5-19-2011

Arregui v. Gallegos-Main Clerk's Record v. 2 Dckt. 38496

Vol 2 of 3

(VOLUME II)

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

MARTHA A. ARREGUI,

Plaintiff-Appellant,

-vs-

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association,

Defendants-Respondents

And

JOHN AND JANE DOES I through X, whose true identities are unknown,

Defendants.

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

Honorable RENAE J. HOFF, District Judge

Sam Johnson
JOHNSON & MONTELEONE, LLP.

Attorney for Appellant

Richard H. Greener
Loren K. Messerly
GREENER BURKE SHOEMAKER, PA.

Attorneys for Respondents

IN THE SUPREME COURT OF THE

STATE OF IDAHO

MARTHA A. ARREGUI, Plaintiff-Appellant, -vs- ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association, Defendants-Respondents, And JOHN AND JANE DOES I through X, whose true identities are unknown, Defendants.	)	Supreme Court No. 38496

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

HONORABLE RENAE J. HOFF, Presiding

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI, Plaintiff, vs. ROSALINDA GALLEGOS-MAIN, AN INDIVIDUAL; FULL LIFE CHIROPRACTIC, P.A., AN IDAHO PROFESSIONAL ASSOCIATION; AND JOHN AND JANE DOES I THROUGH X, WHOSE TRUE IDENTITIES ARE UNKNOWN, Defendants.	) No. CV 09-3450

DEPOSITION OF SARAH TAMAI, D.C.

October 19, 2010

Oceanside, California

Reporter: Sandra J. Skari, RPR, CSR
Certificate No. 7691

The deposition of SARAH TAMAI, D.C., was taken at 1401 Carmelo Drive, Board Room, Oceanside, California, on Tuesday, October 19, 2010, commencing at 10:41 a.m. - 2:30 p.m., before Sandra J. Skari, RPR, CSR No. 7691, a Certified Shorthand Reporter in and for the State of California.

APPEARANCES OF COUNSEL:

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EXHIBITS
(All exhibits are photocopies unless otherwise indicated.)

EXHIBITS
(Continued)

SARAH TAMAI, D.C.,
called as a witness and having been first sworn by the Certified Shorthand Reporter, was examined and testified as follows:

EXAMINATION
BY MR. GREENER:

Q. Let the record reflect that this deposition is being taken pursuant to federal rules of civil procedure pursuant to agreement between the parties as to time and place.

With that out of the way, would you please state your full name for the record.

A. Sarah R. Tamai.

Q. And you are a licensed chiropractic physician; are you not?

A. I am.

Q. And I would like to just kind of go through some preliminary matters with you before we get into the substance of your opinions and the like.

Have you given a deposition before coming here today?

A. No.

Q. This is your first time?

A. Yes.

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Q. Okay. Because of that, I'm going to just go through a little bit of background as far as what we are doing here. I am sure that Mr. Monteleone has already explained this to you.
You recognize you're testifying under oath?
A. Yes.
Q. Every question that I ask of you and every answer you give and everything mentioned by Mr. Monteleone is all being recorded by the court reporter. And at the end of all of this, you will have a chance to review it and look at it.
It's important that you know, though, that this is a document that will be available in court if this matter proceeds to trial and can be used by, frankly, either side for a variety of different purposes.
With that out of the way, do you have any questions as far as this is concerned?
A. No.
Q. You probably already knew that.
A. Yes.
Q. Because you have not had a deposition before or given one before, I would like to have an understanding with you because it's essential that we are communicating.
So if I ask a question of you that you find you don't understand or that is confusing to you in any way, will you let me know?

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A. Sure.
Q. And then I'm going to rephrase my question, Doctor, so that you and I are, hopefully, communicating. Is that agreeable?
A. Sounds great.
Q. With that agreement in place, if you answer a question I ask of you and you don't indicate otherwise, I'm going to proceed with the understanding that you understood my question. Is that also agreeable?
A. Yes.
Q. All right. And I have your CV and I want to hit on it just briefly, but I want to just go ahead and cover some of this stuff right now.
A. Okay.
Q. How long have you been licensed in the State of California as a chiropractic physician?
A. Nine years.
Q. And licensed anywhere else other than California?
A. No.
Q. And do you have any areas of specialty that you hold out yourself as focusing on?
A. "Specialty" meaning?
Q. In terms of chiropractic.
A. So do I --
Q. Pediatric or geriatric or?

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A. I would say muscle sports, so more of an active. So it's active release technique we do a lot of.
Q. And I trust that your license has never been subject to any disciplinary proceeding --
A. No.
Q. -- or revoked or suspended?
A. No.
Q. Have you ever been sued?
A. No.
Q. Have you ever been a party to a lawsuit?
A. No.
Q. Lucky you.
You were hired as an expert in this case by --
A. Yes.
Q. -- Mr. Johnson or Mr. Monteleone's firm, right?
A. Yes.
Q. And when was that?
I have your report, just help us along here, I will be getting to it, but your report indicates a reference to correspondence of September -- if I can see it -- 9th of 2010.
Is that about the time you were contacted?
A. I would say, yeah, maybe the end of August or beginning of September. I don't recall the exact date.
Q. Do you know how you came into contact with the

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plaintiff's firm?
A. A friend of a friend of a friend I guess.
Q. Can you trace it for me?
A. Sure. There's Jake, another chiropractor in my office.
Q. Her name?
A. Jake Daly. And he is a chiropractor as well. And he is a friend of Eri Crum, a classmate. He graduated with Eri Crum who practices in Boise, Idaho.
Q. Eri Crum?
A. Eri, E-R-I.
Q. Did you all go to Western Division of Palmer?
A. I went in a different year, but they were in the same class.
Q. Did you know Dr. Crum?
A. No. Personally, no. I mean I know the name now, but . . .
Q. So that's how this matter came to you?
A. Correct.
Q. You don't advertise any publication or hold yourself out as an expert witness?
A. No.
Q. And you have never served as an expert witness before?
A. No.

