

3-19-2012

# Hall v. Rocky Mountain Emergency Physicians Clerk's Record Dckt. 39473

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Vol. 1 of 2

**SUPREME COURT  
OF THE  
STATE OF IDAHO**

HEATHER HALL

LAW CLERK

Plaintiff-Appellant

vs. **SEE AUGMENTATION RECORD**

ROCKY MOUNTAIN EMERGENCY, PHYSICIANS,  
and KURTIS HOLT, M.D., and RANDALL FOWLER, M.D.  
and Jeff Johnson

Defendant-Respondents

Honorable David C. Nye District Judge

Appealed from the District Court of the Sixth  
Judicial District of the State of Idaho, in and for  
Bannock County.

Allen Browning

Browning Law

Attorney  For Appellant

Terrence S. Jones

Carey Perkins, LLP

Attorney  For Respondent

Filed this \_\_\_\_\_ day of \_\_\_\_\_  
2008

MAR 19 2012

Clerk

Deputy

Supreme Court Court of Appeals  
Entered on ATS by \_\_\_\_\_

39473

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HEATHER HALL,	)	
	)	
Plaintiff-Appellant,	)	
	)	
	)	
	)	Supreme Court No. 39473-2011
vs.	)	
	)	
ROCKY MOUNTAIN EMERGENCY,	)	
PHYSICIANS, L.L.C. and KURTIS HOLT,	)	
M.D., and RANDALL FOWLER, M.D.,	)	
And JEFF JOHNSON	)	
	)	
Defendant-Respondents,	)	
	)	
	)	
_____	)	

**CLERK’S RECORD**

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock.

Before **HONORABLE David C. Nye** District Judge.

For Appellant:

**Allen Browning  
Browning Law  
482 Constitution Way, Ste. 111  
Idaho Falls, Idaho 83402**

For Respondent:

**Terrence S. Jones  
CAREY PERKINS, LLP  
P.O. Box 519  
Boise, Idaho 83701**

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Heather Hall vs. Rocky Mountain Emergency Physicians, L.L.C., Kurtis Holt MD, Randall Fowler MD, Jeff Johnson

Date	Code	User		Judge
5/3/2011	LOCT	NOELIA	CLERKS	David C Nye
	NCPI	NOELIA	New Case Filed-Personal Injury	David C Nye
	SMIS	NOELIA	Summons Issued	David C Nye
	COMP	NOELIA	Complaint Filed	David C Nye
		NOELIA	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Allen Browning Receipt number: 0015419 Dated: 5/3/2011 Amount: \$88.00 (Check) For:	David C Nye
	ATTR	LINDA	Plaintiff: Hall, Heather Attorney Retained Allen H Browning	David C Nye
3/10/2011		CAMILLE	Affidavit of service - srvd on Randall Fowler MD on 6-6-2011	David C Nye
3/17/2011		CAMILLE	Notice of service - Defs First set of Interrog and requests for production of documents to plntf: aty Terrence Jones for def	David C Nye
	NOAP	CAMILLE	Notice Of Appearance; aty Terrence Jones for defs	David C Nye
3/22/2011		MARLEA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Carey Perkins Receipt number: 0021751 Dated: 6/22/2011 Amount: \$58.00 (Check) For: Fowler, Randall MD (defendant), Holt, Kurtis MD (defendant), Johnson, Jeff (defendant) and Rocky Mountain Emergency Physicians, L.L.C. (defendant)	David C Nye
	ATTR	CAMILLE	Defendant: Rocky Mountain Emergency Physicians, L.L.C. Attorney Retained Terrence S. Jones	David C Nye
	ATTR	CAMILLE	Defendant: Holt, Kurtis MD Attorney Retained Terrence S. Jones	David C Nye
	ATTR	CAMILLE	Defendant: Fowler, Randall MD Attorney Retained Terrence S. Jones	David C Nye
	ATTR	CAMILLE	Defendant: Johnson, Jeff Attorney Retained Terrence S. Jones	David C Nye
6/27/2011	ORDR	AMYW	Order for Submission of Information for Scheduling Order; parties have 14 days to submit a joint statement to the court for preparation of scheduling order; /s/ J Nye, 6-27-11	David C Nye
7/8/2011		CAMILLE	Stipulated information for scheduling order; aty Alen Browing for plntf	David C Nye
7/1/2011		CAMILLE	Notice of service - Plaintiffs Response to Defs First set of interrog and request for production of documents, and this notice: aty Allen Browning	David C Nye
7/4/2011	HRSC	AMYW	Hearing Scheduled (Jury Trial 03/20/2012 09:00 AM)	David C Nye

Heather Hall vs. Rocky Mountain Emergency Physicians, L.L.C., Kurtis Holt MD, Randall Fowler MD, Jeff Johnson

Date	Code	User	Judge
3/8/2011	ORDR	AMYW	Order Setting Jury Trial; jury trial set for 3/20/12 at 9:00 am, joint pretrial memo due 14 days before trial, mtns to add new parties or amend pleadings filed 60 days after date of this order, discovery cut off is 60 days before trial, plttf discl due 140 days before trial, defs discl due 110 days before trial, rebuttal discl due 45 days before trial, disp mtns filed 90 days before trial, all other mtns filed and heard 30 days before trial, trial brfs and exhibits filed 10 dys before trial, jury inst filed 7 days before trial, trial scheduled for 6 days, formal mediation, if any, should take place 60 days prior to trial; /s/ J Nye, 8-8-11
3/25/2011		CAMILLE	Defendants Motion for summary judgment; aty Terrence Jones for def
		CAMILLE	Affidavit of Jeffery Johnson, PA in support of defs Motion for summary judgment; aty Terrence Jones for def
		CAMILLE	Affidavit of Kurtis Holt MD in support of motion for summary judgment; aty Terrence Jones for def
		CAMILLE	Memorandum in support of defs Motion for summary judgment; aty Terrence Jones for def
		CAMILLE	Notice of hearing; set for 9-26-2011 @ 10am on Motion aty Terrence Jones
	AFFD	DCANO	Affidavit of Randall Fowler, M.D. In Support of Defendants' Motion for Summary Judgment; Terrence S.Jones, Attorney for Dfdts.
3/26/2011	HRSC	CAMILLE	Hearing Scheduled (Motion 09/26/2011 10:00 AM)
3/15/2011		CAMILLE	Affidavit of Dr. David Bowman; aty Allen Browning for plntf
		CAMILLE	Affidavit of Heather Hall; aty Allen Browning for plntf
		CAMILLE	Memorandum in opposition to defendants motion for summary judgment; Defs Motion for summary judgment be denied in all respects: aty Allen Browning
3/22/2011		CAMILLE	Defendant reply Brief in support of motion for summary judgment; aty Terrence Jones for def
3/26/2011	DCHH	AMYW	Hearing result for Motion scheduled on 09/26/2011 10:00 AM: District Court Hearing Held Court Reporter: Stephanie Morse Number of Transcript Pages for this hearing estimated: Less than 100 pages.
3/29/2011	MEOR	AMYW	Minute Entry and Order; counsel appeared for hrg on MSJ on 9/26/11, court took matter under advisement and will issue a decision; /s/ J Nye, 9-29-11
0/24/2011	CSTS	CAMILLE	Case Status Changed: closed

Heather Hall vs. Rocky Mountain Emergency Physicians, L.L.C., Kurtis Holt MD, Randall Fowler MD, Jeff Johnson

Date	Code	User		Judge
10/25/2011	JDMT	CAMILLE	Decision on Defendants Motion for Summary Judgment; Defs request for Summary judgment is GRANTED: s/ Judge Nye 10-24-2011	David C Nye
10/26/2011		DCANO	Affidavit of Service: Served Michael Hall at 10956 S. Dempsey Creek Rd. Lava Hot Springs, a copy of the Order Requiring Debtor to Appear and Answer Concerning Property.	David C Nye
11/1/2011		CAMILLE	Judgment; complaint and causes of action of the plaintiff is hereby dismissed on the merits with prejudice: s/ Judge Nye 11-1-2011	David C Nye
11/10/2011		CAMILLE	Memorandum in support of motion to alter or amend judgment under rule 59a: aty Allen Browning for plntf	David C Nye
11/17/2011		CAMILLE	Notice of hearing; set for 12-19-2011 @ 9am	David C Nye
11/28/2011		CAMILLE	Amended notice of hearing; set for 12-13-2011@ 2pm:	David C Nye
12/1/2011	HRSC	CAMILLE	Hearing Scheduled (Motion 12/13/2011 02:00 PM)	David C Nye
	CSTS	CAMILLE	Case Status Changed: Closed pending clerk action	David C Nye
12/5/2011		CAMILLE	Response in opposition to plaintiffs request to alter or amend judgment under rule 59a: aty Terrence Jones for defs	David C Nye
12/8/2011	CONT	AMYW	Hearing result for Motion scheduled on 12/13/2011 02:00 PM: Continued	David C Nye
	APSC	DCANO	Appealed To The Supreme Court	David C Nye
	NOTC	DCANO	NOTICE OF APPEAL: Allen Browning, Atty for Plntfs.	David C Nye
		CAMILLE	Second Amended notice of hearing; set for 1-23-2012 @ 9am:	David C Nye
2/9/2011		DCANO	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Browning Law Receipt number: 0042914 Dated: 12/13/2011 Amount: \$101.00 (Check) For: Hall, Heather (plaintiff)	David C Nye
		DCANO	Received Checks for \$101.00 \$100.00 for Appeal fees and Clerk's Record desposit on 12-08-11	David C Nye
2/13/2011	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL: Signed and Mailed to Supreme Court and Counsel on 12-13-11.	David C Nye
2/15/2011	HRSC	CAMILLE	Hearing Scheduled (Motion 12/19/2011 09:00 AM)	David C Nye
	HRSC	CAMILLE	Hearing Scheduled (Motion 01/23/2012 02:30 PM)	David C Nye

Heather Hall vs. Rocky Mountain Emergency Physicians, L.L.C., Kurtis Holt MD, Randall Fowler MD, Jeff Johnson

Date	Code	User	Judge
12/27/2011	MISC	DCANO	IDAHO SUPREME COURT: Notice of Appeal received in SC on 12-15-11. Docket Number #39473-2011. The Clerk's REcord and REporter's Transcripts must be filed in SC. 2-24-12. (1-20-12 5 weeks prior). The following Transcripts shall be Lodged: Summary Judgment 9-26-11.
	MISC	DCANO	IDAHO SUPREME COURT; Please carefully examine the Title and Cert. and Advise the Dist. Court Clerk of any corrections. The title in the Cert. must appear on all documents filed in SC.
1/10/2012	NOTC	DCANO	Notice of Lodging: Transcripts by Stephanie Morse for Summary Judgment held 9-26-11.
1/23/2012	DCHH	AMYW	Hearing result for Motion scheduled on 01/23/2012 02:30 PM: District Court Hearing Held Court Reporter: Stephanie Morse Number of Transcript Pages for this hearing estimated: Less than 100 pages.
1/25/2012	MEOR	AMYW	Minute Entry and Order; counsel appeared for hrg on 1/23/12, court takes mtn to alter or amend judgment under advisement and will issue a written decision; /s/ J Nye, 1-25-12
2/6/2012	NOTC	DCANO	AMENDED NOTICE OF APPEAL; Allen Browning, Atty. for Plntf.
2/7/2012	MISC	DCANO	AMENDED CLERK'S CERTIFICATE OF APPEAL; Signed and Mailed to SC and Counsel on 2-7-12.
2/8/2012	MISC	DCANO	CLERK'S RECORD RECEIVED IN court records on 2-08-12.

DAVID C. NYE

Allen Browning ISB #3007  
BROWNING LAW  
482 Constitution Way, Ste. 111,  
Idaho Falls, ID 83402  
Telephone: (208) 542-2700  
Facsimile: (208) 542-2711

FILED  
BANNOCK COUNTY  
2011 MAY 13 PM 4:48  
BY [Signature]  
DEPUTY CLERK

Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK**

HEATHER HALL, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ROCKY MOUNTAIN EMERGENCY )  
PHYSICIANS, L.L.C., and )  
KURTIS HOLT, M.D., and )  
RANDALL FOWLER, M.D., and )  
JEFF JOHNSON, )  
)  
Defendant. )  
\_\_\_\_\_ )

Case No.: CV-2011-1740-PI

**COMPLAINT FOR DAMAGES**

COMES NOW, Plaintiff HEATHER HALL, by and through her attorney of record, Allen Browning of Browning Law, and complains of Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C., KURTIS HOLT, M.D., RANDALL FOWLER, M.D., and JEFF JOHNSON, as follows:

1. This is an action for personal injuries sustained by Plaintiff due to the intentional and negligent actions of Defendants. Plaintiff seeks general and special damages, attorney's fees, court costs, and other relief.

2. Plaintiff resides in Bannock County, Idaho.

3. The actions complained of in this complaint occurred in Bannock County, Idaho.

4. Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C., is located in Bannock County, Idaho, and does business in Bannock County, Idaho. At all times relevant to this complaint, this defendant provided the emergency room physicians administering emergency room treatment to walk-in patients, including Plaintiff. This defendant had a duty to provide treatment to patients, including Plaintiff, in a safe and competent manner, free from unconsented touching or sexual molestation. As stated below, the defendant violated that duty.

5. On information and belief, defendants KURTIS HOLT, M.D., RANDALL FOWLER, M.D., and JEFF JOHNSON work in and reside in Bannock County, Idaho, and worked in and resided in Bannock County, Idaho, at the time the offenses in this complaint occurred. All of these defendants were employees of Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C., working within the course and scope of their duties for Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C..

6. At all times relevant to this complaint, defendants KURTIS HOLT, M.D., and RANDALL FOWLER, M.D., were physicians charged with supervising Defendant JEFF JOHNSON.

7. The Court has subject matter jurisdiction over this matter, in that the amount in controversy, exclusive of interest and costs, exceeds the jurisdictional minimums for actions filed in the district court. The Court has *in personam* jurisdiction over the Defendant pursuant to I.C. §5-414, in that defendant resided in the State of Idaho at the time of the acts committed here, and committed tortious acts within the State of Idaho during their periods of residency here.

8. Venue is proper in the Sixth Judicial District, Bannock County, in that the accident giving rise to this action occurred in Bannock County, and the parties are located in said County.

### FACTS

9. The incidents complained of in this suit occurred on or about 5/12/09, 6/5/09 and 6/8/09 or 6/9/10.

10. On or about May 12, 2009, Plaintiff went to Portneuf Medical Center emergency room to receive treatment for a headache.

11. At that time, Defendant Randall Fowler, M.D., was the Physician of duty. He allowed a physician's assistant he was supervising, Defendant Jeff Johnson, to examine and treat Plaintiff for a headache.

12. In the course of examining and treating Plaintiff for a headache at that time, Defendant Jeff Johnson related to Plaintiff how he recommended a 13 year-old-girl masturbate in the shower to satisfy her sexual needs. He then closed the examining room door, pulled Plaintiff's pants down and gave her a shot in the buttocks while commenting upon her tanlines.

13. On or about June 5, 2009, Plaintiff again was suffering severe headaches and sought treatment at Portneuf Medical Center emergency room. Plaintiff sought treatment during the day, when she believed Jeff Johnson would not be present.

14. At that time, Kurtis Holt, M.D., was the Physician of duty. He allowed a physician's assistant he was supervising, Defendant Jeff Johnson, to examine and treat Plaintiff for a headache.

15. During the June 5, 2009, visit, Plaintiff explained that she had more headaches the night before. Johnson told her to undress from the waist up, but Plaintiff kept her bra on and put on a hospital gown. Johnson stated he needed to check her heartbeat and that he would have to go under her bra wire as it was in the way. Without consent, Johnson then completely lifted Plaintiff's bra up and over, exposing her left breast, looked under her gown and brushed his hand over her left nipple, then continued with the stethoscope while resting his hand on her left breast for approximately 15-20 seconds, while claiming to check her heartbeat.

16. These actions were unnecessary and unconsented and did not follow appropriate medical guidelines for treatment.

17. The actions were outrageous, an extreme deviation from reasonable conduct, and caused Plaintiff severe emotional distress, pain and suffering and humiliation.

**FIRST CLAIM FOR RELIEF  
(Battery)**

18. Plaintiff incorporates herein paragraphs 1 through 17 of her complaint as though fully set forth herein.

19. The defendant Jeff Johnson intentionally touched the plaintiff;

20. The plaintiff did not permit or consent to the aforementioned touching;

21. The defendant knew the touching was not permitted; and

22. The touching was unlawful, harmful or offensive.

23. The actions of Defendant Jeff Johnson constituted battery upon Plaintiff.

24. As a result of Jeff Johnson's actions, Plaintiff suffered emotional distress, pain and suffering and humiliation, all in an amount to be proven at trial.



**SECOND CLAIM FOR RELIEF**  
**(Intentional Infliction of Emotional Distress)**

25. Plaintiff incorporates herein paragraphs 1 through 24 of his herein complaint.
26. The conduct of Jeff Johnson was intentional or reckless;
27. the conduct of Jeff Johnson was extreme and outrageous;
28. Jeff Johnson's wrongful conduct caused Plaintiff's emotional distress; and
29. Plaintiff's emotional distress suffered due to the actions of Jeff Johnson was severe.
30. As a result of Jeff Johnson's actions, Plaintiff suffered emotional distress, pain and suffering and humiliation, all in an amount to be proven at trial.

**THIRD CLAIM FOR RELIEF**  
**(Invasion of Privacy)**

31. Plaintiff incorporates herein paragraphs 1 through 30 of his herein complaint.
32. Jeff Johnson intentionally intruded upon the physical solitude or seclusion of Plaintiff, in a way that would be highly offensive to a reasonable person.
33. This constituted the tort of invasion of privacy.
34. As a result of Jeff Johnson's actions, Plaintiff suffered emotional distress, pain and suffering and humiliation, all in an amount to be proven at trial.

**FOURTH CLAIM FOR RELIEF**  
**(Negligent Supervision)**

35. Plaintiff incorporates herein paragraphs 1 through 34 of his herein complaint.
36. Defendants KURTIS HOLT, M.D., and RANDALL FOWLER, M.D., failed to adequately supervise Jeff Johnson.

37. Jeff Johnson was unfit to examine and treat females and this should have been apparent to these defendants prior to the times Mr. Johnson examined Plaintiff.

38. As a result of this negligent supervision and failure to properly screen this employee prior to allowing him to examine and treat females, Plaintiff was injured as stated above, and these Defendants share in the responsibility for those damages.

39. As a result of Jeff Johnson's actions, Plaintiff suffered emotional distress, pain and suffering and humiliation, all in an amount to be proven at trial.

**FOURTH CLAIM FOR RELIEF  
(Respondeat Superior)**

40. Plaintiff incorporates herein paragraphs 1 through 39 of his herein complaint.

41. Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C., is responsible and liable for the actions of Defendants KURTIS HOLT, M.D., RANDALL FOWLER, M.D., and JEFF JOHNSON on the basis of respondeat superior, as the wrongful actions of defendants KURTIS HOLT, M.D., RANDALL FOWLER, M.D., and JEFF JOHNSON were accomplished within the course and scope of their duties; their acts were the acts of Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C..

42. As a result of the actions of the Defendants, Plaintiff suffered emotional distress, pain and suffering and humiliation, all in an amount to be proven at trial.

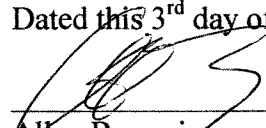
WHEREFORE, Plaintiff Heather Hall prays for relief against Defendants in excess of \$10,000.00, as follows:

1. For general damages for severe emotional distress, pain and suffering and humiliation, and other damages in an amount to be proven at trial, but in excess of \$10,000;
2. For Plaintiffs' special damages in an amount to be proven at trial;

3. For Plaintiff's attorney's fees, court costs, and other disbursements in an amount to be determined at or after trial; and,

4. For such other and further relief as the Court deems appropriate under the circumstances.

Dated this 3<sup>rd</sup> day of May, 2011.




---

Allen Browning  
Attorney for Plaintiff Heather Hall

**PLAINTIFF REQUESTS A TRIAL BY JURY IN THIS MATTER**

DATED this 3<sup>rd</sup> day of May, 2011.

BROWNING LAW



---

Allen Browning

Terrence S. Jones, ISB No. 5811  
CAREY PERKINS LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
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Facsimile (208) 345-8660

FILED  
CLERK OF DISTRICT COURT  
2011 JUN 17 AM 10:29  
BY *[Signature]*  
DEPUTY CLERK

Attorneys for Defendants

# ORIGINAL

IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

NOTICE OF APPEARANCE

TO: PLAINTIFF AND HER ATTORNEY OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned hereby appears as counsel of record for Defendants.

DATED this 15<sup>th</sup> day of June, 2011.

CAREY PERKINS LLP

By *[Signature]*

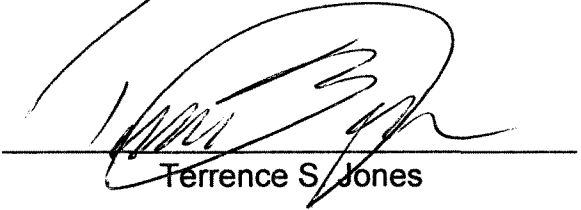
Terrence S. Jones, Of the Firm  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of June, 2011, I served a true and correct copy of the foregoing NOTICE OF APPEARANCE by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning  
BROWNING LAW  
482 Constitution Way, Suite 111  
Idaho Falls, Idaho 83402  
Telephone (208) 542-2700  
*Attorneys for Plaintiff*

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile (208) 542-2711



Terrence S. Jones

Terrence S. Jones, ISB No. 5811  
CAREY PERKINS LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
Boise, Idaho 83701  
Telephone (208) 345-8600  
Facsimile (208) 345-8660

Attorneys for Defendants

CLERK OF DISTRICT COURT  
BANNOCK COUNTY

2011 JUN 17 AM 10:30

BY *[Signature]*  
DEPUTY CLERK

# ORIGINAL

IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

NOTICE OF SERVICE OF  
DISCOVERY

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 15<sup>th</sup> day of June, 2011, I served a copy of DEFENDANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF, together with a copy of this NOTICE, upon counsel in the above-entitled matter by the method indicated below:

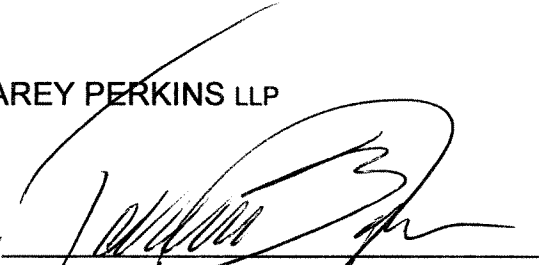
Allen Browning  
BROWNING LAW  
482 Constitution Way, Suite 111  
Idaho Falls, Idaho 83402  
Telephone (208) 542-2700  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 542-2711

DATED this 15<sup>th</sup> day of June, 2011.

