

4-15-2010

Aguilar v. Coonrod Clerk's Record v. 15 Dckt. 36980

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LAW CLERK

(VOLUME 15)

Vol 15 d. 4/11

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.

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

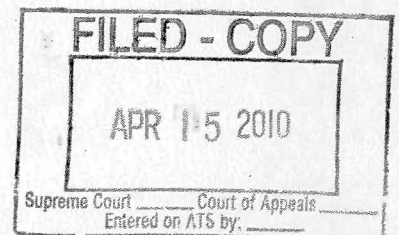
Honorable GREGORY M. CULET, District Judge

Steven K. Tolman
TOLMAN & BRIZEE, P.C. and
Steven J. Hippler
GIVENS PURSLEY, LLP.

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
805 A.M. P.M.

APR 14 2009

CANYON COUNTY CLERK
J HEIDEMAN, 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

**DEFENDANT ANDREW CHAI,
M.D.'S REQUESTED JURY
INSTRUCTIONS**

COMES NOW Defendant Andrew Chai, M.D., by and through his counsel of record, Brassey, Wetherell & Crawford, LLP, and submits the following list and attached requested jury instructions. Defendant reserves the right to add to, delete from, modify or supplement this list.

PATTERN INSTRUCTIONS

Defendant submits the following Pattern Instructions:

1. IDJI 100;
2. IDJI 101;
3. IDJI 104;
4. IDJI 108;
5. IDJI 109;
6. IDJI 110;
7. IDJI 120;
8. IDJI 121;
9. IDJI 122;
10. IDJI 123;
11. IDJI 140;
12. IDJI 141;
13. IDJI 142;
14. IDJI 143;
15. IDJI 144;
16. IDJI 145;
17. IDJI 900;
18. IDJI 901;

19. IDJI 931;
20. IDJI 937; and
21. Special Instructions (attached).

Defendant reserves the right to amend, withdraw or submit additions to any or all of these instructions. Further, Defendant reserves the right to submit a special verdict form.

DATED this 13th day of April, 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 13th day of April, 2009, I served a true and correct copy of the foregoing **DEFENDANT ANDREW CHAI, M.D.'S REQUESTED JURY INSTRUCTIONS** 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
LAW OFFICES OF COMSTOCK &
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Boise, Idaho 83701-2774

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Andrew C. Brassey

E I L E D
A.M. 7:10 P.M.
APR 14 2009
CANYON ORIGINAL
D. BUTLER, DEPUTY

DEFENDANTS' INSTRUCTION NO. 1

THE VOIR DIRE

You have been summoned as prospective jurors in the lawsuit now before us. The first thing we do in a trial is to select 12 jurors, and, perhaps one or two alternate jurors from among you ladies and gentlemen.

I am the judge in charge of the courtroom and this trial. The deputy clerk of court marks the trial exhibits and administers oaths to you jurors and the witnesses. The bailiff will assist me in maintaining courtroom order and will arrange for your meals after this case has been submitted to you for decision. The court reporter will keep a verbatim account of all matters of record during the trial.

To assist both you and the attorneys with this process of selection of a jury, I will introduce you to the parties and attorneys and tell you in brief what this lawsuit is about.

The parties who bring a lawsuit are called the "plaintiffs." In this suit, the plaintiffs are Jose Aguilar, Guadalupe Maria Aguilar, Alejandro Aguilar, Lorena Aguilar, and Jose Aguilar, Jr. The plaintiffs are represented by lawyers, David E. Comstock and Byron V. Foster. The parties against whom a lawsuit is brought are called the "defendants." The defendants in this suit are Nathan Coonrod, M.D., Primary Health Care Center, Andrew Chai, M.D., Steven R. Newman, M.D., and Mitchell Long, D.O. The defendants Nathan Coonrod, M.D. and Primary Health Care Center are represented by Steven K. Tolman. The defendant Andrew Chai, M.D., is represented by Andrew C. Brassey. The defendant Steven R. Newman, M.D. is represented by Gary T. Dance, and the defendant Mitchell Long, D.O. is represented by John J. Burke. This is a civil case involving a claim for wrongful death.

A trial starts with a selection of a fair, impartial jury. To that end, the court and the lawyers will ask each of you questions to discover whether you have any information concerning the case or any opinions or attitudes which any of the lawyers believe might cause you to favor or disfavor some part of the evidence or one side or the other. The questions may probe deeply into your attitudes, beliefs and experiences, but they are not intended to embarrass you.

If you do not hear or understand a question, you should say so. If you do understand the question, you should answer it freely.

The clerk of the court will now swear you for the jury examination.

IDJI 1-1 (modified)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 2

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss

it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

IDJI2d 1.00

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 3

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

IDJI2d 1.01

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 4

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

IDJI2d 1.03

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 5

Members of the jury, I remind you that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case, until after I finally submit the case to you.

IDJI2d 1.03.1

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 6

Whether a party has insurance is not relevant to any of the questions you are to decide. You must avoid any inference, speculation or discussion about insurance.

IDJI2d 1.04

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 7

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

IDJI2d 1.05

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 8

The following facts are not in dispute:

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 Blahd, 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."

IDJI2d 1.07

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 9

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [and upon video tape]. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

IDJI2d 1.22

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __10__

Evidence may be either direct or circumstantial. The law makes no distinction between direct and circumstantial evidence. Each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

IDJI2d 1.24.1

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __11__

A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

IDJI 124

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __12__

When I say that a party has the burden of proof on a proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, that the proposition is more probably true than not true.

IDJI2d 1.20.1

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __13__

On the claim of medical negligence/wrongful death against Dr. Coonrod for failure to meet the applicable standard of health care practice, the plaintiffs have the burden of proof on each of the following propositions:

1. That Dr. Coonrod failed to meet the applicable standard of health care practice as defined in these instructions;
2. That the plaintiffs were damaged;
3. That the acts of Dr. Coonrod which failed to meet the applicable standard of health care practice were a proximate cause of the damages of the plaintiffs; and
4. The elements of damage and the amount thereof.

You will be asked the following questions on the jury verdict form:

Did defendant Nathan Coonrod, M.D. breach the applicable standard of health care practice in his care and treatment of Maria Aguilar?

If so, did any breach of the standard of health care practice on the part of defendant Nathan Coonrod, M.D. proximately cause Maria Aguilar's death and plaintiffs' damages?

If you find from your consideration of all the evidence that the respective proposition has been proved, you should answer the respective question or questions "Yes." However, if you find that any of the propositions have not been proved, then the plaintiffs have not met the burden of proof required and you should answer the respective question or questions "No."

IDJI2d 2.10.3 (modified); IDJI2d 1.41.1 (modified)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __14__

The plaintiffs in this wrongful death case have the burden of affirmatively proving by direct expert testimony, and by a preponderance of all competent evidence, that at the time and place of the incident in question, Dr. Coonrod negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard then existed at the time and place of the alleged negligence of defendant and as such standard then and there existed with respect to the class of health care providers that Dr. Coonrod then and there belonged to and in which capacity he was functioning.

Dr. Coonrod shall be judged in comparison with similarly trained and qualified providers of the same class in the same community, taking into account training, experience and fields of medical specialization.

Idaho Code § 6-1012

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __15__

As used in these instructions, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which the care was or allegedly should have been provided.

Idaho Code § 6-1012

Grimes v. Green, 113 Idaho 519, 746 P.2d 978 (1987)

Dekker v. M.V.R.M.C., 115 Idaho 332, 766 P.2d 1213 (1988)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __16__

In determining whether Dr. Coonrod's care of Maria Aguilar satisfied or breached the applicable standard of care of health care practice as it has been stated to you, you are not permitted to arbitrarily set a standard of your own. The only way you may properly learn the applicable standard of care is through evidence presented in this trial by health care providers, including physicians, called as expert witnesses. The expert witness's testimony can only be considered by the jury if (a) the expert opinion is actually held by the expert witness; (b) that the expert's opinion can be testified to with reasonable medical certainty, and (c) that the expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable community standard to which his or her expert opinion testimony is addressed.

Idaho Code § 6-1013
BAJI 214-B (modified)

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 17

If the plaintiffs prove through expert testimony that Dr. Coonrod breached the applicable standard of health care practice, plaintiffs have the additional burden of proving through expert testimony Dr. Coonrod's breach of the applicable standard of health care practice was, with a reasonable degree of medical certainty, the proximate cause of Maria Aguilar's death.

If you find Dr. Coonrod breached the applicable standard of health care practice, but that this was not the proximate cause of Maria Aguilar's death, then your verdict must be for Dr. Coonrod.

Conrad v. St. Clair, 100 Idaho 401, 599 P.2d 292 (1979)

Swallow v. Emergency Medicine of Idaho, P.A., 138 Idaho 589, 67 P.3d 68 (2003)

Sheridan v. St. Luke's Regional Medical Center, 135 Idaho 775, 25 P.3d 88 (2001)

Doe v. Garcia, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 17

If the plaintiffs prove through expert testimony that Dr. Coonrod breached the applicable standard of health care practice, plaintiffs have the additional burden of proving through expert testimony Dr. Coonrod's breach of the applicable standard of health care practice was, with a reasonable degree of medical certainty, the proximate cause of Maria Aguilar's death.

If you find Dr. Coonrod breached the applicable standard of health care practice, but that this was not the proximate cause of Maria Aguilar's death, then your verdict must be for Dr. Coonrod.

Conrad v. St. Clair, 100 Idaho 401, 599 P.2d 292 (1979)

Swallow v. Emergency Medicine of Idaho, P.A., 138 Idaho 589, 67 P.3d 68 (2003)

Sheridan v. St. Luke's Regional Medical Center, 135 Idaho 775, 25 P.3d 88 (2001)

Doe v. Garcia, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __18__

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury.

Plaintiff must prove proximate cause by expert testimony, by a preponderance of the evidence, and to a reasonable degree of medical certainty.

IDJI2d 2.30.2 (modified)

Swallow v. Emergency Medicine of Idaho, P.A., 138 Idaho 589, 67 P.3d 68 (2003)

Hilden v. Ball, 117 Idaho 314, 787 P.2d 1122 (1989)

Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990)

Flowerdew v. Warner, 90 Idaho 164, 409 P.2d 110 (1965)

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)

Schofield v. Idaho Falls Latter Day Saints Hospital, 90 Idaho 186, 409 P.2d 107 (1965)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __19__

In order to prove "proximate cause," plaintiffs must prove by expert medical testimony, by the preponderance of the evidence and to a reasonable degree of medical certainty, that it is more likely than not that Dr. Coonrod's breach of the standard of health care practice caused Maria Aguilar's death. It is not sufficient if plaintiffs show it is "possible" that a breach of the standard of health care practice by Dr. Coonrod caused Maria Aguilar's death or that a breach of the standard of health care practice increased the risk of harm to her or precluded a chance for a better recovery.

Manning v. Twin Falls Clinic & Hospital, 122 Idaho 47, 830 P.2d 1185 (1992)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 20

I further instruct you that medical practitioners, such as Dr. Coonrod are not insurers of the correctness of their treatment. The mere fact that an undesirable or unfortunate result occurred following medical care rendered by Dr. Coonrod does not, of itself, establish a breach of the applicable standard of health care practice on the part of Dr. Coonrod.

Willis v. Western Hospital Ass'n, 67 Idaho 435, 182 P.2d 950 (1947)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __21__

Dr. Coonrod may not be held liable for the breach of the applicable standard of health care practice, if any, by any other health care provider involved in the care of Mrs. Aguilar.

IDJI2d 2.40 (modified)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANT'S INSTRUCTION NO. 22

On the claim that Defendant Nathan Coonrod, M.D. was acting within the course and scope of his employment, the Plaintiffs have the burden of proof on each of the following propositions:

1. The conduct is of the kind Nathan Coonrod, M.D., was employed to perform; and
2. The conduct occurred substantially within Nathan Coonrod, M.D.'s authorized time and space limits (i.e. during work hours and within the general area or locality); and
3. Nathan Coonrod, M.D.'s purpose was, at least in part, to further Primary Health Care Center's business interests (If the employee acts purely from personal motives which are in no way connected with his employer's business interests, then the employee is not acting within the scope of his employment.); and
4. If force was intentionally used by Nathan Coonrod, M.D. against another, it was not unexpected by Primary Health Care Center.

If you find from your consideration of all the evidence in the case that each of the foregoing propositions have been proved, your verdict should be for the Plaintiffs. However, if you find that any of the propositions have not been proved, then your verdict should be for Defendants.

IDJI2d 2.10.3 (modified)

IDJI2d 1.41.1 (modified)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of April, 2009

District Judge

DEFENDANT'S INSTRUCTION NO. __23__

Conduct is within the scope of the agent's authority if it occurs while the agent is engaged in the duties that the agent was asked or expected to perform and relates to those duties. It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary for the performance of such duties is within the scope of the agent's authority.

IDJI 6.43.1 – Scope of authority

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of April, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __24__

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiffs are entitled to damages.

IDJI2d 9.00

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __25__

If the jury decides the plaintiffs are entitled to recover from the defendants, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiffs for any damages proved to be proximately caused by defendant's negligence.

The elements of damage the jury may consider are:

- 1. The reasonable cost of decedent's funeral.
- 2. The reasonable value of necessary medical care and expenses incurred prior to the decedent's death.

3. The reasonable value to the plaintiffs of the loss of the decedent's [services] [training] [comfort] [conjugal relationship] and [society] and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of the plaintiffs, the decedent's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.

4. The plaintiffs' loss of financial support from the decedent, and the present cash value of financial support the decedent would have provided to the plaintiffs in the future, but for the decedent's death, taking into account the plaintiffs' life expectancy, the decedent's age and normal life expectancy, the decedent's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

There can be no recovery for any pain or suffering of the decedent prior to death.

IDJI2d 9.05

Given _____
 Refused _____
 Modified _____
 Covered _____
 Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 26

You are instructed that if you find the plaintiffs are entitled to damages that you may award only such damages as have been proved by plaintiffs with reasonable certainty.

McLean v. City of Spirit Lake, 91 Idaho 779, 430 P.2d 670 (1967)

Rindlisbaker v. Wilson, 95 Idaho 752, 519 P.2d 421 (1974)

Hake v. DeLane, 117 Idaho 1058, 793 P.2d 1230 (1990)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 27

A person asserting a claim of damages has the burden of proving not only a right to damages, but also the amount of damages. Idaho law does not permit arriving at an alleged amount of damages by guessing or conjecture.

Beare v. Stowes' Builders Supply, 104 Idaho 317, 658 P.2d 988 (Ct. App. 1983)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 28

The amount of damages claimed either by the written pleadings or in the argument of counsel must not be considered by you as evidence of reasonable compensation.

Idaho Code § 10-111

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 29

A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

IDJI2d 9.14

Given _____
Refused _____
Modified _____
Covered _____
Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __30__

In fixing the amount of money which will reasonably and fairly compensate the plaintiffs, you are to consider that a person who is injured must exercise ordinary care to minimize the damage and to prevent further damage. Any loss which results from a failure of the decedent Maria Aguilar to exercise such ordinary care cannot be recovered by plaintiffs.

IDJI2d 9.14 (modified)

Turpen v. Granieri, 133 Idaho 244, 247, 985 P.2d 669, 671 (1999)

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __31__

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

IDJI2d 9.13

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 32

Your award, if any, for wrongful death will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.

IDJI 937

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 33

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

IDJI2D 1.43.1

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 34

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

IDJI2d 1.09

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. __35__

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any other means than such a note.

During your deliberation, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

IDJI2d 1.11

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 36

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

IDJI2d 1.13

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 37

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

IDJI2d 1.13.1

Given _____
Refused _____
Modified _____
Covered _____
Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 38

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

IDJI2d 1.15.2

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 39

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

IDJI 2d 1.17

Given _____
Refused _____
Modified _____
Covered _____
Other _____
DATED This _____ day of May, 2009

District Judge

DEFENDANTS' INSTRUCTION NO. 40

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

We, the Jury, answer the special interrogatories as follows:

Question No. 1: Did Defendant Andrew Chai, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 1: Yes No

If the answer to Question No. 1 is Yes, go to Question No. 2. If answer to Question No. 1 is No, skip Question No. 2 and go to Question No. 3.

Question No. 2: Was Defendant Andrew Chai, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 2: Yes No

If the answer to Question No. 2 is Yes, go to Question No. 3. If answer to Question No. 2 is No, go to Question No. 3.

Question No. 3: Did Defendant Steven R. Newman, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 3: Yes No

If the answer to Question No. 3 is Yes, go to Question No. 4. If answer to Question No. 3 is No, skip Question No. 4 and go to Question No. 5.

Question No. 4: Was Defendant Steven R. Newman, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 4: Yes No

If the answer to Question No. 4 is Yes, go to Question No. 5. If answer to Question No. 4 is No, go to Question No. 5.

Question No. 5: Did Defendant Nathan Coonrod, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 5: Yes No

If the answer to Question No. 5 is Yes, go to Question No. 6. If answer to Question No. 5 is No, skip Question Nos. 6 & 7 and go to Question No. 8.

Question No. 6: Was Defendant Nathan Coonrod, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 6: Yes No

If the answer to Question No. 6 is Yes, go to Question No. 7. If answer to Question No. 6 is No, skip Question No. 7 and go to Question No. 8.

Question No. 7: Was Defendant Nathan Coonrod acting within the course and scope of his employment with Defendant Primary Health Care Center when any breach in the standard of care in his treatment of the decedent, Maria Aguilar, occurred?

