

9-17-2010

Elliott v. Verska Clerk's Record Dckt. 38070

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff-Appellant,

vs.

JOSEPH M. VERSKA, M.D., an individual; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation,

Defendants-Respondents,

and

ST. LUKE'S MERIDIAN MEDICAL CENTER, aka
ST. LUKE'S, an Idaho corporation; HOWMEDICA
OSTEONICS CORP., dba STRYKER
ORTHOPAEDICS; STRYKER; and JANE and JOHN
DOES I through X,

Defendants.

Supreme Court Case No. 38070

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE RONALD J. WILPER

ERIC B. SWARTZ

ATTORNEY FOR APPELLANT

BOISE, IDAHO

RAYMOND D. POWERS

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date	Code	User	Judge
10/5/2009	NCPI	CCAMESLC	New Case Filed - Personal Injury
	COMP	CCAMESLC	Complaint Filed
	SMFI	CCAMESLC	Summons Filed
11/13/2009	AMCO	CCHOLMEE	Amended Complaint Filed
3/30/2010	SMFI	CCNELSRF	(5) Summons Filed
	NOAP	CCNELSRF	Notice Of Appearance (Eric Swartz for Kristeen Elliott)
	NOTC	CCNELSRF	Notice of Status of Case
4/5/2010	AFOS	CCKELMA	(3) Affidavit Of Service (03/31/2010)
4/7/2010	APPL	CCBOYDR	Application for Admission Pro Hac Vice
4/13/2010	ORDR	DCOLSOMA	Order for Admission Pro Hac Vice (Mark Kamitomo)
4/19/2010	ANSW	CCGARDAL	Defendant St Lukes Meridian Medical Center's Answer and Demand for Jury Trial (Fouser for St Lukes Meridian)
	MOTN	CCGARDAL	Motion to Disqualify Judge Without Cause
4/20/2010	ORDR	DCELLISJ	Order of Disqualification
	CJWO	DCELLISJ	Change Assigned Judge: Disqualification W/O Cause
		DCELLISJ	Notice of Reassignment
	MOTN	MCBIEHKJ	Motion to Disqualify Judge without Cause
	AFFD	DCJOHNSI	Affidavit of Powers
	AFFD	DCJOHNSI	Affidavit of Russell
	AFFD	DCJOHNSI	Affidavit of Verska
	AFFD	DCJOHNSI	Affidavit of McLeod
	MEMO	DCJOHNSI	Memorandum Supporting Motion to Dismiss
	MOTN	CCTHIEBJ	Defendants' Motion To Dismiss
4/22/2010	ORDQ	CCNELSRF	Order Disqualifying Judge without Cause
	CJWO	CCNELSRF	Change Assigned Judge: Disqualification W/O Cause
	NOTC	CCNELSRF	Notice of Reassignment to Judge Ronald J Wilper
4/23/2010	AFOS	CCWRIGRM	Affidavit Of Service (04/21/10)
	AFOS	CCWRIGRM	Affidavit Of Service (04/22/10)
4/26/2010	NOHG	CCNELSRF	Notice Of Hearing
	HRSC	CCNELSRF	Hearing Scheduled (Motion 05/17/2010 03:30 PM) Motion to Dismiss
5/10/2010	AFFD	CCLATICJ	Affidavit of Mark Kamitomo in Opposition to Defendants Joseph Verska and Spine Institute of Idaho's Motion to Dismiss for Insufficiency of Service of Process

Date	Code	User	Judge
5/10/2010	MEMO	MCBIEHKJ	Memorandum in Opposition to Motion to Dismiss for Insufficiency of Service of Process
	AFFD	CCDWONCP	Affidavit of Eric B Swartz in Opposition to Defendants Joseph Verska and Spine Institute of Idaho's Motion to Dismiss for Insufficiency of Service of Process
	AFFD	CCDWONCP	Affidavit of Kristeen Elliot in Opposition to Defendants Joseph Verska and Spine Institute of Idaho's Motion to Dismiss for Insufficiency of Service of Process
	AFFD	CCDWONCP	Affidavit of Andrew Remm in Opposition to Defendants Joseph Verska and Spine Institute of Idaho's Motion to Dismiss for Insufficiency of Service of Process
5/12/2010	MOTN	CCNELSRF	Motion for Extension of Time in Which to Serve Stryker
	AFSM	CCNELSRF	Affidavit In Support Of Motion
	MEMO	CCNELSRF	Memorandum in Support of Motion
5/13/2010	RPLY	CCSIMMSM	Reply Memorandum in Support of Defendants' Motion to Dismiss
5/17/2010	AFOS	CCGARDAL	Affidavit Of Service 5.11.10
	DCHH	DCJOHNSI	Hearing result for Motion held on 05/17/2010 03:30 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: Motion to Dismiss-50
5/24/2010	RSPN	CCWRIGRM	Plaintiffs Sur-Response to Joseph Verska Md and Spine Institutes State of Limitations Argument
5/28/2010	REPL	CCSULLJA	Sur-Reply in Support of Defendants' Motion to Dismiss
6/4/2010	NOTS	CCWRIGRM	Notice Of Service
6/21/2010	NOTC	CCLATICJ	Notice of Unavailability (2)
7/12/2010	ORDR	DCJOHNSI	Order Granting Motion to Dismiss
	CDIS	DCJOHNSI	Civil Disposition entered for: Spine Institute Of Idaho PA, Defendant; Verska, Joseph M Md, Defendant; Elliott, Kristeen M, Plaintiff. Filing date: 7/12/2010
8/20/2010	MISC	MCBIEHKJ	Request for Cerification of Final Judgmetn as to Verska and Spine Institute
8/26/2010	JDMT	DCJOHNSI	Judgment Verska and Spine Institute Only
9/17/2010	APSC	CCLUNDMJ	Appealed To The Supreme Court
9/30/2010	RQST	CCGARDAL	Request for Additional Records to be included in Clerk's Record

OCT 05 2009

J. DAVID NAVARRO, Clerk
By L. AMES
DEPUTY

KRIS M. ELLIOTT
10008 Tanglewood
Boise, Idaho 83709
Phone (208) 371-5658

Appearing pro se

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT,
a single woman

Plaintiff

vs.

JOSEPH M. VERSKA, MD, an individual,
ST. LUKE'S MERIDIAN MEDICAL
CENTER a/k/a ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF IDAHO,
P.A., a professional corporation, JANE AND
JOHN DOES I through X.

Defendants.

Case No. **CV P** 0918953

**COMPLAINT AND DEMAND
FOR JURY TRIAL**

COME NOW, the Plaintiff above-named, appearing pro se, and as and for a claim of relief
against the Defendants, allege as follows:

**COUNT ONE
NEGLIGENCE**

I.

The individual Plaintiff at all relevant times herein resided in the State of Idaho, County of
Ada.

II.

Defendant JOSEPH M. VERSKA, M.D., is an individual, and is a medical physician who

COMPLAINT AND DEMAND FOR JURY TRIAL - 1

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at all relevant times herein resided in the State of Idaho, County of Ada, and transacted business as a practitioner licensed by the State of Idaho in the healing arts.

III.

Defendant ST. LUKE'S MERIDIAN MEDICAL CENTER, a hospital, who at all relevant times herein lawfully conducted business in the State of Idaho.

IV.

Defendant SPINE INSTITUTE OF IDAHO, a professional corporation, who at all relevant times herein lawfully conducted business in the State of Idaho.

V.

Defendants JOHN DOES I THROUGH X are individuals, corporations, companies or other entities whose identities are not presently known to the Plaintiff. Plaintiff requests leave of this Court to amend this Complaint when their true identities become known to the Plaintiff, however based upon information and belief said DOES maybe entities, corporations, limited liability companies, and/or employees of any and/or all defendants and/or co-defendants and may have acted on behalf as agents of any and/or all defendants and/or co-defendants and/or individuals who contributed to the Plaintiff's injuries and damages as alleged herein after. That we in accordance requested to set forth the names and identities of John and Jane Does I through X as such as additional facts may be developed by the Plaintiff.

VI.

That all acts which are complained of herein took place within the State of Idaho, County of

Ada. That plaintiff has complied with the statutory requirements set forth in I.C. §§ 6-1001 et seq., however a determination has not been made by the Idaho State Board of Medicine, and a stay of proceedings is requested until such time as the matter be judicially determined if needed.

VII.

KRISTEEN M. ELLIOTT retained and employed Defendant JOSEPH M. VERSKA, M.D., as a practitioner for the healing arts for the purpose of medical treatment for Spinal stenosis, L4-5; spondylolisthesis, L4-5; status post fusion and instrumentation for thoracolumbar scoliosis down to L4 and bilateral radiculopathy. That Defendant JOSEPH M. VERSKA, M.D., performed a surgical procedures known as Decompressive laminectomy, L4-5, posterior spinal fusion, L4-5; exploration of fusion mass L2-3, 3-4, and 4-5; removal of segmental instrumentation L2-3, 3-4, and 4-5 (DePuy); insertion of segmental instrumentation L2-3, 3-4, and 4-5 with fusion at L2-3, 3-4, and 4-5 commencing on or about October 8, 2007. It was actually and/or impliedly represented by Defendant that he would competently handle KRISTEEN M. ELLIOTT'S medical treatment, and Plaintiff, and each of them, relied upon the representations of Defendant, and thereafter Defendant undertook medical treatment for KRISTEEN M. ELLIOTT'S medical problems. That Defendant JOSEPH M. VERSKA, based upon information and belief, was an employee and/or agent of SPINE INSTITUTE OF IDAHO, P.A., a professional corporation, and all acts committed by defendant Verska were acts within the course and scope of his duties as employment and/or agency with defendant Spine Institute of Idaho, and as such under the doctrines of agency and/or Respondent Superior the Spine Institute of Idaho is responsible for their actions. That defendant ST. LUKE'S

MERIDIAN MEDICAL CENTER, and/or JANE AND JOHN DOES I through X, were required to provide sufficient medical facilities, and/or surgical supplies, which said defendants failed to provide for the benefit of the plaintiff.

VIII.

That thereafter, Defendants negligently, carelessly, and with lack of reasonable care on the part of Defendant, performed medical treatment and/or services for KRISTEEN M. ELLIOTT in an negligent and careless manner, to-wit:

- a) Due to continued lower back pain, Defendant Verska performed a second surgery on KRISTEEN M. ELLIOTT, on October 11, 2007. An exploration of the L4 and L5 nerve roots with L5 foraminotomy on the left and partial L5 hemilaminectomy, along with a revision of the L5 screw with reinsertion of rods and screws. During the second operation, a large hematoma was found and removed under pressure. The L5 nerve root was explored and no violation of the threads touching the nerve or penetrating the cortex. The pedicle screw was redirected more superiorly and reinserted, retapped it using a 6 x 40 screw. The rods were reassembled, the top lading set screws were tightened and the wound was closed in layers over a Hemovac drain. The Defendant Verska caused a break in the fusion mass at L1-2.
- b) Defendants failed to correctly properly administer medical treatment, failed to provide proper surgical supplies and/or facilities to KRISTEEN M. ELLIOTT for her medical condition(s), thereby causing physical injury, and damage to KRISTEEN M.

ELLIOTT, together with causing the plaintiff to incur additional medical bills and expenses, therapy, bodily injury, disfigurement, pain, suffering, loss of income and earning capacity, anxiety, worry, mental and emotional distress, loss of guidance, support, etc., and other damages and injuries sustained by KRISTEEN M. ELLIOTT herein.

IX.

That as a direct and proximate result of Defendants' actions and negligence described herein, Plaintiff has sustained damages (which would not have resulted had Defendant adequately performed his duties) in a principal sum that exceeds the jurisdictional limits of the District Court, together with interest at the rate of twelve (12) percent per annum from the date of loss to the date of Judgment, and thereafter at the highest legal rate until paid in full, or such additional sums as may later be proved. Leave of this Court is requested for Plaintiff to amend this Complaint as soon as the same becomes known to Plaintiff.

DEMAND FOR JURY TRIAL

Further, Plaintiff demand a trial by jury on all issues triable by jury in the above-entitled matter.

PRAAYER

WHEREFORE, Plaintiff pray for Judgment against Defendants as follows:

1. For damages in excess of the jurisdictional amount of the District Court for items of damages set forth in Count One hereof, together with twelve (12) percent interest

from the date of loss to the date of Judgment, and thereafter at a highest legal rate until paid in full, or such additional sums as may later be proved. Leave of Court is requested to amend said Complaint as soon as the same becomes known to Plaintiff.

2. For reasonable costs incurred.
3. For such further relief as may be just in the premises.

DATED this 24th day of September, 2009.



KRIS M. ELLIOTT

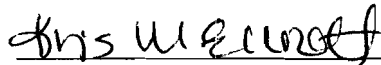
VERIFICATION

STATE OF IDAHO)
) ss:
County of Ada)

KRIS M. ELLIOTT, being first duly sworn upon oath, deposes and states as follows:

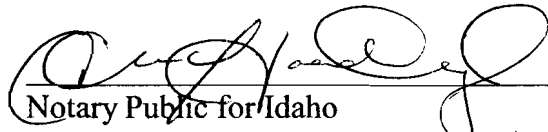
She is the Plaintiff, in the above-entitled action, she has read the foregoing Complaint and Demand for Jury Trial, knows the contents thereof, and believes the same to be true and correct to the best of her knowledge and belief.

DATED This 24th day of September, 2009.

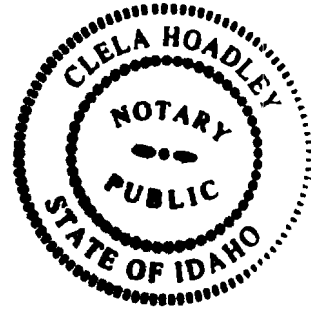


KRIS M. ELLIOTT

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State, this
24 day of September, 2009.



Notary Public for Idaho
Residing at Canyon County
My Commission Expires 9-30-14



KRIS M. ELLIOTT
10008 Tanglewood
Boise, Idaho 83709
Phone (208) 371-5658

AM _____ FIELD 5
OCT 05 2009
J. DAVID NAVARRO, Clerk
By L. MAES
DEPUTY

Appearing pro se

L. MAES HANSEN

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT,
a single woman

Plaintiff

vs.

JOSEPH M. VERSKA, MD, an individual,
ST. LUKE'S MERIDIAN MEDICAL
CENTER a/k/a ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF IDAHO,
P.A., a professional corporation, JANE
AND JOHN DOES I through X.

Defendants.

Case No. -

SUMMONS

CV P 1 0918953

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: DEFENDANT(S)

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond, the court may enter judgment against you as demanded by the Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advise or

COMPLAINT AND DEMAND FOR JURY TRIAL - 1

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representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a) (1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your answer is a response to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the clerk of the above-named court.

DATED this 5 day of ^{Oct}~~September~~, 2009.

J. DAVID NAVARRO
CLERK OF THE COURT

By:

Deputy Clerk

COMPLAINT AND DEMAND FOR JURY TRIAL - 2

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KRIS M. ELLIOTT
10008 Tanglewood
Boise, Idaho 83709
Phone (208) 371-5658

NOV 13 2009

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

Appearing pro se

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT,
a single woman

Plaintiff

vs.

JOSEPH M. VERSKA, MD, an individual,
ST. LUKE=S MERIDIAN MEDICAL
CENTER a/k/a ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF IDAHO,
P.A., a professional corporation,
HOWMEDICA OSTEONICS, CORP. d/b/a
STRYKER ORTHOPAEDICS, STRYKER,
JANE AND JOHN DOES I through X.

Defendants.

Case No. CV P1 0918953

**AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

COME NOW, the Plaintiff above-named, appearing pro se, and as and for a claim of relief
against the Defendants, allege as follows:

**COUNT ONE
NEGLIGENCE**

I.

The individual Plaintiff at all relevant times herein resided in the state of Idaho, County of
Ada.

II.

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 1

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Defendant JOSEPH M. VERSKA, M.D., is an individual, and is a medical physician who at all relevant times herein resided in the state of Idaho, County of Ada, and transacted business as a practitioner licensed by the state of Idaho in the healing arts.

III.

Defendant ST. LUKE'S MERIDIAN MEDICAL CENTER, a hospital, who at all relevant times herein lawfully conducted business in the state of Idaho.

IV.

Defendant SPINE INSTITUTE OF IDAHO, a professional corporation, who at all relevant times herein lawfully conducted business in the state of Idaho.

V.

Defendant HOWMEDICA OSTEONICS, CORP. d/b/a STRYKER ORTHOPAEDICS, who at all relevant times herein lawfully conducted business in the state of Idaho.

VI.

Defendant STRYKER, who at all relevant times herein lawfully conducted business in the state of Idaho.

VII.

Defendants JOHN DOES I THROUGH X are individuals, corporations, companies or other entities whose identities are not presently known to the Plaintiff. Plaintiff requests leave of this Court to amend this Complaint when their true identities become known to the Plaintiff, however based upon information and belief said DOES maybe entities, corporations, limited liability

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 2

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companies, and/or employees of any and/or all defendants and/or co-defendants and may have acted on behalf as agents of any and/or all defendants and/or co-defendants and/or individuals who contributed to the Plaintiff=s injuries and damages as alleged herein after. That we in accordance requested to set forth the names and identities of John and Jane Does I through X as such as additional facts may be developed by the Plaintiff.

VI.

That all acts which are complained of herein took place within the state of Idaho, County of Ada. That plaintiff has complied with the statutory requirements set forth in I.C. section 6-1001 et seq., however a determination has not been made by the Idaho State Board of Medicine, and a stay of proceedings is requested until such time as the matter be judicially determined if needed.

IX.

KRISTEEN M. ELLIOTT retained and employed Defendant JOSEPH M. VERSKA, M.D., as a practitioner for the healing arts for the purpose of medical treatment for Spinal stenosis, L4-5; spondylolisthesis, L4-5; status post fusion and instrumentation for thoracolumbar scoliosis down to L4 and bilateral radiculopathy. That Defendant JOSEPH M. VERSKA, M.D., performed a surgical procedures known as Decompressive laminectomy, L4-5, posterior spinal fusion, L4-5; exploration of fusion mass L2-3, 3-4, and 4-5; removal of segmental instrumentation L2-3, 3-4, and 4-5 (DePuy); insertion of segmental instrumentation L2-3, 3-4, and 4-5 with fusion at L2-3, 3-4, and 4-5 commencing on or about October 8, 2007. It was actually and/or impliedly represented by Defendant that he would competently handle KRISTEEN M. ELLIOTT'S medical treatment, and

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 3

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Plaintiff relied upon the representations of Defendant, and thereafter Defendant undertook medical treatment for KRISTEEN M. ELLIOTT'S medical problems. That Defendant JOSEPH M. VERSKA, based upon information and belief, was an employee and/or agent of SPINE INSTITUTE OF IDAHO, P.A., a professional corporation, and all acts committed by defendant Verska were acts within the course and scope of his duties as employment and/or agency with defendant Spine Institute of Idaho, and as such under the doctrines of agency and/or Respondent Superior the Spine Institute of Idaho is responsible for their actions. That defendant ST. LUKE'S MERIDIAN MEDICAL CENTER, Defendant HOWMEDICA OSTEONICS, CORP. d/b/a STRYKER ORTHOPAEDICS STRYKER and/or JANE AND JOHN DOES I through X, were required to provide sufficient medical facilities, and/or surgical supplies, which said defendants failed to provide for the benefit of the plaintiff.

VII.

That thereafter, Defendants negligently, carelessly, and with lack of reasonable care on the part of Defendant, performed medical treatment and/or services for KRISTEEN M. ELLIOTT in an negligent and careless manner, to-wit:

- a) Due to continued lower back pain, Defendant Verska performed a second surgery on KRISTEEN M. ELLIOTT, on October 11, 2007. An exploration of the L4 and L5 nerve roots with L5 foraminotomy on the left and partial L5 hemilaminectomy, along with a revision of the L5 screw with reinsertion of rods and screws. During the second operation, a large hematoma was found and removed under pressure. The L5

nerve root was explored and no violation of the threads touching the nerve or penetrating the cortex. The pedicle screw was redirected more superiorly and reinserted, retapped it using a 6 x 40 screw. The rods were reassembled, the top lading set screws were tightened and the wound was closed in layers over a Hemovac drain. The Defendant Verska caused a break in the fusion mass at L1-2.

- b) Defendants failed to correctly properly administer medical treatment, failed to provide proper surgical supplies and/or facilities to KRISTEEN M. ELLIOTT for her medical condition(s), thereby causing physical injury, and damage to KRISTEEN M. ELLIOTT, together with causing the plaintiff to incur additional medical bills and expenses, therapy, bodily injury, disfigurement, pain, suffering, loss of income and earning capacity, anxiety, worry, mental and emotional distress, loss of guidance, support, etc., and other damages and injuries sustained by KRISTEEN M. ELLIOTT herein.

XI.

That as a direct and proximate result of Defendants' actions and negligence described herein, Plaintiff has sustained past and future and special and general damages (which would not have resulted had Defendants adequately performed their duties) in a principal sum that exceeds the jurisdictional limits of the District Court, together with interest at the rate of twelve (12) percent per annum from the date of loss to the date of Judgment, and thereafter at the highest legal rate until paid in full, or such additional sums as may later be proved. Leave of this Court is requested for Plaintiff

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 5

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to amend this Complaint as soon as the same becomes known to Plaintiff.

DEMAND FOR JURY TRIAL

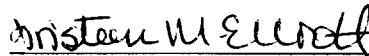
Further, Plaintiff demand a trial by jury on all issues triable by jury in the above-entitled matter.

PRAYER

WHEREFORE, Plaintiff pray for Judgment against Defendants as follows:

1. For damages in excess of the jurisdictional amount of the District Court for items of damages set forth in Count One hereof, together with twelve (12) percent interest from the date of loss to the date of Judgment, and thereafter at a highest legal rate until paid in full, or such additional sums as may later be proved. Leave of Court is requested to amend said Complaint as soon as the same becomes known to Plaintiff.
2. For reasonable costs and fees incurred.
3. For such further relief as may be just in the premises.

DATED this 13th day of November, 2009.



KRIS M. ELLIOTT
Kristeen M. Elliott

VERIFICATION

STATE OF IDAHO)
) ss:
County of Ada)

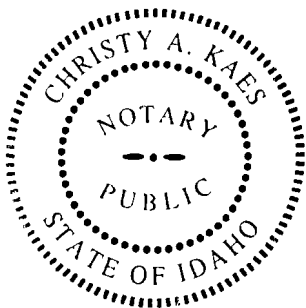
KRIS M. ELLIOTT, being first duly sworn upon oath, deposes and states as follows:

She is the Plaintiff, in the above-entitled action, she has read the foregoing Complaint and Demand for Jury Trial, knows the contents thereof, and believes the same to be true and correct to the best of her knowledge and belief.

DATED This 13th day of November, 2009.

Kristeen M Elliott (handwritten signature)
KRIS M. ELLIOTT
Kristeen M Elliott

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State, this 13th day of November 2009.



Christy A Kaes (handwritten signature)
Notary Public for Idaho
Residing at Boise, ID
My Commission Expires 12/15/2013

MAR 3 8 2010

J. DAVID NAVARRO, Clerk
By P. SCURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

TIMOTHY HANSEN

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

Case No. CV PI 0918953

vs.

ANOTHER SUMMONS

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT
MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU
RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

TO: JOSEPH M. VERSKA, M.D.

✓ ANOTHER SUMMONS [JOSEPH M. VERSKA, M.D.] - 1

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: 
DEPUTY CLERK

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [*Admission PHV Pending*]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

TIMOTHY HANSEN

Filed 3:54 PM
MAR 30 2010

DAVID NAVARRO, Clerk
By D. BOURNE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

ANOTHER SUMMONS

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.

TO: ST. LUKE'S MERIDIAN MEDICAL CENTER

ANOTHER SUMMONS [ST. LUKE'S MERIDIAN MEDICAL CENTER] - 1

000022

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: 
DEPUTY CLERK

MAR 30 2010

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

EMOTIONAL DAMAGE

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

Case No. CV PI 0918953

vs.

ANOTHER SUMMONS

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT
MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU
RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

TO: SPINE INSTITUTE OF IDAHO, P.A.

ANOTHER SUMMONS [SPINE INSTITUTE OF IDAHO, P.A.] - 1

✓

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: 
DEPUTY CLERK

MAR 30 2010

DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

TIMOTHY HANSEN

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

Case No. CV PI 0918953

vs.

ANOTHER SUMMONS

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.

TO: HOWMEDICA OSTEONICS CORP., dba STRYKER ORTHOPAEDICS

ANOTHER SUMMONS [HOWMEDICA OSTEONICS CORP., dba STRYKER ORTHOPAEDICS] – 1

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.


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3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: 
DEPUTY CLERK

MAR 30 2010

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
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Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

TIMOTHY HANSEN

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

Case No. CV PI 0918953

vs.

ANOTHER SUMMONS

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT
MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU
RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

TO: STRYKER

ANOTHER SUMMONS [STRYKER] - 1

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

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1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: 
DEPUTY CLERK

ORIGINAL

MAR 30 2010

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
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Boise, ID 83707-7808
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Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953


NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Eric B. Swartz, of the firm Jones & Swartz PLLC, 1673 West
Shoreline Drive, Suite 200, Post Office Box 7808, Boise, Idaho 83707-7808, and Mark D. Kamitomo,

of the firm The Markam Group, Inc., P.S., 421 West Riverside, Suite 1060, Spokane, Washington 99201, hereby appear on behalf of, and will represent herein, Plaintiff Kristeen M. Elliott.

DATED this 30th day of March, 2010.

JONES & SWARTZ PLLC

By 
ERIC B. SWARTZ

ORIGINAL

NO. _____ FILED _____ 352
A.M. _____ P.M. _____

MAR 30 2010

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
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THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
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aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

NOTICE OF STATUS OF CASE

PLEASE TAKE NOTICE that the Plaintiff, appearing *pro se*, has just now been successful in retaining counsel. The Amended Complaint is being sent out for service and the case will proceed.

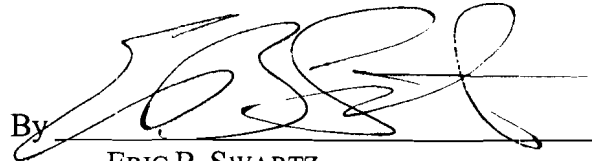
NOTICE OF STATUS OF CASE - 1

000032

This case should not be dismissed by the Clerk.

DATED this 30th day of March, 2010.

JONES & SWARTZ PLLC

By 
ERIC B. SWARTZ

ORIGINAL

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
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E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____ FILED _____
A.M. _____ P.M. *6/10/10*

APR 05 2010

J. DAVID NAVARRO, Clerk
By **E. HOLMES**
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF SERVICE ON
JOSEPH M. VERSKA, M.D.**

STATE OF IDAHO)
: ss.
County of Ada)

I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

AFFIDAVIT OF SERVICE ON JOSEPH M. VERSKA, M.D. - 1

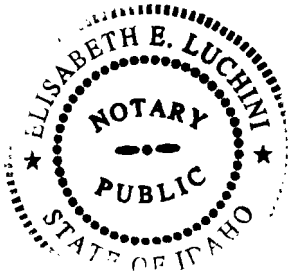
me

1. I am at least 18 years of age and not a party to this action.
2. On March 31, 2010, at approximately 11:19 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Tina McLeod, a person authorized to accept service on behalf of JOSEPH M. VERSKA, M.D., one of the Defendants herein. Said service was accomplished at Dr. Verska's place of business located at 360 East Montvue, Meridian, Idaho 83642.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.




Notary Public for Idaho
My Commission Expires: 7.8.12

ORIGINAL

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____ FILED _____
A.M. _____ P.M. *4:00*

APR 05 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF SERVICE ON
ST. LUKE'S MERIDIAN
MEDICAL CENTER**

STATE OF IDAHO)
 : ss.
County of Ada)

I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

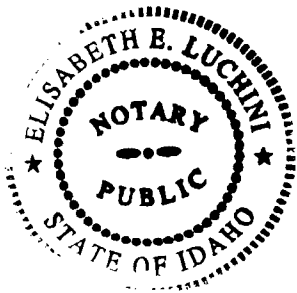
AFFIDAVIT OF SERVICE ON ST. LUKE'S MERIDIAN MEDICAL CENTER - 1

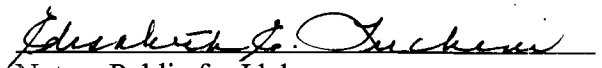
1. I am at least 18 years of age and not a party to this action.
2. On March 31, 2010, at approximately 10:58 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Carol Wilmes, a person authorized to accept service on behalf of Jeffrey S. Taylor, the Registered Agent for ST. LUKE'S MERIDIAN MEDICAL CENTER, one of the Defendants herein. Said service was accomplished at the Registered Agent's place of business located at 190 E. Bannock, Boise, Idaho 83712.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.




Notary Public for Idaho
My Commission Expires: 1.8.12

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____ FILED _____
A.M. _____ P.M. 4:00

APR 05 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

Case No. CV PI 0918953

vs.