CAREY PERKINS LLP

By

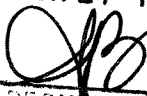


Terrence S. Jones, Of the Firm  
Attorneys for Defendants



FILED  
BANNOCK COUNTY  
CLERK OF THE COURT

2011 JUN 27 PM 4:45

  
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND  
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C., and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No: CV-2011-0001740-PI

**ORDER FOR SUBMISSION OF  
INFORMATION FOR  
SCHEDULING ORDER**

A Complaint was filed in this matter on the 3<sup>rd</sup> day of May, 2011. The Defendants have now appeared and/or answered and the case is at issue.

IT IS HEREBY ORDERED, pursuant to I.R.C.P. 16, that the parties, through their counsel (or the parties themselves if self-represented), confer and submit to the Court, within fourteen (14) days of the date of this Order, a joint statement containing the following information:

- (1) Whether any service is still needed upon any unserved parties.
- (2) Whether motions to add new parties or otherwise amend the pleadings are contemplated.
- (3) Whether the parties currently contemplate or anticipate any pre-trial motions.

Case No.: CV-2011-0001740-PI  
ORDER FOR SUBMISSION OF INFORMATION FOR SCHEDULING ORDER  
Page 1 of 3

(4) Whether the case presents any unusual time requirements for trial preparation.

(5) The agreed amount of time required for trial.

(6) Whether the case presents any unusual times requirements for discovery.

(7) Whether any party requests court-ordered mediation.

(8) Three stipulated trial dates, one no less than six (6) months and no more than nine (9) months from the date of this Order, and a second no less than nine (9) months and no more than twelve (12) months from the date of this Order, and a third no less than twelve (12) months and no more than fifteen (15) months from the date of this Order. These trial dates cannot be during the first full week of any month.

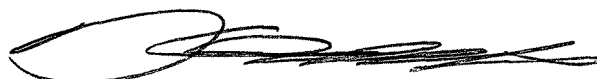
(9) Whether there are other matters conducive to determination of the action that the parties agree should be brought to the attention of the Court prior to entering a Scheduling Order.

The parties shall agree as to which party shall make the joint submission but, if they cannot agree, Plaintiff shall be responsible to make the submission.

Upon receipt of this joint submission the Court will issue an Order setting the matter for trial with appropriate dates for discovery, disclosure of witness, etc.

IT IS FURTHER ORDERED that if the parties do not file the stipulation required herein, within the fourteen (14) days set forth, the Court will set this matter for trial on a date available to the Court.

DATED this 27<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
DAVID C. NYE  
District Judge

**CERTIFICATE OF SERVICE**

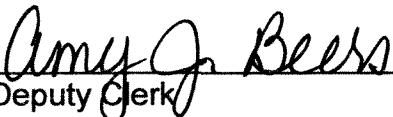
I HEREBY CERTIFY that on the 1<sup>st</sup> day of ~~June~~ July, 2011, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Allen Browning  
Browning Law  
482 Constitution Way, Suite 111  
Idaho Falls, ID 83402

- U.S. Mail  
 E-Mail: [allen.browning.law@gmail.com](mailto:allen.browning.law@gmail.com)  
 Hand Deliver  
 Fax: 542-2711

Terrence S. Jones  
Carey Perkins, LLP  
P.O. Box 519  
Boise, ID 83701

- U.S. Mail  
 E-Mail: [tsjones@careyperkins.com](mailto:tsjones@careyperkins.com)  
 Hand Deliver  
 Fax: 208-345-8660

  
\_\_\_\_\_  
Deputy Clerk

Terrence S. Jones, ISB No. 5811  
Tracy L. Wright, ISB No. 8060  
CAREY PERKINS LLP  
Sixteenth Floor, U.S. Bank Plaza  
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Boise, Idaho 83701  
Telephone (208) 345-8600  
Facsimile (208) 345-8660

Attorneys for Defendants

2011 APR 25 AM 9:32  
DEPUTY CLERK

**ORIGINAL**  
IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

COME NOW Defendants, by and through their counsel of record, Carey Perkins LLP, and move this Court pursuant to IRCP Rules 56 and 12(b), and Idaho Code §39-1391(c) for an entry of summary judgment dismissing this action on the ground that there is no genuine issue of material fact, that the Plaintiff's Complaint fails to state a claim upon which relief can be granted and that the Defendants are entitled to judgment as a matter of law.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - 1

This Motion is based upon the fact that as emergency room physicians and providers of emergency medical treatment, the Defendants are entitled to immunity from civil liability pursuant to Idaho Code §39-1391c. As a second basis for the defense motion, the Plaintiff's intentional tort and common law claims against the Defendants are superseded and controlled entirely by operation of Idaho Code §6-1012. This Motion is supported by the Affidavits of Kurtis Holt, M.D., Randall Fowler, M.D., Jeff Johnson, P.A., the Memorandum in Support thereof, all filed contemporaneously herewith, and the files and records in the above-entitled action.

Oral argument is hereby requested.

DATED this 23<sup>rd</sup> day of August, 2011.

CAREY PERKINS LLP

By

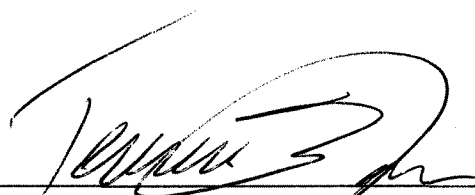
  
Terrence S. Jones, Of the Firm  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of August, 2011, I served a true and correct copy of the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning  
BROWNING LAW  
482 Constitution Way, Suite 111  
Idaho Falls, Idaho 83402  
Telephone (208) 542-2700  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 542-2711

  
\_\_\_\_\_  
Terrence S. Jones



1. The information and facts specified and recited herein are based upon your Affiant's direct and personal knowledge, and the opinions stated herein are based upon reasonable medical certainty.

2. At all times alleged in the Complaint, I was a physician assistant licensed by the Idaho State Board of Medicine to practice as a physician assistant in the State of Idaho.

3. At all times relevant herein, I have served solely as an emergency room physician assistant. In this regard, I am familiar with, and have actual knowledge of, the standard of health care practice applicable to emergency room physician assistants practicing in the emergency room setting in Pocatello, Idaho in 2009, and I engaged continuously in said medical specialty in said community from 2002 to 2011.

4. During my professional career in Pocatello, Idaho I have been and I am familiar with the facilities, capabilities, standards and procedures at Portneuf Medical Center in Pocatello, Idaho. I am also familiar with the duties, responsibilities and requirements placed upon physician assistants practicing in emergency medicine in Pocatello, Idaho in 2009 which vary from patient to patient and the given medical circumstance presented.

5. My medical practice at all times pertinent to this action consisted of working as an emergency room physician assistant in Pocatello, Idaho. I do not have privileges to admit patients into Portneuf Regional Medical Center.

6. My care and treatment of Heather Hall complied in all respects with the standard of health care practice applicable to a physician assistant engaged in the practice of emergency medicine in Pocatello, Idaho, in 2009. My care and treatment of



Heather Hall at issue in this matter occurred in the emergency room at Portneuf Regional Medical Center in Pocatello, Idaho in 2009.

7. I am not personally acquainted with the Plaintiff, Heather Hall, and I have never seen her or interacted with her in any way outside of the emergency department of the Portneuf Medical Center. My only involvement with the Plaintiff was in my limited capacity as a physician assistant and provider of emergency medical treatment.

8. My only purpose for talking to, evaluating and physically examining the Plaintiff was in connection with my efforts to provide her with emergency medical attention when she presented for treatment to the Portneuf Medical Center emergency room on the dates reflected in the attached medical records. In the course of providing Heather Hall with emergency medical treatment, I listened to her heartbeat with my stethoscope and per her Complaint this is the action for which she seeks damages. All of my interactions with the Plaintiff on each occasion set forth her in Complaint and documented per the attached medical records complied fully with the standard of practice applicable to me.

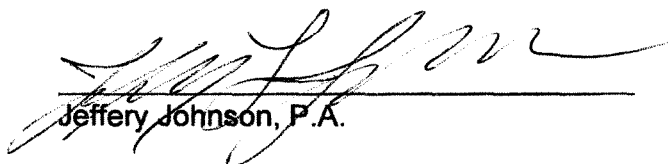
9. On each occasion that I treated the Plaintiff she made repeated requests for narcotic pain medication. Only after she was finally refused narcotic pain medication in June 2009 did this patient elect to pursue this claim against me and my supervising physicians. I never saw the patient on June 8 or 9, 2009.

10. That attached hereto as **Exhibit A** are true and correct copies of my medical records from Portneuf Medical Center relating to the Plaintiff. My involvement with Heather Hall was limited to my role as an emergency room physician assistant. At all times referred to in Plaintiff's Complaint, I had medical staff privileges at Portneuf Regional

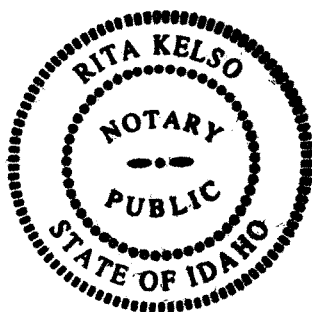
Medical Center in Pocatello only for the rendition of emergency treatment of patients that came to the emergency department of Portneuf Regional Medical Center.


11. At all times referred to in Plaintiff's Complaint, the patient arrived and presented at Portneuf Regional Medical Center where she sought emergency treatment as a result of medical problems which arose before her arrival at Portneuf Regional Medical Center. On each such occasion, the patient, Heather Hall, was treated at the Emergency room at Portneuf Regional Medical Center and released. She was never admitted into the hospital and therefore referral to a more knowledgeable physician specialist was never required. At all times referred to in Plaintiff's Complaint, I did not see the Plaintiff pursuant to an ordinary physician-patient relationship outside of the emergency room setting. As an emergency room health care provider, I do not have regular patients. All my patients present to the emergency room seeking urgent to emergent medical care.

FURTHER your Affiant saith naught.

  
Jeffery Johnson, P.A.

SUBSCRIBED AND SWORN to before me this 19 day of August, 2011.



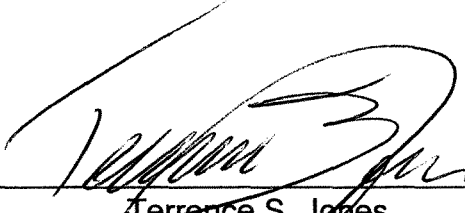
  
Notary Public for Idaho  
Residing at Boise, Idaho  
My Commission expires 12-17-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of August, 2011, I served a true and correct copy of the foregoing AFFIDAVIT OF JEFFERY JOHNSON, P.A. IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning  
BROWNING LAW  
482 Constitution Way, Suite 111  
Idaho Falls, Idaho 83402  
Telephone (208) 542-2700  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 542-2711

  
\_\_\_\_\_  
Terrence S. Jones

# Exhibit A

**PORTNEUF MEDICAL CENTER  
PRIMARY**

**Channell, Heather M**

Wt/lt: 52.2 Kg  
MedRec: 000255656  
AcctNum: 4116069

Patient Data

**Complaint:** Head Pain  
**Triage Time:** Tue May 12, 2009 19:39  
**Urgency:** LEVEL 4  
**Bed:** ED 2-FT  
**Initial Vital Signs:** 5/12/2009 19:37  
**BP:** 162/99  
**P:** 93

**R:** 20  
**T:** 98.9

**ED Attending:** Johnson, PHARMD, PA, Jeff  
**Primary RN:** Cook, LPN, Joann

**O2 sat:** 98 on ra  
**Pain:** 10

**DIAGNOSIS** (21:06 JEFF)

**FINAL PRIMARY:** Migraine headache.

**DISPOSITION**

**PATIENT:** Emerg. Phys. on duty: Fowler, MD Randall, Disposition: Home, Disposition Transport: Ambulatory.

**Condition:** Stable. (21:06 JEFF)

**Remove from ER.** (21:16 JCOO)

**NOTES:** Verbal Instructions Given. Written Instructions Given. (21:16 JCOO)

**HPI HEADACHE** (21:08 JEFF)

**CHIEF COMPLAINT:** Patient presents for the evaluation of headache, nausea, migraine. This is not the worst headache of this patient's life. This headache has not changed in character from prior headaches.

**HISTORIAN:** History obtained from patient.

**TIME COURSE:** Onset was over the past few days. Complaint is persistent.

**LOCATION:** Diffuse, Pain most severe in Posterior.

**QUALITY:** Pain is aching, no different from patient's previous episodes, throbbing.

**ASSOCIATED WITH:** No syncope.

**SEVERITY:** Maximum severity is moderate, Currently symptoms are moderate.

**PAST MEDICAL HISTORY** (Tue May 12, 2009 19:39 AVO)

**MEDICAL HISTORY:** History of neurological disease, including headaches, History of hypertension, which has been treated.

**SURGICAL HISTORY:** History of c-section.

**PSYCHIATRIC HISTORY:** No previous psychiatric history.

**SOCIAL HISTORY:** Denies alcohol abuse, Denies tobacco abuse, Denies drug abuse.

**FAMILY HISTORY:** Family history includes hypertension.

**CURRENT MEDICATIONS:** No recorded medications

**KNOWN ALLERGIES**

No known drug allergies.

**ROS** (21:09 JEFF)

**CONSTITUTIONAL:** No fever, chills.

**EYES:** Historian reports photophobia. No eye redness, eye discharge.

**ENT:** No otorrhea, rhinorrhea, sore throat, otalgia.

**CARDIOVASCULAR:** No chest pain, syncope.

**RESPIRATORY:** No Cough. SOB.

**GI:** Historian reports nausea. No diarrhea.

**GENITOURINARY FEMALE:** No dysuria.

Prepared: Tue May 11, 2010 07:11 by RSIF Page: 1 of 4

HPR4BE9366922F0 16 5/11/2010 10:47:20 AM [Central Daylight Time]

**PORTNEUF MEDICAL CENTER  
PRIMARY**

Channell, Heather M  
DOB: [REDACTED]  
Wt/Ht: 52.2 Kg  
MedRec: 000255656  
AcctNum: 4116069

**MUSCULOSKELETAL:** No neck pain, back pain.

**SKIN:** No rash.

**NEUROLOGIC:** Historian reports headache. No dizziness, recent seizures, paresthesias, focal weakness, sensory changes.

**PHYSICAL EXAM** (21:09 JEFF)

**CONSTITUTIONAL:** Vital Signs Reviewed. Patient has normal respiratory rate, Alert and oriented X 3. **Patient appears uncomfortable, to be in pain. Patient has moderate pain distress.**

**HEAD:** Atraumatic, Normocephalic.

**EYES:** Eyes are normal to inspection, Pupils equal, round and reactive to light. No discharge from eyes.

Extraocular muscles intact. Sclera are normal. Conjunctiva are normal, **marked photophobia.**

**ENT:** Ears normal to inspection, Nose examination normal, Posterior pharynx normal, Mouth normal to inspection.

**NECK:** Assessment includes:, Trachea midline. No masses, lymphadenopathy, Supple, No meningeal signs. Normal ROM.

**RESPIRATORY CHEST:** Chest is nontender. Breath sounds normal. No respiratory distress.

**CARDIOVASCULAR:** RRR. Normal S1 S2.

**ABDOMEN:** Abdomen is nontender.

**BACK:** There is no CVA Tenderness, There is no tenderness to palpation.

**UPPER EXTREMITY:** Inspection normal. Normal range of motion.

**LOWER EXTREMITY:** Inspection normal. Normal range of motion.

**NEURO:** No focal motor deficits, focal sensory deficits, Cranial nerves intact, No cerebellar deficits. Normal DTRs.

**SKIN:** Skin is warm, Skin is dry, Skin is normal color.

**PSYCHIATRIC:** Oriented X 3.

**VITAL SIGNS** (19:37 AVO)

**VITAL SIGNS:** BP: 162/99, Pulse: 93, Resp: 20, Temp: 98.9, Pain: 10, O2 sat: 98 on ra, Time: 5/12/2009 19:37.

**ORDERS**

I.V. start by JEFF for JEFF on Tue May 12, 2009 19:53 Status: Done by JCOO Tue May 12, 2009 20:13.

O2 Administration by JEFF for JEFF on Tue May 12, 2009 19:53 Status: Done by JCOO Tue May 12, 2009 20:13.

NS 1000 ML (1st BOLUS) by JEFF for JEFF on Tue May 12, 2009 19:53 Status: Done by JCOO Tue May 12, 2009 20:13.

**DOCTOR NOTES** (21:10 JEFF)

**TIME:** Routine re-evaluation. Patient's status is improved.

**TEXT:** Put on O2, IV started for fluid but it infiltrated and she refused another start, she elected for IM meds instead. She was improved and will be discharged. I discussed with her the importance of establishing a primary care provider in this community. She agreed that she would.

**INTERVENTIONS:** Pain medications administered:, MORPHINE. Pain medications were given IM, Antiemetics:, PROCHLORPERAZINE.

**PATIENT PLAN:** The patient will be discharged, The patient will follow up with primary care physician.

**MEDICATION ADMINISTRATION SUMMARY** (Tue May 11, 2010 07:11)

Drug Name	Dose	Route	Status	Time
Morphine Sulfate	8mg	IM	Given	20:32 5/12/2009
Cogentin	1 milligram(s)	IM	Given	20:21 5/12/2009
*Prochlorperazine Edisylate	10 milligram(s)	IM	Given	20:20 5/12/2009

Prepared: Tue May 11, 2010 07:11 by RSF Page: 2 of 4

HPR4BE9366922F0 16 5/11/2010 10:47:20 AM [Central Daylight Time]

**PORTNEUF MEDICAL CENTER  
PRIMARY**

Chan [REDACTED]  
DOB: [REDACTED]  
Wt/Ht: 52.2 Kg  
MedRec: 000255656  
AcctNum: 4116069

\*Additional information available in notes. Detailed record available in Medication Service section.

**INSTRUCTION** (21:12 JEFF)

**DISCHARGE:** MIGRAINE HEADACHE.

**FOLLOWUP:** Scott Malm, PA-C, MS, Family Practice, 1595 Bannock Hwy., Pocatello ID 83204, 478-2449, Pocatello Health West, 845 West Center Suite 200, Pocatello ID 83204, 232-6260.

**SPECIAL:** Follow up with Scott Malm or Health West.

You need to establish care with a local provider.

Rest at home.

You received medication that will impair your ability to drive/operate machinery

Please return to ER if you feel you are worsening, changing or if any concerns.

**PRESCRIPTION** (21:08 JEFF)

**Lortab 7.5/500:** Tablet : 500 mg-7.5 mg : Oral : Quantity: \*\*\* 1-2 \*\*\* Unit: Route: Oral Schedule: every 6 hours as needed Dispense: \*\*\* 10 \*\*\*.

**NOTES:**

Product Selection Allowed

No Refills

DEA: MJ0974926

**NURSING ASSESSMENT: NURSES NOTE** (19:42 JCOO)

**TIME ASSESSED:** Pt presents to fast track with c/o headache., LOC: Alert, Respirations: Normal, Skin: Warm, Skin Color: Normal.

**NURSING PROCEDURE: IV** (20:14 JCOO)

**TIME:** Patient's identity verified by, patient stating name, patient stating birth date, hospital ID bracelet,

Indications for procedure: fluid replacement, Indications for procedure: medication administration, IV established, 20 gauge catheter inserted, into right Hand, #1 site. in 2 attempts, Saline lock established,

Amount 10cc, 0.9NS 1 Liter hung, 1st bag hung, IV bolus of 1000 ml established, Rate of bolus, wide open, via primary tubing. Patient tolerated procedure well.

**SAFETY:** Cart in lowest position, Armband present, Call light within reach.

**NURSING PROCEDURE: IV** (20:14 JCOO)

**TIME:** Infusion Stop Time 2018, at 2018. Discontinued due to, swelling, Care after removal, sterile dressing applied. Patient tolerated procedure well.

**SAFETY:** Cart in lowest position, Armband present, Call light within reach.

**NURSING PROCEDURE: DISCHARGE NOTE** (21:15 JCOO)

**TIME:** Patient discharged to, home, Patient, ambulates without assistance, Transported via friend/family driving, Patient unaccompanied, instructed not to drive home, Discharge instructions given to, patient,

Simple/moderate discharge teaching performed, Prescription given and additional instructions on side effects of same given, Above Person(s) verbalized understanding of discharge instructions and follow-up care.

**MEDICATION SERVICE**

**Cogentin:** Order: Cogentin (Benzotropine Mesylate) - Dose: 1 milligram(s) : IM

Ordered by: Jeff Johnson, PHARMD, PA

Entered by: Jeff Johnson, PHARMD, PA Tue May 12, 2009 19:55

Prepared: Tue May 11, 2010 07:11 by RSF Page: 3 of 4

HPR4BE9366922F0 16 5/11/2010 10:47:20 AM [Central Daylight Time]

**PORTNEUF MEDICAL CENTER  
PRIMARY**

Channell Heather M  
DOB: [REDACTED]  
Wt/Ht: 52.2 Kg  
MedRec: 000255656  
AcctNum: 4116069

Documented as given by: Jeff Johnson, PHARMD, PA Tue May 12, 2009 20:21  
Patient, Medication, Dose, Route and Time verified prior to administration.  
Medication administered to right buttock.

: *Follow Up* : **Decreased symptoms.** (21:12)COO)

*Morphine Sulfate*: Order: Morphine Sulfate – Dose: 8mg : IM

Ordered by: Jeff Johnson, PHARMD, PA

Entered by: Jeff Johnson, PHARMD, PA Tue May 12, 2009 20:21

Documented as given by: Jeff Johnson, PHARMD, PA Tue May 12, 2009 20:32

Patient, Medication, Dose, Route and Time verified prior to administration.

IM medication, Medication administered to left hip.

: *Follow Up* : **Decreased pain. On a scale 0–10 patient rates pain as 5, Decreased symptoms.**

(21:12)COO)

*Prochlorperazine Edisylate*: Order: Prochlorperazine Edisylate – Dose: 10 milligram(s) : IM

Notes: compazine

Ordered by: Jeff Johnson, PHARMD, PA

Entered by: Jeff Johnson, PHARMD, PA Tue May 12, 2009 19:55

Documented as given by: Jeff Johnson, PHARMD, PA Tue May 12, 2009 20:20

Patient, Medication, Dose, Route and Time verified prior to administration.

IM medication, Medication administered to right hip.

: *Follow Up* : **Decreased symptoms.** (21:12)COO)

**TRIAGE** (Tue May 12, 2009 19:39 AVO)

**COMPLAINT:** COMPLAINT: Head Pain.

**PROVIDERS:** TRIAGE NURSE: Amy Vanorden, RN, CHARGE NURSE: Steven Silcock, RN.

**ADMISSION:** URGENCY: LEVEL 4. TRANSPORT: Private Vehicle, BED: FT. WAIT.

**PATIENT:** NAME: Heather M Channell, AGE: 32, GENDER: female, DOB: [REDACTED]

[REDACTED] TIME OF GREET: Tue May 12, 2009 19:34, LANGUAGE: English, RACE:

Caucasian, Ctrl Subst. Caution: Yes, Soc. Work Case Mgmt: Not Managed, KG

WEIGHT: 52.2, PHONE: 208582–2959, MEDICAL RECORD NUMBER: 000255656,

ACCOUNT NUMBER: 4116069. PRIMARY CARE: No Doctor..