Answer to Question No. 7: Yes No

If the answer to Question No. 7 is Yes, go to Question No. 8. If answer to Question No. 7 is No, go to Question No. 8.

Question No. 8: Did Defendant Mitchell Long, D.O., M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 8: Yes No

If the answer to Question No. 8 is Yes, go to Question No. 9. If answer to Question No. 8 is No, skip Question No. 9 and go to Question No. 10.

Question No. 9: Was Defendant Mitchell Long, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 9: Yes No

If the answer to Question No. 9 is Yes, go to Question No. 10. If answer to Question No. 9 is No, go to Question No. 10.

If you answered "Yes" to any of the following questions, answer Question No. 10. If you answered "No" to all of the following questions then you are done. Skip Question Nos. 10, 11, and 12, sign the jury verdict form as instructed and advise the bailiff.

Instruction for Question No. 10: You will answer this question only if you have found that the actions of one or more of the Defendants (Andrew Chai, M.D., Steven R. Newman, M.D., Nathan Coonrod, M.D., Mitchell Long, D.O., and Primary Health Care Center), were the proximate cause of any damages to the Plaintiffs. In this question, you are to apportion the fault between any parties for whom you found proximate cause. As to each party or entity to which you answered "Yes" to the proximate cause questions (Question Nos. 2, 4, 6, 9), you must determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to the proximate cause questions for a party, insert a "0" or "Zero" as to that party or entity.

Question No. 10: What is the percentage of fault (if any) you assign to each of the following:

- To the Defendant, Andrew Chai, M.D. _____%
 - To the Defendant, Steven R. Newman, M.D. _____%
 - To the Defendant, Nathan Coonrod, M.D. _____%
 - To the Defendant, Mitchell Long, D.O. _____%
 - To the Defendant, Primary Health Care Center _____%
- Total must equal 100%

Question No. 11: What is the total amount of damage sustained by the Plaintiffs as a result of the Defendants' actions? \$ _____

Answer to Question No. 12: We assess Plaintiffs' damages as follows:

1. Economic damages, as defined in the Instructions:
\$ _____

2. Non-economic damages, as defined in the Instructions:

\$ _____

Sign the verdict and advise the Bailiff.

There will be a signature block for the foreperson and a signature line for each individual juror.

IDJI 1.43.1 – Example verdict on special interrogatories

IDJI 1.43.1 – Instruction on special verdict form

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of April, 2009

District Judge

E I L E D
A.M. 12:10 P.M.

INSTRUCTION NO. _____

ORIGINAL

APR 14 2009

CANYON COUNTY CLERK
D. BUTLER, DEPUTY

THE VOIR DIRE

You have been summoned as prospective jurors in the lawsuit now before us. The first thing we do in a trial is to select 12 jurors, and, perhaps one or two alternate jurors from among you ladies and gentlemen.

I am the judge in charge of the courtroom and this trial. The deputy clerk of court marks the trial exhibits and administers oaths to you jurors and the witnesses. The bailiff will assist me in maintaining courtroom order and will arrange for your meals after this case has been submitted to you for decision. The court reporter will keep a verbatim account of all matters of record during the trial.

To assist both you and the attorneys with this process of selection of a jury, I will introduce you to the parties and attorneys and tell you in brief what this lawsuit is about.

The parties who bring a lawsuit are called the "plaintiffs." In this suit, the plaintiffs are Jose Aguilar, Guadalupe Maria Aguilar, Alejandro Aguilar, Lorena Aguilar, and Jose Aguilar, Jr. The plaintiffs are represented by lawyers, David E. Comstock and Byron V. Foster. The parties against whom a lawsuit is brought are called the "defendants." The defendants in this suit are Nathan Coonrod, M.D., Primary Health Care Center, Andrew Chai, M.D., Steven R. Newman, M.D., and Mitchell Long, D.O. The defendants Nathan Coonrod, M.D. and Primary Health Care Center are represented by Steven K. Tolman. The defendant Andrew Chai, M.D., is represented by Andrew C. Brassey. The defendant Steven R. Newman, M.D. is represented by Gary T. Dance, and the defendant Mitchell Long, D.O. is represented by John J. Burke. This is a civil case involving a claim for wrongful death.

A trial starts with a selection of a fair, impartial jury. To that end, the court and the lawyers will ask each of you questions to discover whether you have any information concerning the case or any opinions or attitudes which any of the lawyers believe might cause you to favor or disfavor some part of the evidence or one side or the other. The questions may probe deeply into your attitudes, beliefs and experiences, but they are not intended to embarrass you.

If you do not hear or understand a question, you should say so. If you do understand the question, you should answer it freely.

The clerk of the court will now swear you for the jury examination.

INSTRUCTION NO. _____

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer

or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

INSTRUCTION NO. _____

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

INSTRUCTION NO. _____

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

INSTRUCTION NO. _____

Members of the jury, I remind you that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case, until after I finally submit the case to you.

INSTRUCTION NO. _____

Whether a party has insurance is not relevant to any of the questions you are to decide. You must avoid any inference, speculation or discussion about insurance.

INSTRUCTION NO. _____

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

INSTRUCTION NO. _____

The following facts are not in dispute:

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 Blahd, 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."

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INSTRUCTION NO. _____

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [and upon video tape]. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

INSTRUCTION NO. _____

Evidence may be either direct or circumstantial. The law makes no distinction between direct and circumstantial evidence. Each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

INSTRUCTION NO. _____

A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, that the proposition is more probably true than not true.

INSTRUCTION NO. _____

On the claim of medical negligence/wrongful death against Dr. Coonrod for failure to meet the applicable standard of health care practice, the plaintiffs have the burden of proof on each of the following propositions:

1. That Dr. Coonrod failed to meet the applicable standard of health care practice as defined in these instructions;
2. That the plaintiffs were damaged;
3. That the acts of Dr. Coonrod which failed to meet the applicable standard of health care practice were a proximate cause of the damages of the plaintiffs; and
4. The elements of damage and the amount thereof.

You will be asked the following questions on the jury verdict form:

Did defendant Nathan Coonrod, M.D. breach the applicable standard of health care practice in his care and treatment of Maria Aguilar?

If so, did any breach of the standard of health care practice on the part of defendant Nathan Coonrod, M.D. proximately cause Maria Aguilar's death and plaintiffs' damages?

If you find from your consideration of all the evidence that the respective proposition has been proved, you should answer the respective question or questions "Yes." However, if you find that any of the propositions have not been proved, then the plaintiffs have not met the burden of proof required and you should answer the respective question or questions "No."

INSTRUCTION NO. _____

The plaintiffs in this wrongful death case have the burden of affirmatively proving by direct expert testimony, and by a preponderance of all competent evidence, that at the time and place of the incident in question, Dr. Coonrod negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard then existed at the time and place of the alleged negligence of defendant and as such standard then and there existed with respect to the class of health care providers that Dr. Coonrod then and there belonged to and in which capacity he was functioning.

Dr. Coonrod shall be judged in comparison with similarly trained and qualified providers of the same class in the same community, taking into account training, experience and fields of medical specialization.

INSTRUCTION NO. _____

As used in these instructions, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which the care was or allegedly should have been provided.

INSTRUCTION NO. _____

In determining whether Dr. Coonrod's care of Maria Aguilar satisfied or breached the applicable standard of care of health care practice as it has been stated to you, you are not permitted to arbitrarily set a standard of your own. The only way you may properly learn the applicable standard of care is through evidence presented in this trial by health care providers, including physicians, called as expert witnesses. The expert witness's testimony can only be considered by the jury if (a) the expert opinion is actually held by the expert witness; (b) that the expert's opinion can be testified to with reasonable medical certainty, and (c) that the expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable community standard to which his or her expert opinion testimony is addressed.

INSTRUCTION NO. _____

If the plaintiffs prove through expert testimony that Dr. Coonrod breached the applicable standard of health care practice, plaintiffs have the additional burden of proving through expert testimony Dr. Coonrod's breach of the applicable standard of health care practice was, with a reasonable degree of medical certainty, the proximate cause of Maria Aguilar's death.

If you find Dr. Coonrod breached the applicable standard of health care practice, but that this was not the proximate cause of Maria Aguilar's death, then your verdict must be for Dr. Coonrod.

INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury.

Plaintiff must prove proximate cause by expert testimony, by a preponderance of the evidence, and to a reasonable degree of medical certainty.

INSTRUCTION NO. _____

In order to prove "proximate cause," plaintiffs must prove by expert medical testimony, by the preponderance of the evidence and to a reasonable degree of medical certainty, that it is more likely than not that Dr. Coonrod's breach of the standard of health care practice caused Maria Aguilar's death. It is not sufficient if plaintiffs show it is "possible" that a breach of the standard of health care practice by Dr. Coonrod caused Maria Aguilar's death or that a breach of the standard of health care practice increased the risk of harm to her or precluded a chance for a better recovery.

INSTRUCTION NO. _____

I further instruct you that medical practitioners, such as Dr. Coonrod are not insurers of the correctness of their treatment. The mere fact that an undesirable or unfortunate result occurred following medical care rendered by Dr. Coonrod does not, of itself, establish a breach of the applicable standard of health care practice on the part of Dr. Coonrod.

INSTRUCTION NO. _____

Dr. Coonrod may not be held liable for the breach of the applicable standard of health care practice, if any, by any other health care provider involved in the care of Mrs. Aguilar.

INSTRUCTION NO. _____

On the claim that Defendant Nathan Coonrod, M.D. was acting within the course and scope of his employment, the Plaintiffs have the burden of proof on each of the following propositions:

1. The conduct is of the kind Nathan Coonrod, M.D., was employed to perform; and
2. The conduct occurred substantially within Nathan Coonrod, M.D.'s authorized time and space limits (i.e. during work hours and within the general area or locality); and
3. Nathan Coonrod, M.D.'s purpose was, at least in part, to further Primary Health Care Center's business interests (If the employee acts purely from personal motives which are in no way connected with his employer's business interests, then the employee is not acting within the scope of his employment.); and
4. If force was intentionally used by Nathan Coonrod, M.D. against another, it was not unexpected by Primary Health Care Center.

If you find from your consideration of all the evidence in the case that each of the foregoing propositions have been proved, your verdict should be for the Plaintiffs. However, if you find that any of the propositions have not been proved, then your verdict should be for Defendants.

INSTRUCTION NO. _____

Conduct is within the scope of the agent's authority if it occurs while the agent is engaged in the duties that the agent was asked or expected to perform and relates to those duties. It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary for the performance of such duties is within the scope of the agent's authority.

INSTRUCTION NO. _____

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiffs are entitled to damages.

INSTRUCTION NO. _____

If the jury decides the plaintiffs are entitled to recover from the defendants, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiffs for any damages proved to be proximately caused by defendant's negligence.

The elements of damage the jury may consider are:

1. The reasonable cost of decedent's funeral.
2. The reasonable value of necessary medical care and expenses incurred prior to the decedent's death.
3. The reasonable value to the plaintiffs of the loss of the decedent's services, training, comfort, conjugal relationship, and society and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of the plaintiffs, the decedent's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.
4. The plaintiffs' loss of financial support from the decedent, and the present cash value of financial support the decedent would have provided to the plaintiffs in the future, but for the decedent's death, taking into account the plaintiffs' life expectancy, the decedent's age and normal life expectancy, the decedent's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

There can be no recovery for any pain or suffering of the decedent prior to death.

INSTRUCTION NO. _____

You are instructed that if you find the plaintiffs are entitled to damages that you may award only such damages as have been proved by plaintiffs with reasonable certainty.

INSTRUCTION NO. _____

A person asserting a claim of damages has the burden of proving not only a right to damages, but also the amount of damages. Idaho law does not permit arriving at an alleged amount of damages by guessing or conjecture.

INSTRUCTION NO. _____

The amount of damages claimed either by the written pleadings or in the argument of counsel must not be considered by you as evidence of reasonable compensation.

INSTRUCTION NO. _____

A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

INSTRUCTION NO. _____

In fixing the amount of money which will reasonably and fairly compensate the plaintiffs, you are to consider that a person who is injured must exercise ordinary care to minimize the damage and to prevent further damage. Any loss which results from a failure of the decedent Maria Aguilar to exercise such ordinary care cannot be recovered by plaintiffs.

INSTRUCTION NO. _____

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

INSTRUCTION NO. _____

Your award, if any, for wrongful death will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.

INSTRUCTION NO. _____

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

INSTRUCTION NO. _____

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

INSTRUCTION NO. _____

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any other means than such a note.

During your deliberation, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. _____

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. _____

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. _____

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

INSTRUCTION NO. _____

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

We, the Jury, answer the special interrogatories as follows:

Question No. 1: Did Defendant Andrew Chai, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 1: Yes No

If the answer to Question No. 1 is Yes, go to Question No. 2. If answer to Question No. 1 is No, skip Question No. 2 and go to Question No. 3.

Question No. 2: Was Defendant Andrew Chai, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 2: Yes No

If the answer to Question No. 2 is Yes, go to Question No. 3. If answer to Question No. 2 is No, go to Question No. 3.

Question No. 3: Did Defendant Steven R. Newman, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 3: Yes No

If the answer to Question No. 3 is Yes, go to Question No. 4. If answer to Question No. 3 is No, skip Question No. 4 and go to Question No. 5.

Question No. 4: Was Defendant Steven R. Newman, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 4: Yes No

If the answer to Question No. 4 is Yes, go to Question No. 5. If answer to Question No. 4 is No, go to Question No. 5.

Question No. 5: Did Defendant Nathan Coonrod, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 5: Yes No

If the answer to Question No. 5 is Yes, go to Question No. 6. If answer to Question No. 5 is No, skip Question Nos. 6 & 7 and go to Question No. 8.

Question No. 6: Was Defendant Nathan Coonrod, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 6: Yes No

If the answer to Question No. 6 is Yes, go to Question No. 7. If answer to Question No. 6 is No, skip Question No. 7 and go to Question No. 8.

Question No. 7: Was Defendant Nathan Coonrod acting within the course and scope of his employment with Defendant Primary Health Care Center when any breach in the standard of care in his treatment of the decedent, Maria Aguilar, occurred?

Answer to Question No. 7: Yes No

If the answer to Question No. 7 is Yes, go to Question No. 8. If answer to Question No. 7 is No, go to Question No. 8.

Question No. 8: Did Defendant Mitchell Long, D.O., M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 8: Yes No

If the answer to Question No. 8 is Yes, go to Question No. 9. If answer to Question No. 8 is No, skip Question No. 9 and go to Question No. 10.

Question No. 9: Was Defendant Mitchell Long, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 9: Yes No

If the answer to Question No. 9 is Yes, go to Question No. 10. If answer to Question No. 9 is No, go to Question No. 10.

If you answered "Yes" to any of the following questions, answer Question No. 10. If you answered "No" to all of the following questions then you are done. Skip Question Nos. 10, 11, and 12, sign the jury verdict form as instructed and advise the bailiff.

Instruction for Question No. 10: You will answer this question only if you have found that the actions of one or more of the Defendants (Andrew Chai, M.D., Steven R. Newman, M.D., Nathan Coonrod, M.D., Mitchell Long, D.O., and Primary Health Care Center), were the proximate cause of any damages to the Plaintiffs. In this question, you are to apportion the fault between any parties for whom you found proximate cause. As to each party or entity to which you answered "Yes" to the proximate cause questions (Question Nos. 2, 4, 6, 9), you must determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to the proximate cause questions for a party, insert a "0" or "Zero" as to that party or entity.

Question No. 10: What is the percentage of fault (if any) you assign to each of the following:

To the Defendant, Andrew Chai, M.D. _____%

To the Defendant, Steven R. Newman, M.D. _____%

To the Defendant, Nathan Coonrod, M.D. _____%

To the Defendant, Mitchell Long, D.O. _____%

To the Defendant, Primary Health Care Center _____%

Total must equal 100%

Question No. 11: What is the total amount of damage sustained by the Plaintiffs as a result of the Defendants' actions? \$ _____

Answer to Question No. 12: We assess Plaintiffs' damages as follows:

1. Economic damages, as defined in the Instructions:

\$ _____

2. Non-economic damages, as defined in the Instructions:

\$ _____

Sign the verdict and advise the Bailiff.

There will be a signature block for the foreperson and a signature line for each individual juror.

APR 14 2009

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE CANYON COUNTY CLERK
D. BUTLER, DEPUTY
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ORIGINAL

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

SPECIAL VERDICT FORM

We, the Jury, answer the special interrogatories as follows:

Question No. 1: Did Defendant Andrew Chai, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 1: Yes No

If the answer to Question No. 1 is Yes, go to Question No. 2. If answer to Question No. 1 is No, skip Question No. 2 and go to Question No. 3.

Question No. 2: Was Defendant Andrew Chai, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 2: Yes No

If the answer to Question No. 2 is Yes, go to Question No. 3. If answer to Question No. 2 is No, go to Question No. 3.

Question No. 3: Did Defendant Steven R. Newman, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 3: Yes No

If the answer to Question No. 3 is Yes, go to Question No. 4. If answer to Question No. 3 is No, skip Question No. 4 and go to Question No. 5.

Question No. 4: Was Defendant Steven R. Newman, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 4: Yes No

If the answer to Question No. 4 is Yes, go to Question No. 5. If answer to Question No. 4 is No, go to Question No. 5.

Question No. 5: Did Defendant Nathan Coonrod, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 5: Yes No

If the answer to Question No. 5 is Yes, go to Question No. 6. If answer to Question No. 5 is No, skip Question Nos. 6 & 7 and go to Question No. 8.