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Q. And you have never testified in court as an expert witness --
A. No.
Q. -- obviously?
Are you bilingual? Do you read Spanish?
A. I can read some.
Q. When you say that, I can read some German, but I am not bilingual.
A. I wouldn't consider myself bilingual.
Q. Are you able to read and understand Spanish in terms of looking at medical records or do you need assistance to do that?
A. It depends on what it is.
Q. Can you help me with that?
A. There's some parts for chiropractic that I can read a bit. And I can speak some, but I would hardly consider myself bilingual.
I didn't take any formal classes. It's just picking things up as, you know, in the community, especially living in San Diego.
Q. As you go along?
A. Uh-huh.
Q. And that's a yes?
If I prompt you to say is that a yes or a no, I'm not trying to be rude, but she can't pick up --

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A. So yes -- I don't know what the question was. Can you repeat the question?
Q. It doesn't matter.
A. Okay.
Q. It wasn't of any great -- but if you say uh-huh or uh-uh, I may say is that a yes or no.
A. Okay.
MR. MONTELEONE: You have to answer audibly and verbally if you could, please, Doctor.
THE WITNESS: Sure.
BY MR. GREENER:
Q. Then help me with this, just focusing for a moment, did someone from Mr. Monteleone's office call you or how did this get rolling?
A. As I recall, Jake asked me if I would be, if I would be willing to speak to an attorney that had a case that needed some expert testimony. And he felt that he probably was not the best, hadn't been in practice or didn't feel comfortable with it.
And I said I don't know what it is involving. He said, well this is the attorney's name, you can talk to him and see if maybe this is a fit for you, if you can help them out, if what you know may help them with what they need.
So I called Sam Johnson and that's how we spoke on the phone.

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Q. And that would have been within that same time frame we've talked about?
A. Correct.
Q. When you called him, do you have a memory of the conversation in terms what you said to him and what he said to you?
A. I believe he said -- he introduced himself. He said thank you very much for calling. I have a case involving a chiropractor here in Boise. I represent the plaintiff. She suffered a stroke. And he gave me some brief, very brief details in the case.
And I said I don't know if I am qualified as your expert. I haven't done a deposition. I don't consider myself an expert. I haven't done cases such as this.
And he said, well, think about it. And I said okay. And I said, well, maybe I can contact someone else who might know or has done more. And he said sure. If you want to contact them. So I gave him a couple of ideas of different names.
And we spoke again, I don't know when that was from the first time, but we spoke again. And he said no, I think that if you -- we discussed how I practiced, how long I have been in practice, what type of techniques we do in the practice.
And he said, no, I think that you would be a great

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fit if you wouldn't mind writing a report and serving as the chiropractic expert witness. And I said okay.
Q. You said you gave him some other names of chiropractors to contact?
A. I just mentioned names, but I didn't give him contact information.
Q. Whose names did you give him?
A. There's a gentleman in Gig Harbor.
Q. In Washington?
A. In Washington, yes. And he does a lot of pettibon.
Q. Who is that?
A. His name is Christian Cohen.
Q. Did you talk to him about this?
A. No.
Q. Do you know how he spells his last name?
A. C-O-H-E-N I believe.
Q. Anyone else whose name you gave to Mr. Johnson?
A. Not that I recall, no.
Q. You said when you first talked to him you questioned whether or not you qualified to serve as an expert.
Can you tell me what the basis for that question in your mind was?
A. I have never done a deposition. I have never been

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in court. In my opinion I would assume that an expert witness would be someone who is a little bit more savvy in the legal side of, perhaps, chiropractic.
Q. Okay. And I was going to get into this in a little bit greater detail. What is the nature of your practice in terms of what techniques and modalities you use? Do you regard yourself to be a pettibon practitioner?
A. Yes. I am not certified, but I was at one point.
Q. You were certified by California as a pettibon?
A. It's not by California; it's by the pettibon system.
Q. When was that?
A. I would say 2006.
Q. And how long were you certified?
A. One year.
Q. And what did you have to do to get certified?
A. Complete their standard of courses, so there's a set of three. And then you have to submit x-rays. Having done basically classes there or classes online they now have them. But going through making sure that you are competent in their field of practice.
I'm still on the Web site, but I am not considered a certified. They would say that I am on the list for having knowledge of pettibon system, but I am not certified

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at this moment.
Q. Why did you let the certification go in 2006 or at the end of 2006?
A. I started doing more, as I mentioned previously, active release technique.
Q. What is that?
A. It is a manual muscle, patented manual muscle technique. It's patented.
Q. And it's called?
A. Active release technique.
Q. You and I both speak rapidly. We have to slow down a little bit and sorry to bother you with that.
A. That's fine.
Q. Just do the best you can.
I wrote down active release?
A. Release technique.
Q. And what is that?
A. It's a muscle technique.
Q. And how do --
A. For --
Q. -- you -- is it like a pressure point or a release point? How would you explain it to me as a layperson?
A. As a layperson I would say it is a muscle technique used primarily to address adhesions, perhaps sprains/strains, tendinis issues, chronic overuse or acute

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injuries. Primarily with the muscles.
Q. When you're talking about adhesions, are you talking about adhesions resulting from surgery?
A. No. It's not per surgical.
Q. What is the technique? Are you using a device or --
A. Hands.
Q. -- your hands?
A. Hands.
Q. Just hands?
A. Uh-huh.
Q. Is that what you're doing now? Is that your primary focus in your practice?
A. We do adjustments as well; but we do a lot of active release technique, yes.
Q. When you say you do adjustments, what kind of adjustments do you do? Do you practice the diversified methodology?
A. We do some pettibon adjustments, P-E-T-T-I-B-O-N; we do diversified; activator; and some blocking, SOT blocking.
Q. SOT blocking?
A. Uh-huh.
Q. That's a yes?
A. Yes.

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Q. Okay. Does that cover your modalities of treatment?
A. Yes.
Q. Okay. And so what is SOT blocking?
A. Sacro-occipital technique. They are blocks that you use for the pelvis to help level them out. Very light, hardly any force.
Q. It's all in the pelvic area?
A. A lot of it, yes.
Q. Anything in the cervical area?
A. Uh-huh. But we don't do the blocking up there.
Q. I might come back to this in a bit when I go through your CV.
A. Okay.
Q. Let me move to just another background subject.
A. Okay.
Q. Did you review any documents to prepare for this deposition, Doctor?
A. Yes.
Q. Tell me what you reviewed.
A. I reviewed part of the deposition for Martha Arregui. I reviewed the full deposition, I believe it was, for Dr. Gallegos-Main. I reviewed the records. I reviewed a letter from Dr. Han. And the medical records.
Did I say the medical records?