**PREVIOUS VISIT ALLERGIES:** No known drug allergies.

**PAIN:** Triage assessment performed.

**DOMESTIC VIOLENCE:** The presence of domestic violence is unknown.

**LMP:** Last menstrual period: 05/10/2009, Pt not on birth control.

**TREATMENTS IN PROGRESS:** No treatment.

**VITAL SIGNS:** BP 162/99, Pulse 93, Resp 20, Temp 98.9, Pain 10, O2 Sat 98. on ra. Time 5/12/2009 19:37.

**Key:**

AVO=Vanorden, RN, Amy JCOO=Cook, LPN, Joann JEFF=Johnson, PHARMD, PA, Jeff



**PORTNEUF MEDICAL CENTER  
PRIMARY**

Chanell, Heather M  
DO  
Wt/Ht: 52.2 Kg (est.)  
MedRec: 000255656  
AcctNum: 4125596

Patient Data

**Complaint:** Headache  
**Triage Time:** Fri Jun 05, 2009 10:47  
**Urgency:** LEVEL 3  
**Bed:** ED 1-ED  
**Initial Vital Signs:** 6/5/2009 10:45  
**BP:** 163/101  
**P:** 100  
**R:** 16  
**T:** 98.6

**ED Attending:** Holt, MD, Kurtis  
**Primary RN:** Sabel, RN, Linda  
**O2 sat:** 95 on RA  
**Pain:** 9

**DIAGNOSIS** (13:56 JEPF)  
**FINAL: PRIMARY: headache.**

**DISPOSITION**  
**PATIENT:** Emerg. Phys. on duty: Holt, MD Kurtis. Disposition: Home. Disposition Transport: Ambulatory.  
**Condition:** Stable. (13:56 JEPF)  
**Remove from ER.** (13:11 15A)

**HPI HEADACHE** (13:32 JEPF)  
**CHIEF COMPLAINT:** Patient presents for the evaluation of **headache**. This is not the worst headache of this patient's life. **This headache has not changed in character from prior headaches.**  
**HISTORIAN:** History obtained from patient.  
**TIME COURSE:** Onset was **this morning**.  
**LOCATION:** On left of Frontal. On right of Frontal.  
**QUALITY:** Pain is **aching**.  
**ASSOCIATED WITH:** **No syncope**.  
**SEVERITY:** Maximum severity is **moderate**. Currently symptoms are moderate.

**PAST MEDICAL HISTORY** (Fri Jun 05, 2009 10:47 GST)  
**MEDICAL HISTORY:** History of neurological disease, including headaches , History of hypertension, which has been treated.  
**SURGICAL HISTORY:** History of c-section.  
**PSYCHIATRIC HISTORY:** No previous psychiatric history.  
**SOCIAL HISTORY:** Denies alcohol abuse, Denies tobacco abuse, Denies drug abuse.  
**FAMILY HISTORY:** Family history includes hypertension.

**CURRENT MEDICATIONS** (10:47 GST)  
**AZOR for HTN**

**KNOWN ALLERGIES**  
No known drug allergies.

**ROS** (13:33 JEPF)  
**CONSTITUTIONAL:** No fever, chills.  
**EYES:** **Historian reports photophobia**. No eye redness, eye discharge.  
**ENT:** No otorrhea, rhinorrhea, sore throat, otalgia.  
**CARDIOVASCULAR:** No chest pain, syncope.  
**RESPIRATORY:** No Cough, SOB.  
**GI:** **Historian reports nausea**. No diarrhea.  
**GENITOURINARY FEMALE:** No dysuria.  
**MUSCULOSKELETAL:** No neck pain, back pain.

Prepared: Tue May 11, 2010 09:45 by RSF Page: 1 of 5

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**PORTNEUF MEDICAL CENTER  
PRIMARY**

Channell, Heather M  
DOB: [REDACTED]  
Wt/Ht: 52.2 Kg (est.)  
MedRec: 000255656  
AcctNum: 4125596

*SKIN:* No rash.

*NEUROLOGIC:* **Historian reports headache.** No dizziness, recent seizures, paresthesias, focal weakness, sensory changes.

**PHYSICAL EXAM** (13:33 JEFF)

*CONSTITUTIONAL:* Vital Signs Reviewed. Patient has normal respiratory rate, Alert and oriented X 3. **Patient appears uncomfortable, to be in pain. Patient has moderate pain distress.**

*HEAD:* Atraumatic, Normocephalic.

*EYES:* Eyes are normal to inspection, Pupils equal, round and reactive to light. No discharge from eyes, Extraocular muscles intact. Sclera are normal. Conjunctiva are normal, **marked photophobia.**

*ENT:* Ears normal to inspection, Nose examination normal, Posterior pharynx normal, Mouth normal to inspection.

*NECK:* Assessment includes:, Trachea midline. No masses, lymphadenopathy, Supple, No meningeal signs. Normal ROM.

*RESPIRATORY CHEST:* Chest is nontender. Breath sounds normal. No respiratory distress.

*CARDIOVASCULAR:* RRR. Normal S1 S2.

*ABDOMEN:* Abdomen is nontender.

*BACK:* There is no CVA Tenderness, There is no tenderness to palpation.

*UPPER EXTREMITY:* Inspection normal. Normal range of motion.

*LOWER EXTREMITY:* Inspection normal. Normal range of motion.

*NEURO:* No focal motor deficits, focal sensory deficits, Cranial nerves intact, No cerebellar deficits. Normal DTRs.

*SKIN:* Skin is warm, Skin is dry, Skin is normal color.

*PSYCHIATRIC:* Oriented X 3.

**VITAL SIGNS**

*VITAL SIGNS:* BP: 163/101, Pulse: 100, Resp: 16, Temp: 98.6, Pain: 9, O2 sat: 95 on RA, Time: 6/5/2009 10:45.

(10:45 CST)

BP: 146/88, Pulse: 88, Resp: 18, Pain: 6, O2 sat: 98 on ra, Time: 6/5/2009 13:10. (13:10 LSA)

**ORDERS**

I.V. start by JEFF for JEFF on Fri Jun 05, 2009 11:18 Status: Done by RHAR Fri Jun 05, 2009 11:55.

NS 1000 ML (1st BOLUS) by RHAR for HOLT on Fri Jun 05, 2009 11:55 Status: Done by RHAR Fri Jun 05, 2009 11:56.

**DOCTOR NOTES**

*INTERVENTIONS:* Pain medications administered:, MORPHINE, Antiemetics:

PROCHLORPERAZINE. (13:34 JEFF)

*TEXT:* Walgreen pharmacy called relating that they filled her Lortab 7.5/500 mg tab rx with 5//500 mg rx instead. pt realized it and wanted more med. pt was then rx'd the difference, 7.5/500 #3, and message for her to f/u w/ pcp given. (Mon Jun 08, 2009 19:51 TAND)

**ATTENDING** (13:35 HOLT)

*CHIEF COMPLAINT:* discussed and agree.

**MEDICATION ADMINISTRATION SUMMARY** (Tue May 11, 2010 09:45)

Drug Name	Dose	Route	Status	Time
*Morphine Sulfate	4mg milligram(s)	IV	Given	12:20 6/5/2009
*Prochlorperazine Edisylate	10 milligram(s)	Slow IV Push	Given	11:41 6/5/2009

Prepared: Tue May 11, 2010 09:45 by RSF Page: 2 of 5

**PORTNEUF MEDICAL CENTER  
PRIMARY**

Cha [REDACTED]  
DOB [REDACTED]  
Wt/Ht: 52.2 Kg (est.)  
MedRec: 000255656  
AcctNum: 4125596

Cogentin	1 milligram(s)	IV	Given	11:39 6/5/2009
----------	----------------	----	-------	----------------

\*Additional information available in notes. Detailed record available in Medication Service section.

**INSTRUCTION** (12:57 JEPF)

**DISCHARGE:** NONSPECIFIC HEADACHE.

**FOLLOWUP:** Scott Malm, PA-C, MS, Family Practice, 1595 Bannock Hwy., Pocatello ID 83204, 478-2449, Pocatello Health West, 845 West Center Suite 200, Pocatello ID 83204, 232-6260.

**SPECIAL:** Follow-up with regular doctor, health west or Scott Malm. Please return to ER if worse or concerned. You have been prescribed the following medications: lortab.

**PRESCRIPTION** (12:58 JEPF)

**Lortab 7.5/500:** Tablet : 500 mg--7.5 mg : Oral : Quantity: \*\*\* 1-2 \*\*\* Unit: Route: Oral Schedule: every 6 hours as needed Dispense: \*\*\* 8 \*\*\*.

**NOTES:**

Product Selection Allowed  
No Refills  
DEA: MJ0974926

**NURSING ASSESSMENT: NEURO** (10:50 RHAR)

**NOTES:** pt reports frontal head pressure since 6/04/09 at about 1800, 10/10 on pain scale, pain radiates down to posterior neck and "making my neck feel stiff"; pt reports nausea but denies vomiting; pt reports cold chills and sweats last night; pt reports for past 2 days she has been dizzy and sees "sparkles", pt light sensitive but denies noise sensitivity; no facial droop, upper extremity strength equal and strong bilaterally.

**CONSTITUTIONAL:** Complex assessment performed. Patient arrives ambulatory with steady gait to treatment area. Patient is cooperative, alert and oriented x 3, Patient's skin is warm and dry, Patient's mucous membranes are moist and pink. Patient appears in pain distress.

**NEURO:** Patient's speech is clear and understandable.

**NURSING PROCEDURE: IV** (11:38 RHAR)

**TIME:** Procedure performed at 1138, IV established, 20 gauge catheter inserted, into right Hand, #1 site, in 1 attempt, Saline lock established, Amount 8cc, 0.9NS 1 Liter hung, 1st bag hung, IV bolus of 1000 ml established, Rate of bolus, wide open, via primary tubing, Labs drawn at time of placement, Labs labeled and sent to lab, After procedure, no swelling noted at site, After procedure, no drainage noted at site, After procedure, no redness, Sterile dressing applied.

**NURSING PROCEDURE: DISCHARGE NOTE** (13:08 LSA)

**TIME:** Patient, ambulates without assistance, Accompanied by family member. Patient instructed not to drive home, IV discontinued with catheter intact. Dressing placed to IV site, Complex discharge teaching performed, Name of prescription(s) given: vicodin, Prescription given and additional instructions on side effects of same given, Above Person(s) verbalized understanding of discharge instructions and follow-up care.

**NURSING PROCEDURE: IV** (12:35 LSA)

**TIME:** Infusion Stop Time 1235.

**NURSING PROCEDURE: DISCHARGE NOTE** (13:10 LSA)

**VITAL SIGNS:** BP: 146, / 88, Pulse: 88, Resp: 18, Pain: 6, O2 sat: 98, ra.

Prepared: Tue May 11, 2010 09:45 by RSF Page: 3 of 5

HPR4BE9366922F0 16 5/11/2010 10:47:20 AM [Central Daylight Time]

**PORTNEUF MEDICAL CENTER  
PRIMARY**

Channell, Heather M  
DOB: [REDACTED]  
Wt/Ht: 52.2 Kg (est.)  
MedRcc: 000255656  
AcctNum: 4125596

**MEDICATION SERVICE**

*Cogentin*: Order: Cogentin (Benztropine Mesylate) – Dose: 1 milligram(s) : IV

Ordered by: Jeff Johnson, PHARMD, PA

Entered by: Jeff Johnson, PHARMD, PA Fri Jun 05, 2009 11:15 .

Acknowledged by: Robyn Harding, RN Fri Jun 05, 2009 11:25

Documented as given by: Robyn Harding, RN Fri Jun 05, 2009 11:39

Patient, Medication, Dose, Route and Time verified prior to administration.

Time given: 1139, IV SITE #1 IVP, Slowly, Catheter placement confirmed via flush prior to administration, IV site without signs or symptoms of infiltration during medication administration. No swelling during administration, drainage during administration, IV flushed after administration, Correct patient, time, route, dose and medication confirmed prior to administration. Patient advised of actions and side-effects prior to administration. Allergies confirmed and medications reviewed prior to administration. Patient in position of comfort. Side rails up, Cart in lowest position, Family at bedside.

*Morphine Sulfate*: Order: Morphine Sulfate – Dose: 4mg milligram(s) : IV

Notes: May repeat X1

Ordered by: Jeff Johnson, PHARMD, PA

Entered by: Jeff Johnson, PHARMD, PA Fri Jun 05, 2009 12:36

Documented as given by: Robyn Harding, RN Fri Jun 05, 2009 12:20

Patient, Medication, Dose, Route and Time verified prior to administration.

Time given: 1220, IV SITE #1 IVP, Slowly, Catheter placement confirmed via flush prior to administration, IV site without signs or symptoms of infiltration during medication administration. No swelling during administration, drainage during administration, IV flushed after administration, Correct patient, time, route, dose and medication confirmed prior to administration. Patient advised of actions and side-effects prior to administration. Allergies confirmed and medications reviewed prior to administration. Patient in position of comfort. Side rails up, Cart in lowest position, Family at bedside.

: *Follow Up* : Decreased pain, On a scale 0–10 patient rates pain as 6, Decreased symptoms.

(12:58 LSA)

*Prochlorperazine Edisylate*: Order: Prochlorperazine Edisylate – Dose: 10 milligram(s) : Slow IV Push

Notes: compazine

Ordered by: Jeff Johnson, PHARMD, PA

Entered by: Jeff Johnson, PHARMD, PA Fri Jun 05, 2009 11:16 .

Acknowledged by: Robyn Harding, RN Fri Jun 05, 2009 11:25

Documented as given by: Robyn Harding, RN Fri Jun 05, 2009 11:41

Patient, Medication, Dose, Route and Time verified prior to administration.

Time given: 1141, IV SITE #1 IVP, Slowly, Catheter placement confirmed via flush prior to administration, IV site without signs or symptoms of infiltration during medication administration. No swelling during administration, drainage during administration, IV flushed after administration, Correct patient, time, route, dose and medication confirmed prior to administration. Patient advised of actions and side-effects prior to administration. Allergies confirmed and medications reviewed prior to administration. Patient in position of comfort. Side rails up, Cart in lowest position, Family at bedside.

**TRIAGE** (Fri Jun 05, 2009 10:47 GST)

**COMPLAINT**: COMPLAINT: Headache.

**PROVIDERS**: TRIAGE NURSE: Gina Sterner, RN, CHARGE NURSE: Wendy Muir, RN.

**ADMISSION**: URGENCY: LEVEL 3, TRANSPORT: Private Vehicle, BED: ED WAIT.

**PATIENT NAME**: Heather M Channell, AGE: 32, GENDER: female, DOB: [REDACTED]

**TIME OF GREET**: Fri Jun 05, 2009 10:43, LANGUAGE: English, RACE:

Prepared: Tue May 11, 2010 09:45 by RSF Page: 4 of 5

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**PORTNEUF MEDICAL CENTER  
PRIMARY**

Chappell, Heather M  
DOB [REDACTED]  
Wt/Ht: 52.2 Kg (est.)  
MedRec: 000255656  
AcctNum: 4125596

---

Caucasian, Ctrl Subst. Caution: Yes, Soc. Work Case Mgmt: Not Managed, KG  
WEIGHT: 52.2 (est.), PHONE: 208240-6839, MEDICAL RECORD NUMBER:  
000255656, ACCOUNT NUMBER: 4125596. PRIMARY CARE: No Doctor.  
*PREVIOUS VISIT ALLERGIES:* No known drug allergies.  
*PAIN:* Triage assessment performed.  
*DOMESTIC VIOLENCE:* No domestic violence.  
*LMP:* Last menstrual period: 5-20-2009.  
*VITAL SIGNS:* BP 163/101, Pulse 100, Resp 16, Temp 98.6, Pain 9, O2 Sat 95, on RA, Time 6/5/2009 10:45.

**Key:**

GST=Sterner, RN, Gina HOLT=Holt,MD, Kurtis JEFF=Johnson, PHARMD, PA, Jeff LSA=Sabel, RN, Linda  
RHAR=Harding,RN, Robyn TAND=Anderson, PA, Terry

Prepared: Tue May 11, 2010 09:45 by RSIF Page: 5 of 5

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Visit History

Portneuf Medical Center

Main | Visits | Chart | Orders | Flowsheet | Med SVC | My Tasks | Results | Dispo | Rx | DCI | My Charts | Archive | Reports | My Mail | Display | All | Help | Logout

\*\*\*\*\* ARCHIVED PATIENT \*\*\*\*\*

Channell, Heather M	Sex/Age: F32	Complaint: Head Pain	Triage: Tue May 12, 2009 19:39	Acuity:
MRN:000255656 Acct: 4116069	Weight: 52.2 kg	Discharge: Tue May 12, 2009 21:16	Disposition:	

Medical Record Number 255656

Patient	Age	Complaint	Diagnosis	ATT	RES	RN	RNX	Triage	Account	Site	Disposition
<input checked="" type="radio"/> Channell, Heather M	F31	Headache	acute cephalgia	SAND	JEFF	LEL		Thu Apr 23, 2009 13:46	4107731		H
<input type="radio"/> Channell, Heather M	F31	Headache	Migraine headache	MMCI		SSI		Mon Apr 27, 2009 16:31	4109062		HCSC
<input type="radio"/> Channell, Heather M	F32	Head Pain	Migraine headache	JEFF		JCOO		Tue May 12, 2009 19:39	4116069		H
<input type="radio"/> Channell, Heather M	F32	Headache	headache	HOLT	JEFF	LSA		Fri Jun 05, 2009 10:47	4125596		H
<input type="radio"/> Channell, Heather M	F32	Head Pain	Cephalgia	OKI		TBAR		Mon Jun 08, 2009 22:44	4126578		H
<input type="radio"/> Hall, Heather M	F32	Headache	recurrent cephalgia likely tension	FAV		TPOP		Mon Jul 06, 2009 17:23	4137328		H
<input type="radio"/> Hall, Heather M	F32	Headache	headache by history	BOZ		DAVE		Tue Jul 07, 2009 11:31	4137585		H
<input type="radio"/> Hall, Heather M	F32	Headache	migraine headache	HOLT		SHMA		Tue Jul 21, 2009 19:10	4143001		H
<input type="radio"/> Hall, Heather M	F32	Headache	Headache	WPA		LEL	TRAV	Wed Aug 19, 2009 13:07	4153490		H
<input type="radio"/> Hall,	F32	Headache	Migraine headache-	EDDI		JCOO		Thu Sep 10,	4161253		HCSC

Heather M		not treated				2009		
						14:59		
						Mon		
<input type="radio"/> Hall, Heather M	F32 Cough	Upper respiratory infection (URI)	FAV	FHS	TSAL	Nov	02, 4179609	H
						2009		
						14:52		
	<input type="button" value="Enter"/>							
								<input type="button" value="Display"/>
11 visits								

Terrence S. Jones, ISB No. 5811  
Tracy L. Wright, ISB No. 8060  
CAREY PERKINS LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
Boise, Idaho 83701  
Telephone (208) 345-8600  
Facsimile (208) 345-8660

2011 AUG 25 PM 9:32  
BY: [Signature]  
DEPUTY CLERK

Attorneys for Defendants

# ORIGINAL

IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

AFFIDAVIT OF RANDALL FOWLER,  
M.D. IN SUPPORT OF DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO            )  
                                      : ss.  
County of Bannock        )

I, Randall Fowler, M.D., having been first duly sworn upon oath, deposes and  
says:

AFFIDAVIT OF RANDALL FOWLER, M.D. IN SUPPORT OF DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT - 1



1. The information and facts specified and recited herein are based upon your Affiant's direct and personal knowledge, and the opinions stated herein are based upon reasonable medical certainty.

2. I am, and at all times alleged in the Complaint was, a physician licensed by the Idaho State Board of Medicine to practice medicine in the State of Idaho. I am board certified in emergency medicine and also am a licensed supervising physician for physician assistants who are employed specifically and solely to work in the Portneuf Regional Medical Center Emergency Room.

3. I am familiar with, and have actual knowledge of, the standard of health care practice applicable to physicians engaged in the medical specialty of emergency medicine in Pocatello, Idaho in 2009 at Portneuf Regional Medical Center, including the standard of health care practice applicable to the supervision of an emergency room physician's assistant such as Jeff Johnson, P.A.

4. I have engaged continuously in the emergency medicine medical specialty in Pocatello, Idaho from 1991 through the present. During my professional career in Pocatello, Idaho, I am and have been acquainted with numerous physicians in Pocatello, Idaho who engage in emergency medicine, the nature and scope of their practice in this emergency medicine specialty, the procedures utilized by them in this specialty in Pocatello, Idaho and their knowledge of evaluating and treating patients similar to the Plaintiff, Heather Hall, including the work up of complaints similar and identical to those she presented with and the requirements and obligations placed upon a supervising physician for a physician assistant in the course of evaluating and treating such patients.

5. During my professional career in Pocatello, Idaho, I have and continue to hold emergency medicine medical staff privileges at Portneuf Regional Medical Center and I have been and I am familiar with the facilities, capabilities and equipment at said institution and have participated in numerous medical staff and quality review meetings at said institution. My practice at all times pertinent to this action consisted of emergency medicine.

6. As it relates to the patient, Heather Hall, I did not directly examine, evaluate or treat her with respect to any of the occasions referred to in the Plaintiff's Complaint. The standard of health care practice to which I am held did not and does not require me to personally see and examine patients with presenting complaints like those encountered with the patient, Heather Hall. As an experienced and competent emergency room physician assistant, Jeff Johnson, P.A. was qualified to evaluate and treat all of the patient's presenting symptoms on each visit referred to in Plaintiff's Complaint. As a supervising physician of Jeff Johnson, P.A., at all times referred to in Plaintiff's Complaint I was entitled to rely upon the evaluation, observations and treatment recommendations by Jeff Johnson, P.A.

7. My involvement with Heather Hall was limited to my role as an emergency room physician in my capacity as a supervising physician of Jeff Johnson, P.A. In that limited capacity, and based on my actual knowledge of the local standard of practice applicable to me as stated herein, it is my opinion and testimony that I complied in all respects with the standard of health care practice applicable to physicians engaged in the medical specialty of emergency medicine in Pocatello, Idaho in 2009, and that the

supervision I provided was consistent with that typically provided by such specialists in the Pocatello, Idaho community served by Portneuf Regional Medical Center.

8. In my capacity as emergency room supervisor of Jeff Johnson, P.A., I am familiar with and have actual knowledge of the standard of health care practice applicable to physician assistants engaged in the medical specialty of emergent medicine and the scope of their practice and care responsibilities in Pocatello, Idaho in 2009. It is also my opinion and testimony that Jeff Johnson, P.A.'s care and treatment of the patient, Heather Hall, which occurred in Pocatello, Idaho, in 2009, on the dates during which Mr. Johnson was under my supervision, complied in all respects with said standard of health care practice. My role as supervisor of Jeff Johnson, P.A. occurred in Pocatello, Idaho in 2009.

9. At all times referred to in Plaintiff's Complaint, I had medical staff privileges at Portneuf Regional Medical Center in Pocatello only for the rendition of emergency treatment of patients that came to the emergency department of Portneuf Regional Medical Center. I did not have medical staff privileges at Portneuf Regional Medical Center to admit patients to this hospital.