Question No. 6: Was Defendant Nathan Coonrod, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 6: Yes No

If the answer to Question No. 6 is Yes, go to Question No. 7. If answer to Question No. 6 is No, skip Question No. 7 and go to Question No. 8.

Question No. 7: Was Defendant Nathan Coonrod acting within the course and scope of his employment with Defendant Primary Health Care Center when any breach in the standard of care in his treatment of the decedent, Maria Aguilar, occurred?

Answer to Question No. 7: Yes No

If the answer to Question No. 7 is Yes, go to Question No. 8. If answer to Question No. 7 is No, go to Question No. 8.

Question No. 8: Did Defendant Mitchell Long, D.O., M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 8: Yes No

If the answer to Question No. 8 is Yes, go to Question No. 9. If answer to Question No. 8 is No, skip Question No. 9 and go to Question No. 10.

Question No. 9: Was Defendant Mitchell Long, M.D.'s, breach the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 9: Yes No

If the answer to Question No. 9 is Yes, go to Question No. 10. If answer to Question No. 9 is No, go to Question No. 10.

If you answered "Yes" to any of the following questions, answer Question No. 10. If you answered "No" to all of the following questions then you are done. Skip Question Nos. 10, 11, and 12, sign the jury verdict form as instructed and advise the bailiff.

Instruction for Question No. 10: You will answer this question only if you have found that the actions of one or more of the Defendants (Andrew Chai, M.D., Steven R. Newman, M.D., Nathan Coonrod, M.D., Mitchell Long, D.O., and Primary Health Care Center), were the proximate cause of any damages to the Plaintiffs. In this question, you are to apportion the fault between any parties for whom you found proximate cause. As to

each party or entity to which you answered "Yes" to the proximate cause questions (Question Nos. 2, 4, 6, 9), you must determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to the proximate cause questions for a party, insert a "0" or "Zero" as to that party or entity.

Question No. 10: What is the percentage of fault (if any) you assign to each of the following:

To the Defendant, Andrew Chai, M.D. _____%

To the Defendant, Steven R. Newman, M.D. _____%

To the Defendant, Nathan Coonrod, M.D. _____%

To the Defendant, Mitchell Long, D.O. _____%

To the Defendant, Primary Health Care Center _____%

Total must equal 100%

Question No. 11: What is the total amount of damage sustained by the Plaintiffs as a result of the Defendants' actions? \$ _____

Answer to Question No. 12: We assess Plaintiffs' damages as follows:

1. Economic damages, as defined in the Instructions:

\$ _____

2. Non-economic damages, as defined in the Instructions:

\$ _____

Sign the verdict and advise the Bailiff.

DATED This _____ day of _____, 2009

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Steven K. Tolman (ISB #1769)
Nicole L. Cannon (ISB #5502)
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Twin Falls, Idaho 83303-1276
Telephone: (208) 733-5566

E I L E U
A.M. 12:50 P.M.

APR 14 2009

CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorney for Defendant Nathan Coonrod, MD 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.

 ORIGINAL

Case No. CV 05-5781

**DEFENDANTS NATHAN COONROD,
M.D. AND PRIMARY HEALTH CARE
CENTER'S PROPOSED JURY
INSTRUCTIONS**

COMES NOW the Defendants Nathan Coonrod, M.D., and Primary Health Care
Center, by and through their counsel of record, Tolman & Brizee, P.C., and submits the

following proposed jury instructions numbered 1 through 40, inclusively, as well as the Special Verdict Form. These proposed instructions include the standard Idaho Pattern Jury Instructions as well as Requested or modified Jury Instructions.

Defendant reserves the right to amend, supplement or withdraw any of these instructions.

DATED this 13th day of April, 2009.

TOLMAN & BRIZEE, P.C.

By: 
Steven K. Tolman

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2009, I caused a true and correct copy of the foregoing DEFENDANTS NATHAN COONROD, M.D. AND PRIMARY HEALTH CARE CENTER PROPOSED JURY INSTRUCTIONS to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

Andrew C. Brassey
BRASSEY, WETHERELL, CRAWFORD & McCURDY
203 W. Main St.
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Steven K. Tolman

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FILED
A.M. 12 15 P.M.

APR 14 2009

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

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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,

Case No. CV 05-5781

**DEFENDANT STEVEN R. NEWMAN,
M.D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER
RE: DR. BLAHD**

**DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER
RE: DR. BLAHD - 1**

Defendants.

COMES NOW defendant Steven R. Newman, M.D., hereby submits this Memorandum in Opposition to Plaintiffs' Motion for Protective Order Re: Dr. Blahd.

ARGUMENT

I. DR. NEWMAN ABSOLUTELY DID NOT INTIMIDATE OR ATTEMPT TO PREVENT DR. BLAHD FROM PARTICIPATING IN THIS CASE.

Dr. Newman absolutely and categorically did not intimidate Dr. Blahd. On April 10, 2009, Dr. Newman contacted Dr. Blahd and spoke with him for three to four minutes. Dr. Newman never asked Dr. Blahd to recant any purported statements. He simply contacted Dr. Blahd to verify that he had talked with plaintiffs' counsel and Drs. Blaylock and Lapinel, as plaintiffs purport in their Ninth Supplemental Expert Witness Disclosure.

II. PLAINTIFFS SHOULD BE JUDICIALLY ESTOPPED FROM RELYING UPON DR. BLAHD TO QUALIFY THEIR STANDARD OF CARE EXPERTS.

Plaintiffs' unsupported accusations against Dr. Newman are a red herring. The issue is not Dr. Newman; rather, it is why plaintiffs contacted Caldwell physicians on April 8, 2009, to qualify Drs. Blaylock and Lapinel as having knowledge of the local community standard of care, especially after plaintiffs represented to the Court at the March 26, 2009 hearing on their Motion for Protective Order Re: Dr. Bramwell that they were unable to contact a Caldwell physician. The other issue is why plaintiffs disregarded the Court's verbal order on March 30, 2003, that in granting the protective order, plaintiffs were left with the foundation upon which they relied to argue that Dr. Blaylock and Dr. Lapinel had sufficient knowledge of the standard of care, i.e., conversation with Dr. Bramwell, in opposition to Dr. Newman's Second Motion in Limine.

**DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER
RE: DR. BLAHD - 2**

Client:1190255.1

Plaintiffs contacted Caldwell physicians after the March 30, 2009 pretrial conference. Their counsel avers that sometime in March, 2009, he contacted Dr. Blahd, Dr. Guerin Walsh, and Dr. Stanley Cart. April 13, 2009 Affidavit of Byron Foster, ¶¶ 4, 5, 6, and 7.

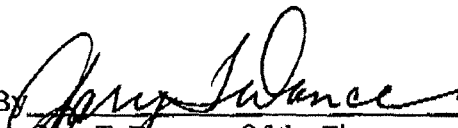
Plaintiffs should be judicially estopped from playing fast and loose with the Court by taking one position with regard to their Motion for Protective Order Re: Dr. Bramwell (plaintiffs are unable to speak with a Caldwell physician), and now taking a completely opposite position by relying upon Dr. Blahd to allow Dr. Blaylock and Dr. Lapinel to become familiar with the standard of care applicable to Dr. Newman. The doctrine of judicial estoppel "is . . . intended to prevent parties from playing fast and loose with the courts." *A & J Constr. Co., Inc. v. Wood*, 141 Idaho 682, 685, 116 P.3d 12, 15 (2005) (quoting *Robertson Supply, Inc. v. Nicholls*, 131 Idaho 99, 101, 952 P.2d 914, 916 (Ct. App. 1998)).

CONCLUSION

Based upon the foregoing argument and authority, Dr. Newman respectfully requests that the Court deny Plaintiffs' Motion for Protective Order Re: Dr. Blahd.

DATED this 14 day of April, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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

**DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER
RE: DR. BLAHD - 3**

Client:1190255.1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 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 FOR PROTECTIVE ORDER RE: DR. BLAHD** to be served by the method indicated below, and addressed to the following:

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Attorney-at-law
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Gary T. Dance

**DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER
RE: DR. BLAHD - 4**

Client:1190255.1

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF IDAHO
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY
FILED
A.M. 4:40 P.M.
APR 14 2009

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.

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

Case No. CV 05-5781

**ORDER TO SHORTEN TIME RE:
PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER**

THIS MATTER having come before the Court on Plaintiff's Motion for Order Shortening Time, and good cause appearing therefor;

IT IS HEREBY ORDERED AND THIS DOES ORDER That Plaintiff's Motion for Protective Order will be heard on April 22, 2009 at 3:00 p.m.

DATED this 14 day of April, 2009.



Honorable Gregory M. Culet
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of April, 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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Chai, M.D.**

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Fields Chartered
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Pocatello ID 83204-0817
**Attorneys for Defendant Steven R.
Newman, M.D.**

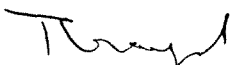
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Clerk of the Court

Andrew C. Brassey (ISB No. 2128)
Bradley S. Richardson (ISB No. 7008)
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Attorneys for Defendant Andrew Chai, M.D.

F I L E D
A.M. 7:40 P.M.

APR 15 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 JOINDER IN DEFENDANT
MICHAEL LONG, D.O.'S
MOTION IN LIMINE**

COMES NOW Defendant Andrew Chai, M.D., by and through his counsel of record, Brassey, Wetherell & Crawford, LLP, and hereby joins in Defendant Michael Long, D.O.'s Motion in Limine, as if his own, and in the supporting documentation dated March 18, 2009, including Defendant Long's supporting memorandum and affidavit of counsel. Defendant Long's Motion in Limine seeks the preclusion of any evidence regarding the receipt of medical records by Defendant Long from Primary Health on or around May 27, 2003. For the reasons and grounds set forth in the above-referenced documents, and in their supporting authorities and evidence, the Court should grant the above-referenced Motion in Limine by Defendant Long.

DATED this 15th day of April, 2009.

BRASSEY, WETHERELL & CRAWFORD

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2009, I served a true and correct copy of the foregoing **DEFENDANT ANDREW CHAI, M.D.'S JOINDER IN DEFENDANT MICHAEL LONG, D.O.'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:

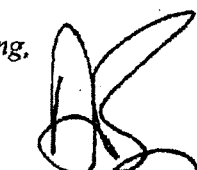
David E. Comstock	<input type="checkbox"/>	U.S. Mail, postage prepaid
LAW OFFICES OF COMSTOCK &	<input type="checkbox"/>	Hand-Delivered
BUSH	<input type="checkbox"/>	Overnight Mail
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Gary T. Dance	<input type="checkbox"/>	U.S. Mail, postage prepaid
MOFFATT, THOMAS, BARRETT,	<input type="checkbox"/>	Hand-Delivered
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<i>Attorneys for Defendant Steven R. Newman,</i>		
<i>M.D.</i>		

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Tolman & Brizee	<input type="checkbox"/>	Hand-Delivered
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<i>M.D., and Primary Health Care Center</i>		

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Hall, Farley, Oberrecht & Blanton	<input type="checkbox"/>	Hand-Delivered
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Boise, Idaho 83701		
<i>Attorneys for Defendant Mitchell Long,</i>		
<i>D.O.</i>		



 Andrew C. Brassey

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Facsimile: (208) 344-7077

Attorneys for Defendant Andrew Chai, M.D.

F I L E D
A.M. / 1:45 P.M.
APR 15 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 RESPONSE TO
PLAINTIFFS' FIRST MOTION IN
LIMINE**

COMES NOW Defendant Andrew Chai, M.D., by and through his counsel of record, Brassey, Wetherell & Crawford, LLP, and hereby submits this Response to Plaintiffs' First Motion in Limine.

I.

INTRODUCTION

Plaintiffs have moved the Court in limine to preclude: (1) cumulative expert testimony; (2) evidence regarding the cause of death; (3) testimony of violations of former Co-Defendants, and their listing on the verdict form; (4) any settlement by parties and a reduction of any verdict by the amount paid by any settling party; (5) Dr. Dean Lapinel's retirement and credentials; (6) issues relating to insurance, shortages in health care, and potential financial hardship on the Defendants; and (7) evidence of the decedent's toxicology screening results.

Defendant Chai now provides his response to Plaintiffs' First Motion in Limine. As set forth below, many of the issues raised by Plaintiffs are unripe for consideration. Further, each of Defendant Chai's expert witnesses should be allowed to testify, as their testimony will aid the jury and not be needlessly cumulative. Defendant Chai does not dispute the limited issues raised as to insurance, shortages in health care, and potential financial hardship on the Defendants. As a result, the Court should deny Plaintiffs' motion except as to these latter limited issues.

II.

ARGUMENT

A. The Court Should Deny Plaintiffs' Motion in Limine as it Presents Issues Unripe for Consideration by the Court.

Unlike the issues raised in the Defendants' motions in limine, many of the in-limine requests by Plaintiffs are unripe for consideration and would require improper speculation by the Court. In general, motions in limine seek an advanced ruling on the admissibility of evidence. *Warren v.*

Sharp, 130 Idaho 599, 605, 83 P.3d 773, 779 (2003) (citation omitted). As such, these motions inherently are based upon an alleged or anticipated set of facts, rather than on actual trial testimony. *Id.*; *Kirk v. Ford Motor Co.*, 141 Idaho 697, 701, 116 P.3d 27, 31 (2005) (citation omitted). Thus, a trial court may not be able to make an informed decision regarding admissibility without the benefit of "all the other actual evidence which will be admitted at trial." *Kirk*, 141 Idaho at 701, 116 P.3d at 31 (citing *State v. Hester*, 114 Idaho 688, 699, 760 P.2d 27, 38 (1988)). As a result, a trial court may deny a motion in limine and wait until trial to hear the evidence in full context. *Id.* (citing *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005)).

At this stage of the litigation, Plaintiffs' in limine requests would require the Court to hypothesize regarding many potential issues such as settlement and the outcome of a jury verdict. These requests are entirely speculative at this point and therefore should be denied by the Court.

B. The Opinions of Defendant Chai's Expert Witnesses do not Constitute Cumulative Evidence and Therefore Should be Allowed at Trial.

Plaintiffs argue that Defendant Chai's expert witnesses will provide cumulative evidence, and that the Court should limit testimony to one witness in addition to Defendant Chai. *See* p. 12 of Memorandum in Support of Plaintiffs' First Motion in Limine. As set forth below, Defendant Chai's expert witnesses will address different aspects of this case from different perspectives. As a result, their testimony is not cumulative, but will be helpful to the jury.

The procedural rule regarding this issue states in pertinent part:

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See I.R.E. 403.

Thus, under the Rule, a party is required to show that the presentation of expert testimony will amount to the “needless presentation of cumulative evidence.” *See id.* (emphasis added). Therefore, the fact that an expert’s testimony may be somewhat similar to that of another witness does not meet the threshold requirements for exclusion under Rule 403. *Id.*

Significantly, the language of Rule 403 “tips in favor of admissibility.” *State v. McGuire*, 135 Idaho 535, 540, 20 P.3d 719, 724 (Ct. App. 2001). Further, statements by witnesses that collaborate facts made by other witnesses are not automatically inadmissible because they are cumulative. *State v. Blackstead*, 126 Idaho 14, 22, 878 P.2d 188, 196 (Ct. App. 1994). Rather, evidence must be needlessly cumulative to be excluded. *Id.*

Courts from other jurisdictions have allowed several expert witnesses to testify as to the same issues in medical malpractice actions based upon their varying credentials, experiences, specialties and backgrounds. *See e.g., B.C. Simms v. Brackett*, 885 S.W.2d 450, 454 (Tex. Ct. App. 1994); *Kobos v. Everts*, 768 P.2d 534, 546 (Wyo. 1989); *Frederick v. Woman’s Hospital of Acadiana*, 626 So.2d 467, 472-73 (La. Ct. App. 1993).

A review of Defendant Chai’s expert witness disclosures shows that the testimony of his experts will not be needlessly cumulative, or even cumulative. Defendant Chai intends to call one pulmonologist, Dr. George Pfoertner, to testify regarding the issues of causation. Specifically, it is expected that Dr. Pfoertner will testify that Defendant Chai’s conduct and actions did not cause the decedent’s death in this matter. In doing so, Dr. Pfoertner will explain and discuss the physiology and structural makeup of the lungs, the symptomology and manifestations of pulmonary emboli and their application to this case. In addition, Dr. Pfoertner will discuss diagnostic difficulties in assessing pulmonary emboli.

Defendant Chai also intends to call Dr. James Smith, a local cardiologist, to testify regarding the applicable standard of health care practice. Specifically, it is expected that Dr. Smith will testify that Defendant Chai was correct in having Mrs. Aguilar return to the hospital following notice of her abnormal EKG. Moreover, Dr. Smith will explain to the jury that Dr. Chai acted appropriately in transferring Mrs. Aguilar to another cardiologist who assumed care for Mrs. Aguilar.

Given the complexities of this medical malpractice action, Defendant Chai also may call Dr. Michael Kenner, a Caldwell cardiologist, to testify as to issues of causation and standard of care. In doing so, Dr. Kenner will explain to the jury that a pulmonary embolism is usually a rapid or quick event, and that saddle emboli may become present in a single event without prior notice or indication of a shower of emboli. In addition, Dr. Kenner is expected to testify that a physician is no longer responsible or involved in a case once he or she has referred a patient back to the primary care physician. As such, Defendant Chai's experts will provide the jury with probative evidence as to different aspects of the case from different perspectives.