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Q. Yes. The chart?
A. Uh-huh.
Q. Is that a yes?
A. Yes.
Q. In reviewing the chart, did you review all of the medical records?
A. No. I don't think I did. I don't know.
MR. MONTELEONE: Can we go off the record for a second?
MR. GREENER: Yeah.
(Discussion off the record.)
BY MR. GREENER:
Q. Back on the record.
A. Yes.
Q. Doctor, what I was interested in in my last question was everything that you have looked at in terms of getting ready to come here and testify today.
Were you responding to that?
A. Yes.
Q. And then Mr. Monteleone has indicated you also looked at another document that he provided you this morning?
A. Yes.
Q. And do you have a copy of that here?
MR. MONTELEONE: It has my double secret notes on

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it.
MR. GREENER: Oh, good.
THE WITNESS: I saw that too. Do you want me to mention those as well?
MR. MONTELEONE: Doctor, you will need to probably reference each of the medical literature articles you reviewed in doing your work here today as best you can recall.
BY MR. GREENER:
Q. That would be good.
A. I didn't bring all of that information. I reviewed -- there was a Spine article. There was an article from Neurology I believe dated 2003.
Q. Why don't you go ahead and just identify them and then hand them to me if you would.
A. Okay.
Q. Would you do that, please?
A. Sure.
Q. While we are doing that -- and let's stay on the record a minute. This might move us along. I was going to hand you a deposition notice and ask you if you brought any documents with you here today.
MR. GREENER: And I guess I will ask you, Jason. Other than the documents you're giving me, did you bring documents responsive to our duces tecum request?

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And I will just preface it by saying I know we did not send this out with 30 days' notice, but one reason why is because we were trying to get the doctor's date that was convenient to the doctor so we could do it. And then we asked for this information in our document production request anyway. I think we are entitled to what we have in here to the extent she has them.
MR. MONTELEONE: What I have done is I have collected some of the documents that I think would be responsive to this, but without that 30 days to cull them together and respond to the deposition duces tecum notice, I don't have anything to produce.
In fact, the copies of the medical literature articles are my working copies. I can't even really give you copies of these. They just happen to be the same articles that Dr. Tamai reviewed. I don't have anything to produce for you today, Counsel.
MR. GREENER: Would it be possible for us to get copies of those?
MR. MONTELEONE: Do you want to just read the citations into the record? I will get you copies that are clean copies that don't have my notes, I'm happy to do that.
MR. GREENER: I was going to have her read your notes to me.
MR. MONTELEONE: If she can read rather

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inscrutable, illegible handwriting. And, more importantly, if there's anything intelligent in any of it.
BY MR. GREENER:
Q. I think this is the quickest way to go through this. Here is a copy of the notice of deposition.
(Exhibit 1 marked for identification.)
BY MR. GREENER:
Q. Let's do this. Here is a copy of your notice of deposition. Have you seen this before?
A. This?
Q. Yes.
A. Yes.
Q. This is the document that kind of brought us here today, Doctor.
A. Okay.
Q. And let's go through the documents we asked for and let's see if they even exist.
Number 1. I wanted to have copies of documents reviewed by you in preparation for rendering your opinions in this lawsuit.
And I guess that you told me about certain documents you reviewed. That would be part of the deposition of the plaintiff, the full deposition of Dr. Gallegos-Main, and the medical chart, and the Dr. Han letter. Right?

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A. Yes.
Q. In addition to the documents that we will be talking about here in a moment that are provided here today, would that encompass all the documents reviewed by you in preparing your opinions?
Were there any others?
A. Not that comes to mind, no.
Q. All right. And then that kind of overlaps into item number 2. And I think you have answered item number 2.
Do you have any handwritten notes or memos or -- I know I have your report. Do you have any underlying notes, rough drafts of the report that you provided to us?
A. No. The working copy of the report was it. There wasn't a rough draft.
Q. That was it?
A. Yes.
Q. There was no predecessor draft that you edited or that you sent to Mr. Johnson and he edited and sent back?
A. No.
Q. Did you make any notes while you were going through and preparing for this? Preparing your opinion.
A. I may have; but they are probably in the garbage somewhere.
Q. Do you have a file that you maintain on this, a separate file?

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A. No. Most of the correspondence was via e-mail. I just left whatever was -- if they sent me a record, it was in the e-mail.
Q. Incidental to this, were there any letters or e-mails from Mr. Monteleone's firm to you on this subject?
A. Were there any e-mails?
Q. Yes.
A. Yes.
Q. And did they contain any -- do you have those with you here today?
A. No.
Q. Do you recall if they contained anything other than just statements to the effect that we're transmitting these records to you?
A. They were probably -- no. It was sending records, asking for a date for a phone conference, asking for dates for the deposition, what would be most convenient.
Q. Taking a slight detour. Was there a phone conference then that you had after you worked on your opinion?
A. No. I just completed the opinion.
Q. When did you complete the opinion?
A. Oh, the date that's on there.
Q. That's fine. It is dated October 15. So it was Friday, right?

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A. Last Friday.
Q. Now --
A. Oh, this is the same one.
MR. MONTELEONE: You need to maybe focus on Mr. Greener's question to facilitate things a bit.
Counsel, I can represent -- I'm not testifying -- there was a draft report dated September 16. And I thought you had gotten that.
MR. GREENER: I didn't.
MR. MONTELEONE: I don't know if you call it a draft report. It was the initial report. And then it had a short change to it on October 15.
So I will get you -- you never saw the September 16 report?
MR. GREENER: Never.
MR. MONTELEONE: Okay. Then we need to give you that.
MR. GREENER: Can I see it right now?
MR. MONTELEONE: Of course.
THE WITNESS: Oh, that's right. Okay.
BY MR. GREENER:
Q. I was going to ask you this anyway. But do you charge 225 an hour for your work?
A. Yes.
Q. A giveaway.

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A. I didn't know what to charge, actually. I didn't know what was appropriate. I asked them, "What do I charge you?"
Q. I want to cover one thing before I get into this September 16, 2010, draft.
From the time that you were hired around September 9 up to the time you finalized your report, did you have any phone conversations with Mr. Johnson or anyone else from his firm that you can recall?
A. Yes.
Q. How many?
A. Two.
Q. Okay.
A. Well, three including the very first one when we spoke.
Q. There is the first one we talked about?
A. Right.
Q. When was the second, to the best of your recollection?
A. Probably around the time of the first draft.
Q. All right. And what was the nature of the conversation -- first of all, who was involved? Just you and Mr. Johnson?
A. Yes.
Q. And he called you or you called him?