**AFFIDAVIT OF SERVICE ON
SPINE INSTITUTE OF IDAHO, P.A.**

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

STATE OF IDAHO)
 : ss.
County of Ada)

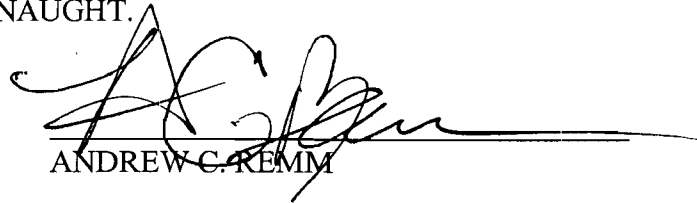
I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

ORIGINAL

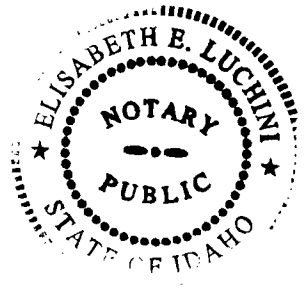
the

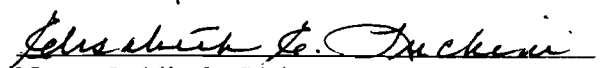
1. I am at least 18 years of age and not a party to this action.
2. On March 31, 2010, at approximately 11:19 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Tina McLeod, a person authorized to accept service on behalf of Nickolas Russell, the Registered Agent for SPINE INSTITUTE OF IDAHO, P.A., one of the Defendants herein. Said service was accomplished at the Registered Agent's place of business located at 360 East Montvue, Meridian, Idaho 83642.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.




Notary Public for Idaho
My Commission Expires: 7.8.12

ORIGINAL

NO. _____
A.M. _____ FILED P.M. 3:29

APR 07 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
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E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**APPLICATION FOR ADMISSION
PRO HAC VICE**

The undersigned, Eric B. Swartz, of the firm Jones & Swartz PLLC, petitions this Court for admission of Mark D. Kamitomo, pursuant to Idaho Bar Commission Rule 222, for the purpose of the above-captioned matter.

RB

Mark D. Kamitomo, of the firm The Markam Group, Inc., P.S., certifies that he is an active member, in good standing, of the bar of Washington, that he maintains the regular practice of law at the above-noted address, and that he is not a resident of the state of Idaho or licensed to practice in Idaho. Mr. Kamitomo certifies that he has previously been admitted under IBCR 222 in the following matters:

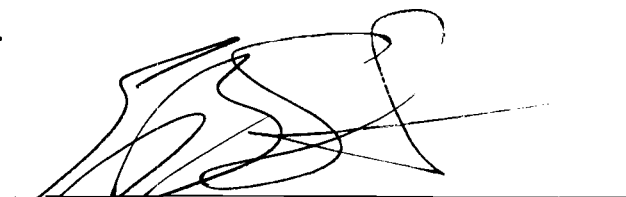
- Davis v. Zimmerman, M.D. – Case No. CV PI 0-100185D
- Kennell vs. Wurster, M.D. – Case No. OC 0616339
- Bendocchi v. Howmedica, Inc. – Case CIV-96-0311-M-EJL
- Rowland v. Life Care Centers – Before Idaho State Nursing Panel
- Bowen v. St. Alphonsus Regional Medical Center – Case No. CV OC 0823212
- Anderson v. Seyb, M.D. – Case No. CV PI 0915978
- Westby v. Schaefer, et al. – Case No. CV 09-13236

Both Mark D. Kamitomo and Eric B. Swartz certify that a copy of this Application has been served on all other parties to this matter, and that a copy of this Application, accompanied by a \$200 fee, has been provided to the Idaho State Bar.

Mr. Swartz certifies that the above information is true to the best of his knowledge, after reasonable investigation. Mr. Swartz acknowledges that his attendance shall be required at all court proceedings in which Mr. Kamitomo appears, unless specifically excused by the trial judge.

DATED this 5th day of April, 2010.


MARK D. KAMITOMO


ERIC B. SWARTZ

RECEIVED

APR 07 2010

Eric B. Swartz
Mireen Olson

Ada County Clerk
Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

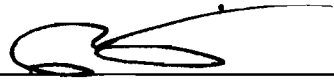
Case No. CV PI 0918953

**ORDER FOR ADMISSION
PRO HAC VICE**

The Application of Mark D. Kamitomo for Admission *Pro Hac Vice* having come before this
Court, and good cause appearing therefor,

IT IS HEREBY ORDERED, and this does ORDER, that Mark D. Kamitomo, of the firm The Markam Group, Inc., P.S., Spokane, Washington, is admitted to practice before this Court, *pro hac vice*, for the limited purpose of appearing in the above-entitled matter. Eric B. Swartz of the firm Jones & Swartz PLLC is designated as resident and local counsel.

DATED this 12 day of April, 2010.


TIMOTHY HANSEN, DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of April, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Eric B. Swartz
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808

U.S. Mail
 Fax: 489-8988
 Overnight Delivery
 Messenger Delivery
 Email: eric@jonesandswartzlaw.com

Mark D. Kamitomo
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201

U.S. Mail
 Fax: (509) 747-1993
 Overnight Delivery
 Messenger Delivery
 Email: mark@markamgrp.com

J. DAVID NAVARRO, CLERK
ADA COUNTY DISTRICT COURT

By 
DEPUTY CLERK

APR 19 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Trudy Hanson Fouser, ISB No. 2794
GJORDING & FOUSER, PLLC
509 W. Hays Street
P.O. Box 2837
Boise, Idaho 83701
Telephone: (208)336-9777
Facsimile: (208)336-9177

Attorneys for Defendant St. Luke's
Meridian Medical Center

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

KRISTEEN M. ELLIOTT, a single woman,	)	Case No. CV PI 0918953
)	
Plaintiff,)	
	)	DEFENDANT ST. LUKE'S
vs.	)	MERIDIAN MEDICAL CENTER'S
	)	ANSWER AND DEMAND FOR
	)	JURY TRIAL
JOSEPH M. VERSKA, M.D., an individual;)	
ST. LUKE'S MERIDIAN MEDICAL CENTER,)	
aka ST. LUKE'S, an Idaho corporation; SPINE	)	Fee Category: I(2)
INSTITUTE OF IDAHO, P.A., a professional	)	Filing Fee: \$58.00
corporation; HOWMEDICA OSTEONICS,)	
CORP., dba STRYKER ORTHOPAEDICS;)	
STRYKER; and JANE and JOHN DOES)	
I through X,)	
)	
Defendants.)	
)	

COMES NOW, Defendant St. Luke's Meridian Medical Center, by and through its undersigned counsel of record, Gjording & Fouser, PLLC, and in answer to the Plaintiff's Amended Complaint and Demand for Jury Trial on file herein, admits, denies, and alleges as follows:

DEFENDANT ST. LUKE'S MERIDIAN MEDICAL CENTER'S ANSWER AND DEMAND FOR JURY TRIAL, P. 1

aa

FIRST DEFENSE

I.

Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

II.

This answering Defendant denies each and every allegation of Plaintiff's Amended Complaint not herein expressly and specifically admitted. Defendant further reserves the right to amend this or any other answer or denial stated herein once it has had the opportunity to complete discovery regarding any of the claims and allegations contained in the Plaintiff's Amended Complaint.

III.

This answering Defendant admits paragraph III of the Plaintiff's Amended Complaint.

IV.

In answer to paragraph VI [*sic*] (should be VIII) on page three of the Plaintiff's Amended Complaint, this answering Defendant admits that Plaintiff has complied with the prelitigation screening requirements pursuant to Idaho Code Sections 6-1001, *et seq.* and denies the remainder of the allegations contained therein.

THIRD DEFENSE

V.

There is no causation or proximate causation between the Plaintiff's alleged damages and any alleged act or breach of duty by this answering Defendant.

FOURTH DEFENSE

VI.

The Plaintiff has, and continues to have, the ability and opportunity to mitigate the damages alleged with respect to the subject matter of this action, and has failed to mitigate said damages, if any were in fact incurred.

FIFTH DEFENSE

VII.

The damages alleged to have been suffered by Plaintiff, if any, were proximately caused by the negligence of other persons, parties or entities for which this Defendant is not responsible or had no control over. In asserting this defense, Defendant does not admit that Plaintiff has been damaged.

SIXTH DEFENSE

VIII.

This Defendant alleges that the Plaintiff's damages, if any, were proximately caused by the superseding, intervening, negligence, fault or actions of other third persons or parties that are not parties to this lawsuit for which this Defendant is not responsible, and that any negligence or breach of duty on the part of this Defendant, if any, was not a proximate cause of the alleged loss to the Plaintiff. In asserting this defense, this Defendant does not admit any negligence or breach of duty, and to the contrary, denies allegations of negligence or breach of duty.

SEVENTH DEFENSE

IX.

If this Defendant has any liability to the Plaintiff, which liability this Defendant denies, any award made to the Plaintiff in this action must be reduced by the Court, pursuant to Idaho Code §§ 6-1603, 6-1604 and 6-1606.

EIGHTH DEFENSE

X.

All services and work performed by this Defendant, its agents, employees and/or representatives, upon the Plaintiff were performed only after she gave her informed consent to having said services rendered after being fully advised of the nature and extent of all treatment to be performed.

NINTH DEFENSE

XI.

That the damages claimed by the Plaintiff may be a result of complications and are not a result of conduct, care or treatment furnished by Defendant St. Luke's Meridian Medical Center.

TENTH DEFENSE

XII.

That the Plaintiff's injuries, if any, may have been the result of a preexisting condition.

RESERVATION OF RIGHTS

XIII.

Discovery has not yet commenced, the result of which may reveal additional defenses to Defendant. Defendant reserves the right to amend this Answer if appropriate.

REQUEST FOR ATTORNEY FEES

XIV.

As a result of the filing of Plaintiff's Complaint, this answering Defendant has been required to retain legal counsel to defend the said action and is entitled to recover attorney fees, pursuant to the provisions contained in Idaho Code Sections 12-120 and 12-121 and Rule 54 of the Idaho Rules of Civil Procedure.

DEMAND FOR JURY TRIAL

XV.

This answering Defendant demands a jury trial on all issues pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure.

WHEREFORE, having fully and completely answered the Plaintiff's Amended Complaint herein, this answering Defendant prays as follows:

1. That Plaintiff's Amended Complaint be dismissed in its entirety, and that Plaintiff takes nothing thereby;

2. That this Defendant recover reasonable costs and attorney fees incurred herein;

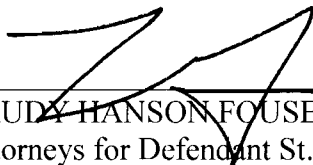
and

DEFENDANT ST. LUKE'S MERIDIAN MEDICAL CENTER'S ANSWER AND DEMAND FOR JURY TRIAL, P. 5

3. That this Court grant such other and further relief as it deems just and proper.

DATED this 19 day of April, 2010.

GJORDING & FOUSER, PLLC



TRUDY HANSON FOUSER
Attorneys for Defendant St. Luke's Meridian
Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of April, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Eric B. Swartz
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200
P.O. Box 7808
Boise, ID 83707-7808


Via U.S. Mail
 Via Hand-Delivery
 Via Overnight Delivery
 Via Facsimile

Mark D. Kamitomo
THE MARKHAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201

Via U.S. Mail
 Via Hand-Delivery
 Via Overnight Delivery
 Via Facsimile

Raymond D. Powers
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

Via U.S. Mail
 Via Hand-Delivery
 Via Overnight Delivery
 Via Facsimile



Trudy Hanson Fouser

DEFENDANT ST. LUKE'S MERIDIAN MEDICAL CENTER'S ANSWER AND DEMAND FOR JURY TRIAL, P. 6

APR 19 2010

J. DAVID NAVARRO, Clerk
 By A. GARDEN
 DEPUTY

Trudy Hanson Fouser, ISB No. 2794
GJORDING & FOUSER, PLLC
 509 W. Hays Street
 P.O. Box 2837
 Boise, Idaho 83701
 Telephone: (208)336-9777
 Facsimile: (208)336-9177

Attorneys for Defendant St. Luke's
 Meridian Medical Center

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

KRISTEEN M. ELLIOTT, a single woman,	)	Case No. CV PI 0918953
)	
Plaintiff,)	
	)	MOTION TO DISQUALIFY
vs.	)	JUDGE WITHOUT CAUSE
)	
JOSEPH M. VERSKA, M.D., an individual;)	
ST. LUKE'S MERIDIAN MEDICAL CENTER,)	
aka ST. LUKE'S, an Idaho corporation; SPINE)	
INSTITUTE OF IDAHO, P.A., a professional)	
corporation; HOWMEDICA OSTEONICS,)	
CORP., dba STRYKER ORTHOPAEDICS;)	
STRYKER; and JANE and JOHN DOES)	
I through X,)	
)	
Defendants.)	


COMES NOW, Defendant St. Luke's Meridian Medical Center, by and through its attorneys of record, Gjording & Fouser, PLLC, and pursuant to Rule 40(d)(1) of the Idaho Rules of Civil Procedure, hereby moves this Court for an order disqualifying the Honorable Timothy Hansen from governing over further proceedings herein.

MOTION TO DISQUALIFY JUDGE WITHOUT CAUSE, P. 1

AD

DATED this 19 day of April, 2010.

GJORDING & FOUSER, PLLC



TRUDY HANSON FOUSER
Attorneys for Defendant St. Luke's Meridian
Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of April, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Eric B. Swartz
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200
P.O. Box 7808
Boise, ID 83707-7808

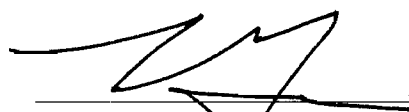
- Via U.S. Mail
- Via Hand-Delivery
- Via Overnight Delivery
- Via Facsimile

Mark D. Kamitomo
THE MARKHAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201

- Via U.S. Mail
- Via Hand-Delivery
- Via Overnight Delivery
- Via Facsimile

Raymond D. Powers
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

- Via U.S. Mail
- Via Hand-Delivery
- Via Overnight Delivery
- Via Facsimile



Trudy Hanson Fouser

RECEIVED
APR 19 2010
Ada County Clerk

NO. _____
A.M. _____ FILED P.M. 2:58

Trudy Hanson Fouser, ISB No. 2794
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509 W. Hays Street
P.O. Box 2837
Boise, Idaho 83701
Telephone: (208)336-9777
Facsimile: (208)336-9177

APR 20 2010

J. DAVID NAVARRO, Clerk
By JANET L. ELLIS
DEPUTY

Attorneys for Defendant St. Luke's
Meridian Medical Center

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,)
)
 Plaintiff,)
)
 vs.)
)
 JOSEPH M. VERSKA, M.D., an individual;)
 ST. LUKE'S MERIDIAN MEDICAL CENTER,)
 aka ST. LUKE'S, an Idaho corporation; SPINE)
 INSTITUTE OF IDAHO, P.A., a professional)
 corporation; HOWMEDICA OSTEONICS,)
 CORP., dba STRYKER ORTHOPAEDICS;)
 STRYKER; and JANE and JOHN DOES)
 I through X,)
)
 Defendants.)
)
 _____)

Case No. CV PI 0918953

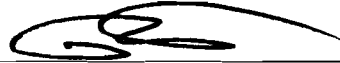
ORDER OF DISQUALIFICATION
OF JUDGE WITHOUT CAUSE

This matter having come before the Court on Defendant St. Luke's Meridian Medical Center's Motion to Disqualify Judge Without Cause, and pursuant to Rule 40(d)(1) of the Idaho Rules of Civil Procedure, and the motion having been timely made;

ORDER OF DISQUALIFICATION OF JUDGE WITHOUT CAUSE, P. 1

IT IS SO ORDERED that the Honorable Timothy Hansen be disqualified from further proceedings in this matter.

DATED this 20~~th~~ day of April, 2010.



HON. TIMOTHY HANSEN
DISTRICT JUDGE

CLERK'S CERTIFICATE OF MAILING

I do hereby certify that on the 20 day of April, 2010, I have mailed (served) by United States Mail, a true and correct copy of the within instrument to the following:

Eric B. Swartz
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200
P.O. Box 7808
Boise, ID 83707-7808

Via U.S. Mail
 Via Hand-Delivery
 Via Overnight Delivery
 Via Facsimile

Mark D. Kamitomo
THE MARKHAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201

Via U.S. Mail
 Via Hand-Delivery
 Via Overnight Delivery
 Via Facsimile

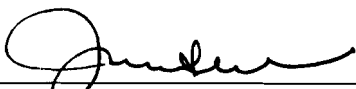
Raymond D. Powers
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

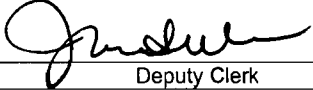
Via U.S. Mail
 Via Hand-Delivery
 Via Overnight Delivery
 Via Facsimile

Trudy Hanson Fouser
GJORDING & FOUSER PLLC
P.O. Box 2837
Boise, ID 83701

Via U.S. Mail
 Via Hand-Delivery
 Via Overnight Delivery
 Via Facsimile

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: 
Deputy Court Clerk

FILED
Tuesday, April 20, 2010 at 02:59 PM
J. DAVID NAVARRO, CLERK OF THE COURT
BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M ELLIOTT ,
Plaintiff,

vs.

JOSEPH M VERSKA MD, ETAL.,
Defendant.

Case No. CV-PI-2009-18953

NOTICE OF REASSIGNMENT

NOTICE IS HEREBY GIVEN That the above-entitled case has been
reassigned to the Honorable DARLA WILLIAMSON.

DATED Tuesday, April 20, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By: 
Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on Tuesday, April 20, 2010, I have delivered a true and accurate
copy of the foregoing document to the following parties in the method indicated below:

TRUDY FOUSER
FAX: 336-9177

MARK KAMITOMO
FAX: 509-747-1993

KRISTEEN ELLIOTT
10008 TANGLEWOOD
BOISE ID 83709

ERIC SWARTZ
FAX: 489-8988
J. DAVID NAVARRO
Clerk of the Court

By: 
Deputy Clerk

ANY PREVIOUSLY SCHEDULED HEARINGS AND OR TRIALS ARE HEREBY VACATED.

 NOTICE OF REASSIGNMENT-Criminal

000055

ORIGINAL

APR 20 2010

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

Raymond D. Powers
ISB #2737; rdp@powerstolman.com
Portia L. Rauer
ISB #7233; plr@powerstolman.com
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
Post Office Box 9756
Boise, Idaho 83707
Telephone: (208) 577-5100
Facsimile: (208) 577-5101
W:\22\22-003\DQ Williamson - Mot.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**MOTION TO DISQUALIFY JUDGE
WITHOUT CAUSE**


COME NOW Defendants Joseph M. Verska, M.D. and the Spine Institute of Idaho,
P.A., by and through their counsel of record, Powers Tolman, PLLC, and, pursuant to Idaho Rule

K3

of Civil Procedure 40(d)(1), move this Court for the disqualification of The Honorable Darla S. Williamson. In accordance with Rule 40(d)(1), this motion is made without cause.

DATED this 20th day of April, 2010.

POWERS TOLMAN, PLLC

By 

Raymond D. Powers - Of the Firm
Portia L. Rauer - Of the Firm
Attorneys for Defendants Joseph M. Verska,
M.D. and Spine Institute of Idaho, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2010, I caused to be served a true copy of the foregoing **MOTION TO DISQUALIFY JUDGE WITHOUT CAUSE**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz
JONES & SWARTZ, PLLC
1673 W. Shoreline Drive, Suite 200
PO Box 7808
Boise, ID 83707-7808
Fax No.: 489-8988
Attorneys for Plaintiff


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

Mark D. Kamitomo
THE MARKAM GROUP, INC., P.S.
421 W. Riverside, Suite 1060
Spokane, WA 99201
Fax No.: (509) 747-1993
Attorneys for Plaintiff

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 Hand Delivered
 Overnight Mail
 Telecopy

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
PO Box 2837
Boise, ID 83701
Fax No.: 336-9177
*Attorneys for Defendant St. Luke's Meridian
Medical Center*

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



Raymond D. Powers
Portia L. Rauer

ORIGINAL

NO. _____ FILED 4/13
A.M. _____ P.M.

APR 20 2010

J. DAVID NAVARRO, Clerk
By L. AMES
DEPUTY

Raymond D. Powers
ISB #2737; rdp@powerstolman.com
Portia L. Rauer
ISB #7233; plr@powerstolman.com
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
Post Office Box 9756
Boise, Idaho 83707
Telephone: (208) 577-5100
Facsimile: (208) 577-5101
W:\22\22-003\Dismiss - Aff-Powers.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF RAYMOND D.
POWERS**

STATE OF IDAHO)
 :ss.
County of Ada)

RAYMOND D. POWERS after being first duly sworn on oath, deposes and states as follows:

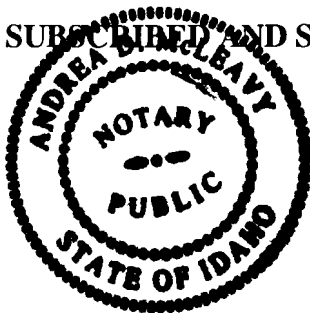
1. I am an attorney licensed to practice in the State of Idaho, and am one of the attorneys of record for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A. in the above-referenced matter.
2. I am familiar with and have personal knowledge regarding the matters set forth herein.
3. Attached to this Affidavit as Exhibit A is a true and correct copy of Another Summons address to Joseph M. Verska, M.D.
4. Attached to this Affidavit as Exhibit B is a true and correct copy of Another Summons address to Spine Institute of Idaho, P.A.
5. Attached to this Affidavit as Exhibit C is a true and correct copy of the Reinstatement of Annual Report.
6. Attached to this Affidavit as Exhibit D is a true and correct copy of the Affidavit of Service on Spine Institute of Idaho, P.A.
7. Attached to this Affidavit as Exhibit E is a true and correct copy of the Affidavit of Service on Joseph M. Verska, M.D.

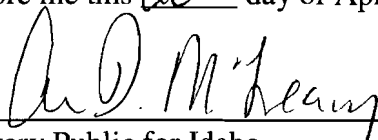
FURTHER YOUR AFFIANT SAYETH NAUGHT.



RAYMOND D. POWERS

SUBSCRIBED AND SWORN TO before me this 20th day of April, 2010.





Notary Public for Idaho
Residing at Meridian, ID
My Commission Expires: 3/26/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2010, I caused to be served a true copy of the foregoing **AFFIDAVIT OF RAYMOND D. POWERS**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz
JONES & SWARTZ, PLLC
1673 W. Shoreline Drive, Suite 200
PO Box 7808
Boise, ID 83707-7808
Fax No.: 489-8988
Attorneys for Plaintiff


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

Mark D. Kamitomo
THE MARKAM GROUP, INC., P.S.
421 W. Riverside, Suite 1060
Spokane, WA 99201
Fax No.: (509) 747-1993
Attorneys for Plaintiff

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

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
PO Box 2837
Boise, ID 83701
Fax No.: (208) 336-9177
*Attorneys for Defendant St. Luke's Meridian
Medical Center*

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



Raymond D. Powers
Portia L. Rauer

EXHIBIT A

MAR 30 2010

By DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

TIMOTHY HANSEN

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

Case No. CV PI 0918953

vs.

ANOTHER SUMMONS

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT
MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU
RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

TO: JOSEPH M. VERSKA, M.D.

ANOTHER SUMMONS [JOSEPH M. VERSKA, M.D.] - 1

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: _____
DEPUTY CLERK

P. BOURNE
SEAL

EXHIBIT B

MAR 30 2010

J. DAVID NAYARR, Clerk
By R. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

TIMOTHY HANSEN

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

Case No. CV PI 0918953

vs.

ANOTHER SUMMONS

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.

TO: SPINE INSTITUTE OF IDAHO, P.A.

ANOTHER SUMMONS [SPINE INSTITUTE OF IDAHO, P.A.] - 1

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: _____

P. BOURNIVAL
DEPUTY CLERK

EXHIBIT C

FILED EFFECTIVE

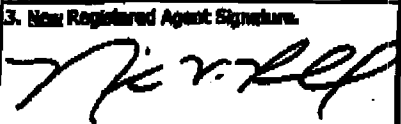
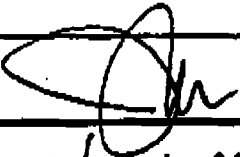
No. C 138101	Reinstatement Annual Report Form ADMIN DISSOLVED 06/04/2009		2. Registered Agent and Office (NOT A P.O. BOX)			
Return to: SECRETARY OF STATE 450 N 4th STREET PO BOX 83720 BOISE, ID 83720-0080 REINSTATEMENT FEE DUE: \$30.00	1. Mailing Address: Correct in this box if needed. SPINE INSTITUTE OF IDAHO, P.A. NICK RUSSELL 360 E MONTVUE MERIDIAN ID 83642		PAMELA MONFERRER 360 E MONTVUE MERIDIAN ID 83642 NICKOLAS RUSSELL 3. New Registered Agent Signature: 			
4. Corporations: Enter Names and Business Addresses of President, Secretary, Directors and (optional) Treasurer.						
Office Held	Name	Street or PO Address	City	State	Country	Postal Code
President	Joseph M. Yerka	360 E	Meridian	ID	US	83642
Secretary	Samuel S. Jorgenson	Montvue Dr				
				855-2900		
				or 333-8500		
5. Organized Under the Laws of IDAHO C 138101		5. Signature  Name (type or print): Joseph M. Yerka		Date: 7-15-09 Title: Pres.		
Revised 07/10/2009 by SLJ						

EXHIBIT D

ORIGINAL

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED _____ P.M. 4:00

APR 05 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF SERVICE ON
SPINE INSTITUTE OF IDAHO, P.A.**

STATE OF IDAHO)
 : ss.
County of Ada)

I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

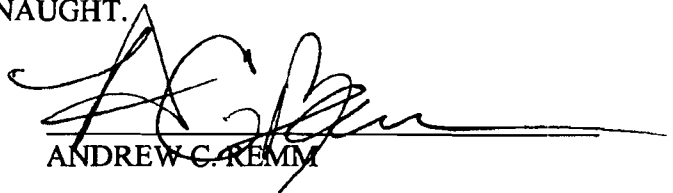
AFFIDAVIT OF SERVICE ON SPINE INSTITUTE OF IDAHO, P.A. - 1

VW

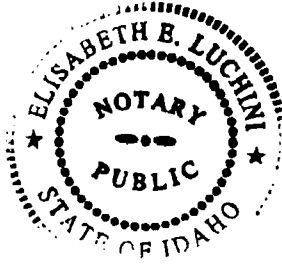
1. I am at least 18 years of age and not a party to this action.

2. On March 31, 2010, at approximately 11:19 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Tina McLeod, a person authorized to accept service on behalf of Nickolas Russell, the Registered Agent for SPINE INSTITUTE OF IDAHO, P.A., one of the Defendants herein. Said service was accomplished at the Registered Agent's place of business located at 360 East Montvue, Meridian, Idaho 83642.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.



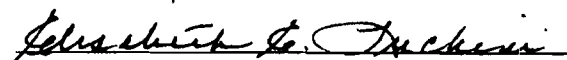

Notary Public for Idaho
My Commission Expires: 7.8.12

EXHIBIT E

ORIGINAL

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____ FILED _____
A.M. _____ PM *4:00*

APR 05 2010

J. DAVID NAVARRO, Clerk
By **E. HOLMES**
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF SERVICE ON
JOSEPH M. VERSKA, M.D.**

STATE OF IDAHO)
 : ss.
County of Ada)

I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

AFFIDAVIT OF SERVICE ON JOSEPH M. VERSKA, M.D. - 1

me

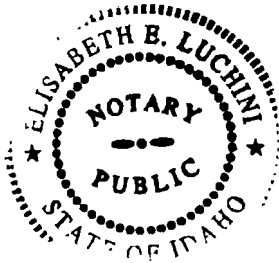
1. I am at least 18 years of age and not a party to this action.


2. On March 31, 2010, at approximately 11:19 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Tina McLeod, a person authorized to accept service on behalf of JOSEPH M. VERSKA, M.D., one of the Defendants herein. Said service was accomplished at Dr. Verska's place of business located at 360 East Montvue, Meridian, Idaho 83642.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.




Notary Public for Idaho
My Commission Expires: 7.8.12

ORIGINAL

NO. _____ FILED _____
A.M. _____ P.M. 413

APR 20 2010

J. DAVID NAVARRO, Clerk
By L. AMER
DEPUTY

Raymond D. Powers
ISB #2737; rdp@powerstolman.com
Portia L. Rauer
ISB #7233; plr@powerstolman.com
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
Post Office Box 9756
Boise, Idaho 83707
Telephone: (208) 577-5100
Facsimile: (208) 577-5101
W:\22\22-003\Dismiss - Aff-Russell.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF NICKOLAS
RUSSELL**

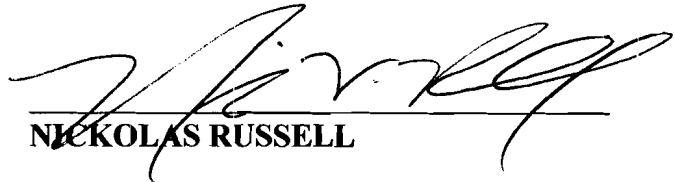
STATE OF IDAHO)
 :ss.
County of Ada)

NICKOLAS RUSSELL, after being first duly sworn on oath, deposes and states as follows:

1. I am the office administrator at Spine Institute of Idaho. I am also the registered agent for Spine Institute of Idaho, P.A.
2. I was in my office at the Spine Institute of Idaho on March 31, 2010.
3. I was not called to the front desk to receive service of any documents from a process server.
4. At some point on March 31, 2010, as I was going through the items in my office inbox, I stumbled upon a packet of documents that included two documents entitled Another Summons – one to the Spine Institute of Idaho and one to Dr. Verska – and two copies of an Amended Complaint and Demand for Jury Trial.
5. I was not personally served, as the registered agent for Spine Institute of Idaho, P.A., by a law enforcement official or a process server with the documents included in the packet.
6. I found out later that the documents had been dropped off and left with the receptionist, Tina McLeod.
7. I have not authorized Tina McLeod as my agent to accept service of process on my behalf either individually or in my capacity as the registered agent for Spine Institute of Idaho, P.A.
8. The position of receptionist has never been conferred with any type of appointment authorizing the receptionist to accept service on behalf of the individuals who work at Spine Institute of Idaho.