The policy considerations in this case also weigh in favor of denying Plaintiffs' Motion. Significantly, Plaintiffs' theories of the case have not been solidified, nor have Plaintiffs put on their case-in-chief. Therefore, it would be fundamentally unfair to limit Defendant Chai's experts at this point and leave him open to undisclosed attacks at trial. This particularly is true given the fact that Defendant Chai is required to defend his case primarily by the use of expert testimony. *See* Idaho Code §§ 6-1012 and 6-1013.

Plaintiffs also should be estopped from limiting Defendant Chai's experts because Plaintiffs have retained more experts in this matter than Defendant Chai. Plaintiffs have disclosed three standard-of-care experts to address their case against Defendant Chai. These experts are Dr. Daniel

Brown, Dr. Paul Blaylock, and Dr. Samuel LeBaron. As such, the Court should deny Plaintiffs' request to limit Defendant Chai's expert witnesses.

C. The Court Should Not Limit Any Credible Evidence Regarding the Cause of the Decedent's Death.

Plaintiffs also contend that Defendants should be limited in presenting evidence as to the cause of the decedent's death. *See* p.2 of Memorandum in Support of Plaintiffs' First Motion in Limine. Defendant Chai has provided detailed expert witness disclosures, including the expected opinions of his experts regarding causation. As such, Defendant Chai's experts should not be limited in explaining, expounding and discussing the autopsy report. In doing so, these experts should be allowed to provide their assessments and opinions as to the significance of this finding, and as to its implications on liability. Furthermore, Defendant Chai's expert should be allowed to rebut any testimony from Plaintiffs' experts regarding the cause of death.

Moreover, the author of the autopsy report, Dr. Thomas Donndelinger, M.D., has provided deposition testimony in this matter relevant to these issues. As a result, the Court should deny Plaintiffs' motion with respect to evidence on the cause of death.

D. The Court Should Deny Plaintiffs' Motion Regarding Any Former Co-Defendants and any Preclusion of Such Parties on the Jury Verdict Form.

Plaintiffs next argue that Defendants should be precluded from providing evidence of standard of care violations by any "future former Co-Defendant." *See* p.3 of Memorandum in Support of Plaintiffs' First Motion in Limine. Likewise, Plaintiffs allege that any former Co-Defendants should not be included on the jury verdict form. *See id.* These requests, however, are speculative and unripe, and therefore should be denied.

Specifically, the very idea of a "future former Co-Defendant" shows the speculative nature of the instant request. Further, Plaintiffs have provided their own expert disclosures regarding the

alleged standard of care violations of the Co-Defendants, and therefore Plaintiffs have sufficient notice of those opinions and should be precluded from taking a contrary position in the event of settlement.

Additionally, as set forth thoroughly in Defendant Chai's expert disclosures, Defendant Chai's experts will testify extensively regarding the medical records, care, treatment, and procedures performed by the various medical providers in this case and the potential impact of their conduct on liability. Defendant Chai has made these experts readily available to Plaintiffs to have their depositions taken. To date, however, Plaintiffs' counsel has not requested their depositions.

Plaintiffs' argument likewise is untenable given the fact that non-parties may be included on the jury verdict form. *See Van Brunt v. Stoddard*, 136 Idaho 681, 687, 39 P.3d 621, 627 (2001) (citing *Pocatello Indus. Park Co. v. Steel W., Inc.*, 101 Idaho 783, 621 P.2d 339 (1980)). The justification for placing non-parties on a jury verdict is that true apportionment cannot be achieved unless it includes all alleged tortfeasors, whether or not they are parties to the case. *Id.*

Defendants and their experts are entitled to discuss and explain all of the care and treatment provided to the decedent in this case, whether it regards current parties or other health care providers. Accordingly, the Court should deny Plaintiffs' motion with respect to former Co-Defendants.

E. The Court Should Deny Plaintiffs' Motion Regarding the Preclusion of Any Setoff of a Jury Verdict and Regarding Facts of Settlement.

Plaintiffs further argue that there should be no offset of any eventual jury verdict for an amount paid in settlement. *See* p.4-6 of Memorandum in Support of Plaintiffs' First Motion in Limine. Further, Plaintiffs contend that the facts of any settlement should be precluded from evidence at trial. *See* p.6 of Memorandum in Support of Plaintiffs' First Motion in Limine. Again, however, Plaintiffs' arguments are unripe for consideration and premature at this stage of the litigation.

informed of these facts, so that they may give proper weight to the credibility and opinions of Dr. Lapinel.

G. Statements Regarding Insurance Premiums, Shortages in Health Care and Financial Hardship of the Defendants.

Defendant Chai is aware of prohibitions on evidence involving insurance and the exceptions thereto. Further, Defendant Chai is unaware at this point of the relevance of evidence regarding insurance premium, shortages of health care, and statements as to financial hardship. Therefore, based upon the information presently known, Defendant Chai does not anticipate making any reference to such evidence at trial. That being said, Defendant Chai reserves the right to raise subsequently these issues with the Court out of the presence of the jury.

H. The Court Should Allow Evidence of the Decedent's Toxicology Screening Results.

Plaintiffs' final argument is that the Court should preclude any toxicology screening test results for the decedent. *See* p.13 of Memorandum in Support of Plaintiffs' First Motion in Limine. Specifically, Plaintiffs seek to preclude evidence of the presence of barbiturates and of benzodiazepine. *See id.* Nevertheless, Plaintiffs provide only a rendition of anticipated or expected facts to be proven at trial. Moreover, Plaintiffs do not provide any affidavits or other supporting evidence for the alleged facts in their motion. As a result, the Court should wait until trial to hear the evidence in full context before making a decision regarding its admissibility. *See Kirk*, 141 Idaho at 701, 116 P.3d at 31.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2009, I served a true and correct copy of the foregoing **DEFENDANT ANDREW CHAI, M.D.'S RESPONSE TO PLAINTIFFS' FIRST 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:

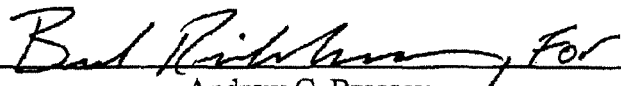
David E. Comstock	<input type="checkbox"/>	U.S. Mail, postage prepaid
LAW OFFICES OF COMSTOCK &	<input type="checkbox"/>	Hand-Delivered
BUSH	<input type="checkbox"/>	Overnight Mail
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Boise, Idaho 83701-2774		

Byron V. Foster	<input type="checkbox"/>	U.S. Mail, postage prepaid
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MOFFATT, THOMAS, BARRETT,	<input type="checkbox"/>	Hand-Delivered
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F I L E D
8:11 A.M. P.M.

APR 16 2009 ✓

**CANYON COUNTY CLERK
D. BUTLER, DEPUTY**

Attorney for Defendant Nathan Coonrod, MD 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,
M.D. AND PRIMARY HEALTH CARE
CENTER'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS'
MOTION IN LIMINE**

COME NOW the defendants, Nathan Coonrod, M.D. and Primary Health Care
Center, by and through their counsel of record, Tolman & Brizee, P.C., and hereby
submit this Memorandum in Opposition to Plaintiffs' Motion in Limine.

DEFENDANTS NATHAN COONROD, M.D. AND PRIMARY HEALTH CARE CENTER'S
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE, PAGE 1

I.
INTRODUCTION

Plaintiffs have moved the Court to prohibit (a) a cause of death of Maria A. Aguilar other than the conclusions of Thomas M. Donndelinger, M.D., (b) alleged violations of the standard of health care practice by any Defendant not a party at the time of trial, (c) placing on the verdict form any Defendant not a party at the time of trial, (d) a set-off of any jury verdict by amounts Plaintiffs may receive through settlement, (e) settlements received by Plaintiffs or the amounts thereof, (f) former co-Defendants who are no longer parties, (g) Plaintiffs' expert, Dean Lapinel's, disability-related retirement from the practice of emergency medicine, (h) suggestion that Plaintiff attorneys are the cause of too many lawsuits and the rise in insurance premiums, (i) suggestion that claims against medical personnel are causing a shortage of health care services in rural areas, (j) suggestion that a verdict for Plaintiffs will cause economic or professional hardship to Defendants, (k) cumulative expert testimony, and (l) the toxicology screen results of Maria A. Aguilar.

II.
ARGUMENT

A. ALTERNATIVE CAUSES OF DEATH OF MARIA A. AGUILAR

Defendants Nathan Coonrod, M.D. and Primary Health Care Center (hereinafter referred to as "Defendant") do not contest the cause of death opined to in Thomas M. Donndelinger, M.D.'s autopsy report. To the contrary, in Defendants' Second Motion in Limine they joined with Defendant Steven R. Newman, M.D.'s Third Motion in Limine filed February 6, 2009, asking this Court to preclude the testimony of Deputy Coroner Bill Kirby. This Motion was made based on Mr. Kirby's expected testimony as to Mrs.

Aguilar's cause of death, which differed from that noted in her autopsy report. As such, Defendants agree that any testimony regarding cause of death be limited to that of Dr. Donndelinger.

B. ALLEGED VIOLATIONS OF STANDARD OF HEALTH CARE BY DEFENDANTS NO LONGER A PARTY

Defendants agree with defendant Dr. Newman that this issue in Plaintiffs' Motion is premature and not ripe for consideration. Defendants hereby adopt and incorporate by reference herein, as if fully set forth herein, Dr. Newman's argument relative to cumulative expert testimony, as set forth in his Memorandum in Opposition to Plaintiffs' Motion in Limine, dated the 6th day of April, 2009.

C. DEFENDANTS NO LONGER A PARTY ON VERDICT FORM

Defendants agree with defendant Dr. Newman that this issue in Plaintiffs' Motion is premature and not ripe for consideration. Defendants hereby adopt and incorporate by reference herein, as if fully set forth herein, Dr. Newman's argument relative to cumulative expert testimony, as set forth in his Memorandum in Opposition to Plaintiffs' Motion in Limine, dated the 6th day of April, 2009.

D. OFF-SET OF JURY AWARD BY SETTLEMENT AMOUNTS

Defendants agree with defendant Dr. Newman that this issue in Plaintiffs' Motion is premature and not ripe for consideration. Defendants hereby adopt and incorporate by reference herein, as if fully set forth herein, Dr. Newman's argument relative to cumulative expert testimony, as set forth in his Memorandum in Opposition to Plaintiffs' Motion in Limine, dated the 6th day of April, 2009.

As noted in Dr. Newman's Memorandum, any off-sets of jury awards pursuant to Idaho Code § 6-805 are done after the award, if any, of the jury. As such, Plaintiffs' Motion in this matter is untimely.

E. SETTLEMENTS/AMOUNTS RECEIVED BY PLAINTIFFS

Defendants agree with defendant Dr. Newman that this issue in Plaintiffs' Motion is premature and not ripe for consideration. Defendants hereby adopt and incorporate by reference herein, as if fully set forth herein, Dr. Newman's argument relative to cumulative expert testimony, as set forth in his Memorandum in Opposition to Plaintiffs' Motion in Limine, dated the 6th day of April, 2009.

In the alternative, should a party settle, Idaho Rule of Evidence allows the admission of settlement evidence for limited purposes. At a minimum, the Court should admit any judgments or settlements between parties for the purpose of showing witness bias or prejudice pursuant to the plain language of Idaho Rule of Evidence 408. See Idaho Rule of Evidence 408 (2008). The trial court has "broad discretion" to determine whether a settlement agreement is admissible in court and disclosed to a jury. *Soria v. Sierra Pacific Airlines, Inc.* 111 Idaho 594, 606, 726 P.2d 706, 718 (1986). The *Soria* court acknowledged that IRE 408 bars admissibility of settlement agreements to prove liability for a claim, or the amount thereof, but it ruled IRE 408 does not require exclusion of evidence of settlements pertaining to compromises or offers to compromise if the evidence is being introduced to prove or show witness bias or prejudice. *Id.* at 605, 726 P.2d at 717.

Additionally, the Idaho Supreme Court states that the allowable uses for evidence of settlements listed in Idaho Rule of Evidence 408 are not exhaustive or limited to proving witness bias or prejudice only. *Davidson v. Beco Corporation*, 114 Idaho 107, 109, 753 P.2d 1253, 1255 (1987). "Relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state." Idaho Rule of Evidence 402 (2008).

F. FORMER CO-DEFENDANTS WHO ARE NO LONGER PARTIES

G. REASONS FOR PLAINTIFFS' EXPERT'S RETIREMENT

The weight given the testimony of expert witnesses, as any other witness, is left to the determination of the trier of fact. In order to make such a determination,

H. PLAINTIFF(S) ATTORNEYS CAUSE OF TOO MANY LAWSUITS AND HIGH INSURANCE RATES

Idaho Rule of Evidence 411 states in relevant part "(e)vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Defendants are aware of this prohibition and intend to honor it fully.

I. LAWSUITS CAUSE SHORTAGE OF HEALTH CARE PROVIDERS IN RURAL AREAS

Idaho Rule of Evidence 411 states in relevant part "(e)vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Defendants are aware of this prohibition and intend to honor it fully.

J. DEFENDANTS WOULD BE HARMED ECONOMICALLY OR PROFESSIONALLY BY VERDICT FOR PLAINTIFFS

Idaho Rule of Evidence 411 states in relevant part "(e)vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Defendants are aware of this prohibition and intend to honor it fully.

K. CUMULATIVE EXPERT TESTIMONY

Defendants has only retained six outside expert witnesses. This is a minimal number in any medical malpractice case. Defendants strongly oppose Plaintiffs' Motion on the basis it would severely inhibit their ability to present an appropriate and necessary defense at trial, as required by Idaho Code §§ 6-1012 and 6-1013. Defendants disagree that the testimony of the proposed expert witnesses is cumulative. Rather, Defendants respectfully submits each proposed expert witness is necessary to rebut individual aspects of Plaintiffs' experts' anticipated testimony.

The requirements of Idaho Code §§ 6-1012 and 6-1013 regarding the proof required in any malpractice case govern this matter. Idaho Code § 6-1012 specifies, in relevant part:

In any case, claim or action for damages due to injury or death of any person, brought against any physician...such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician...in comparison with similarly trained and qualified providers of the same

class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any.

Emphasis added.

This requirement under Idaho law -- the showing of a failure to meet the applicable community standard of health care practice -- is a critical component which must be proven in this case in order for Plaintiffs to prevail. Conversely, it is imperative that Defendants be allowed to defend themselves against Plaintiffs' allegations. In order to do so, Defendants must be allowed to present evidence by qualified experts that Defendants did not breach the community standard of health care practice. Defendants have retained experts in different specialties in order to testify to specific aspects of Plaintiffs' experts' testimony.

Each retained defense expert provides insight from his individual area of specialty into the community standard of health care practice for the diagnosis and treatment of patients such as Mrs. Aguilar, who present to emergency care physicians as well as family practice physicians, internal medicine specialists, pulmonary medicine and critical care specialists. These differing perspectives are critical to Defendants' in that these areas of specialty were all involved and working together in the treatment of Mrs. Aguilar. Defendant Nathan Coonrod, M.D. did not treat Mrs. Aguilar in a vacuum. The standard of health care practice for the other areas of health care with which he worked are directly relevant to the underlying question in this case. Therefore, Defendant's witnesses are not cumulative in nature, and should not be limited by this Court.

Each defendant in this case is certainly entitled to present his or her own testimony, witnesses and defenses. Idaho Rule of Evidence 403 allows the court to prohibit relevant evidence if its probative value is outweighed by, among other items, undue waste, confusion, delay, or cumulative evidence. Given the complex nature of this case, the number of co-defendants, and the allegations against the defendants, those factors are not met here.

L. MARIA A. AGUILAR'S TOXICOLOGY SCREEN RESULTS

Mrs. Aguilar's drug screen toxicology report is part of her medical record, which details the treatment Mrs. Aguilar received during the time encompassed by this lawsuit. The nature of that treatment, the decisions made by the defendants, and the information known to the defendants at that time are central to the question of whether the defendants breached community standard of health care practice as it existed at the time. Defendants contend evidence such as the toxicology report relates directly thereto. Its probative value, is not outweighed by any prejudicial to Plaintiffs. As such, it should be allowed pursuant to Idaho Rules of Evidence 402 and 403. Additionally, Defendants hereby adopt and incorporate by reference herein, as if fully set forth herein, Dr. Newman's argument relative to cumulative expert testimony, as set forth in his Memorandum in Opposition to Plaintiffs' Motion in Limine, dated the 6th day of April, 2009.

DATED this 15th day of April, 2009.

TOLMAN & BRIZEE, P.C.

By: Steven K. Tolman for
Steven K. Tolman

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2009, I caused a true and correct copy of the foregoing DEFENDANTS NATHAN COONROD, M.D. AND PRIMARY HEALTH CARE CENTER'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

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- Overnight Mail


Steven K. Tolman

4:30 Calet
FILED
A.M. 330 P.M.

