contemporaneously herewith. Dr. Blaylock testified as to his attempt to become familiar with the applicable standard of health care practice for various Defendants in this matter. Specifically, Dr. Blaylock testified that he learned the applicable standard by reviewing Idaho statutes, in lecturing to Idaho physicians at the American College of Emergency Physician Conferences, by practicing with doctors who previously worked in Idaho, and in reviewing Idaho cases. *See* p.24-27 of Exhibit "C" of Affidavit of Counsel. None of this testimony, however, referenced cardiology or the standards for cardiologists.

With respect to his opinions regarding Dr. Chai, Dr. Blaylock stated that he spoke to Dr. Brown to familiarize himself with the applicable standard for cardiologists. *See* p.114-117 of Exhibit "C" of Affidavit of Counsel. Nevertheless, Dr. Blaylock could not verify how Dr. Brown knew the applicable standard. The inquiry by defense counsel and Dr. Blaylock's answers regarding this issue are as follows:

Q. And here's my question: What information did Dr. Brown give you to tell you he knew the standard of care in Nampa for a cardiologist in May of 2003?

A. Other than - he told me that he knew what the standard of care was for Twin Falls for Boise and for Nampa and that it was the same.

Q. Did he tell you how he knew that, that's my question.

A. We may have discussed it. My notes don't reflect that.

*See* p.116, L.18-p.117, L.3 of Exhibit "C" of Affidavit of Counsel (emphasis added).

On June 3, 2008, Defendants took the deposition of Dr. Samuel LeBaron. *See* Exhibit "D" of Affidavit of Counsel. Dr. LeBaron testified that he is a family doctor, not a cardiologist. In addition, Dr. LeBaron admitted that he was not disclosed as an expert to testify against Dr. Chai. This subsequently was confirmed by Plaintiffs' counsel at the deposition. The relevant inquiries and responses regarding this issue are as follows:

Q Doctor, I'm Andy Brassey. I represent Dr. Chai, a cardiologist. I just have a few questions for you. As I looked at your disclosures that we've discussed today and that have been marked as exhibits, it did not appear to me as though you have any intention of offering standard of care opinions as to Dr. Chai.

A The way you put it, I would say that's correct.

Q Well, do you have any intention of offering standard of care opinions as to Dr. Chai, the cardiologist?

A To answer that, I need to ask for some clarification. If I'm asked -- if I'm asked do you have any opinion at all, does that constitute a standard of care opinion?

Q Let's go about it this way. You're not a cardiologist?

A No.

...

Q You have no expertise in cardiology?

A Correct. Not beyond my general training in family medicine.

...

Q I don't mean to beat this to death but I don't see -- I mean, there's no disclosure to you testifying about cardiology matters.

And Byron, if you want to jump in, fine. If you're going to ask him about this, I guess I'm going to think about it.

MR. FOSTER: Well, the only thing that I think to be fair to all of you that he will testify about is that pursuant to what he has learned as a family practice physician and the issues in this case, he may be called upon. And I don't know, because we've got several other witnesses to talk about this.

But he may be called upon to say that with regard to the development of a differential diagnosis and the diagnosis of and treatment for pulmonary emboli, those cross specialty lines. But whether or not that constitutes whether he can testify about what Chai should have done technically, I don't know.

But I realize that opens up a whole can of worms. But he's not our main witness on standard of care for a cardiologist. But I think in this specific situation, when we're talking about diagnosis and treatment of pulmonary emboli that principles apply to whatever specialty he may be talking about.

...

Q BY MR. BRASSEY: And let me ask one further question.

You don't have any expertise in the medicine practiced by a cardiologist -- and let me, with this caveat, I understand as a family practitioner you deal with cardiac issues. My question is more directed or specific to you don't hold yourself out as an expert cardiologist?

A That's true. I understand you're setting aside so to speak the general training in family medicine. My understanding is you're asking me about training or expertise beyond the general training as a family physician. And I agree, that's correct.

*See* p.65, L.15-p.66, L.9; p.67, L.14-16; p.68, L.4-p.69, L.5; p.69, L.17-p.70, L.5 of Exhibit "D" of

Affidavit of Counsel (emphasis added).

Defendant Chai now brings the instant motion in limine to preclude testimony from Drs. Brown, Blaylock, and LeBaron as to the standard of care for Dr. Chai. In addition, Defendant Chai joins in the motions in limine filed by Co-Defendants in this matter as outlined below.

### III.

#### ARGUMENT

##### A. Drs. Brown and Blaylock Cannot Testify as to the Standard of Care for Dr. Chai.

Drs. Brown and Blaylock should be precluded from testifying as to the standard of care with respect to Dr. Chai. In Idaho, an expert must have “actual knowledge of the applicable community standard of care.” *Dulaney v. St. Alphonsus Reg’l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002)(citing *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994); *Dunlap ex rel. Dunlap v. Garner*, 127 Idaho 599, 903 P.2d 1296 (1994)). Thus, the expert must be familiar with the standard of care for a particular healthcare professional in the relevant community and time. *Id.* (citing *Perry v. Magic Valley Reg’l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000) and *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994)). Although an expert may be of a different specialty, the expert must “demonstrate a knowledge acquired from experience or study of the standards of the specialty of the defendant physician.” *Id.* at 168, 45 P.3d at 824 (quoting *Clark v. Prenger*, 114 Idaho 766, 769, 760 P.2d 1182, 1185 (1988)).

One method for an out-of-area expert to learn the standard of care is by inquiring of a local specialist. *Dulaney*, 137 Idaho at 164, 45 P.3d at 821. In the unique situation, however, where there is no local specialist to consult, experts may look to other comparable medical communities. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 147, 937 P.2d 1212, 1221 (1997) (discussing *Hoene v. Barnes*, 121 Idaho 752, 828 P.2d 315 (1992)).

In *Morris*, the Idaho Supreme Court recognized that out-of-area experts could only contact experts in other communities after the plaintiff had demonstrated that there were no available health care providers in the local community. *Id.* at 147, 937 P.2d at 1221. Thus, the Court stated that a plaintiff first must show that the local standard of care is indeterminable before contacting other communities. *Id.* Based on the facts in *Morris*, the Court concluded that the plaintiff failed to demonstrate that the local standard of care in Emmett, Idaho, was indeterminable. *Id.* As a result, the Court held that the plaintiff could not proffer the testimony of an out-of-area expert. *Id.*

In the instant action, Plaintiffs have failed to meet the requirements as set forth above, and therefore their standard of care opinions regarding Dr. Chai should be precluded from trial. Significantly, Plaintiffs have failed to utilize a local expert in the Nampa-Caldwell area to familiarize their out-of-area experts. As such, Plaintiffs cannot claim that Dr. Brown's cardiology practice in Twin Falls is similar to those of cardiologists in the Nampa-Caldwell area. This is because Plaintiffs must first show that the standard of care in the Nampa-Caldwell area is indeterminable. *See Morris*, 130 Idaho at 147, 937 P.2d at 1221. As there has been no such showing, Plaintiffs cannot proffer the testimonies of Dr. Brown and Dr. Blaylock with regard to Dr. Chai. *Id.*

The deposition testimonies of Dr. Brown and Dr. Blaylock provide an additional basis to strike or limit their trial testimonies. Specifically, these deposition testimonies show that Dr. Brown and Dr. Blaylock do not have an actual knowledge on the local standard of care. In fact, Dr. Brown testified that he was practicing in Washington, not Nampa, in May of 2003. *See* p.21-22 of Exhibit "B" of Affidavit of Counsel. Further, Dr. Brown testified that none of his interactions with local cardiologists dealt with the treatment of a pulmonary embolus. *See* p.26 of Exhibit "A" of Affidavit of Counsel. As a result, Plaintiffs have failed to adequately familiarize Dr. Brown, and therefore he cannot testify as to the standard of care with respect to Dr. Chai.

The same holds true for Dr. Blaylock. Because Dr. Brown did not know the standard of care, he could not familiarize Dr. Blaylock. Notably, Dr. Blaylock could not state how Dr. Brown knew the standard of care. *See* p.116-117 of Exhibit "C" of Affidavit of Counsel. Even more concerning is the fact that Dr. Blaylock is an emergency room physician, and not a cardiologist. Therefore, Dr. Blaylock is required to learn the standard of care for Dr. Chai's specialty in cardiology.

Plaintiffs' use of Dr. Blaylock is analogous to the facts in the case of *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 45 P.3d 816 (2002). In *Dulaney*, the plaintiff attempted to utilize an expert neurologist, Dr. Stump, from Washington to testify against an orthopedic surgeon in Boise. *Id.* at 167, 169, 45 P.3d at 823, 825. Dr. Stump had contacted an anonymous professor who claimed to know the standard for orthopedic surgeons in Boise. *See id.* at 169, 45 P.3d at 825. The Idaho Supreme Court, however, found that the professor did not have an actual knowledge of the standard for orthopedic surgeons, and therefore could not familiarize Dr. Stump. *Id.* The Court explained:

The professor stated that he had trained orthopedic physicians "that presently practice in Boise," but he did not state whether they were practicing in Boise in 1994. He stated that he has "maintained personal and professional relationships with physicians in Boise," but he did not state whether he did so during 1994. He likewise did not state that he had ever discussed with these orthopedic physicians the standard of care for an orthopedic physician practicing in Boise in 1994. He stated that he had taught and lectured in Boise, but did not state when he did so. Dr. Stump's affidavit does not allege any specific facts showing that the anonymous professor was familiar with the standard of care for orthopedic surgeons in Boise in August 1994. The professor's conclusory statement that he was familiar with the standard of care in Boise in 1994 is simply not sufficient. *Strode v. Lenzi*, 116 Idaho 214, 775 P.2d 106 (1989). The district court correctly held that the supplement affidavit of Dr. Stump was not sufficient to show that he had adequately familiarized himself with the standards and practices of orthopedic surgeons in Boise, Idaho, in August 1994.

*See id.*

As was the case in *Dulaney*, there is no showing that Dr. Brown knew the standard of care before discussing the case with Dr. Blaylock. Similarly, under *Dulaney*, Dr. Blaylock's lectures to Idaho emergency room physicians do not establish that he knows the standard of care for cardiologists such as Dr. Chai. *See id.*

Accordingly, the Court should preclude any and all testimony from Dr. Brown and Dr. Blaylock as to the applicable standard of health care practice for Dr. Chai in this matter.

**B. Dr. LeBaron has Not been Properly Disclosed and Cannot Testify Regarding Dr. Chai.**

Dr. Samuel LeBaron is a family doctor and does not have the requisite knowledge to testify as to the standard of care for Dr. Chai, a cardiologist, in this matter. Additionally, such testimony should be precluded because Plaintiffs have failed to properly disclose any opinions for Dr. LeBaron regarding Dr. Chai.

Under Idaho law, expert witnesses may be excluded if they are not timely disclosed. *Priest v. Landon*, 135 Idaho 898, 901, 26 P.3d 1235, 1238 (Ct. App. 2001). Further, the absence of a legitimate excuse or explanation for a late expert disclosure provides an additional basis for exclusion. *Branwell v. South Rigby Canal Co.*, 136 Idaho 648, 652, 39 P.3d 588, 592 (2001); *Clark v. Raty*, 137 Idaho 343, 347, 48 P.3d 672, 676 (Ct. App. 2001). Notably, an opposing party is not required to compel disclosure of expert opinions. *Clark v. Klein*, 137 Idaho 154, 160, 45 P.3d 810, 816 n.1. The underlying rationale for the rule is that effective cross-examination of an expert witness requires advance preparation. *Clark*, 137 Idaho at 157, 45 P.3d at 813.

Defendant Chai specifically requested the opinions of all of Plaintiffs' experts as part of his First Set of Interrogatories to Plaintiffs on October 26, 2006. Nevertheless, Plaintiffs have included no opinions for Dr. LeBaron as to Dr. Chai in any of Plaintiffs' expert witness disclosures. In addition, Plaintiffs have not provided any discovery responses indicating that Dr. LeBaron would

testify in any way as to Dr. Chai. Clearly, Dr. Chai is not required to compel disclosure of such opinions, and therefore any opinions regarding Dr. Chai must be excluded from trial. *Clark*, 137 Idaho at 160, 45 P.3d at 816 n.1.

Likewise, the deposition testimony of Dr. LeBaron shows that he cannot testify against Dr. Chai in this matter. Specifically, Dr. LeBaron admitted during his deposition that his expert witness disclosures did not include any opinions as to the standard of care for Dr. Chai. *See* p.65 of Exhibit “D” of Affidavit of Counsel. In addition, Dr. LeBaron conceded that he is not a cardiologist and that he has no expertise in cardiology. *See* p.66 of Exhibit “D” of Affidavit of Counsel. In fact, even Plaintiffs’ counsel stated that he did not know whether Dr. LeBaron could testify as to Dr. Chai. *See* p.68 of Exhibit “D” of Affidavit of Counsel. As a result, Dr. LeBaron lacks the requisite knowledge for giving opinions as to a cardiologist.

Thus, the Court should not allow Dr. LeBaron to testify as to the standard of care for Dr. Chai. Otherwise, Dr. Chai will be unduly prejudiced in his defense of this lawsuit.

**C. The Court should grant Co-Defendants’ Motions in Limine.**

Defendant Chai has filed a joinder contemporaneously herewith as to Defendants Nathan Coonrod, M.D.’s and Primary Health Care Center’s Motion in Limine and Second Motion in Limine, and Defendant Steven R. Newman, M.D.’s Motion in Limine, Second Motion in Limine and Third Motion in Limine, and hereby references below key issues associated with those motions.

**1. Medical Malpractice Screening Panel.**

Pursuant to Rules 413 and 520 of the Idaho Rules of Evidence, the Court should preclude any and all testimony or other evidence relating in any way to the Idaho Medical Malpractice Screening Panel and its subsequent report issued regarding this matter.

2. **Insurance.**

Pursuant to Rule 411 of the Idaho Rules of Evidence, the Court should preclude any and all references or evidence as to the Defendants' malpractice insurance, or the insurance industry, in this matter. Specifically, there is no showing that any exceptions apply to the pertinent rule.