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It doesn't matter --
A. I don't recall.
Q. -- but one of you called the other.
A. Yes.
Q. How long was the conversation?
A. Maybe a half an hour.
Q. And do you have a recollection as to the substance of what you guys discussed?
I know you can't say he said X to me and I said Y, but I want to know the substance of what you talked about.
A. There was, he had sent me a letter with those records that you have written saying that there was a date that they wanted information by. I believe it was September -- it might have been September 9 was the date. don't know if that's absolutely correct.
So I had drafted a report to get out to them. Maybe it was -- it had to be after the 16th, actually. Regardless. Maybe it was the 20th.
And we spoke and I said is that date still on. And he said no, actually, I believe they want to take your deposition. So we don't have to get them the report by this date, whichever date it was.
And we discussed, we discussed my opinions on the records that they had sent, what I thought of what he had sent me. And we briefly discussed my report that you have

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in your hand. And he asked me a couple of questions that would be more pertinent to, I guess, forming a more concrete opinion as the expert witness in the case.
Q. Anything else?
A. That we would be in contact again at some point.
Q. Okay. Focusing just on this conversation.
A. Sure.
Q. What did you talk about in terms of what you thought about what had been sent to you?
A. I said I was rather confused by the depositions, they didn't seem to add up to me.
Q. And why is that?
A. Probably, as with most cases, Martha Arregui seemed to say one thing happened and Dr. Gallegos-Main said another. And I couldn't really make heads or tails of what really happened based on what was printed on the deposition.
Q. Does your opinion assume that the plaintiff, Ms. Arregui, was telling the truth about what occurred and Dr. Main was not?
A. No. I don't have an opinion either way. I don't know.
Q. You don't know who is being candid or not being candid?
A. No. I don't know.
Q. Anything else in terms of your confusion that you

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discussed with Mr. Johnson?
A. No. I just said something was not right. I just said I didn't know what was not right, but there are two different stories about a same date. And I was confused.
Q. Would it be necessary for you to finalize your opinion to assume one of the two individuals -- either the plaintiff or Dr. Gallegos-Main -- was telling the truth?
A. Probably, yes.
Q. And you haven't determined that yet?
A. No. I mean there can be something happen and two people see the same thing and come away with two different opinions. Perhaps it's a blend, but I don't know.
Q. Okay. If Dr. Main, Dr. Gallegos-Main, is truthfully recounting what occurred with the plaintiff on June 4 of 2007, do you have an opinion that she violated the standard of care for chiropractic physicians in Napa and Caldwell, Idaho, on that day?
MR. MONTELEONE: Object to the form.
THE WITNESS: What does that mean?
MR. GREENER: You can go ahead and answer.
MR. MONTELEONE: You can go ahead and answer.
BY MR. GREENER:
Q. He is making an objection for the record.
Do you want the court reporter to read it back to you?

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A. Sure.
Q. I want you to listen to it carefully, if you would.
A. That would be helpful, please.
(Record read.)
THE WITNESS: Are you referring to the examination or the treatment?
BY MR. GREENER:
Q. Everything she did.
A. Yes.
Q. Your opinion is she did?
A. Yes.
Q. Okay. And I will be getting into your opinion then later.
MR. MONTELEONE: I'm confused. I apologize for interrupting, Counsel.
Your opinion is yes, she did violate the standard of care?
THE WITNESS: For the examination.
BY MR. GREENER:
Q. Okay. That's what I want to get at.
In your opinion her examination that she did on that date was a deviation from the standard of care?
A. Yes.
Q. But her diagnosis you agree with; do you not?

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A. The torticollis?
Q. Yes.
A. Yes.
Q. And you don't disagree with her treatment of her on that date or her treatment plan?
A. No.
MR. MONTELEONE: Object to the form.
THE WITNESS: Of what was written in the record, yes.
Say it again.
BY MR. GREENER:
Q. And I take it that although you believe she violated the standard of care in terms of the examination, you do not have an opinion that she violated the standard of care in terms of her treatment of the plaintiff on June 4 of 2007?
MR. MONTELEONE: Object to the form.
THE WITNESS: No. According to what was written in the record.
BY MR. GREENER:
Q. She did not?
A. Correct.
Q. Okay. That's no, she did not violate the standard of care --
A. Standard of care.

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Q. -- according to what was written in the record --
A. According to what -- yes.
Q. -- in terms of the treatment she provided?
A. In terms of the treatment she provided.
Q. Yes?
A. Yes.
Q. Good.
A. I'm actually very confused as to what you just said.
MR. MONTELEONE: I was going to say. Doctor, are you tracking the question --
THE WITNESS: No.
MR. MONTELEONE: -- that Mr. Greener is asking you?
THE WITNESS: No. He kind of went one way and then he went this way.
BY MR. GREENER:
Q. Well, you'll get another chance.
A. Good. Round 2.
MR. MONTELEONE: No, I get the other chance.
BY MR. GREENER:
Q. I want to go back to the September 16th conversation.
And, I'm sorry, in these depositions you will find that we get into a topic and -- I actually have an outline

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to cover and I never stay with the outline. We start talking about something and it leads to something else. Just bear with me. If you don't know for some reason where I am in my line of questioning, say wait a minute, what are you talking about here.
Is that agreeable?
A. Yes.
Q. Back to September 16 --
A. Okay.
Q. -- and that conversation.
Do you remember anything in any more substance other than what we talked about?
A. No.
Q. Okay. And so on September -- did Mr. Johnson have -- this says Sam Johnson's work copy on it.
Did you have a copy of the September 16 -- I would like to mark this if I could.
MR. MONTELEONE: Let me see it.
BY MR. GREENER:
Q. Let me ask you this.
Whose handwriting is that?
A. I don't know.
Q. I take it it's not yours?
A. No.
MR. GREENER: Well, look at it and see if I can

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mark it.
MR. MONTELEONE: That's the problem I have, Counsel. This is a working copy. I can tell you that's Sam Johnson's handwriting.
MR. GREENER: All right. Okay.
MR. MONTELEONE: As is on the first page of September 16.
MR. GREENER: What I'm thinking what I might do -- can I have it back for a second?
What I would like to do is maybe use something to cover this up and have it copied here.
Well, maybe I don't need to do that. Just to move it along, I would like to conditionally mark this and then talk about it. Because I want to ask her a question about the difference between this and her actual expert report of last Friday.
MR. MONTELEONE: Why don't we take a break? I will make a copy that doesn't have the handwritten interlineated notes.
MR. GREENER: That's fine.
There's some other e-mails that I haven't seen that are attached. I would like to have those. I don't think there is any --
MR. MONTELEONE: Right. And that's the issue, Counsel. Without the 30 days allowable under the procedural

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rules to figure out exactly what you're entitled to in your duces tecum notice, that's why we don't have the production. And I understand the scheduling of the matter is the reason why it's --

MR. GREENER: Well, there's that. And, Jason, also, in truth, we had asked for all this -- I can show you the interrogatory, or pardon me, the document production request. We asked for all of this information anyways and it hasn't been produced. I think we are on solid ground to say we are entitled to it.