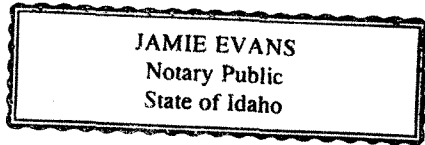
10. At all times referred to in Plaintiff's Complaint, the patient arrived and presented at Portneuf Regional Medical Center where she sought emergency treatment as a result of medical problems which arose before her arrival at Portneuf Regional Medical Center. On each such occasion, the patient, Heather Hall, was treated at the emergency room at Portneuf Regional Medical Center and released. She was never admitted into the hospital and therefore referral to a more knowledgeable physician specialist was never required. At all times referred to in Plaintiff's Complaint, I did not see

the Plaintiff pursuant to an ordinary physician-patient relationship outside of the emergency room setting.


FURTHER your Affiant saith not.

  
\_\_\_\_\_  
Randall Fowler, M.D.

SUBSCRIBED AND SWORN to before me this 18<sup>th</sup> day of August, 2011.



MY COMMISSION EXPIRES  
December 22, 2012  
BONDED THRU NOTARY PUBLIC UNDERWRITERS

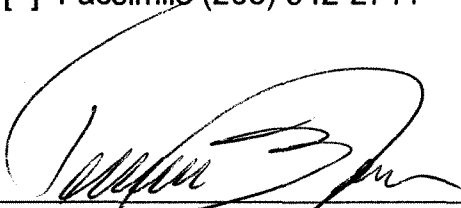
  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at Blaine County Idaho  
My commission expires 12-22-12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of August, 2011, I served a true and correct copy of the foregoing AFFIDAVIT OF RANDALL FOWLER, M.D. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning  
BROWNING LAW  
482 Constitution Way, Suite 111  
Idaho Falls, Idaho 83402  
Telephone (208) 542-2700  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 542-2711

  
\_\_\_\_\_  
Terrence S. Jones

Terrence S. Jones, ISB No. 5811  
Tracy L. Wright, ISB No. 8060  
CAREY PERKINS LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
Boise, Idaho 83701  
Telephone (208) 345-8600  
Facsimile (208) 345-8660

2011 JUL 25 AM 9:32  
BY: [Signature]  
DEPUTY CLERK

Attorneys for Defendants

**ORIGINAL**  
IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

AFFIDAVIT OF KURTIS HOLT, M.D.  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT

STATE OF IDAHO            )  
                                      : ss.  
County of Bannock        )

I, Kurtis Holt, M.D., having been first duly sworn upon oath, deposes and  
says:

1. The information and facts specified and recited herein are based upon your Affiant's direct and personal knowledge, and the opinions stated herein are based upon reasonable medical certainty.

2. I am, and at all times alleged in the Complaint was, a physician licensed by the Idaho State Board of Medicine to practice medicine in the State of Idaho. I am board certified in emergency medicine and also am a licensed supervising physician for physician assistants who are employed specifically and solely to work in the Portneuf Regional Medical Center Emergency Room.

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supervision I provided was consistent with that typically provided by such specialists in the Pocatello, Idaho community served by Portneuf Regional Medical Center.

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9. At all times referred to in Plaintiff's Complaint, I had medical staff privileges at Portneuf Regional Medical Center in Pocatello only for the rendition of emergency treatment of patients that came to the emergency department of Portneuf Regional Medical Center. I did not have medical staff privileges at Portneuf Regional Medical Center to admit patients to this hospital.

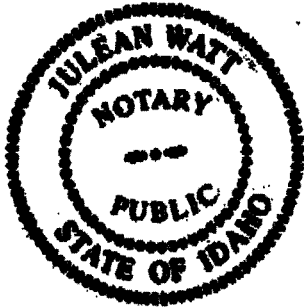
10. At all times referred to in Plaintiff's Complaint, the patient arrived and presented at Portneuf Regional Medical Center where she sought emergency treatment as a result of medical problems which arose before her arrival at Portneuf Regional Medical Center. On each such occasion, the patient, Heather Hall, was treated at the emergency room at Portneuf Regional Medical Center and released. She was never admitted into the hospital and therefore referral to a more knowledgeable physician specialist was never required. At all times referred to in Plaintiff's Complaint, I did not see

the Plaintiff pursuant to an ordinary physician-patient relationship outside of the emergency room setting.

FURTHER your Affiant saith not.

Kurtis R Holt, M.D.  
Kurtis Holt, M.D.

SUBSCRIBED AND SWORN to before me this 22 day of August, 2011.



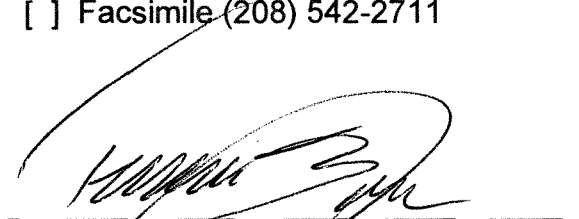
Julean Watt  
Notary Public for Idaho  
Residing at AMMON, Idaho  
My commission expires May 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of August, 2011, I served a true and correct copy of the foregoing AFFIDAVIT OF KURTIS HOLT, M.D. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

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CAREY PERKINS LLP

Attorneys for Defendants

**ORIGINAL**  
IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

MEMORANDUM IN SUPPORT  
OF DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

COME NOW Defendants by and through their counsel of record, Carey Perkins LLP, and hereby submit their memorandum in support of their motion for summary judgment.

**I.**  
**INTRODUCTION**

This is a medical malpractice case. Although not properly pled as a

malpractice case, the allegations against the various Defendants relate solely to the provision of emergency medical care in the Portneuf Medical Center emergency room. As such, the Defendants are entitled to immunity from such claims under Idaho Code § 39-1391(c). Furthermore, to the extent the protections of the immunity provision do not resolve all of the allegations in the Complaint, because all of Plaintiff's claims relate solely to the provision of health care, they are governed solely by Idaho Code §§ 6-1012 and 6-1013.

Plaintiff alleges that veteran emergency room physician assistant Jeff Johnson, while acting within the course and scope of providing emergency medical treatment to the Plaintiff, engaged in an inappropriate touching of the Plaintiff. Plaintiff improperly characterizes the Defendants' conduct as amounting to a battery which resulted in the intentional infliction of emotional distress and an invasion of her privacy. **See** Plaintiff's Complaint at ¶¶ 9-34. Plaintiff further alleges that the Defendant emergency room physicians and their group, Rocky Mountain, were negligent in their supervision of Johnson during his examination and treatment of Plaintiff, and therefore are liable under the theory of negligent supervision and/or respondeat superior. *Id.* at ¶¶ 35-39.

Before the Court is the defense motion for summary judgment. The motion is three-fold. First, pursuant to the express language of Idaho Code § 39-1391(c), all the Defendants are entitled to complete immunity from civil liability arising out of the emergency medical care and treatment to Plaintiff. Second, pursuant to Idaho Code §§ 6-1012 and 1013, there is but one cause of action recognized in Idaho against a licensed health care provider. As a result, the allegations in the Complaint fail to state a claim upon which relief can be granted and must be dismissed. Third, even if the allegations were

deemed sufficient to state a claim for medical negligence under Idaho Code §6-1012, the supporting affidavits of the Defendant health care providers filed herewith are sufficient to shift the burden to the Plaintiff to respond with appropriate expert affidavits in order to establish an issue of fact. Absent appropriate opposing affidavits from the Plaintiff, all of the Defendants are entitled to summary judgment as to all claims as a matter of law.

**II.  
CHRONOLOGICAL SUMMARY OF UNDISPUTED FACTS**

1. Plaintiff presented to the Portneuf Medical Center emergency department on April 23, 2009, complaining of headache. She was treated in the emergency room by Defendant Jeff Johnson, P.A., who after initially trying non-narcotic medications agreed to the Plaintiff's request that she be provided with a limited amount of narcotic pain medication. Plaintiff was new to town and was told to establish care with a primary care provider to work up her headache complaints. See medical records attached to the Aff. Jeff Johnson, P.A. in support of summary judgment.

2. After failing to establish a physician patient relationship with a primary care provider, Plaintiff again presented to the Portneuf Medical Center emergency department on April 27, 2009 with subjective pain complaints without evidence of any trauma. At that time, the patient was seen by a different emergency room provider who documented that he was concerned the patient had presented to the emergency room exhibiting drug seeking behavior. As a result of his observations of the patient, he flagged her records and documented his concern.

3. Plaintiff again presented to the Portneuf Medical Center emergency department on May 12, 2009, with another subjective pain complaint of suffering from a headache. She was again seen and treated in the emergency room where she was seen

by Defendant Jeff Johnson, P.A., The patient again requested to be treated with narcotic pain medication. Plaintiff had failed to establish care with a primary care provider as instructed. Aware of the prior provider's documented drug seeking concern, the patient was provided a very limited amount of narcotic pain medication and again told to establish care with a local provider. *Id.* See also Pl.'s Compl. ¶¶ 10 and 11.

4. Dr. Randall Fowler was the supervising physician on duty in the Portneuf emergency room during Plaintiff's May 12, 2009 visit. As outlined in his supporting affidavit, he did not examine or treat Plaintiff at that time, but he agreed with Johnson's emergency medical treatment and recommendations to the Plaintiff. See Aff. Randall Fowler, M.D.

5. Plaintiff again presented to the Portneuf Medical Center emergency department on June 5, 2009, with another subjective pain complaint that she was suffering from a headache. She was seen and treated in the emergency room by Defendant Jeff Johnson, P.A. The patient again requested additional narcotic pain medication after complaining that non-narcotic pain medication administered by Johnson had not relieved her pain complaints. After reporting pain relief after receiving the narcotic drug morphine, the patient was again provided with a very limited amount of narcotic pain medication tablets and instructed to establish a physician patient relationship with a local provider. See medical records attached to the Aff. Jeff Johnson, P.A. in support of summary judgment.

6. Dr. Kurtis Holt was the supervising physician on duty in the Portneuf emergency room during Plaintiff's May 12, 2009 visit. He did not examine or treat Plaintiff at that time, but he agreed with Johnson's emergency medical treatment and recommendations to the Plaintiff. See Aff. Kurtis Holt, M.D.

7. Several days following the patient's last ER visit outlined above, the Plaintiff attempted to have her pharmacy provide her with an unauthorized prescription refill for the non-refillable narcotic pain medication provided by Johnson on May 12. The Walgreen's pharmacist contacted Terry J. Anderson, PA-C who was on duty at the Portneuf Medical Center emergency room regarding this refill request. As emergency room providers do not provide pain medication refills since the patients are instructed to follow up with their primary health care provider, the refill request was rejected. When this refill was rejected by the Defendants, this Complaint was pursued by the Plaintiff.

### III. STANDARD OF REVIEW

Summary judgment is appropriate where the record shows no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). The principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims. ***Sparks v. St. Luke's Regional Medical Center***, 115 Idaho 505, 768 P.2d 768 (1988). Judgment shall be granted if the non-moving party fails to make a showing sufficient to establish an essential element of the non-moving party's case. ***Foster v. Traul***, 141 Idaho 890, 892, 120 P.3d 278, 280 (2006) (Affirming summary judgment in favor of physician. Defendant's affidavit shifted burden to plaintiffs, and plaintiffs failed to establish any evidence regarding non-compliance with the standard of health care practice).



**IV.  
ARGUMENT**

**A. Pursuant to Idaho Code § 1391(c), the Defendants Are Entitled to Immunity from Civil Liability With Regard to the Allegations in Plaintiff's Complaint.**

Idaho Code § 39-1391(c) provides, in relevant part:

Any licensed physician and surgeon shall be conclusively presumed to be qualified to undertake and to furnish any emergency medical or surgical treatment . . . and in the absence of gross negligence under the existing circumstances, no physician so proceeding nor any hospital where such care and treatment is provided shall be held liable in any civil action arising out of the furnishing of such emergency care and treatment.

**Idaho Code § 39-1391(c).** The statute was enacted “[i]n order to encourage doctors of all specialties and trainings to render emergency medical care and first aid treatment”. *Eby v. Newcombe*, 116 Idaho 838, 840, 780 P.2d 589, 591 (1989). “[T]he Act was meant to provide ‘that a physician rendering emergency treatment or first aid services shall not be subject to liability therefor in the absence of gross negligence.’” *Id.* (quoting 1973 Idaho Sess. Laws ch. 82, P.131).

According to the above-cited authority, no physician rendering emergency medical care may be held subject to civil liability in an action arising out of the provision of such care. In this case, it is undisputed that Defendants were acting in their capacity as emergency care physicians when they provided emergent care to Plaintiff on the dates in question. The affidavits of Dr. Holt, Dr. Folwer and Jeff Johnson, P.A. all state that their limited role with this patient was in their capacity as emergency medical providers working at the emergency room at Portneuf Regional Medical Center. They did not have an

ordinary physician patient relationship as their only relationship was as providers of emergency medicine.

Plaintiff concedes as much in her Complaint. At paragraphs 4 and 5 of her Complaint, Plaintiff states “At all times relevant to this Complaint, [Rocky Mountain Emergency Physicians, L.L.C.] provided the emergency room physicians administering emergency room treatment to walk-in patients, including Plaintiff” . . . “On information and belief, defendants KURTIS HOLT, M.D., RANDALL FOWLER, M.D., and JEFF JOHNSON . . . were employees of Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C., working within the course and scope of their duties for Defendant ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C.”. Thus, it is axiomatic that Defendants, whose only contact with the Plaintiff were in their capacity as emergency medical care providers, are entitled to the statutory immunity protections provided by Idaho Code §39-1391c.

**B. *The Requirements of Idaho Code §§ 6-1012 and 6-1013 Apply to All of Plaintiff's Claims.***

In the alternative, and to the extent the court concludes any of the Defendants do not enjoy the immunity protections outlined above, the Defendants still are entitled to summary judgment. A plaintiff “cannot avoid the requirements of Idaho Code §§ 6-1012 and 6-1013 by claiming his action is based on an intentional tort rather than negligence.” *Litz v. Robinson*, 131 Idaho 282, 284, 955 P.2d 113, 115 (1997). “The form of the action is not the decisive test in actions against physicians, surgeons and dentists for malpractice. The decisive test is the subject of the action.” *Id.* at n.1. Accordingly, “to determine if I.C. § 6-1012 applies, courts need only look to see if the injury occurred on account of the provision of or failure to provide health care.” *Jones v. Crawforth*, 147 Idaho 11, 16, 205

P.3d 660, 665 (2009) (quoting *Hough v. Fry*, 131 Idaho 230, 233, 953 P.2d 980, 983 (1998)) (emphasis in original).

The Idaho Supreme Court case of *Litz v. Robinson* is on point. There, the plaintiff sued two physicians, alleging they had wrongfully withheld life support from his wife. The physicians moved for summary judgment and submitted their own affidavits in support of their motion, which was granted because the plaintiff had not put forth expert testimony in satisfaction of the Idaho Code §§ 6-1012 and 6-1013 requirements. The plaintiff appealed, claiming that Idaho Code §§ 6-1012 and 6-1013 did not apply to his claims, because his cause of action was based on intentional infliction of emotional distress. The Court rejected that reasoning, noting that “significant portions of [the plaintiff’s] cause of action contained language consistent with a claim of negligence.” 955 P.2d at 114. Further, the “underlying nature of [the] claim . . . was inextricably intertwined with a claim of negligence.” *Id.* at 115 (citing to *Trimming v. Howard*, where the Court rejected a plaintiff’s argument that his cause of action against a surgeon was grounded in contract, reasoning that “the basic allegations of the complaint are directed solely to carelessness, negligence and misconduct as the proximate cause of the injury claimed to have been suffered.” 52 Idaho 412, 415-16, 16 P.2d 661, 662 (1932)). Thus, the plaintiff was unable to avoid the statutory requirements applicable to a claim for medical negligence by “artfully labeling his cause of action as a claim for the intentional infliction of emotional distress.” *Id.*

Similarly, in *Hough v. Fry*, the plaintiff had fallen from a balance board during physical therapy, sued her physical therapist, and argued on her appeal from summary judgment that her cause of action was not governed by I.C. §§ 6-1012 and 6-1013,

because it was a claim based on “ordinary negligence” of the therapist in failing to support her while she was on the balance board. 953 P.2d at 983. In rejecting the plaintiff’s argument, the Court observed, “There is nothing in the statute or its statement of purpose to indicate that the type of negligence, ordinary or professional, has anything to do with the application of *Section 6-1012*. Rather, by its plain and unambiguous language, the statute applies when the damages complained of result from providing or failing to provide health care.” *Id.* The Court held that “[t]he act complained of was so directly related to providing [health care] that it cannot be reasonably argued that *Section 6-1012* does not apply.”<sup>1</sup> *Id.*

In the case at bar, as in *Litz* and *Hough*, the underlying nature of the claims against the Defendant health care providers is so “inextricably intertwined” with the health care provided to Plaintiff “that it cannot be reasonably argued” that Idaho Code §§ 6-1012 and 6-1013 do not apply. First, it should be noted (as did the Court in *Hough*) that the very language of Plaintiff’s Complaint in this case demonstrates that her claims are grounded in medical negligence. For example, the allegedly improper conduct occurred “[i]n the course of examining and treating Plaintiff for a headache” and allegedly “did not follow appropriate medical guidelines for treatment” when listening to the patient’s heartbeat. Pl.’s Compl. at ¶¶ 12 and 16. Thus, the Complaint, by its very terms, indicates Plaintiff’s allegations are grounded in medical negligence, which is governed exclusively by Idaho Code §6-1012.

Here, the injuries Plaintiff claims to have suffered arise solely as a result of her interactions with Jeff Johnson in his role as a licensed health care provider treating the patient in the emergency room setting. Mr. Johnson’s contact with Plaintiff was limited to

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<sup>1</sup>The Court found the plaintiff’s appeal argument “frivolous, unreasonable and without foundation,” and awarded attorney fees to the respondents. *Hough v. Fry*, 953 P.2d at 984.

professional consultations and treatment conducted exclusively in a hospital emergency department setting for the purpose of providing health care. See Aff. Jeff Johnson, P.A. Accordingly, all Plaintiff's alleged injuries, if any, would have necessarily "occurred on account of the provision of or failure to provide health care." See Idaho Code § 6-1012. Therefore, Plaintiff's intentional tort claims are superceded by the dictates of and the exclusive remedy provided under Idaho Code § 6-1012 and must therefore be dismissed.

Furthermore, Plaintiff's negligent supervision and respondeat superior claims against the Defendant physicians and the Rocky Mountain Group are entirely derivative of her improperly pled intentional tort claims. Thus, because Plaintiff's claims arising out of the care and treatment provided by Jeff Johnson are grounded in medical negligence, so too would be any negligent supervision and respondeat superior claims against these Defendants. All such claims are therefore subject to the expert witness requirements of Idaho Code §§ 6-1012 and 6-1013. For these reasons, the Plaintiff's Complaint and all causes of action set forth therein fail to state a claim upon which relief can be granted under Idaho law and must be dismissed.

**C. *Summary Judgment for the Defendant Health Care Providers is Appropriate Where Plaintiff Fails to Comply with the Requirements of Idaho Code § 6-1012.***

Even if the court were to allow the Complaint to be amended to state a claim grounded in medical negligence, the Defendants are still entitled to summary judgment in the absence of any expert testimony to support Plaintiff's case. It is well settled law in Idaho that to avoid summary judgment in a medical malpractice case, a plaintiff must produce expert testimony showing a breach of the applicable standard of health care practice consistent with the requirements of Idaho Code § 6-1012. This section sets forth

the "Proof of Community Standard of Health Care Practice in Malpractice Case" and states:

In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of any matter incidental or related thereto, 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 and surgeon, hospital or other such health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases 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. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licenses general hospital at or nearest to which such care was or allegedly should have been provided.

(Emphasis added.) Concisely stated, this statutes places the burden on a Plaintiff to

prove, through expert opinion testimony, that the Defendant health care providers failed to meet the applicable standard of health care practice of the local community. **Strode v. Lenzi**, 116 Idaho 214, 775 P.2d 106 (1989); **Dekker v. Magic Valley Regional Medical Center**, 115 Idaho 332, 766 P.2d 1213 (1988); **Kunz v. Miciak**, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990); **Dulaney v. St. Alphonsus Regional Medical Center**, 137 Idaho 160, 164, 45 P.3d 816 (2002); **Foster v. Traul, supra.**; **Ramos v. Dixon**, 144 Idaho 32, 156 P.3d 533 (2007); and **McDaniel v. Inland Northwest Renal Care**, 144 Idaho 219, 159 P.3d 856 (2007).

The Plaintiff is thus required to present expert testimony if her claim is to survive a Motion for Summary Judgment. **Hough v. Fry**, 953 P.2d at 983. In order to create an issue of fact as to the medical care and treatment rendered by the Defendant health care providers, Plaintiff is, therefore, required to submit the testimony of an appropriate expert which conforms with the requirements outlined under Idaho Code §6-1012 and as set forth by the Idaho Supreme Court in **Dulaney v. St. Alphonsus Regional Medical Center**. According to **Dulaney**:

To avoid summary judgment for the defense in a medical malpractice case, the plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice. In order for such expert testimony to be admissible, the plaintiff must lay the foundation required by Idaho Code § 6-1013. To do so, the plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to

which his expert opinion testimony is addressed.

The applicable community standard of care is defined in Idaho Code § 6-1012. It is: (a) the standard of care for the class of health care provider to which the defendant belonged and was functioning, taking into account the defendant's training, experience, and fields of medical specialization, if any; (b) as such standard existed at the time of the defendant's alleged negligence; and (c) as such standard existed at the place of the defendant's alleged negligence.

Rule 56(e) of the Idaho Rules of Civil Procedure imposes additional requirements upon the admission of expert medical testimony submitted in connection with a motion for summary judgment. The party offering such evidence must show that it is based upon the witness' personal knowledge and that it sets forth facts as would be admissible in evidence. The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e).

An expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time. The expert must also state how he or she became familiar with that standard of care. . . .

45 P.3d at 816 (citations omitted).

In this case, Jeff Johnson, P.A., Dr. Holt and Dr. Fowler have each filed Affidavits which set forth their actual knowledge of the applicable local standard of health care practice applicable to emergency medical providers. These affidavits state that the care and treatment of the Plaintiff by the Defendant health care providers complied in all respects with the applicable local community standard of health care practice for Pocatello,



Idaho, in 2009. Accordingly, said Affidavits establish the elements required by Idaho Code §§ 6-1012 and 1013, as well as Rule 56(e) and are sufficient to shift the burden of proof to the Plaintiff to respond.

In the event the first two arguments of the defense set forth above do not resolve this case, the Plaintiff must then respond with expert Affidavits consistent with the requirements of *Dulaney* outlined above. In the absence of qualified expert opinion testimony to rebut the opinions advanced by the Defendant health care providers, the Plaintiff cannot, as a matter of law, establish a *prima facie* case. Under such circumstances, all of the Defendants would again be entitled to summary Judgment on all counts.

## V. CONCLUSION

Idaho Code § 39-1391(c) was created by the Idaho legislature to provide emergency care providers like the Defendants with immunity from civil claims for damages such as those being advanced by Plaintiff.