3. **Testimony Regarding Grief, Pain or Anguish.**

The Court should preclude any and all evidence regarding Plaintiffs' or the decedent's alleged grief, pain or anguish. Under Idaho's wrongful death statute, I.C. § 5-311, grief suffered by surviving heirs is not "a compensable element of damage." *Gavica v. Hanson*, 111 Idaho 58, 61, 608 P.2d 816, 864 (1980) *overruled on other grounds* in *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986); *see also Checketts v. Bowman*, 70 Idaho 463, 220 P.2d 682 (1950). Moreover, claim for any pain and suffering is personal to the decedent, and would not survive her death. *See Evans v. Twin Falls County*, 118 Idaho 210, 215-16, 796 P.2d 87, 92-93 (1990). As a result, the Court should preclude any witness or expert witness from testifying regarding the Plaintiffs' or the decedent's grief, pain or suffering in this matter.

Perhaps more importantly, any such evidence would unfairly mislead or confuse the jury as to the real issues of this case. Any testimony to generate sympathy for Plaintiffs through this means should be excluded as irrelevant and misleading pursuant to Rules 401 and 403 of the Idaho Rules of Evidence. Therefore, the Court should preclude any and all such evidence at trial.

4. **Loss Counselor.**

Defendant Chai hereby adopts and incorporates as if set forth fully herein Defendant Newman's arguments as to the preclusion of testimony by Plaintiffs' loss counselor. In addition, the Court should disallow Plaintiffs' loss counselor from testifying as Plaintiffs have failed to meet the requirements for expert witnesses under Rule 26(b)(4) of the Idaho Rules of Civil Procedure. *See*

*Radmer v. Ford Motor Co.*, 120 Idaho 86, 90, 813 P.2d 897, 901 (1991)(stating that the “failure to meet the requirements of Rule 26 results in exclusion of the proffered evidence.”) Specifically, Plaintiffs neither identified the individual who would testify as a loss counselor, nor otherwise provided the requisite information under Rule 26. Therefore, the Court should bar Plaintiffs from calling a loss counselor.

5. **Exclusion of Testimony by Carol Bates and Michelle Giokas.**

Defendant Chai hereby adopts and incorporates as if set forth fully herein Defendant Newman’s arguments as to the preclusion of testimony by Carol Bates and Michelle Giokas. Specifically, there is insufficient proof of habit evidence as required under Rule 406 of the Idaho Rules of Evidence. As such, the proposed evidence by Plaintiffs is speculative, and lacks sufficient indicia to constitute a habit. Furthermore, Rule 602 of the Idaho Rules of Evidence prohibits a witness from testifying unless he or she has personal knowledge of the matter. Ms. Bates and Ms. Giokas do not recall the specific evidence and cannot testify with any degree of certainty.

6. **Exclusion of Sympathy Testimony by Eliserio Marquez, Edelmira DeValle, and Jennifer Aguilar.**

Defendant Chai hereby adopts and incorporates as if set forth herein Defendant Newman’s arguments as to the preclusion of testimony by Eliserio Marquez, Edelmira DeValle, and Jennifer Aguilar. In addition, any prior statements made by the decedent or any of these individuals is inadmissible hearsay pursuant to Rule 803 of the Idaho Rules of Evidence and no exception applies. Moreover, these individuals should not be allowed to testify for the purposes of generating sympathy, or in restating cumulative evidence in contravention of Rule 403 of the Idaho Rules of Evidence.

7. **Coroner’s Record and Testimony from Bill Kirby.**

Defendant Chai hereby adopts and incorporates as if set forth fully herein Defendant Newman’s arguments as to the preclusion of testimony by Bill Kirby and the Canyon County

Coroner's Record. As to these issues, the Court should preclude such evidence as there is great danger to confuse and mislead the jury. Moreover, pursuant to Rules 702 and 703, the Court should preclude evidence from Mr. Kirby as his testimony will not assist the trier of fact. Mr. Kirby is not a medical doctor and therefore he cannot issue statements or opinions regarding medical issues. His proposed testimony also implicates Rule 403, as it would confuse the jury. Likewise, any testimony as to what Mr. Kirby told Plaintiffs is inadmissible hearsay. *See* I.R.E. 803. Therefore, Mr. Kirby should not be allowed to testify at trial.

**8. Learned Treatise.**

In addition to the arguments made by Defendant Coonrod, the Court must require that a proper foundation be laid before any reference of a medical text or treatise may be read into the record. *See Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 602, 798 P.2d 55, 61 (1990); *LaBelle v. State*, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997).

**IV.**

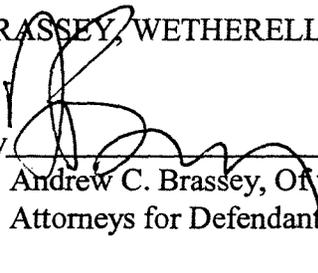
**CONCLUSION**

Based upon the foregoing, and for the reasons set forth herein, the Court should grant Defendant Andrew Chai's Motion in Limine, as well as the other Co-Defendants' motions in limine.

DATED this 20<sup>th</sup> day of March, 2009.

BRASSEY, WETHERELL & CRAWFORD

By

  
\_\_\_\_\_  
Andrew C. Brassey, Of the Firm  
Attorneys for Defendant Andrew Chai, M.D.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20<sup>th</sup> day of March, 2009, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT ANDREW CHAI, M.D.'S MOTION IN LIMINE** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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**FILED**  
A.M. 11:00 P.M.

**MAR 23 2009**

**CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY**

Attorneys for Defendant Mitchell Long, D.O.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the  
Personal Representative of the estate of  
Maria A. Aguilar, deceased, and as the  
natural father and guardian of  
GUADALUPE MARIA AGUILAR,  
ALEJANDRO AGUILAR, and LORENA  
AGUILAR, minors, and JOSE AGUILAR,  
JR., heirs of Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.  
NEWMAN, M.D., NATHAN COONROD,  
M.D., MITCHELL LONG, D.O.,  
PRIMARY HEALTH CARE CENTER, an  
Idaho corporation, JOHN and JANE DOES  
I through X, employees of one or more of  
the Defendants,

Defendants.

Case No. Case No. CV 05-5781

**MITCHELL LONG, M.D.'S  
PRETRIAL STATEMENT**

MITCHELL LONG, M.D.'S PRETRIAL STATEMENT - 1

## I. STATEMENT OF DEFENSE

This is a medical malpractice action in which plaintiffs allege numerous medical providers failed to diagnose or treat plaintiffs' decedent's pulmonary embolus in the April, May and June 2003 time frame, that such failures were breaches of the standard of care, and resulted in plaintiffs' decedent's death. Dr. Long's care and treatment of plaintiffs' decedent, Maria Aguilar, which consisted of a single visit to the Mercy Medical Center Emergency Department on May 27, 2003, complied with the standard of care applicable to an emergency medicine physician practicing in Nampa, Idaho, in May 2003. Plaintiffs will be unable to establish any breach on behalf of Dr. Long as required pursuant to Idaho Code Sections 6-1012 and 6-1013. Further, plaintiffs will be unable to establish any action or inaction on behalf of Dr. Long caused plaintiffs' decedent's death.

### 1. Elements of a *prima facie* case.

To prevail on a medical malpractice claim, a plaintiff must establish the following elements of proof:

- (a) The existence of a physician/patient relationship;
- (b) A duty of care, recognized by law requiring the physician to conform to a certain standard of conduct;
- (c) A breach of that duty by conduct which fails to meet the applicable standard of care;
- (d) Proximate cause, and;
- (e) Actual loss or damage.

Fuller v. Studer, 122 Idaho 251, 833 P.2d 109 (1992); Johnson v. Thomson, 103 Idaho 702, 652 P.2d 650 (1982); Algeria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); IDJI 205. If plaintiffs are unable to prove all of these elements, Dr. Long is entitled to judgment as a matter of law.

**2. Plaintiffs will be unable to establish that Dr. Long failed to conform to the local standard of care.**

Plaintiffs will be unable to prove that Dr. Long did not follow the local standard of care in the care and treatment rendered to plaintiffs' decedent on May 27, 2003; plaintiffs cannot prove a case of medical malpractice against Dr. Long. First, plaintiffs must establish the standard of care applicable to Dr. Long. Second, they must prove by expert medical testimony a breach of the standard of care applicable to an emergency medicine physician practicing in Nampa, Idaho, in May 2003. I.C. § 6-1012 and § 6-1013 (establishing the substantive and foundational requirements for expert testimony in medical malpractice cases); Ramos v. Dixon, 144 Idaho 32, 35, 156 P.3d 533, 536 (2007); Edmunds v. Kraner, 142 Idaho 867, 876, 136 P.3d 338, 347 (2006); Newberry v. Martens, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005); Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 164, 45 P.3d 816, 820 (2002); Kolln v. St. Luke's Reg. Med. Ctr., 130 Idaho 323, 940 P.2d 1142, 1147-48 (1997); Strode v. Lenzi, 116 Idaho 214, 775 P.2d 106 (1989); LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980).

Under Idaho Code Section 6-1012, an essential part of a plaintiff's case is affirmative proof by direct expert testimony that the defendant health care provider failed to meet the applicable standard of health care practice in the community in which the care was, or should have been, provided. I.C. § 6-1012; see also Ramos v. Dixon, 144 Idaho at 35, 156 P.3d at 536; Edmunds v. Kraner, 142 Idaho at 876, 136 P.3d at 347; Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 164, 45 P.3d 816, 820 (2002); Rhodehouse v. Stutts, 125 Idaho 208, 868 P.2d 1224, 1227 (1994). The expert must testify that the defendant health care provider did not meet the standard of care applicable to his or her particular field of health care and specialty.

MITCHELL LONG, M.D.'S PRETRIAL STATEMENT - 3

I.C. § 6-1012. Thus, every defendant health care provider shall be judged in comparison with similarly trained and qualified health care providers in the same community, taking into account his or her training, experience, and field of medical specialization, if any. See Ramos v. Dixon, 144 Idaho at 35, 156 P.3d at 536; Edmunds v. Kraner, 142 Idaho at 876, 136 P.3d at 347; Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 164, 45 P.3d 816, 820 (2002); Kolln, 940 P.2d at 1150.

Idaho Code Section 6-1012 must be read in conjunction with Idaho Code § 6-1013, which provides the foundational requirements for the expert testimony in medical malpractice cases. The applicable standard of practice and the failure to adequately meet the community standard of care must be established by the plaintiff by one or more knowledgeable, competent expert witness. I.C. § 6-1013. However, before the expert testimony will be admitted into evidence, the plaintiff must first lay a proper foundation for the testimony. See Weeks v. Eastern Idaho Health Services, 143 Idaho 834, 153 P.3d 1180, 1183 (2007); Ramos v. Dixon, 144 Idaho 32, 156 P.3d 533, 536 (2007); Dulaney, 137 Idaho at 164, 45 P.3d at 533; Evans v. Griswold, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997); Watts v. Lynn, 125 Idaho 341, 345, 870 P.2d 1300, 1304 (1994); Rhodehouse, 868 P.2d at 1227-28. A proper foundation establishes that: (a) the opinion is actually held by the expert witness, (b) the opinion is held with a reasonable degree of medical certainty, and (c) the expert possesses actual knowledge of the applicable community standard which was in place at the time of the alleged malpractice. I.C. § 6-1013. Accordingly, the expert's testimony must show that he or she familiarized himself or herself with the local standard of care for a particular defendant, whether the defendant be a physician, thoracic surgeon, nurse, hospital or other health care worker. Id.; see also Ramos v.

Dixon, 144 Idaho 32, 156 P.2d at 536 (2007). A plaintiff must first establish, as a foundation for expert testimony, that their expert has actual knowledge of the local standard of care and skill ordinarily exercised by a like provider in the same community. Id. This means showing actual knowledge of the standard of care and skill for an emergency medicine physician in Nampa, Idaho, in May 2003.

If the expert is not from the locality where the alleged malpractice occurred, the expert can only demonstrate an adequate familiarity with the local standard of care by consulting with a health care provider who practices in the same community where the alleged malpractice occurred. Kolln v. St. Luke's Reg'l Med. Ctr., 130 Idaho 323, 940 P.2d 1142, 1147-48 (1997); Watts v. Lynn, 870 P.2d at 1304; Rhodehouse v. Stutts, 125 Idaho 208, 868 P.2d 1224, 1228 (1994) (In order to show actual knowledge of the local standard of care under I.C. 6-1013, the Court has held that a medical expert from out of the area must inquire of a local specialist as to the local community standard of care.); Strode, 775 P.2d at 108 (holding that before a board certified specialist from outside the state may testify as to the local standard of care, the specialist "must, at a minimum, inquire of a local specialist to determine whether the local community standard varies from the national standard for that board certified specialty.") The term community refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was provided. I.C. § 6-1012. The community at issue in the instant action as to Dr. Long is Nampa, Idaho. As such, plaintiffs must establish their experts have actual knowledge of the standard of care for an emergency medicine physician in Nampa, Idaho (not Boise or Meridian) in May 2003.

In this case, plaintiffs' emergency medicine physician experts have not practiced in Nampa and do not have individual knowledge of the community specific standard of care. Given that plaintiffs' standard of care experts do not have actual knowledge of the applicable standard of care, they must establish that they have adequately familiarized themselves with that standard of care in order to testify at trial.

In this case, plaintiffs have attempted to qualify their experts through a discussion with Kenneth Bramwell, M.D., an emergency medicine physician who practices in Boise and Meridian. As discussed in briefing in support of Dr. Newman's Second Motion in Limine, plaintiffs have failed to establish Dr. Bramwell has actual knowledge of the standard of care applicable to Dr. Long. Further, plaintiffs have failed to establish that the applicable standard of care is indeterminable.

As such, plaintiffs will not be able to qualify either of their emergency medicine physician experts, Dr. Paul Blaylock and Dr. Dean Lapinel, to testify as to the standard of care applicable to Dr. Long, or whether his actions failed to meet such standard.