Let's work this out. Okay?

MR. MONTELEONE: I agree.

MR. GREENER: Let me ask you this before we take a quick break.

MR. MONTELEONE: And, for the record, I agree on working it out. I am not sure I agree on the notice.

BY MR. GREENER:

Q. Okay. Do you remember discussing with Mr. Johnson at any time whether an adjustment of the cervical spine was indicated?

A. Yes.

Q. And what did you tell him?

A. I said personally I wouldn't have done one.

Q. And in your opinion Dr. Gallegos-Main didn't do one either, did she?

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A. According to the record, no.

According to her records, no.

Q. And her testimony.

A. But according to Martha's, she doesn't know if it was an adjustment, but her head was rotated when she was face down and face up.

Q. And she doesn't know what kind of work was done on her in those positions?

A. No.

Q. Okay. And then there's another question. Should the chiropractor have phoned ambulatory services under those circumstances.

And do you recall discussing that with Mr. Johnson?

A. Yes.

Q. And what did you tell him in that regard?

A. I said that if she had been my patient and had difficulty walking, I probably would have called for care.

Q. You say "probably." Are you certain of that?

A. Yes. If I had seen her not walking well, yes.

Q. In this particular case are you aware of the fact that she went to an emergency room in Weiser, Idaho, on June 5th?

A. Yes.

Q. Have you reviewed those records?

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A. No.

Q. Do you know whether or not the medical doctor on June 5th came to essentially the same diagnosis as Dr. Gallegos-Main on June 4?

A. No.

Q. Would that be of significance to you if the medical doctor did?

MR. MONTELEONE: Object to the form.

THE WITNESS: I don't know.

BY MR. GREENER:

Q. When you say you don't know, what causes you to answer that question that way?

MR. MONTELEONE: Object to the form.

THE WITNESS: If I didn't review it, I don't know what tests were performed or not performed.

BY MR. GREENER:

Q. We will get into that then.

A. Okay.

Q. That's fine. I just wanted to -- let's take a break.

Was there a difference between your report of October 15 and this document other than the handwriting?

"This document" being your rough draft or your draft of September 16, 2010.

A. This one includes those questions that he asked

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me. He asked me to basically opine on those two questions.

Q. So you added those?

A. Uh-huh.

Q. That's a yes?

A. Yes.

Q. And then the e-mail is not attached to your expert report.

May I see the one you have there? I want to make sure it's the same one I have.

MR. GREENER: Okay. Let's go off the record.

(Recess held.)

BY MR. GREENER:

Q. Doctor, back on the record.

And I will probably remind you periodically, you are still under oath and you recognize that.

We're waiting to have some documents copied. In the meantime let's go back and look at Exhibit 1, your deposition notice, and get through it and get it out of the way.

I would like to ask you this. Have you ever been to Idaho?

A. No.

Q. And have you talked to any chiropractic physician in Idaho?

A. I talked to Eri Crum for about three minutes.

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Q. And when was that?
A. After the first conversation with Sam Johnson at some point.
Date? I don't know.
Q. Did you call him?
A. Yes.
Q. And what was your purpose in calling him?
A. To touch base with him to say are they good attorneys, have you worked with them before.
Q. What did he tell you?
A. He said he had worked with them before and that they were good guys.
Q. Did he say they are really smart lawyers?
A. Oh, sure.
Q. And so then did you talk about anything else or was that the extent of your conversation?
A. No, that was it.
Q. Other than Dr. Crum, have you talked to any other chiropractic physicians in Idaho?
A. No.
Q. As we sit here today do you know if there is any difference between the standard of care for chiropractic physicians in Caldwell Napa, Idaho, and chiropractic physicians who practice where you practice in California?
A. Are you --

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MR. MONTELEONE: Object to the form.
THE WITNESS: Are you asking if there's a difference?
BY MR. GREENER:
Q. Yes.
Do you know if there is or not?
A. I am not aware of a difference, no.
Q. Do you know if the standard of care is the same?
MR. MONTELEONE: Object to the form.
THE WITNESS: I believe it is. Because we are both -- what? -- regulated or under the national board of chiropractic examiners. But I can't say with 100 percent certainty yes or no.
BY MR. GREENER:
Q. So it is really your supposition?
MR. MONTELEONE: Object to the form.
THE WITNESS: It is my estimation. I am not . .
BY MR. GREENER:
Q. It's your estimation?
A. Uh-huh.
Q. Do you have those documents?
Let's go ahead and finish up Exhibit No. 1. That's what I said I was going to do before we do the documents.
There's an e-mail attached to the draft of your

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report dated September 16, 2010. Other than that e-mail, do you recall if there are any other e-mail transmissions between you and Mr. Johnson?
A. I don't recall.
Q. And would you need to go back to your server to make that determination?
A. Yes.
Q. Would you be willing to do that and --
A. Sure.
Q. -- then let Mr. Monteleone know if there is anything else in there?
And then I would ask him to advise me if there are any other e-mail transmissions. I think we are entitled to those. And I would make the request for them or any writings of any kind between you and Mr. Monteleone's firm.
Would you be kind enough to do that?
A. Yes.
You're requesting e-mails?
Q. Yes.
A. Yes.
Q. Okay. And so that kind of covers -- we are on item number 3 on the second page of the notice of deposition.
So in terms of that, would there be any other kind of document -- other than notes you made, drafts of your