9. The position of receptionist has never been conferred with any type of appointment authorizing the receptionist to accept service of behalf of the Spine Institute of Idaho.
10. Tina McLeod has never been an officer, director, managing agent, or shareholder of the Spine Institute of Idaho, P.A.
11. Tina McLeod has never been vested with any type of managerial or supervisory responsibilities at Spine Institute of Idaho, P.A.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


NICKOLAS RUSSELL

SUBSCRIBED AND SWORN TO before me this 16 day of April, 2010.




Notary Public for Idaho
Residing at Nampa, Idaho
My Commission Expires: 04/24/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2010, I caused to be served a true copy of the foregoing **AFFIDAVIT OF NICKOLAS RUSSELL**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz
JONES & SWARTZ, PLLC
1673 W. Shoreline Drive, Suite 200
PO Box 7808
Boise, ID 83707-7808
Fax No.: 489-8988
Attorneys for Plaintiff

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

Mark D. Kamitomo
THE MARKAM GROUP, INC., P.S.
421 W. Riverside, Suite 1060
Spokane, WA 99201
Fax No.: (509) 747-1993
Attorneys for Plaintiff

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

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
PO Box 2837
Boise, ID 83701
Fax No.: (208) 336-9177
*Attorneys for Defendant St. Luke's Meridian
Medical Center*

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



Raymond D. Powers
Portia L. Rauer

ORIGINAL

FILED PM 4:13

APR 20 2010

J. DAVID NAVAHO, Clerk
By L. AMES
DEPUTY

Raymond D. Powers
ISB #2737; rdp@powerstolman.com
Portia L. Rauer
ISB #7233; plr@powerstolman.com
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
Post Office Box 9756
Boise, Idaho 83707
Telephone: (208) 577-5100
Facsimile: (208) 577-5101
W:\22\22-003\Dismiss - Aff-Verska.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

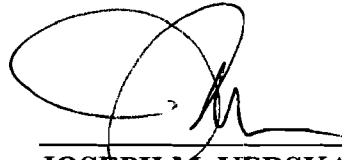
**AFFIDAVIT OF JOSEPH M.
VERSKA, M.D.**

STATE OF IDAHO)
 :ss.
County of Ada)

JOSEPH M. VERSKA, M.D., after being first duly sworn on oath, deposes and states as follows:

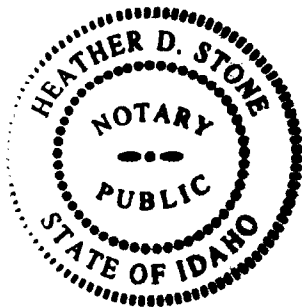
1. I was not personally served with a copy of the summons and complaint in this action.
2. No one at my dwelling or usual place of abode received copies of the summons and complaint in this action on my behalf.
3. I have not appointed Tina McLeod or Nickolas Russell to act as my authorized agents for the purpose of accepting service on my behalf.

FURTHER YOUR AFFIANT SAYETH NAUGHT.



JOSEPH M. VERSKA, M.D.

SUBSCRIBED AND SWORN TO before me this 16 day of April, 2010.



Heather D Stone
Notary Public for Idaho
Residing at Nampa, Idaho
My Commission Expires: 04/24/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2010, I caused to be served a true copy of the foregoing **AFFIDAVIT OF JOSEPH M. VERSKA, M.D.**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
JONES & SWARTZ, PLLC	<input type="checkbox"/>	Hand Delivered
1673 W. Shoreline Drive, Suite 200	<input type="checkbox"/>	Overnight Mail
PO Box 7808	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83707-7808		
Fax No.: 489-8988		
<i>Attorneys for Plaintiff</i>		

Mark D. Kamitomo	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
THE MARKAM GROUP, INC., P.S.	<input type="checkbox"/>	Hand Delivered
421 W. Riverside, Suite 1060	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input checked="" type="checkbox"/>	Telecopy
Fax No.: (509) 747-1993		
<i>Attorneys for Plaintiff</i>		

Trudy Hanson Fouser	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
GJORDING & FOUSER, PLLC	<input type="checkbox"/>	Hand Delivered
509 W. Hays Street	<input type="checkbox"/>	Overnight Mail
PO Box 2837	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83701		
Fax No.: (208) 336-9177		
<i>Attorneys for Defendant St. Luke's Meridian Medical Center</i>		



Raymond D. Powers
Portia L. Rauer

ORIGINAL

FILED 4/3 PM

APR 20 2010

J. DAVID NAVARRO, Clerk
By L. AMES DEPUTY

Raymond D. Powers
ISB #2737; rdp@powerstolman.com
Portia L. Rauer
ISB #7233; plr@powerstolman.com
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
Post Office Box 9756
Boise, Idaho 83707
Telephone: (208) 577-5100
Facsimile: (208) 577-5101
W:\22\22-003\Dismiss - Aff-McLeod.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

AFFIDAVIT OF TINA McLEOD

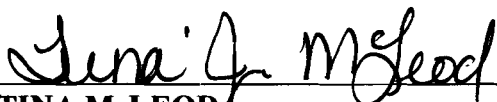
STATE OF IDAHO)
 :ss.
County of Ada)

TINA McLEOD, after being first duly sworn on oath, deposes and states as follows:

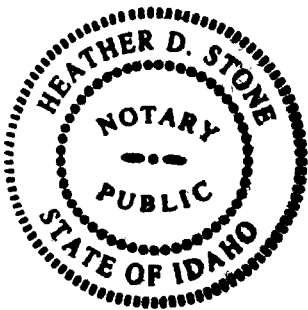
1. I am the receptionist at Spine Institute of Idaho. I work at the front desk. My job is to greet patients and the general public, check patients in for their appointments at the clinic, and answer the telephones.
2. I have been employed at the Spine Institute of Idaho for approximately two years.
3. On March 31, 2010, a man came into Spine Institute of Idaho and approached the front counter where I was working.
4. The man was wearing street clothes and appeared to be a patient or a courier.
5. The man placed a packet of documents on the counter and said he needed to give them to me. He did not identify himself.
6. I did not know what the packet of documents was, so I asked the man what the documents were in regard to. He said "It's a complaint." I thought he meant it was some type of informal complaint from a patient, but had no idea they were legal papers.
7. I have never been served before nor have I been a party to a lawsuit. Therefore, I had no reason to understand that a complaint was a legal document.
8. I was not told to whom the documents should have been given.
9. I was not told that the documents were time sensitive.
10. I was not asked by the man if I was an agent or officer of the Spine Institute of Idaho, P.A., nor did he ask me if I was an agent authorized to receive service on behalf of either Dr. Verska or the Spine Institute of Idaho, P.A.
11. I was not asked to sign for the documents.
12. On the top of the packet was a copy of a form, which had Nickolas Russell's name on the top. From this form I guessed that the packet of documents should be delivered to office administrator, Nick Russell.


13. I put the packet in Mr. Russell's inbox, just as I did with other routine office documents.
14. I am not a registered agent for the Spine Institute of Idaho, P.A., nor have I ever been a director, officer, or shareholder of Spine Institute of Idaho, P.A.
15. I have never been appointed as an authorized agent for Nickolas Russell or Dr. Verska.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


TINA McLEOD

SUBSCRIBED AND SWORN TO before me this 16 day of April, 2010.




Notary Public for Idaho
Residing at Nampa, Idaho
My Commission Expires: 04/24/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2010, I caused to be served a true copy of the foregoing **AFFIDAVIT OF TINA McLEOD**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz
JONES & SWARTZ, PLLC
1673 W. Shoreline Drive, Suite 200
PO Box 7808
Boise, ID 83707-7808
Fax No.: 489-8988
Attorneys for Plaintiff

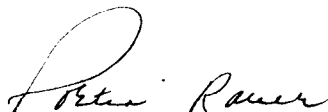
U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Telecopy

Mark D. Kamitomo
THE MARKAM GROUP, INC., P.S.
421 W. Riverside, Suite 1060
Spokane, WA 99201
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APR 20 2010

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Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS**

COME NOW Defendants Joseph M. Verska, M.D. and the Spine Institute of Idaho, P.A., by and through their counsel of record, Powers Tolman, PLLC, and submit this memorandum in support of their motion to dismiss for insufficiency of service of process.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS - 1

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INTRODUCTION

Plaintiff is alleging that Defendants were negligent in the medical care provided to her on October 11, 2007. Plaintiff filed a cause of action against these moving Defendants on October 5, 2009, while awaiting a decision from the pre-litigation screening panel.¹

On March 30, 2010, Plaintiff had at least two summonses issued.² Each was titled “Another Summons.” On March 31, 2010, a process server went to the offices of the Spine Institute of Idaho and approached the front counter where the receptionist, Tina McLeod, was working.³ The process server was wearing street clothes and appeared to Ms. McLeod to be either a patient or a courier.⁴ The process server placed a packet of documents on the counter and told Ms. McLeod that he needed to give them to her.⁵ Ms. McLeod did not know what the packet of documents was, so she asked the process server what the documents were in regard to, to which the process server responded “It’s a complaint.”⁶ Ms. McLeod did not know what type of “complaint” he meant and assumed it was some type of complaint from a patient, but had no idea they were legal papers.⁷ She was not told to whom the documents should have been given, nor was she given any indication that the documents were time sensitive.⁸ Ms. McLeod was not asked whether she was an agent or officer of the corporation, Spine Institute of Idaho, P.A., nor was she asked if she was an agent authorized to receive service on behalf of either Dr. Verska or

¹ The Court will note that Plaintiff filed an amended complaint on November 13, 2009, which was the complaint that Plaintiff attempted to serve upon Defendants. It is not the purpose of this motion, nor is it Defendants’ responsibility, to attempt to reconcile why two complaints were filed.

² Another Summons addressed to Joseph M. Verska, M.D. and Another Summons addressed to Spine Institute of Idaho, P.A., copies of which are attached to the Affidavit of Raymond D. Powers.

³ Affidavit of Tina McLeod; Affidavits of Service on file herein and attached as exhibits to the Affidavit of Raymond D. Powers.

⁴ Affidavit of Tina McLeod.

⁵ Affidavit of Tina McLeod.

⁶ Affidavit of Tina McLeod.

⁷ Affidavit of Tina McLeod.

⁸ Affidavit of Tina McLeod.

the Spine Institute of Idaho.⁹ Ms. McLeod was not asked to sign for the documents.¹⁰ On the top of the packet was a copy of a “Reinstatement Annual Report Form” from 2009, which had the name of Nickolas Russell on the top.¹¹ From this form, Ms. McLeod guessed that the packet of documents should be delivered to office administrator, Nick Russell.¹² Ms. McLeod put the packet in Mr. Russell’s inbox, just as she did with other routine office documents.¹³

Mr. Russell is the registered agent for the Spine Institute of Idaho, P.A.¹⁴ Mr. Russell was in his office at the Spine Institute of Idaho on March 31, 2010.¹⁵ He was not called to the front desk to receive service of any documents from a process server.¹⁶ At a point later in the day, Mr. Russell sorted through the items in his inbox that had been placed there at various times throughout the day.¹⁷ Mr. Russell stumbled upon the packet of documents that had been placed in his inbox.¹⁸ Included in the packet of documents were the two documents entitled Another Summons – one to the Spine Institute of Idaho and one to Dr. Verska – and two copies of an Amended Complaint and Demand for Jury Trial.¹⁹

Ms. McLeod is not the registered agent for the Spine Institute, nor has she been given authority from the Spine Institute of Idaho to receive service of process on behalf of the Spine Institute of Idaho.²⁰ In her position as receptionist, Ms. McLeod does not have any managerial or supervisory responsibilities.²¹ Ms. McLeod’s duties and responsibilities as a receptionist do

⁹ Affidavit of Tina McLeod.

¹⁰ Affidavit of Tina McLeod.

¹¹ Reinstatement of Annual Report, a copy of which is attached as an exhibit to the Affidavit of Raymond D. Powers.

¹² Affidavit of Tina McLeod.

¹³ Affidavit of Tina McLeod.

¹⁴ Affidavit of Nickolas Russell.

¹⁵ Affidavit of Nickolas Russell.

¹⁶ Affidavit of Nickolas Russell.

¹⁷ Affidavit of Nickolas Russell.

¹⁸ Affidavit of Nickolas Russell.

¹⁹ Affidavit of Nickolas Russell.

²⁰ Affidavits of Tina McLeod and Nickolas Russell; Reinstatement of Annual Report.

²¹ Affidavit of Nickolas Russell.

not include acting as a registered agent to accept service of process for the Spine Institute of Idaho; she greets patients, checks the patients into the clinic, and answers the telephones.²² Similarly, Ms. McLeod is not an agent of Dr. Verska's authorized to accept service of process on his behalf; neither has Mr. Russell been authorized to accept service on Dr. Verska's behalf.²³

Additionally, Dr. Verska has not been personally served with process, nor have copies been left with anyone at his home.²⁴

Since Ms. McLeod had no authority to receive service on behalf of the Spine Institute of Idaho, P.A. or Dr. Verska and the documents were not delivered by the process server to Mr. Russell or Dr. Verska, the service of process is insufficient and the complaint against the Spine Institute of Idaho, P.A. and Dr. Verska must be dismissed with prejudice.

ARGUMENT

A. STANDARD FOR MOTION TO DISMISS.

The defense of insufficiency of service of process shall be made by motion, instead of in a responsive pleading. Rule 12(b), Idaho R. Civ. P. The defense of insufficiency of service of process shall be waived unless it is made by motion prior to a responsive pleading being filed or the filing of any other motion. Rule 12(g)(1), Idaho R. Civ. P.

B. PLAINTIFF'S ACTION AGAINST THE SPINE INSTITUTE OF IDAHO AND DR. VERSKA MUST BE DISMISSED FOR INSUFFICIENCY OF SERVICE OF PROCESS.

1. Service of Process Upon the Spine Institute of Idaho Was Insufficient Because Service Was Not Made Upon the Registered Agent.

Rule 4(d)(4), Idaho R. Civ. P., requires that service upon a domestic corporation be accomplished by delivering a copy of the summons and complaint to an officer, managing or

²² Affidavits of Tina McLeod and Nickolas Russell.

²³ Affidavits of Tina McLeod, Nickolas Russell, and Joseph M. Verska, M.D.

²⁴ Affidavit of Joseph M. Verska, M.D.

general agent, or to any other agent authorized by appointment or by statute of this state to receive service of process. In order to be effective, service must be made on an actual agent. *Brown v. Carolina Emergency Physicians, P.A.*, 560 S.E.2d 624, 631 (S.C. App. 2001). Just because an individual is an employee of a defendant does not cloak that individual with authority to receive process for the defendant. *Brakke v. Rudnick*, 409 N.W.2d 326, 330 (N.D. 1987). Attempted service of a summons and complaint on a corporate defendant, by delivering a copy to a receptionist, is ineffective if the receptionist is not an officer, director, or managing agent. *Gleizer v. American Airlines, Inc.*, 815 N.Y.S.2d 740 (2006). In order for an employee to be authorized to accept service of process on behalf of a corporation, it is necessary that the employee occupy some managerial or supervisory responsibility within the organization. *GMAC Mortgage Corp. v. Bongiorno*, 626 S.E. 2d 536 (Ga. App. 2006). Plaintiff's action against Spine Institute of Idaho, P.A. must be dismissed because Ms. McLeod was not the registered agent of the Spine Institute of Idaho, P.A., nor did she have any kind of authority whatsoever to accept service of process upon the Spine Institute of Idaho, P.A.

Other jurisdictions have held that service of process is insufficient when it is upon a person who is not an agent, officer, director, or manager of the corporation to be served. For example, in *Aikens v. Brent Scarbrough & Company, Inc.*, the Georgia Court of Appeals held that the corporation's receptionist was not authorized to accept service of process on corporation's behalf. 651 S.E. 2d 214 (Ga. App. 2007). In so holding, the court explained that for an employee to be authorized to accept service on a corporation's behalf, her position must be such as to afford reasonable assurance that she will inform the corporate principal that such process has been served upon her. *Id.* at 217. The employee need not be an officer or be authorized to enter into contracts on behalf of the corporation. *Id.* at 216-17. But if she is not an officer or has not been expressly designated by the corporation to receive service, she must

occupy some position of managerial or supervisory responsibility within the organization. *Id.* To support its finding, the court relied upon facts that established that the receptionist had never been an officer, director or shareholder of the corporation, had never been expressly or impliedly designated as a person to receive service and had no managerial or supervisory responsibilities. *Id.*

Jurisdiction was never obtained over the corporate defendants in *Hossain v. Fab Cab Corp.* where the process server served the receptionist in the defendant's office. 868 N.Y.S.2d 746 (2008). The court could find no evidence that the receptionist was an officer, director, managing agent, or an agent authorized by appointment to accept service on the defendant's behalf. *Id.*

The appellate court in *Brown v. Carolina Emergency Physicians, P.A.*, 560 S.E.2d 624, 632 (S.C. App. 2001) upheld the trial court's finding that service was ineffective. The rationale supporting the court's decision was that "without specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary." *Id.*

To effectuate service in the present case, service of process must have been made upon an agent of the Spine Institute of Idaho. In the present case, Tina McLeod was the receptionist at the Spine Institute of Idaho, P.A. She was not an agent by any stretch of the imagination. She was not, nor had she ever been, an officer, director, or shareholder of the Spine Institute of Idaho. Ms. McLeod has never held a managerial or supervisory position at the Spine Institute of Idaho. She was not, nor had she ever been, the registered agent. The Spine Institute of Idaho did not appoint her as an agent to receive service of process by virtue of her sitting at the front desk and greeting patients.

Furthermore, the process server knew who the registered agent was for Spine Institute of Idaho because atop the stack of papers he delivered was the annual corporate report form from

the Secretary of State bearing the name and business address of the registered agent – Nickolas Russell. The process server, however, made no attempt to make proper delivery of the copy of the summons and complaint upon the actual registered agent because he did not even ask for Mr. Russell. He dropped off the papers and left, with very little conversation taking place with Ms. McLeod. Ms. McLeod made no representation to the process server that she was authorized to accept service, despite the representation made by the process server that she was “a person authorized to accept service on behalf of Nickolas Russell, the Registered Agent for SPINE INSTITUTE OF IDAHO, P.A., one of the Defendants herein.”²⁵

Ms. McLeod has never been served in a suit against her, nor has she ever accepted service on behalf of someone else. Ms. McLeod did not know that the packet of papers that were dropped off were legal papers and, thus, did not treat the packet of papers with any greater sense of urgency than other deliveries made to the office. As far as Ms. McLeod knew, the process server was either a patient or a regular courier.

Plaintiff’s service of process upon Spine Institute of Idaho, P.A. does not comply with the requirements of Rule 4(d)(4); therefore, the service of process is insufficient and Plaintiff’s case should be dismissed with prejudice.

2. Service of Process Upon Dr. Verska Was Insufficient Because Service Was Not Made Upon Dr. Verska Personally or Upon an Authorized Agent.

Rule 4(d)(2), Idaho R. Civ. P., requires that service upon an individual be accomplished by delivering a copy of the summons and complaint to the individual personally or by leaving copies thereof at the individual’s dwelling house or usual place of abode with some person over the age of eighteen (18) years then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or law to receive service of process. Under this

²⁵ Affidavit of Service of Process on Spine Institute of Idaho, P.A., executed by process server, Andrew C. Remm, attached hereto as an exhibit to the Affidavit of Raymond D. Powers.

rule, service is to be accomplished upon an individual in one of three ways: 1) personally, 2) by leaving copies at his dwelling house or usual place of abode with some person over 18 residing there, or 3) by delivering copies to an agent authorized by appointment or by law to receive service. *Thiel v. Stradley*, 118 Idaho 86, 794 P.2d 1142 (1990). Just because an individual is an employee of a defendant does not cloak that individual with authority to receive process for the defendant. *Brakke v. Rudnick*, 409 N.W.2d 326, 330 (N.D. 1987). Agent, as defined, does not extend to mere employees having no independent powers. *Johnson v. Rao*, 952 So.2d 151, 154 (Miss. 2007).

Plaintiff's action against Dr. Verska must be dismissed because Dr. Verska was not served personally, Ms. McLeod was not a person over 18 years old residing at Dr. Verska's dwelling or usual place of abode who accepted delivery of the documents, nor did Dr. Verska appoint and authorize Ms. McLeod as his agent to accept service of process on his behalf.

By virtue of the Affidavit of Service,²⁶ it is clear that Dr. Verska was not served personally, nor were copies of the summons and complaint delivered and left with someone at his dwelling place or usual place of abode. The Affidavit of Service explains that service was made upon "Tina McLeod, a person authorized to accept service on behalf of JOSEPH M. VERSKA, M.D., one of the defendants herein." Contrary to the representation in the process server's affidavit, Tina McLeod is not, and never has been, authorized to accept service on behalf of Dr. Verska.

The court in *Thiel v. Stradley* addressed this type of issue when it was asked to determine whether Mr. Stradley's wife was an agent authorized to accept service on Mr. Stradley's behalf. 118 Idaho 86, 794 P.3d 1142 (1990). Mr. Stradley moved to dismiss a default judgment that had

²⁶ Affidavit of Service on Joseph M. Verska, M.D., on file herein and attached as an exhibit to the Affidavit of Raymond D. Powers.

been entered against him on the grounds that he had not been personally served. Mrs. Stradley was served with a copy of the summons and complaint at the Four Winds Bar. *Id.* The court found that while Mrs. Stradley had been served, that would not constitute service upon Mr. Stradley unless Mrs. Stradley was found to be an agent authorized by appointment or by law to receive service for Mr. Stradley. *Id.* Agency by appointment requires an actual appointment for the specific purpose of receiving process. *Id.* The court concluded that proper service had not been made upon Mr. Stradley since there was no evidence in the record that Mrs. Stradley had been appointed by Mr. Stradley to accept service of process on his behalf. *Id.*

In a case directly on point, the Mississippi Supreme Court affirmed the trial court's grant of defendant's motion to dismiss for insufficiency of service of process. *Johnson v. Rao*, 952 So.2d 151 (Miss. 2007). Johnson filed a medical malpractice case against Dr. Rao and served Dr. Rao's receptionist with a copy of the summons and complaint. *Id.* at 153. Dr. Rao filed a motion to dismiss claiming that service was improper because his receptionist was not authorized to accept service on his behalf. *Id.* His receptionist, Ms. Powell, testified that she did not understand what was taking place when the sheriff's deputy came into the office and handed her some papers. *Id.* She testified that the deputy did not explain his reason for being there, did not explain that the papers were legal documents, and did not ask for Dr. Rao. *Id.* She also testified that Dr. Rao had never appointed her as his agent to accept service and she had never accepted service of process before. *Id.* at 156. The court agreed with the trial court's finding that Dr. Rao did not appoint Ms. Powell as an authorized agent to accept service of process on his behalf. "Only employees with some authority are classified as agents authorized to accept service of process on behalf of an employer." *Id.* at 154.

The facts of the *Johnson* case are virtually identical to the facts in the case at hand and an identical finding by this Court should result – Plaintiff's case should be dismissed for

insufficiency of service of process. Ms. McLeod was not an agent authorized by appointment or by law to accept service on behalf of Dr. Verska. Dr. Verska did not appoint her as an authorized agent to accept service of his behalf. Furthermore, Ms. McLeod has no managerial or supervisory responsibilities which would create authority for her to accept service; Ms. McLeod's responsibilities include greeting patients and answering the phones. Ms. McLeod has never been served in a suit against her, nor has she ever accepted service on behalf of someone else. Ms. McLeod did not make any representations to the process server that she was authorized to accept service. Ms. McLeod did not know that the packet of papers that were dropped off were legal papers and, thus, did not treat the packet of papers with any greater sense of urgency than other deliveries made to the office. As far as Ms. McLeod knew, the process server was either a patient or a regular courier.

Moreover, the process server did not ask for Dr. Verska, the process server did not identify himself or explain his purpose for being there, nor did he ask Ms. McLeod if she was authorized to accept service on behalf of Dr. Verska.

Plaintiff's service of process upon Dr. Verska does not comply with the requirements of Rule 4(d)(2); therefore, the service of process is insufficient and Plaintiff's case should be dismissed with prejudice.

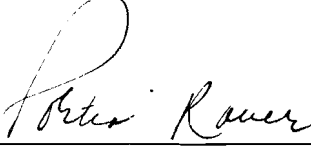
CONCLUSION

Plaintiff did not properly serve a copy of the summons and complaint upon either Spine Institute of Idaho, P.A. or Dr. Verska because Tina McLeod was not authorized as an agent to accept service of process. Therefore, dismissal of plaintiff's action against Spine Institute of Idaho, P.A. and Dr. Verksa is warranted.

Defendants Spine Institute of Idaho, P.A. and Dr. Verska respectfully request that Plaintiff's case, as against them, be dismissed with prejudice.

DATED this 20 day of April, 2010.

POWERS TOLMAN, PLLC

By 

Raymond D. Powers - Of the Firm
Portia L. Rauer - Of the Firm
Attorneys for Defendants Joseph M. Verska,
M.D. and Spine Institute of Idaho, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2010, I caused to be served a true copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**, by the method indicated below, and addressed to each of the following:

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Fax No.: 489-8988
Attorneys for Plaintiff

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*Attorneys for Defendant St. Luke's Meridian
Medical Center*

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Raymond D. Powers
Portia L. Rauer

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A.M. _____ PM

APR 20 2010

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By L. AMES
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Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**DEFENDANTS' MOTION TO
DISMISS**

COME NOW, Defendants Joseph M. Verska, M.D. and the Spine Institute of Idaho,
P.A., by and through their counsel of record, Powers Tolman, PLLC, and, pursuant to Rule

DEFENDANTS' MOTION TO DISMISS - 1

000098

12(b)(5), Idaho R. Civ. P., move this Court for an order dismissing Plaintiff's cause of action against these Defendants for insufficiency of service of process.

This motion is supported by a memorandum and affidavits filed contemporaneously herewith.

DATED this 30th day of April, 2010.

POWERS TOLMAN, PLLC

By 

Raymond D. Powers - Of the Firm
Portia L. Rauer - Of the Firm
Attorneys for Defendants Joseph M. Verska,
M.D. and Spine Institute of Idaho, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2010, I caused to be served a true copy of the foregoing **DEFENDANTS' MOTION TO DISMISS**, by the method indicated below, and addressed to each of the following:

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PO Box 7808	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83707-7808		
Fax No.: 489-8988		
<i>Attorneys for Plaintiff</i>		

Mark D. Kamitomo	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
THE MARKAM GROUP, INC., P.S.	<input type="checkbox"/>	Hand Delivered
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Trudy Hanson Fouser	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
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Fax No.: (208) 336-9177		
<i>Attorneys for Defendant St. Luke's Meridian Medical Center</i>		



Raymond D. Powers
Portia L. Rauer

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APR 22 2010

J. DAVID NAVARRO, Clerk
By RIC NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**ORDER DISQUALIFYING JUDGE
WITHOUT CAUSE**

Upon the motion of defendants Joseph M. Verska, M.D. and the Spine Institute of Idaho, P.A., the Honorable Darla S. Williamson is disqualified as the judge in this matter, pursuant to Idaho Rule of Civil Procedure 40(d)(1).

DATED this 21 day of April, 2010.

By *Darla S. Williamson*
DARLA S. WILLIAMSON
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of April, 2010, I caused to be served a true copy of the foregoing **ORDER DISQUALIFYING JUDGE WITHOUT CAUSE**, by the method indicated below, and addressed to each of the following:

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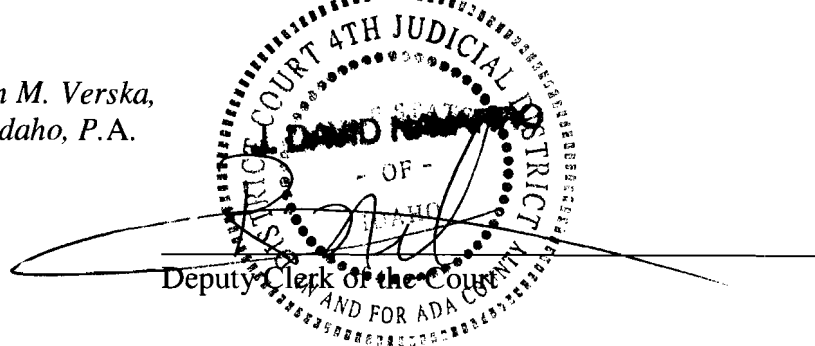
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- Telecopy



Filed Thursday, April 22, 2010 at 01:01 PM

J. DAVID NAVARRO, CLERK OF THE COURT

BY:

Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M ELLIOTT,
Plaintiff,

vs.