### **3. Dr. Long's experts.**

Dr. Long has retained Willis Parmley, M.D., J.D, and Greg Henry, M.D., to testify as to the applicable standard of care and Dr. Long's conformance therewith and their opinion that Dr. Long's actions did not cause or contribute to Mrs. Aguilar's death. Dr. Parmley is an emergency medicine physician currently practicing in Pocatello, Idaho, while Dr. Henry is an emergency medicine physician in Michigan. Both of the experts will testify based upon their education, training and experience as emergency medicine physicians and based on their actual or gained knowledge of the applicable standard of care.

**4. The mere fact that an unfortunate or undesirable result occurred does not constitute a breach of the standard of care.**

The mere fact that an undesirable or unfortunate result occurs following the medical care rendered by Dr. Long does not, of itself, establish a breach of the standard of care. See Brown v. Tulane Medical Center Hosp. and Clinic, 958 So.2d 87 (La. 2007) (holding “the mere fact that an injury occurred . . . raises no presumption or inference of negligence.”); Kenyon v. Miller, 756 So.2d 133, 136 (Fl. App. 2000)(holding “the law is clear that ‘negligence cannot be inferred from the fact that the surgery was unsuccessful or terminated in unfortunate results.’” Citations omitted); Hirahara v. Tanaka, 959 P.2d 830 (Haw. 1998)(“The mere proof of an unfavorable result, without more, will not be enough to establish a physician’s liability.”); Bates v. Meyer, 565 So.2d 134, 137 (Ala., 1990)(holding that “the existence of an unfortunate result does not raise an inference of culpability.”); Miller v. Kennedy, 588 P.2d 734 (Wash. 1978)(holding “the instruction challenged here accurately states that a bad result or injury in itself is not evidence of negligence. Instruction No. 5 is neither erroneous nor misleading, and the court did not err in giving the instruction to the jury.”); e.g., Crawford v. Anagnostopoulos, 387 N.E.2d 1064 (Ill. 1st Dist. 1979) (“Proof by plaintiff that defendant’s treatment was not favorable, that she still suffers from the same condition, does not of itself indicate that the defendant failed to use the applicable standard of care. Proof of a bad result or mishap is not evidence of lack of skill or negligence.”).

If liability could be predicated on a perceived “bad” result, without more, strict liability--rather than negligence--would be the standard. Medical practitioners, however, are not insurers of the correctness of their diagnosis or treatment. Willis v. Western Hospital Ass'n, 67 Idaho 435, 182 P.2d 950 (1947); see also Holton v. Pfingst, 534 S.W.2d 786, 789 (Ky. 1975). Medicine is not a perfect or exact science and infallibility is not, and has never been, the rule in

MITCHELL LONG, M.D.'S PRETRIAL STATEMENT - 7

Idaho or elsewhere. Thus, in this case, plaintiffs must show more than the mere fact that Mrs. Aguilar died following treatment by Dr. Long. Plaintiffs must prove that Dr. Long did not exercise the care and skill reasonably expected of an emergency medicine physician practicing in the Nampa, Idaho, area in May 2003. Testimony in this case, including the testimony of defendants' experts, will show that Dr. Long's care and treatment of Mrs. Aguilar was entirely appropriate and in accordance with the applicable standard of care.

**5. Plaintiffs are unable to establish, on a more probable than not basis, that Dr. Long's care of Mrs. Aguilar caused her death.**

Plaintiffs must also establish that Dr. Long's breach of the local standard of care proximately caused the plaintiffs' injuries. See generally Idaho Code § 6-1013; Newberry v. Martens, 142 Idaho 284, 127 P.3d 187 (2005); Swallow v. Emergency Medicine of Idaho, P.A., 138 Idaho 589, 594-95, 67 P.3d 68, 73-74 (2003); Manning v. Twin Falls Clinic & Hosp., Inc., 122 Idaho 47, 830 P.2d 1185 (1992); Fussell v. St. Clair, 120 Idaho 591, 818 P.2d 295 (1991); Fau v. Greenwood, 101 Idaho 387, 613 P.2d 1338 (1980); Doe v. Sisters of the Holy Cross, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995). Plaintiffs are required to establish causation by competent expert medical testimony because issues such as medical causation and medical prognosis are typically outside the competency, knowledge or experience of the jury. See Swallow, 138 Idaho at 594-595, 67 P.3d at 73-74; Dodge-Farrar v. American Cleaning Services Co., Inc., 137 Idaho 838, 54 P.3d 954 (2002); Maxwell v. Women's Clinic, P.A., 102 Idaho 53, 625 P.2d 407 (1981); Hall v. Bacon, 93 Idaho 1, 453 P.2d 816 (1969); Scotfield v. Idaho Falls Latter Day Saints Hosp., 90 Idaho 186, 409 P.2d 107, 109 (1965).

Proximate cause is composed of two elements which are cause in fact (actual cause) and the true proximate cause or “legal cause.” Newberry v. Martens, 142 Idaho 284, 288, 127 P.3d 187, 191 (2005); Collins v. Collins, 130 Idaho 705, 946 P.2d 1345 (1997). “Actual cause is the factual question of whether a particular event produced a particular consequence. True proximate cause ‘focuses upon legal policy in terms of whether responsibility will be extended to the consequences of conduct which has occurred.’” Newberry, 127 P.3d at 191 (internal citations omitted).

In Idaho, two mutually exclusive tests are used to determine proximate cause. A “but for” test is used to determine proximate cause when there is only one alleged cause of plaintiff’s injury. Newberry, 127 P.3d at 191. When there is evidence of two or more possible causes of plaintiff’s injury, courts employ the “substantial factor test” to determine proximate cause. Newberry v. Martens, supra, Doe v. Garcia, 131 Idaho 578, 961 P.2d 1181 (1998); State v. Fussell, 120 Idaho 591, 595, 818 P.2d 295, 299 (1991). Idaho courts have defined a substantial factor as “one that in natural probable sequence produced the damage complained of, or one concurring with some other cause acting at the same time which in combination with it causes the damage.” Doe v. Garcia, 131 Idaho 578, 961 P.2d 1181, 1185 (1998)(citing Fussell v. St. Clair, 120 Idaho 591, 595, 818 P.2d 295, 299 (1991)).

## II. STIPULATED FACTS

1. Maria Aguilar saw William Bland, M.D., at West Valley Medical Center’s Emergency Department on April 26, 2003.
2. Maria Aguilar was seen by defendant Nathan Coonrod, M.D., on April 28, 2003, May 5, 2003 and May 27, 2003.
3. Maria Aguilar presented to Mercy Medical Center’s Emergency Department on May 27, 2003, and was seen by Dr. Long.

MITCHELL LONG, M.D.’S PRETRIAL STATEMENT - 9

4. Maria Aguilar presented to Mercy Medical Center's Emergency Department on May 28, 2003, and was seen by Mark Thomas, D.O.
5. Andrew Chai, M.D., admitted Maria Aguilar to Mercy Medical Center on May 28, 2003.
6. Richard Field, M.D., performed a left heart catheterization on May 29, 2003.
7. Mrs. Aguilar was discharged from Mercy Medical Center on May 29, 2003.
8. Mrs. Aguilar presented to Dr. Coonrod on May 30, 2003.
9. Mrs. Aguilar presented to West Valley Medical Center's Emergency Department on May 31, 2003, and was seen by Steven Newman, M.D.
10. Mrs. Aguilar underwent an esophagogastroduodenoscopy (EGD) at Saint Alphonsus Regional Medical Center on June 3, 2003, performed by Robert Gibson, M.D.
11. Mrs. Aguilar presented to West Valley Medical Center's Emergency Department on June 4, 2003, in cardiac arrest and was seen by Guerin Walsh, M.D.
12. Mrs. Aguilar was pronounced dead on June 4, 2003.
13. Thomas Donndelinger, M.D., performed a cause of death only autopsy on Mrs. Aguilar on June 5, 2003, which indicates "Saddle embolism, right and left pulmonary arteries."

### III. WITNESSES

Jose Aguilar, Sr.	Maria Guadalupe Aguilar
Alejandro Aguilar	Jose Aguilar, Jr.
Catherine Atup-Leavitt, M.D.	William Bland, M.D.
Nathan Coonrod, M.D.	Mitchell Long, D.O.
Mark Thomas, D.O.	Steven Newman, M.D.
Gregory Henry, M.D.	Willis Parmley, M.D.
Richard Slaughter	Hillard Zallen, M.D.
Andrew Chai, M.D.	James Field, M.D.
Robb Gibson, M.D.	Thomas Donndelinger, M.D.
Guerin Walsh, M.D.	

Dr. Long reserves the right to call any lay or expert witnesses disclosed by any of the parties in this matter, specifically including Paul Blaylock, M.D.

#### IV. EXHIBITS

Primary Health medical records relating to Mrs. Aguilar;  
West Valley Medical Center records relating to Mrs. Aguilar;  
Mercy Medical Center records relating to Mrs. Aguilar;  
Boise Gastroenterology Associates records relating to Mrs. Aguilar;  
St. Alphonsus Regional Medical Center records relating to Mrs. Aguilar;  
Southwest District Health Department records relating to Mrs. Aguilar;  
Maria Aguilar's 5-27-03 Chest film taken at Primary Health, Nampa;  
Maria Aguilar's 5-27-03 Chest film taken at Mercy Medical Center;  
Maria Aguilar's 5-28-03 heart catheterization study done at Mercy Medical Center;  
Canyon County Paramedics records relating to Mrs. Aguilar;  
Family Medical Clinic records relating to Mrs. Aguilar;  
Penny Wise Drugs records relating to Mrs. Aguilar;  
Robin W. King, D.C. records relating to Mrs. Aguilar;  
Demonstrative and Illustrative Exhibits;  
Impeachment Exhibits;  
Exhibits identified by plaintiffs;  
Exhibits identified by Steven Newman, M.D.;  
Exhibits identified by Nathan Coonrod, M.D.; and  
Exhibits identified by Andrew Chai, M.D.

V. SETTLEMENT

A mediation took place on January 14, 2009. The parties did not reach a settlement.

DATED this 23 day of March, 2009.

HALL, FARLEY, OBERRECHT  
& BLANTON, P.A.

By John J. Burke  
John J. Burke Of the Firm  
Attorneys for Defendant Mitchell Long, D.O.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of March, 2009, I caused to be served a true copy of the foregoing **MITCHELL LONG, M.D.'S PRETRIAL STATEMENT**, by the method indicated below, and addressed to each of the following:

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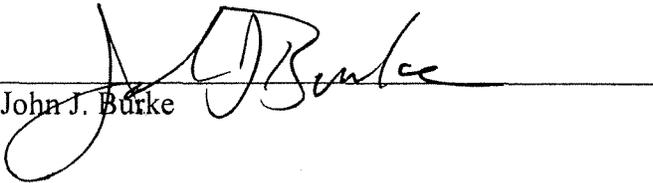
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John J. Burke

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**FILED**  
A.M. 4:30 P.M.  
MAR 23 2009 ✓  
CANYON COUNTY CLERK  
D. BUTLER, DEPUTY

Attorney for Defendants Nathan Coonrod, MD and Primary Health Care Center

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the  
Personal Representative of the Estate of  
Maria A. Aguilar, deceased, and as the  
natural father and guardian of  
GUADALUPE MARIA AGUILAR,  
ALEJANDRO AGUILAR, and LORENA  
AGUILAR, minors, and JOSE  
AGUILAR, JR., heirs of Maria A. Aguilar,  
deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.  
NEWMAN, M.D., NATHAN COONROD,  
M.D., MITCHELL LONG, D.O., and  
PRIMARY HEALTH CARE CENTER, an  
Idaho corporation, JOHN and JANE  
DOES I through X, employees of one or  
more of the Defendants,

Defendants.

Case No. CV 05-5781

**DEFENDANTS NATHAN COONROD,  
MD'S AND PRIMARY HEALTH CARE  
CENTER'S PRETRIAL STATEMENT**

COME NOW the defendants, Nathan Coonrod, MD and Primary Health Care  
Center, by and through their counsel of record, Steven K. Tolman of Tolman & Brizee,

DEFENDANTS NATHAN COONROD, MD'S AND PRIMARY HEALTH CARE CENTER'S PRETRIAL  
STATEMENT, PAGE 1

P.C., and pursuant to this Court's Scheduling Order entered the 20<sup>th</sup> day of June, 2007, submit their Pretrial Statement.

**A. THEORY OF DEFENSE**

Mrs. Aguilar was first seen by Dr. Coonrod on April 28, 2003, for a follow-up from her previous visit with Dr. Catherine Atup-Leavitt. She was diagnosed with anemia and difficulty swallowing and Dr. Coonrod initiated evaluation and treatment to address these health issues. Dr. Coonrod referred Mrs. Aguilar to Dr. Robb Gibson, a specialist in gastroenterology for work-up of a possible internal bleed, as it would be the most likely cause of her anemia that would require further intervention. On April 29, 2003, Mrs. Aguilar returned again to see Dr. Coonrod.

On May 5, 2003, Mrs. Aguilar returned to Dr. Coonrod for follow-up for her anemia. On this visit she stated she was doing a little better, but was now complaining of mild right flank pain.

On May 19, 2003, Mrs. Aguilar finally had her first appointment with Dr. Gibson.

On May 27, 2003, Mrs. Aguilar returned to see Dr. Coonrod for follow-up of her anemia and complaint of sharp mild chest pain for a few days. Dr. Coonrod ordered a chest x-ray, which was read as normal, as well as an EKG, which was not normal. Mrs. Aguilar was sent by Dr. Coonrod to the emergency department at Mercy Medical Center with her EKG and her chest x-ray. Mrs. Aguilar was seen in the Mercy Medical Center emergency room by Dr. Michael Long, the physician staffing the emergency department on this day. Mrs. Aguilar was discharged from the emergency department that day.

After reviewing Mrs. Aguilar's EKG the next day, Dr. Andrew Chai, a cardiologist, called her back to the emergency department for further evaluation.

A cardiac catheterization procedure on May 29, 2003, showed normal coronary arteries and no obstructive stenosis, which suggested non-ischemic change. Mrs. Aguilar was discharged from the hospital to home.