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opinion or report, and your final report, and the e-mails we have just referenced -- would there be any other kinds of writings that you would have either received or sent related to this matter?
A. No.
The other are -- I mean at the very end of the report there are references, but that's it.
Q. Right.
A. You have those, right?
Q. Those references are a part of your report?
A. Yes.
Q. Then item number 5, if you look at that. It says we request a copy of every article, journal, publication, manual, treatise, or other similar authority upon which you intend to rely to support your opinion.
Are there any such documents?
A. Yes.
Q. What are they?
A. Those. These.
Q. All right. And those are the -- let's take those up then.
MR. MONTELEONE: There's four articles that are being referenced. The first one is Risk of Vertebrobasilar Stroke and Chiropractic Care by Cassidy, Boyle, Cote, He, Hogg, two g's, hyphen, Johnson, Silver and Bondy in

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volume 33, number 4S of Spine magazine.
MR. GREENER: Date?
MR. MONTELEONE: 2008.
The second article is from Neurology --
MR. GREENER: Pardon?
MR. MONTELEONE: It's from Neurology, the journal.
MR. GREENER: That's the publication?
MR. MONTELEONE: Correct.
And the title of it is Spinal manipulative therapy is an independent risk factor for vertebral artery dissection by Smith, Johnston, Skalabrin, Weaver, Azari, Albers and Gress, with a G and two S's.
MR. GREENER: And the date?
MR. MONTELEONE: 2003.
MR. GREENER: Okay.
MR. MONTELEONE: The third article is entitled Cervical artery strokes - Serious complications with neck manipulation and informed consent from the column Lessons from Practice from the MJA, which I believe is the Medical Journal of America, volume 173, number 4, page 213 is its beginning. And that's from August of 2000.
And then the final of the four articles is entitled Chiropractic's Dirty Secret: Neck Manipulation and Strokes.
THE WITNESS: I believe that's off of a Web site.

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MR. MONTELEONE: Yes.
And that's off the Web site www.quackwatch.org, Q-U-A-C-K, W-A-T-C-H, a scholarly Web site.
MR. GREENER: Yes.
Is there a date on that one?
MR. MONTELEONE: April 21, 2005.
And the only reason, Counsel, I am not giving you these copies is they have my notes all over them. And these are not what Dr. Tamai reviewed. I believe the doctor, this witness, reviewed clean copies that were e-mailed to her.
BY MR. GREENER:
Q. Did you review clean copies?
A. Yes.
Q. And you didn't bring those here with today?
A. No.
MR. GREENER: Can I get clean copies of those?
MR. MONTELEONE: I will be happy to.
MR. GREENER: Hand them back to her, if you would. While we are on it, I might as well exhaust it and get back to the draft and the report in a minute.
MR. MONTELEONE: Well, if she looks at them with my notes, you will ask her about my notes, Counsel.
BY MR. GREENER:
Q. Did you read his notes?
A. No.

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MR. MONTELEONE: We will get you clean copies.
If we can have a stipulation that we are not going to discuss my notes on these articles, which have not been reviewed by the witness.
BY MR. GREENER:
Q. With your testimony -- you are sure you have not looked at those notes?
A. No.
Q. Let's do it this way.
MR. MONTELEONE: Wait. Are you sure you have not looked at the notes?
THE WITNESS: Well, I looked at the article.
MR. MONTELEONE: His question had a negative embedded in it and you gave a no to a negative, so I got confused.
Have you looked at my notes?
THE WITNESS: I saw them on the page. I did not read them.
MR. GREENER: That answers it.
Let's do it that way. So we have something, a reference, I would like to at least mark them, Jason. And then -- or have the agreement that -- so we don't get all cluttered up here. I would like to give you these tabs.
Will you put exhibit numbers on them and then I understand you will take them back. Sandy can reserve an

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exhibit for them and you will provide those to me and I will give them to her and we will get them into the record.
Does that make sense?
MR. MONTELEONE: It does. But what might be easiest is if we have Internet here, and we do, I will just have clean copies e-mailed down right now.
MR. GREENER: Let's do that.
MR. MONTELEONE: And we can print them. And when we print them, we can have them as exhibits. And that way Sandy doesn't have to do the fussing around.
MR. GREENER: That's fine.
Can we mark them right now and then we will mark the others? Just to get through it and we will do that at the next break to keep going.
MR. MONTELEONE: Okay.
MR. GREENER: Why don't you do it so I won't be tempted to read all of your brilliant handwritten notes?
MR. MONTELEONE: In the immortal words of Shakespeare: Much ado about nothing. There is nothing brilliant in the notes.
Do you want me to number them in the order that I read them?
MR. GREENER: Yes, please.
Risk of vertebro --
MR. MONTELEONE: Basilar stroke.

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We'll make Exhibit 2 Risk of Vertebrobasilar Stroke and Chiropractic Care.
MR. GREENER: Spinal magazine 2008.
(Exhibit 2 marked for identification.)
MR. MONTELEONE: And Exhibit 3 is the Neurology article.
(Exhibit 3 marked for identification.)
MR. GREENER: Regarding manipulations and dissections of 2003.
MR. MONTELEONE: Correct.
MR. GREENER: Number 4 will be cervical artery strokes and informed consent from the MJA 2000.
(Exhibit 4 marked for identification.)
MR. GREENER: And number 5 will be the quack document.
(Exhibit 5 marked for identification.)
BY MR. GREENER:
Q. While those are being marked so we can identify them, could you tell me when did you read these?
A. When they were e-mailed to me.
Q. When was that?
A. I don't have a date for you.
Q. Sometime in September or October of this year?
A. Yes.
Q. And prior to your receiving them by e-mail, had

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you ever read them before?
A. Yes.
Q. And in what context did you read these?
Let's look at Exhibit No. 2. Do you have that before you?
A. Yes.
Q. We have already identified that sufficiently; have we not?
MR. MONTELEONE: I think so, Counsel.
BY MR. GREENER:
Q. Exhibit No. 2. When in point of time did you become aware of that document and read it?
A. The entire document? I had not read the entire document.
The reference, the abstract? I had read about, I would say, earlier this year and perhaps last year.
Q. Was that the first time you had ever read it, to your recollection?
A. Yes.
Q. So this particular document, did it impact the way you practice chiropractic?
A. No.
Q. You do cervical adjustments of the neck on human beings; do you not?
A. I do.