APR 17 2009

CANYON COUNTY CLERK
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Attorneys for Plaintiffs

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

**AFFIDAVIT OF BYRON V.
FOSTER IN SUPPORT OF
PLAINTIFFS' REPLY TO
DEFENDANT STEVEN R.
NEWMAN, M.D.'S OPPOSITION
TO PLAINTIFFS' MOTION IN
LIMINE**

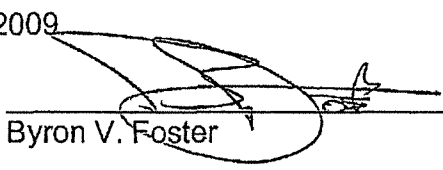
**AFFIDAVIT OF BYRON V. FOSTER IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANT
STEVEN R. NEWMAN, M.D.'S OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE - P. 1**

Your Affiant, being first duly sworn up oath, deposes and states:

- 1, That I am an attorney, duly licensed by the Idaho State Bar to practice law in the State of Idaho;
2. That I am one of the attorneys representing Plaintiffs in the above-referenced matter;
- 3, That I make this Affidavit based upon my own personal knowledge;
4. That attached hereto as Exhibit "A" are a true and correct copies of Defendant Steven R. Newman, M.D.'s Fourth Expert Witness Disclosure, pp. 7 and 8.
5. That attached hereto as Exhibit "B" is an excerpt from the transcript of the Deposition of Steven R. Newman, M.D., p. 34.

Further your Affiant sayeth naught.

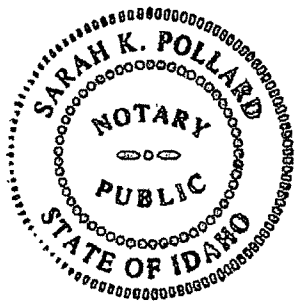
DATED This 17 day of April, 2009

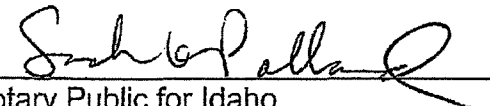


 Byron V. Foster

STATE OF IDAHO,)
 : ss.
 County of Ada.)

SUBSCRIBED and SWORN to before me this 17th day of April, 2009.





 Notary Public for Idaho
 Residing at Boise, Idaho
 My Commission Expires:

AFFIDAVIT OF BYRON V. FOSTER IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE - P. 2

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of April, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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Coonrod, M.D. and Primary Health Care
Center*

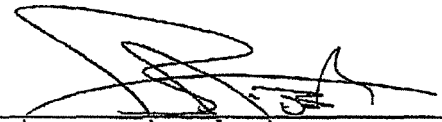
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Byron V. Foster

AFFIDAVIT OF BYRON V. FOSTER IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE - P. 3

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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.

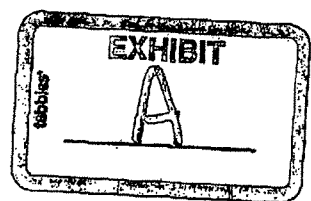
ANDREW CHAI, M.D., STEVEN R. NEWMAN,
 M.D., NATHAN COONROD, M.D. CATHERINE
 ATUP-LEAVITT, M.D., MITCHELL LONG,
 D.O., COLUMBIA WEST VALLEY MEDICAL
 CENTER, an Idaho corporation, MERCY
 MEDICAL CENTER, an Idaho corporation,
 PRIMARY HEALTH CARE CENTER, an Idaho
 corporation, JOHN and JANE DOES, I through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

Defendants.

Case No. CV 05-5781

**DEFENDANT STEVEN R. NEWMAN,
 M.D.'S FOURTH EXPERT WITNESS
 DISCLOSURE**

**DEFENDANT STEVEN R. NEWMAN, M.D.'S
FOURTH EXPERT WITNESS DISCLOSURE - 1**



Client:

arrest from which she did not recover. An autopsy was done on June 5, 2003, which states, "Saddle embolism, right and left pulmonary arteries."

Dr. Bosley is expected to testify that Dr. Newman considered a PE diagnosis in that he asked Mrs. Aguilar whether she had any problems breathing or shortness of breath, to which she replied in the negative. By asking Mrs. Aguilar whether she had any breathing problems or shortness of breath, Dr. Newman was considering PE as a diagnosis.

Dr. Bosley is expected to testify that he disagrees with the opinions of Dr. Blaylock, Dr. LeBaron, and Dr. Lapinel, and their opinion that Dr. Newman should have ordered a D-Dimer, a chest CT or V/Q scan and that if these tests were abnormal, blood clotting studies or a pulmonary angiogram should have been ordered. Dr. Bosley is expected to testify that a D-Dimer is not diagnostic of a PE and that if it is positive, it is irrelevant with regard to a clinical evaluation of a PE diagnosis. The only time a D-Dimer test is helpful is if it is negative, which confirms a suspicion that a patient does not have a PE.

Dr. Bosley will testify that it was appropriate for Dr. Newman not to have ordered a chest CT scan in Mrs. Aguilar's case because there was no clinical reason to do so. Dr. Bosley is expected to testify that it is medical malpractice to order a chest CT scan without a good clinical reason to do so, particularly when CT scans have been demonstrated to increase the risk of future cancers. See, e.g., Computed Tomography: An Increasing Source of Radiation Exposure, EMERGENCY MEDICAL ABSTRACTS, 2008, 5/08 #40; Health Effects of Ionising Radiation From Diagnostic CT, EMERGENCY MEDICAL ABSTRACTS, 2006, 10/06 #40.

Dr. Bosley is expected to testify that Mrs. Aguilar's symptomatology was consistent with a combination of barbiturate abuse, dehydration, and iron deficiency anemia.

**DEFENDANT STEVEN R. NEWMAN, M.D.'S
FOURTH EXPERT WITNESS DISCLOSURE - 7**

Client:1

which is substantiated by the fact that on June 3, 2003, Dr. Gibson diagnosed Mrs. Aguilar with profound iron deficiency anemia.

Dr. Bosley is expected to testify that it was appropriate for Dr. Newman not to have ordered a pulmonary angiogram in Mrs. Aguilar's case, because there was no clinical reason to do so and because a pulmonary angiogram has morbidity and mortality risk to the patient. Dr. Bosley will testify that it would be a breach of the standard of care to order a pulmonary angiogram following an abnormal chest CT scan. The only time a physician should order a pulmonary angiogram is when the physician is overwhelmingly convinced that the patient has a PE and that a chest CT scan study is negative.

Dr. Bosley disagrees with Dr. Lapinel's and Dr. Blaylock's opinions that Mrs. Aguilar's complaint of shortness of breath to the EMS personnel at her home warranted Dr. Newman to conduct a D-Dimer, chest CT, CT pulmonary angiogram, or other study. When Dr. Newman saw Mrs. Aguilar, she had no complaint of shortness of breath and no chest discomfort.

Dr. Bosley is expected to testify that contrary to the opinions of Drs Blaylock, LeBaron, and Lapinel, an EKG study showing S1, Q3, T3 is not indicative of a PE. Dr. Bosley is expected to testify that the American College of Emergency Physicians issued a clinical policy in February 2003, entitled, *Clinical Policy: Critical Issues in the Evaluation and Management of Adult Patients Presenting with Suspected Pulmonary Embolism*, which does not list S1, Q3, T3 on an EKG study as a factor to consider when conducting a clinical evaluation for a PE diagnosis, which is confirmed in *Electrocardiographic Findings in Emergency Department Patients With Pulmonary Embolism*, EMERGENCY MEDICAL ABSTRACTS, 2004, 12/04 #38 ("In these ED patients, no EKG changes were identified that were useful for the differentiation of patients with and without PE."). Dr. Bosley is expected to testify that he disagrees with Dr.

**DEFENDANT STEVEN R. NEWMAN, M.D.'S
FOURTH EXPERT WITNESS DISCLOSURE - 8**

Client:1

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,)
v.) Case No.
ANDREW CHAI, M.D., STEVEN R. NEWMAN,) CV 05-5781
M.D., NATHAN COONROD, M.D.,)
_____)

(Caption Continued)

VIDEOTAPED DEPOSITION OF STEVEN R. NEWMAN, M.D.

September 25, 2007

REPORTED BY:

DIANA L. DURLAND, CSR No. 637, Notary Public



10:39:17 1 A. Some mild dehydration.

10:39:29 2 Q. You also, on page 17 of exhibit, I gather,
10:39:34 3 ordered a drug screen; is that correct?

10:39:37 4 A. Yes.

10:39:38 5 Q. What is the purpose of that? Or is that
10:39:41 6 just standard protocol in the emergency room?

10:39:44 7 A. Standard protocol.

10:39:46 8 Q. Was there any information there that was of
10:39:49 9 assistance to you in reaching your diagnosis of
10:39:52 10 Maria Aguilar's problems?

10:39:54 11 A. No.

10:39:59 12 Q. Let's get back to the first page of the
10:40:04 13 exhibit -- we marked that Exhibit 1. In terms of
10:40:21 14 preparing the information on the first page, I gather
10:40:24 15 that you're obtaining, in part, a history from the
10:40:27 16 patient in order to allow you to make the markings on
10:40:30 17 this page; is that correct?

10:40:31 18 A. Yes.

10:40:32 19 Q. And in communicating with Maria Aguilar,
10:40:36 20 were you communicating with her directly or through
10:40:39 21 an interpreter?

10:40:40 22 A. I was communicating through her -- through
10:40:41 23 an interpreter in the hospital and through her
10:40:44 24 daughter who spoke both English and Spanish.

10:40:48 25 Q. Did you feel you had any difficulty with

FILED
A.M. 330 P.M.

APR 17 2009

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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,)

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' REPLY TO
DEFENDANT ANDREW CHAI,
M.D.'S RESPONSE TO
PLAINTIFFS' FIRST MOTIOIN IN
LIMINE**

**PLAINTIFFS' REPLY TO DEFENDANT ANDREW CHAI, M.D.'S RESPONSE TO
PLAINTIFFS' FIRST MOTIOIN IN LIMINE - P. 1**

COME NOW Plaintiffs above-named, by and through their counsel of record and hereby reply to Defendant Andrew Chai, M.D.'s Response to Plaintiffs' First Motion in Limine.

FORMER CO-DEFENDANTS

Those portions of Plaintiffs' Motion in Limine dealing with the appropriate methodology for treating issues related to former co-defendants are now ripe for review due to the settlement between Plaintiffs and Dr. Long. Plaintiffs refer the Court to their briefing contained in their Motion in Limine.

CUMULATIVE EXPERT TESTIMONY

Plaintiffs have previously briefed this issue and would only add that Defendant Chai appears to intend to utilize two local standard of care experts in addition to Defendant Chai himself. This would constitute the needless presentation of cumulative testimony, would unfairly prejudice Plaintiffs, and cause undue delay and waste the time of the Court and jury.

CAUSE OF DEATH

All parties appear to agree that the cause of Maria Aguilar's death was a saddle pulmonary embolus. A saddle pulmonary embolus is, by definition bilateral because it blocks both the left and right pulmonary arteries. Thus the autopsy achieved its purpose; to determine the cause of death. As such, a cataloging of what pathologist Donndelinger could have done had a full and complete autopsy been performed is irrelevant. In addition, if any of Defendants had wanted a full autopsy, they could have spoken to Maria Aguilar's family and requested one. None of the Defendants saw fit to do this and should not now be heard to complain.

**PLAINTIFFS' REPLY TO DEFENDANT ANDREW CHAI, M.D.'S RESPONSE TO
PLAINTIFFS' FIRST MOTIOIN IN LIMINE – P. 2**


DR. LAPINEL'S CREDENTIALS

Plaintiffs do not have an objection to the presentation of evidence that Dr. Lapinel retired from the practice of Emergency Medicine in 2001. However, Dr. Lapinel is a licensed physician in the State of Idaho. Plaintiffs do object to any attempt to portray Dr. Lapinel as no longer being fit to practice medicine. Dr. Lapinel's retirement was voluntary and as such the reason for his retirement is irrelevant.

TOXICOLOGY SCREENING RESULTS

This issue has been dealt with by Plaintiffs in their Motion in Limine and in reply to Defendant Newman's Response thereto. As such, Plaintiffs' arguments will not be repeated here except to say, once again, that the only reason Defendants want this information placed before the jury is to unfairly prejudice Plaintiffs and such should not be allowed.

DATED THIS 17 of April, 2009.



Byron V. Foster
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of April, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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Byron V. Foster

**PLAINTIFFS' REPLY TO DEFENDANT ANDREW CHAI, M.D.'S RESPONSE TO
PLAINTIFFS' FIRST MOTIOIN IN LIMINE - P. 4**

APR 17 2009

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Attorneys for Plaintiffs

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,

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' REPLY TO
DEFENDANT STEVEN R.
NEWMAN'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS'
MOTION IN LIMINE**

**PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE - P. 1**

COME NOW Plaintiffs' above-named, by and through their counsel of record and hereby reply to Defendant Steven R. Newman's Memorandum in Opposition to Plaintiffs' Motion in Limine.

TOXICOLOGY SCREEN

Defendant Newman argues that the toxicology screen ordered by Defendant Newman of May 31, 2003 is a medical record and should be admitted in evidence because it is relevant to show what drugs were in her body at the time she saw him on May 31, 2003. However, the unconfirmed, qualitative and not quantitative lab result showing the presence of barbiturates is irrelevant and the only purpose for attempting to enter it into evidence is to unfairly prejudice Plaintiffs.

Defendant showed his hand when, in his Fourth Supplemental Expert Witness Disclosure, he disclosed that his expert, Dr. Bosley, would testify that: "...Mrs. Aguilar's symptomology was consistent with a combination of barbiturate abuse, dehydration and iron deficiency anemia." See Newman's Fourth Expert Witness Disclosure, page 7, attached as Exhibit "A" to the Affidavit of Byron V. Foster ("Foster Aff.") filed herewith.

While Defendant Newman subsequently redacted the words "barbiturate abuse" in his Fifth Supplemental Expert Witness Disclosure; his continued insistence that the toxicology screen should come into evidence simply because it is a medical record ignores the unfairly prejudicial effect this could potentially have on the jury's perception of not only the deceased, but on the Plaintiffs as well.

Furthermore, the toxicology screen is irrelevant because, in Defendant Newman's deposition, he stated the following:

"Q. You also, on page 17 of exhibit, I gather, ordered a drug screen; is that correct?

A. Yes.

Q. What is the purpose of that? Or is that just standard protocol in the emergency room?

A. Standard protocol.

Q. Was there any information there that was of any assistance to you in reaching your diagnosis of Maria Aguilar's problems?

A. No."

See Deposition transcript of Steven R. Newman, M.D., page 34, attached as Exhibit "B" to the Foster Aff. filed herewith.

If the results of the toxicology screen did not contain any information that was of assistance to Dr. Newman in treating or diagnosing Maria, then what is the purpose of attempting to get the drug screen into evidence other than to unfairly prejudice Plaintiffs?

Defendant Newman cites *Cramer v. Slater* 2009 WL 540706 (Idaho) for the proposition that the drug screen should be admitted. However, in *Cramer*, Plaintiff's deceased had committed suicide and arguably the positive drug screen in that case could have been relevant to determine his mental state at the time he committed suicide. Here, no such considerations apply. The toxicology screens of May 31 and June 4, 2003 should therefore be ruled irrelevant and inadmissible because of the very real danger of unfairly prejudicing Plaintiffs. While Plaintiffs' expert witnesses have medically valid reasons for the positive drug screens, this subject should not have to be dealt with in light of the lack of relevance and fact that the danger of unfair prejudice

substantially outweighs any possible probative value of this information.

CUMULATIVE EXPERT TESTIMONY

This subject has been dealt with by all parties and Plaintiffs leave it to the Court to exercise its discretion to limit the testimony of experts so as not to give to one side or the other an unfair advantage, allow needlessly cumulative testimony, waste the jury's time, or unduly delay the proceedings.

CAUSE OF DEATH

Plaintiffs have briefed this issue in their Motion in Limine and will not repeat that argument here.


FORMER CO-DEFENDANTS

Since one of the Defendants has now settled with Plaintiffs, these issues are ripe for determination by the Court and Plaintiffs refer the Court to their initial Motion in Limine where these issues were briefed.

DR. LAPINEL'S RETIREMENT

Dr. Lapinel retired from the practice of Emergency Medicine in 2001. Plaintiffs do not challenge Defendants' right to delve into Dr. Lapinel's qualifications to provide expert testimony in this case based upon his training, education, background and experience. However, it would be unfairly prejudicial to Plaintiffs to attempt to portray Dr. Lapinel as somehow unqualified because he retired from providing emergency medical care. He is a licensed physician in the State of Idaho who formerly but no longer acts as an Emergency Medicine physician. The probative value of why he no longer practices Emergency Medicine is outweighed by the danger of unfair prejudice to Plaintiffs.

DATED This 17 day of April, 2009.


Byron V. Foster
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of April, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE - P. 5

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Byron V. Foster

**PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE - P. 6**

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A.M. 530 P.M.

APR 17 2009

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Attorneys for Plaintiffs

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,)

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' REPLY TO
DEFENDANT NATHAN
COONROD M.D. AND PRIMARY
HEALTH CARE CENTER'S
MEMORANDUM IN
OPPOSITION TO PLAINTIFFS'
MOTION IN LIMINE**

COME NOW Plaintiffs above-named and hereby respond to Defendant Nathan Coonrod, M.D. and Primary Health Care Center's Memorandum in Opposition to Plaintiffs' Motion in Limine.

CAUSE OF DEATH

Plaintiffs have briefed the cause of death issues elsewhere and will not repeat them here.

FORMER CO-DEFENDANTS

All of the issues regarding former co-defendants on the verdict form, standard of health care violations by former co-defendants, off-sets of amounts received in settlement, et cetera, have been dealt with in Plaintiffs' Motion in Limine and will not be repeated here. However, since Dr. Long has settled with Plaintiffs, these issues are now ripe for consideration by the Court.