JOSEPH M VERSKA MD,
ST LUKES MERIDIAN MEDICAL CENTER,
SPINE INSTITUTE OF IDAHO PA,
ST LUKES,
HOWMEDICA OSTEONICS CORP,
STRYKER ORTHOPAEDICS,
Defendant.

CASE NO. CV-PI-2009-18953

NOTICE OF REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled case has been reassigned to the
Honorable **JUDGE RONALD J WILPER.**

Dated this 22nd day of April, 2010.

J. David Navarro
Clerk of the District Court

By:

Deputy Clerk

**ANY OTHER HEARINGS CURRENTLY SET WILL HAVE TO BE RESET WITH THE NEWLY
ASSIGNED JUDGE!**

CERTIFICATE OF MAILING

I hereby certify that on Thursday, April 22, 2010, I have delivered a true and accurate copy of the
foregoing document to the following parties in the method indicated below:

ERIC SWARTZ
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TRUDY FOUSER
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RAYMOND POWERS
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345 BOBWHITE CRT STE 150
BOISE ID 83706

J. DAVID NAVARRO
Clerk of the Court

By:

Deputy Clerk

NOTICE OF REASSIGNMENT

000103

APR 23 2010

J. DAVID NAVARRO, Clerk
By P. BOURNE, DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Kristeen M. Elliott

Plaintiff(s):

AFFIDAVIT OF SERVICE

vs.

Case Number: CV PI 0918953

Joseph M. Verska, M.D. et al.

Defendant(s):

For:
Jones & Swartz, PLLC
1673 W. Shoreline Dr., Ste. 200
Boise, ID 83707

STATE OF IDAHO)
)
) :ss
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on April 21, 2010 to be served on **JOSEPH M. VERSKA, M.D.**

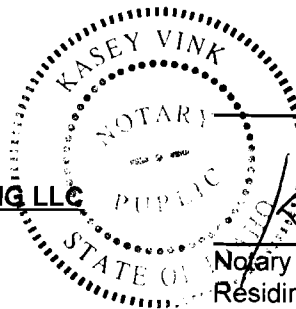
I, Antonio Roque, who being duly sworn, depose and say that on Wednesday, April 21, 2010, at 8:12 PM, I:

SERVED the within named person(s) by leaving a true copy of the **Another Summons, Amended Complaint and Demand for Jury Trial** with Desiree Verska, co-resident, a person over the age of 18 years at **7893 Vue Estates Rd., Meridian, ID 83642**, the usual place of abode of Joseph M. Verska, M.D.. Said service was effected at 7893 Vue Estates Rd., Meridian, ID 83642.

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Reference Number: 94520
Client Reference: Eric B. Swartz

Subscribed and sworn before me today
Thursday, April 22, 2010



[Handwritten signature]

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132

[Handwritten signature: Kasey Vink]

Notary Public for the State of Idaho
Residing at Nampa, Idaho
My Commission Expires on March 7th, 2014

ORIGINAL

APR 23 2010

DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Kristeen M. Elliott

Plaintiff(s):

AFFIDAVIT OF SERVICE

vs.

Joseph M. Verska, M.D. et al.

Defendant(s):

Case Number: CV PI 0918953

For:
Jones & Swartz, PLLC
1673 W. Shoreline Dr., Ste. 200
Boise, ID 83707

STATE OF IDAHO)
)
) :ss
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on April 21, 2010 to be served on **SPINE INSTITUTE OF IDAHO, P.A.**

I, Zach D. Heesch, who being duly sworn, depose and say that on Thursday, April 22, 2010, at 3:45 PM, I:

SERVED the within named **Spine Institute of Idaho, P.A.** by delivering a true copy of the **Another Summons, Amended Complaint and Demand for Jury Trial** to Nickolas Russell, Registered Agent, a person authorized to accept service on behalf of Spine Institute of Idaho, P.A.. Said service was effected at **360 E. Montvue, Meridian, ID 83642.**

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Our Reference Number: 94521
Client Reference: Eric B. Swartz

Subscribed and sworn before me today
Thursday, April 22, 2010

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132


Zach D. Heesch

Notary Public for the State of Idaho
Residing at Boise, Idaho
My Commission Expires on January 12th, 2013

ORIGINAL

ORIGINAL

NO. _____ FILED _____
A.M. _____ P.M. 418

APR 26 2010

J. DAVID NAVARRO, Clerk
By RIC NELSON
DEPUTY

Raymond D. Powers
ISB #2737; rdp@powerstolman.com
Portia L. Rauer
ISB #7233; plr@powerstolman.com
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
Post Office Box 9756
Boise, Idaho 83707
Telephone: (208) 577-5100
Facsimile: (208) 577-5101
W:\22\22-003\Dismiss - NOH.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

**JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,**

Defendants.

Case No. CV PI 0918953

NOTICE OF HEARING

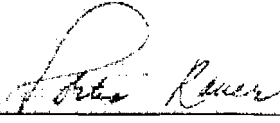
YOU WILL PLEASE TAKE NOTICE that Defendants Joseph M. Verska, M.D. and the Spine Institute of Idaho, P.A., by and through their attorneys of record, Powers Tolman, PLLC, will bring on for hearing Defendants' Motion to Dismiss before the above-entitled Court on

NOTICE OF HEARING - 1

Monday, May 17, 2010, at 3:30 p.m., at the Ada County Courthouse before the Honorable
Ronald J. Wilper.

DATED this 26 day of April, 2010.

POWERS TOLMAN, PLLC

By  _____

Raymond D. Powers - Of the Firm
Portia L. Rauer - Of the Firm
Attorneys for Defendants Joseph M. Verska,
M.D. and Spine Institute of Idaho, P.A.


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of April, 2010, I caused to be served a true copy of the foregoing **NOTICE OF HEARING**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
JONES & SWARTZ, PLLC	<input type="checkbox"/>	Hand Delivered
1673 W. Shoreline Drive, Suite 200	<input type="checkbox"/>	Overnight Mail
PO Box 7808	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83707-7808		
Fax No.: 489-8988		
<i>Attorneys for Plaintiff</i>		

Mark D. Kamitomo	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
THE MARKAM GROUP, INC., P.S.	<input type="checkbox"/>	Hand Delivered
421 W. Riverside, Suite 1060	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input checked="" type="checkbox"/>	Telecopy
Fax No.: (509) 747-1993		
<i>Attorneys for Plaintiff</i>		

Trudy Hanson Fouser	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
GJORDING & FOUSER, PLLC	<input type="checkbox"/>	Hand Delivered
509 W. Hays Street	<input type="checkbox"/>	Overnight Mail
PO Box 2837	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83701		
Fax No.: (208) 336-9177		
<i>Attorneys for Defendant St. Luke's Meridian Medical Center</i>		



Raymond D. Powers
Portia L. Rauer

ORIGINAL

MAY 10 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
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Telephone: (208) 489-8989
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Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF MARK KAMITOMO
IN OPPOSITION TO DEFENDANTS
JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION
TO DISMISS FOR INSUFFICIENCY
OF SERVICE OF PROCESS**

STATE OF WASHINTON)
 : ss.
County of Spokane)

AFFIDAVIT OF MARK KAMITOMO IN OPPOSITION TO DEFENDANTS JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION TO DISMISS FOR INSUFFICIENCY OF SERVICE OF PROCESS - 1

MARK KAMITOMO, being first duly sworn upon oath, deposes and states:


1. I am co-counsel with the law firm of Jones and Swartz for the above-named Plaintiff and make this affidavit based upon my personal knowledge.

2. On or about Friday, March 26, 2010, Eric Swartz and I agreed to represent Kristeen Elliott and undertook the process to complete service of the complaint that had been previously filed in this matter.

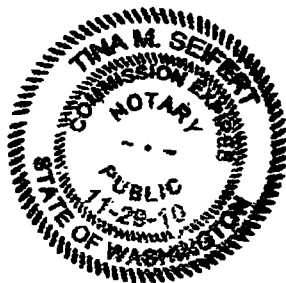
3. As a matter of professional courtesy and in an effort to avoid the embarrassment of serving the Defendant Dr. Verska, I called Raymond Powers whom I already knew was representing Dr. Verska in the matter. I asked Mr. Powers if he could accept service on behalf of Dr. Verska as opposed to Plaintiff serving Dr. Verska directly.

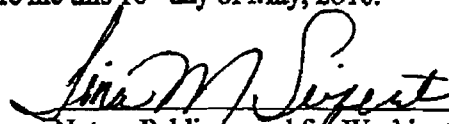
4. Mr. Powers advised me that he was not authorized to accept service on behalf of Dr. Verska. He further stated that he believed Dr. Verska was not in town, however, would be returning on Monday, March 29, 2010.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


MARK D. KAMITOMO

SUBSCRIBED AND SWORN TO before me this 10th day of May, 2010.




Notary Public in and for Washington
Residing at Spokane
My Commission expires 11/29/2010

CERTIFICATE OF SERVICE

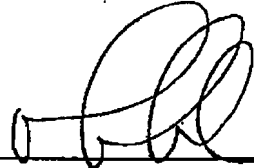
I HEREBY CERTIFY that on this 10th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707
*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

- U.S. Mail
- Fax: 577-5101
- Overnight Delivery
- Messenger Delivery
- Email: rdp@powerstolman.com
plr@powerstolman.com

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
P.O. Box 2837
Boise, ID 83701
*Counsel for Defendant
St. Luke's Meridian Medical Center*

- U.S. Mail
- Fax: 336-9177
- Overnight Delivery
- Messenger Delivery
- Email: tfouser@g-g.com



MARK D. KAMITOMO

ORIGINAL

NO _____
AM _____ FILED _____
PM 4:52

MAY 10 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS
JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION
TO DISMISS FOR INSUFFICIENCY
OF SERVICE OF PROCESS**

KS

I.

INTRODUCTION

Proper service was timely effectuated on Defendants Joseph M. Verska, M.D., and the Spine Institute of Idaho (“Spine Institute”). On March 31, 2010, Andrew Remm went to the Spine Institute.¹ He asked a women who later identified herself as Tina McLeod if he could see Dr. Verska and Nickolas Russell, Registered Agent of Spine Institute.² Ms. McLeod refused to allow Mr. Remm to see either Mr. Russell or Dr. Verska.³ She asked why Mr. Remm needed to see them.⁴ Mr. Remm stated that it was to serve them with a summons and a complaint.⁵ She asked to see the documents.⁶ Mr. Remm laid the documents out on the desk and pointed out that they were separate documents – a set for Dr. Verska and a set for Mr. Russell as Registered Agent for Spine Institute.⁷ After reviewing the documents, Ms. McLeod stated that she could take them.⁸ Mr. Remm asked her if she was authorized to accept service on behalf of both Dr. Verska and Spine Institute and Ms. McLeod stated, “yes.”⁹ Ms. McLeod then took the documents from the desk and sometime thereafter delivered the documents to Dr. Verska and Spine Institute.¹⁰

¹ Affidavit of Andrew Remm in Opposition to Defendants Joseph Verska and Spine Institute of Idaho’s Motion to Dismiss for Insufficiency of Service of Process (“Remm Aff.”), ¶ 8.

² Remm Aff., ¶ 11.

³ Remm Aff., ¶¶ 12-17.

⁴ Remm Aff., ¶ 12.

⁵ Remm Aff., ¶ 13.

⁶ Remm Aff., ¶ 14.

⁷ Remm Aff., ¶ 15.

⁸ Remm Aff., ¶ 16.

⁹ Remm Aff., ¶ 17.

¹⁰ Remm Aff., ¶ 17; Affidavit of Nicholas Russell, ¶ 4.

Ms. McLeod's affidavit is a sham. Whatever her motivations may be for signing the same, the fact is that her affidavit should not be permitted to nullify Plaintiff's proper and timely service of process on both Dr. Verska and the Spine Institute.

Even if the first service of process on these Defendants was somehow insufficient, the day after Plaintiff received the Defendants' 12(b)(5) motion, Dr. Verska was served again. As such, any insufficiency of process during the first service is now moot. Another summons and copy of the Amended Complaint was left at Dr. Verska's residence with a woman who identified herself as Dr. Verska's wife. Spine Institute was served the day after that when its Registered Agent personally accepted a summons and a copy of the Amended Complaint. The second service of process on both Dr. Verska and Spine Institute was proper. It was also timely, as the six-month period for service of the Amended Complaint did not run until May 13, 2010.

Whether by the first, or second, or both services of process on Dr. Verska and Spine Institute, the fact remains that both Defendants were properly and timely served. Dismissing the action for an alleged insufficiency of the first service of process is not warranted. If the first service of process is found to be insufficient, the service should be quashed, but the action should proceed based upon the second, timely, service of process.

II.

STANDARD OF REVIEW

Where service of process is alleged to be insufficient, dismissing the action is not necessarily the appropriate relief. This Court has broad discretion in deciding appropriate relief; specifically, the action may be dismissed, or the insufficient service can be quashed without dismissing the action. "The choice between dismissal and quashing service of process is in the district court's discretion."

Silver Sage Ranch, Inc. v. Lawson, 98 Idaho 707, 708, 571 P.2d 768, 769 (1977); *Woodworth v. Subprime Lenders, Inc.*, No. CV07-520, 2008 WL 5054687*5 (D. Idaho, June 11, 2008) (“[t]he courts have broad discretion to dismiss the action or to retain the case but quash the service that has been made on defendant.”) (citation omitted).

“Dismissal is not appropriate when there exists a reasonable prospect that service can be obtained.” *Novak v. World Bank*, 703 F.2d 1305 (D.C. Cir., 1983).¹¹ Additionally, where, as here, the insufficiency of service of process is alleged to be a technical defect, dismissal is not appropriate if: “(a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if [her] complaint were dismissed.” *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir., 1984). This exception to a Rule 12(b)(5) request for dismissal is “sensible and necessary to prevent serious miscarriages of justice.” *Id.*

The standard of review on a 12(b)(5) motion is read in light of Rule 4(a)(2), which requires service of process to occur within six months of the filing of the complaint, unless there is good cause shown. *Herrera v. Estay*, 146 Idaho 674, 679, 201 P.3d 647, 652 (2009). “The relevant period of time on which to focus is the six months following the filing of the amended complaint.” *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). Whether there is “good cause” is a factual question and the court follows a Rule 56 analysis. *Sammis*, 130 Idaho at 346, 941 P.2d at 318 citing *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 74-75, 803 P.2d 978, 980-81 (1990)

¹¹ Idaho follows the federal standard of review where state case law is lacking. *Herrera v. Estay*, 146 Idaho 674, 678, 201 P.3d 647, 651 (2009) (“[G]iven the virtual identity between [Rule 12] and their counterparts in the Federal Rules of Civil Procedure, and the lack of case law in Idaho, it is appropriate for this Court to turn to federal authority to address the standard of review.”)

(applying summary judgment standard to factual questions presented by conflicting affidavits in motion to dismiss for lack of personal jurisdiction). As such, the court “must liberally construe the record in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party’s favor.” *Sammis*, 130 Idaho at 346, 941 P.2d at 318; citations omitted.

III.

FACTUAL BACKGROUND

This is a medical negligence case.¹² It arises out of surgeries performed by Defendant Dr. Verska on Plaintiff Kristeen Elliott’s back.¹³ Her first surgery took place on October 8, 2007. Ms. Elliott woke up from that surgery in excruciating pain and was unable to move her arms or legs.¹⁴ In an apparent attempt to correct the problem, Dr. Verska performed another surgery on Ms. Elliott’s back three days later, on October 11, 2007.¹⁵

Ms. Elliott has never recovered from the surgeries.¹⁶ She cannot walk upright.¹⁷ She is in constant, severe pain.¹⁸ She is totally disabled.¹⁹

Represented by attorney Tom Maile, Ms. Elliott filed a prelitigation complaint with the Idaho Board of Medicine on April 28, 2009. A pro se civil Complaint was filed in Ada County, on October 5, 2009. The Board of Medicine prelitigation panel issued its decision on or about

¹² Amended Complaint filed on November 12, 2009. The original Complaint was filed on October 5, 2009.

¹³ *Id.* See also, Affidavit of Kristeen Elliott in Opposition to Defendants Joseph Verska and Spine Institute of Idaho’s Motion to Dismiss for Insufficiency of Process (“Aff. of Kristeen Elliott”).

¹⁴ Aff. of Kristeen Elliott, ¶ 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

October 27, 2009. Mr. Maile discontinued representing Ms. Elliott on November 2, 2009, leaving her without an attorney. She immediately began looking for counsel. On November 12, 2009, Ms. Elliott filed a pro se Amended Complaint based upon information that she learned from the Board of Medicine's decision. Ms. Elliott remained pro se until Friday, March 26, 2010, the date that her attorneys of record agreed to take her case. On that day, Mark Kamitomo, counsel for the Plaintiff, telephoned counsel for Dr. Verska and Spine Institute, Raymond Powers, to inquire whether Mr. Powers was authorized to accept service on behalf of Dr. Verska and Spine Institute.²⁰ Mr. Powers was not authorized, but did advise that Dr. Verska could be found at the Spine Institute.²¹

Efforts to serve the Amended Complaint and summons on the Defendants began on the following Monday, March 29, 2010. The next day, March 30, 2010, summonses were issued by the Clerk of the Court.²² They went out for service on March 31, 2010. The summons and Amended Complaint was served on St. Luke's Meridian Medical Center on March 31, 2010.²³ St. Luke's is not asserting insufficiency of process.

The summons and Amended Complaint were served on Dr. Verska on March 31, 2010, by leaving them at Dr. Verska's place of business, Spine Institute, with Tina McLeod, a woman who affirmatively represented herself to be authorized to accept service on Dr. Verska's behalf.²⁴ The

²⁰ Affidavit of Mark Kamitomo in Opposition to Defendants Joseph Verska and Spine Institute of Idaho's Motion to Dismiss for Insufficiency of Service of Process ("Kamitomo Aff."), ¶ 3.

²¹ Kamitomo Aff., ¶ 4.

²² Ex. A to Affidavit of Eric B. Swartz re: Defendant Joseph Verska, M.D. and Spine Institute of Idaho's Motion to Dismiss for Insufficiency of Process ("Swartz Aff."), true and correct copies of summons issued on March 30, 2010.

²³ Ex. B to Swartz Aff., true and correct copy of Affidavit of Service on St. Luke's Medical Center.

²⁴ Remm Aff., ¶¶ 8-19. *See also*, Ex. C to Swartz Aff., true and correct copy of Affidavit of Service on Joseph M. Verska, M.D.

summons and Amended Complaint were served on Spine Institute at the address of its business and Registered Agent, Nickolas Russell, on March 31, 2010, by leaving them with Tina McLeod, a person who affirmatively represented herself to be authorized to accept service on Spine Institute's behalf.²⁵

On April 20, 2010, Dr. Verska and Spine Institute filed their Motion to Dismiss for Insufficiency of Service of Process. The next day, on April 21, 2010, a summons and a copy of the Amended Complaint were sent out for service a second time. Dr. Verska was served on April 21, 2010, by leaving the summons and a copy of the Amended Complaint with Desiree Verska, Dr. Verska's wife, at their shared residence.²⁶ Spine Institute was served on April 22, 2010, by leaving the summons and a copy of the Amended Complaint with its Registered Agent, Nickolas Russell, at the Spine Institute's place of business.²⁷

IV.

ARGUMENT

A. The First Service of Process Was Timely Effectuated by Serving a Person at Spine Institute Who Affirmatively Represented Herself as Being Authorized to Accept Service on Behalf of Both Spine Institute and Dr. Verska

The entire basis of Dr. Verska and Spine Institute's claim that service upon them was insufficient is that they did not authorize Ms. Tina McLeod to accept service on their behalf.²⁸ The Defendants make Ms. McLeod out to be a mere receptionist with duties strictly limited to greeting

²⁵ Remm Aff., ¶¶ 8-19. *See also*, Ex. D to Swartz Aff., true and correct copy of Affidavit of Service on Spine Institute of Idaho.

²⁶ Ex. E to Swartz Aff., true and correct copy of Affidavit of Service on Joseph M. Verska, M.D., filed April 23, 2010 ("Second Service on Dr. Verska").

²⁷ Ex. F to Swartz Aff., true and correct copy of Affidavit of Service on Spine Institute, filed April 23, 2010 ("Second Service on Spine Institute").

²⁸ Defendants' Memorandum in Support of Motion to Dismiss.

patients, checking patients in, and answering the telephone.²⁹ In reality, Ms. McLeod performs much more. Specifically, on March 31, 2010, the day of the service of process in question, Ms. McLeod greeted, conversed with, and affirmatively represented to Andrew Remm that she was authorized to accept service of the summons and Amended Complaint on behalf of Dr. Verska and Spine Institute.³⁰ On March 31, 2010, at 11:19 a.m., Mr. Remm arrived at the Spine Institute of Idaho located at 360 East Montvue, Meridian, Idaho 83642.³¹ Based upon the filing with the Secretary of State for the State of Idaho, he understood this address to be the location of the Spine Institute's Registered Agent, Nickolas Russell.³² He also understood that Dr. Verska could be found there.³³

Mr. Remm approached a lady at the front desk who later identified herself as Tina McLeod.³⁴ Mr. Remm asked if he could speak with Nickolas Russell and Joseph Verska.³⁵ Ms. McLeod refused to get them and instead asked Mr. Remm what he needed to see them for.³⁶ Mr. Remm stated that he needed to serve a complaint and summons on them.³⁷ Ms. McLeod asked if she could see the documents.³⁸ Mr. Remm laid them on the desk and pointed to the names that appeared on the summons—Joseph M. Verska, M.D., and Spine Institute of Idaho, PA (on top of the latter was a paper showing the registered agent for Spine Institute of Idaho, Nickolas Russell).³⁹ Ms. McLeod

²⁹ Defendants' Memorandum in Support of Motion to Dismiss, pp. 3-4, citing to Affidavits of Tina McLeod and Nicholas Russell.

³⁰ Remm Aff., ¶¶ 8-19.

³¹ Remm Aff., ¶ 8.

³² Remm Aff., ¶ 9.

³³ Kamitomo Aff., ¶ 4; Ex. G to Swartz Aff., July 2009 and April 2010 Annual Filings of Spine Institute listing Dr. Verska's address as the address of the Spine Institute.

³⁴ Remm Aff., ¶ 10.

³⁵ Remm Aff., ¶ 11.

³⁶ Remm Aff., ¶ 12.

³⁷ Remm Aff., ¶ 13.

³⁸ Remm Aff., ¶ 14.

³⁹ Remm Aff., ¶ 15.

refused to get Dr. Verska and Spine Institute and instead nodded her head and said “yes,” she would take these to them.⁴⁰ Mr. Remm asked her if she was authorized to accept service on behalf of Joseph Verska and Nickolas Russell.⁴¹ Ms. McLeod replied, “yes,” and took the documents.⁴² Mr. Remm asked for her first and last name and to spell each.⁴³ Mr. Remm thanked Ms. McLeod and asked her to please make sure Dr. Verska and Mr. Russell got the summons and complaint as soon as possible.⁴⁴

Mr. Remm is competent at effectuating service of process. He has been doing so for approximately one year.⁴⁵ He understands that when someone identifies themselves as not being authorized to accept service, he must find someone who is.⁴⁶ He did not need to do that when he went to serve Dr. Verska and Spine Institute. Ms. McLeod affirmatively represented her authority to accept service on behalf of both Dr. Verska and Spine Institute.⁴⁷ Mr. Remm relied on Ms. McLeod’s representations.⁴⁸ And her representations were without hesitation. She did not state, or indicate, that she did not know whether she was or was not authorized.⁴⁹ She did not state that accepting the summons and complaints were outside of her job duties.⁵⁰ She did not identify herself as being only a receptionist.⁵¹ She never said that she was not authorized to do what she told

⁴⁰ Remm Aff., ¶ 16.

⁴¹ Remm Aff., ¶ 17.

⁴² Remm Aff., ¶ 17.

⁴³ Remm Aff., ¶ 18.

⁴⁴ Remm Aff., ¶ 19.

⁴⁵ Remm Aff., ¶ 2.

⁴⁶ Remm Aff., ¶¶ 3-5.

⁴⁷ Remm Aff., ¶¶ 10-17.

⁴⁸ Remm Aff., ¶ 20.

⁴⁹ Remm Aff., ¶ 21.

⁵⁰ Remm Aff., ¶ 22.

⁵¹ Remm Aff., ¶ 23.

Mr. Remm she was authorized to do.⁵² If Mr. Remm had any doubt about her representations, he would not have agreed to leave the summons and complaints with her.⁵³

While the obvious conflict between the affidavit testimony submitted by the Defendants and Plaintiff will have to be resolved by the Court—drawing all reasonable inferences in favor of the non-moving party⁵⁴—the Court should take notice of the fact that both Dr. Verska and Spine Institute received the summons and Amended Complaint that were served on them via Ms. McLeod. In other words, this is not a case where default judgment was taken against Dr. Verska and Spine Institute because Ms. McLeod – not being trained to know what to do – failed to give the summons and complaint to Dr. Verska and Mr. Russell so that they could timely reply. This is a case where they received the papers on the same day as service on Ms. McLeod.⁵⁵ The due process afforded by the service of process through Ms. McLeod undoubtedly satisfies due process requirements recognized by Idaho law:

In the context of service of process, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information ..., and it must afford a reasonable time for those interested to make their appearance.

Herrera v. Estay, 146 Idaho 674, 681, 201 P.3d 647, 654 (2009). Citations omitted.

⁵² Remm Aff., ¶ 23.

⁵³ Remm Aff., ¶ 24.

⁵⁴ The summary judgment standard applies to factual questions presented by conflicting affidavits in Rule 12 motions to dismiss. *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 74-75, 803 P.2d 978, 980-81 (1990).

⁵⁵ Russell Aff., ¶ 4.

Dr. Verska and Spine Institute were both served by leaving the summons and Amended Complaint with a woman at the Spine Institute who expressly and unequivocally represented herself as being authorized to accept service on their behalf. Dr. Verska and Spine Institute's motion should be denied.

B. The Second Service of Process Was Timely Effectuated on Both Dr. Verska and Spine Institute

Even if the service on Dr. Verska and Spine Institute via Ms. McLeod was somehow insufficient, Dr. Verska and Spine Institute were timely served, again. “[I]neffective service ... does not preclude subsequent service under Rule 4 ... and state law.” *Electrical Specialty Co. v. Road and Ranch Supply, Inc.*, 967 F.2d 309, 313 (9th Cir., 1992). Subsequent service took place on April 21, 2010, and April 22, 2010, the first two days after Plaintiff received Dr. Verska and Spine Institute's Motion to Dismiss for Insufficiency of Service of Process.

Dr. Verska was served by leaving the summons and a copy of the Amended Complaint with Desiree Verska, Dr. Verska's wife, at their shared residence.⁵⁶ The day after that, the Spine Institute was served by leaving the summons and a copy of the Amended Complaint with its Registered Agent, Nickolas Russell, at the Spine Institute's place of business.⁵⁷

Both of these methods of service of process are expressly permitted under Rules 4(d)(2) and (d)(4)(A) of the Idaho Rules of Civil Procedure. And both of these second services of process on

⁵⁶ Ex. E to Swartz Aff., true and correct copy of Affidavit of Service on Joseph M. Verska, M.D., filed April 23, 2010 (“Second Service on Dr. Verska”).

⁵⁷ Ex. F to Swartz Aff., true and correct copy of Affidavit of Service on Spine Institute, filed April 23, 2010 (“Second Service on Spine Institute”).

April 21 and 22, 2010, were timely. The six-month deadline for serving the Amended Complaint was not for another three weeks—May 13, 2010.⁵⁸

C. Dismissal of the Action is Not Warranted—Dr. Verska and Spine Institute Were Properly and Timely Served

Where, as here, the second service was effective – assuming the first was not – Dr. Verska and Spine Institute’s request for dismissal of the action is not an appropriate remedy. The Second Service was effectuated approximately three weeks before the six-month deadline was set to run. Any technical defect in the first service has been made moot by the proper and timely effectuation of the Second Service.

If the first service was insufficient, this Court has the broad discretion to simply quash the insufficient service without dismissing the action. “The choice between dismissal and quashing service of process is in the district court’s discretion.” *Silver Sage Ranch, Inc. v. Lawson*, 98 Idaho 707, 708, 571 P.2d 768, 769 (1977). “Dismissal is not appropriate when there exists a reasonable prospect that service can be obtained.” *Novak v. World Bank*, 703 F.2d 1305 (D.C. Cir., 1983).⁵⁹ In this instance, it is not a matter of whether there is a reasonable prospect of service being obtained, it was, in fact, obtained. It was obtained the first and second day after Dr. Verska and Spine Institute filed their motion challenging the sufficiency of the first service of process.

Dismissal is also an inappropriate remedy in this case where, despite the alleged technical defect in service: “(a) the party that had to be served personally received actual notice, (b) the

⁵⁸ “The relevant period of time on which to focus is the six months following the filing of the amended complaint.” *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997).