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Q. Men and women both?
A. Yes.
Q. And perhaps children?
A. Yes.
Q. And when you do those, what type of adjustment technique or modality do you use? I am assuming you use diversified.
A. Yes.
Q. And what level of force do you deliver? Does it depend?
A. Yes.
Q. And what would it depend on?
A. It would depend on what that patient presented with and what their injuries were and who I was working with.
Q. And say that person presented with torticollis. You have had that occur and diagnosed a person, a woman, presenting with torticollis?
A. Yes.
Q. And would torticollis only occur in the neck or can it occur elsewhere?
A. It is typically not called torticollis if it's elsewhere, but it can.
Q. It's really a muscle spasm, isn't it?
A. Correct.

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Well, the kind that we would be able to treat, yes. There are other kinds that are not treatable by chiropractors.
Q. Such as?
A. Congenital.
Q. Any others?
A. I believe there are four, but that's the only one that I can recall off the top of my head.
Q. Now going back to a person presents to you, Doctor, with torticollis --
A. Yes.
Q. -- and complaining of a severe headache and complaining of dizziness and complaining of some numbness in her face, would you, depending upon the way she presented with those symptoms, undertake a cervical adjustment?
A. Not using diversified technique, no.
Q. What technique would you use?
A. I may not adjust that person at that time.
Q. Would there be any adjustment that that person would be a candidate for, in your opinion?
A. Perhaps activator.
Q. Of the type that Dr. Main used?
A. No. According to the record of what I read, it was ArthroStim or PTLMS.
Q. Would either of those be contraindicated under

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those circumstances?
A. For torticollis?
Q. Yes.
A. No.
Q. Has Exhibit No. 2, the abstract that you read, changed anything about the way you practice?
A. No.
Q. Is Exhibit No. 2 of any significance to your opinion?
Did you use it really other than you read it and it was interesting, but does it provide any underpinning or basis for your opinions?
A. Opinions on?
Q. That you're expressing here today on Dr. Gallegos-Main.
A. No.
Q. How about Exhibit No. 3? When did you read that for the first time? The Neurology journal.
A. When this one was e-mailed to me.
Q. Okay. Sometime in September/October?
A. Uh-huh.
Q. That's a yes?
A. Yes.
Q. Has that had any impact on how you do your chiropractic, practice your chiropractic?

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A. No.
Q. Is that of any significance or is that a -- does that information in the Neurology journal form any basis for your opinion?
A. Repeat the question.
Q. Sure.
Does that Exhibit No. 3, the Neurology journal, did you use that at all in developing your opinion?
A. In this report?
Q. Yes.
A. Or the way I practice?
Q. In the report.
A. No.
Q. Because of your last answer I want to make sure I didn't miss something.
Did the Exhibit No. 2, the risk of vertebrobasilar strokes in the Spine magazine -- I know you said that didn't affect the way you practiced.
Was there anything about that that you used in forming your opinions? I think you said no, but I want to make sure I didn't miss anything.
A. I believe I said no; and I would say no again.
Q. Okay. Let's go to Exhibit No. 4.
Do you have that in front of you?
When did you receive that?

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A. In the same e-mail as Exhibit 3.
Q. When did you first read it?
A. When it was sent to me.
Q. Has that had any effect on the way you practice?
A. No.
Q. And I take it that that wasn't used by you in forming your opinions in this case?
A. Correct.
Q. Exhibit No. 5. Sent to you at the same time, correct?
A. Yes.
I have seen this before.
Q. Oh, you saw it before?
A. Uh-huh.
Q. That was a yes?
A. Yes.
Q. And what occasioned you seeing it prior to receiving it from Mr. Johnson?
A. It had been discussed by several journals, American Chiropractic Association I believe, the ACA, discussing this Web page.
Q. Has that had any effect on the way you practice chiropractic?
A. No.
Q. And was Exhibit No. 5 used by you in any way in

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formulating your opinions in this case?
A. So when you say "formulating opinions," it wasn't referenced. So in reading the articles --
Q. It wasn't.
A. Right.
So I didn't reference it, but I read it as a journal that's out there. But it doesn't affect the way I practice.
Q. Right. I understand.
A. I am confused the way you're asking the question.
Q. I will ask it again.
A. Okay.
Q. Is there anything in Exhibit No. 5 that you can point me to that you used in formulating your opinions that are set forth in your report of October 15 of 2010?
A. No.
Q. Okay. Other than Exhibits 2 through 5 and the references that you cited in your report of October 15, 2010, are there any other documents that you would refer me to that you used in any way in developing your opinions or had reference to?
A. I read something online, but it was referencing the first article. Exhibit 2.
Q. And did that have any impact on your opinion?
A. No.

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Q. Okay. Let's go back to Exhibit No. 1 for a minute and get done with this, the duces tecum request.
I have your CV. We have talked about all of the items responsive to item number 5. And you have already covered that you haven't testified before, so we can leave that.
Now that I have gotten completely off course, I will go to something else. I will come back to these at some point in time.
(Exhibit 6 marked for identification.)
BY MR. GREENER:
Q. Here is Exhibit No. 6, Doctor. This is a copy of your CV.
Let's see if we can make it through this quickly, hopefully. I think we have covered a lot of this.
This is a complete updated version of your CV; is it not?
A. I believe so.
Q. Nothing else you need to add, right?
A. Not that I see.
Q. Okay. And this covers your entire educational background; does it not?
A. Entire?
Q. Yes.
A. Not during high school, but college.

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Q. All right.
A. Well, he said "entire." I'm trying to be very truthful.
Q. When and where did you graduate from high school?
A. Los Gatos --
Q. What year?
A. -- California.
1990.
Q. And then you enrolled in the University of California?
A. Yes.
Q. In terms of your current licenses and certificates, we have talked about the pettibon certification. We have talked about the active release technique.
That doesn't have a license with it, does it?
A. No. Neither of them have licenses.
Q. Does it have a certification? The active release technique.
A. Certification? Yes, of sorts.
I mean you become -- you can say certified practitioner. You complete their course. If you pass their -- at the end of the training session if you complete their testing, then you're qualified to be a practitioner listed on their Web site. I don't know if you call that

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certified.
Q. But you don't have a certificate on your wall that says that you're an active release technique certified practitioner?
A. No. I just took the course.
Q. Would that be the same for the pettibon certification you had in 2006?
A. What would be correct?
Q. Well, you said you were certified by the pettibon system. You had some type of certification in --
A. Yes, in 2006.
Q. So you received an actual certification from them?
A. Yes.
Well, there's not like a diploma. But once you complete it, they say that -- they give you like a little plaque, but . . .
Q. What about State of California radiographic supervisor? What is that?
A. That's saying I'm licensed and completed the classes and hours necessary to take x-rays in California.
Q. You don't need a separate license for that?
A. You need separate hours, yes. And there's a piece of paper that you get from the State of California, the radiographic division.
Q. Do you know if there is any similar such procedure