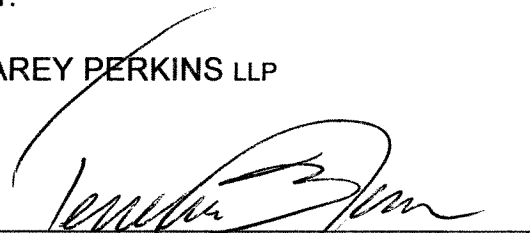
To the extent the Court deems this statute does not fully resolve this case, Idaho Courts have unambiguously indicated that a Plaintiff cannot avoid the requirements of Idaho Code §§ 6-1012 and 6-1013 by “artfully labeling [her] cause of action” as an intentional tort as it is the “subject of the action” which controls. *Litz*, 955 P.2d at 114 and at n.1. Because Plaintiff has no cause of action against the Defendants which does not arise out of the provision of health care, Idaho Code §§ 6-1012 and 6-1013 apply. As a result, under Idaho Law there can be only one cause of action in this case against the Defendants, namely one based on malpractice. As a result, pursuant to Rule 12(b), Plaintiff’s Complaint fails to state a claim and should be dismissed.

Finally, if the Complaint is allowed to be reformed or otherwise deemed to state a claim for malpractice, Plaintiff is required to produce expert testimony in support of her claims against the Defendants. In the absence of an appropriate affidavit from a qualified expert which meets the requirements outlined above, Plaintiff cannot make a prima facie case. Under such circumstances, the Defendant health care providers would all be entitled to summary judgment as a matter of law on all courts in the Plaintiff's Complaint.

DATED this 23<sup>rd</sup> day of August, 2011.

CAREY PERKINS LLP

By

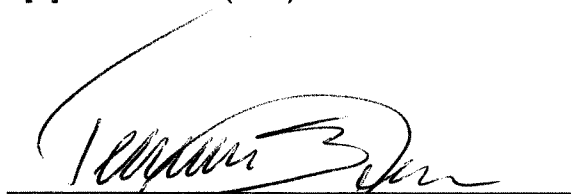
  
Terrence S. Jones, of the Firm  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of August, 2011, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

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Terrence S. Jones

FILED  
BANNOCK COUNTY  
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2011 SEP 15 AM 9:19

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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HEATHER HALL,	)	Case No.: CV-2011-1740
	)	
Plaintiff,	)	
	)	
ROCKY MOUNTAIN EMERGENCY	)	MEMORANDUM IN
PHYSICIANS, L.L.C. and KURTIS HOLT M.D.,	)	OPPOSITION TO
and RANDALL FOWLER, M.D.,	)	DEFENDANTS' MOTION
and JEFF JOHNSON	)	FOR SUMMARY
	)	JUDGMENT
	)	
Defendants.	)	
	)	

COMES NOW, Plaintiff Heather Hall, by and through her attorney of record, Allen H. Browning, BROWNING LAW, and hereby presents this Memorandum in Opposition to Defendants' Motion for Summary Judgment. The Affidavit of Dr. David Bowman and Affidavit of Heather Hall are filed contemporaneously herein.

**BACKGROUND (from the Affidavit of Heather Hall)**

On or about June 5, 2009, Plaintiff was suffering severe headaches and sought treatment at Portneuf Medical Center emergency room. Plaintiff sought treatment during the day, when she believed Jeff Johnson would not be present, due to his prior improper conduct toward her.

At that time Kurtis Holt, M. D., was the physician of duty. He allowed a physician's assistant he was supervising, Defendant Jeff Johnson, to examine and treat Plaintiff for a headache.

During the June 5, 2009, visit, Plaintiff explained that she had more headaches the night before. Johnson told her to undress from the waist up, but Plaintiff kept her bra on and put on a hospital gown. Johnson stated he needed to check her heartbeat and that he would have to go under her bra wire as it was in the way. Without consent, Johnson then completely lifted Plaintiff's bra up and over, exposing her left breast, looked under her gown and brushed his hand over her left nipple, then continued with the stethoscope while resting his hand on her left breast for approximately 15-20 seconds, while claiming to check her heartbeat.

These actions were unnecessary and consented and did not follow appropriate medical guidelines for treatment.

The actions were outrageous, an extreme deviation from reasonable conduct, and caused Plaintiff severe emotional distress, pain and suffering and humiliation.

The affidavits of Dr. Kurtis Holt, Dr. Randall Fowler and Jeff Johnson fail to address the conduct alleged by Heather Hall. They are woefully inadequate in this case and should be stricken. Not one of the three affidavits produced by the defense addresses the specific conduct alleged by Heather Hall at paragraph 15 of her complaint, the forcibly removing her bra, looking at her breasts and groping of her breast by Jeff Johnson when she was sitting on an exam table to be treated for a headache. The defendants' affidavits are all conclusory and ignore the actual allegations. For that reason, the defendants have failed to produce facts in their favor in this case.

Plaintiff, however, has produced affidavits which address the specific conduct and the standard of care in this case.

## STANDARD FOR SUMMARY JUDGMENT

Summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Nelson v. Anderson Lumber Company*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. *Id.* The trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 976, P.2d 154, 156 (Ct. App. 1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997); *Eliopoulos v. Know*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). In a medical malpractice case, if a defendant seeks summary judgment, "the supporting affidavits or other evidence must show that there is no genuine issue of material fact. *Pearson v. Parsons*, 114 Idaho 334, 338, 757 P.2d 197, 201 (1988).

Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders*, 125 Idaho at 874, 876 P.2d at 156.

## **ARGUMENT**

### **I. There is a Genuine Issue of Material Fact that Defendants Breached the Applicable Community Standard of Care.**

There is a genuine issue of material fact, supported by expert opinion, that physician assistant Jeff Johnson and his employer, Defendant Rocky Mountain Emergency Physicians, LLC, breached the applicable community standard of care in this case.

Plaintiff must, as an essential part of her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that the Defendant:

1. negligently failed to meet the applicable standard of health care practice
2. of the community in which such care allegedly should have been provided
3. as such standard existed at the time and place of the alleged negligence of such hospital
4. with respect to the class of health care provider that such defendant belonged to and in which capacity it was functioning.

I.C. § 6-1012.

The standard to be examined is that of a physician administering emergency care to a patient suffering headaches in Pocatello, Idaho, in 2009.

This is established by the Affidavit of Dr. David Bowman. He states in his affidavit that

- (a) he is qualified to administer emergency care in Idaho Falls, Idaho, and has been for many years.
- (b) He has toured the emergency room at Portneuf Medical Center in Pocatello, Idaho, and their standard of care of treatment is the same as that in Idaho Falls, Idaho,
- (c) He also knows the standard of care in Pocatello, Idaho, for emergency room treatment is the same in Pocatello, Idaho, as it is in Idaho Falls, Idaho, because he had a former employee work for him that had emergency room privileges in Pocatello, Idaho, and confirmed that with him;
- (d) He spoke to a physician in Pocatello, Idaho, who is qualified to render emergency room treatment to patients in Pocatello, Idaho, who confirmed to him that the treatment Heather Hall describes in her complaint as occurring on June 5, 2009, would not have met the standard of care required of a doctor administering emergency room treatment in Pocatello at that time.
- (e) He states in his affidavit:

“Idaho Code Section 54-1814 states the basic grounds for discipline against physicians and surgeons, and also applies to physician assistants:

**“Grounds for medical discipline.** Every person licensed to practice medicine, licensed to practice as a physician assistant or registered as an extern, intern or resident in this state is subject to discipline by the board pursuant to the procedures set forth in this chapter and rules promulgated pursuant thereto upon any of the following grounds ... **(22) Engaging in any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient.”**

Every doctor in Idaho, whether an emergency room physician, physician assistant or otherwise, knows that fondling a patient in the course of medical examination or treatment violates this section of the Idaho Code

and subjects him or his physician assistant to discipline if he engages in it.”

*Affidavit of Dr. David Bowman, Para. 6.*

Dr. Bowman then gives his opinion, which he does in fact hold, for this case:

7. Based upon my knowledge of the standard of care required of emergency room physicians in Pocatello, and my review of the medical records and the complaint of Heather Hall in this case, I have formed an opinion concerning whether this standard was actually met, and I actually hold this opinion.

8. The opinions I hold are based upon a reasonable degree of medical certainty.

9. That said, it is my opinion that the treatment given by Jeff Johnson to Heather Hall, as described in paragraph 15 of her complaint, on June 5, 2009, failed to meet the standard of care of physicians and physicians’ assistants in Pocatello in June of 2009. The activity described would be far, far beneath the standard of care expected of any health care provider in Pocatello, whether in an emergency room or otherwise.

10. It is further my opinion that if Heather Hall’s report of what occurred on June 5, 2009, is accurate, Jeff Johnson’s conduct would probably have caused the “severe emotional distress, pain and suffering and humiliation” which Heather Hall ascribes to his conduct.

*Affidavit of Dr. David Bowman, para. 7-10.*

Under I. C. § 6-1013, the applicable standard of practice and the defendants’ failure to meet it must be established by expert witness testimony, upon a proper foundation being laid. To lay a proper foundation, it must be established that:

(a) such an opinion is actually held by the expert witness,  
(b) that the said opinion can be testified to with reasonable medical certainty, and  
(c) that such expert witness possess professional knowledge and expertise coupled with the actual knowledge of the community standard to which his or her expert opinion testimony is addressed.

*Id.* See also, *Shane v. Blair*, 139 Idaho 126, 75 P.3d 180 (2003); *Dulany v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002). A competent expert who



resides elsewhere may familiarize herself with the standards of practice of a particular area prior to rendering an opinion. I.C. § 6-1013. The Affidavit of Dr. David Bowman, submitted herewith, meets the requirements of I.C. §§ 6-1012 and 6-1013 for purposes of this summary judgment determination, creating a genuine issue of material fact. Therefore, summary judgment should be denied.

**II. There are facts present which disentitle Defendants to immunity under I.C. Section 39-1391c.**

As to whether the conduct of Jeff Johnson, described in Heather Hall's complaint and affidavit, rises to the level of "gross negligence," which prevents the defendant from immunity for emergency treatment under I.C. Section 39-1391c, such is a question of fact. The defendants in this case are actually trying to get "double mileage" out of the idea that this Plaintiff appeared for treatment in an emergency room, even though physicians treat patients for headaches outside of emergency rooms every day.

The defendants in this case urge they should be held to an "emergency room" standard of care. Fair enough. Idaho Doctors can't grope patients whether in or out of the emergency room, and they are subject to discipline if they do. *Affidavit of Dr. David Bowman*, para. 6.

Whether this breach of the standard of care sinks to the level of "gross negligence" is a question of fact.

The affidavits of Heather Hall describing groping in the course of diagnosing and treating a headache, and Dr. David Bowman's affidavit stating unequivocally that Jeff Johnson's alleged conduct was far beneath the standard of care required of a physician rendering emergency treatment in Pocatello, Idaho, the Plaintiff has met her burden to

show that this case should proceed to trial. There is evidence present in this case to demonstrate the defendants are not entitled to immunity under Idaho Code Section 39-1391c.

**PRAYER FOR RELIEF**

Plaintiff respectfully requests the Defendants' Motion for Summary Judgment be denied in all respects.

DATED this 14th day of September, 2011.



Allen H. Browning  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of September, 2011, a true and correct copy of the foregoing was delivered to the following attorney of record by placing same in the U.S. mail in a postage-paid envelope, hand delivery, or facsimile.

Terrence S. Jones, ISB No. 5811  
Carey Perkins LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
Boise, Idaho 83701

U.S. Mail  
 Facsimile 208-345-8660  
 Express Mail



Allen H. Browning

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BY DW  
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Allen Browning ISB #3007  
BROWNING LAW  
482 Constitution Way, Ste. 111,  
Idaho Falls, ID 83402  
Telephone: (208) 542-2700  
Facsimile: (208) 542-2711

Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

Heather Hall, )  
Plaintiffs, )  
vs. )  
ROCKY MOUNTAIN EMERGENCY )  
PHYSICIANS, L.L.C. and KURTIS HOLT )  
M.D., and RANDALL FOWLER, M.D., and )  
Jeff Johnson, )  
Defendants. )

Case No. CV-2011-1740-PI

**AFFIDAVIT OF DR. DAVID BOWMAN**

STATE OF UTAH )  
 ) s.s.  
COUNTY OF Utah )

COMES NOW DR. DAVID BOWMAN, who after being duly sworn upon his oath,  
deposes and states:

1. That I am a physician licensed in Idaho and have been licensed in Idaho since 1997.
2. I have practiced in Idaho Falls since that time and I am familiar with the standard of care of physicians practicing in Pocatello in the year 2009. I am familiar with the standard of care necessary in Pocatello that was required for Jeff Johnson to

**AFFIDAVIT OF DR. DAVID BOWMAN**

PAGE 1

carry out his duties as to Heather Hall in examining and treating her in May and June 2009.

3. That I am familiar with the standard of care of physicians practicing in Pocatello, Idaho, and know first-hand the applicable standard of care for physicians and physicians' assistants practicing in Pocatello, Idaho, in May 2009 and June 2009 which are relevant to the accusations made by Plaintiff Heather Hall in this case.
4. That I have reviewed the complaint in this case, the medical records of Heather Hall for May and June of 2009.
5. I believe I possess the requisite background and knowledge and expertise to render an opinion concerning whether the treatment given by physicians' assistant Jeff Johnson to Plaintiff Heather Hall met or failed to meet the applicable standard of health care practice of the community of Pocatello, Idaho, as such standard existed at the time and place of the alleged negligence of the physicians and physician's assistant in this case, as such standard then and there existed with respect to physicians and physicians' assistants operating or functioning in Jeff Johnson's capacity.
6. I became familiar with the standard of care for emergency treatment in Pocatello as follows:
  - a. I previously hired a doctor from Pocatello to work for me, and he had emergency room privileges in Pocatello. Through him, I became aware the standard of care of emergency room treatment in Pocatello was the same as the standard of care of emergency room treatment in Idaho Falls.

b. I have evaluated the emergency room at Portneuf Medical Center, and the standard of care in use there was the same as the standard of care in Idaho Falls, and I am qualified to treat patients in the emergency room in Idaho Falls at EIRMC, and have been so qualified for many years, and have been familiar with the standard of care of emergency room doctors in Idaho Falls for many years.

c. Prior to signing this affidavit, I personally spoke to another medical doctor in Pocatello who also has privileges to practice emergency medicine in Pocatello. I described the conduct to that physician which Heather Hall described in her complaint in this case which she states occurred on or about June 5, 2009, and asked him if that conduct met the conduct expected of a doctor seeing a patient in the ER in a Pocatello hospital for a headache. He stated that it did not.

*Dr. Wise*

d. I have been told that none of the defendants in this case, who all practice emergency medicine in Pocatello, have stated in their affidavits that the conduct described in Heather Hall's complaint as occurring on June 5, 2009, met the standard of care expected of physicians practicing emergency medicine in Pocatello, Idaho. I am sure they could not; as such a contention would be utter nonsense.

*Dr. Wise*

e. Idaho Code Section 54-1814 states the basic grounds for discipline against physicians and surgeons, and also applies to physician assistants:

**AFFIDAVIT OF DR. DAVID BOWMAN**

PAGE 3


**“Grounds for medical discipline. Every person licensed to practice medicine, licensed to practice as a physician assistant or registered as an extern, intern or resident in this state is subject to discipline by the board pursuant to the procedures set forth in this chapter and rules promulgated pursuant thereto upon any of the following grounds ... (22) Engaging in any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient.”**

Every doctor in Idaho, whether an emergency room physician, physician assistant or otherwise, knows that fondling a patient in the course of medical examination or treatment violates this section of the Idaho Code and subjects him or his physician assistant to discipline if he engages in it.

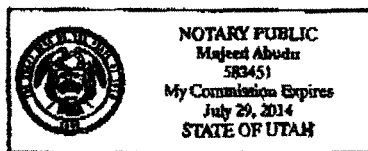
7. Based upon my knowledge of the standard of care required of emergency room physicians in Pocatello, and my review of the medical records and the complaint of Heather Hall in this case, I have formed an opinion concerning whether this standard was actually met, and I actually hold this opinion.
8. The opinions I hold are based upon a reasonable degree of medical certainty.
9. That said, it is my opinion that the treatment given by Jeff Johnson to Heather Hall, as described in paragraph 15 of her complaint, on June 5, 2009, failed to meet the standard of care of physicians and physicians' assistants in Pocatello in June of 2009. The activity described would be far, far beneath the standard of care expected of any health care provider in Pocatello, whether in an emergency room or otherwise.


10. It is further my opinion that if Heather Hall's report of what occurred on June 5, 2009, is accurate, Jeff Johnson's conduct would probably have caused the "severe emotional distress, pain and suffering and humiliation," which Heather Hall ascribes to his conduct.

DATED this 14 day of September, 2011.

  
\_\_\_\_\_  
Dr. David Bowman

SUBSCRIBED AND SWORN to before the undersigned on this 14<sup>th</sup> day of September, 2011 by Dr. David Bowman, who swore or affirmed the information in this affidavit was true and correct and known to him by first hand information.



  
\_\_\_\_\_  
NOTARY PUBLIC FOR UTAH  
Residing at Ammon Fork, Utah,  
My Commission Expires: 07/29/2014

CERTIFICATE OF SERVICE

I hereby certify that on this 14<sup>TH</sup> day of September, 2011, a true and correct copy of the foregoing *AFFIDAVIT OF DR. DAVID BOWMAN* was served upon the following person(s) by the method indicated below:

Terrence S. Jones,  
Carey Perkins, LLP

[X] By Facsimile No. (208) 345-8660

CLERK OF THE COURT  
Bannock County Court

[X] By Facsimile No. (208) 236-7013

  
\_\_\_\_\_  
ALLEN H. BROWNING

**AFFIDAVIT OF DR. DAVID BOWMAN**  
PAGE 5

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BY [Signature]  
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Allen Browning ISB #3007  
BROWNING LAW  
482 Constitution Way, Ste. 111,  
Idaho Falls, ID 83402  
Telephone: (208) 542-2700  
Facsimile: (208) 542-2711

Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

Heather Hall, )  
Plaintiffs, )  
vs. )  
ROCKY MOUNTAIN EMERGENCY )  
PHYSICIANS, L.L.C. and KURTIS HOLT )  
M.D., and RANDALL FOWLER, M.D., and )  
Jeff Johnson, )  
Defendants. )

Case No. CV-2011-1740-PI

**AFFIDAVIT OF HEATHER HALL**

STATE OF IDAHO )  
COUNTY OF Bannock ) s.s.


COMES NOW HEATHER HALL, who after being duly sworn upon his oath, deposes  
and states:

1. That I am the Plaintiff in this action.
2. I sought treatment at the emergency room of Portneuf Medical Center in May and June 2009 for headaches. My attorney was later told that Defendant Rocky Mountain Emergency Physicians, L.L.C., was the company responsible for emergency room treatment at Portneuf Medical Center; for this reason he named this company as a defendant.



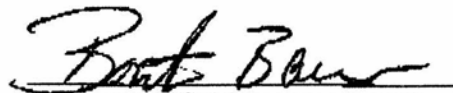
3. When I went in for treatment in May, I was treated by physician assistant Jeff Johnson. In the course of treating me, I believed he engaged in inappropriate conduct, as I described in my complaint filed in this action.
4. On or about June 5, 2009, I was again suffering severe headaches and sought treatment at Portneuf Medical Center emergency room. I sought treatment during the day, when I believed Jeff Johnson would not be present, as I did not want to deal with Mr. Johnson.
5. At that time, Kurtis Hold, M.D., was the physician on duty. He allowed Defendant Jeff Johnson to examine and treat me for my headache. During that visit, I explained that I had more headaches the night before. Johnson told me to undress from the waist up, but I kept my bra on and put on a hospital gown. Johnson stated he needed to check my heartbeat and that he would have to go under my bra wire as it was in the way. Without consent, Johnson then completely lifted my bra up and over, exposing my left breast, looked under my gown and brushed his hand over my left nipple, then continued with the stethoscope while resting his hand on my left breast for approximately 15-20 seconds, while claiming to check my heartbeat.
6. I was shocked by this treatment. It was unnecessary, invasive and terribly disturbing to me. I felt terribly violated.
7. The actions of Jeff Johnson did cause me severe emotional distress, pain and suffering and humiliation.

DATED this 14<sup>th</sup> day of September, 2011.

  
Heather Hall

SUBSCRIBED AND SWORN to before the undersigned on this 14<sup>th</sup> day of September, 2011 by Heather Hall, who swore or affirmed the information in this affidavit was true and correct and known to her by first hand information.



  
NOTARY PUBLIC FOR IDAHO  
Residing at Bannock, Idaho,  
My Commission Expires: September 30, 2016  
BONDED THRU NOTARY PUBLIC UNDERWRITERS

CERTIFICATE OF SERVICE

I hereby certify that on this 14<sup>TH</sup> day of September, 2011, a true and correct copy of the foregoing *AFFIDAVIT OF HEATHER HALL* was served upon the following person(s) by the method indicated below:

Terrence S. Jones,  
Carey Perkins, LLP

By Facsimile No. (208) 345-8660

CLERK OF THE COURT  
Bannock County Court

By Facsimile No. (208) 236-7013

  
ALLEN H. BROWNING

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Tracy L. Wright, ISB No. 8060  
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BY  DEPUTY CLERK

Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

DEFENDANTS' REPLY BRIEF IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT

I.  
INTRODUCTION

This brief is submitted in support of Defendants' motion for summary judgment scheduled to be heard on September 26. This reply brief is submitted less than seven days before the hearing date, however, it is submitted timely consistent with the Plaintiff's counsel's request (which defense counsel granted) for additional time to

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT - 1

*NYE*

complete his responsive materials. Plaintiff's excused delay resulted in defense counsel getting Plaintiff's response materials less than 14 days before the hearing date and needing until now to prepare this reply brief. It is defense counsel's understanding that the parties are not advancing any objections as to the timeliness of the briefing and affidavits currently before the Court.

Although this a case sounding in medical malpractice, as all claims arise out of the provision of emergency medical care, it has not been pled as such. Instead, Plaintiff improperly pled her claims as an intentional tort case. Despite Defendants having briefed this issue extensively during their opening brief, Plaintiff's response materials do not address at all the improperly pled intentional tort claims. Presumably, Plaintiff's silence serves as her concession that the intentional tort claims are improper and that her complaint should therefore be dismissed entirely and/or somehow converted into another cause of action. However, as the Plaintiff's complaint does not contain any counts alleging medical malpractice, once the intentional tort claims have been dismissed the defense contends that this case is effectively over.

Even if a medical malpractice claim had been advanced, to allow any such amendment to the pleadings would be futile as the Defendants would still be entitled to summary judgement for two distinct reasons advanced herein: First, the affidavits submitted by Plaintiff lack foundation, are inadmissible and therefore are insufficient to create a genuine issue of material fact. Even setting aside the foundational objections, none of the Plaintiff's affidavits even mention Dr. Fowler. As a result, his motion for summary judgment remains entirely unopposed. Second, as emergency room health care providers, all of the Defendants remain entitled to the immunity protections provided by

Idaho Code § 39-1391c. As a result, the Defendants are globally entitled to summary judgment as to all of Plaintiff's claims.