⁵⁹ Idaho follows the federal standard of review where state case law is lacking. *Herrera v. Estay*, 146 Idaho 674, 678, 201 P.3d 647, 651 (2009) (“[G]iven the virtual identity between [Rule 12] and their counterparts in the Federal Rules of Civil Procedure, and the lack of case law in Idaho, it is appropriate for this Court to turn to federal authority to address the standard of review.”)

defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if [her] complaint were dismissed.” *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir., 1984). This exception to a Rule 12(b)(5) request for dismissal is “sensible and necessary to prevent serious miscarriages of justice.” *Id.* The application of this exception in the present case is fully justified. There is no doubt that both Dr. Verska and Spine Institute received actual notice of the summons and Amended Complaint. Mr. Russell testifies that he received the summons and Amended Complaints for Spine Institute and Dr. Verska on the same day that Ms. McLeod received them.⁶⁰ Dr. Verska does not state when he received them, but if it was after the day of service on Ms. McLeod, it was certainly provided in sufficient time for Dr. Verska to timely file his Motion to Dismiss. Of course, Dr. Verska and Spine Institute received actual notice again when they were served for the second time on April 21 and 22, 2010, respectively. Neither Dr. Verska nor Spine Institute can claim any prejudice as a result of not knowing about the lawsuit. Again, this is not a case where default was taken against them as a result of not receiving notice of the suit and failing to appear. They each received actual notice of the suit (repeatedly) and they each have timely appeared and responded.

As for the third element of the applicable exception to technically correct service, if there was any failure in the first service of process, it is justified by Ms. McLeod misrepresenting her authority to accept service. Had she told Mr. Remm that she was not authorized, or if he had any doubt about her representations, he would not have allowed her to take the summonses and Amended

⁶⁰ Russell Aff., ¶ 4.

Complaints.⁶¹ Mr. Remm had no way of knowing that Ms. McLeod was misrepresenting her authority.

Finally, the fourth factor for excusing technically incorrect service of process—whether the Plaintiff will be severely prejudiced if her Amended Complaint were dismissed—carries a significant weight in this case. The negligence that is the subject matter of the Plaintiff’s Amended Complaint occurred more than two years ago. If the Plaintiff’s Amended Complaint is dismissed, she will not be able to re-file. Great injustice is the only outcome that would be served if the Plaintiff loses her right to pursue her case because of reasonable reliance on Ms. McLeod’s affirmative representations that she was authorized to accept service on behalf of Dr. Verska and Spine Institute when, according to the Defendants’ affidavits, she was not. This is particularly true where, as here, Dr. Verska and Spine Institute were timely and properly served within two days of the filing of their Motion to Dismiss alleging that the first service of process was insufficient.

D. If Service is Determined to be Untimely, Good Cause Exists for Not Dismissing Plaintiff’s Amended Complaint

In the event the Court finds that the Amended Complaint has not been timely served, good cause exists for not dismissing the case. Plaintiff reasonably relied upon Ms. McLeod’s affirmative representations that she was authorized to accept service. That she later recanted her authority is precisely the type of situation that satisfies the “good cause” required by Rule 4(a)(2). *See, e.g., Berry v. Evans*, No. C 06-3795, 2008 WL 2951346, *6 (N.D. Cal., July 24, 2008) (“The Court finds plaintiff’s mistaken belief that Johnson was properly served when the Attorney General’s Office signed the acknowledgment of service form constitutes the requisite good cause under Rule 4.”). There was no reason for Plaintiff to suspect that Ms. McLeod would lie about her authority to accept

⁶¹ Remm Aff., ¶ 24.

service of process. Further, the Plaintiff had no control over Ms. McLeod's decision to state that she was authorized to accept service when, apparently, she was not. *Harrison v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008) (factors outside of plaintiff's control support a finding of good cause) (citation omitted).

The Plaintiff has been diligent in her efforts to timely serve the Defendants and, if service is found to be untimely, good cause should be found for not dismissing the case.

E. Plaintiff Should be Allowed to Conduct Discovery Before the Court Acts on Any Inclination to Dismiss the Action

In the event the Court is inclined to dismiss the Amended Complaint based upon the Affidavits of the Defendants conclusively stating that Ms. McLeod was not authorized to do what she did, Plaintiff requests the opportunity to conduct discovery on the matter. While the Defendants' affidavit testimony portrays Ms. McLeod as having no authority to do anything but greet patients, check patients in, and answer the telephone, her representations to Mr. Remm were very different. The Plaintiff's only opportunity to fairly respond to the Defendants' testimony to this effect is to be able to conduct discovery on Ms. McLeod's work history with Spine Institute and Dr. Verska and the duties that she has performed throughout the such work history. Finding that Ms. McLeod did, in fact, have the requisite minimum authority necessary for effectuating service of process is not simply a matter of what Defendants say in their conclusory affidavits. Ms. McLeod's authority is a factual matter that requires inquiry.

V.

CONCLUSION

For the forgoing reasons, Plaintiff Kristeen Elliott respectfully requests that this Court deny the Defendants' Motion to Dismiss for Insufficiency of Process.

DATED this 10th day of May, 2010.

JONES & SWARTZ PLLC

By 

ERIC B. SWARTZ

MARK D. KAMITOMO
THE MARKAM GROUP, INC., P.S.

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

U.S. Mail
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 Overnight Delivery
 Messenger Delivery
 Email: rdp@powerstolman.com
plr@powerstolman.com

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
P.O. Box 2837
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*Counsel for Defendant
St. Luke's Meridian Medical Center*

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ERIC B. SWARTZ

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Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED _____
P.M. 4:51

MAY 10 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF ERIC B. SWARTZ IN
OPPOSITION TO DEFENDANTS
JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION
TO DISMISS FOR INSUFFICIENCY
OF SERVICE OF PROCESS**

AFFIDAVIT OF ERIC B. SWARTZ IN OPPOSITION TO DEFENDANTS JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION TO DISMISS FOR INSUFFICIENCY OF SERVICE OF PROCESS - 1

000128

STATE OF IDAHO)
 : ss.
County of Ada)

ERIC B. SWARTZ, being first duly sworn upon oath, deposes and states:

1. I am counsel for the above-named Plaintiff and am authorized to practice before this Court.

2. I make this affidavit based upon my personal knowledge and if called upon to testify about the same I could do so competently.

3. Attached hereto as Exhibit A are true and correct copies of summons issued by the clerk of the Ada County Court on March 30, 2010.

4. Attached hereto as Exhibit B is a true and correct copy of the Affidavit of Service on St. Luke's Meridian Medical Center.

5. Attached hereto as Exhibit C is a true and correct copy of the Affidavit of Service on Joseph M. Verska, M.D., filed April 5, 2010.

6. Attached hereto as Exhibit D is a true and correct copy of the Affidavit of Service on Spine Institute of Idaho, filed April 5, 2010.

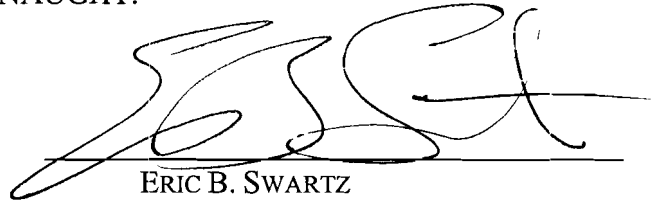
7. Attached hereto as Exhibit E is a true and correct copy of the Affidavit of Service on Joseph M. Verska, M.D., filed April 23, 2010.

8. Attached hereto as Exhibit F is a true and correct copy of the Affidavit of Service on Spine Institute of Idaho, filed April 23, 2010.

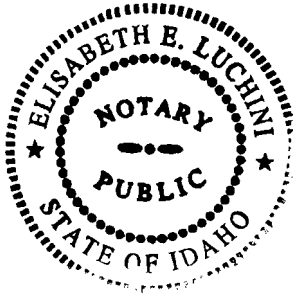
9. Attached hereto as Exhibit G are true and correct copies of the July 2009 and April 2010 Annual Filings with the Idaho Secretary of State for Spine Institute.


///

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ERIC B. SWARTZ

SUBSCRIBED AND SWORN TO before me this 10th day of May, 2010.




Notary Public for Idaho
My Commission expires 7.8.12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

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*Counsel for Defendant
St. Luke's Meridian Medical Center*

U.S. Mail
 Fax: 336-9177
 Overnight Delivery
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 Email: tfouser@g-g.com

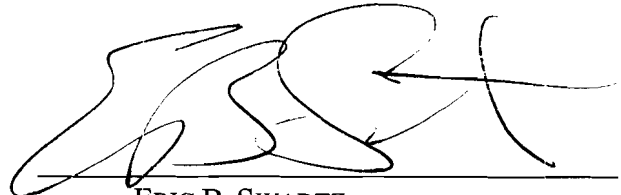

ERIC B. SWARTZ

EXHIBIT A
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

EXHIBIT A
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

Eric B. Swartz, ISB #6396
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Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

TIMOTHY HANSEN

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
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Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993
Attorneys for Plaintiff

FILED
MAR 30 2010
L. DAVID NAVARRO, Clerk
By P. GOURNE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

ANOTHER SUMMONS

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.

TO: JOSEPH M. VERSKA, M.D.

ANOTHER SUMMONS [JOSEPH M. VERSKA, M.D.] -- 1

000133

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: _____
DEPUTY CLERK



MAR 30 2010

J. DAVID MAWARREN, Clerk
By P. BOURNE
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
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Boise, ID 83707-7808
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E-mail: eric@jonesandswartzlaw.com

TIMOTHY HANSEN

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
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Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

Case No. CV PI 0918953

vs.

ANOTHER SUMMONS

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT
MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU
RESPOND WITHIN TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

TO: SPINE INSTITUTE OF IDAHO, P.A.

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated Court within twenty (20) days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Amended Complaint.

A copy of the Amended Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 30 day of March, 2010.

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By: _____
DEPUTY CLERK

EXHIBIT B

To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

EXHIBIT B

To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
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Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

NO. _____
P.M. _____
A.M. _____

APR 6 5 2010
J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF SERVICE ON
ST. LUKE'S MERIDIAN
MEDICAL CENTER**

STATE OF IDAHO)
 : ss.
County of Ada)

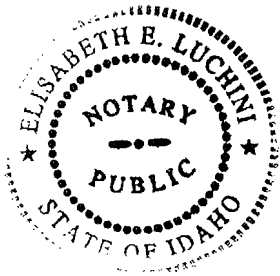
I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

1. I am at least 18 years of age and not a party to this action.
2. On March 31, 2010, at approximately 10:58 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Carol Wilmes, a person authorized to accept service on behalf of Jeffrey S. Taylor, the Registered Agent for ST. LUKE'S MERIDIAN MEDICAL CENTER, one of the Defendants herein. Said service was accomplished at the Registered Agent's place of business located at 190 E. Bannock, Boise, Idaho 83712.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.



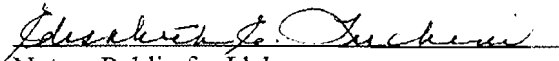

Notary Public for Idaho
My Commission Expires: 1.8.12

EXHIBIT C
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

EXHIBIT C
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
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Telephone: (208) 489-8989
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E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____ FILED _____
A.M. _____ P.M. _____

APR 05 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF SERVICE ON
JOSEPH M. VERSKA, M.D.**

STATE OF IDAHO)
: ss.
County of Ada)

I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

AFFIDAVIT OF SERVICE ON JOSEPH M. VERSKA, M.D. - 1

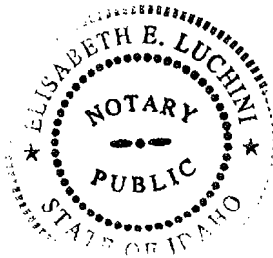
000141

1. I am at least 18 years of age and not a party to this action.
2. On March 31, 2010, at approximately 11:19 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Tina McLeod, a person authorized to accept service on behalf of JOSEPH M. VERSKA, M.D., one of the Defendants herein. Said service was accomplished at Dr. Verska's place of business located at 360 East Montvue, Meridian, Idaho 83642.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.





Notary Public for Idaho
My Commission Expires: 7.8.12

EXHIBIT D

To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

EXHIBIT D

To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____ FILED _____
A.M. _____ P.M. _____

APR 05 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS,
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

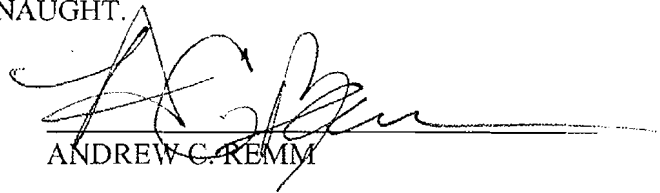
**AFFIDAVIT OF SERVICE ON
SPINE INSTITUTE OF IDAHO, P.A.**

STATE OF IDAHO)
 : ss.
County of Ada)

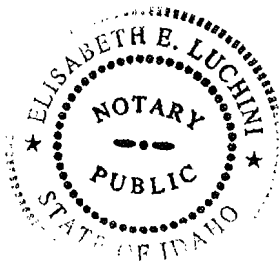
I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

1. I am at least 18 years of age and not a party to this action.
2. On March 31, 2010, at approximately 11:19 a.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Tina McLeod, a person authorized to accept service on behalf of Nickolas Russell, the Registered Agent for SPINE INSTITUTE OF IDAHO, P.A., one of the Defendants herein. Said service was accomplished at the Registered Agent's place of business located at 360 East Montvue, Meridian, Idaho 83642.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2010.



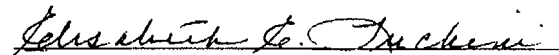

Notary Public for Idaho
My Commission Expires: 7.8.12

EXHIBIT E
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

EXHIBIT E
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

APR 23 2010

J. DAVID NAVARRO, Clerk
By P. BOUINE
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

Kristeen M. Elliott

Plaintiff(s):

AFFIDAVIT OF SERVICE

vs.

Joseph M. Verska, M.D. et al.

Defendant(s):

Case Number: CV PI 0918953

For:
Jones & Swartz, PLLC
1673 W. Shoreline Dr., Ste. 200
Boise, ID 83707

STATE OF IDAHO)
 :SS
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on April 21, 2010 to be served on **JOSEPH M. VERSKA, M.D.**

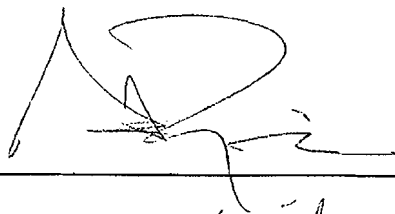
I, Antonio Roque, who being duly sworn, depose and say that on Wednesday, April 21, 2010, at 8:12 PM, I:

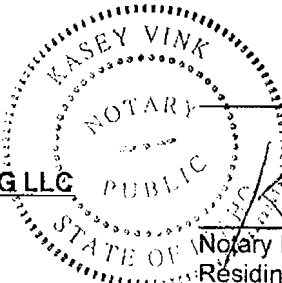
SERVED the within named person(s) by leaving a true copy of the **Another Summons, Amended Complaint and Demand for Jury Trial** with Desiree Verska, co-resident, a person over the age of 18 years at **7893 Vue Estates Rd., Meridian, ID 83642**, the usual place of abode of Joseph M. Verska, M.D.. Said service was effected at 7893 Vue Estates Rd., Meridian, ID 83642.

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Reference Number: 94520
Client Reference: Eric B. Swartz

Subscribed and sworn before me today
Thursday, April 22, 2010




Kasey Vink
Notary Public for the State of Idaho
Residing at Nampa, Idaho
My Commission Expires on March 7th, 2014

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132

EXHIBIT F
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

EXHIBIT F
To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

APR 23 2010

J. DAVID NAVARRE
By P. BOUQUIN
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

Kristeen M. Elliott

Plaintiff(s):

AFFIDAVIT OF SERVICE

vs.

Joseph M. Verska, M.D. et al.

Defendant(s):

Case Number: CV PI 0918953

For:
Jones & Swartz, PLLC
1673 W. Shoreline Dr., Ste. 200
Boise, ID 83707

STATE OF IDAHO)
 :SS
COUNTY OF ADA)

Received by TRI-COUNTY PROCESS SERVING LLC on April 21, 2010 to be served on **SPINE INSTITUTE OF IDAHO, P.A.**

I, Zach D. Heesch, who being duly sworn, depose and say that on Thursday, April 22, 2010, at 3:45 PM, I:

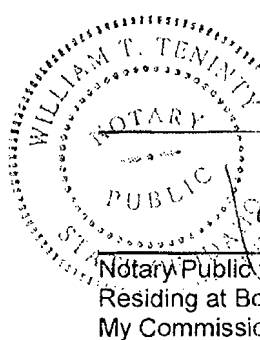
SERVED the within named **Spine Institute of Idaho, P.A.** by delivering a true copy of the **Another Summons, Amended Complaint and Demand for Jury Trial** to Nickolas Russell, Registered Agent, a person authorized to accept service on behalf of Spine Institute of Idaho, P.A.. Said service was effected at **360 E. Montvue, Meridian, ID 83642.**

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

Our Reference Number: 94521
Client Reference: Eric B. Swartz

Subscribed and sworn before me today
Thursday, April 22, 2010

TRI-COUNTY PROCESS SERVING LLC
P.O. Box 1224
Boise, ID, 83701
(208) 344-4132


Zach D. Heesch

Notary Public for the State of Idaho
Residing at Boise, Idaho
My Commission Expires on January 12th, 2013

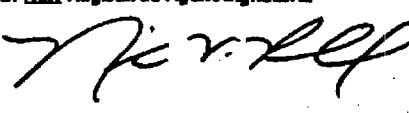
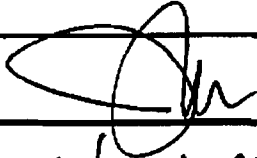
EXHIBIT G

To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

EXHIBIT G

To Affidavit of Eric B. Swartz
In Opposition to Defendants' Motion to Dismiss

FILED EFFECTIVE

No. C 138101	Reinstatement Annual Report Form ADMIN DISSOLVED 06/04/2009		2. Registered Agent and Office (NOT A P.O. BOX) PAMELA MONTGOMERY 360 E MONTVUE MERIDIAN ID 83642 NICKOLAS RUSSELL
Return to: SECRETARY OF STATE 450 N 4th STREET PO BOX 83720 BOISE, ID 83720-0080 REINSTATEMENT FEE DUE: \$30.00	1. Mailing Address: Correct in this box if needed. SPINE INSTITUTE OF IDAHO, P.A. NICK RUSSELL 360 E MONTVUE MERIDIAN ID 83642		3. New Registered Agent Signature. 
4. Corporations: Enter Names and Business Addresses of President, Secretary, Directors and (optional) Treasurer.			
Office Held	Name	Street or PO Address	City State Country Postal Code
President	Joseph M. Yerka	360 E	Meridian ID US 83642
Secretary	Samuel S. Jorgenson	Montvue Dr	
5. Organized Under the Laws of: IDAHO C 138101	6. Signature: 		Date: 7-15-09
	Name (type or print): Joseph M. Yerka		Title: Pres.
Issued 07/10/2009 by SL1			

No. C 138101	Due no later than Mar 31, 2010 Annual Report Form		2. Registered Agent and Address: (NO PO BOX)			
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	1. Mailing Address: Correct in this box if needed. SPINE INSTITUTE OF IDAHO, P.A. NICK RUSSELL 360 E MONTVUE MERIDIAN ID 83642		NICKOLAS RUSSELL 360 E MONTVUE MERIDIAN ID 83642			
4. Corporations: Enter Names and Business Addresses of President, Secretary, Directors and(optional) Treasurer.			3. <u>New</u> Registered Agent Signature: *			
5. Organized Under the Laws of: ID C 138101	6. Annual Report must be signed.* Signature: Jason Sali Name (type or print): Jason Sali			Date: 04/20/2010	Title: Cpa	
Processed 04/20/2010			* Electronically provided signatures are accepted as original signatures.			

ORIGINAL

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO _____ FILED
A.M. _____ P.M. 4:51

MAY 10 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF KRISTEEN ELLIOT
IN OPPOSITION TO DEFENDANTS
JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION
TO DISMISS FOR INSUFFICIENCY
OF SERVICE OF PROCESS**

STATE OF IDAHO)
: ss.
County of Ada)

KRISTEEN ELLIOT, being first duly sworn upon oath, deposes and states:

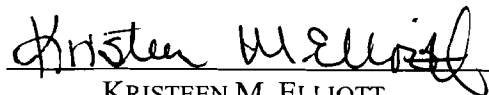
AFFIDAVIT OF KRISTEEN ELLIOT IN OPPOSITION TO DEFENDANTS JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION TO DISMISS FOR INSUFFICIENCY OF SERVICE OF PROCESS - 1

1. I am the Plaintiff in the above-entitled action and I make this affidavit based upon my own personal knowledge and if called upon to do so, I could testify competently about the same.

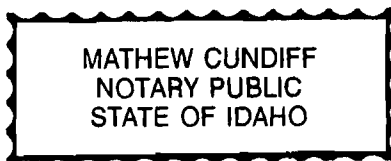
2. On October 8, 2007, Defendant Dr. Verska operated on my back. I woke up from the surgery in excruciating pain and was unable to move my arms or legs. Dr. Verska performed another surgery on my back on October 11, 2007 to correct the problems. I have never recovered from the surgeries. I cannot walk upright. I am in constant, severe pain. I am totally disabled.

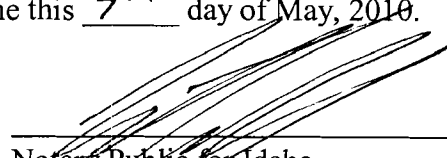
3. On or about November 28, 2008, I hired attorney Tom Maile to handle my case against Dr. Verska. Mr. Maile filed an Idaho Board of Medicine prelitigation complaint on my behalf on April 28, 2009. He prepared, and I filed in Ada County, a pro se civil Complaint on October 5, 2009. Mr. Maile argued my case to the Idaho State Board of Medicine on October 23, 2009. The Board's decision was issued on or about October 27, 2009. Mr. Maile discontinued representing me on November 2, 2009, leaving me without an attorney. I immediately began looking for an attorney to replace Mr. Maile. On November 12, 2009, I filed an Amended pro se Complaint based upon information that I learned from the Board of Medicine's decision of my case. I remained pro se until March 26, 2010, when my attorneys of record agreed to take my case.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


KRISTEEN M. ELLIOTT

SUBSCRIBED AND SWORN TO before me this 7th day of May, 2010.




Notary Public for Idaho
My Commission expires 10/20/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

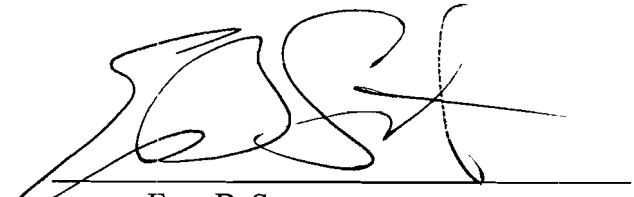
*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

U.S. Mail
 Fax: 577-5101
 Overnight Delivery
 Messenger Delivery
 Email: rdp@powerstolman.com
plr@powerstolman.com

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
P.O. Box 2837
Boise, ID 83701

*Counsel for Defendant
St. Luke's Meridian Medical Center*

U.S. Mail
 Fax: 336-9177
 Overnight Delivery
 Messenger Delivery
 Email: tfouser@g-g.com


ERIC B. SWARTZ

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED 4:51 P.M.

MAY 10 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF ANDREW REMM IN
OPPOSITION TO DEFENDANTS
JOSEPH VERSKA AND SPINE
INSTITUTE OF IDAHO'S MOTION
TO DISMISS FOR INSUFFICIENCY
OF SERVICE OF PROCESS**

STATE OF IDAHO)
 : ss.
County of Ada)

ANDREW REMM, being first duly sworn upon oath, deposes and states:

1. I am over the age of 18 and I make this affidavit based upon my own personal knowledge and if called upon to do so, I could testify competently about the same.

2. I have been serving summons and complaints in Ada County for about one year.

3. When serving a complaint and summons on a person other than a person named in a summons or complaint, it is my practice to ask whether the person is authorized to accept service on behalf of the party named in the summons and complaint.

4. It is also my practice to show the complaint and summons to any person holding themselves out as being authorized to accept service on behalf of the named person.

5. It is also my practice not to attempt to serve an un-named person who cannot tell me specifically that are authorized to accept service.

6. I ask the person to confirm their authorization to accept service because after serving them, I submit an affidavit under oath stating that the person served was authorized. I would never sign an affidavit stating that a person was authorized to accept service unless they confirmed for me their authority to do so.

7. With respect to the above-captioned case, I followed my normal practice when carrying out service of process.

8. Specifically, on March 31, 2010, at 11:19 a.m., I arrived at the Spine Institute of Idaho located at 360 East Montvue, Meridian, Idaho 83642.

9. Based upon the filing with the Secretary of State for the State of Idaho, I understood

this address to be the location of the Spine Institute's Registered Agent, Nickolas Russell. I also understood that Dr. Verska could be found there.

10. I approached a lady at the front desk that later identified herself as Tina McLeod.

11. I asked if I could speak with Nickolas Russell and Joseph Verska.

12. Ms. McLeod asked what I needed to see them for.

13. I responded saying I needed to serve a complaint and summons on them.

14. She asked if she could see them.

15. I laid them on the desk and pointed to the names that appeared on the summons (Joseph M. Verska, M.D., and Spine Institute of Idaho, PA – on top of the latter was a paper showing the registered agent for Spine Institute of Idaho, Nickolas Russell).

16. She nodded her head and said "yes," she would take these to them.

17. I asked her if she was authorized to accept service on behalf of Joseph Verska and Nickolas Russell. She replied, "yes," and took the documents.

18. I asked for her first and last name and to spell each.

19. Afterwards, I said thank you and please make sure they get these as soon as possible.

20. I relied on Ms. McLeod's repeated representations to me that she was authorized to accept service on behalf of both Joseph M. Verska, M.D., and Spine Institute of Idaho, PA.

21. At no time did she state, or indicate, that she did not know whether she was authorized.

22. At no time did she state that accepting the summons and complaints was beyond her job duties.

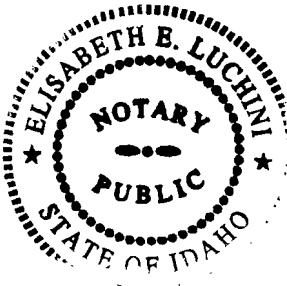
23. At no time did she identify herself as being a receptionist with no authority to do what she told me she was authorized to do.

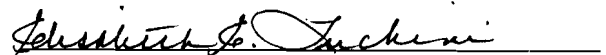
24. If I had any doubt about her representations to me, I would not have agreed to leave the summons and complaints with her.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW REMM

SUBSCRIBED AND SWORN TO before me this 10th day of May, 2010.




Notary Public for Idaho
My Commission expires 7.8.12

CERTIFICATE OF SERVICE

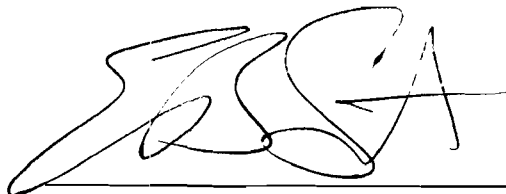
I HEREBY CERTIFY that on this 10th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707
*Counsel for Defendants
Joseph M. Verska, M.D., and
Spine Institute of Idaho*

U.S. Mail
 Fax: 577-5101
 Overnight Delivery
 Messenger Delivery
 Email: rdp@powerstolman.com
plr@powerstolman.com

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
P.O. Box 2837
Boise, ID 83701
*Counsel for Defendant
St. Luke's Meridian Medical Center*

U.S. Mail
 Fax: 336-9177
 Overnight Delivery
 Messenger Delivery
 Email: tfouser@g-g.com



ERIC B. SWARTZ

ORIGINAL

NO. _____ FILED 4:10
A.M. _____ P.M.

MAY 12 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, ID 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com

Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**PLAINTIFF'S MOTION FOR
EXTENSION OF TIME IN
WHICH TO SERVE STRYKER**

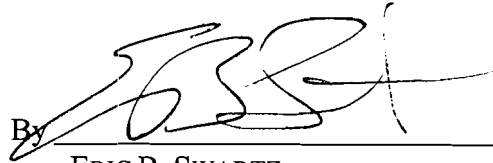
Pursuant to Rules 6(b) and 7(b)(1) of the Idaho Rules of Civil Procedure, and for cause shown, Plaintiff, Kristeen Elliott, requests an enlargement of time in which to effectuate service on

Defendant Stryker.¹ Plaintiff requests a 60-day extension.

This motion is made and supported by the pleadings of record herein and is further supported by the Memorandum in Support of Plaintiff's Motion for Enlargement of Time to Serve Stryker and the Affidavit of Eric B. Swartz in support thereof.

DATED this 12th day of May, 2010.

JONES & SWARTZ PLLC

By  _____

ERIC B. SWARTZ

MARK D. KAMITOMO
THE MARKAM GROUP, INC., P.S.