On May 30, 2003, Mrs. Aguilar returned to Dr. Coonrod for a follow-up visit from her hospital admission. At this time she was to follow-up with Dr. Gibson, the gastroenterologist, for an already scheduled endoscopy. After the endoscopy she was then to follow-up with Dr. Coonrod.

On May 31, 2003, Mrs. Aguilar was seen in the Columbia West Valley Medical Center emergency room by Dr. Newman, the physician staffing the emergency department on that day.

On June 3, 2003, Mrs. Aguilar saw Dr. Gibson, the gastroenterologist, for her scheduled endoscopy. He recommended a colonoscopy in the near future.

On June 4, 2003, Mrs. Aguilar returned to Dr. Coonrod after her May 31, 2003, visit to the Columbia West Valley Medical Center emergency department and the June 3, 2003, procedure by Dr. Gibson. He noted that while she had been seen by Dr. Gibson on June 3, 2003, for the upper endoscopy, Dr. Gibson had not completed his evaluation of a gastrointestinal source for her complaints and prior anemia. He also noted that Dr. Gibson felt a colonoscopy was needed to complete Mrs. Aguilar's gastrointestinal evaluation. The plan at that time was for her to follow-up with him on Monday, June 9, 2003. Unfortunately, Mrs. Aguilar died on June 4, 2003.

Under Idaho Code §§ 6-1012 and 6-1013, Nathan Coonrod, MD denies plaintiffs' claim he breached the standard of care for a family practice physician in Nampa/Caldwell, Idaho in April, May and June 2003, regarding the care and treatment

he provided to Maria Aguilar (deceased) on April 28, 2003, April 29, 2003, May 5, 2003, May 27, 2003, May 30, 2003 and June 4, 2003. Dr. Coonrod maintains he complied with the local standard of health care practice at all times throughout his treatment and care of Mrs. Aguilar.

Defendant Primary Health Care Center denies Dr. Coonrod was negligent in his treatment of Maria Aguilar and thus, denies any vicarious liability on its part.

**B. STIPULATED FACTS**

1. Maria Aguilar was seen by Catherine Atup-Leavitt, MD, at Primary Health Care Center on April 23, 2003.
2. Maria Aguilar was seen by William Bland, MD at the emergency department of West Valley Medical Center on April 26, 2003.
3. Maria Aguilar was seen by Nathan Coonrod, MD, at Primary Health Care Center on April 28, 2003.
4. Maria Aguilar was seen by Nathan Coonrod, MD, at Primary Health Care Center on April 29, 2003.
5. Maria Aguilar was seen by Nathan Coonrod, MD, at Primary Health Care Center on May 5, 2003.
6. Maria Aguilar was seen by Nathan Coonrod, MD, at Primary Health Care Center on May 27, 2003.
7. Maria Aguilar presented to the emergency department of Mercy Medical Center on May 27, 2003, and was seen by Mitchell Long, DO.
8. Maria Aguilar presented to the emergency department of Mercy Medical Center on May 28, 2003, and she was seen by Mark Thomas, DO.

9. Maria Aguilar was admitted to Mercy Medical Center on May 28, 2003, by Andrew Chai, MD.

10. Maria Aguilar underwent a left heart catheterization, performed by Richard Fields, MD at Mercy Medical Center on May 29, 2003.

11. Maria Aguilar was seen by Nathan Coonrod, MD, at Primary Health Care Center on May 30, 2003.

12. Maria Aguilar presented to the emergency department of West Valley Medical Center on May 31, 2003, and she was seen by Steven Newman, MD.

13. On June 3, 2003, Maria Aguilar underwent an esophagogastroduodenoscopy at St. Alphonsus Regional Medical Center, which was performed by Robb Gibson, MD.

14. Maria Aguilar was seen by Nathan Coonrod, MD, at Primary Health Care Center on June 4, 2003.

15. On June 4, 2003, Maria Aguilar presented to the emergency department of West Valley Medical Center and she was seen by Guerin Walsh, MD.

16. Maria Aguilar died on June 4, 2003.

17. On June 5, 2003, an autopsy was performed by Thomas Donndelinger, MD. The autopsy report states under "Final Anatomic Diagnoses," "Saddle embolism, right and left pulmonary arteries."

**C. WITNESSES**

Nathan Coonrod, MD

Andrew Chai, MD

Steven R. Newman, MD

Mitchell Long, DO

Any and all of Maria Aguilar's health care providers, who provided medical care and treatment and whose true and correct identities are set forth in her medical records, including, but not limited to, any and all health care providers with Columbia West Valley Medical Center; any and all health care providers with Mercy Medical Center; any and all health care providers with Primary Health Care Center, Canyon County Paramedics, including Terry Goff and Bob Dickinson

Catherine Atup-Leavitt, MD

Robb Gibson, MD

James Fields, MD

Thomas Donndelinger, MD

William Blahd, MD

Guerin Walsh, MD

Mark Thomas, DO

Jon Hlavinka, MD

Robert M. Franklin, MD

Greg L. Ledgerwood, MD

Ronald C. Dobson, MD

Brent P. Pistorese, MD

Daniel J. Urbach, MD

W. Cris Lewis, PhD

Paul Blaylock, MD

Samuel LeBaron, MD

Dean Lapinel, MD

Richard Lubman, MD

Daniel Brown, MD

Cornelius Hofman

Craig Bosley, MD

Willis E. Parmley, MD

Gregory L. Henry, MD

Richard A. Slaughter

James W. Smith, MD.

George B. Pfoertner, MD

Michael D. Kenner, MD

Any and all individuals identified by plaintiffs, through written discovery or formal disclosures

Any and all individuals called to testify by plaintiffs

Any and all individuals identified by co-defendants, through written discovery or formal disclosures

Any and all individuals called to testify by co-defendants.

Any and all individuals identified or disclosed through deposition testimony taken in this matter

**D. EXHIBITS**

Defendants are in the process of reviewing and compiling a complete set of all medical records for Maria Aguilar, which have been produced by all parties in this action. It is anticipated prior to trial counsel for all parties will confer and agree upon a complete set of medical records for Maria Aguilar which can be introduced as an exhibit at trial.

Based upon the foregoing, defendants identify the following exhibits:

Primary Health Nampa records

West Valley Medical Center records

Mercy Medical Center records

Boise Gastroenterology Associates records

Canyon County Coroner records

St. Alphonsus Regional Medical Center records

Southwest District Health Department records

Maria Aguilar's 5-27-03 Chest film taken at Primary Health Care Center

Marla Aguilar's 5-27-03 Chest film taken at Mercy Medical Center;

Maria Aguilar's 5-29-03 heart catheterization study done at Mercy Medical Center

Canyon County Paramedics records

Family Medical Clinic records

Penny Wise Drugs

Robin W. King, DC records

Demonstrative Exhibits to illustrate Dr. Coonrod's defenses;

Exhibit depicting anatomy of human cardio-pulmonary system;

Exhibit depicting timeline of Maria Aguilar's care

Any and all exhibits identified and/or introduced into evidence by plaintiffs

Any and all exhibits identified and/or introduced into evidence by co-defendants

Any and all documents identified and/or produced by the parties, either informally or through formal discovery

Any and all documents identified and/or produced in depositions.

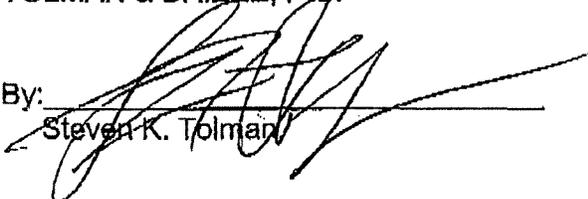
**E. SETTLEMENT DISCUSSIONS**

The parties attempted mediation on January 14, 2009, in Boise, Idaho, with Tim Walton serving as mediator. The parties were not able to reach a settlement.

DATED this 23<sup>rd</sup> day of March, 2009.

TOLMAN & BRIZEE, P.C.

By:

  
Steven K. Tolman

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of March, 2009, I caused a true and correct copy of the foregoing DEFENDANTS NATHAN COONROD, MD'S AND PRIMARY HEALTH CARE CENTER'S PRETRIAL STATEMENT to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

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\_\_\_\_\_  
Steven K. Tolman

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal )  
Representative of the Estate of Maria A. Aguilar, )  
deceased, and as the natural father and )  
guardian of GUADALUPE MARIA AGUILAR, )  
ALEJANDRO AGUILAR, and LORENA )  
AGUILAR, minors, and JOSE AGUILAR, JR., )  
heirs of Maria A. Aguilar, deceased, )

Plaintiffs, )

v. )

ANDREW CHAI, M.D., STEVEN R. NEWMAN, )  
M.D., NATHAN COONROD, M.D., MITCHELL )  
LONG, D.O., and PRIMARY HEALTH CARE )  
CENTER, an Idaho corporation, JOHN and )  
JANE DOES I through X, employees of one or )  
more of the Defendants, )

Defendants. )

Case No. CV 05-5781

**PLAINTIFFS' WITNESS LIST**

**FILED**  
A.M. ~~4:45~~ P.M.

MAR 23 2009

CANYON COUNTY CLERK  
K CANNON, DEPUTY

COME NOW, Plaintiffs, by and through their attorneys of record, David E. Comstock of Comstock and Bush, and Byron V. Foster, Attorney at Law, and pursuant to the Court's Scheduling Order, hereby submits the following list of witnesses to be called at the trial of this matter:

1. Jose Aguilar, Sr.
2. Maria Aguilar
3. Jose Aguilar, Jr.
4. Lorena Aguilar
5. Alejandro Aguilar
6. Jennifer Aguilar
7. Ecliserio Marquez
8. Edelmira DeValle
9. Carol Bates
10. Michell Giokas
11. Kay Hall
12. Terry Goff
13. Bob Dickinson
14. Bill Kirby
15. Thomas M. Donndelinger, M.D.
16. Paul Blaylock M.D., FACEP
17. Daniel C. Brown, M.D.
18. Samuel LeBaron, M.D., Ph.D.
19. Dean Lapinel, M.D.
20. Richard Lubman, M.D.

21. Cornelius Hofman
22. Nathan Coonrod, M.D.
23. Andrew Chai, M.D.
24. Mitchell Long, D.O.
25. Steven Newman, M.D.
26. Catherine S. Atup-Leavitt, M.D.
27. Robb Gibson, M.D.
28. James Field, M.D.
29. William Blahd, M.D.
30. Guerin Walsh, M.D.
31. Mercy Medical Center Personnel
32. West Valley Medical Center Personnel
33. Primary Health Personnel

Plaintiffs reserve the right to amend, add to, supplement, or delete from this list of witnesses. Plaintiffs reserve the right to call as a witness any person identified by name, title, or description in any document provided by any party during discovery. Additionally, Plaintiffs' reserve the right to call all Defendants; all Defendants' named expert witnesses; and all Defendants' named witnesses.

DATED This 23 day of March, 2009.

  
\_\_\_\_\_  
Byron V. Foster  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of March, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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Garrett LLP  
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M.D.*

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Byron V. Foster

ORIGINAL

FILED  
A.M. 4:45 P.M.

MAR 23 2009

CANYON COUNTY CLERK  
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal  
Representative of the Estate of Maria A. Aguilar,  
deceased, and as the natural father and  
guardian of GUADALUPE MARIA AGUILAR,  
ALEJANDRO AGUILAR, and LORENA  
AGUILAR, minors, and JOSE AGUILAR, JR.,  
heirs of Maria A. Aguilar, deceased,

Plaintiffs,

v.

ANDREW CHAI, M.D., STEVEN R. NEWMAN,  
M.D., NATHAN COONROD, M.D., MITCHELL  
LONG, D.O., and PRIMARY HEALTH CARE  
CENTER, an Idaho corporation, JOHN and  
JANE DOES I through X, employees of one or  
more of the Defendants,

Defendants.

Case No. CV 05-5781

PLAINTIFFS' EXHIBIT LIST

COME NOW, Plaintiffs, by and through their attorneys of record, David E. Comstock of Comstock and Bush, and Byron V. Foster, Attorney at Law, and pursuant to the Court's Scheduling Order, hereby submits the following list of exhibits to be utilized at the trial of this matter:

1. Primary Health Medical Records (certified copy);
2. Mercy Medical Records (certified copy);
3. West Valley Medical Center Records (certified copy);
4. Maria Aguilar's Autopsy Report;
5. Coroner's Report;
6. Canyon County Paramedics Records;
7. Death Certificate;
8. Cornelius Hoffman Economic Charts;
9. Maria Aguilar Wage Loss Summary;
10. Maria Aguilar Funeral Expenses;
11. Photographs;
12. Maria Aguilar's Obituary;
13. Maria Aguilar's Funeral Program;
14. Maria Aguilar's Death Notice;
15. Anatomical Charts (as yet undetermined); and
16. Timeline of Maria's Aguilar's Medical Care.

Plaintiffs reserve the right to supplement this list, not to use any of the exhibits listed herein and/or to use any exhibit listed by the Defendants.

DATED This 23 day of March, 2009.



Byron V. Foster,  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of March, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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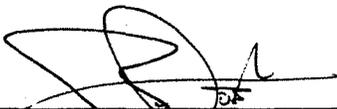
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\_\_\_\_\_  
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**F I L E D**  
A.M. ~~4:45~~ P.M.

MAR 23 2009

CANYON COUNTY CLERK  
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal )  
Representative of the Estate of Maria A. Aguilar, )  
deceased, and as the natural father and )  
guardian of GUADALUPE MARIA AGUILAR, )  
ALEJANDRO AGUILAR, and LORENA )  
AGUILAR, minors, and JOSE AGUILAR, JR., )  
heirs of Maria A. Aguilar, deceased, )

Case No. CV 05-5781

Plaintiffs;

**PLAINTIFFS' PRETRIAL/TRIAL  
MEMORANDUM**

v.

ANDREW CHAI, M.D., STEVEN R. NEWMAN, )  
M.D., NATHAN COONROD, M.D., MITCHELL )  
LONG, D.O., and PRIMARY HEALTH CARE )  
CENTER, an Idaho corporation, JOHN and )  
JANE DOES I through X, employees of one or )  
more of the Defendants, )

Defendants.