CUMULATIVE EXPERT TESTIMONY

Defendant Coonrod argues that he has a statutory obligation to present expert testimony in defense of himself. This is correct as far as it goes. However, Defendant Coonrod does not have a right to present needlessly cumulative expert testimony. Defendant Coonrod's Supplemental Expert Disclosure lists seven medical experts in addition to Defendant Coonrod. Of these seven experts; the disclosures for Franklin, Ledgerwood, Dobson, Pistorese, and Urbach are almost identical. While the disclosure is lengthy, each expert's disclosure follows the same format and contains the same information presented in the same way. Thus, the testimony of these experts is presumptively needlessly cumulative. Since Plaintiffs chose to rely on the Defendants' disclosures in lieu of obtaining their deposition testimony; and since IRCP 26(b)(4)

requires a detailed disclosure of an expert's opinions, if the disclosure for each expert is nearly identical as to the five named above, those disclosures prove the cumulative nature of Defendant Coonrod's proposed expert witness testimony.

Therefore, Plaintiffs once again move the court for a ruling limiting the number of experts called by Dr. Coonrod.

MARIA AGUILAR'S TOXICOLOGY SCREENS

Plaintiffs refer the Court to their Reply to Defendant Newman's Memorandum in Opposition to Plaintiffs' Motion in Limine. Suffice it to say, the drug screen reports are unconfirmed and are the result of medications prescribed by her treating physicians. However, Plaintiffs believe that drug screen results are irrelevant to any issue in this litigation; have no probative value and would be unfairly prejudicial if the information were presented to the jury. Therefore, Plaintiffs request that the Court exclude them from the trial.

DATED This 17th day of April, 2009.


Byron V. Foster
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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Byron V. Foster

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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,

Case No. CV 05-5781

**DEFENDANT STEVEN R. NEWMAN,
M.D.'S REPLY MEMORANDUM IN
SUPPORT OF FIRST, SECOND, AND
THIRD MOTIONS IN LIMINE**

**DEFENDANT STEVEN R. NEWMAN, M.D.'S REPLY
MEMORANDUM IN SUPPORT OF FIRST, SECOND,
AND THIRD MOTIONS IN LIMINE - 1**

Defendants.

COMES NOW defendant Steven R. Newman, M.D., by and through undersigned counsel, hereby submits this Reply Memorandum in Support of First, Second, and Third Motions in Limine.

I. ARGUMENT

A. A Court Order Instructing the Plaintiffs to Refrain From Introducing Evidence of Grief and Mental Anguish is Appropriate.

Contrary to plaintiffs' argument, a Court order instructing the Plaintiffs to refrain from introducing evidence of grief and mental anguish is appropriate by way of a motion in limine. Under Idaho law, plaintiffs cannot recover damages for grief and mental anguish, i.e., how they still grieve the loss of their mother and the emotional distress her death caused them. Idaho courts also have specifically interpreted Idaho's Wrongful Death Statute to preclude the recovery of emotional distress, i.e., grief and mental anguish, suffered by a decedent's survivors. *Evans v. Twin Falls County*, 118 Idaho 210, 215-216, 796 P.2d 87, 92-93 (1990), *cert. denied*, 498 U.S. 1086 (1991). Accordingly, plaintiffs should be instructed by the Court not to discuss their grief and mental anguish that resulted from their mother's death.

B. Under Idaho Rule of Evidence 403, Plaintiffs Should Not Be Allowed to Have Dr. Blaylock and Dr. Lapinel Testify That Dr. Newman Breached the Standard of Care.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." IDAHO R. EVID. 403. Idaho courts have affirmed a trial court's decision to exclude cumulative expert testimony under I.R.E. 403. *Burgess v. Salmon River Canal Co.*,

Ltd., 127 Idaho 565, 574, 903 P.2d 730, 739 (1995) (Affirming trial court's decision to exclude counsel's cumulative line of questioning posed to an expert); *Runcorn v. Shearer Lumber Products, Inc.*, 107 Idaho 389, 397, 690 P.2d 324, 332 (1984) (Affirming trial court's exclusion of a portion of an expert's testimony on the basis that it was cumulative, "since two other experts subsequently gave the same testimony"). Courts from other jurisdictions have affirmed the trial court's exclusion of cumulative medical expert testimony. *Dillon v. Evanston Hosp.*, 771 N.E.2d 357 (Ill. 2002) (affirming trial court's exclusion of expert testimony as to medical standard of care on basis it was cumulative to another expert's testimony as to the medical standard of care); *MacKay v. St. Charles Med. Ctr.*, 804 P.2d 1192 (Or. Ct. App. 1991) (affirming trial court's exclusion of testimony of radiation oncologist on basis that the testimony was cumulative to that of two other experts); *State ex rel. A.M.D.*, 153 P.3d 724 (Utah Ct. App. 2006) (affirming trial court's decision to exclude expert testimony when party had another expert provide same testimony as to the ultimate issue).

Plaintiffs have identified Dr. Blaylock and Dr. Lapinel as standard of care experts who will testify that Dr. Newman breached the standard of care. Both have disclosed identical opinions based upon a review of Maria Aguilar's medical records: (1) Mrs. Aguilar was suffering from a pulmonary embolism when Dr. Newman saw her on May 31, 2003; (2) that Dr. Newman should have suspected she was suffering from a pulmonary embolism; (3) that Dr. Newman should have conducted tests to rule out a pulmonary embolism; and (4) that Dr. Newman breached the standard of care. Neither Dr. Blaylock, nor Dr. Lapinel have disclosed that they are relying upon the other's opinions in order to render their opinions. Allowing plaintiffs to have both Dr. Blaylock and Dr. Lapinel testify that Dr. Newman breached the

standard of care would constitute a needless presentation of cumulative evidence in violation of I.R.E. 403.

Plaintiffs' argument that they should have two emergency medicine experts testify due to the number of defense experts expected to testify begs the question. Plaintiffs are the ones who decided to sue four defendants. Moreover, plaintiffs have identified only one cardiologist (Dr. Brown) to testify against Dr. Chai, and one family practitioner (Dr. LeBaron) to testify against Dr. Coonrod. Yet, they have identified two emergency medicine physicians to testify against Dr. Newman. Plaintiffs have no reasonable basis upon which to argue that they should have two emergency medicine experts testify that Dr. Newman breached the standard of care. Accordingly, an order from this Court instructing plaintiffs to choose between Dr. Blaylock and Dr. Lapinel as testifying against Dr. Newman at trial is appropriate.

C. Plaintiffs Should Not Have Dr. LeBaron Testify Against Dr. Newman, as Dr. Newman Has Never Claimed That he Treated Maria Aguilar in a Family Practice Setting.

Plaintiffs admit that they do not intend to have Dr. LeBaron testify against Dr. Newman, but may do so if Dr. Newman asserts the defense that he is not an emergency medicine physician but a family practitioner who saw Mrs. Aguilar in West Valley Medical Center's Emergency Department. Dr. Newman never has maintained that he should be judged by the standard of care applicable to a family practitioner, as he saw Mrs. Aguilar as a physician practicing emergency medicine at West Valley Medical Center's Emergency Department on May 31, 2003. Dr. Newman has retained Craig Bosley, M.D., a physician who practices emergency medicine at Portneuf Medical Center in Pocatello, Idaho, to testify that Dr. Newman did not breach the standard of care applicable to an emergency medicine physician.

Additionally, Dr. LeBaron cannot offer any opinions against Dr. Newman, because he admitted in his deposition that he is not familiar with the standard of care applicable to a physician practicing emergency medicine in Caldwell, Idaho. Affidavit of Julian E. Gabiola in Support of Defendant Steven R. Newman, M.D.'s Motion in Limine, Ex. B, Deposition of Samuel LeBaron, M.D., 63:4-13; 64:3-65:2.

Finally, Dr. LeBaron's opinions are identical to those of Dr. Lapinel and Dr. Blaylock and are inadmissible under Rule 403's admonition against cumulative evidence. *Burgess*, 127 Idaho at 574, 903 P.2d at 739; *Runcorn*, 107 Idaho at 397, 690 P.2d at 332. Accordingly, plaintiffs should not be allowed to offer testimony from Dr. LeBaron against Dr. Newman.

D. Dr. Blaylock and Dr. Lapinel Should Not Be Allowed to Testify, Because They Are Not Familiar with the Standard of Care Applicable to a Physician Practicing Emergency Medicine in Caldwell, Idaho, in May 2003.

Plaintiffs argue that Dr. Blaylock and Dr. Lapinel have sufficient knowledge of the standard of care for a physician practicing emergency medicine in Caldwell, Idaho, in May 2003, because they have talked with Dr. Bramwell and have read Dr. Newman's deposition. They further argue that the standard of care for Caldwell, Idaho, is indeterminable and, therefore, their conversation with an out-of-area physician such as Dr. Bramwell provides adequate knowledge of the standard of care. Dr. Newman submits that none of these arguments have merit.

1. Dr. Bramwell is not familiar with the standard of care applicable to Dr. Newman.

As he indicates in his affidavit, Dr. Bramwell came to Idaho in June 2003 to practice medicine in Meridian and Boise. Affidavit of Kenneth J. Bramwell, ¶ 8. Mrs. Aguilar

died on June 4, 2003. This does not qualify Dr. Bramwell as having knowledge of the Caldwell standard of care, because he has not practiced in Caldwell, Idaho, which is a medical community separate from Meridian and Boise, as Caldwell has its own hospital, i.e., West Valley Medical Center. Idaho Code Section 6-1012 defines community as “that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.” *Ramos v. Dixon*, 144 Idaho 32, 37, 156 P.3d 533, 538 (2007).

Additionally, even though Dr. Bramwell avers that he has interacted with physicians practicing emergency medicine in Caldwell, there is no indication as to who these physicians are and whether they practiced emergency medicine in Caldwell, Idaho, in May 2003. “If the out-of-area expert consults with an Idaho physician to learn the applicable standard of care, there must be evidence showing that the Idaho physician knows the applicable standard of care.” *Ramos*, 144 Idaho at 37, 156 P.3d at 538. Dr. Bramwell finds himself in the same situation as the Idaho physician with whom the out-of-area expert contacted in *Ramos* to claim knowledge of the standard of care: there is no evidence that Dr. Bramwell is familiar with the standard of care for a physician practicing emergency medicine in Caldwell, Idaho, in May 2003.

2. Dr. Newman’s deposition does not supply Dr. Blaylock and Dr. Lapinel adequate knowledge of the Caldwell standard of care for a physician practicing emergency medicine in May, 2003.

Noticeably absent from Dr. Newman’s deposition is any question from plaintiffs’ counsel as to what diagnostic tests were available to Dr. Newman at West Valley Medical Center *in May 2003* to rule out a pulmonary embolism. *See* Deposition of Steven R. Newman, M.D., 20:7-8. The absence of any evidence of what tests were available to Dr. Newman in May of 2003 at West Valley Medical Center to rule out a pulmonary embolism, is fatal to plaintiffs’

claim that Dr. Newman's deposition supplies Dr. Lapinel and Dr. Blaylock the knowledge of the Caldwell standard of care.

Finally, Dr. Blaylock and Dr. Lapinel claim that Dr. Newman had a duty to obtain Mrs. Aguilar's medical records from Primary Health and Mercy Medical Center when Mrs. Aguilar presented to the West Valley Medical Center ER on May 31, 2003; however, at no point in Dr. Newman's deposition, was he asked whether the standard of care required him to obtain medical records from other providers. Plaintiffs do not make any argument as to this issue regarding Dr. Blaylock's and Dr. Lapinel's knowledge of the standard of care. They, therefore, should not be allowed to discuss their opinions on this issue at trial.

3. The Caldwell standard of care is not indeterminable.

Plaintiffs mischaracterize and misunderstand Dr. Newman's argument and what the Idaho Supreme Court held in *Hoene v. Barnes*, 121 Idaho 752, 828 P.2d 315 (1992), and *Morris By and Through Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997). Neither of the holdings in those cases support plaintiffs' claim that a local community standard of care is indeterminable if none of the physicians in the area will speak to plaintiffs out-of-area experts. On the contrary, in *Hoene*, the defendant and his partners were the only providers who could have been contacted by an out-of-area expert to familiarize himself with the local standard of care. In *Morris*, the Idaho Supreme Court explained its premise in *Hoene*:

Morris, however, has ignored the central premise of our decision in *Hoene*. *In that case, the plaintiff first demonstrated that no health care provider other than the defendant or his business associates practiced in the local community (Boise) and thus that the local standard of care was indeterminable. Only then did we turn to "similar communities" to establish the relevant standard of care.*

Morris, 130 Idaho at 147, 937 P.2d at 1221 (emphasis added).

The court in *Morris* rejected Morris' argument that the standard of care was indeterminable because doctors in the Emmett community were unavailable or biased in favor of the defendant physician:

Under § 6-1012, Morris cannot establish the local standard of care by reference to similar communities until she has demonstrated that the standard of care in Emmett was indeterminable due to the *absence* of other health care providers in the community. In this case, however, Morris has failed to establish *that no other health care provider was practicing in Emmett* at the time of Jessie's birth through which her expert could have familiarized himself with the local standard of care. Because she did not demonstrate that the standard of care in Emmett was indeterminable, Morris could not use the standard of care in similar communities.

Id. (emphasis added).

In short, in *Hoene* and *Morris*, the Idaho Supreme Court fashioned the rule that a local community standard of care can be shown to be indeterminable if the plaintiff establishes that no other health care provider is practicing in the particular community. If a local standard of care could be deemed indeterminable based upon an attorney's claim that no one in the community responded to a request to qualify an out-of-area expert, then the local community standard of care rule set forth in Idaho Code Section 6-1012 would be eviscerated. There would no longer be a local community standard of care, but a statewide standard of care, which is not what the legislature intended in enacting Section 6-1012, and it is not what the Idaho Supreme Court held in *Hoene* and *Morris*.

Plaintiffs argue that the task of qualifying an out-of-area expert is daunting, yet they quote the Idaho Supreme Court that "[i]t is not an overly burdensome requirement to have

an expert become familiar with the standard of care in the community where alleged malpractice is committed.” *Frank v. East Shoshone Hosp.*, 114 Idaho 480, 482, 757 P.2d 1199, 1201 (1988).

Plaintiffs’ reliance upon Judge Bevan’s decision in *Morton v. Sinclair*, is misplaced for a number of reasons. First, Judge Bevan’s decision is not controlling. The Idaho Supreme Court’s holdings in *Hoene* and *Morris* are. Second, the Boise, Idaho physician with whom the out-of-state expert spoke, Dr. Tanabe, knew the local community standard of care in Twin Falls, Idaho. Third, Judge Bevan’s discussion regarding the local community standard of care being indeterminable is *dicta*. Fourth, Judge Bevan’s decision is not a correct interpretation of *Hoene* and *Morris*. In fact, he cited neither of those cases in his decision.

Finally, plaintiffs’ indeterminable argument is without merit when they state that they contacted William Blahd, M.D., one of the physicians who treated Maria Aguilar on April 26, 2003, at West Valley Medical Center’s ER. Dr. Newman has objected to plaintiffs’ use of Dr. Blahd to qualify Drs. Blaylock and Lapinel as to the Caldwell standard of care. *See* Dr. Newman’s Objection to Plaintiffs’ Ninth Supplemental Expert Witness Disclosure.

E. Carol Bates and Michelle Giokas Should Not Be Allowed to Offer Habit Testimony.

Regardless of whether Bates’ and Giokas’ expected testimony is habit or standard operating procedure, it is inadmissible under I.R.E. 402 and 403. Absent from Bates’ and Giokas’ anticipated trial testimony is any identification of a person to whom they report. They do not indicate that they speak directly with the on-duty physician, and they have not indicated that they spoke with Dr. Newman when Mrs. Aguilar was brought to West Valley Medical Center on May 31, 2003. Plaintiffs do not dispute that the May 31, 2003 report that Bates and Giokas generated does not indicate that they spoke with Dr. Newman. Bates and Giokas also do

not indicate to whom they fax their written report or that the written report is faxed to the ER physician. Therefore, whether Bates and Giokas provide an oral or written report is not a factual issue of consequence to the determination of the action and inadmissible under I.R.E. 402.

Even if it were, the little probative value of such evidence is substantially outweighed by its prejudicial value. Plaintiffs intend to use such evidence to suggest improperly to the jury that Bates and Giokas spoke directly with Dr. Newman and faxed their written report to him, when there is no such evidence in their May 31, 2003 report that they did so. Such evidence is inadmissible under Rule 403.

F. Ecliserio Marquez, Edelmira DeValle, and Jennifer Aguilar Should Not be Allowed to Testify, as Their Expected Testimony is Inadmissible.

1. Ecliserio Marquez's purported testimony is inadmissible under I.R.E. 402, 403, 702, and I.R.E. 802.

Mr. Marquez will testify (1) that the Aguilars are and were a tightly knit family, loving, and devoted to each other; (2) that in the spring of 2003, Mr. Marquez observed Mrs. Aguilar as being short of breath, weak, and tired; (3) that he recalls the family discussing that Mrs. Aguilar kept going to doctors and being told she had anemia but she still had breathing problems; and (4) that he was with Mrs. Aguilar the day she died, she fainted, and they called an ambulance.

First, evidence that the Aguilars are and were a tightly knit family, loving, and devoted to each other is cumulative to what the Aguilars are likely to testify to at trial. It is inadmissible under I.R.E. 403. *See, e.g., Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963)(Where plaintiff had already presented testimony regarding the presence or absence of

blinker lights and warning signs in his case in chief, the judge did not abuse his discretion in disallowing further testimony on that issue by three other witnesses in rebuttal).