Attorneys for Plaintiff

¹ Howmedica Osteonics Corp., dba Stryker Orthopaedics, has been served and is not included in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

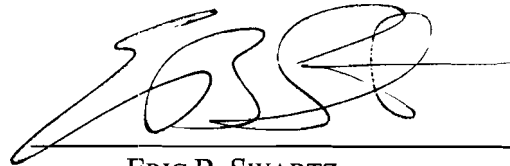
*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

U.S. Mail
 Fax: 577-5101
 Overnight Delivery
 Messenger Delivery
 Email: rdp@powerstolman.com
plr@powerstolman.com

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
P.O. Box 2837
Boise, ID 83701

*Counsel for Defendant
St. Luke's Meridian Medical Center*

U.S. Mail
 Fax: 336-9177
 Overnight Delivery
 Messenger Delivery
 Email: tfouser@g-g.com



ERIC B. SWARTZ

ORIGINAL

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
 1673 W. Shoreline Drive, Suite 200 [83702]
 Post Office Box 7808
 Boise, ID 83707-7808
 Telephone: (208) 489-8989
 Facsimile: (208) 489-8988
 E-mail: eric@jonesandswartzlaw.com

NO. _____
 AM. _____ **4:10**

NOV 12 2010

J. DAVID HAVASNO, Clerk
 BY **J. D. DALL**
DEPUTY

Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
 421 West Riverside, Suite 1060
 Spokane, WA 99201
 Telephone: (509) 747-0902
 Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
 ST. LUKE'S MERIDIAN MEDICAL CENTER,
 aka ST. LUKE'S, an Idaho corporation; SPINE
 INSTITUTE OF IDAHO, P.A., a professional
 corporation; HOWMEDICA OSTEONICS
 CORP., dba STRYKER ORTHOPAEDICS;
 STRYKER; and JANE and JOHN DOES
 I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF ERIC B. SWARTZ
 IN SUPPORT OF PLAINTIFF'S
 MOTION FOR EXTENSION OF
 TIME IN WHICH TO SERVE
 STRYKER**

STATE OF IDAHO)
 : ss.
 County of Ada)

ERIC B. SWARTZ, being first duly sworn upon oath, deposes and states:

AFFIDAVIT OF ERIC B. SWARTZ IN SUPPORT OF PLAINTIFF'S MOTION FOR
 EXTENSION OF TIME IN WHICH TO SERVE STRYKER - 1

1. I am counsel for the above-named Plaintiff and am authorized to practice before this Court.

2. I make this affidavit based upon my personal knowledge and if called upon to testify about the same I could do so competently.

3. Although Plaintiff's counsel were not engaged to represent Plaintiff Kristeen Elliott until late March 2010, counsel has been investigating the case since late November 2009.

4. As part of that investigation, Plaintiff's counsel was contacted by counsel for Stryker and Howmedica Osteonics Corp., dba Stryker Orthopaedics. That first occurred on December 1, 2009, following receipt by Stryker and Howmedica Osteonics Corp., dba Stryker Orthopaedics, of the Amended Complaint in the above-entitled action.

5. Further discussions about the case took place in January, February, March, and May of 2010. During none of the discussions did counsel for Stryker or Howmedica Osteonics Corp., dba Stryker Orthopaedics, state, or otherwise indicate, that the entities' names were incorrect.

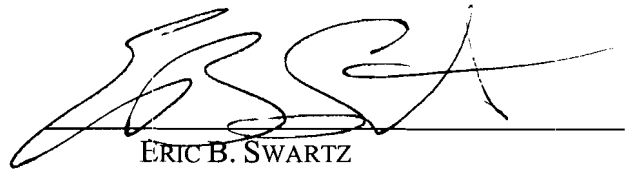
6. Despite on-going discussions with Howmedica Osteonics Corp., dba Stryker Orthopaedics, and Stryker, the deadline to timely serve the Amended Complaint is May 13, 2010.

7. Service on Howmedica Osteonics Corp., dba Stryker Orthopaedics, and Stryker was attempted on May 11, 2010.

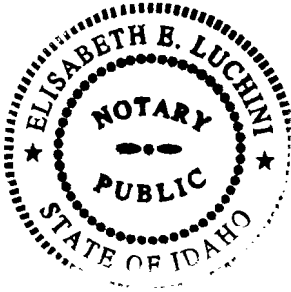
8. Service on Howmedica Osteonics Corp., dba Stryker Orthopaedics, was effective.

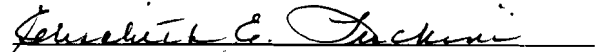
9. Service on Stryker, however, was not because the Idaho Registered Agent for all of the Idaho registered Stryker entities did not believe that "Stryker," without some subsidiary or division name included, was the correct name. The Registered Agent requested that the name be corrected before service would be accepted.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ERIC B. SWARTZ

SUBSCRIBED AND SWORN TO before me this 12th day of May, 2010.




Notary Public for Idaho
My Commission expires 7.8.12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

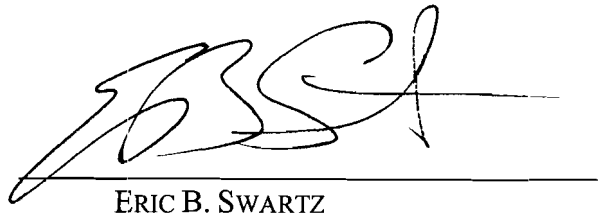
*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

U.S. Mail
 Fax: 577-5101
 Overnight Delivery
 Messenger Delivery
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plr@powerstolman.com

Trudy Hanson Fouser
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*Counsel for Defendant
St. Luke's Meridian Medical Center*

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 Messenger Delivery
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ERIC B. SWARTZ

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Attorneys for Plaintiff

NO _____
AM _____ **4:10**

MAY 12 2010

J. DAVID HAWBARO, Clerk
By J. RANDALL
OFF. CL.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION FOR
EXTENSION OF TIME IN WHICH
TO SERVE STRYKER**

Pursuant to Rules 6(b) and 7(b)(1) of the Idaho Rules of Civil Procedure, and for good cause shown, Plaintiff, Kristeen Elliott, requests an enlargement of time in which to effectuate service on

Defendant Stryker.¹ Service was attempted on Stryker's Registered Agent on May 11, 2010, but the Registered Agent refused to accept.² Stryker is a complex, global, corporation with many subsidiary entities and division names.³ While the Registered Agent recognized that it was authorized to accept service for all of the Stryker subsidiaries registered in Idaho, there was not an entity or division known simply as "Stryker."⁴ The Registered Agent requested that the name be modified on the caption and summons before it would accept service.⁵

Plaintiff will be filing a motion for leave to amend the Amended Complaint to correct the naming of the appropriate subsidiary or division of Stryker, if appropriate. Further research and discussion with Stryker's counsel, however, will be required before that can occur. Such discussions will follow discussions with Stryker's counsel that have taken place since early December 2009 when Stryker was provided with a copy of the Amended Complaint.⁶ At no time during discussions with counsel for Stryker in December, January, February, March, or May, has Stryker identified the naming of "Stryker" in the Amended Complaint to be a misnomer.⁷ It may be that it is not a misnomer. Further discussions with Stryker's counsel, however, will be required before that can be determined.

Meanwhile, to preserve Plaintiff's Amended Complaint from being dismissed with respect to Stryker under Rule 4(a)(2), the Plaintiff requests a reasonable enlargement of time in which to have Stryker (or whatever its subsidiary or division might be), served. The Amended Complaint was filed

¹ Howmedica Osteonics Corp., dba Stryker Orthopaedics, has been served and is not included in this motion.

² Affidavit of Eric B. Swartz in Support of Plaintiff's Motion for Enlargement of Time in Which to Serve Stryker ("Swartz Aff.").

³ See <http://www.stryker.com/en-us/corporate/ContactUs/index.htm>.

⁴ Swartz Aff.

⁵ Swartz Aff.

⁶ Swartz Aff.

⁷ Swartz Aff.

on November 12, 2009. The 6-month deadline is May 13, 2010. Plaintiff requests a 60-day extension. Such an extension would allow Plaintiff's counsel time to speak with Stryker, allow time for amending the Complaint to correct the Stryker name (if necessary), and allow time for service.

Granting Plaintiff's request for an enlargement is within this Court's discretion upon there being cause shown:

Rule 6(b). Enlargement.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, ... **the court for cause shown may at any time in its discretion** (1) with or without motion or notice **order the period enlarged** if request therefor is made before the expiration of the period originally prescribed....

I.R.C.P. 6(b); emphasis added. The necessary cause for exercising the Court's discretion exists where, as here, the Registered Agent's rejection of service appears to be a matter of a misnomer of the name of a Stryker company subsidiary or division. Counsel for Stryker and Plaintiff have been engaged in discussions about the case for about five months without Stryker's counsel ever suggesting that "Stryker" was not the appropriate name. Further discussions and investigation will be required before it can be determined whether Stryker is the appropriate name. Granting Plaintiff's request for the 60-day extension will allow Plaintiff the time necessary to accomplish this.

DATED this 12th day of May, 2010.

JONES & SWARTZ PLLC

By 
ERIC B. SWARTZ

MARK D. KAMITOMO
THE MARKAM GROUP, INC., P.S.

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, ID 83707

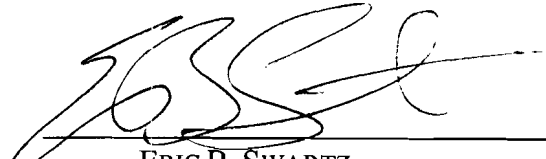
*Counsel for Defendants Joseph M. Verska, M.D.
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Trudy Hanson Fouser
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Boise, ID 83701

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St. Luke's Meridian Medical Center*

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 Fax: 336-9177
 Overnight Delivery
 Messenger Delivery
 Email: tfouser@g-g.com


ERIC B. SWARTZ

MAY 13 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

ORIGINAL

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W:\22\22-003\Dismiss - reply.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

COME NOW Defendants Joseph M. Verska, M.D. and the Spine Institute of Idaho, P.A.

(Dr. Verska), by and through their counsel of record, Powers Tolman, PLLC, and submit this memorandum in support of their motion to dismiss for insufficiency of service of process.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS - 1

INTRODUCTION

Plaintiff has alleged three grounds as to why her claim against Dr. Verska and the Spine Institute of Idaho should not be dismissed: 1) service was proper upon Tina McCleod, 2) proper service was later perfected, and 3) any defect in service was only a technical defect. Dr. Verska disagrees and argues that 1) Andrew Remm's affidavit is an attempt to cover up his failure to properly effectuate service, 2) the date of the original Complaint controls the time for service, and 3) Plaintiff failed to demonstrate good cause as to why service was not properly made, therefore, dismissal is mandatory.

ARGUMENT

A. SERVICE OF PROCESS ON TINA MCLEOD WAS INSUFFICIENT; THEREFORE, PLAINTIFF'S ACTION AGAINST DR. VERSKA AND THE SPINE INSTITUTE MUST BE DISMISSED.

As she testified in her affidavit, Tina McLeod did not accept service for Dr. Verska nor for the Spine Institute of Idaho. There is no reason for her to be dishonest or attempt to evade service, as was suggested in Plaintiff's response. There is **every** reason for the process server to misrepresent the interaction between he and Ms. McLeod. Either his job or his business is at risk if he does not properly effectuate service; therefore, to save face and cover his mistake he felt compelled to misrepresent the conversation he and Ms. McLeod had on March 31, 2010. Plaintiff claims that Mr. Remm is competent at effectuating service of process because he has been doing so for **one** year. One year, however, does not make a process server competent, which is evident through his failure to properly effect service on March 31, 2010. Plaintiff also claims that Ms. McLeod did not represent to Mr. Remm that she was only a receptionist. This argument is illogical given Ms. McLeod's physical location in the Spine Institute of Idaho's office; Ms. McLeod sits at the front desk and is the first person seen when one enters the office. Mr. Remm admitted that Ms. McLeod "was the lady at the front desk" and greeted him when he

entered the office. It is simply implausible to believe that Mr. Remm needed Ms. McLeod to tell him she was only the receptionist.

Contrary to Plaintiff's argument, Ms. McLeod's affidavit should be permitted and fully considered by the Court. Ms. McLeod's testimony is credible because there is no incentive for her to have lied in her affidavit or to have misrepresented to Mr. Remm that she was authorized to accept service. There is absolutely no reason for Ms. McLeod to not have called Mr. Russell to the front desk had Mr. Remm in fact asked for Mr. Russell or Dr. Verska and told her he needed to serve them with a copy of a summons and complaint.

Despite Plaintiff's arguments to the contrary, Ms. McLeod did not accept service for Dr. Verska or the Spine Institute of Idaho, she did not sign anything stating she was accepting service on behalf of Dr. Verska or the Spine Institute of Idaho, nor did either Dr. Verska or the Spine Institute or Nicholas Russell authorize her to accept service. Service was ineffective on March 31, 2010, and Plaintiff's claim against Dr. Verska and the Spine Institute of Idaho should be dismissed.

B. PLAINTIFF'S ATTEMPT TO PERFECT SERVICE IS INEFFECTIVE BECAUSE THE AMENDED COMPLAINT DOES NOT RELATE BACK TO THE DATE OF FILING THE ORIGINAL COMPLAINT; THEREFORE, THE SIX MONTH TIME PERIOD FOR SERVICE OF THE ORIGINAL COMPLAINT HAD RUN ON APRIL 5, 2010.

In order to preserve the insufficiency of service of process argument, Dr. Verska and the Spine Institute of Idaho were required to file a motion to dismiss prior to filing a responsive pleading. Plaintiff admits that upon receiving the motion to dismiss she re-served Dr. Verska through service upon his wife, Desiree Verska, and re-served the Spine Institute of Idaho through its registered agent Nicholas Russell. Plaintiff now asserts in her response to Dr. Verska's motion to dismiss that the re-service was effective because the time for service of the Amended Complaint had not yet run. The Amended Complaint should be barred, however, because it was

filed beyond the statute of limitation period as against the new parties added through the amendment. Therefore, the time for service is governed by the date of filing of the original Complaint.

Plaintiff brought this action as a medical malpractice claim as set forth in her original Complaint filed on October 5, 2009. Plaintiff filed her Amended Complaint and Demand for Jury Trial on November 13, 2009. In her Amended Complaint Plaintiff added Defendants Howmedica Osteonics, Corp. d/b/a Stryker Orthopaedics, and Stryker and incorporated them into the one count of medical malpractice negligence. The statute of limitations for bringing a claim against a medical device manufacturer is two years as set forth in Idaho Code § 5-219(4). The statute of limitations applicable to a medical device manufacturer is not tolled by virtue of a prelitigation screening panel proceeding, which is applicable to healthcare providers under 6-1001, *et seq.* Therefore, Plaintiff's Amended Complaint against the medical device manufacturer was filed beyond the two year statute of limitations, which ran on October 8, 2009. For Plaintiff to salvage her Amended Complaint, she is required to demonstrate that it relates back to the date of filing of the original Complaint, which Plaintiff cannot do.

Under Rule 15(a), Idaho Rules of Civil Procedure, a party may amend its pleading once as a matter of right at any time before a responsive pleading is due. Rule 15(c), Idaho R. Civ. P., provides that an amendment changing the party against whom a claim is asserted will relate back to the date of the original pleading if: a) the claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence alleged in the original complaint; b) within the period provided by law for commencing the action against the new party, the new party received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits; and c) within the period provided by law for commencing the action against the new party, the new party knew or should have known that, but for a mistake

concerning the identity of the proper party, the action would have been brought against the new party. *See also Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2002).

On May 12, 2010, Plaintiff filed a motion to extend the time to serve the Stryker defendants claiming that because the medical device manufacturing company is a complex, global corporation with many subsidiary entities and division names Plaintiff has encountered difficulty effectuating service upon the medical device manufacturing company. Consistent with her attempt to serve Dr. Verska and the Spine Institute of Idaho at the last minute, Plaintiff waited until May 11, 2010 to attempt service on Defendant Stryker. Plaintiff had six months to effectuate service but waited until the last minute. Plaintiff's request for an extension of time with which to serve Defendant Stryker demonstrates that Plaintiff has not satisfied the requirements of Rule 15(c) under which an amendment would relate back to the date the original Complaint was filed. It is clear that Plaintiff made no attempt to put the medical device manufacturer on notice, before the statute of limitations had ran, that she intended to include them in her negligence action against the other Defendants. If she had made such an attempt she would have identified the proper party and its registered agent early in the process.

Dr. Verska and the Spine Institute of Idaho acknowledge that they might not be the proper parties to argue 1) that the Amended Complaint is not valid as against the newly named defendants, 2) that the statute of limitations as to the newly named defendants had already run before the filing of the amended complaint; 3) that the newly named defendants were not given proper notice of the institution of the action prior to the statute of limitations expiring; or 4) that the newly named defendants knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. Nonetheless, Dr. Verska and the Spine Institute of Idaho's interests are necessarily implicated in determining whether the Amended Complaint is valid and relates back to the time of filing of the original

Complaint. If the Court finds that the Plaintiff has failed to demonstrate that the Amended Complaint relates back to the date of the filing of the original Complaint, then the Amended Complaint is not valid and the original Complaint governs the action. If the original Complaint governs the action, then the six-month time period for service of process is governed by the original Complaint, which is April 5, 2010. If April 5, 2010, is the date that Plaintiff was to have served Dr. Verska and the Spine Institute of Idaho, then Plaintiff's attempt at re-service was futile.

Amending her Complaint to add a new party should not extend the time period for serving Dr. Verska and the Spine Institute of Idaho when the Amended Complaint is barred by the statute of limitations.

Dr. Verska acknowledges that this is a new argument raised now as a result of Plaintiff's response to the motion to dismiss and her motion for extension of time to serve Styker. However, it is Dr. Verska's position that the Amended Complaint is barred and does not relate back to the date the original Complaint was filed. It is also his position that this action is governed by the original Complaint that was filed on October 5, 2009 and the six-month period for service of process runs from that date. Plaintiff's attempt to perfect service on April 21 and 22, 2010, is beyond the six-month time period; therefore, Plaintiff's claim as against Dr. Verska and the Spine Institute of Idaho must be dismissed.

C. DISMISSAL OF PLAINTIFF'S ACTION AGAINST DR. VERSKA AND THE SPINE INSTITUTE OF IDAHO IS MANDATORY SINCE PLAINTIFF HAS FAILED TO SHOW GOOD CAUSE WHY SHE DID NOT TIMELY SERVE DR. VERSKA OR THE SPINE INSTITUTE OF IDAHO.

Rule 4(a)(2), Idaho R. Civ. P, provides that if service of the summons and complaint is not made within six months of the filing of the complaint and the party on whose behalf such was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant. Dismissal is mandatory unless the plaintiff shows

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS - 6

good cause as to why service was not timely made. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 976 P.2d 457 (1999). In order to escape the harshness of the rule, the plaintiff has the burden to show good cause as to why service was not made. *Hincks v. Neilson*, 137 Idaho 610, 51 P.3d 424 (Ct. App. 2002). In the instant case, Plaintiff has not shown good cause for her failure to timely serve Dr. Verska or the Spine Institute; therefore, her claims must be dismissed.

In affirming the district court's dismissal of plaintiff's claim, the court in *Hincks* pointed out that factors deemed **irrelevant** to a good cause analysis are: the *pro se* status of the plaintiff; that the action will be time barred if dismissal is granted; lack of prejudice to the defendant from untimely service; prior notice of the claim to the defendant; and the timing of the defendant's motion to dismiss. *Hincks*, at 612, 51 P.3d at 426.

Here, Plaintiff's status as a *pro se* plaintiff between November 2, 2009, and March 26, 2010 is irrelevant in determining whether she has met her good cause burden. Also irrelevant is Plaintiff's claim that Dr. Verska and the Spine Institute of Idaho are not prejudiced from the untimely service because they ultimately received the Another Summons and Amended Complaint. Absent from Plaintiff's affidavit is any testimony to establish that she attempted timely service upon Dr. Verska or the Spine Institute of Idaho and was unable to do so because she could not locate them or that they were evading service. In fact, Plaintiff makes no attempt to meet her good cause burden. Instead, Plaintiff relies upon her argument that since the improper service was a "technical defect" and Dr. Verska and the Spine Institute of Idaho eventually received the summons and complaint the insufficient service of process should be ignored. Rule 4(a)(2) does not permit the Court to ignore a "technical defect." To the contrary, if Plaintiff fails to show good cause as to why service was not made well within the six month period the Court "shall" dismiss the complaint. Plaintiff had since October 5, 2009 to serve Dr.

Verska and the Spine Institute. She knew where Dr. Verska's office was located since she had been there before, his office had not changed locations, she could have found his office address online or in the phonebook, and Dr. Verska has not relocated his practice to some other group. There is no reason Plaintiff could not have made timely service upon Dr. Verska and the Spine Institute of Idaho.

Plaintiff's attempt to diminish the importance of proper service by characterizing the improper service as a technical defect is not well taken. The rules of civil procedure are meant to govern the interactions between the parties. The rules are not for the convenience of the parties; the rules are mandatory.

Furthermore, Plaintiff makes no attempt to distinguish the cases on point that were cited by Dr. Verska. Those cases stand for the proposition that service upon a person who is not authorized to accept service is improper and the case must be dismissed. Specifically, Plaintiff does not address the holding in *Thiel v. Stradley*, 118 Idaho 86, 794 P.3d 1142 (1990) wherein the Idaho Supreme Court held that even service upon a person's spouse is ineffective when the spouse has not been duly authorized to accept service. Nor did Plaintiff refute the findings in *Johnson v. Rao*, 952 So.2d 151 (Miss. 2007), which is a case directly on point. Recall that the *Johnson* court upheld the trial court's grant of dismissal to Dr. Rao when the plaintiff served Dr. Rao's receptionist, who was not authorized to accept service of the medical malpractice claim brought against him.

Instead of addressing Idaho case law and cases directly on point, Plaintiff has attempted to persuade the Court with snippets of federal case law that are not on point and are presented without a full analysis of the case itself. Plaintiff's arguments and case law should not be considered, even for illustrative purposes, because Idaho case law is the mandatory case law and

there is case law on point from other jurisdictions to guide the Court's analysis of this issue. Reliance upon federal law is unnecessary and should be disregarded.


Plaintiff's complete failure to meet her burden of proof, through a showing of good cause as to why she was unable to effectuate proper service, mandates dismissal of her claims against Dr. Verska and the Spine Institute of Idaho.

CONCLUSION

Based on the foregoing arguments, Dr. Verska and the Spine Institute of Idaho respectfully request that Plaintiff's claims against them be dismissed with prejudice for insufficient service of process.

DATED this 13th day of May, 2010.

POWERS TOLMAN, PLLC

By 
Raymond D. Powers - Of the Firm
Portia L. Rauer - Of the Firm
Attorneys for Defendants Joseph M. Verska,
M.D. and Spine Institute of Idaho, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of May, 2010, I caused to be served a true copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
JONES & SWARTZ, PLLC	<input type="checkbox"/>	Hand Delivered
1673 W. Shoreline Drive, Suite 200	<input type="checkbox"/>	Overnight Mail
PO Box 7808	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83707-7808		
Fax No.: 489-8988		
<i>Attorneys for Plaintiff</i>		

Mark D. Kamitomo	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
THE MARKAM GROUP, INC., P.S.	<input type="checkbox"/>	Hand Delivered
421 W. Riverside, Suite 1060	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input checked="" type="checkbox"/>	Telecopy
Fax No.: (509) 747-1993		
<i>Attorneys for Plaintiff</i>		

Trudy Hanson Fouser	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
GJORDING & FOUSER, PLLC	<input type="checkbox"/>	Hand Delivered
509 W. Hays Street	<input type="checkbox"/>	Overnight Mail
PO Box 2837	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83701		
Fax No.: (208) 336-9177		
<i>Attorneys for Defendant St. Luke's Meridian Medical Center</i>		



Raymond D. Powers
Portia L. Rauer

ORIGINAL

NO. _____ FILED _____
A.M. _____ P.M. 2/3

MAY 17 2010

J. DAVID NAVARRO, Clerk
BY K. BARRON
DEPUTY

Eric B. Swartz, ISB #6396
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Mark D. Kamitomo, WSB #18803 [Admission PHV Pending]
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Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
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STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**AFFIDAVIT OF SERVICE ON
HOWMEDICA OSTEONICS, CORP.,
dba STRYKER ORTHOPAEDICS**

STATE OF IDAHO)
 : ss.
County of Ada)

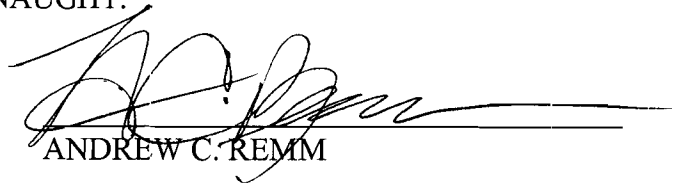
I, ANDREW C. REMM, being first duly sworn upon oath, depose and state as follows:

AFFIDAVIT OF SERVICE ON HOWMEDICA OSTEONICS, CORP., dba STRYKER ORTHOPAEDICS – 1

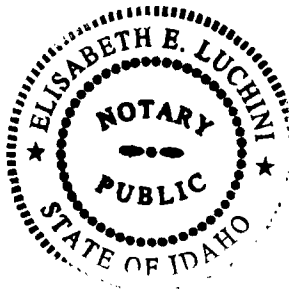
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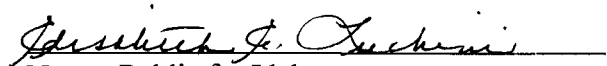
1. I am at least 18 years of age and not a party to this action.
2. On May 11, 2010, at approximately 1:43 p.m., I caused to be served a true and correct copy of the Summons and Complaint in the above-captioned matter by personally serving Nicole Bohrn, a person authorized to accept service on behalf of CT Corporation System, the Registered Agent for HOWMEDICA OSTEONICS CORP., dba STRYKER ORTHOPAEDICS, one of the Defendants herein. Said service was accomplished at the Registered Agent's place of business located at 1111 West Jefferson, Suite 530, Boise, Idaho 83702.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


ANDREW C. REMM

SUBSCRIBED AND SWORN TO before me this 14th day of May, 2010.




Notary Public for Idaho
My Commission Expires: 7.8.12

ORIGINAL

NO. _____ FILED 435
A.M. _____ P.M.

MAY 24 2010

J. DAVID NAVARRO, CLERK
BY: AMER
COURT

Eric B. Swartz, ISB #6396
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

**PLAINTIFF'S SUR-RESPONSE TO
JOSEPH VERSKA, M.D., AND SPINE
INSTITUTE'S STATUTE OF
LIMITATIONS ARGUMENT
BROUGHT ON BEHALF OF
STRYKER DEFENDANTS**

I. INTRODUCTION

Defendants Joseph Verska, M.D., and Spine Institute made a general appearance and waived their Rule 12(b)(5) challenge to sufficiency of process when they argued that the Amended

Complaint should be barred with respect to the Stryker Defendants because of the statute of limitations. Had Defendants Dr. Verska and Spine Institute raised this argument as part of their Rule 12(b)(5) motion, and if it was their defense to raise, they would not have waived their Rule 12(b)(5) challenge to sufficiency of service of process. They did not, however, raise the defense in their motion, and the defense is not even theirs to raise. Consequently, they have exceeded the limits of their limited special appearance and have waived their challenge to sufficiency of service of process.

II. PROCEDURAL AND FACTUAL BACKGROUND

On April 20, 2010, Defendants Joseph Verska, M.D., and Spine Institute filed a Rule 12(b)(5) Motion to Dismiss for Insufficiency of Service of Process. Dr. Verska and Spine Institute argued that, while they received the Summons and Amended Complaint, it got to them from someone who was not authorized to accept the same from the process server. On May 10, 2010, Plaintiff Kristeen Elliott responded to the Motion stating that service was properly and timely effectuated. Alternatively, Plaintiff states that the re-service on Dr. Verska and Spine Institute was timely and proper. Specifically, Plaintiff argues that re-service was timely when measuring the 6 months for service from the date of the filing of the Amended Complaint.¹

On May 13, 2010, in their Reply brief, Dr. Verska and Spine Institute argued that the date of the original filed Complaint should control. In support of their argument, they state that the Amended Complaint—as against the Stryker Defendants—is barred by the statute of limitations:

¹ Plaintiff's Memorandum in Opposition to Defendants Joseph Verska and Spine Institute of Idaho's Motion to Dismiss for Insufficiency of Service of Process, pp. 11-12, citing *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997) ("The relevant period of time on which to focus is the six months following the filing of the amended complaint.")

“The Amended Complaint should be barred, however, because it was filed beyond the statute of limitation as against the [Stryker Defendants] added through the amendment.”²

At the hearing on Defendants Dr. Verska and Spine Institute’s Rule 12(b)(5) Motion to Dismiss for Insufficiency of Service of Process, the Court invited Plaintiff to submit a Sur-Response to Dr. Verska and Spine Institute’s argument that the filing date of the original Complaint and not the Amended Complaint should govern. The Court also requested briefing on whether Dr. Verska and Spine Institute’s statute of limitations argument on the Stryker Defendants’ behalf constituted a general appearance and a waiver of their Rule 12(b)(5) challenge.

III. ARGUMENT

A. **Arguing Statute of Limitations on Behalf of the Stryker Defendants Constitutes a General Appearance and a Waiver of a Rule 12(b)(5) Challenge**

The law in Idaho is clear: “If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection.”³ Dr. Verska and Spine Institute exceeded the limited scope of the special appearance recognized by Idaho law by raising the statute of limitations defense as to the Stryker Defendants. Arguing statute of limitations as to the Stryker Defendants goes far beyond the scope of Dr. Verska and Spine Institute’s ability to argue only that they are not properly before the Court.

Idaho Rule of Civil Procedure 4(i)(1) governs general versus special appearances. It states that any appearance other than a special appearance is a general appearance whereby a defendant submits to the jurisdiction of the Court:

² Defendants Verska and Spine Institute’s Reply in Support of their Motion to Dismiss, pp. 3-4, filed May 13, 2010.