Plaintiffs respectfully submit this memorandum in an effort to provide the Court with a factual background, as well as to address certain issues likely to come before the Court during trial. In addition, while it is unclear whether or not the Court's June 20, 2007, Scheduling Order is applicable, Plaintiffs also intend that this be their Pre-Trial Statement as well.

I.

**BACKGROUND**

Plaintiffs' deceased, Maria Aguilar, was a 41 year-old working wife and mother of four when she died of a saddle pulmonary embolus on June 4, 2003. She left behind her husband, Jose, and four children; Maria, Jose Jr., Alejandro and Lorena. Alejandro and Lorena have not yet reached the age of majority.

Plaintiffs filed the instant action for medical negligence against Andrew Chai, M.D., cardiologist; Steven R. Newman, M.D., family practice physician who was acting as an emergency physician at the time; Nathan Coonrod, M.D., family practice physician; Mitchell Long, M.D., emergency physician; and Primary Health Care Center, the employer of Dr. Coonrod. Previous parties, Catherine Atup-Leavitt, M.D.; Mercy Medical Center and West Valley Medical Center have been dismissed, either by stipulation or by Order of the Court. Several Motions in Limine, a Motion for Protective Order and a Motion to Strike are presently before the Court and hearings on those various Motions have been scheduled. Mediation was unsuccessful.

II.

**FACTS**

*NOTE:* These are not stipulated facts and many of these facts will be contested at

trial. Plaintiffs agree with the statement of stipulated facts contained in Defendant Newman's Pretrial Statement, although the recitation is incomplete.

This lawsuit has been brought by the family of Maria Aguilar for her wrongful death arising out of the failure of Defendants to diagnose a fatal pulmonary embolus. A pulmonary embolus is the blockage of blood vessels in the lungs brought about when a blood clot, or a portion of one, breaks loose from another area of the body and travels to the lung; lodging at the point of most resistance. Plaintiffs' experts will testify that Maria Aguilar suffered a "showering" of small pulmonary emboli which caused signs and symptoms over the course of several weeks until a clot large enough to block off her pulmonary arteries formed.

Some of the symptoms of pulmonary emboli are: shortness of breath; chest pain; pleuritic chest pain (pain with breathing); tachycardia (heart rate over 100 bpm); anxiety in conjunction with other symptoms; syncope (fainting or near fainting); sweating; heart palpitations; and a vague complaint of not feeling well.

Each of the Defendant health care providers had the opportunity to diagnose and treat Maria's signs and symptoms of pulmonary embolus which she exhibited over the several weeks she was seeking care. Instead, it appears they focused upon their own narrow area of interest and never broadened their medical investigation or considered her pulmonary system as a potential cause of her medical condition. Had they taken a broader view of her signs and symptoms, her condition would have been diagnosed and treated and she would be alive today.

In October of 2002, Maria Aguilar had experienced an episode of swelling in her left thigh and left lower extremity. She was diagnosed at Primary Health in Nampa with

superficial thrombophlebitis. An ultrasound ruled out deep venous thrombosis.

In April of 2003, Maria Aguilar began experiencing symptoms of shortness of breath, weakness and fatigue. She presented at Primary Health in Nampa and was seen by Dr. Atup-Leavitt. She was complaining of a history of being short of breath, nauseous and dizzy for the past 5-6 days. Dr. Atup-Leavitt's diagnosis was chest tightness and palpitation. An EKG was performed which was read as normal. A Holter monitor was placed to determine if a heart irregularity was the cause. The Holter monitor did not indicate any significant cardiac pathology. Blood was drawn and it was determined that Maria's Hematocrit was 29.7 and her hemoglobin was 8.9. Based upon the lab work, Dr. Coonrod diagnosed Maria with anemia on April 26, 2003. On that date, at the advice of personnel at Primary Health, Maria went to the emergency department at West Valley Medical Center (WVMC) where she saw William Blahd, M.D., emergency physician. Dr. Blahd, based upon the lab work from Primary Health, once again diagnosed Maria with anemia. He found no blood in her stool and noted that while she did not complain of shortness of breath while in the emergency room, she did indicate a history of being occasionally short of breath.

Maria returned to Primary Health on April 28, 2003 and was seen by Dr. Coonrod. He diagnosed her with severe anemia and placed her on iron supplements to correct the anemia. He also diagnosed her with difficulty swallowing. She returned to Primary Health on April 29, 2003 with complaints of being short of breath with climbing stairs. Either on that date or the previous day, Dr. Coonrod had referred Maria for an endoscopy procedure with Robb Gibson, M.D., a gastroenterologist, because of the difficulty swallowing. Blood work taken on April 28, 2003 and reported on April 30, 2003 showed that the iron medication was already resulting in Maria's hemoglobin (Hgb) and hematocrit (Hct) trending toward normal.

This lab work also led Dr. Coonrod to diagnose H. pylori and prescribe Nexium and Prevpak times 2 weeks.

Maria returned to Primary Health on May 4, 2003 and on that date a document called "History & Physical" was filled out by hand. This document indicated that Maria's main health concern at that time was "breathing problems." She checked "headaches," "shortness of breath" and "irregular heart beat" on the review of symptoms sheet and gave as the details: "Feel really tired. While working feel shortness of breath."

Maria returned to Primary Health on May 5, 2003 and once again blood was drawn. Lab work from that day indicates that Maria's Hgb was 10.4 and her Hct was 35.3; once again an improvement in her anemia. The normal ranges for Hemoglobin are 12.0-15.0 and the normal ranges for Hematocrit are 36.0-45.0. Thus, Maria was nearing normal ranges in the most significant blood tests for anemia. On that date, Dr. Coonrod doubted that Maria was experiencing ongoing bleeding and when she returned her hemoccult cards on May 9, 2003; those once again indicated she had no blood in her stool. Even though just the day before, Maria had complained of shortness of breath on the handwritten History & Physical, Dr. Coonrod reported on May 5, 2003 that Maria was no longer getting short of breath walking up flights of stairs.

Maria returned to Primary Health on May 27, 2003. She was seen by Dr. Coonrod. The Primary Health Physician Record for that date states: "41 y.o. female here for follow up anemia; states has been getting a sharp pain mid chest since Sunday. Only gets it with activity."

Dr. Coonrod examined Maria and had blood drawn. His notes from the examination indicate that Maria complained of fatigue, congestion, trouble breathing, chest pain and

black stools. His "History of Present Illness" stated: "Sharp chest pain starts and stops." Her lab work indicated that both her hematocrit and hemoglobin were within normal ranges, showing that the anemia was greatly improved. Dr. Coonrod took a chest x-ray and had an EKG performed. His reading of the EKG indicated it was abnormal and showed ischemia. Because of this, he telephoned the emergency department at Mercy Medical Center and spoke with the emergency physician on duty. The emergency physician agreed to see Maria and Dr. Coonrod sent her to the hospital with a copy of the EKG, the original chest x-ray and the office notes from that day. The Mercy Medical Center records contain copies of the Primary Health abnormal EKG and the two pages of Primary Health records generated on May 27, 2003; indicating that Maria did, in fact, take these documents with her to the emergency department.

At Mercy Medical Center, Maria saw emergency physician Dr. Long. Dr. Long's notes indicate that Maria's chief complaint was chest pain that was sharp and continuous; exacerbated by deep breathing and possibly by exercise and relieved by nothing. His notes indicate the pain was 6 out of 10 in severity and had started 4 days previous. While an EKG was once again performed at the hospital and while it was once again abnormal; Dr. Long makes no mention of it in his notes, choosing instead to diagnose Maria with "atypical chest pain-probable gastro esophageal reflux disease (GERD)." He prescribed Darvocet and administered a "GI cocktail" containing Mylanta, viscous lidocaine and Donnatal. He also ordered blood work which showed that Maria's hemoglobin and hematocrit were well within normal ranges. He also ordered a chest x-ray which indicated that Maria's heart was mildly enlarged. Thus, on May 27, 2003, Maria's blood work was essentially normal; she had a new finding of an abnormal EKG and a new finding of a mildly enlarged heart. After noting

that Maria was to have her endoscopy procedure the next Tuesday (June 3, 2003); he discharged Maria to return home.

The next day, May 28, 2003; Dr. Chai, as part of his duties, read over the EKG taken at Mercy on May 27<sup>th</sup> and had someone place a call to Maria to return to the hospital. Dr. Chai admitted Maria to the hospital to undergo a cardiac catheterization because of his belief that Maria's abnormal EKG indicated she suffered from coronary artery disease. Maria's daughter, also named Maria, is expected to testify that she told Dr. Chai that Maria was also experiencing shortness of breath and Maria wanted to sit up in the hospital bed because when laying down, she could not breathe well. Dr. Chai's History & Physical indicates that Maria did not associate the chest tightness and pressure with shortness of breath. Dr. Chai recommended cardiac catheterization.

The next day, Dr. Field, Chai's partner, performed the procedure. Dr. Chai was not present. Dr. Field found Maria's coronary arteries to be normal. The procedure dealt with the coronary arteries but in no way ruled out the possibility of pulmonary embolus. Dr. Field then discharged Maria with a recommendation that she return to Dr. Coonrod. Dr. Field also forwarded the records of the procedure to Dr. Coonrod.

Maria next saw Dr. Coonrod on May 30, 2003. On that date, her chief complaint was: "41 y.o. female here for follow up from Mercy Hospital--she had stress cardiolyte test which was negative." The history of present illness indicates that the pain in her chest was relieved with the GI cocktail. However, on that date, Maria was still experiencing shortness of breath. Dr. Coonrod's diagnosis was atypical chest pain and anemia even though Maria's most recent blood work had indicated her hemoglobin and hematocrit were normal. He told Maria to return in one month after noting that she was to see Dr. Gibson for the

scope procedure the next Tuesday. He spent 15 minutes with her that day.

The next day, while at home, Maria suffered a syncopal episode (she fainted) and was taken by ambulance to West Valley Medical Center. The paramedics arrived at her home at 9:26 a.m. and arrived with Maria at the hospital at 9:52 a.m. The paramedics' run sheet indicates that Maria's syncopal episode was preceded by dizziness, weakness and shortness of breath. When they arrived at her home at 9:26 a.m., Maria was still complaining of weakness and shortness of breath. At the hospital, Maria was seen by Dr. Newman. His notes indicate that he obtained historical information from Maria, her family and the EMS personnel. His notes indicate that Maria felt palpitations before she passed out. His history indicates that he knew she had been to the hospital in Nampa with chest pain; had undergone a negative cardiac catheterization, was easily fatigued had experienced palpitations in April, that the Holter monitor was negative and that she was seeing a GI doctor on Tuesday.

Dr. Newman ordered an EKG which was abnormal with a pattern indicative of right heart strain; a finding which can be related to pulmonary emboli. His diagnostic considerations included: myocardial infarction, arrhythmia, dehydration and anemia. His clinical impression was syncope and anemia. He made no attempt to confirm the anemia by a blood test.

It is unclear whether Maria was suffering from shortness of breath while she was in the emergency room, but it is clear that she suffered shortness of breath while at home, no more than 26 minutes before. Regardless, neither at this time nor at any previous time had anyone performed any tests to determine whether Maria was suffering or was at risk for a pulmonary embolus; even though at various times she had exhibited nearly all the classic

signs and symptoms of pulmonary embolus.

Dr. Newman discharged Maria to her home with instructions to continue taking her iron supplement and resume normal activities as she was able.

Maria next underwent an endoscopy procedure as scheduled by Dr. Gibson on June 3, 2003. The procedure went well and Dr. Gibson found no source of bleeding to explain the anemia she had experienced earlier. Dr. Gibson discharged her to home with instructions to call to schedule the colonoscopy.

On June 4, 2003 at 2:50 p.m., Maria saw Dr. Coonrod for the last time. Her chief complaint was: "41 y.o. female here for follow up from visit to West Valley ER. Fainted on 5/31/03. Son called ambulance. Diagnosed with syncope." In the space for history of present illness, Dr. Coonrod wrote: "Got up 9:00 a.m. and after urinating got hot and sweaty and passed out. Was not incontinent. Last menstrual period was 5/31. Alert and oriented. Bruised left hip. Hurts in her back when she coughs. No further symptoms since. Feeling very weak. Saw Gibson yesterday. Found no lesions. Plans to have colonoscopy."

Dr. Coonrod went on to write in his notes that Maria was having some sweats and fatigue. He also notes that she has an occasional cough and that it hurt when she breathed. He also noted that Maria was anxious and nervous and was distressed. He indicated that her upper back hurt. Blood work indicated that Maria's hemoglobin and hematocrit were both normal. His diagnosis was vasovagal syncope and back pain. Dr. Coonrod told Maria to push slightly salty fluids, take Tylenol and return to see him on Monday. She was discharged from his office at 3:50 p.m.

At 10:04 p.m. that night, Maria's family called 911 for an ambulance transport to the hospital. She had passed out at home and could not be revived. When the paramedics

arrived, Maria was in the front seat of the family car and was non-responsive. She never regained consciousness and was pronounced dead at West Valley Medical Center at 10:46 p. m. on June 4, 2003.

III.

**LEGAL ISSUES**

Plaintiffs believe the pertinent legal issues are adequately set forth in the various Motions in Limine filed by the parties as well as Plaintiffs' Motion for Protective Order and Motion to Strike. It is anticipated that as other legal issues are brought to light, Plaintiffs will file bench briefs or other documents as necessary to assist the Court in deciding those as yet undefined issues.

DATED THIS 23 day of March, 2009.

  
Byron V. Foster  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of March, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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**F I L E D**  
 8:20 A.M. P.M.