Second, Mr. Marquez' observation of Mrs. Aguilar being short of breath, weak, and tired in the spring of 2003 is not relevant to any factual issue and not specific as to a point in time and place. Spring includes March, April, May, and June. The relevant time period for Dr. Newman is May 31, 2003, the only occasion that Dr. Newman saw Mrs. Aguilar. Absent a more specific time and context, Mr. Marquez' purported testimony is not probative of any issue relative to Mrs. Aguilar's medical condition on a particular day. Therefore, such purported evidence is inadmissible under I.R.E. 402. In addition, the only purpose to having Mr. Marquez offer such irrelevant evidence is to improperly suggest to the jury that Mrs. Aguilar was always short of breath, weak, or tired when she presented to her health care providers in contrast to what her medical records indicate. The probative value of such evidence is substantially outweighed by the prejudicial effect on the jury. Accordingly, it is inadmissible under I.R.E. 403.

Mr. Marquez' purported testimony also is inadmissible, under I.R.E. 702, because he is not competent to offer testimony of Mrs. Aguilar's medical condition. The Idaho Supreme Court has held, on several occasions, that a court should disregard lay opinion testimony relating to the cause of a medical condition, as a lay witness is not competent to testify to such matters. *Cook v. Skyline Corp.*, 135 Idaho 26, 13 P.3d 857 (2000) (“[T]estimony offered by a lay person relating to the cause of a medical condition should be disregarded.”); *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 846, 934 P.2d 17, 19 (1997) (court should disregard lay opinion testimony relating to the cause of a medical condition as a lay witness is not competent to testify to such matters); *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990) (affirming trial court's

conclusion that lay opinion of husband that his wife's death by cardiac arrest was caused by events in question was inadmissible under I.R.E. 701); *Flowerdew v. Warner*, 90 Idaho 164, 409 P.2d 110 (1965) (lay opinion testimony is inadmissible to prove the cause of a plaintiff's condition); *see also Kolln v. St. Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997) (holding that as lay person, plaintiff in medical malpractice case was not competent to testify about the cause of her injury).

Third, Mr. Marquez's expected testimony of family conversations that Mrs. Aguilar kept going to doctors and was told she had anemia but she still had breathing problems does not fall within the present sense impression exception. I.R.E. 803(1) states that a present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Mr. Marquez is not describing an event or condition regarding Mrs. Aguilar's health as it happened. Moreover, Mr. Marquez' discussion with other family members that Mrs. Aguilar kept going to doctors and still did not feel well is not a statement made by Mrs. Aguilar of her existing mental, emotional, or physical condition.

Even if such evidence falls within a hearsay exception, it is inadmissible under I.R.E. 403, because it improperly, and without any context or reference as to a particular point in time, will suggest to the jury that Mrs. Aguilar was always short of breath, weak, or tired when she presented to her health care providers in contrast to what her medical records indicate. Such testimony is cumulative to what plaintiffs are expected to testify.

2. Eldemira DeValle should not be allowed to testify.

Ms. DeValle's anticipated testimony of describing the Aguilar family is cumulative to what the plaintiffs themselves have explained in their depositions and is impermissibly cumulative under I.R.E. 403. *See, e.g., Findley, supra.* Her anticipated testimony as to how Mrs. Aguilar's death affected Mr. Aguilar also is cumulative and impermissible evidence of grief and/or sorrow, which is not a damage recoverable in a wrongful death claim. IDJI 9.05.

As for Ms. DeValle's testimony that in the spring of 2003, Mrs. Aguilar fell ill, and that she complained of being weak, tired, and out of breath, such expected testimony is not sufficiently specific as to time and place and irrelevant to any factual issue in this case and inadmissible under I.R.E. 402 and I.R.E. 403, as any probative value is substantially outweighed by the danger of the evidence misleading the jury into thinking that Mrs. Aguilar was ill the entire spring of 2003 in contrast to what is indicated in her medical records.

Finally, Ms. DeValle's expected testimony that she recalls Mrs. Aguilar going to the hospital to have something done on her heart is cumulative and inadmissible under I.R.E. 403.

3. Jennifer Aguilar should not be allowed to testify.

Jennifer Aguilar, plaintiff Jose Aguilar, Jr.'s wife, is expected to testify as to her interactions with the Aguilar family and her observations of the family following Mrs. Aguilar's death. However, such expected testimony is cumulative to what the plaintiffs have explained in their depositions and inadmissible under I.R.E. 403. Moreover, such proposed evidence is akin

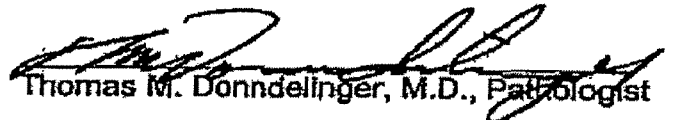
to grief and sorrow and inadmissible, as grief and sorrow are not recoverable forms of damages in a wrongful death case. IDJI 9.05.

G. Plaintiffs Should Not Be Allowed to Introduce Portions of the Canyon County Coroner's Record, the Death Certificate, and Testimony From Bill Kirby, as Such Evidence is Inadmissible Under I.R.E. 403, 702, 703, and 802.

The problem with Bill Kirby's report, i.e., the Canyon County Coroner's Record of June 5, 2003, is that it is wrong. It does not accurately state the cause of death. The same is true of the Death Certificate. Both records incorrectly state, "Multiple bilateral pulmonary embolism." Dr. Donndelinger, on the other hand, wrote in his autopsy report:

FINAL ANATOMIC DIAGNOSES

- I. **Saddle embolism, right and left pulmonary arteries.**


Thomas M. Donndelinger, M.D., Pathologist

Allowing the jury to view Mr. Kirby's incorrect report, as well as the Death Certificate, would mislead the jury into improperly thinking that Mrs. Aguilar died from multiple emboli, which is not what Dr. Donndelinger stated or meant. Dr. Donndelinger testified in his deposition that when he referenced saddle embolism in his report, he meant it in the singular:

42

- 17 Q. *Likewise, I take it from your report*
18 *that you, in using the term "saddle embolus,"*
19 *you were speaking in the singular?*

20 MR. FOSTER: Object to the form.
21 THE WITNESS: *Yes.*
22 Q. BY MR. McCOLLUM: That is, rather than
23 emboli?
24 A. *The term is meant to be singular.*
25 Usually, these things are a single, long piece of

43

1 clot.
2 Q. Even though it may be bilateral in the
3 sense that parts of it go into one pulmonary
4 artery and the other?
5 A. Yes. They fold.
6 MR. McCOLLUM: Thank you very much, Doctor.

Donndelinger Deposition, Exhibit D to the Affidavit of Julian E. Gabiola in Support of Dr. Newman's Third Motion in Limine, 42:17 to 43:6 (emphasis added).

As for plaintiffs' argument that Dr. Newman can call Mr. Kirby and Ms. Morris to have them testify as to their description of "Multiple bilateral pulmonary embolism," why would Dr. Newman do so when (1) Mr. Kirby's and Ms. Morris' description is incorrect and contrary to what Dr. Donndelinger states in the autopsy report and his deposition, and, therefore, misleading and inadmissible under I.R.E. 403; and (2) when they are not qualified to make a final anatomic diagnosis as to a cause of death and, therefore, their testimony is inadmissible under I.R.E. 702, 703.

Mr. Kirby's case summary in the report also is inadmissible under I.R.E. 801(c) and 802, as it contains inadmissible hearsay: "I had talked to the family and they advised me that the deceased had been having fainting spells for the last two weeks. She was getting very tired and she would have to stop and take a few breaths every time she would walk." This statement is not a present sense impression under I.R.E. 803(1); it is not an excited utterance relative to Mrs. Aguilar's death under I.R.E. 803(2); it is not describing a statement made by Mrs. Aguilar as to her existing mental, emotional, or physical condition under I.R.E. 803(3); and it is not a statement made to a physician for purposes of a medical diagnosis under I.R.E. 803(4). Mrs. Aguilar had already died. Mr. Kirby also is not a physician.

Mr. Kirby also states in his case summary that "I told them that from what they told me and the way she was acting that she could have had an embolism, I explained what that is and told them that someone would contact them after the autopsy." Mr. Kirby is not a physician. He also did not attend the autopsy with Dr. Donndelinger. Therefore, under I.R.E. 702 and 703, Mr. Kirby lacks the foundation to make a medical diagnosis of Mrs. Aguilar's death. The case summary also states, "Upon completion of the autopsy the results were found to be Bilateral Pulmonary Embolism." Gabiola Aff., Exhibit B. Again, this is not the diagnosis Dr. Donndelinger states in his autopsy report and, therefore, should not be introduced as evidence, as it will mislead the jury. I.R.E. 403.

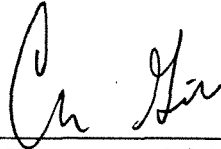
Finally, even if the Coroner's Report and Death Certificate fall under a hearsay exception, the Court still must determine whether those records are relevant under I.R.E. 402 and admissible under I.R.E. 403. Since the Coroner's Report and Death Certificate will mislead the jury as to their incorrect statements, they are inadmissible under I.R.E. 403.

II. CONCLUSION

Based upon the foregoing argument and authority, Dr. Newman respectfully requests that his motions in limine be granted.

DATED this 20th day of April, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April, 2009, I caused a true and correct copy of the foregoing DEFENDANT STEVEN R. NEWMAN, M.D.'S REPLY MEMORANDUM IN SUPPORT OF MOTIONS IN LIMINE to be served by the method indicated below, and addressed to the following:

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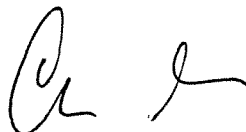
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Gary T. Dance

C. Clayton Gill

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FILED
A.M. 200 P.M.

APR 20 2009

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Steven K. Tolman (ISB #1769)
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P.O. Box 1276
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Telephone: (208) 733-5566

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,
M.D.'S AND PRIMARY HEALTH CARE
CENTER'S JOINDER IN DEFENDANT
STEVEN R. NEWMAN, M.D.'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER**

COME NOW defendants Nathan Coonrod, M.D. and Primary Health Care
Center, by and through their attorney of record, Tolman & Brizee, PC, and hereby join in
and adopt herein by reference Defendant Steven R. Newman, M.D.'s Memorandum in
Opposition to Plaintiffs' Motion for Protective Order.

DEFENDANTS NATHAN COONROD, M.D.'S AND PRIMARY HEALTH CARE CENTER'S JOINDER IN
DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER, PAGE 1

DATED this 22 day of April, 2009.

TOLMAN & BRIZEE, P.C.

By: 
Steven K. Tolman

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of April, 2009, I caused a true and correct copy of the foregoing DEFENDANTS NATHAN COONROD, M.D.'S AND PRIMARY HEALTH CARE CENTER'S JOINDER IN DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

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Steven K. Tolman

DEFENDANTS NATHAN COONROD, M.D.'S AND PRIMARY HEALTH CARE CENTER'S JOINDER IN DEFENDANT STEVEN R. NEWMAN, M.D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER, PAGE 2

4-22-09
F I L E D
A.M. 2:30 P.M.

Steven K. Tolman (ISB #1769)
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APR 20 2009

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Attorney for Defendant 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 SUPPLEMENTAL
PROPOSED JURY INSTRUCTION AND
AMENDED SPECIAL VERDICT FORM**

COMES NOW the Defendants Nathan Coonrod, M.D., and Primary Health Care
Center, by and through their counsel of record, Tolman & Brizee, P.C., and submits the

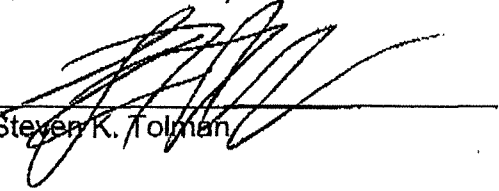
DEFENDANTS NATHAN COONROD, MD'S AND PRIMARY HEALTH CARE CENTER'S
SUPPLEMENTAL PROPOSED JURY INSTRUCTION AND SPECIAL VERDICT FORM, PAGE 1

following proposed jury instruction numbered 41, as well as the Amended Special Verdict Form. This proposed instruction includes the standard Idaho Pattern Jury Instructions as well as Requested or modified Jury Instructions.

Defendants reserve the right to amend, supplement or withdraw any of these instructions or the special verdict form.

DATED this 20th day of April, 2009.

TOLMAN & BRIZEE, P.C.

By: 
Steven K. Tolman

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2009, I caused a true and correct copy of the foregoing DEFENDANTS NATHAN COONROD, MD'S AND PRIMARY HEALTH CARE CENTER'S SUPPLEMENTAL PROPOSED JURY INSTRUCTION AND SPECIAL VERDICT FORM to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

Andrew C. Brassey
BRASSEY, WETHERELL, CRAWFORD & McCURDY
203 W. Main St.
P.O. Box 1009
Boise, ID 83702

- First Class Mail
- Hand Delivered
- Facsimile
- Overnight Mail

Byron V. Foster
199 N. Capitol Blvd., Suite 500
P.O. Box 1584
Boise, ID 83701-1584

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David E. Comstock
Law Offices of Comstock & Bush
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P.O. Box 2774
Boise, ID 83701

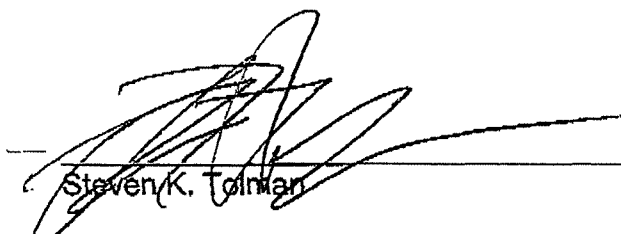
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John J. Burke
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
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Boise, ID 83701

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Steven K. Tolman

DEFENDANTS' INSTRUCTION NO. 41

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

We, the Jury, answer the special interrogatories as follows:

Question No. 1: Did Defendant Andrew Chai, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 1: Yes No

If the answer to Question No. 1 is Yes, go to Question No. 2. If the answer to Question No. 1 is No, skip Question No. 2 and go to Question No. 3.

Question No. 2: Was Defendant Andrew Chai, M.D.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 2: Yes No

If the answer to Question No. 2 is Yes, go to Question No. 3. If the answer to Question No. 2 is No, go to Question No. 3.

Question No. 3: Did Defendant Steven R. Newman, M.D. breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 3: Yes No

If the answer to Question No. 3 is Yes, go to Question No. 4. If the answer to Question No. 3 is No, skip Question No. 4 and go to Question No. 5.

Question No. 4: Was Defendant Steven R. Newman, M.D.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 4: Yes No

If the answer to Question No. 4 is Yes, go to Question No. 5. If the answer to Question No. 4 is No, go to Question No. 5.

Question No. 5: Did Defendant Nathan Coonrod, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 5: Yes No

If the answer to Question No. 5 is Yes, go to Question No. 6. If the answer to Question No. 5 is No, skip Question Nos. 6 & 7 and go to Question No. 8.

Question No. 6: Was Defendant Nathan Coonrod, M.D.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 6: Yes No

If the answer to Question No. 6 is Yes, go to Question No. 7. If the answer to Question No. 6 is No, skip Question No. 7 and go to Question No. 8.

Question No. 7: Was Defendant Nathan Coonrod acting within the course and scope of his employment with Defendant Primary Health Care Center when any breach in the standard of care in his treatment of the decedent, Maria Aguilar, occurred?

Answer to Question No. 7: Yes No

If the answer to Question No. 7 is Yes, go to Question No. 8. If the answer to Question No. 7 is No, go to Question No. 8.

~~Question No. 8: Did Defendant Mitchell Long, D.O. breach the standard of care in his~~
Answer to Question No. 8: Yes No

If the answer to Question No. 8 is Yes, go to Question No. 9. If the answer to Question No. 8 is No, skip Question No. 9 and go to Question No. 10.

Question No. 9: Was Defendant Mitchell Long, D.O.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 9: Yes No

If the answer to Question No. 9 is Yes, go to Question No. 10. If the answer to Question No. 9 is No, go to Question No. 10.

If you answered "Yes" to any of the proximate cause questions (Question Nos. 2, 4, 6, 9), then please answer Question No. 10. If you answered "No" to all of the proximate cause questions (Question Nos. 2, 4, 6, 9), then you are done. Skip Question Nos. 10, 11, and 12, sign the jury verdict form as instructed and advise the bailiff.

Instruction for Question No. 10: You will answer this question only if you have found that the actions of one or more of the Defendants (Andrew Chai, M.D., Steven R. Newman, M.D., Nathan Coonrod, M.D., Mitchell Long, D.O., and Primary Health Care Center), were the proximate cause of any damages to the Plaintiffs. In this question, you are to apportion the fault between any parties for whom you found proximate cause. As to each party or entity to which you answered "Yes" to the proximate cause questions (Question Nos. 2, 4, 6, 9), you must determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to the proximate cause questions for a party, insert a "0" or "Zero" as to that party or entity.