³ *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 320, 193 P.3d 866, 867 (2008) quoting *Pingree Cattle Loan Co. v. Charles J. Webb & Co.*, 36 Idaho 442, 446, 211 P. 556, 557 (1922).

(i) General or Special Appearance.

(1) General Appearance. The voluntary appearance of a party or service of any pleading by the party, except as provided in subsection (2) hereof, constitutes voluntary submission to the personal jurisdiction of the court.

The enumerated exceptions to Rule 4(i)(1) are found in subsection (2), and they are quite limited:

(2) Motion or Special Appearance to Contest Personal Jurisdiction. [1] A motion under Rule 12(b)(2), (4) or (5), whether raised before or after judgment, a motion under Rule 40(d)(1) or (2), or a motion for an extension of time to answer or otherwise appear does not constitute a voluntary appearance by the party under this rule. [2] The joinder of other defenses in a motion under Rule 12(b)(2), (4) or (5) does not constitute a voluntary appearance by the party under this rule. [3] After a party files a motion under Rule 12(b)(2), (4) or (5), action taken by that party in responding to discovery or to a motion filed by another party does not constitute a voluntary appearance. [4] If, after a motion under Rule 12(b)(2), (4), or (5) is denied, the party pleads further and defends the action, such further appearance and defense of the action will not constitute a voluntary appearance under this rule. [5] The filing of a document entitled “special appearance,” which does not seek any relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, does not constitute a voluntary appearance by the party under this rule if the party files a motion under Rule 12(b)(2), (4), or (5) within fourteen (14) days after filing such document, or within such later time as the court permits.

I.R.C.P. 4(i)(2)

None of these exceptions (enumerated in the block quote above as [1], [2], [3], [4], and [5]) apply to Dr. Verska and Spine Institute’s appearance to raise the statute of limitations defense on behalf of the Stryker Defendants in their May 13, 2010 Reply and at the May 17, 2010 hearing. Exception [1] is not at issue. Exception [2] is not applicable because Dr. Verska and Spine Institute did not raise the statute of limitations defense in their Rule 12(b)(5) motion. Even if they had, it is not their statute of limitations defense that they are raising. They are raising it on behalf of the

Stryker Defendants. Exception [3] is not applicable because the statute of limitations defense was not raised in discovery or in response to a motion brought by another party. Exception [4] is not applicable because the Rule 12(b)(5) motion has not yet been denied. Exception [5] is not applicable because a “notice of appearance” is not at issue. One defendant raising a defense on behalf of another defendant simply is not an allowable exception under Rule 4(i)(2). And, whether or not Dr. Verska and Spine Institute intended the raising of the statute of limitations argument on the Stryker Defendants’ behalf to constitute a general appearance is irrelevant.⁴ “Under Rule 4(i), whether or not a defendant has made a general or a special appearance is based upon the defendant’s conduct, not upon the defendant’s intent.”⁵

In this case, Dr. Verska and Spine Institute appeared in their May 13 Reply and on May 17 at the hearing to raise the statute of limitations defense on the Stryker Defendants’ behalf. In both appearances, Dr. Verska and Spine Institute seek affirmative relief on behalf of the Stryker Defendants: “The Amended Complaint should be barred, however, because it was filed beyond the statute of limitation as against the [Stryker Defendants] added through the amendment.⁶ Dr. Verska and Spine Institute go on to argue, again on Stryker Defendants’ behalf, why, under Rule 15, the Amended Complaint could not relate back to the Stryker Defendants.⁷ Statute of limitations and Rule 15 relief for the Stryker Defendants goes far beyond the limited special appearance allowable by Rule 4(i). Dr. Verska and Spine Institute’s conduct constitutes a general appearance and a complete waiver of their Rule 12(b)(5) challenge to sufficiency of process.

⁴ *Rhino Metals*, 146 Idaho at 322, 193 P.3d at 869 (“Whether or not [defendant] intended to make a general appearance is irrelevant.”)

⁵ *Id.*

⁶ Defendants Verska and Spine Institute’s Reply in Support of their Motion to Dismiss, pp. 3-4, filed May 13, 2010.

⁷ Defendants Verska and Spine Institute’s Reply in Support of their Motion to Dismiss, pp. 4-5, filed May 13, 2010.

B. The Amended Complaint Still Governs the 6 Month Timeframe at Issue

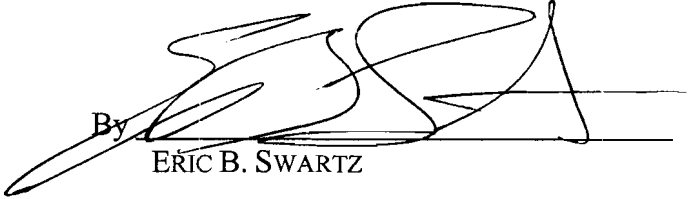
Dr. Verska and Spine Institute erroneously assume that the re-service of Dr. Verska and Spine Institute is untimely if the Amended Complaint is time barred as against Stryker. Regardless of how the Court rules on Dr. Verska and Spine Institute's statute of limitations argument on the Stryker Defendants' behalf, the fact remains that the filing of the Amended Complaint is the timeframe that is relevant when determining whether re-service on Dr. Verska and Spine Institute was timely. The Idaho Supreme Court has held that the last-filed Complaint is the date by which the timeliness of service of process is measured. *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997) ("The relevant period of time on which to focus is the six months following the filing of the amended complaint."). Moreover, in their fervor to dismiss out the Stryker Defendants, Dr. Verska and Spine Institute overlook the fact that they too are subject to the Amended Complaint. Dismissing the Stryker Defendants does not change this. The Complaint of record, and the Complaint that will be answered and responded to by all Defendants, is the Amended Complaint. It was filed when leave of Court was not necessary under Rule 15. And, under Rule 15(c), the Amended Complaint relates back to the original filing date for the purpose of Dr. Verska and Spine Institute where, as here, they were parties to the originally filed Complaint. *See I.R.C.P. 15(c)*. Whether the Stryker Defendants are in this action or not, Dr. Verska and Spine Institute are subject to the Amended Complaint, its filing date, and the 6-month service period following the same.

IV. CONCLUSION

For the forgoing reasons, Plaintiff Kristeen Elliott respectfully requests that this Court deny the Defendants' Motion to Dismiss for Insufficiency of Process.

DATED this 24th day of May, 2010.

JONES & SWARTZ PLLC

By 
ERIC B. SWARTZ

MARK D. KAMITOMO
THE MARKAM GROUP, INC., P.S.

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
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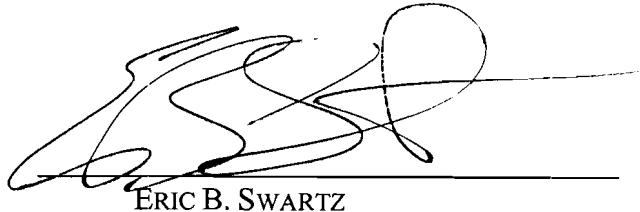
*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

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Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
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*Counsel for Defendant
St. Luke's Meridian Medical Center*

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ERIC B. SWARTZ

FILED 3/5
P.M.
MAY 28 2010
J. F. NAVARRO, Clerk
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Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**SUR-REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS**

COME NOW Defendants Joseph M. Verska, M.D. and the Spine Institute of Idaho,
P.A., by and through their counsel of record, Powers Tolman, PLLC, and submit this sur-reply in
support of their motion to dismiss.

SUR-REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS - 1

INTRODUCTION

In Plaintiff's response to Defendants' motion to dismiss, she claimed, *inter alia*, that any improper service was remedied when the Spine Institute of Idaho and Dr. Verska were re-served because the six-month time period for service of the Amended Complaint had not yet run. To refute this argument, Defendants argued that the six-month time period for service had run on April 5, 2010, because the service time period related to the time the original Complaint was filed, not the Amended Complaint. In support of this argument, Defendants argued that the Amended Complaint is barred because it was brought to include the Stryker defendants after the statute of limitations period had run. Plaintiff brought this action as a medical malpractice claim related to medical care and treatment that commenced on October 8, 2007. Plaintiff filed her original Complaint on October 5, 2009. On November 13, 2009, over a month after the two year statute of limitations had run, Plaintiff filed her Amended Complaint and Demand for Jury Trial. In her Amended Complaint, Plaintiff added Defendants Howmedica Osteonics, Corp., d/b/a Stryker Orthopaedics, and Stryker and incorporated them into the one count of medical malpractice negligence, without alleging any new cause of action or claim.

Defendants' position and supporting argument with regard to the validity of the Amended Complaint were brought to refute Plaintiff's argument. It was not brought as a new motion or a new defense that should have, or could have, been raised in these Defendants' moving papers.

Defendants have not waived their special appearance and were not properly served; therefore, Plaintiff's action against them should be dismissed.

ARGUMENT

A. DEFENDANTS HAVE NOT MADE A GENERAL APPEARANCE, NOR HAVE THEY WAIVED THEIR 12(b)(5) CHALLENGE.

Rule 4(i)(2) of the Idaho Rules of Civil Procedure states that a motion under Rule 12(b)(5), Idaho R. Civ. P., does not constitute a voluntary or general appearance. The joinder of other defenses in a motion under Rule 12(b)(5) does not constitute a voluntary appearance by the party. Idaho R. Civ. P. 4(i)(2). After a party files a motion under Rule 12(b)(5), “action taken by that party in response to discovery or to a motion filed by another party does not constitute a voluntary appearance.” Idaho R. Civ. P. 4(i)(2) (Emphasis added). A defense of insufficiency of service of process is waived unless it is made by motion prior to filing a responsive pleading and prior to filing any other motion. Idaho R. Civ. P. 12(g). Defendants’ conduct in rebutting an argument made by Plaintiff in her response to Defendants’ motion to dismiss did not constitute a general appearance, nor did it waive their 12(b)(5) challenge.

1. Defendants did not make a general appearance when they responded to Plaintiff’s responsive argument.

Contrary to Plaintiff’s argument, refuting a responsive argument does not constitute a general appearance. Without citing any direct authority, she claims that Defendants have effectively entered a general appearance through simply refuting Plaintiff’s responsive argument that she had time remaining under which to perfect service. Plaintiff’s claim that Defendants have made a voluntary or general appearance by refuting an argument raised in Plaintiff’s responsive briefing is not well taken.

The rules of civil procedure referenced by Plaintiff do not support her position. Defendants have filed a motion to dismiss for insufficiency of service of process. They have not

filed a responsive pleading.¹ Plaintiff has filed a motion for extension of time to serve the Stryker defendants; however, Defendants have not responded to that motion. The logical purpose of Rule 4(i)(2), Idaho R. Civ. P., is to protect against the very tactic Plaintiff is attempting to employ. The objective of the rule is to protect a defendant who has made a special appearance from losing that special appearance status if it is otherwise required to respond to the plaintiff. If Plaintiff's argument is to be followed, then every defendant who rebuts an argument raised in a plaintiff's responsive briefing would be entering a general appearance. Under such a scenario, the only way a defendant could maintain the special appearance is by not replying at all – such a result is absurd. According to Plaintiff's logic, a defendant could never reply to a responsive argument without waiving a special appearance.

Rule 4(i)(2) protects a defendant who has moved under 12(b)(2), (4), or (5) from waiving a special appearance if said defendant responds to discovery or a motion filed by the plaintiff. Here, Defendants have merely replied to refute an argument in a responsive brief. Since the rule protects a defendant when it responds to discovery or a motion filed by a plaintiff, it surely protects these Defendants who have simply replied to an argument raised by Plaintiff in responding to a motion filed by the Defendants.

Plaintiff has cited *Rhino Metals, Inc. v. Craft* to support her position. 146 Idaho 319, 193 P.3d 866 (2008). However, the facts in *Rhino* are quite different than the facts in the present case. In *Rhino*, the court reversed the trial court's grant of defendant's motion to dismiss because the defendant had filed a motion to strike after he had filed his motion to dismiss, which was considered a general appearance. *Id.* The rationale supporting the court's decision was that the defendant's conduct of filing the motion to strike determined whether the defendant had

¹ Defendants also filed a motion for disqualification of Judge Williamson pursuant to Rule 40(d)(1), Idaho R. Civ. P.; however, under Rule 4(i)(2), a motion to disqualify brought under Rule 40(d)(1) does not constitute a general appearance.

made a general appearance. *Id.* at 321, 193 P.3d at 868. The court noted that Rule 4(i), Idaho R. Civ. P., “mitigates to some extent the rule that the party must keep out for all purposes except to object that he is not in court.” *Id.* at 320, 193 P.3d at 867. Not even the mitigation provided in Rule 4(i) could help the defendant because he had filed a subsequent motion. As argued above, Defendants in this case have not filed any subsequent motion; therefore, the mitigation provided under 4(i), Idaho R. Civ. P., applies here to protect them and supports preserving Defendants’ special appearance.

Rebutting an argument made by the other party in responsive briefing does not constitute a general appearance. Defendants did not make a general appearance; therefore, their special appearance remains intact.

2. **Raising the statute of limitation issue did not waive Defendants’ Rule 12(b)(5) challenge.**

In refuting Plaintiff’s responsive argument, Defendants brought to the Court’s attention that Plaintiff’s Amended Complaint should be barred by the statute of limitations. Plaintiff mistakenly argues that by raising such a “defense” in their reply briefing, Defendants have now waived their Rule 12(b)(5) challenge. However, the statute of limitation argument is not a defense that Defendants can, or did, raise on behalf of the Stryker defendants. These moving Defendants do not have standing to raise such a defense on behalf of the Stryker defendants, counsel for these moving Defendants have not appeared on behalf of the Stryker defendants, and the Stryker defendants have not yet been served so they are not before this Court. More importantly, the statute of limitation argument could not have been raised in Defendants’ moving papers because it did not come to light until Plaintiff’s responsive briefing.

Rule 12(g), Idaho R. Civ. P., is the specific rule that governs the waiver of certain defenses. A defense of insufficiency of service of process is only waived if it was brought after the filing of a responsive pleading or after the filing of some other motion. Rule 12(g)(1), Idaho SUR-REPLY IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS - 5

R. Civ. P. It is not waived if it is joined with one or more other motions or by filing a special appearance as provided in Rule 4(i)(2), Idaho R. Civ. P. Defendants have filed but one motion and it was filed before any responsive pleading. If the Court is inclined to accept Plaintiff's argument that Defendants have raised an additional defense, Defendants' Rule 12(b)(5) motion to dismiss is valid because any such statute of limitations "defense" was raised or joined within the motion to dismiss for insufficiency of service of process framework; it was not raised in a separate, subsequent motion.

The crux of Defendants' motion to dismiss is whether service of process was proper. It should not be lost on the Court that the March 31, 2010, service was improper because of service upon a person who was not authorized or appointed to accept service. Plaintiff was only made aware of the improper service because Defendants were required to file a 12(b)(5) motion to dismiss to preserve their defense prior to the time their responsive pleading was due. The time for filing their responsive pleading ran before the time for service expired under the Amended Complaint. It was only through Defendants' motion to dismiss that Plaintiff was alerted to the service of process error and later attempted proper service.

Plaintiff's arguments that Defendants made a general appearance or waived their Rule 12(b)(5) challenge are a red herring and an attempt to shift the Court's focus from deciding the real issue.

B. SINCE PLAINTIFF'S AMENDED COMPLAINT DOES NOT RELATE BACK TO THE ORIGINAL COMPLAINT, THE ORIGINAL COMPLAINT GOVERNS THIS CASE.

Defendants have argued in rebuttal that the date of filing of the original Complaint governs this proceeding. Defendants' rebuttal argument was based on the following grounds 1) that an amendment is futile and subject to dismissal if it merely restates the same facts as the original complaint or could not withstand a motion to dismiss (*ACLU v. Whitman*, 159 P.3d 707

(Colo. App. 2006)); 2) that there is sufficient evidence to demonstrate that Plaintiff cannot satisfy the "relation back" requirements of Rule 15(c), Idaho R. Civ. P.; and 3) that if the Amended Complaint is subject to dismissal then the original Complaint will govern the action as to the original defendants.

In the analogous, and more typical, situation of a plaintiff moving for leave to amend, it is not an abuse of discretion for the trial court to deny the motion to amend if the claims are barred by the statute of limitations. *Lapham v. Stewart*, 137 Idaho 582, 51 P.3d 396 (2002). Moreover, as eluded to above, if it is shown that the amendment cannot survive a motion to dismiss for failure to state a valid claim, i.e., the claim is barred by the statute of limitations, then the amendment would be futile and should be dismissed. In a situation where an amended complaint to add new defendants is dismissed as to those defendants, it is reasonable that the original Complaint would be reinstated and govern the action for all purposes as to the original defendants.

It would unduly prejudice Defendants for the Court to deny their motion to dismiss by finding that proper service was made on April 21 and 22, 2010, by virtue of the date of the filing of the Amended Complaint, but then later dismiss the Amended Complaint because it was barred by the statute of limitations as to the newly named defendants.

CONCLUSION

Dr. Verska and the Spine Institute of Idaho respectfully request that Plaintiff's claims against them be dismissed with prejudice for insufficient service of process.

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DATED this 28th day of May, 2010.

POWERS TOLMAN, PLLC

By 
Raymond D. Powers - Of the Firm
Portia L. Rauer - Of the Firm
Attorneys for Defendants Joseph M. Verska,
M.D. and Spine Institute of Idaho, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of May, 2010, I caused to be served a true copy of the foregoing **SUR-REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz
JONES & SWARTZ, PLLC
1673 W. Shoreline Drive, Suite 200
PO Box 7808
Boise, ID 83707-7808
Fax No.: 489-8988
Attorneys for Plaintiff

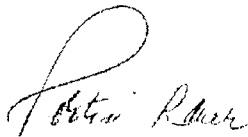
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 Overnight Mail
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Fax No.: (509) 747-1993
Attorneys for Plaintiff

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509 W. Hays Street
PO Box 2837
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Fax No.: (208) 336-9177
*Attorneys for Defendant St. Luke's Meridian
Medical Center*

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Raymond D. Powers
Portia L. Rauer

ORIGINAL

NO. _____
A.M. _____ FILED PM 3:53

JUN 04 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

Eric B. Swartz, ISB #6396
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS CORP.,
dba STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

NOTICE OF SERVICE

TO: THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the 3rd day of June, 2010, Plaintiff Kristeen M. Elliott, by
and through her counsel of record, Jones & Swartz PLLC, served a copy of **Plaintiff's First Set of**

Interrogatories and Requests for Production of Documents to Defendants Howmedica Osteonics Corp., dba Stryker Orthopaedics, and Stryker, together with a copy of this Notice of

Service, upon counsel for Defendants as follows:

Erica L. Visokey
325 Corporate Drive
Mahwah, NJ 07430
*Counsel for Defendants
Howmedica Osteonics Corp., dba
Stryker Orthopaedics, and Stryker*

U.S. Mail
 Fax:
 Overnight Delivery
 Messenger Delivery
 Email: erica.visokey@stryker.com

With courtesy copies to

Raymond D. Powers
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Joseph M. Verska, M.D. and
Spine Institute of Idaho*

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Trudy Hanson Fouser
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*Counsel for Defendant
St. Luke's Meridian Medical Center*

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DATED this 3rd day of June, 2010.

JONES & SWARTZ PLLC

By 

ERIC B. SWARTZ

MARK D. KAMITOMO
THE MARKAM GROUP, INC., P.S.

Attorneys for Plaintiff

RECEIVED
JUN 21 2010
Ada County Clerk

JUN 21 2010

J. DAVID NAVARRO, Clerk
By **CARLY LATIMORE**
DEPUTY

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

NOTICE OF UNAVAILABILITY

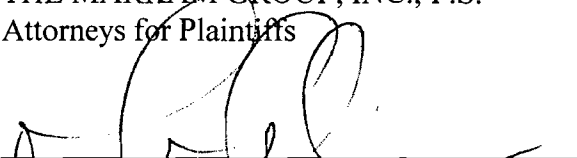
NOTICE IS HEREBY GIVEN that Mark D. Kamitomo of The Markam Group, Inc., P.S.,
attorney for Plaintiffs, will be unavailable for motions, motion responses, discovery responses,

hearings, mediations, settlement conferences, status conferences, depositions, and all other time-sensitive matters from July 9, 2010 through August 9, 2010 inclusively, due to a trial in Texas.

This Notice is to respectfully request the above-referenced parties and the clerk of the Court not to note or schedule any matters during that time period.

DATED this 5 day of June 2010 in Spokane, Washington.

THE MARKAM GROUP, INC., P.S.
Attorneys for Plaintiffs



Mark D. Kamitomo, WSBA #: 18803

CERTIFICATE OF SERVICE

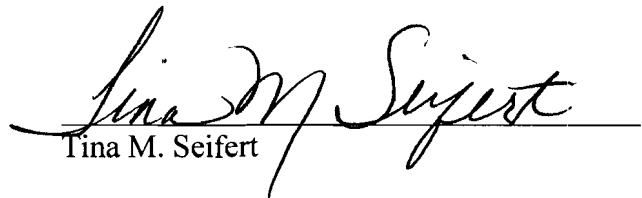
I HEREBY CERTIFY that on this 18th day of June 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Mr. Eric B. Swartz	<input checked="" type="checkbox"/> U.S. Mail
<i>Jones & Swartz, PLLC</i>	<input type="checkbox"/> Fax:
1673 W. Shoreline Drive, Suite 200	<input type="checkbox"/> Overnight Delivery
P.O. Box 7808	<input type="checkbox"/> Messenger Delivery
Boise, ID 83707	<input type="checkbox"/> Email:

Trudy Hanson Fouser	<input checked="" type="checkbox"/> U.S. Mail
<i>Gjordin & Fouser, PLLC</i>	<input type="checkbox"/> Fax:
509 W. Hays Street	<input type="checkbox"/> Overnight Delivery
PO Box 2837	<input type="checkbox"/> Messenger Delivery
Boise, ID 83701	<input type="checkbox"/> Email:

Raymond D. Powers	<input checked="" type="checkbox"/> U.S. Mail
<i>Powers Tolman, PLLC</i>	<input type="checkbox"/> Fax:
345 Bobwhite Court, Suite 150	<input type="checkbox"/> Overnight Delivery
PO Box 9756	<input type="checkbox"/> Messenger Delivery
Boise, ID 83707	<input type="checkbox"/> Email:

Signed in Spokane, Washington on June 18 2010.


Tina M. Seifert

FILED
A.M. 10:49 P.M.

JUN 21 2010

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

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Attorneys for Plaintiff

RECEIVED
JUN 21 2010
Ada County Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS
CORP., dba STRYKER ORTHOPAEDICS;
STRYKER; and JANE and JOHN DOES
I through X,

Defendants.

Case No. CV PI 0918953

NOTICE OF UNAVAILABILITY

NOTICE IS HEREBY GIVEN that Mark D. Kamitomo of The Markam Group, Inc., P.S.,
attorney for Plaintiffs, will be unavailable for motions, motion responses, discovery responses,

NOTICE OF UNAVAILABILITY - 1

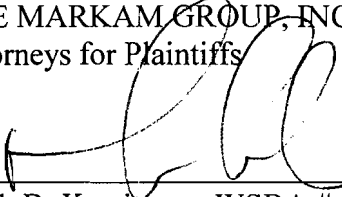
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hearings, mediations, settlement conferences, status conferences, depositions, and all other time-sensitive matters from August 23, 2010 through September 23, 2010 inclusively, due to a vacation.

This Notice is to respectfully request the above-referenced parties and the clerk of the Court not to note or schedule any matters during that time period.

DATED this 15 day of June 2010 in Spokane, Washington.

THE MARKAM GROUP, INC., P.S.
Attorneys for Plaintiffs



Mark D. Kamitomo, WSBA #: 18803

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Mr. Eric B. Swartz	<input checked="" type="checkbox"/> U.S. Mail
<i>Jones & Swartz, PLLC</i>	<input type="checkbox"/> Fax:
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Boise, ID 83701	<input type="checkbox"/> Email:

Raymond D. Powers	<input checked="" type="checkbox"/> U.S. Mail
<i>Powers Tolman, PLLC</i>	<input type="checkbox"/> Fax:
345 Bobwhite Court, Suite 150	<input type="checkbox"/> Overnight Delivery
PO Box 9756	<input type="checkbox"/> Messenger Delivery
Boise, ID 83707	<input type="checkbox"/> Email:

Signed in Spokane, Washington on June 18 2010.


Tina M. Seifert

JUL 12 2010

J. DAVID NAVARRO, Clerk
By _____ INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Case No. CV PI 09 18953

Plaintiff,

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

vs.

JOESPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LIKE'S, an Idaho ;
corporation; SPINE INSTITUTE OF IDAHO,
P.A., a professional corporation; HOWMEDICA
OSTEONICS CORP., dba STRYKER
ORTHOPAEDICS; STRYKER; and JANE and
JOHN DOES I through X,;

Defendants.

This matter came before the Court on Defendants Dr. Joseph Verska and the Spine Institute of Idaho, PA's 12(b)(5) motion to dismiss for insufficiency of service of process. The Court heard oral arguments on Monday, May 17, 2010. Eric Swartz appeared for the Plaintiff Kristeen Elliott. Portia Rauer appeared for Defendants Dr. Joesph Verska and the Spine Institute of Idaho, PA. The remaining Defendants did not appear. The parties requested additional time to brief the relation back and waiver by general appearance issues raised in Defendants' Reply Memorandum and at oral

1 argument. The Court granted the parties additional time to file further briefing on these issues. The
2 Court took the matter under advisement on May 28, 2010.

3 BACKGROUND

4 On October 8, 2007, Defendant Dr. Verska performed spinal surgery, consisting of
5 decompressive laminectomies, fusions, and removal and insertion of instrumentation among other
6 procedures, on Plaintiff Kristeen Elliott at St. Luke's Meridian Medical Center. During the
7 procedure, Dr. Verska removed previously inserted DePuy instrumentation and implanted
8 Stryker/Howmedica instrumentation. Due to continued pain, Dr. Verska performed a second
9 operation consisting of an exploration and revision/reinsertion of instrumentation on October 11,
10 2007. Plaintiff alleges that these procedures were performed negligently and filed the instant
11 medical malpractice suit *pro se* on October 5, 2009. Before serving the Complaint on any party,
12 Plaintiff filed an Amended Complaint on November 13, 2009.

14 Plaintiff later retained counsel and on March 30, 2010 had additional summonses issued. On
15 March 31, 2010, Andrew Remm went to the offices of Defendant the Spine Institute of Idaho to
16 serve process. Mr. Remm presented the receptionist Tina McLeod with documents entitled Another
17 Summons, Amended Complaint, and Reinstatement Annual Report Form for the Spine Institute and
18 for Dr. Verska. After a brief discussion, Mr. Remm left the Spine Institute with the impression that
19 he had completed the service and Ms. McLeod placed the documents in an "inbox" for Nickolas
20 Russell.
21

22 On April 20, 2010, Defendants filed the instant motion to dismiss for insufficiency of
23 service of process arguing that Tina McLeod was not an authorized agent of service for either
24 Defendant. On April 21, 2010 Plaintiff attempted substitute service on Dr. Verska by presenting the
25

1 documents to his wife at his place of residence. On April 22, 2010 Plaintiff attempted service on the
2 Spine Institute by personally serving Nickolas Russell, the registered agent for the Spine Institute.

3 **STANDARD OF REVIEW**

4 Idaho Rule of Civil Procedure 4(a)(2) states:

5 If a service of the summons and complaint is not made upon a defendant within six
6 (6) months after the filing of the complaint and the party on whose behalf such service
7 was required cannot show good cause why such service was not made within that
8 period, the action shall be dismissed as to that defendant without prejudice upon the
9 court's own initiative with 14 days notice to such party or upon motion.

10 A party who fails to effect timely service bears the burden of demonstrating good cause.

11 *Harrison v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 145 Idaho 179, 183, 177 P.3d 393,
12 397 (2008) (citing *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997)).

13 Whether or not good cause exists is a factual determination. *Rudd v. Merritt*, 138 Idaho 526, 532, 66
14 P.3d 230, 236 (2003) (citing *Regjovich v. First Western Investments, Inc.*, 134 Idaho 154, 157, 997
15 P.2d 615, 618 (2000)). When reviewing the district court's decision, the appellate Courts liberally
16 construe the record in the light most favorable to the non-moving party and draw all reasonable
17 inferences in that party's favor. *Harrison*, 145 Idaho at 182–83, 177 P.3d at 396–97.

18 **MARCH 31, 2010 SERVICE**

19 Idaho Rule of Civil Procedure 4(d)(2) provides for service upon individuals. It states:

20 Upon an individual other than those specified in subdivision (3) of this rule, by
21 delivering a copy of the summons and of the complaint to the individual personally or
22 by leaving copies thereof at the individual's dwelling house or usual place of abode
23 with some person over the age of eighteen (18) years then residing therein or by
24 delivering a copy of the summons and of the complaint to an agent authorized by
25 appointment or by law to receive service of process.