## II. ARGUMENT

### A. ***Since Plaintiff's Claims Are Governed by Idaho's Medical Malpractice Act, Her Intentional Tort Claims Should Be Dismissed.***

The requirements of Idaho Code §§ 6-1012 and 6-1013 apply to “any case, claim or action for damages due to injury...brought against any physician...” **See** Idaho Code § 6-1012. Thus, any claim brought against a health care provider must be pled as a medical malpractice claim. **See *Litz v. Robinson***, 131 Idaho 282, 284, 955 P.2d 113, 115 (1997); ***Hough v. Fry***, 131 Idaho 230, 233, 953 P.2d 980, 983 (1998). As discussed in Defendants’ opening memorandum, Idaho Courts have unambiguously indicated that a Plaintiff cannot avoid the requirements of Idaho Code §§ 6-1012 and 6-1013 by “artfully labeling [her] cause of action as a claim for the intentional infliction of emotional distress.” 955 P.2d at 114. Likewise, nor can she avoid those requirements by labeling her cause of action as some other intentional tort.

Plaintiff’s response briefing and affidavits are surprisingly silent on this critical issue. Plaintiff has not provided the Court with any argument or case authority to support the position that her claims for battery, intentional and/or negligent infliction of emotional distress and invasion of privacy are anything other than an “artful” attempt to avoid the requirements of Idaho Code §§ 6-1012 and 6-1013. Given the complete absence of any briefing regarding this issue, Defendants contend these claims should be deemed unopposed for purposes of ruling on the pending motion for summary judgment.

As such, Defendants contend they are entitled to an order granting summary judgment as to all claims contained within the complaint, including the derivative claims for negligent supervision and respondeat superior. Because Plaintiff has not alleged any claims for medical malpractice in her Complaint, any such issues are not properly before the Court for further consideration.

**B. *Plaintiffs' Expert Affidavit for Dr. Bowman Lacks Foundation and Is Inadmissible as a Matter of Law pursuant to Rule 56(e).***

Despite the fact that the complaint fails to include a claim based on an alleged violation of the standard of practice, Plaintiffs have perplexingly submitted the affidavit of Dr. Bowman in opposition to the defense motion. As the affidavit of Dr. Bowman is not responsive to any of the intentional tort allegations contained within the Plaintiff's complaint, it is not relevant and should not be considered by this court. Even if the Plaintiff's complaint did set forth a claim based on the Defendants' alleged failure to comply with the applicable standard of practice, the affidavit of Dr. Bowman is inadmissible and therefore fails to establish an issue of fact for the reasons set forth below.

In order for Dr. Bowman's opinions to be admissible as required by Rule 56(e) and Idaho Code § 6-1013(1)c, Dr. Bowman was required to demonstrate that he has actual knowledge of the Pocatello standards of health care practice applicable to the Defendants as emergency room physicians and emergency room physician assistants. To be admissible, an affidavit opposing summary judgement must "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). "Admissibility of expert testimony requires personal knowledge." *Shane v. Blair*, 139 Idaho 126, 129, 75 P.3d 180, 183

(2003). The question of admissibility of affidavits under Rule 56(e) is a “threshold question to be analyzed before applying the liberal construction and reasonable inferences rules when reviewing motions for summary judgment.” *Rhodehouse v. Stuttz*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994).

Experts testifying as to the standard of practice in medical malpractice actions must show that they have familiarized themselves with the standard for a particular profession for the relevant community and time. *Perry v. Magic Valley Reg’l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000) (citing *Kolln v. St. Luke’s Reg’l Med. Ctr.*, 130 Idaho 323, 331, 940 P.2d 1142, 1150 (1997)). They must also state how they became familiar with the standard of practice for the particular health care professional. *Id.* “The witness must demonstrate a knowledge acquired from experience or study of the standards of the speciality of the defendant physician sufficient to enable him to give an expert opinion as to the conformity of the defendant’s conduct to those particular standards. . .” *Dulaney v. St. Alphonsus Reg’l Med. Ctr.*, 137 Idaho 160, 168, 45 P.3d 816, 824 (2002). One approved means for an out-of-area expert to obtain knowledge of the local standard of care is by inquiring of a local specialist. *Perry v. Magic Valley Reg’l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000) (citing *Watts v. Lynn*, 125 Idaho 341, 347, 870 P.2d 1300, 1306 (1994)).

With the foregoing authorities as a guide, we turn to the affidavit of Dr. Bowman which is woefully lacking in foundation. First, his affidavit demonstrates that he is not a Pocatello area physician, nor is there anything in his affidavit which states what type of physician he is at all. **Aff. Dr. David Bowman ¶ 2** (Sept. 14, 2011). Second, Dr. Bowman’s affidavit simply states that he is a doctor without stating what his specialty is.

It is unknown if he is a doctor of osteopathy, whereas the defense physicians are medical doctors and/or physician assistants who specialize in emergency medicine. Third, without knowing what his specialty is, there is nothing in his affidavit which states what he did to learn the applicable standards in place as to each of the Defendants for the time period of May and June 2009. Without all of this missing information, his affidavit lacks foundation and is inadmissible under Rule 56(e).

Before Dr. Bowman's opinions could be admissible, he must first set forth precisely what he did in order to familiarize himself with the standard of health care practice applicable to the Defendants. His affidavit fails to do this. Instead, Dr. Bowman's affidavit suggests he obtained some level of knowledge from a secret consultant who allegedly had ER privileges at some unknown time period at some unknown location somewhere in Pocatello. The above authorities make it clear that Dr. Bowman's actions to learn the local standard are insufficient. He cannot rely on a "familiarizing physician" without showing that the familiarizing physician has actual knowledge of the applicable standard of health care practice for Pocatello in 2009 as it applied to the Defendant physician's assistant and emergency room physicians. The supreme court's recent decision in ***Suhadolnik v. Pressman***, 254 P.3d 11 (2011) is both instructive and controlling on this issue.

1. ***Plaintiff's Use of Un-named Familiarizing Physicians Is Insufficient to Impart Actual Knowledge of the Local Standard of Practice Required by Idaho Code § 6-1012.***

Dr. Bowman's reliance on secret familiarizing physicians is *per se* inadequate. The Idaho Supreme Court ***Grover v. Smith*** indicated that the use of anonymous familiarizing experts, standing alone, is not an acceptable means of demonstrating knowledge of the applicable standard of health care practice. 137 Idaho



247, 251, 46 P.3d 1105, 1109 (2002). In that dental malpractice case, the plaintiff's expert contacted anonymous local practitioners and one named non-local practitioner (Dr. Wilcox). The Court noted that, "standing alone, Dr. Wilcox and anonymous dentists would be insufficient to meet the requirements of I.C. § 6-1013." *Id.*

For obvious reasons, Dr. Bowman's vague reference to "a doctor in Pocatello" and "another medical doctor in Pocatello" are similarly insufficient to meet the statutory requirements for expert witness foundation. **Aff. Dr. David Bowman** ¶¶ 6(a) and 6(c). That is, the Court cannot glean from such statements whether the anonymous familiarizing physicians themselves have actual knowledge of the standard of health care practice applicable to the Defendants for the pertinent time period of April and May 2009. As phrased by the *Dulaney* Court, "[t]here are no facts showing" the anonymous familiarizing physicians "had actual knowledge of the standard of care for those medical specialties." 45 P.3d at 824. In this case, the Court cannot even determine what the familiarizing physicians' medical specialties are or for what time period they allegedly have sufficient knowledge.

Furthermore, the Affidavit of Dr. Bowman fails to recognize the clear distinction between the standard of health care practice applicable to a physician's assistant and that applicable to a medical doctor specializing in emergency medicine. *Idaho Code § 6-1012* "makes clear that a health care provider must be compared to a health care provider with similar training and in the same category or class, 'taking into account his or her training, experience, and fields of medical specialization.'" *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997) (quoting I.R.C.P. § 6-1012). Because Dr. Bowman's affidavit does not "tak[e] into account" the difference between a

P.A. and an M.D. physician versus a D.O. physician, it does not comply with the clear requirements of Idaho Code § 6-1012 and is inadmissible as a matter of law under Rule 56(e).

2. **Dr. Bowman's Affidavit Lacks Specific Facts Showing the Anonymous Familiarizing Physicians Have Actual Knowledge of the Standard of Health Care Practice for the Relevant Time Period.**

The familiarizing actions allegedly taken as per Dr. Bowman's Affidavit are not time specific as required under Idaho Code §6-1012. In *Dulaney*, one of Plaintiff's medical experts stated that he was familiar with the standard of health care practice for orthopedic surgeons in Boise in 1994 because he had spoken with an anonymous familiarizing expert who "had trained orthopedic physicians 'that presently practice in Boise,'" had "taught and lectured in Boise" and "maintained personal and professional relationships with physicians in Boise." *Id.* at 825. The Court found such statements inadequate ("Even assuming the use of an anonymous informant is an acceptable manner for adequately familiarizing an out-of-area physician of the local standard of care"), because the statements did not reference the relevant time period. *Id. See also Ramos v. Dixon*, 144 Idaho 32, 37, 156 P.3d 533, 538 (2007) (reiterating that Idaho Code § 6-1012 defines the relevant community and "is both site and time specific.").

In his Affidavit, Dr. Bowman alleges that he "previously hired a doctor from Pocatello to work for [him], and he had emergency room privileges in Pocatello." **Aff. Dr. David Bowman** ¶ 6(a). He goes on to allege that he "personally spoke to another medical doctor in Pocatello who also has privileges to practice emergency medicine in Pocatello." *Id.* at ¶ 6(c). There is absolutely no reference to the relevant time period. Thus, his

affidavit lacks the “specific facts showing that the anonymous [familiarizing expert] was familiar with the standard of care” in 2009, as required by the *Dulaney* Court. That is fatal to Dr. Bowman’s claim of foundation and to the admissibility of his affidavit.

3. **The Statements and Opinions Contained in Dr. Bowman’s Affidavit Are Vague, Conclusory, Not Based on Personal Knowledge and Conflict with the Evidence in the Record.**

As the *Dulaney* Court stated:

Rule 56(e) of the Idaho Rules of Civil Procedure imposes additional requirements upon the admission of expert medical testimony submitted in connection with a motion for summary judgment. The party offering such evidence must show that it is based upon the witness’ personal knowledge and that it sets forth facts as would be admissible in evidence. The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e).

45 P.3d at 816 (citations omitted) (emphasis added). Conclusory and/or speculative statements by a party opposing summary judgment are insufficient to create an issue of fact. In his Affidavit, Dr. Bowman states that his opinions are “[b]ased upon my knowledge of the standard of care required of emergency room physicians in Pocatello, and my review of the medical records and the complaint of Heather Hall in this case.” **Aff. Dr. David Bowman ¶ 7.**

Setting aside the previously argued numerous fatal foundational deficiencies associated with Dr. Bowman’s alleged knowledge of the standard of practice for ER physicians, there is also an absence of evidence in the record to support Dr. Bowman’s substantive conclusions. “A moving party must support their summary judgement motion with evidence, but it is the adverse party that must come forward with specific facts to

support their claim.” *Foster v. Traul*, 141 Idaho 890, 893, 120 P.3d 278, 281 (2005); **see also** *Suhadolnik v. Pressman*, 254 P.3d 11, 16 (2011).

Dr. Bowman’s affidavit states that his opinions are based on the medical records and the complaint filed in this case. **Aff. Dr. David Bowman ¶ 7**. With respect to the allegations in the Complaint, Dr. Bowman states that “the treatment given by Jeff Johnson to Heather Hall, as described in paragraph 15 of her complaint” violated “the standard of care expected of any health care provider in Pocatello, whether in an emergency room or otherwise.” *Id.* at ¶ 9.<sup>1</sup> This proves nothing. The allegations in the Complaint are simply that, allegations, they are not facts in evidence. It is well settled in the summary judgment setting that a Plaintiff may not rely merely upon the allegations in her complaint, but rather she must set forth such facts as would be admissible in evidence in order to create an issue of fact. Rule 56(e); *Suhadolnik v. Pressman*, 254 P.3d 11 (2011).

Excluding the allegations in the Complaint, there is nothing in the record before this Court which creates an issue of fact. For example, there is no evidence that Dr. Bowman ever read the Affidavit of Heather Hall, that he ever spoke to Heather Hall or that he ever even read the defense affidavits. To the extent Dr. Bowman wants to base his opinions on the allegations in the Complaint, such opinions would be conclusory,

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<sup>1</sup> Dr. Bowman cites to no statewide minimum standards when making such a global statement. Similarly, Dr. Bowman’s reference to Idaho Code §54-1814 which deals with the grounds for administrative medical discipline has no bearing on this case and no case authority is offered by the Plaintiffs to suggest otherwise.

speculative and not based on personal knowledge of the affiant. As such, they would not be admissible and should therefore not be considered by the Court.<sup>2</sup>

Furthermore, Dr. Bowman's statement that his opinions are based in any way on his review of the medical records is also of no support. The medical records of Heather Hall (which are before the Court) do not address, nor do they in any way support the allegations set forth in her Complaint (see medical records attached to **Aff. Jeffrey Johnson, P.A.** Exhibit A (Aug. 19, 2011)). The medical records describe the encounters Mr. Johnson had with the patient on the dates in question. In his affidavit, Dr. Bowman does not point to anything of significance in the medical records which supports his opinions or his conclusions that there were any failures or violations of the standards of practice by any of the Defendants. Dr. Bowman was required to state with particularity what each Defendant did which amounted to a violation of the applicable standard of practice. His failure to do so renders his affidavit insufficient to establish an issue of fact.

4. **The Affidavit of Heather Hall Is Inadmissible for Purposes of Establishing Medical Causation.**

It is well-settled in Idaho that a lay person is not qualified to give an opinion about the cause of a medical condition or disease. Lay people do not possess the knowledge, training, or experience to render an opinion on such matters. **See** I.R.E. 701 and 702. According to the Idaho Supreme Court, courts are to disregard lay opinion testimony relating to the cause of a medical condition. **See, i.e., Bloching v. Albertson's,**

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<sup>2</sup> Ironically, Plaintiff argues that "[t]he affidavits of Dr. Kurtis Holt, Dr. Randall Fowler and Jeff Johnson fail to address the conduct alleged by Heather Hall" and should therefore be stricken. **Plif.'s Memo. In Opposition to Def.'s Mot. For S.J.** p.2. The argument is without merit, because the summary judgment process places different burdens upon the moving and non-moving parties, and the moving party is only required to point out the "absence of evidence" to support the non-moving party's case. **Foster v. Traul**, 141 Idaho 890, 893, 120 P.3d 278, 281 (2005) (emphasis added). **See also** Section C, below.

*Inc.*, 129 Idaho 844, 934 P.2d 17 (1997) (lay person was not qualified to testify that the seizure he suffered immediately after using a blend of pork and beef insulin was caused by the insulin); ***Evans v. Twin Falls County***, 118 Idaho 210, 796 P.2d 87 (1990) (husband was not qualified to testify that conduct by sheriff's deputies on April 15, 1987 in grabbing and shaking his wife was a cause of her cardiac arrest and death over eleven months later); ***Flowerdew v. Warner***, 90 Idaho 164, 409 P.2d 110 (1965) (patient was not qualified to testify that his injury was caused by physician's treatment).

Idaho Rule of Evidence 701 has not altered the requirement that medical causation be proved by expert testimony. In ***Cook v. Skyline Corp.***, 135 Idaho 26, 13 P.3d 857 (2000), the Court held that physical manifestations of emotional distress were medical conditions which required expert testimony. The Court stated:

I.R.E. 701 affords the district court discretion to determine whether a lay witness may testify as to his or her opinion regarding certain matters but testimony offered by a lay person relating to the cause of a medical condition should be disregarded.

***Cook***, 135 Idaho at 35, 13 P.3d at 866 (emphasis added), *citing Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990) (wherein the Court held the plaintiff's opinions as to the cause of his high blood pressure would be inadmissible under I.R.E. 701.) In support of the Court's holding in ***Evans v. Twin Falls County***, the Court quoted from 31A Am.Jur.2d, *Expert & Opinion Evidence* § 207 as follows:

Where the subject matter regarding the cause of disease, injury, or death of a person is wholly scientific or so far removed from the usual and ordinary experience of the average person that expert knowledge is essential to the formation of an intelligent opinion, only an expert can

competently give opinion evidence as to the cause of death, disease or physical condition.

*Id.*, 118 Idaho at 214, 796 P.2d at 91 (emphasis added).

The same considerations that disqualified the lay testimony in the above cases apply in the instant action. Ms. Hall is not competent to testify regarding whether the treatment she received at the Portneuf Medical Center emergency room was “unnecessary” or “invasive,” nor is she competent to testify that it caused her any injury, such as “emotional distress, pain and suffering and humiliation.” **See Aff. Heather Hall ¶¶ 6 and 7** (Sept. 14, 2011). The allegations at issue involve Mr. Johnson’s efforts to listen to the patient’s heart beat in response to complaints of chest pains. The patient is not trained in medicine and is incompetent to opine whether or not under the applicable standard of practice the Defendant’s conduct was necessary or appropriately invasive. Indeed, virtually all efforts to treat a given medical condition may well be subjectively considered by a patient to be unnecessary or invasive - this does not mean the health care provider committed malpractice. This is why plaintiffs in medical malpractice cases are required to comply with the expert witness requirements set forth under Idaho Code §§6-1012 and 1013. For this reason, the affidavit of the patient fails to establish an issue of fact sufficient to preclude the defense motion for summary judgment.

**C. *The Plaintiff Has Offered No Evidence to Rebut Dr. Fowler’s Expert Witness Opinion.***

A party moving for summary judgment bears the initial burden of “present[ing] ‘evidence’ establishing the absence of a genuine issue of material fact before the burden to come forward with evidence shifts to the non-moving party.” **Foster v. Traul**, 141 Idaho 890, 893, 120 P.3d 278, 281 (2005). However, “there is no requirement the movant

present specific facts.” *Id.*; **see also** *Paugh v. Ottman*, 2008 U.S. Dist. LEXIS 52281, \*10-11 (D. Idaho 2008) (citing *Fairbanks v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (applying Idaho law and stating “the moving party need not introduce affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the non-moving party’s case.”) (emphasis added). An affidavit put forth by the defendant physician, and complying with the requirements of Idaho Code § 6-1013, as well as Idaho Rule of Civil Procedure 56(e), is sufficient to shift the burden to Plaintiffs. **See** *Id.*; *Suhadolnik v. Pressman*, 254 P.3d 11, 16 n.4 (2011). The non-moving party is then required to “come forward with evidence, and to ‘set forth specific facts showing that there is a genuine issue for trial.’” *Foster*, 120 P.3d at 281 (quoting I.R.C.P. 56(e) (internal cites omitted).

In this case, Dr. Fowler has put forth qualified expert witness opinion in the form of his own affidavit that he complied in all respects with the applicable local standard of health care practice in his limited involvement with patient Heather Hall. **Aff. Randall Fowler, M.D.** (Aug. 18, 2011). The Affidavits of Dr. Bowman and Heather Hall, even if admissible, contain no facts whatsoever, nor do they even mention, Dr. Fowler’s limited and tangential involvement in Heather Hall’s treatment at the Portneuf Medical Center emergency room. It is uncontested that Dr. Fowler was the supervising physician for Mr. Johnson only during Plaintiff’s May 12, 2009 visit to the emergency room. **See Plf.’s Compl. ¶¶ 10-17.** He was not the supervising physician during Plaintiff’s subsequent visit at issue in June. *Id.*; **Aff. Jeffrey Johnson, P.A.** Exhibit A. Of critical importance is the fact that the affidavits of Dr. Bowman and Heather Hall refer only to the June 5, 2009 visit. Because Plaintiff’s response papers do not address or even purport to rebut Dr. Fowler’s



testimony, it is without question that his motion remains unopposed. As a result, Dr. Fowler's motion for summary judgement should be granted.

**D. Defendants are entitled to immunity per the express language of Idaho Code Section 39-1391c, to allow otherwise would render the statute a nullity.**

"When construing a statute, the words used must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole." *Jones v. Crawford*, 147 Idaho 11, 15, 205 P.3d 660, 664 (2009). Furthermore, "[i]t is well established that statutes should be interpreted to mean what the legislature intended them to mean." *Eby v. Newcombe*, 116 Idaho 838, 841, 780 P.3d 589, 592 (1989) (quoting *Walker v. Nationwide Fin. Corp. of Idaho*, 102 Idaho 266, 268, 629 P.2d 662, 664 (1981). "It is incumbent upon [the] Court to give the statute an interpretation that will not effectively nullify it." *Id.*

The plain language of the statute indicates that no medical professional "shall be held liable in any civil action arising out of the furnishing of such emergency care and treatment." Idaho Code Section 39-1391(c). In *Eby*, the Court determined that the statute was enacted "[i]n order to encourage doctors of all specialties and trainings to render emergency medical care and first aid treatment." 780 P.2d at 592. Immunity applies to situations where "emergency treatment or first aid services" are rendered. *Id.* (emphasis added). The Court noted that such an interpretation "comports with . . . § 39-1391(a) and § 39-1391(b), wherein similar protection is given to hospitals rendering emergency treatment or first aid services." *Id.*

In *Eby*, the question was whether the defendant doctor had established "an ordinary doctor/patient relationship, or whether he simply rendered Jeremy emergency

treatment or first aid services.” *Id.* The Court found a question of fact existed as to whether the defendant doctor had established a doctor/patient relationship. For that reason, the *Eby* Court’s reasoning makes the outcome distinguishable. In this case, Plaintiff has not contested that Defendants were providing emergency services when they provided emergent care to Plaintiff on the dates in question. Indeed, the medical records attached to the affidavit of Mr. Johnson repeatedly state that the patient is urged to establish care with a primary care provider. The reason for this statement is because the Defendants are merely emergency care providers. They do not provide routine care to the same patients.

Second, in *Eby*, (1) the defendant physician saw the patient in his office, by appointment, not in an emergency room setting; (2) the defendant physician did not render any “treatment” or “first aid” to the patient, but only conducted an examination; and (3) the defendant provided a referral to another specialist instead of rendering treatment himself. Under those circumstances, it may be fairly said that a “doctor/patient relationship” was established. However, as Plaintiff concedes, no such relationship existed in this case.

Instead, Plaintiff focuses on the “in the absence of gross negligence” language in the statute, suggesting that it always is a question of fact whether a defendant physician’s conduct under this statute amounts to “gross negligence.” First of all, to even argue any issue of fact exists under this statute would require expert testimony. Nowhere does Plaintiff’s expert, Dr. Bowman, state in his affidavit that any of the Defendants’ conduct was grossly negligent nor reckless. Absent such testimony, there is nothing for a court to consider on this issue for purposes of summary judgment. .

Second, Plaintiff’s proposed interpretation has no case authority in support and defense contends such an interpretation would “effectively nullify” the statutory


immunity protection afforded. To accept the Plaintiff's interpretation would require any defendant claiming immunity under the statute to always have to round all the bases of a trial and put the question to a jury in order to determine whether the immunity statute applied. The chilling effect of such a proposition would strongly discourage medical professionals from freely "rendering emergency medical care and first aid treatment," contrary to what the Legislature intended. As such, Plaintiff's statutory interpretation should be rejected by this Court.