Question No. 10: What is the percentage of fault (if any) you assign to each of the following:

- To the Defendant, Andrew Chai, M.D. _____%
- To the Defendant, Steven R. Newman, M.D. _____%
- To the Defendant, Nathan Coonrod, M.D. _____%
- To the Defendant, Mitchell Long, D.O. _____%
- To the Defendant, Primary Health Care Center _____%
- Total must equal 100%

Question No. 11: What is the total amount of damage sustained by the Plaintiffs as a result of the Defendants' actions? \$ _____

Answer to Question No. 12: We assess Plaintiffs' damages as follows:

1. Economic damages, as defined in the Instructions:

\$ _____

2. Non-economic damages, as defined in the Instructions:

\$ _____

Sign the verdict and advise the Bailiff.

There will be a signature block for the foreperson and a signature line for each individual juror.

IDJI 1.43.1 – Example verdict on special interrogatories

IDJI 1.43.1 – Instruction on special verdict form

Given _____

Refused _____

Modified _____

Covered _____

Other _____

DATED This _____ day of April, 2009

District Judge

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

AMENDED SPECIAL VERDICT FORM

We, the Jury, answer the special interrogatories as follows:

Question No. 1: Did Defendant Andrew Chai, M.D., breach the standard of care in his
treatment of the decedent, Maria Aguilar?

Answer to Question No. 1: Yes No

If the answer to Question No. 1 is Yes, go to Question No. 2. If the answer to Question
No. 1 is No, skip Question No. 2 and go to Question No. 3.

Question No. 2: Was Defendant Andrew Chai, M.D.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 2: Yes No

If the answer to Question No. 2 is Yes, go to Question No. 3. If the answer to Question No. 2 is No, go to Question No. 3.

Question No. 3: Did Defendant Steven R. Newman, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 3: Yes No

If the answer to Question No. 3 is Yes, go to Question No. 4. If the answer to Question No. 3 is No, skip Question No. 4 and go to Question No. 5.

Question No. 4: Was Defendant Steven R. Newman, M.D.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 4: Yes No

If the answer to Question No. 4 is Yes, go to Question No. 5. If the answer to Question No. 4 is No, go to Question No. 5.

Question No. 5: Did Defendant Nathan Coonrod, M.D., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 5: Yes No

If the answer to Question No. 5 is Yes, go to Question No. 6. If the answer to Question No. 5 is No, skip Question Nos. 6 & 7 and go to Question No. 8.

Question No. 6: Was Defendant Nathan Coonrod, M.D.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 6: Yes No

If the answer to Question No. 6 is Yes, go to Question No. 7. If the answer to Question No. 6 is No, skip Question No. 7 and go to Question No. 8.

Question No. 7: Was Defendant Nathan Coonrod acting within the course and scope of his employment with Defendant Primary Health Care Center when any breach in the standard of care in his treatment of the decedent, Maria Aguilar, occurred?

Answer to Question No. 7: Yes No

If the answer to Question No. 7 is Yes, go to Question No. 8. If the answer to Question No. 7 is No, go to Question No. 8.

Question No. 8: Did Defendant Mitchell Long, D.O., breach the standard of care in his treatment of the decedent, Maria Aguilar?

Answer to Question No. 8: Yes No

If the answer to Question No. 8 is Yes, go to Question No. 9. If the answer to Question No. 8 is No, skip Question No. 9 and go to Question No. 10.

Question No. 9: Was Defendant Mitchell Long, D.O.'s, breach of the standard of care in his treatment of the decedent, Maria Aguilar, a proximate cause of the decedent's death?

Answer to Question No. 9: Yes No

If the answer to Question No. 9 is Yes, go to Question No. 10. If the answer to Question No. 9 is No, go to Question No. 10.

If you answered "Yes" to any of the proximate cause questions (Question Nos. 2, 4, 6, 9), then please answer Question No. 10. If you answered "No" to all of the proximate cause questions (Question Nos. 2, 4, 6, 9), then you are done. Skip Question Nos. 10, 11, and 12, sign the jury verdict form as instructed and advise the bailiff.

Instruction for Question No. 10: You will answer this question only if you have found that the actions of one or more of the Defendants (Andrew Chai, M.D., Steven R. Newman, M.D., Nathan Coonrod, M.D., Mitchell Long, D.O., and Primary Health Care Center),

were the proximate cause of any damages to the Plaintiffs. In this question, you are to apportion the fault between any parties for whom you found proximate cause. As to each party or entity to which you answered "Yes" to the proximate cause questions (Question Nos. 2, 4, 6, 9), you must determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to the proximate cause questions for a party, insert a "0" or "Zero" as to that party or entity.

Question No. 10: What is the percentage of fault (if any) you assign to each of the following:

- To the Defendant, Andrew Chal, M.D. _____%
- To the Defendant, Steven R. Newman, M.D. _____%
- To the Defendant, Nathan Coonrod, M.D. _____%
- To the Defendant, Mitchell Long, D.O. _____%
- To the Defendant, Primary Health Care Center _____%
- Total must equal 100%

Question No. 11: What is the total amount of damage sustained by the Plaintiffs as a result of the Defendants' actions? \$ _____

Answer to Question No. 12: We assess Plaintiffs' damages as follows:

- 1. Economic damages, as defined in the Instructions:
\$ _____
- 2. Non-economic damages, as defined in the Instructions:
\$ _____

Sign the verdict and advise the Bailiff.

DATED This _____ day of _____, 2009

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

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FILED
A.M. *3:15* P.M.
APR 20 2009 ✓
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO 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. CV 05-5781
Plaintiffs,)	
v.)	PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M. D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: DR. BLAHD AND RESPONSE TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OBJECTION TO PLAINTIFFS' NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE
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' REPLY TO DEFENDANT STEVEN R. NEWMAN, M. D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: DR. BLAHD AND RESPONSE TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OBJECTION TO PLAINTIFFS' NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE - P. 1

COME NOW Plaintiffs' above-named and hereby reply to Defendant Newman's Memorandum in Opposition to Plaintiffs' Motion for Protective Order Re; Dr. Blahd and Respond to Defendant Newman's Objection to Plaintiffs' Ninth Supplemental Expert Witness Disclosure.

I.

ARGUMENT REGARDING OPPOSITION TO PROTECTIVE ORDER RE: DR. BLAHD

It should be noted at the outset that Defendant Newman makes these accusations and arguments having testified at his own deposition what the "standard of care" was for an ER physician practicing at WVMC in May/June of 2003. By review of Dr. Newman's own testimony, Plaintiffs' experts are qualified. Yet, Plaintiffs' have gone further to qualify their experts, who are arguably qualified by their own actual knowledge, by having them speak with Dr. Bramwell and, most recently, Dr. Blahd. Defendant Newman's attack is an unnecessary and time consuming distraction from the truth.

There is very little that can be said in response to what is apparently an attack on the professional integrity of Plaintiffs' attorneys. In two short pages, counsel for Dr. Newman accuses counsel for Plaintiffs of fabricating the telephone call between Dr. Blahd, Dr. Blaylock and Dr. Lapinel and then goes on to accuse counsel for Plaintiffs of playing "fast and loose" with this Court.

This Court well knows the difficulty encountered in attempting to secure a local physician willing to qualify an out-of-area expert in a medical malpractice case. This Court is also aware, through the filings of Plaintiffs in this matter; that Plaintiffs have

PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M. D.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: DR. BLAHD AND RESPONSE TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OBJECTION TO PLAINTIFFS' NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE – P. 2

always maintained that they could secure no local emergency medicine specialist, not a treating physician in this case, to speak to their emergency medicine experts. Both in the Affidavit of Byron V. Foster in support of Plaintiffs' Motion for Protective Order, filed February 19, 2009 (paragraph 8); and in the Memorandum in Support of Plaintiffs' Motion for Protective Order, the Court and all parties were informed that Plaintiffs had contacted each emergency physician listed in the 2008 Idaho Medical Association Directory as practicing in the Nampa/Caldwell area, "...with the exception of emergency physicians who were involved at some point in time in the care and treatment of Plaintiffs' deceased." (Page 4 of Plaintiffs' brief).

Counsel for Plaintiffs did not want to involve, and try never to involve, a treating physician in this process. However, due to Defendants' late summary judgment motion, masquerading as a motion in limine, efforts were undertaken to contact Dr. Blahd. Once Plaintiffs learned that Dr. Blahd was now practicing at the VA Medical Center in Boise, he was contacted, informed of the identities of the involved physicians and agreed to assist in qualifying Drs. Blaylock and Lapinel. Due to the schedules of all involved, the telephone conference could not be scheduled until April 8, 2009.

The telephone conference with Dr. Blahd served to confirm the fact that the standard of care for an emergency department physician in Caldwell, Idaho, in May of 2003 was as it had been portrayed by Dr. Bramwell in the previous telephone conference of November 14, 2007.

What Plaintiffs were attempting to achieve through the telephone conference involving Dr. Blahd was to remove any doubt in the Court's mind regarding the

qualifications of Drs. Lapinel and Blaylock.

II.

**ARGUMENT REGARDING DEFENDANT NEWMAN'S OBJECTION TO PLAINTIFFS'
NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE**

A. FACTS

Defendants wanted to take the deposition of Dr. Bramwell, a Meridian emergency medicine physician who participated in a telephone conference with Dr. Blaylock and Dr. Lapinel on November 14, 2007. Plaintiffs did not and do not believe that defendants in medical negligence cases have a right to depose plaintiffs' local qualifying physicians. Thus, Plaintiffs in this case filed a Motion for Protective Order to prevent the deposition.

A hearing was held with the Court and it was determined that such a deposition would not be ordered by the Court but that Plaintiffs', in return would stand on the Arguments, Affidavits and Disclosures when the Court hears the abundance of Motions in Limine set for April 23, 2009. However, Plaintiffs did not understand that the Court would allow no further actions on Plaintiffs part to further bolster the qualifications of their experts. In fact, Plaintiffs had yet to file their responses to Dr. Newman's Motions in Limine.

B. JUDICIAL ESTOPPEL

Defendant Newman argues that Plaintiffs should be judicially estopped from relying on their Ninth Supplemental Expert Witness Disclosure; evidently accusing Plaintiffs' counsel of misrepresenting to the Court the status of attempts to contact local qualifying physicians. However, while Defendant Newman is correct that at page 12 of Plaintiffs' Memorandum in Support of Motion for Protective Order, Plaintiffs make the

**PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M. D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: DR. BLAHD AND
RESPONSE TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OBJECTION TO PLAINTIFFS'
NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE - P. 4**

statement: "No other qualified health care provider in Caldwell or Nampa will speak with Plaintiffs' experts." At page 4 of the same document; Plaintiffs indicate:

"...Plaintiffs have contacted, by letter, every emergency physician listed in the 2008 Idaho Medical Association Directory as practicing emergency medicine in both Caldwell and Nampa, Idaho; with the exception of emergency physicians who were involved at some point in time in the care and treatment of Plaintiffs' deceased."

While the Affidavit of Byron V. Foster filed in support of Plaintiffs' Motion for Protective Order does indicate, at paragraph 7; that Mr. Foster sent a letter to all emergency medicine physicians listed in the 2008 IMA Directory, paragraph 8 states: "That in response to this letter, not one of the physicians contacted, not a previous treating emergency physician of Maria Aguilar, agreed to speak to Drs. Lapinel and Blaylock."

Thus, it is obvious there was no attempt by Plaintiffs to mislead Defendants, the Court or anyone else regarding who had been contacted and by whom and what the responses were.

Regarding the concept of judicial estoppel; the cases cited by Defendant Newman indicate that when a party intentionally misleads a party or the Court, judicial estoppel may be an appropriate remedy for the wrongdoing. The cases arise in the context of bankruptcy when a bankrupt has failed to list an asset and then, in another proceeding attempts to secure a judgment regarding the unlisted asset. Cases also discuss the concept of judicial estoppel in the context of marital separation agreements and other contract actions involving the collection of debt. One of the cases; *Loomis v. Church*, 76 Idaho 87, 277 P. 2d 561 (1954) even involved a motor vehicle collision

where the injured guest passenger in the first action against the other driver averred that the driver of the car in which the guest was a passenger had done nothing wrong and then proceeded to bring suit in a separate action against the host driver alleging that she had run a stop sign and been otherwise reckless in the operation of the motor vehicle. The Court in *Loomis* stated, with regard to judicial estoppel:

"It is quite generally held that where a litigant, by means of such sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or right against another party, arising out of the same transaction or subject matter." *Supra* at 93-94.

In other words, you cannot speak out of both sides of your mouth to the Court and expect to gain an advantage. Here Plaintiffs have not done that, they have continuously and dutifully turned over every stone to ascertain the "standard of care" for an ER physician practicing in Caldwell, Idaho, in May/June of 2003. Thus, the application of judicial estoppel is not warranted, nor appropriate.

C. Dr. Blahd is not an expert witness

Plaintiffs contacted Dr. Blahd to see if he would be willing to speak to their emergency medicine experts regarding the standard of care. This was done out of an overabundance of caution. Given the case law in Idaho regarding the methodology for laying a sufficient foundation for the qualifications of expert witnesses in medical malpractice cases, this overabundance of caution is understandable. However, no Court in this state has ever found that the local qualifying physician becomes a standard of care expert witness by virtue of participating in a telephone conference with

testifying experts.

Plaintiffs have not named Dr. Blahd as a testifying expert and he will not be called as an expert at trial. While he may be called as a fact witness by one of the parties, no party has disclosed him as an expert. Dr. Blahd was not requested to give his opinion as to whether or not Dr. Newman violated the standard of care. As Plaintiffs' Ninth Supplemental Expert Witness Disclosure indicates; there were discussions regarding whether or not there were any deviations between the standard of care as it is known by Drs. Lapinel and Blaylock and the standard of care as it was known to be by Dr. Blahd in May of 2003 at Caldwell and Nampa. There were discussions regarding various subjects which are set forth on page 3 of the disclosure. There were discussions regarding certain "red flag" warnings for an impending pulmonary embolus; the value of a D-Dimer blood test and when it would be appropriate, in May of 2003 in Caldwell and Nampa, to order such a test. Then Dr. Blahd was asked to discuss his experience at West Valley Medical Center when a patient was brought to the emergency department by ambulance, and the duty of an emergency physician to rule out pulmonary embolus under certain circumstances. At the end of the conversation, there was agreement that there were no deviations as to each of the physicians' understanding of the applicable standard of care.

The above subjects are all subjects which Idaho case law has identified as aspects of a proper foundation for the qualifications of an out-of-area expert. A discussion of this type does not in any way make the local qualifying physician an expert witness.

**PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M. D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: DR. BLAHD AND
RESPONSE TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OBJECTION TO PLAINTIFFS'
NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE - P. 7**

III.

CONCLUSION

Defendant Newman, in his Opposition to Plaintiffs Motion for Protective Order Re: Dr. Blahd and in his Objection to Plaintiffs' Ninth Supplemental Expert Witness Disclosure has made some serious and uncalled for accusations against Plaintiffs and their counsel. Counsel for Plaintiffs' is willing to chalk this up to the heat of battle. However, it must be noted that such unfounded statements are neither true nor justified under any circumstances presented herein.

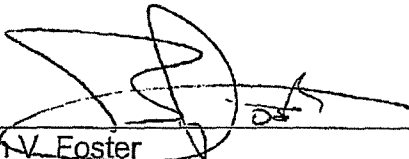
The application of judicial estoppel is not called for under the circumstances presented by Defendant's submissions. Plaintiffs have set forth the actions they undertook to properly qualify their emergency medicine experts. The basic issue is; has an appropriate foundation been laid for the qualifications of Dr. Blaylock and Dr. Lapinel to testify at trial? Plaintiffs have taken extraordinary steps to insure the proper foundation of their experts' testimony. All parties and this Court know the difficulty of locating local physicians willing to speak with out-of-area experts. When this difficulty is finally overcome, the result is often that outside pressures are brought to bear on the local physician. Pressures such as a call from the defendant physician, attempts to depose, or attempts to portray the local physician as holding opinions adverse to a colleague have a chilling effect on any future involvement by a local physician in matters of this type. These outside pressures are one aspect of what makes it so difficult to lay a foundation for expert testimony in Idaho.

The telephone call made by Defendant Newman to Dr. Blahd was inappropriate

and should not be tolerated by the Court. If it was important for counsel for Dr. Newman to verify that Plaintiffs' counsel were not lying about the conversation among the physicians, there are other steps he could have taken. If he suspects Plaintiffs' counsel are dishonest, he should take up the issue with the Idaho State Bar. However, to have Dr. Newman call Dr. Blahd was improper under these circumstances.

Plaintiffs have established an abundance of foundation for the testimony of their expert witnesses and request that the Court so find.

DATED This 20 day of April, 2009.



Byron V. Foster
Attorney for Plaintiffs

PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M. D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: DR. BLAHD AND
RESPONSE TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OBJECTION TO PLAINTIFFS'
NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE – P. 9

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of April, 2009, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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

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- Hand Delivery
- Facsimile (208) 344-7077

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Tolman & Brizee, PC
132 3rd Ave. E
P.O. Box 1276
Twin Falls, ID 83303
*Attorneys for Defendants Nathan
Coonrod, M.D. and Primary Health Care
Center*

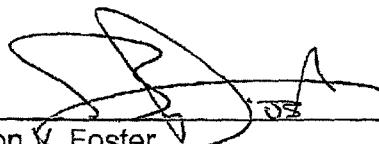
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Byron V. Foster

PLAINTIFFS' REPLY TO DEFENDANT STEVEN R. NEWMAN, M. D.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: DR. BLAHD AND
RESPONSE TO DEFENDANT STEVEN R. NEWMAN, M.D.'S OBJECTION TO PLAINTIFFS'
NINTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURE - P. 10