26 On March 31, 2010, Mr. Remm attempted personal service upon Defendant Verska by
leaving the documents with the receptionist at his office. There is no dispute that on March 31, 2010

1 Plaintiff did not deliver the documents to Dr. Verska personally or leave them with a person over
2 the age of eighteen at his residence. Plaintiff asserts and Mr. Remm testified that Ms. McLeod
3 affirmatively represented to him that she was authorized to accept service. Ms. McLeod testified
4 that she did not represent that she was authorized to accept service of process and that she did not
5 understand the term service of process. The Court finds that the scenarios as testified to by Mr.
6 Remm and Ms. McLeod are equally plausible. Because IRCP 4(a)(2) places the burden of proof
7 upon the party attempting to effect timely service of process, the Court finds that Plaintiff has not
8 met her burden to establish that Ms. McLeod was an authorized agent for service of process for
9 Defendant Verska. The Court finds that service upon Defendant Verska was not effectuated on
10 March 31, 2010.
11

12 Idaho Rule of Civil Procedure 4(d)(4) provides for service upon corporations. It provides:

13 Upon a domestic or foreign corporation by delivering a copy of the summons and
14 complaint to an officer, managing or general agent, or to any other agent authorized
15 by appointment or by statute of this state to receive service of process, and upon a
16 partnership or other unincorporated association which is subject to suit under a
17 common name, by delivering a copy of the summons and the complaint to an officer
18 or the managing or general agent of the partnership or association, or to any other
19 agent authorized by appointment or by statute of this state to receive service of
20 process. If service is upon a statutory agent, any statutory requirement as to the
21 number of copies of summons and complaint to be served shall be followed, and if
22 such agent is a state official such service may be made by registered or certified mail,
23 and also, if the statute so requires, by mailing a copy to the defendant.

24 On March 31, 2010, Mr. Remm attempted service upon Defendant Spine Institute by leaving
25 the documents with the receptionist at the front desk. It is undisputed that on March 31, 2010 Mr.
26 Remm did not personally serve Nickolas Russell, the registered agent for the Spine Institute, or any
other officer of the Spine Institute. As stated above Plaintiff asserts and Mr. Remm testified that Ms.
McLeod affirmatively represented to him that she was authorized to accept service and Ms. McLeod

1 testified that she did not make such a representation. The Court found above that the scenarios as
2 testified to by Mr. Remm and Ms. McLeod are equally plausible. Because IRCP 4(a)(2) places the
3 burden of proof upon the party attempting to effect timely service of process, the Court finds that
4 Plaintiff has not met her burden to establish that Ms. McLeod was an authorized agent for service of
5 process for Defendant Spine Institute. The Court finds that service upon Defendant Spine Institute
6 was not effectuated on March 31, 2010.

7 APRIL 2010 SERVICE

8 Plaintiff argues that even if the March 31, 2010 service were found to be ineffective, there is
9 no need to dismiss the complaint because good cause for the delay has been shown and service was
10 properly effectuated on Defendant Verska on April 21, 2010 via substitute service and on Defendant
11 Spine Institute on April 22, 2010 by personally serving Nickolas Russell, the registered agent.
12 Plaintiff contends that the six month time limit set by IRCP 4(a)(2) begins on the date of filing of
13 the Amended Complaint. Defendants counter 1) that amending a complaint to add a new party
14 should not extend the time period for serving existing defendants and 2) that the amended complaint
15 was filed after the statute of limitations had expired, fails to meet the relation back requirements of
16 IRCP 15(c), and is therefore barred.
17

18 In describing the test for good cause, the Idaho Supreme Court has stated:
19

20 There is no bright-line test in determining whether good cause exists. “[W]hether
21 legal excuse has been shown is a matter for judicial determination based upon the
22 facts and circumstances in each case.” The focus of the good cause inquiry is on the
23 six-month time period following the filing of the complaint. “If a plaintiff fails to
24 make any attempt at service within the time period of the rule, it is likely that a court
25 will find no showing of good cause.” Courts look to factors outside of the plaintiff’s
26 control including sudden illness, natural catastrophe, or evasion of service of process.
Lack of prejudice is irrelevant to the good cause analysis.

1 *Harrison v. Board of Professional Discipline of the Idaho State Board of Medicine*, 145 Idaho 179,
2 183, 177 P.3d 393, 397 (2008)(citations omitted). The Court finds that prior to the filing of the
3 motion to dismiss for insufficiency of service of process Plaintiff made only a single attempt at
4 service of each of these Defendants. The Court does not find factors outside of the Plaintiff's
5 control, such as illness, natural catastrophe, or evasion of process.

6 Plaintiff did not attempt to personally serve Dr. Verska at his residence. Plaintiff did not
7 make multiple attempts to personally serve Dr. Verska at his place of business, but instead relied on
8 an alleged affirmative representation of authorization without confirming that authorization. Prior to
9 attempting to serve Dr. Verska at his office, Plaintiff's counsel was aware that Dr. Verska's counsel
10 had declined to accept service on his behalf because "he was not authorized to accept service of
11 process." (Affidavit of Mark Kamitomo, ¶ 4.) Considering that Plaintiff's counsel was aware that
12 Defense counsel was not authorized to accept service on behalf of Dr. Verska, the Court does not
13 find it is reasonable for Mr. Remm to have accepted at face value an alleged representation that an
14 employee or associate would be authorized to accept service of process on his behalf. The Court
15 does not find the Plaintiff has met her burden of establishing good cause for the failure to effectuate
16 service upon Defendant Verska within six months of the filing of the Complaint.
17

18
19 Similarly, Mr. Remm delivered with the process documents a document entitled
20 "Reinstatement Annual Report Form." This document shows Nick Russell to be the authorized
21 agent for service of process on the Spine Institute. Plaintiff and Mr. Remm contend that Mr. Remm
22 asked to see Russell but was affirmatively advised by Ms. McLeod that she could accept the
23 documents. The Court does not find that Plaintiff made sufficient effort to personally serve the
24 registered agent, such as asking a second time to see him, asking when he would be available, or
25

1 asking to speak to him by telephone. The Court does not find the Plaintiff has met her burden of
2 establishing good cause for the failure to effectuate service upon Defendant Spine Institute within
3 six months of the filing of the Complaint.

4 Plaintiff also contends that the filing of the Amended Complaint on November 13, 2009
5 causes the six month period for service of process to begin on that date. Plaintiff cites *Sammis v.*
6 *Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997) for this proposition. In *Sammis*, the
7 Idaho Supreme Court stated “The relevant time period on which to focus is the six months
8 following the filing of the amended complaint.” *Id.* However, *Sammis* is factually distinguishable
9 from the instant case. There the plaintiffs filed their original complaint on March 18, 1993 and filed
10 an amended complaint on March 18, 1994 which added several defendants. *Id.* at 344, 941 P.2d at
11 316. The plaintiffs failed to serve all of the new defendants within six months of filing the amended
12 complaint. *Id.* at 345, 941 P.2d at 317. The Idaho Supreme Court stated that the relevant time period
13 was after the amended complaint had been filed because the issue was whether the amended
14 complaint had been served upon the new defendants within six months of its filing. There was no
15 issue in *Sammis* as to whether the original defendants had been properly served.
16

17 Plaintiff has cited and the Court has found no other case from Idaho or any jurisdiction
18 establishing that filing an amended complaint extends the deadline for service of process on existing
19 defendants. Based upon the plain and mandatory language of IRCP 4(a)(2) and existing case law,
20 the Court does not find that the six month deadline is reset upon the filing of an amended complaint.
21 Defendants’ motion to dismiss for insufficiency of service of process is GRANTED.
22

WAIVER


1
2 Plaintiff argues that by raising an argument that the Amended Complaint fails to meet the
3 requirements of IRCP 15(c) to relate back to the date of the original complaint, the Defendants have
4 made a general appearance and waived their right to challenge the sufficiency of the service of
5 process. Defendants counter that this argument was raised only to refute Plaintiff's contention that
6 the improper service was remedied and was not a new motion or new defense which could or should
7 have been raised in Defendants' motion to dismiss. Idaho Rule of Civil Procedure 4(i)(2) states in
8 pertinent part:

9
10 The joinder of other defenses in a motion under Rule 12(b)(2), (4) or (5) does not
11 constitute a voluntary appearance by the party under this rule. After a party files a
12 motion under Rule 12(b)(2), (4) or (5), action taken by that party in responding to
13 discovery or to a motion filed by another party does not constitute a voluntary
14 appearance. If, after a motion under Rule 12(b)(2), (4), or (5) is denied, the party
15 pleads further and defends the action, such further appearance and defense of the
16 action will not constitute a voluntary appearance under this rule.

17
18 The Court finds that under the facts and circumstances of this case, Defendants' raising of an
19 issue under IRCP 15(c) was a response to an argument made by Plaintiff and does not constitute an
20 independent motion or voluntary appearance in this matter.

21
22 IT IS SO ORDERED.

23 Dated this 12th day of July, 2010.

24
25
26


Ronald J. Wilber
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 12 day of July, 2010, I caused a true and correct copy of the foregoing ORDER GRANTING DEFENDANTS' MOTION TO DISMISS to be served by the method indicated below, and addressed to the following:

Eric Swartz
1673 W. Shoreline Dr., Ste. 200
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Boise, ID 83707-7808

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Mark Kamitomo
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Boise, ID 83707

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- Overnight Mail
- Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk

ORIGINAL

Eric B. Swartz, ISB #6396
JONES & SWARTZ PLLC
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Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
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Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

FILED
P.M. 3
AUG 20 2010
J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS CORP.,
dba STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**REQUEST FOR RULE 54(b)
CERTIFICATION OF FINAL
JUDGEMENT AS TO DEFENDANTS
JOSEPH M. VERSKA, M.D., AND
SPINE INSTITUTE OF IDAHO, P.A.**

COMES NOW the Plaintiff, by and through her counsel of record, and requests Rule 54(b)
certification of final judgment as against Defendants Joseph M. Verska, M.D., and Spine Institute of

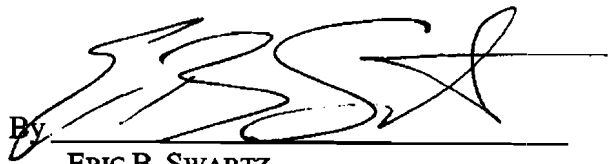
REQUEST FOR RULE 54(b) CERTIFICATION OF FINAL JUDGEMENT AS TO DEFENDANTS
JOSEPH M. VERSKA, M.D., AND SPINE INSTITUTE OF IDAHO, P.A. - 1

KD

Idaho, P.A., on their motion to dismiss granted on July 12, 2010, so that Plaintiff may have an appeal as a matter of right pursuant to Idaho Appellate Rule 11(a)(3), where, as here, there are multiple parties involved in the action but where only two of the above-named five Defendants have been dismissed. There is no just reason for delay and express direction for the entry of the judgment as requested herein is warranted.

DATED this 20th day of August, 2010.

JONES & SWARTZ PLLC

By 

ERIC B. SWARTZ

MARK D. KAMITOMO
THE MARKAM GROUP, INC., P.S.

Attorneys for Plaintiff

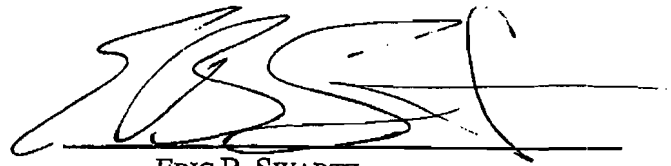
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers	<input type="checkbox"/> U.S. Mail
Portia L. Rauer	<input checked="" type="checkbox"/> Fax: 577-5101
POWERS TOLMAN, PLLC	<input type="checkbox"/> Overnight Delivery
345 Bobwhite Court, Suite 150	<input type="checkbox"/> Messenger Delivery
P.O. Box 9756	<input type="checkbox"/> Email: rdp@powerstolman.com
Boise, ID 83707	plr@powerstolman.com
<i>Counsel for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho</i>	

Trudy Hanson Fouser	<input type="checkbox"/> U.S. Mail
GJORDING & FOUSER, PLLC	<input checked="" type="checkbox"/> Fax: 336-9177
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Boise, ID 83701	<input type="checkbox"/> Email: tfouser@g-g.com
<i>Counsel for Defendant St. Luke's Meridian Medical Center</i>	

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Mahwah, NJ 07430	<input type="checkbox"/> Overnight Delivery
<i>Counsel for Defendants</i>	<input type="checkbox"/> Messenger Delivery
<i>Howmedica Osteonics Corp., dba</i>	<input type="checkbox"/> Email: erica.visokey@stryker.com
<i>Stryker Orthopaedics, and Stryker</i>	



ERIC B. SWARTZ

RECEIVED

AUG 24 2010

Ada County Clerk

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Mark D. Kamitomo, WSB #18803
THE MARKAM GROUP, INC., P.S.
421 West Riverside, Suite 1060
Spokane, WA 99201
Telephone: (509) 747-0902
Facsimile: (509) 747-1993

Attorneys for Plaintiff

NO. _____ FILED _____
A.M. _____ P.M. 12:45

AUG 26 2010

By J. DAVID NAVARRO, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS CORP.,
dba STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

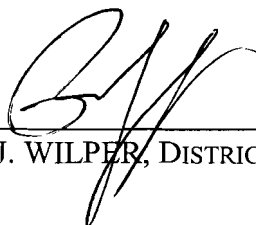
Case No. CV PI 0918953

JUDGMENT

In accordance with the Court's July 12, 2010 Order Granting Defendants Joseph M. Verska and Spine Institute of Idaho's Motion to Dismiss, the Court now enters judgment. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss filed by Defendants Joseph M. Verska, M.D., and Spine Institute of Idaho, P.A., shall be, and the same hereby is, GRANTED, and all claims asserted by Plaintiff in the above-captioned lawsuit are dismissed as against said Defendants for the reasons set forth in the Court's July 12, 2010 Order.

DATED this 26th day of August, 2010.



RONALD J. WILPER, DISTRICT JUDGE

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the above judgment shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 26th day of August, 2010.



RONALD J. WILPER, DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of August, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Eric B. Swartz
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
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and

Mark D. Kamitomo
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Spokane, WA 99201
Counsel for Plaintiff

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Raymond D. Powers
Portia L. Rauer
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345 Bobwhite Court, Suite 150
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Boise, ID 83707
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*Counsel for Defendant
St. Luke's Meridian Medical Center*

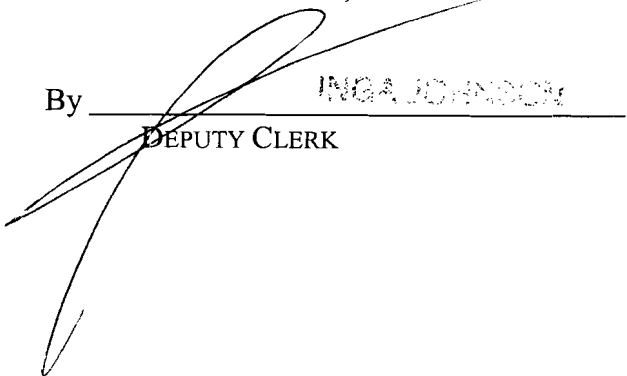
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Erica L. Visokey
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Mahwah, NJ 07430
*Counsel for Defendants
Howmedica Osteonics Corp. and Stryker*

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J. DAVID NAVARRO, CLERK

By


INGA JOHNSON
DEPUTY CLERK

ORIGINAL

NO. _____ FILED 3:31
A.M. _____ P.M.

SEP 17 2010

J. DAVID NAVARRO, Clerk
By MARGARET LUNDQUIST
DEPUTY

Eric B. Swartz, ISB #6396
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Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff/Appellant,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL CENTER,
aka ST. LUKE'S, an Idaho corporation; SPINE
INSTITUTE OF IDAHO, P.A., a professional
corporation; HOWMEDICA OSTEONICS CORP.,
dba STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants/Respondents.

Case No. CV PI 0918953

NOTICE OF APPEAL

**TO: THE ABOVE NAMED RESPONDENTS, JOSEPH M. VERSKA, M.D., AND
SPINE INSTITUTE OF IDAHO, P.A., AND THEIR ATTORNEYS OF RECORD,
RAYMOND D. POWERS AND PORTIA L. RAUER, OF THE FIRM
POWERS TOLMAN, PLLC, 345 BOBWHITE COURT, SUITE 150,
BOISE, ID 83707, AND THE CLERK OF THE ABOVE-ENTITLED COURT.**

NOTICE OF APPEAL - 1

000222

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, **KRISTEEN M. ELLIOTT**, appeals against the above-named Respondents to the Idaho Supreme Court from the July 12, 2010 Order dismissing all claims asserted by the Plaintiff/Appellant against the Defendants/Respondents in the above-entitled action, Judgment on which was entered on the 26th day of August, 2010, the Honorable Judge Ronald J. Wilper presiding.

2. Appellant has a right to appeal to the Idaho Supreme Court, and the Order described in paragraph 1 above is an appealable Order under and pursuant to Idaho Appellate Rule 11(a)(1).

3. Appellant requests a review of the following issues:

(a) Did the District Court err as a matter of law by failing to apply the appropriate standard of review that requires it to interpret the facts in a light most favorable to the non-moving party on Respondents' claims of ineffective service of process?

(b) Did the District Court err as a matter of law in failing to measure the six-month time frame for service of process required by I.R.C.P. 4(a)(2) from the date of the amended complaint?

(c) Did the District Court err as a matter of law or abuse its discretion in dismissing the action for a technical defect in service of process where: (i) the Respondents that had to be served personally received actual notice, (ii) the Respondents suffered no prejudice from the defect in service, (iii) there is a justifiable excuse for the failure to serve properly, and (iv) the Appellant is severely prejudiced by the dismissal of her Amended Complaint as against the Respondents?

(d) Did the District Court abuse its discretion in failing to find good cause for extending the six-month deadline for service of process under I.R.C.P. 4(a)(2)?

(e) Did the District Court abuse its discretion by failing to find a question of fact on Respondents' claims of ineffective service of process?

4. No order has been entered sealing all or any portion of the record.

5. A reporter's transcript of the May 17, 2010 hearing on Defendants Verska and Spine Institute's motion to dismiss has been requested.

6. Appellant requests the following documents to be included in the clerk's record:

(a) Plaintiff's Amended Complaint and Demand for Jury Trial

(b) Affidavit of Service on Joseph M. Verska, M.D.

(c) Affidavit of Service on Spine Institute of Idaho, P.A.

(d) Defendants Verska and Spine Institute's Motion to Dismiss

(e) Memorandum in Support of Defendants Verska and Spine Institute's Motion to Dismiss

(f) Affidavit of Joseph M. Verska, M.D., in Support of Defendants Verska and Spine Institute's Motion to Dismiss

(g) Affidavit of Nickolas Russell in Support of Defendants Verska and Spine Institute's Motion to Dismiss

(h) Affidavit of Raymond D. Powers in Support of Defendants Verska and Spine Institute's Motion to Dismiss

(i) Affidavit of Tina McLeod in Support of Defendants Verska and Spine Institute's Motion to Dismiss

(j) Second Affidavit of Service on Joseph M. Verska, M.D.

(k) Second Affidavit of Service on Spine Institute of Idaho, P.A.

(l) Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss

(m) Affidavit of Andrew Remm in Opposition to Defendants' Motion to Dismiss

(n) Affidavit of Eric Swartz in Opposition to Defendants' Motion to Dismiss

- (o) Affidavit of Kristeen Elliott in Opposition to Defendants' Motion to Dismiss
- (p) Affidavit of Mark Kamitomo in Opposition to Defendants' Motion to Dismiss
- (q) Reply Memorandum in Support of Defendants' Motion to Dismiss
- (r) July 12, 2010 Order dismissing all claims asserted by Plaintiff/Appellant against Defendants/Respondents in the above-entitled action, Judgment on which was entered on the 26th day of August, 2010, the Honorable Judge Ronald J. Wilper presiding

7. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Diane Cromwell
200 W. Front Street
Boise, ID 83701

(b) That the reporter has been paid the estimated fee for preparation of the reporter's transcript.

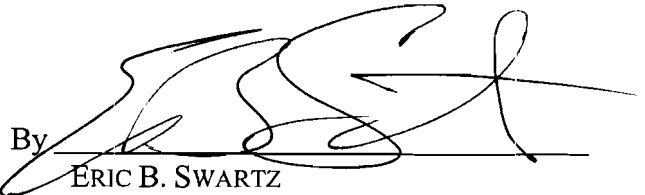
(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 17th day of September, 2010.

JONES & SWARTZ PLLC

By 
ERIC B. SWARTZ

MARK D. KAMITOMO
THE MARKAM GROUP, INC., P.S.

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2010, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

Raymond D. Powers
Portia L. Rauer
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
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*Counsel for Defendants Joseph M. Verska, M.D.
and Spine Institute of Idaho*

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 Fax: 577-5101
 Overnight Delivery
 Messenger Delivery
 Email: rdp@powerstolman.com
plr@powerstolman.com

Trudy Hanson Fouser
GJORDING & FOUSER, PLLC
509 W. Hays Street
P.O. Box 2837
Boise, ID 83701
*Counsel for Defendant
St. Luke's Meridian Medical Center*

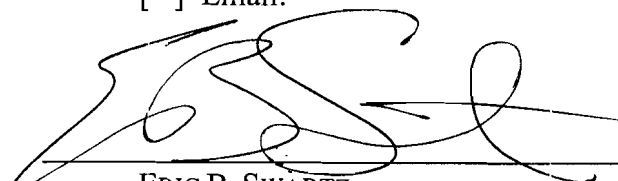
U.S. Mail
 Fax: 336-9177
 Overnight Delivery
 Messenger Delivery
 Email: tfouser@g-g.com

Erica L. Visokey
325 Corporate Drive
Mahwah, NJ 07430
*Counsel for Defendants
Howmedica Osteonics Corp., dba
Stryker Orthopaedics, and Stryker*

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 Overnight Delivery
 Messenger Delivery
 Email: erica.visokey@stryker.com

Diane Cromwell
200 W. Front Street
Boise, ID 83702
Court Reporter

U.S. Mail
 Fax:
 Overnight Delivery
 Messenger Delivery
 Email:


ERIC B. SWARTZ

ORIGINAL

NO. _____ FILED _____
A.M. _____ P.M. 2:33

SEP 30 2010

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Raymond D. Powers
ISB #2737; rdp@powerstolman.com
Portia L. Rauer
ISB #7233; plr@powerstolman.com
POWERS TOLMAN, PLLC
345 Bobwhite Court, Suite 150
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Telephone: (208) 577-5100
Facsimile: (208) 577-5101
W:\22\22-003\Appeal\Request Add'l Records on Appeal.docx

Attorneys for Defendants Joseph M. Verska, M.D. and Spine Institute of Idaho, P.A.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,
Plaintiff,

vs.

JOSEPH M. VERSKA, M.D., an individual;
ST. LUKE'S MERIDIAN MEDICAL
CENTER, aka ST. LUKE'S, an Idaho
corporation; SPINE INSTITUTE OF
IDAHO, P.A., a professional corporation;
HOWMEDICA OSTEONICS, CORP., dba
STRYKER ORTHOPAEDICS; STRYKER;
and JANE and JOHN DOES I through X,

Defendants.

Case No. CV PI 0918953

**DEFENDANTS JOSEPH M.
VERSKA, M.D. AND SPINE
INSTITUTE OF IDAHO, P.A.'S
REQUEST FOR ADDITIONAL
RECORDS TO BE INCLUDED IN
THE CLERK'S RECORD ON
APPEAL**

DEFENDANTS JOSEPH M. VERSKA, M.D. AND SPINE INSTITUTE OF IDAHO, P.A.'S REQUEST FOR
ADDITIONAL RECORDS TO BE INCLUDED IN THE CLERK'S RECORD ON APPEAL - 1

000227

TO: THE ABOVE-NAMED PLAINTIFF/APPELLANT KRISTEEN M. ELLIOTT, HER ATTORNEYS, ERIC B. SWARTZ OF JONES & SWARTZ, PLLC, 1673 W. SHORELINE DRIVE, SUITE 200, BOISE, ID 83707, MARK D. KAMITOMO OF THE MARKAM GROUP, INC., P.S., 421 W. RIVERSIDE, SUITE 1060, SPOKANE, WA 99201, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that Defendants/Respondents in the above-entitled proceeding hereby request, pursuant to Rule 19(c) of the Idaho Appellate Rules, the inclusion of the following material in the Clerk's Record in addition to that required to be included by the Idaho Appellate Rules and the Notice of Appeal:

1. Complaint and Demand for Jury Trial, filed on October 5, 2009;
2. Plaintiff's Motion for Extension of Time in Which to Serve Stryker, filed on May 12, 2010;
3. Memorandum in Support of Plaintiff's Motion for Extension of Time, filed on May 12, 2010;
4. Affidavit of Eric B. Swartz in Support of Plaintiff's Motion for Extension of Time to Serve Stryker, filed on May 12, 2010;
5. Affidavit of Service on Howmedica Osteonics, Corp., dba Stryker Orthopaedics, filed on May 17, 2010;
6. Plaintiff's Sur-Response to Joseph M. Verska, M.D., and Spine Institute's Statute of Limitations Argument Brought on Behalf of Stryker Defendants, filed on May 24, 2010; and
7. Sur-Reply in Support of Defendants' Motion to Dismiss, filed on May 28, 2010.

I certify that a copy of this request for additional records has been served upon the Clerk of the District Court and upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 30th day of September, 2010.

POWERS TOLMAN, PLLC

By *Portia Rauer*

Raymond D. Powers - Of the Firm
Portia L. Rauer - Of the Firm
Attorneys for Defendants Joseph M. Verska,
M.D. and Spine Institute of Idaho, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2010, I caused to be served a true copy of the foregoing **DEFENDANTS JOSEPH M. VERSKA, M.D. AND SPINE INSTITUTE OF IDAHO, P.A.'S REQUEST FOR ADDITIONAL RECORDS TO BE INCLUDED IN THE CLERK'S RECORD ON APPEAL**, by the method indicated below, and addressed to each of the following:

Eric B. Swartz	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
JONES & SWARTZ, PLLC	<input type="checkbox"/>	Hand Delivered
1673 W. Shoreline Drive, Suite 200	<input type="checkbox"/>	Overnight Mail
PO Box 7808	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83707-7808		
Fax No.: 489-8988		
<i>Attorneys for Plaintiff</i>		

Mark D. Kamitomo	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
THE MARKAM GROUP, INC., P.S.	<input type="checkbox"/>	Hand Delivered
421 W. Riverside, Suite 1060	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input checked="" type="checkbox"/>	Telecopy
Fax No.: (509) 747-1993		
<i>Attorneys for Plaintiff</i>		

Trudy Hanson Fouser	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
GJORDING & FOUSER, PLLC	<input type="checkbox"/>	Hand Delivered
509 W. Hays Street	<input type="checkbox"/>	Overnight Mail
PO Box 2837	<input checked="" type="checkbox"/>	Telecopy
Boise, ID 83701		
Fax No.: 336-9177		
<i>Attorneys for Defendant St. Luke's Meridian Medical Center</i>		



Raymond D. Powers
Portia L. Rauer

NO. _____
AM. 8:00 FILED P.M.
OCT 18 2010
J. DAVID N. ZIMMERMAN, Clerk
By BRADLEY J. THIES
DEPUTY

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: Kristeen M. Elliott v. Joseph M. Verska, Docket No. 38070-2010

Notice is hereby given that on Wednesday, October 13, 2010, I lodged a transcript of 89 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 5/17/2010

David Cromwell
Tucker & Associates

cc: kloertscher@idcourts.net
PDF format of completed files emailed to Supreme Court

BT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff-Appellant,
vs.
JOSEPH M. VERSKA, M.D., an individual; SPINE
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corporation,

Defendants-Respondents,
and
ST. LUKE'S MERIDIAN MEDICAL CENTER, aka
ST. LUKE'S, an Idaho corporation; HOWMEDICA
OSTEONICS CORP., dba STRYKER
ORTHOPAEDICS; STRYKER; and JANE and JOHN
DOES I through X,

Defendants.

Supreme Court Case No. 38070


CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the
State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered 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 the said
Court this 15th day of October, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By 
Deputy Clerk

CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff-Appellant,

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Defendants-Respondents,

and

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ST. LUKE'S, an Idaho corporation; HOWMEDICA
OSTEONICS CORP., dba STRYKER
ORTHOPAEDICS; STRYKER; and JANE and JOHN
DOES I through X,

Defendants.

Supreme Court Case No. 38070

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

ERIC B. SWARTZ

ATTORNEY FOR APPELLANT

BOISE, IDAHO

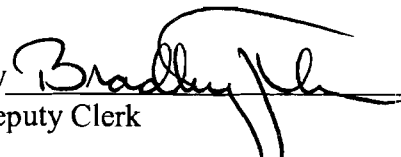
RAYMOND D. POWERS

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: OCT 18 2010

By  ,
Deputy Clerk

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

KRISTEEN M. ELLIOTT, a single woman,

Plaintiff-Appellant,

vs.

JOSEPH M. VERSKA, M.D., an individual; SPINE
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Defendants-Respondents,

and

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ST. LUKE'S, an Idaho corporation; HOWMEDICA
OSTEONICS CORP., dba STRYKER
ORTHOPAEDICS; STRYKER; and JANE and JOHN
DOES I through X,

Defendants.

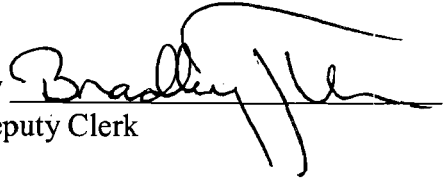
Supreme Court Case No. 38070

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, 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 and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 17th day of September, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By 
Deputy Clerk

CERTIFICATE TO RECORD

000234