MAR 24 2009 ✓

CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

JOSE AGUILAR, individually, as the Personal Representative of the Estate of Maria A. Aguilar, deceased, and as the natural father and guardian of GUADALUPE MARIA AGUILAR, ALEJANDRO AGUILAR, and LORENA AGUILAR, minors, and JOSE AGUILAR, JR., heirs of Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R. NEWMAN, M.D. NATHAN COONROD, M.D., CATHERINE ATUP-LEAVITT, M.D. MITCHELL LONG, D.O., COLUMBIA WEST VALLEY MEDICAL CENTER, an Idaho corporation, MERCY MEDICAL CENTER, an Idaho corporation, and PRIMARY HEALTH CARE CENTER, an Idaho corporation, JOHN and JANE DOES I through X, employees of one or more of the Defendants,

Defendants.

Case No. CV05-5781

**DEFENDANT ANDREW CHAI,  
 M.D.'S PRETRIAL STATEMENT**

COMES NOW, Defendant Andrew Chai, M.D., and, pursuant to this Court's Order Setting Case for Trial and Pretrial and respectfully submits this Pretrial Statement.

DEFENDANT ANDREW CHAI'S PRETRIAL STATEMENT- 1

## I. INTRODUCTION

This is a medical malpractice claim brought by the heirs of the deceased, Maria Aguilar, against a number of physicians, including Defendant Andrew Chai, M.D. Defendant Chai is a cardiologist who, at the time of the events which form the subject of this litigation, was a member of Idaho Cardiology, a group of cardiologists who provided services to Mercy Medical Center. On May 28, 2003, Defendant Chai was the on-call cardiologist at Mercy Medical Center and as part of his work, he reviewed an EKG of the deceased, Maria Aguilar, which had been conducted on May 27, 2003. As a result of his review of the EKG, Defendant Chai requested that Mrs. Aguilar return to the hospital through the emergency room for further evaluation. Mrs. Aguilar returned to the hospital and was admitted by Dr. Chai to Mercy Medical Center on May 28, 2003 for purposes of a heart catheterization, which was to take place on May 29, 2003. Defendant Chai's involvement with the deceased took place on May 28, 2003, after which he had no further involvement with Mrs. Aguilar. On May 29, 2003, another cardiologist, Dr. James C. Field was on-call and conducted the heart catheterization that had been requested by Defendant Chai. The heart catheterization was normal and Dr. Field discharged Mrs. Aguilar from the hospital with a referral back to her primary physician and an evaluation with another outside provider which had been scheduled prior to Mrs. Aguilar's admission to the hospital on May 28, 2003.

## II. CONCISE STATEMENT OF DEFENSES

As indicated above, Defendant Chai's involvement with the deceased, Mrs. Aguilar, was on May 28, 2003. Defendant Chai believes his care and treatment of the deceased, Maria Aguilar, on May 28, 2003 met the applicable standard of health care practice and he denies he breached the standard of care. In addition, Defendant Chai denies he was a proximate cause of Maria Aguilar's death.

Specifically, with regard to Defendant Chai's theory of defense, in summary form only, Defendant Chai would respectfully show the Court as follows:

1. That it was within the standard of health care practice for Defendant Chai to request that the deceased, Maria Aguilar, return to Mercy Medical Center on May 28, 2003 given Defendant Chai's reading of Mrs. Aguilar's EKG, which had been conducted on May 27, 2003;
2. That Defendant Chai's evaluation of the decedent, Maria Aguilar, on May 28, 2003 was, in all respects, appropriate and within the applicable standard of health care practice;
3. That the work up conducted by Defendant Chai of the decedent, Maria Aguilar, on May 28, 2003 was, in all respects, appropriate and within the applicable standard of health care practice;
4. That it was appropriate and within the standard of health care practice for Defendant Chai to recommend the decedent, Maria Aguilar, undergo a heart catheterization on May 29, 2003;
5. That because Defendant Chai was not the on-call cardiologist on May 29, 2003, it was appropriate for Dr. James Field, a cardiologist with Idaho Cardiology, to conduct the heart catheterization on May 29, 2003;
6. That on May 29, 2003, Dr. Field assumed care and treatment of the decedent, Maria Aguilar, from Defendant Chai;
7. That, pursuant to the standard of health care practice, as it existed in May of 2003 at Mercy Medical Center, Defendant Chai was not expected to participate further in the care and treatment of the decedent, Maria Aguilar, nor to conduct any follow up care and treatment of Mrs. Aguilar once Dr. Field assumed care of the decedent, Maria Aguilar, on May 29, 2003.
8. Pursuant to Idaho Code §6-1012 and §6-1013, Plaintiffs have the burden to prove through qualified expert testimony that Defendant Chai breached the applicable standard of health

care practice. These statutes require both requisite knowledge of the applicable standard of health care practice and requisite expertise in the Defendant's specialty. Defendant Chai has moved in limine with regard to Plaintiff's experts on the basis of the lack of Plaintiff's expert's actual knowledge of the standard of care as it applied to Defendant Chai in May of 2003, and that certain of Plaintiff's experts do not have the requisite expertise in Defendant's specialty; that Plaintiff's expert witnesses, Dr. Paul Blaylock and Dr. Samuel LeBaron, are not cardiologists, have not demonstrated the requisite knowledge required by Idaho Code § 6-1012 and §6-1013, and furthermore, have not demonstrated actual knowledge of the applicable standard of health care practice; that Plaintiff's expert, Dr. Daniel Brown, a cardiologist in Twin Falls, Idaho, has not demonstrated the requisite knowledge with regard to the standard of health care applicable to Defendant Chai as required by Idaho Code §6-1012 and §6-1013.

### III. PERTINENT AND STIPULATED FACTS

The parties have not entered into a formal stipulation regarding facts involving this litigation. The undersigned counsel for Defendant Chai has reviewed those facts set forth in Defendant Newman's Pretrial Statement and has no disagreement with those stipulated facts set forth in the Pretrial Statement of Defendant Newman.

### IV. WITNESSES

A number of witnesses have been identified in discovery of this matter, including medical providers, lay witnesses and expert witnesses. Defendant Chai reserves the right to call any witnesses identified in discovery, including any or all of the deceased, Maria Aguilar's health care providers, all lay witnesses and any expert witnesses named on said Defendant's behalf, on behalf of Plaintiff and/or on behalf of Co-defendants. In addition, Defendant Chai reserves the right to utilize the depositions of any lay or expert witnesses. By listing the following witnesses, Defendant

Chai does not waive any objection to the witness and/or the substance of the witnesses' testimony.

With that in mind, the witnesses most likely to be called by Defendant Chai at the time of trial

include the following:

1. Andrew Chai, M.D., Cardiologist;
2. James W. Smith, M.D., Cardiologist
3. George B. Pfoertner, M.D., Pulmonologist
4. Michael D. Kenner, M.D., Cardiologist
5. James C. Field, M.D.
6. Thomas M. Donndelinger, M.D.
7. Kathryn S. Arup-Levett, M.D.
8. Robb F. Gibson, M.D.
9. Mark Thomas, D.O.
10. Scott R. Hiatt, D.O.
11. Defendant Steven Newman, M.D.
12. Defendant Nathan Coonrod, M.D.
13. Defendant Mitchell Long, D.O.
14. William Blad, M.D.
15. Samuel Gibson, M.D.
16. Guerin Walsh, M.D.
17. Plaintiff Jose Aguilar
18. Guadalupe Maria Aguilar
19. Alejandro Aguilar
20. Lorcna Aguilar

21. Jose Aguilar, Jr.

In addition, other individuals identified in discovery who may be called as witnesses, are as follows:

22. Gavin Powell, M.D.

23. Dr. Hartwig, M.D.

24. Jan Saucer, R.N., and other nurses in the emergency room at Mercy Medical Center on or around May 28, 2003.

25. Robin Anderson, R.N., at Mercy Medical Center

26. Jon Hlavinka, M.D.

27. Dean Felthouser, R.N. at West Valley Medical Center

28. Kathy Burch, R.N. at West Valley Medical Center.

29. Ecliserio Marquez (subject to Motion in Limine)

30. Edelmira DeValle (subject to Motion in Limine)

31. Terry Goff

32. Bob Dickenson

33. Bill Kirby (subject to Motion in Limine)

34. Staff at Mercy Medical Center

35. Staff at Columbia West Valley Medical Center

36. Carol Bates (subject to Motion in Limine)

37. Michelle Giokas (subject to Motion in Limine)

38. Paul Blaylock, M.D. and/or deposition of Paul Blaylock, M.D. (without waving Defendant Chai's Motion in Limine.)

39. Daniel Brown, M.D. and/or deposition of Daniel Brown, M.D. (without waiving Defendant Chai's Motion in Limine.)

Defendant Chai reserves the right to call any and all witnesses listed or disclosed in this matter, including expert witnesses named by any party and/or depositions of said experts or lay witnesses. Defendant Chai also expressly reserves the right to supplement this list, and the right not to call any of the individuals or witnesses identified herein.

#### V. EXHIBITS

##### A. Medical Records

A number of medical records, including those listed below, have been produced during discovery in this litigation. Because the documents were produced at various times, there are a number of different date stamped numbers on the documents. Counsel for Defendant Chai presumes that, for the most part, the parties can stipulate to those medical records that will be admitted during the trial. These records include the following:

Primary Health records (including laboratory studies, EKGs and radiographic studies.)

West Valley Medical Center records.

Mercy Medical Center records (including all laboratory studies, radiographic studies, results of heart catheterization.)

Boise Gastroenterology Associates records.

Autopsy report.

St. Alphonsus Regional Medical Center records.

Southwest District Health Department records.

Canyon County Paramedics records.

Family Medical Clinic records.

Penny Wise Drugs.

Robin W. King, DC records.

B. Demonstrative Exhibits to illustrate Defendant Chai's defenses.

Exhibit(s) depicting anatomy of human cardio-pulmonary system.

Exhibits depicting pulmonary embolism and/or saddle embolism.

Exhibit depicting timeline of Maria Aguilar's care.

C. Any and all exhibits identified and/or introduced into evidence by Plaintiffs.

D. Any and all exhibits identified and/or introduced into evidence by Co-Defendants.

E. Any and all documents identified and/or produced into evidence by the parties, either informally or through formal discovery.

F. Any and all documents identified and/or produced in depositions.

G. Impeachment exhibits.

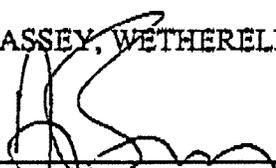
The Defendant reserves the right to supplement, or amend this list as additional exhibits. In addition, the Defendant has listed several exhibits which may be subject to a Motion(s) in Limine and as a result, reserves the right to object to any of the above-listed exhibits and/or part thereof.

#### VI. SETTLEMENT EFFORTS

The parties participated in a mediation on January 14, 2009. To date, however, the parties have not resolved this matter.

DATED this 23<sup>rd</sup> day of March, 2009.

BRASSEY, WETHERELL & CRAWFORD

By 

Andrew C. Brassey, Of the Firm  
Attorneys for Defendant Andrew Chai, M.D.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of March, 2009, I served a true and correct copy of the foregoing **DEFENDANT ANDREW CHAI, M.D.'S PRETRIAL STATEMENT** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

David E. Comstock	<input type="checkbox"/>	U.S. Mail, postage prepaid
LAW OFFICES OF COMSTOCK &	<input type="checkbox"/>	Hand-Delivered
BUSH	<input type="checkbox"/>	Overnight Mail
199 North Capitol Boulevard, Suite 500	<input checked="" type="checkbox"/>	Facsimile (208) 344-7721
P.O. Box 2774		
Boise, Idaho 83701-2774		

Byron V. Foster	<input type="checkbox"/>	U.S. Mail, postage prepaid
Attorney at Law	<input type="checkbox"/>	Hand-Delivered
199 North Capitol Boulevard, Suite 500	<input type="checkbox"/>	Overnight Mail
P.O. Box 1584	<input checked="" type="checkbox"/>	Facsimile (208) 344-7721
Boise, Idaho 83701		

Gary T. Dance	<input type="checkbox"/>	U.S. Mail, postage prepaid
MOFFATT, THOMAS, BARRETT,	<input type="checkbox"/>	Hand-Delivered
ROCK & FIELDS, CHARTERED	<input type="checkbox"/>	Overnight Mail
412 West Center, Suite 2000	<input checked="" type="checkbox"/>	Facsimile (208) 232-0150
P.O. Box 817		
Pocatello, ID 83204-0817		
<i>Attorneys for Defendant Steven R. Newman, M.D.</i>		

Steven K. Tolman	<input type="checkbox"/>	U.S. Mail, postage prepaid
Tolman & Brizee	<input type="checkbox"/>	Hand-Delivered
132 3 <sup>rd</sup> Ave E	<input type="checkbox"/>	Overnight Mail
P.O. Box 1276	<input checked="" type="checkbox"/>	Facsimile (208) 733-5444
Twin Falls, Idaho 83303		
<i>Attorneys for Defendant Nathan Coonrod, M.D., and Primary Health Care Center</i>		

John Burke	<input type="checkbox"/>	U.S. Mail, postage prepaid
Hall, Farley, Oberrecht & Blanton	<input type="checkbox"/>	Hand-Delivered
702 West Idaho, Suite 700	<input type="checkbox"/>	Overnight Mail
P.O. Box 1271	<input checked="" type="checkbox"/>	Facsimile (208) 395-8585
Boise, Idaho 83701		
<i>Attorneys for Defendant Mitchell Long, D.O.</i>		

  
\_\_\_\_\_  
Andrew C. Brassey

John J. Burke  
ISB #4619; jjb@hallfarley.com  
Chris D. Comstock  
ISB #6581; cdc@hallfarley.com  
HALL, FARLEY, OBERRECHT & BLANTON, P.A.  
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Boise, Idaho 83701  
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Facsimile: (208) 395-8585  
W:\3\3-655.5\Expert Witness Disclosure Supplemental.doc

3:30 Culet  
**FILED**  
A.M. 2:20 P.M.

**MAR 27 2009**

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Attorneys for Defendant Mitchell Long, D.O.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the  
Personal Representative of the estate of  
Maria A. Aguilar, deceased, and as the  
natural father and guardian of  
GUADALUPE MARIA AGUILAR,  
ALEJANDRO AGUILAR, and LORENA  
AGUILAR, minors, and JOSE AGUILAR,  
JR., heirs of Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.  
NEWMAN, M.D., NATHAN COONROD,  
M.D., MITCHELL LONG, D.O.,  
PRIMARY HEALTH CARE CENTER, an  
Idaho corporation, JOHN and JANE DOES  
I through X, employees of one or more of  
the Defendants,

Defendants.