### **III. CONCLUSION**

Plaintiff has provided no argument in favor of her intentional tort claims and in opposition to the defense motion. Thus, the Defendants are entitled to summary judgment as a matter of law as to all claims within the Complaint. To the extent the Court deems (over defense objection) that the Plaintiff has somehow alleged a claim for medical negligence on the part of the Defendants, the Defendants are still entitled to summary judgment as the Plaintiff has failed to put forth admissible expert testimony on such issue. Furthermore, the evidence put forth by Plaintiff in opposition fails to address Dr. Fowler's involvement at all in this case. Thus, Dr. Fowler's un rebutted testimony is sufficient to warrant summary judgment in his favor. Finally, according to the plain language of Idaho Code §39-1391c, all the Defendants as emergency care providers are entitled to immunity from civil liability. For the foregoing reasons, the Defendants respectfully request this Court grant their respective motions for summary judgment.

DATED this 21<sup>st</sup> day of September, 2011.

CAREY PERKINS LLP

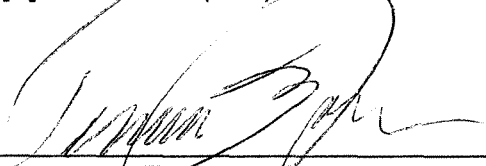
By   
Terrence S. Jones, Of the Firm  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of September, 2011, I served a true and correct copy of the foregoing DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning  
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482 Constitution Way, Suite 111  
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*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 542-2711

  
Terrence S. Jones

2011 SEP 29 PM 3:23



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND  
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C., and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No: CV-2011-0001740-PI


**MINUTE ENTRY & ORDER**

THE PARTIES came before the Court on the 26<sup>th</sup> day of September, 2011 for a hearing on Defendants' Motion for Summary Judgment. Allen Browning appeared in person on behalf of the Plaintiff. Terrance Jones appeared in person on behalf of the Defendants. Stephanie Morse was the Court Reporter.

At the outset, the Court heard oral argument from the parties on Defendants' Motion.

Thereafter, the Court took the matter under advisement and will issue a written decision.

DATED this 29<sup>th</sup> day of September, 2011.

  
\_\_\_\_\_  
DAVID C. NYE  
District Judge

**CERTIFICATE OF SERVICE**

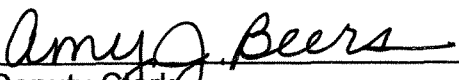
I HEREBY CERTIFY that on the 29<sup>th</sup> day of September, 2011, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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\_\_\_\_\_  
Deputy Clerk

TRANSMISSION VERIFICATION REPORT

TIME : 09/29/2011 16:22  
NAME : JUDGE NYE  
FAX : 2082367418  
TEL : 2082367418  
SER.# : 000H5J547093

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BY [Signature]  
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT,  
STATE OF IDAHO, BANNOCK COUNTY

HEATHER HALL,

Plaintiff,

v.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C., and KURTIS  
HOLT, M.D., and RANDALL FOWLER,  
M.D., and JEFF JOHNSON,

Defendants.

Case No.: CV-2011-1740-PI

DECISION ON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT

Hon. David C. Nye

This matter came before the Court for a hearing on September 26, 2011. Allen Browning appeared on behalf of Plaintiff Heather Hall, and Terrence S. Jones appeared in behalf of all Defendants. At the hearing, the Court took Defendants' Motion for Summary Judgment under advisement, and now issues its decision **granting** the motion.

**I. INTRODUCTION**

This case arises out Hall's visits to the Portneuf Medical Center emergency room in Pocatello to receive treatment for headaches. She alleges that on one occasion, a physician's assistant, Jeff Johnson, in the course of a medical examination, touched her breast inappropriately while listening to her heartbeat with a stethoscope. She asserts claims against Johnson for battery, intentional infliction of emotional distress, and invasion of privacy. She also

Case No.: CV-2011-1740-PI  
DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
Page 1 of 8

asserts claims against Drs. Kurtis Holt and Randall Fowler for negligent supervision of Johnson. Additionally, Hall asserts a claim against Rocky Mountain Emergency Physicians, L.L.C., under the theory of *respondeat superior*. Defendants have not yet submitted an answer to Hall's complaint, but have moved for summary judgment.

## II. STANDARD OF REVIEW

Summary judgment under Rule 56 of the Idaho Rules of Civil Procedure is appropriate only when there is no genuine issue of material fact after the pleadings, depositions, admissions, and affidavits have been construed in a light most favorable to the party opposing summary judgment and the moving party is entitled to judgment as a matter of law on the challenged claim or claims.<sup>1</sup> Initially, the burden of establishing the absence of a genuine issue of material fact rests with the party moving for summary judgment.<sup>2</sup> When “the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist.”<sup>3</sup> If the moving party is successful in shifting the burden to the nonmoving party to show the existence of an issue of fact on the challenged element, the nonmoving party may not rest upon the mere allegations or denials contained in the pleadings, but must come forth with evidence setting forth specific facts showing that there is a genuine issue for trial on the challenged elements.<sup>4</sup> If the nonmoving

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<sup>1</sup> *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 303, 647 P.2d 754, 758 (1982).

<sup>2</sup> *Finholt v. Cresto*, 143 Idaho 894, 896-97, 155 P.3d 695, 697-98 (2007).

<sup>3</sup> *Levinger v. Mercy Med. Ctr., Nampa*, 139 Idaho 192, 195, 75 P.3d 1202, 1205 (2003).

<sup>4</sup> *Id.*

party fails to do so, it will result in a court granting an order of summary judgment in favor of the moving party.<sup>5</sup>

### III. DISCUSSION

In support of their request for summary judgment, Defendants argue that [1] I.C. § 39-1391c provides Johnson<sup>6</sup> with immunity from civil liability in this case, and that [2] Hall has failed to properly comply with the expert testimony requirements for medical malpractice cases contained in I.C. § 6-1012 and -1013.

#### 1. I.C. §39-1391c immunity

Defendants argue that according to the proper interpretation of I.C. § 39-1391c, Johnson is entitled to immunity from civil liability for any malpractice he allegedly committed in the course of providing medical care in the emergency room. The statute contains the following provisions:

Any licensed *physician* and *surgeon* shall be conclusively presumed to be qualified to undertake and to furnish any emergency medical or surgical care and treatment, regardless of the specialty training or skills which might otherwise be preferred for care and treatment of the particular patient, whenever, in the good faith judgment of such *physician* and *surgeon*, the condition and best interests of the patient require such *physician* and *surgeon* to undertake such care and treatment, and, in the absence of gross negligence under the existing circumstances, *no physician so proceeding nor any hospital where such care and treatment is provided shall be held liable in any civil action arising out of the furnishing of such emergency care and treatment.*<sup>7</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> Defendants actually argue that this statute provides all Defendants with immunity; however, the doctors did not undertake or furnish any emergency medical care or treatment to Hall. This statute can only apply to Johnson's conduct.

<sup>7</sup> I.C. § 39-1391c(emphasis added).

Johnson argues that under this statute, in the absence of gross negligence he cannot be held liable for any emergency room medical treatment he provided. Johnson argues that this immunity extends even to Hall's intentional tort claims against him.

The Court notes that the statute mentions only *physicians* and *surgeons*, not physician's assistants. The definitions for chapter 13 of title 39 are set forth in I.C. § 39-1301. Under that section, "Physician" is defined as "an individual licensed to practice medicine and surgery by the Idaho state board of medicine or the Idaho state board of podiatry."<sup>8</sup> The section also defines "Authorized provider" as "an individual who is a nurse practitioner or clinical nurse specialist, licensed to practice in Idaho in accordance with the Idaho nurse practice act; or a *physician's assistant*, licensed by the Idaho state board of medicine."<sup>9</sup> The Court finds that a *physician's assistant* is not to be treated the same as a *physician* for purposes of the chapter. It is evident from these definitions that the Idaho legislature did not intend to provide immunity in I.C. § 39-1391c to physician's assistants—only physicians and surgeons. Because the Court finds that the statute does not apply to physician's assistants, it is unnecessary to address Johnson's other arguments concerning the statute's applicability to intentional torts.

## 2. Medical malpractice expert testimony

Although Hall's complaint contains intentional tort claims, the case is treated as a standard medical malpractice case. Defendants argue that as a medical malpractice case, Hall has not properly complied with the requirements of I.C. § 6-1012 and -1013 concerning expert testimony.

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<sup>8</sup> *Id.* § 39-1301(h).

<sup>9</sup> *Id.* § 39-1301(i)(emphasis added).

Under I.C. § 6-1012, plaintiffs in medical malpractice cases must prove by direct expert testimony that the defendant failed to meet the standard of health care practice of the community where the care was provided. That expert's testimony concerning the standard of care must also be specific to the time and place the care was provided.<sup>10</sup> Additionally, I.C. § 6-1013 imposes the following foundational requirements for expert witness testimony in medical malpractice cases:

[T]he plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his expert opinion testimony is addressed.<sup>11</sup>

Thus, if a plaintiff's expert witness does not demonstrate that they either personally know the applicable community standard or have adequately familiarized themselves with it, their testimony is not admissible. Additionally, Rule 56(e) of the Idaho Rules of Civil Procedure requires that in order to be admissible in connection with summary judgment, an affidavit submitted must be based on the personal knowledge of the witness and must set forth facts that would be admissible in evidence. Admissibility of an affidavit under IRCP 56(e) "is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required in motions for summary judgment."<sup>12</sup>

In this case, Hall has provided an expert witness affidavit from Dr. David Bowman. Defendants argue that Dr. Bowman's affidavit contains several fatal deficiencies, such as lack of foundation and time specificity. The Supreme Court of Idaho held in *Dulaney v. St. Alphonsus*

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<sup>10</sup> *Id.* § 6-1012.

<sup>11</sup> *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002)(citing I.C. § 6-1013).

<sup>12</sup> *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994).

*Regional Medical Center* that if an expert affidavit submitted in a medical malpractice case fails to set forth specific facts showing that the expert is familiar with the standard of care for the specific community at the *specific time* of the alleged malpractice, the affidavit is inadmissible and therefore insufficient to prevent summary judgment.<sup>13</sup> If an expert is not already personally acquainted with the applicable standard of care, one permissible way for the expert to become familiar is through inquiring of a local specialist who has personal knowledge of the applicable standard of care.<sup>14</sup> Each expert must describe exactly *how* they became familiar with the applicable standard of care.<sup>15</sup>

This Court finds that Dr. Bowman's affidavit contains at least several fatal deficiencies that render it inadmissible. First, while Dr. Bowman states that he is a physician licensed in Idaho, he does not state his medical specialty. Without knowing what kind of physician Dr. Bowman is, the Court is unable to determine if he is competent to testify concerning the emergency room care provided by a physician's assistant. Additionally, while Dr. Bowman, an Idaho Falls doctor, describes that he inquired of two other physicians to familiarize himself with the applicable standard of care in Pocatello, he does not name the two physicians. Dr. Bowman states that one of the familiarizing physicians he inquired of *had* emergency room privileges in Pocatello previously, but there is no mention of the specific *time* period. Dr. Bowman also states that the other familiarizing physician he spoke with currently *has* emergency room privileges in Pocatello, but there is no indication that this physician has knowledge of what the standard of

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<sup>13</sup> *Dulaney*, 137 Idaho at 169, 45 P.3d at 825.

<sup>14</sup> *Id.* at 164, 45 P.3d at 816.

<sup>15</sup> *Id.*

care *was* at the specific time period relevant to this case. The Court finds that all these deficiencies, collectively and individually, render Dr. Bowman's affidavit inadmissible under IRCP 56(e) and I.C. § 6-1012 and -1013.


Because Hall failed to satisfy the applicable requirements for her medical malpractice case against Johnson, her claim fails and the Court grants Johnson summary judgment on all the claims asserted against him. The other claims in the complaint against Johnson's supervising physicians and Rocky Mountain Emergency Physicians, L.L.C. are derived from the claims against Johnson. Because the claims against Johnson are dismissed, all of the remaining claims in the case are also dismissed, and the Court grants all Defendants summary judgment on all of Hall's claims.

#### IV. CONCLUSION

Johnson's defense of immunity based on I.C. § 39-1391c fails as a matter of law. Hall failed to comply with the requirements for medical malpractice expert witness testimony contained in I.C. § 6-1012 and -1013. Dr. Bowman's affidavit contained numerous foundational deficiencies, which rendered it inadmissible. Defendants' request for summary judgment is **granted**.

IT IS SO ORDERED.

DATED October 24, 2011.

  
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DAVID C. NYE  
District Judge

**CERTIFICATE OF SERVICE**

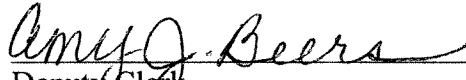
I HEREBY CERTIFY that on the 20<sup>th</sup> day of October, 2011, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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- Email:

  
Deputy Clerk



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BANNOCK COUNTY  
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2011 NOV -1 AM 9:47

BY [Signature]  
DEPUTY CLERK

Terrence S. Jones, ISB No. 5811  
Tracy L. Wright, ISB No. 8060  
CAREY PERKINS LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
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Telephone (208) 345-8600  
Facsimile (208) 345-8660

Attorneys for Defendants

ORIGINAL  
IN THE DISTRICT COURT OF  
THE SIXTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C. and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

JUDGMENT

The Court having entered a Decision on Defendants' Motion for Summary  
Judgment which is dispositive of all issues of the case,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint and causes of action of the Plaintiff is hereby dismissed on the merits with prejudice.

DATED this 1<sup>st</sup> day of November, 2011.

DISTRICT JUDGE



Honorable David C. Nye

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of November, 2011, I served a true and correct copy of the foregoing JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning  
BROWNING LAW  
482 Constitution Way, Suite 111  
Idaho Falls, Idaho 83402  
Telephone (208) 542-2700  
*Attorneys for Plaintiff*

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile (208) 542-2711

Terrence S. Jones  
CAREY PERKINS LLP  
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Telephone (208) 345-8600  
*Attorneys for Defendants*

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 Hand-Delivered  
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Clerk

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CLERK OF THE COURT

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BY [Signature]  
DEPUTY CLERK

Allen Browning ISB#3007  
Browning Law  
482 Constitution Way, Ste. 111  
Idaho Falls, Idaho 83402  
Phone: 208-542-2700  
Fax: 208-542-2711  
Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HEATHER HALL,	)	Case No.: CV-2011-1740
	)	
Plaintiff,	)	
	)	
ROCKY MOUNTAIN EMERGENCY	)	MEMORANDUM IN
PHYSICIANS, L.L.C. and KURTIS HOLT M.D.,	)	SUPPORT OF MOTION
and RANDALL FOWLER, M.D.,	)	TO ALTER OR AMEND
and JEFF JOHNSON	)	JUDGMENT UNDER
	)	RULE 59(a)
Defendants.	)	
	)	
	)	

The defendants in this case moved for summary judgment. Missing from any documents submitted by the defendants was a single affidavit from anyone acknowledging that Jeff Johnson groped Heather Hall's breasts. Additionally missing from any documents submitted by the defendants was any affidavit stating that such groping, as described by Heather Hall in her complaint and her affidavit, does not violate the standard of care expected of a physician's assistant in Pocatello for the time in question. Missing from any documentation presented by the defendants was any document contradicting Dr. Bowman's statement that such groping violates the statewide ethical code governing physicians' assistants.

Quoting from the court's "Standard of Review" at page 2 of its opinion,

Initially, the burden of establishing the absence of a genuine issue of material fact rests with the party moving for summary judgment. When “the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist.”

In order to bring this matter to a position in which the court could consider granting defendants a summary judgment, the defendants would have to agree to accept as established, for the purposes of their motion, the facts attested to by the Plaintiff, and then give opinions that this conduct did not violate the standard of care. This was never done. The defendants have refused to acknowledge that Jeff Johnson groped the Plaintiff.

There remains in this case a genuine issue of material fact. Heather Hall was either groped or she was not groped by Jeff Johnson. It is insufficient to provide affidavits which state, in effect, that whatever Jeff Johnson did, it did not violate the standard of care of an emergency room physician’s assistant in Pocatello in May and June 2009.

The defendant never submitted affidavits sufficient to require Plaintiff to respond. The Court cites *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002) in finding the Plaintiff failed to properly answer a summary judgment motion concerning medical malpractice. However, in *Dulaney*, the court specifically noted

Dr. Holland supported his motion with an affidavit of his medical expert who stated that Holland's treatment of Dulaney had met the applicable standard of care, and Dr. Waters supported his motion with his affidavit in which he stated that his treatment of Dulaney complied with the applicable standard of care.

*Id.* at 163 45 P.3d at 819. In that case, there was no dispute concerning what physical actions the doctor actually performed. The affidavits were to the effect that the actions taken did not violate the standard of care.

Contrarily, in this case, the entire controversy is not whether x-rays or an MRI were properly diagnosed. The question involves what the physician's assistant did with his hands. The defendants in this case were required to address these specific allegations in order to properly bring a summary judgment motion before this court:

During the June 5, 2009, visit, Plaintiff explained that she had more headaches the night before. Johnson told her to undress from the waist up, but Plaintiff kept her bra on and put on a hospital gown. Johnson stated he needed to check her heartbeat and that he would have to go under her bra wire as it was in the way. Without consent, Johnson then completely lifted Plaintiff's bra up and over, exposing her left breast, looked under her gown and brushed his hand over her left nipple, then continued with the stethoscope while resting his hand on her left breast for approximately 15-20 seconds, while claiming to check her heartbeat.

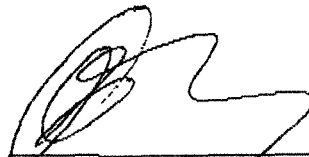
It is plaintiff's contention that, in order to bring a summary judgment motion before this court, the defendants were required to concede, for the purposes of the motion, that this conduct occurred, and then support their motion with an opinion from a doctor that this specific conduct, of which Heather Hall complained, did not violate the standard of care in Pocatello during the time in question. They did not do this. They based their opinion on Jeff Johnson's affidavit that he checked Heather's pulse. For this reason, the motion for summary judgment should have been dismissed.

We can't lose sight of the fact that a summary judgment motion should only be granted when undisputed facts lead to only one conclusion. We do not have that in this case. The defendants did not submit affidavits from doctors stating that the conduct complained of by Heather Hall did not violate the applicable standard of care because

such affidavits would be absurd. Plaintiff submits that no doctor with integrity would give an opinion ON THE RECORD that the conduct complained of by Heather Hall met the standard of care in their community.

This case is about a factual dispute which can only be resolved by a trier of fact. Plaintiff requests, once again, that the court DENY the defendants' motion for summary judgment.

DATED this 8<sup>th</sup> day of November, 2011.



Allen H. Browning  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8<sup>th</sup> day of November, 2011, a true and correct copy of the foregoing was delivered to the following attorney of record by placing same in the U.S. mail in a postage-paid envelope, hand delivery, or facsimile.

Terrence S. Jones, ISB No. 5811  
Carey Perkins LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
Boise, Idaho 83701


U.S. Mail  
 Facsimile 208-345-8660  
 Express Mail



Allen H. Browning

FILED  
BANNOCK COUNTY  
CLERK OF THE COURT

2011 DEC -8 PM 12:15

BY   
DEPUTY CLERK

Allen Browning ISB#3007  
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482 Constitution Way, Ste. 111  
Idaho Falls, Idaho 83402  
Phone: 208-542-2700  
Fax: 208-542-2711  
Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HEATHER HALL,	)	Case No.: CV-2011-1740
	)	
Plaintiff/Appellant	)	
	)	NOTICE OF APPEAL
	)	I.A.R. RULE 17
ROCKY MOUNTAIN EMERGENCY	)	
PHYSICIANS, L.L.C. and KURTIS HOLT M.D.,	)	
and RANDALL FOWLER, M.D.,	)	
and JEFF JOHNSON	)	
	)	
Defendants/Respondents.	)	
	)	

TO: THE ABOVE NAMED DEFENDANTS AND THEIR ATTORNEY OF RECORD, TERRENCE JONES, ESQ. AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT PLAINTIFF APPEALS FROM THE JUDGMENT RENDERED AGAINST THE PLAINTIFF IN THIS CASE:

The Hon. David C. Nye of the Seventh Judicial District of the State of Idaho, County of Bannock, heard a summary judgment motion brought by the defendants in this case on September 26, 2011. He entered a minute entry granting summary judgment on October 24, 2011, and formally entered a written Judgment against the Plaintiff on November 1, 2011.

**Parties:** The name of the appealing party is Heather Hall. Her attorney is Allen Browning, 482 Constitution Way, Suite 111, Idaho Falls, Idaho 83402; Phone: (208) 542-2700. Email: [allen.browning.law@gmail.com](mailto:allen.browning.law@gmail.com).

The adverse parties are Rocky Mountain Emergency Physicians, L.L.C., Kurtis Holt, M.D., Randall Fowler, M.D., and Jeff Johnson. Their attorney is Terry S. Jones. His address is Carey Perkins, 101 S. Capitol Blvd., Ste. 1600, Boise, ID 83702. His email is [tsjones@careyperkins.com](mailto:tsjones@careyperkins.com).

**Designation of the Judgment or Order Appealed From.** The Judgment dated November 1, 2011.

Preliminary statement of the issues on appeal: The appellant asserts the court erred in granting summary judgment in this case, because:

1. The controversy depended upon which facts were accepted as true for the purpose of the motion;
2. The defendants asserted defendant Jeff Johnson did not grope Heather Hall. They then asserted they were entitled to summary judgment because the non-groping conduct did not violate the standard of care for Pocatello, Idaho. However, the plaintiff's entire case rests upon her sworn assertion that she was in fact groped by Jeff Johnson. The court could not grant a summary judgment in this case because the defendants did not support their motion with sworn opinions by the defendant doctors that the specific groping described by Heather Hall did not violate the standard of care in Pocatello for the time in question.
3. The court refused to consider the testimony of Dr. David Bowman that the conduct of Jeff Johnson, described by Heather Hall, violated a statewide ethical standard to which all medical personnel are held.



4. The court erred in refusing to recognize that Dr. Bowman had familiarized himself with the applicable standard of care.

5. The court otherwise erred in refusing to consider the testimony of Dr. Bowman.

**(g) Jurisdictional Statement.** The Plaintiff has the right to appeal this matter, as she is appealing from a final judgment issued by the court.

**(h) Transcript.** A transcript of the proceedings held on September 26, 2011, at 10:00 a.m. in both hard copy and electronic format is requested. Appellant requests the record include all of those items included under Rule 25(c).

**(i) Record.** Appellant requests those documents be included in the clerk's record which are automatically included pursuant to Rule 28.

**(l) Certification.** Allen Browning, attorney for the Plaintiff, certifies:

(1) That service of the notice of appeal has been made upon the reporter of the trial or proceeding;

(2) That the clerk of the district court has been paid the estimated fees for preparation of the designated reporter's transcript as required by Rule 24; {find out the cost and get an address where to mail the check}

(3) That the estimated fees for preparation of the clerk's or agency's record have been paid;

(4) That all appellate filing fees have been paid;

(5) That service has been made upon all other parties required to be served pursuant to Rule 20.

DATED this 2 day of December, 2011.