Case No. Case No. CV 05-5781

**DEFENDANT MITCHELL LONG,  
D.O.'S SUPPLEMENTAL EXPERT  
WITNESS DISCLOSURE**

ORIGINAL

COMES NOW Mitchell Long, D.O. ("Dr. Long"), by and through his attorneys of record, Hall, Farley, Oberrecht & Blanton, P.A., and submits the following Supplemental Expert Witness Disclosure.

2. Willis E. Parmley, M.D., JD, EMT-P  
9242 North Sunset Drive  
Pocatello, Idaho 83201

A. Subject Matter of Expected Testimony

See Dr. Parmley's February 14, 2008, report with attached CV. The report expresses the opinion of Dr. Parmley that Dr. Long's treatment of the deceased did not cause the death of Maria A. Aguilar. Dr. Long did not violate any applicable standard of care which was a cause of or a significant factor in the death of Maria A. Aguilar on June 4, 2003. The report contains opinions Dr. Parmley may express at trial subject to supplementation based upon additional information and data obtained in the subsequent depositions of plaintiffs' experts if they occur and additional information pertaining to the treatment by Dr. Long at the time he was examining Maria Aguilar and other patients in the Emergency Department of Mercy Medical Center on May 27, 2003.

On May 28, 2003, when plaintiffs' decedent was called back to Mercy Medical Center, defendant cardiologist Dr. Chai examined her and admitted her to the hospital. Cardiologist Dr. Field performed a catheterization procedure which eliminated concerns about a problem with her heart as a cause for her complaints which were the reasons she was sent to the Emergency Department at Mercy Medical Center. Dr. Parmley is expected to discuss why the elimination of the heart problems as a cause of her complaints demonstrated that Dr. Long's actions and decisions were not a factor in her death from some as yet unknown cause. Plaintiffs' decedent

returned to defendant Primary Health Center and was again examined by her treating physician, defendant Dr. Coonrod, five days before her unfortunate death. Dr. Parmley may also testify regarding the fact that Mrs. Aguilar was treated by other health care providers following Dr. Long's treatment of her and prior to her death on June 4, 2003.

Dr. Parmley will testify regarding the standard of care applicable to Dr. Long on May 27, 2003, causation of Maria Aguilar's death, applicable medical theories and principles, including, but not limited to: the practice of emergency medicine; differential diagnosis; physical examination; principles relating to diagnosing pulmonary embolus, including tests and procedures, signs, symptoms and risk factors of pulmonary embolus, including the Wells, Wicki and Kline criteria; pulmonary emboli showers; saddle embolism; treatment for pulmonary embolus and basic anatomy issues related to the cardio and pulmonary systems; blood tests; metabolic panels; gastroesophageal reflux disease; chest pain; anemia and other relevant matters.

B. Basis and Reasons for Opinions

See report attached as Exhibit 2.

It is further anticipated that Dr. Parmley will testify to opinions he holds to a reasonable degree of medical certainty, based upon his education, training and experience as an emergency physician, and the information, records, and testimony he has reviewed in this matter, that Dr. Long's care and treatment of Maria Aguilar on May 27, 2003, met the applicable standard of care in all respects, but for not taking steps to have Maria Aguilar admitted for workup of possible myocardial ischemia.

Dr. Parmley is expected to testify that Mrs. Aguilar presented to the Mercy Medical Emergency Room in the early evening on May 27, 2003, complaining of epigastric substernal

chest pain and was seen by Dr. Long. Dr. Long took an appropriate history and physical of Mrs. Aguilar. By means of an interpreter, Dr. Long learned that Mrs. Aguilar's chest pain began approximately four days earlier and was sharp and continuous. Mrs. Aguilar indicated the pain was a 6 out of 10, was exacerbated by deep breathing and relieved by nothing. Mrs. Aguilar denied nausea/vomiting, shortness of breath, diaphoresis, jaw pain, being dizzy, trouble swallowing, palpitations or abdominal pain. Dr. Parmley is further expected to testify that the medical records from Dr. Long's care of Mrs. Aguilar indicate the review of systems was negative for anything other than chest pain. Dr. Parmley is expected to testify that Dr. Long conducted an appropriate physical examination of Mrs. Aguilar as noted in the medical records and noted she was smiling and very pleasant throughout her examination. Dr. Parmley is expected to testify that Mrs. Aguilar's vital signs were stable throughout her nearly two hours of monitoring on that day.

Dr. Parmley is expected to testify that Dr. Long provided an appropriate workup of Mrs. Aguilar based upon her presentation on May 27, 2003, and the information available to Dr. Long. Specifically, Dr. Parmley is expected to testify that Dr. Long ordered a portable chest x-ray, EKG and appropriate labs.

Dr. Parmley is expected to testify that Dr. Long did consider a pulmonary embolus in his differential diagnosis of Maria Aguilar on May 27, 2003, based upon her complaints of chest pain, and that Dr. Long was able to properly eliminate a pulmonary embolus diagnosis based upon Mrs. Aguilar's presentation, including that Mrs. Aguilar did not have any complaints of shortness of breath or trouble breathing, was not fatigued, had normal oxygen saturation levels, had a normal pulse, was not on birth control pills, was of a relatively young age, did not have a

rapid heart rate, did not indicate a history of deep vein thrombosis, did not have cancer, had not recently been immobilized and had not recently undergone a major surgery.

It is anticipated Dr. Parmley will testify that he disagrees with Dr. Lapinel and Dr. Blaylock that the standard of care required Dr. Long to conduct a D-Dimer or V/Q Scan on Mrs. Aguilar on May 27, 2003, and, if abnormal, to order blood clotting studies or a chest CT, to rule out a pulmonary embolus as there was no clinical reason to conduct these tests. Specifically, there was no clinical basis to order such tests to rule out a pulmonary embolus based upon Mrs. Aguilar's presentation on May 27, 2003, and the information available to Dr. Long, including the EKG which was indicative of cardiac issues, that Mrs. Aguilar did not have any complaints of shortness of breath or trouble breathing, was not fatigued, had normal oxygen levels, had a normal pulse, was not on birth control pills, was of a relatively young age, did not have a rapid heart rate, did not indicate a history of deep vein thrombosis, did not have cancer, had not recently been immobilized, and had not undergone a recent major surgery.

Dr. Parmley is expected to testify that the standard of care did not require Dr. Long to order a pulmonary angiogram based upon Mrs. Aguilar's presentation and the information available to Dr. Long.

Dr. Parmley is expected to testify regarding each of the above described procedures, including their uses, ability to evaluate possible medical conditions, including pulmonary embolus, and when and for what reasons such tests and procedures are warranted or unwarranted.

It is anticipated Dr. Parmley will testify that Dr. Long conducted appropriate tests, panels and films based upon Mrs. Aguilar's presentation on May 27, 2003, and the information made

available to Dr. Long. Dr. Long ordered labs, an EKG and a portable chest x-ray as a workup for Mrs. Aguilar's complaints, which consisted of sharp substernal epigastrically located chest pain that had been present for four days and which was exacerbated by deep breathing with reported GERD.

Dr. Parmley will testify that the portable chest x-ray ordered by Dr. Long on May 27, 2003, is not indicative of pulmonary embolus. Dr. Parmley will further testify that the Mrs. Aguilar's presentation, provided history, Dr. Long's physical examination, the EKG, and portable chest x-ray, do not indicate Mrs. Aguilar was suffering from a pulmonary embolus or emboli shower at the time she was seen by Dr. Long on May 27, 2003.

Dr. Parmley is expected to testify that Dr. Long's diagnosis of atypical chest pain and probable GERD was reasonable and within the standard of care based upon Mrs. Aguilar's presentation on May 27, 2003, and the information available to him on that day. However, Dr. Parmley believes Dr. Long should have undertaken steps to have Mrs. Aguilar admitted to the hospital for additional cardiac workup, as was done the following day.

Dr. Parmley is expected to testify that Dr. Long appropriately prescribed a GI cocktail to Mrs. Aguilar on May 27, 2003, to treat her pain complaints.

Dr. Parmley is expected to testify that had Dr. Long attempted to admit Mrs. Aguilar to the hospital based upon her abnormal EKG, she likely would have been admitted on May 27, 2003, for a cardiac workup rather than on May 28, 2003. Dr. Parmley will testify that the cardiac workup performed at Mercy Medical revealed no signs of coronary artery disease. Dr. Parmley is expected to testify that Dr. Long had no reason to anticipate the cardiac workup of Mrs. Aguilar would be negative.

Dr. Parmley is expected to testify regarding the difficulties in diagnosing pulmonary embolism in patients presenting to the emergency room, and the emergency physician's role with regard to treating patients. Dr. Parmley is expected to testify as to the high morbidity rate of patients who develop saddle embolisms.

C. Data Or Information Considered in Forming Opinions

Dr. Parmley was provided with and reviewed the transcript of the deposition of Dr. Long and the exhibits to that deposition. He was provided with and reviewed the transcript of the deposition of defendant Dr. Chai pertaining to the care of Maria A. Aguilar at defendant Mercy Medical Center and reviewed the exhibits to that deposition which included the records of Mercy Medical Center pertaining to the treatment of plaintiffs' decedent in the Emergency Department by Dr. Long from 5:45 p.m. until approximately 7:28 p.m. These records also pertain to the admission to Mercy Medical Center on May 28, 2003, until the time of her discharge. Dr. Parmley also reviewed copies of the transcripts of the depositions of plaintiffs Maria Guadalupe Aguilar and Jose Aguilar, the deposition of defendant Dr. Newman, and Plaintiffs' Expert Disclosures served on January 15, 2008.

Following the delayed deposition of defendant Dr. Nathan Coonrod on February 7, 2008, Dr. Parmley reviewed the transcript of his deposition testimony and the records of defendant Primary Health Care Center used at that deposition. The testimony and documents confirmed that Dr. Coonrod was on May 27, 2003, concerned about a potential cardiac problem that was later established to not be the cause of her complaints. The testimony and documents established that his patient never returned to Mercy Medical Center for treatment by any physician practicing

at Mercy Medical Center and that her subsequent care was all associated with other practitioners and institutions.

It is further anticipated that Dr. Parmley will rely upon his review of Maria Aguilar's medical records produced throughout the course of discovery, including, but not limited to, those records of Mercy Medical Center, Primary Health-Nampa, West Valley Medical Center, Boise Gastroenterology Associates, Canyon County Coroner, Canyon County Paramedics, and Maria Aguilar's autopsy. Dr. Parmley has also reviewed deposition testimony given in this case, including the depositions of Maria Guadalupe Aguilar, Jose Aguilar, Alejandro Aguilar, Alejandro Aguilar, Jr., Daniel Brown, M.D., Thomas Donndelinger, M.D., Kay Hall, Records Custodian for Mercy Medical Center, Dean Lapinel, M.D., Paul Blaylock, M.D., Richard Lubman, M.D., Samuel LeBaron, M.D., Robb Gibson, M.D., and Dr. Field and the exhibits attached thereto. Dr. Parmley is also expected to review any additional depositions taken in this matter. Dr. Parmley has also reviewed Plaintiffs' Expert Disclosures in this matter, the eight supplemental disclosures, Plaintiffs' Rebuttal Expert Witness Disclosure, and Plaintiffs' Supplemental Rebuttal Expert Witness Disclosure.

D. Any Exhibits That Will Be Used To Summarize Opinions

No exhibits have been prepared by Dr. Parmley at this time.

E. Witnesses Qualifications and Publications

The Curriculum Vitae for Dr. Parmley is attached as Exhibit 2 to his report. He has not authored any publications.

F. Statement Of Compensation

Dr. Parmley charges \$250.00 per hour for review of documents, \$300.00 per hour for time spent in depositions, and \$350.00 per hour for time spent in trial.

G. List Of Other Cases

In the last four years, Dr. Parmley has not testified or given depositions in any case with the exception of one deposition, taken on April 12, 2005, in the Ada County case of *Murphy v. Ottman and Mercy Medical Center*, CV PI 0300609D.

SUPPLEMENTATION

Dr. Parmley has been retained to rebut the trial testimony of plaintiffs' designated retained experts and any testimony of any party or person stating opinions which are critical of Dr. Long's care and treatment of plaintiffs' decedent.

Discovery is not complete, and additional documents and transcripts of depositions may be supplied to him for review, after which he may provide a supplemental report.

3. Gregory L. Henry, M.D., FACEP  
Emergency Physicians Medical Group  
2000 Green Road, Suite 300  
Ann Arbor, MI 48105-1521

C. Data Or Information Considered in Forming Opinions

Dr. Henry has been provided the following additional materials:

1. Deposition transcript of Maria Guadalupe Aguilar;
2. Deposition transcript of Jose Aguilar;
3. Deposition transcript of Jose Aguilar, Jr.;
4. Deposition transcript of Alejandro Aguilar;
5. Deposition transcript and exhibits of Daniel Brown, M.D.;

6. Deposition transcript and exhibits of Andrew Chai, M.D.;
7. Deposition transcript and exhibits of Robb Gibson, M.D.;
8. Deposition transcript and exhibits of Kay Hall, records custodian for Mercy

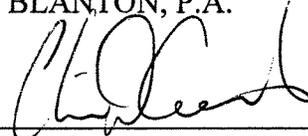
Medical Center;

9. Deposition transcript and exhibits of Samuel LeBaron, M.D.;
10. Deposition transcript and exhibits of Richard Lubman, M.D.;
11. Deposition transcript and exhibits of Steven Newman, M.D.;
12. Plaintiffs' Eighth Supplemental Expert Witness Disclosure;
13. Plaintiffs' Rebuttal Expert Witness Disclosure;
14. Plaintiffs' Supplemental Rebuttal Expert Witness Disclosure;
15. Medical Records of Canyon County Paramedics;
16. Medical Records of Robb Gibson, M.D.;
17. Medical Records of Robin King, D.C.;
18. Medical Records of SW District Health; and
19. Medical Records of West Valley Medical Center.

Dr. Henry is also expected to review any additional depositions taken in this matter.

DATED this \_\_\_\_ day of March, 2009.

HALL, FARLEY, OBERRECHT  
& BLANTON, P.A.

By 

John J. Burke - Of the Firm  
Attorneys for Defendant Mitchell Long, D.O.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26<sup>th</sup> day of March, 2009, I caused to be served a true copy of the foregoing DEFENDANT MITCHELL LONG, D.O.'S SUPPLEMENTAL EXPERT WITNESS DISCLOSURE, by the method indicated below, and addressed to each of the following:

David E. Comstock  
COMSTOCK & BUSH  
199 N. Capitol Blvd., Suite 500  
P.O. Box 2774  
Boise, ID 83701  
Fax: 208-344-7721

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Telecopy

Byron V. Foster  
Attorney at Law  
199 N. Capitol Blvd., Suite 500  
P.O. Box 1584  
Boise, ID 83701  
Fax: 208-344-7721

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Telecopy

Andrew C. Brassey  
BRASSEY WETHERELL & CRAWFORD  
203 W. Main Street  
P.O. Box 1009  
Boise, ID 83701  
Fax: 208-344-7077

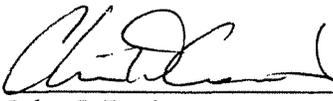
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Gary T. Dance  
MOFFATT THOMAS  
412 W. Center, Suite 2000  
P.O. Box 817  
Pocatello, ID 83204  
Fax: 208-232-0150

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Telecopy

Steven K. Tolman  
TOLMAN & BRIZEE, P.C.  
132 3<sup>rd</sup> Ave. East  
P.O. Box 1276  
Twin Falls, ID 83303-1276  
Fax: 208-733-5444

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Telecopy

*for*   
\_\_\_\_\_  
John J. Burke

ORIGINAL

F I L L E D  
11:30 A.M. P.M.

David E. Comstock  
LAW OFFICES OF COMSTOCK & BUSH  
199 N. Capitol Blvd., Ste 500  
P.O. Box 2774  
Boise, Idaho 83701-2774  
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APR 07 2009

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

Byron V. Foster  
Attorney At Law  
199 N. Capitol Blvd., Ste 500  
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal )  
Representative of the Estate of Maria A. )  
Aguilar, deceased, and as the natural father )  
and guardian of GUADALUPE MARIA )  
AGUILAR, ALEJANDRO AGUILAR, and )  
LORENA AGUILAR, minors, and JOSE )  
AGUILAR, JR., heirs of Maria A. Aguilar, )  
Deceased, )

Case No. CV 05-5781

NOTICE OF SERVICE OF  
DISCOVERY

Plaintiffs, )  
)  
)

v. )  
)  
)

ANDREW CHAI, M.D., STEVEN R. )  
NEWMAN, M.D., NATHAN COONROD, )  
M.D., MITCHELL LONG, D.O., and )  
PRIMARY HEALTH CENTER, an Idaho )  
Corporation, JOHN AND JANE DOES I )  
through X, employees of one or more of )  
the Defendants, )  
)  
)

Defendants. )  
)  
)

NOTICE OF SERVICE OF DISCOVERY, P. 1

COMES NOW, Byron V. Foster, Attorney for the above named Plaintiffs and hereby gives notice of service of PLAINTIFFS' FOURTH SUPPLEMENTAL ANSWERS TO DEFENDANT STEVEN R. NEWMAN, M.D.'S FIRST SET OF INTERROGATORIES, by depositing a true and correct copy thereof in the United States Mail, in the manner indicated herein, this 6 day of April, 2009, addressed to:

Andrew C. Brassey, Esq.  
Brassey Wetherell Crawford &  
Garrett LLP  
203 W. Main St.  
Boise, ID 83702  
*Attorneys for Defendant Andrew Chai,  
M.D.*

U.S. Mail  
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Steven K. Tolman  
Tolman & Brizee, PC  
132 3<sup>rd</sup> Ave. E  
P.O. Box 1276  
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*Attorneys for Defendants Nathan  
Coonrod, M.D. and Primary Health Care  
Center*

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 Hand Delivery  
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Gary T. Dance  
Moffatt Thomas Barrett Rock &  
Fields Chartered  
412 W. Center, Suite 2000  
PO Box 817  
Pocatello ID 83204-0817  
*Attorneys for Defendant Steven R.  
Newman, M.D.*

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 Hand Delivery  
 Facsimile (208) 232-0150

John J. Burke  
Hall Farley Oberrecht & Blanton  
702 W. Idaho, Ste. 700  
PO Box 1271  
Boise, ID 83701  
*Attorneys for Defendant Mitchell Long,  
D.O.*

U.S. Mail  
 Hand Delivery  
 Facsimile (208) 395-8585

DATED This 6 day of April, 2009.

  
Byron V. Foster

Gary T. Dance, ISB No. 1513  
Julian E. Gabiola, ISB No. 5455  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
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Facsimile (208) 232-0150  
gtd@moffatt.com  
jeg@moffatt.com  
17230.0107

Attorneys for Steven R. Newman, M.D.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the Personal Representative of the Estate of Maria A. Aguilar, deceased, and as the natural father and guardian of GUADALUPE MARIA AGUILAR, ALEJANDRO AGUILAR, AND LORENA AGUILAR, minors, and JOSE AGUILAR, JR., heirs of Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R. NEWMAN, M.D., NATHAN COONROD, M.D., CATHERINE ATUP-LEAVITT, M.D., MITCHELL LONG, D.O., COLUMBIA WEST VALLEY MEDICAL CENTER, an Idaho corporation, MERCY MEDICAL CENTER, an Idaho corporation, PRIMARY HEALTH CARE CENTER, an Idaho corporation, JOHN and JANE DOES, I through X, employees of one or more of the Defendants,

Defendants.

Case No. CV 05-5781

**DEFENDANT STEVEN R.  
NEWMAN, M.D.'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFFS'  
MOTION IN LIMINE**

4:22 Culet  
**F I L E D**  
1140 A.M. P.M.

**APR 08 2009**

CANYON COUNTY CLERK  
J HEIDEMAN, DEPUTY

COMES NOW defendant Steven R. Newman, M.D. ("Dr. Newman"), by and through undersigned counsel, and hereby submits this Memorandum in Opposition to Plaintiffs' Motion in Limine.

## I. INTRODUCTION

Plaintiffs have moved in limine to preclude (1) Maria Aguilar's May 31, 2003, drug screen; (2) cumulative expert testimony; (3) evidence of any theory of the cause of Maria Aguilar's death other than Dr. Donndelinger's conclusion of a saddle embolism, left and right pulmonary arteries; (4) evidence that a settling/dismissed defendant breached the standard of care; that a settling defendant be on the verdict form; that there was settlement with another defendant; and that there should be a reduction of any verdict by the amount paid by any settling defendant; (5) Dr. Lapinel's retirement from the practice of emergency medicine; (6) that plaintiff attorneys, in general, are the cause of too many lawsuits and a rise in insurance premiums; (7) that claims against physicians have resulted in a shortage of healthcare in rural communities; and (8) that an adverse verdict to the defendants will cause them financial and professional hardship.

## II. ARGUMENT

### A. **Maria Aguilar's May 31, 2003, Drug Screen is an Admissible Medical Record.**

Just recently, in *Cramer v. Slater*, 2009 WL 540706 (Idaho), the Idaho Supreme Court affirmed Judge McLaughlin's decision to admit evidence of a toxicology report that was positive for amphetamines. Judge McLaughlin ruled that the report was relevant to determine the decedent's mental status and whether or not he was impaired by drugs at the time of his death. *Id.*, 2009 WL 540706 at \*8.

Mrs. Aguilar's May 31, 2003, drug screen is a medical record, and it is relevant to show what drugs were still in her body when she saw Dr. Newman at West Valley Medical Center's Emergency Department for medical treatment. There is no evidence that an employer or police officer ordered it. *Cf., People v. Palomo*, 31 P.3d 879, 883 (Colo. 2001) (holding that drug test was not a medical record because it was ordered by an employer and not by a physician for the purpose of medical treatment). On the contrary, Dr. Newman testified in his deposition (Newman Depo. p. 34, LL. 2-8) that he ordered the drug screen as part of the normal course of the treatment process. *See, e.g., Ex Parte Radford*, 557 So. 2d 1288, 1291 (Ala. 1990) (holding that drug screen ordered by physician as part of diagnostic work-up was admissible).

Accordingly, Mrs. Aguilar's May 31, 2003, drug screen is admissible and should be admitted into evidence at trial.

**B. Cumulative Expert Testimony.**

Dr. Newman is expected to testify as to the care and treatment that he provided Maria Aguilar. Dr. Bosley has been identified as Dr. Newman's expert regarding standard of care and causation issues. Dr. Newman reiterates his argument that plaintiffs should not be allowed to have both Dr. Lapinel and Dr. Blaylock testify to the same opinions at trial. The probative value of these opinions is substantially outweighed by concerns of delay, waste of time, and needless presentation of cumulative evidence. Trial in this case has been scheduled from April 27, 2009, through May 28, 2009. The trial will take enough of the jury's time without cumulative and identical testimony from two expert witnesses. Accordingly, the Court should preclude plaintiffs from having both Dr. Lapinel and Dr. Blaylock testify to the same opinions, as such testimony is cumulative and inadmissible under Rule 403.

**C. Dr. Newman Does Not Dispute Dr. Donndelinger's Cause of Death Statement.**

Dr. Newman does not dispute Dr. Donndelinger's final anatomic diagnosis as stated in the June 5, 2003, autopsy report, "Saddle embolism, right and left pulmonary arteries." Dr. Newman has moved in limine to preclude plaintiffs from introducing statements made by Canyon County Deputy Coroner Bill Kirby in the June 9, 2003, Canyon County Coroner's Record, where he states that Mrs. Aguilar died from "multiple bilateral pulmonary embolism," as such a statement is incorrect and inconsistent with Dr. Donndelinger's statement in his autopsy report.

**D. Evidence of a Settling Defendant.**

Plaintiffs have moved in limine regarding the following: (1) evidence that a defendant settled with the plaintiffs; (2) evidence that a settling defendant breached the standard of care; (3) having a settling defendant be on the verdict form; and (4) evidence that the verdict should be off-set by the amount paid by any settling defendant.

None of the defendants have settled or have been dismissed from this case; therefore, this issue in plaintiffs' Motion in Limine is not ripe for consideration. Plaintiffs seek an impermissible advisory opinion from this Court based upon an event that has not happened. *See, e.g., Mannos v. Moss*, 143 Idaho 927, 936, 155 P.3d 1166, 1175 (2007) (affirming district court's dismissal of tax indemnification claim where plaintiff had not yet paid taxes and, therefore, had no present need for adjudication); *see also Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002).

Additionally, Rule 408 of the Idaho Rules of Evidence allows the admission of evidence of settlement, "if the evidence is offered for another purpose, such as proving bias or

prejudice of a witness, negating a contention of undue delay, . . . .” In *Davidson v. Beco Corp.*, 114 Idaho 107, 110, 753 P.2d 1253, 1256 (1987), the Idaho Supreme Court held that “a trial court may allow the use of statements contained in settlement negotiations for the purpose of impeaching witnesses who give contrary testimony at trial.” And, in *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 57, 995 P.2d 816, 827 (2000), the Idaho Supreme Court affirmed the trial court’s decision to allow evidence of a former plaintiff’s settlement with the hospital defendant, along with any prior inconsistent statements in the pleadings, during impeachment. Again, since the plaintiffs have not settled with any of the defendants, it is premature to consider such an issue. Even so, the Court must wait until it hears what witnesses will say at trial, rather than prematurely conclude that evidence of settlement is inadmissible. Defendants have a right to utilize impeachment evidence to witnesses who give contrary testimony at trial.

Finally, plaintiffs’ arguments that there should be no offset of any amount from a settling defendant is also premature and not ripe for consideration, as plaintiffs have not obtained a verdict. Furthermore, the issue as to whether a verdict amount should be offset by the amount paid by a defendant who settled prior to trial is a post-trial issue, and not an issue ripe for consideration by way of a motion in limine. See IDAHO CODE § 6-1606 (“Evidence of payment by collateral sources is admissible to the court *after* the finder of fact has rendered an award”).

**E. Evidence That Dr. Lapinel Retired from Practicing Emergency Medicine.**

In the event that plaintiffs have Dr. Lapinel testify against Dr. Newman, Dr. Newman should be entitled to an adequate cross-examination of Dr. Lapinel’s credentials and opinions. “Our system of dispute resolution permits and encourages challenges to the credentials and opinions of an opponent’s experts.” *Harmston v. Agro-West, Inc.*, 111 Idaho

814, 820, 727 P.2d 1242, 1248 (Ct. App. 1986); *see also* D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK, § 16:12 (2d ed. 2005). Dr. Lapinel no longer practices emergency medicine, and he has not done so since 2001. The reason as to why Dr. Lapinel no longer practices emergency medicine is relevant as to his qualifications and appropriate for cross-examination at trial.

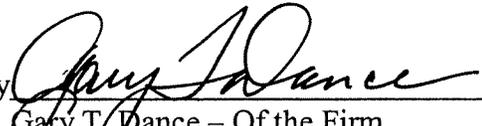
**F. Statements That Lawsuits Cause a Rise in Insurance Premiums and a Shortage of Healthcare, and Statements That an Adverse Verdict to Defendants Will Cause Them Financial and Professional Hardship.**

Dr. Newman is aware of Idaho Rule of Evidence 411's prohibition of the introduction of evidence of liability insurance at trial and he will not make reference to or state that plaintiffs' attorneys cause too many lawsuits and a rise in insurance premiums.

DATED this 6 day of April, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By

  
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Gary T. Dance – Of the Firm  
Attorneys for Steven R. Newman, M.D.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6 day of April, 2009, I caused a true and correct copy of the foregoing **DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE** to be served by the method indicated below, and addressed to the following:

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