Allen H. Browning  
482 Constitution Way, Ste. 111  
Idaho Falls, Idaho 83402  
Phone: 208-542-2700  
[allen.browning.law@gmail.com](mailto:allen.browning.law@gmail.com)  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2 day of December, 2011, a true and correct copy of the foregoing was delivered to the following attorney of record by placing same in the U.S. mail in a postage-paid envelope, hand delivery, or facsimile.

Terry S. Jones, ISB No. 5811  
Carey Perkins LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
Boise, Idaho 83701


U.S. Mail  
 Facsimile 208-345-8660  
 Express Mail

CLERK OF THE IDAHO SUPREME COURT  
451 West State St.,  
P.O. Box 83720,  
Boise, ID 83720-0101

U.S. Mail  
 Facsimile 208-334-2616

Stephanie Morse  
PO Box 594  
Inkom, ID 83245

U.S. Mail  
 Facsimile 208-236-7418

  
Allen H. Browning

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HEATHER HALL,	)	
	)	
Plaintiff-Appellant	)	Supreme Court No.
	)	
vs.	)	
	)	CLERK'S CERTIFICATE
ROCKY MOUNTAIN EMERGENCY,	)	
PHYSICIANS, L.L.C. and KURTIS HOLT	)	OF
M.D., and RANDALL FOWLER, M.D.,	)	
And JEFF JOHNSON	)	
	)	APPEAL
Defendants-Respondents,	)	
	)	
	)	

---

Appealed from: Sixth Judicial District, Bannock County

Honorable Judge David C. Nye presiding

Bannock County Case No: CV-2011-1740-PI

Order of Judgment Appealed from: Decision on Defendants' Motion for Summary Judgment filed the 25<sup>th</sup> day of October, 2011.

Attorney for Appellant: Allen Browning, Browning Law, Idaho Falls, Idaho

Attorney for Respondent: Terry S. Jones, Carey Perkins LLP, Boise, Idaho

Appealed by: Heather Hall

Appealed against: Rocky Mountain Emergency Physicians, L.L.C. and Kurtis Holt M.D., and Randall Fowler, M.D., and Jeff Johnson

Notice of Appeal filed: December 8, 2011

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

Name of Reporter: Stephanie Morse

Was District Court Reporter's transcript requested? Yes

Estimated Number of Pages: Less than 100

Dated December 13, 2011



(Seal)

DALE HATCH,  
Clerk of the District Court

By [Signature]  
Deputy Clerk

Terrence S. Jones, ISB No. 5811  
 Tracy L. Wright, ISB No. 8060  
 Aubrey D. Lyon, ISB No. 8380  
 CAREY PERKINS LLP  
 Sixteenth Floor, U.S. Bank Plaza  
 101 South Capitol Boulevard  
 P.O. Box 519  
 Boise, Idaho 83701  
 Telephone (208) 345-8600  
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FILED  
 BANNOCK COUNTY  
 CLERK OF DISTRICT COURT  
 2011 DEC -5 PM 5:11  
 BY *[Signature]*  
 DEPUTY CLERK

Attorneys for Defendants

IN THE DISTRICT COURT OF  
 THE SIXTH JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND  
 FOR THE COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
 PHYSICIANS, L.L.C. and KURTIS HOLT,  
 M.D., and RANDALL FOWLER, M.D., and  
 JEFF JOHNSON,

Defendants.

Case No. CV-2011-1740-PI

RESPONSE IN OPPOSITION TO  
 PLAINTIFF'S REQUEST TO ALTER  
 OR AMEND JUDGMENT UNDER  
 RULE 59(a)

I.  
 INTRODUCTION

This matter comes before the Court on Plaintiff's Memorandum to Alter or Amend the Judgment under Rule 59(a). As set forth herein, this Memorandum is procedurally improper and untimely and should therefore be denied and/or ignored by the Court.

*N/A*

**II.  
FACTUAL AND PROCEDURAL BACKGROUND**

On September 26, 2011, this Court heard oral argument on Defendants' Motion for Summary Judgment. The Court thereafter issued its written decision on October 25, 2011 granting the Defendants' Motion as to all of Plaintiff's claims. The Court thereafter entered a Judgment of dismissal with prejudice of Plaintiff's claims on November 1, 2011 with a certificate of service dated November 4, 2011. On November 8, 2011 Plaintiff filed a document entitled "Memorandum in Support of Motion to Alter or Amend Judgment under Rule 59(a)." In this document, Plaintiff does not cite to any authorities applying Rule 59(a), nor has Plaintiff ever filed a motion upon which this matter may be properly set for a hearing before this Court.

**III.  
ARGUMENT**

**A. Plaintiff's request to alter or amend the judgment under Rule 59(a) is procedurally improper and should therefore be denied.**

*1. Plaintiff failed to file any motion before the Court.*

The record reflects that Plaintiff simply filed a Memorandum In Support Of Motion To Alter Or Amend Judgment ("Memorandum") and a Notice of Hearing. In order to make an application to the court for an order, unless made during a hearing or at trial, a party must submit a written motion. See Rule 7(b)(1). It is undisputed that Plaintiff did not file a written motion to alter or amend the judgment nor was such an application made at a hearing or trial. This matter is therefore not properly before the Court and should be denied and/or ignored.

2011 12 02 10:01 CARLETT F. KING LLP 12005430000 2- 200 230 1012 P 370

Furthermore, Plaintiff is unable to remedy the deficiency associated with her failure to file a motion because the 14-day time period to move to alter or amend the judgment has long expired. Pursuant to Rule 59(e), Plaintiff was required to file her motion not later than 14 days after a judgment is entered. Because the Judgment was entered more than four weeks ago, the Plaintiff's procedural error cannot be remedied and the matter should be denied and/or the Court should simply take no action and the existing Judgment should remain undisturbed.

**B. Because Plaintiff failed to seek reconsideration under Rule 11(a)(2)(B) of the Court's order granting summary judgment, Plaintiff may not attempt to improperly utilize Rule 59(a).**

It is well settled in Idaho that in medical malpractice cases where summary judgment has been granted to the defendant health care provider that the plaintiff may offer supplemental affidavits in an attempt to correct the deficiencies which led to the summary judgment as part of a Rule 11(a)(2)(B) motion for reconsideration. *See Dunlap v. Cassia Mem. Hosp. & Med. Ctr.*, 134 Idaho 233, 236 (2000). No such motion was filed in this case. Instead, Plaintiff seeks pursuant to Rule 59(a) to have the Court's Judgment altered or amended, however, Rule 59(a) refers to requests for a new trial. Assuming Plaintiff really meant Rule 59(e), this Rule provides as follows: "A motion to alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment."

In support of her Memorandum, Plaintiff has offered no new evidence, no additional expert opinions, no case authorities and has not pointed out any errors in the Court's Judgment and/or prior Order granting Summary Judgment. Instead, Plaintiff seeks to rehash the same arguments and conclude that Summary Judgment was improper. Completely overlooked in Plaintiff's Memorandum is the fact that this Court concluded

Plaintiff's expert affidavit contained fatal deficiencies and was therefore inadmissible under Rule 56(e).

The affidavit of Dr. Bowman was deemed to lack foundation for the opinions set forth therein. There is nothing in Dr. Bowman's affidavit which purports to set forth a statewide minimum standard of practice on the issue of how one should listen to a patient's heartbeat. Defendant Physician Assistant Jeff Johnson stated in his affidavit that he was engaged in the medical task of listening to the patient's heart beat which the patient thereafter sought to characterize as an episode of groping amounting to a violation of the standard of practice. Plaintiff argues that Defendant Jeff Johnson was required to concede that he somehow improperly touched the Plaintiff and that this fact alone rendered summary judgment improper.

Plaintiff's argument misses the point. The issue is not whether the patient was groped, but rather there was a violation of the local standard of practice. In order to avoid summary judgment in the medical malpractice context, Plaintiff was required to comply with the requirements of Rule 56(e) and Idaho Code §§ 6-1012 and 6-1013. It is the Plaintiff's failure to so comply which formed the basis of the Court's decision in favor of the Defendants. (See Decision On Defendants' Motion For Summary Judgment at 7.)

Rather than submitting a revised affidavit from her expert in an attempt to try and cure the foundational deficiencies specifically identified by the Court, Plaintiff elected to submit a memorandum referring only in the caption to Rule 59(e). Plaintiff is not entitled to any reasonable inferences where the affidavit of her expert has not met the requirements of Rule 56(e). "Idaho law mandates a heightened burden of proof for individuals alleging negligent medical treatment. Idaho Code § 6-1013 requires that, in



order to avoid summary judgment in a medical malpractice case, the plaintiff must put forward expert testimony "indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice." *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002)." *See Hoover v. Hunter*, 249 P.3d 851, 855 (Idaho 2011).

As further stated by the court in *Dulaney*:

The admissibility of the expert testimony is an issue that is separate and distinct from whether that testimony is sufficient to raise genuine issues of material fact sufficient to preclude summary judgment. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224(1994). When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party. *Mitchell v. Bingham Mem'l Hosp.*, 130 Idaho 420, 942 P.2d 544 (1997). The liberal construction and reasonable inferences standard does not apply, however, when deciding whether or not testimony offered in connection with a motion for summary judgment is admissible: *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). The trial court must look at the witness' affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, Would render the testimony of that witness admissible. *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994).

*Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163 (2002) (emphasis added).

In sum, Plaintiff has not identified a basis for reconsidering this Court's decision, nor has Plaintiff identified any case authority supporting such an attack on the

existing judgment. Plaintiff's expert affidavit of Dr. Boman remains inadmissible and accordingly, this Court should not reconsider, alter, or amend its grant of Summary Judgment for Defendants.

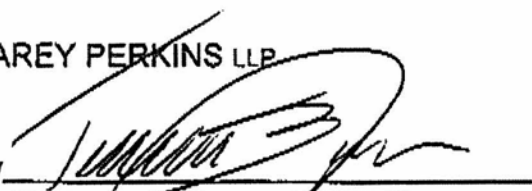
**IV.  
CONCLUSION**

Based on the foregoing reasons, the Defendants respectfully request this Court leave the current Judgment in favor of the Defendants undisturbed and take no action on Plaintiff's Memorandum seeking to Alter or Amend the Judgment under Rule 59(e).

DATED this 5<sup>th</sup> day of December, 2011.

CAREY PERKINS LLP

By



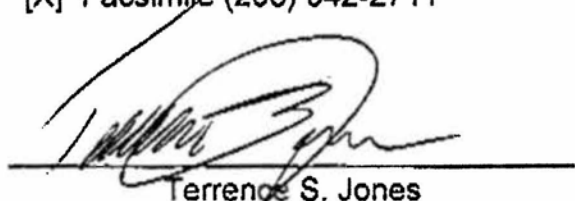
Terrence S. Jones, Of the Firm  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of December, 2011, I served a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO PLAINTIFF'S REQUEST TO ALTER OR AMEND JUDGMENT UNDER RULE 59(a) by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning  
BROWNING LAW  
482 Constitution Way, Suite 111  
Idaho Falls, Idaho 83402  
Telephone (208) 542-2700  
*Attorneys for Plaintiff*

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile (208) 542-2711



Terrence S. Jones



Request for additional records filed: No

Request for additional reporter's transcript filed: No

Name of Reporter: Stephanie Morse

Was District Court Reporter's transcript requested? Yes

Estimated Number of Pages: Less than 100

Dated November 13, 2011

DALE HATCH,  
Clerk of the District Court

(Seal)



By [Signature]  
Deputy Clerk

IN THE DISTRICT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FILED  
BANNOCK COUNTY  
19 JAN 10 PM 4:25  
BY [Signature]

HEATHER HALL

NOTICE

VS.

OF

LODGING

ROCKY MOUNTAIN EMERGENCY PHYSICIANS, LLC

SUPREME COURT DOCKET NO. 39473-2011  
BANNOCK COUNTY DOCKET NO. CV-2011-1740

The following transcript(s) in the above-entitled appeal consisting of  
44 pages was lodged with the District Court Clerk at the Bannock  
County Courthouse in Pocatello, Idaho on  
**January 10th, 2012:**


1. Summary Judgment held September 26, 2011

via:

( x ) Hand-Delivery

( ) U.S. Mail

DATED this 10th Day of January, 2012.



STEPHANIE MORSE, RPR, CSR

cc: Karel Lehrman and Klondy Loertscher--Idaho Supreme Court/Court of Appeals

\*Electronic copy of transcript sent to: SCTFILINGS@IDCOURTS.NET

2012 JAN 25 PM 4: 25

BY AB  
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND  
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HEATHER HALL,

Plaintiff,

vs.

ROCKY MOUNTAIN EMERGENCY  
PHYSICIANS, L.L.C., and KURTIS HOLT,  
M.D., and RANDALL FOWLER, M.D., and  
JEFF JOHNSON,

Defendants.

Case No: CV-2011-0001740-PI

**MINUTE ENTRY & ORDER**

THE PARTIES came before the Court on the 23<sup>rd</sup> day of January, 2012 for a hearing on Plaintiff's Motion to Alter or Amend Judgment. Allen Browning appeared in person on behalf of the Plaintiff. Tracy Wright appeared in person on behalf of the Defendants. Stephanie Morse was the Court Reporter.

At the outset, the Court heard oral argument from the parties on Plaintiff's Motion.

Thereafter, the Court took the matter under advisement and will issue a written decision.

IT IS SO ORDERED.

DATED this 25<sup>th</sup> day of January, 2012.



DAVID C. NYE  
District Judge

**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY that on the 26 day of January, 2012, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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Browning Law  
482 Constitution Way, Suite 111  
Idaho Falls, ID 83402

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- E-Mail: [allen.browning.law@gmail.com](mailto:allen.browning.law@gmail.com)
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- Fax: 542-2711

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Carey Perkins, LLP  
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- U.S. Mail
- E-Mail: [tsjones@careyperkins.com](mailto:tsjones@careyperkins.com)
- Hand Deliver
- Fax: 208-345-8660

  
Deputy Clerk

Allen Browning ISB#3007  
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 482 Constitution Way, Ste. 111  
 Idaho Falls, Idaho 83402  
 Phone: 208-542-2700  
 Fax: 208-542-2711  
 Attorney for Plaintiff

FILED  
 BANNOCK COUNTY  
 DISTRICT COURT  
 12 FEB -3 PM 2:36  
 BY [Signature]  
 DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT  
 IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HEATHER HALL,	)	Case No.: CV-2011-1740
	)	
Plaintiff/Appellant	)	AMENDED
	)	NOTICE OF APPEAL
	)	I.A.R. RULE 17
ROCKY MOUNTAIN EMERGENCY	)	
PHYSICIANS, L.L.C. and KURTIS HOLT M.D.,	)	
and RANDALL FOWLER, M.D.,	)	
and JEFF JOHNSON	)	
	)	
Defendants/Respondents.	)	
	)	

**TO: THE ABOVE NAMED DEFENDANTS AND THEIR ATTORNEY OF RECORD, TERENCE JONES, ESQ. AND THE CLERK OF THE ABOVE ENTITLED COURT:**

NOTICE IS HEREBY GIVEN THAT PLAINTIFF APPEALS FROM THE JUDGMENT RENDERED AGAINST THE PLAINTIFF IN THIS CASE:

The Hon. David C. Nye of the Seventh Judicial District of the State of Idaho, County of Bannock, heard a summary judgment motion brought by the defendants in this case on September 26, 2011. He entered a minute entry granting summary judgment on October 24, 2011, and formally entered a written Judgment against the Plaintiff on November 1, 2011.

**Parties:** The name of the appealing party is Heather Hall. Her attorney is Allen Browning, 482 Constitution Way, Suite 111, Idaho Falls, Idaho 83402; Phone: (208) 542-2700. Email: [allen.browning.law@gmail.com](mailto:allen.browning.law@gmail.com).



The adverse parties are Rocky Mountain Emergency Physicians, L.L.C., Kurtis Holt, M.D., Randall Fowler, M.D., and Jeff Johnson. Their attorney is Terry S. Jones. His address is Carey Perkins, 101 S. Capitol Blvd., Ste. 1600, Boise, ID 83702. His email is [tsjones@careyperkins.com](mailto:tsjones@careyperkins.com).

**Designation of the Judgment or Order Appealed From.** The Judgment dated November 1, 2011.

Preliminary statement of the issues on appeal: The appellant asserts the court erred in granting summary judgment in this case, because:

1. The controversy depended upon which facts were accepted as true for the purpose of the motion;

2. The defendants asserted defendant Jeff Johnson did not grope Heather Hall. They then asserted they were entitled to summary judgment because the non-groping conduct did not violate the standard of care for Pocatello, Idaho. However, the plaintiff's entire case rests upon her sworn assertion that she was in fact groped by Jeff Johnson. The court could not grant a summary judgment in this case because the defendants did not support their motion with sworn opinions by the defendant doctors that the specific groping described by Heather Hall did not violate the standard of care in Pocatello for the time in question.

3. The court refused to consider the testimony of Dr. David Bowman that the conduct of Jeff Johnson, described by Heather Hall, violated a statewide ethical standard to which all medical personnel are held.

4. The court erred in refusing to recognize that Dr. Bowman had familiarized himself with the applicable standard of care.

5. The court otherwise erred in refusing to consider the testimony of Dr. Bowman.

**(g) Jurisdictional Statement.** The Plaintiff has the right to appeal this matter, as she is appealing from a final judgment issued by the court.

**(h) Transcript.** A transcript of the proceedings held on September 26, 2011, at 10:00 a.m. in both hard copy and electronic format is requested. Appellant requests the record include all of those items included under Rule 25(c).

**(i) Record.** Appellant requests those documents be included in the clerk's record which are automatically included pursuant to Rule 28, as well as the following documents:

1. Defendants' Motion for Summary Judgment;
2. All affidavits filed in support of Motion for Summary Judgment;
3. Memorandum in support of Defendants Motion for Summary Judgment;
4. Memorandum in Opposition to Defendants Motion for Summary Judgment;
5. Affidavit of Dr. David Bowman;
6. Affidavit of Heather Hall;
7. Defendants Reply Brief;

8. Memorandum in support of Motion to Alter or Amend Judgment under Rule 59a; and

9. Response in Opposition to Plaintiff's Request to Alter or Amend Judgment under Rule 59a.

(l) **Certification.** Allen Browning, attorney for the Plaintiff, certifies:

(1) That service of the amended notice of appeal has been made upon the reporter of the trial or proceeding;

(2) That the clerk of the district court has been paid the estimated fees for preparation of the designated reporter's transcript as required by Rule 24; {find out the cost and get an address where to mail the check}

(3) That the estimated fees for preparation of the clerk's or agency's record have been paid;

(4) That all appellate filing fees have been paid;

(5) That service has been made upon all other parties required to be served pursuant to Rule 20.

DATED this 3 day of January, 2012..



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Allen H. Browning  
482 Constitution Way, Ste. 111  
Idaho Falls, Idaho 83402  
Phone: 208-542-2700  
[allen.browning.law@gmail.com](mailto:allen.browning.law@gmail.com)  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3 day of January, 2012, a true and correct copy of the foregoing was delivered to the following attorney of record by placing same in the U.S. mail in a postage-paid envelope, hand delivery, or facsimile.

Terry S. Jones, ISB No. 5811  
Carey Perkins LLP  
Sixteenth Floor, U.S. Bank Plaza  
101 South Capitol Boulevard  
P.O. Box 519  
Boise, Idaho 83701

U.S. Mail  
 Facsimile 208-345-8660  
 Express Mail

CLERK OF THE IDAHO SUPREME COURT  
451 West State St.,  
P.O. Box 83720,  
Boise, ID 83720-0101

U.S. Mail  
 Facsimile 208-334-2616

Stephanie Morse  
PO Box 594  
Inkom, ID 83245

U.S. Mail  
 Facsimile 208-236-7418



Allen H. Browning

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HEATHER HALL,	)	
	)	
Plaintiff-Appellant,	)	Supreme Court No. 39473-2011
	)	
vs.	)	AMENDED
	)	CLERK'S CERTIFICATE
ROCKY MOUNTAIN EMERGENCY,	)	OF
PHYSICIANS, L.L.C. and KURTIS HOLT,	)	APPEAL
M.D., and RANDALL FOWLER, M.D.,	)	
And JEFF JOHNSON	)	
	)	
	)	
Defendant-Respondents,	)	
	)	
	)	

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Appealed from: Sixth Judicial District, Bannock County

Honorable Judge David C. Nye presiding

Bannock County Case No: CV-2011-1740-PI

Order of Judgment Appealed from: Decision on Defendants' Motion for Summary Judgment filed the 25<sup>th</sup> day of October, 2011.

Attorney for Appellant: Allen Browning, Browning Law, Idaho Falls, Idaho

Attorney for Respondent: Terry S. Jones, Carey Perkins LLP, Boise, Idaho

Appealed by: Heather Hall

Appealed against: Rocky Mountain Emergency Physicians, L.L.C. and Kurtis Holt M.D., and Randall Fowler, M.D., and Jeff Johnson

Notice of Appeal filed: December 8, 2011  
Amended Notice of Appeal filed: February 3, 2012

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

Name of Reporter: Stephanie Morse

Was District Court Reporter's transcript requested? Yes

Estimated Number of Pages: Less than 100

Dated February 8, 2012

DALE HATCH,  
Clerk of the District Court



By [Signature]  
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HEATHER HALL,	)	
	)	
Plaintiff-Appellant,	)	
	)	
	)	
	)	Supreme Court No. 39473-2011
vs.	)	
	)	
ROCKY MOUNTAIN EMERGENCY,	)	CLERK'S CERTIFICATE
PHYSICIANS, L.L.C. and KURTIS HOLT,	)	
M.D., and RANDALL FOWLER, M.D.,	)	
And JEFF JOHNSON	)	
	)	
Defendant-Respondents,	)	
	)	
	)	
_____	)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true, full, and correct record of the pleadings and documents as are automatically required under Rule 28 of the Idaho appellate Rules.

I do further certify that there were no exhibits marked for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 8 day of February, 2012.

CLERK'S CERTIFICATE

(Seal)

DALE HATCH,  
Clerk of the District Court  
Bannock County, Idaho Supreme Court

By 

Deputy Clerk



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HEATHER HALL, )  
)  
Plaintiff-Appellant, )  
)  
)  
)  
) Supreme Court No. 39473-2011  
vs. )  
)  
)  
ROCKY MOUNTAIN EMERGENCY, )  
PHYSICIANS, L.L.C. and KURTIS HOLT, ) CERTIFICATE OF SERVICE  
M.D., and RANDALL FOWLER, M.D., )  
And JEFF JOHNSON )  
)  
Defendant-Respondents, )  
)  
\_\_\_\_\_ )

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that I have personally served or mailed, by United States mail, one copy of the REPORTER'S TRANSCRIPT and CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

Allen Browning  
Browning Law  
482 Constitution Way, Ste. 111  
Idaho Falls, Idaho 83402

Terrence S. Jones  
Carey Perkins, LLP  
P.O. Box 519  
Boise, Idaho 83701

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 15 day of February, 2012.

CERTIFICATE OF SERVICE

(Seal)

DALE HATCH,  
Clerk of the District Court  
Bannock County, Idaho Supreme Court

By   
Deputy Clerk