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in Idaho?
A. I do not.
Q. Your career development. That covers everything in terms of your specific training for the practice of chiropractic?
A. Additional training than what I would get in school, yes.
Q. If we can just go through these maybe starting with the latest. Bio geometric integration.
What is that?
A. That is a light force technique that involves very light holes on anywhere from the lower back and hip area to the neck.
Q. What does that do?
A. It is to help release -- the theory is that it helps release pressure on the dura mater in the neck and the sacrum.
Q. Does it work?
A. Does it work? Yes.
Q. Do you use it in your practice?
A. Briefly.
Q. Do you still use it?
A. No.
Q. When did you stop?
A. 2004 maybe.

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Q. Then we have the several pettibon system notations here under career development.
A. Yes.
Q. That would all have to do with your pettibon training?
A. Correct.
Q. And are all of those various training references that you have here, are those all necessary to become certified as a pettibon practitioner?
A. Yes.
Q. Then we get into your active release technique certification. We talked about that I think. 2008.
And you're still practicing that, correct?
A. Uh-huh.
Q. Is that yes?
A. Yes.
Q. And what is kinesiotaping?
Am I pronouncing that correctly?
A. Kinesiotaping, yes.
Q. What is that?
A. It's not specific to chiropractic. It is a patented tape that is used that allows full mobility of the joint after it's injured, but it gives it support.
If you saw the Olympics, Women's Olympics, when they had the black on their shoulders, the women that played

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volleyball.
Q. Got it.
A. That's what it is.
Q. Then your experience. At the present time, I take it from your earlier testimony, you practice with someone?
A. Yes. He's an independent contractor.
Q. Does he work for you as an independent contractor or do you work together? How does that work?
A. No. Independent contractor. He was an employee, but now he's an independent contractor. He does his own.
Q. And that's Jake?
A. Yes.
Q. And D-A-I-L-E-Y?
A. D-A-L-Y.
Q. Is there anyone else in your office other than you and Jake?
A. There is an acupuncturist.
Q. What's that person's name?
A. Michael Woodworth.
Q. Anyone else?
A. There are three part-time massage therapists.
Q. And anyone else?
A. Front desk staff.
Q. So is this your business?
A. Tamai Chiropractic?

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Q. Yes.
A. Yes.
Q. What's the name of it?
A. Tamai Chiropractic.
Q. Oh, all right.
Is that an LLC?
A. It's an S-Corp.
Q. And then you were the treating doctor in 2008 at the US Open?
A. Yes.
Q. And then your practice in Carlsbad from 2001 to 2002. Were you practicing by yourself or --
A. Yes.
Q. -- with someone else?
A. No, just me.
Q. All alone?
A. Uh-huh.
Q. Is that yes?
A. Yes.
Q. What is locum tenens?
A. Locum tenens is where if a chiropractor or a practicing physician goes on vacation or they need some relief work, but you are not an actual doctor in that practice.
Q. That was in Redwood City?

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A. Yes.
Q. Who was the doctor you were relieving?
A. I do not recall her name.
Q. And then you also note you were in chiropractic practice in San Ramon and San Carlos, Costa Rica?
A. Yes.
Q. What took you there?
A. I didn't know where I wanted to practice in California.
Q. Who did you practice with there? By yourself or with others?
A. In San Carlos I was by myself; in San Ramon I practiced with Jimmy Lee.
Q. With who?
A. Jimmy Lee.
Q. Is he a gringo?
A. Yes.
Q. What was your reason for leaving that Costa Rican practice?
A. Wanted to come back to California.
Q. Who were you a chiropractic assistant to in San Francisco in '95 through '99?
A. Alan Cheng.
Q. And is he solo?
A. Yes.

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Q. Is he still practicing in San Francisco?
A. I don't know.
Q. Then your professional services. The Panama Mission and the Costa Rica Mission. What were those?
A. Those were chiropractic, chiropractors from the United States that go over to Panama or Costa Rica where there are not many chiropractors and work on the local people who may perhaps needed chiropractic care.
Q. Were you doing work for free then?
A. Yes.
Q. Did anyone pay you or did you pay your own way?
A. Paid our own way.
Q. How long do you do that?
A. It was in October 2000 and April 2000.
Q. For the entire months?
A. No, it was a week.
Q. A week each month?
A. I believe so.
Q. Okay. Then your professional organizations. You were in the International Chiropractic Association --
A. Yes.
Q. -- until 2009.
Are you still in it?
A. No.
Q. Why did you drop it?

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A. 2009 was a difficult year and I trimmed a lot of things.
Q. Economic downturn?
A. Yes.
Q. And CCA member. What is -- the chiropractic --
A. California Chiropractic Association.
Q. And you were a member from 2005 to 2008.
Why are you no longer a member?
A. That was the beginning of the downturn for us.
Q. So for economic reasons?
A. Yes.
Q. And then just let's quickly do this. Educational programs and presentations.
What is LeTip?
A. LeTip International is a networking organization.
Q. For chiropractors?
A. No. For anybody who has a small business.
Q. And then what were you doing with CORE in 2006, 2007?
What does CORE stand for?
A. You know, I don't know.
CORE is a group of chiropractors that meet in San Diego. And they just get together and meet and occasionally have speakers come.
Q. And then what was the Chiropractic World Tour?

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A. Oh, that was back in 1999. 11 years ago.
Q. Did you go on a world tour?
A. No, I didn't go. A world tour came. It was big. It's chiropractic pediatrics. It was a lot of people that work on children. And it was a big expo.
Q. And then you mention Dr. Alan Cheng in the fourth bullet from the bottom. Is that the gentleman --
A. Yes.
Q. -- the doctor in San Francisco you worked for?
A. Yes.
Q. What is the motion palpation technique --
A. Motion palpation --
Q. -- in 1998?
A. -- is in school. So you look at segments and basically motion them to see how they are moving or not moving.
Q. That's part of -- I'm sorry.
A. That would be the layman's explanation of what it is.
Q. It's part of the palpation process?
A. Yes -- no. They consider it a separate technique of the way that they check the spine and check segments, the way they move.
Q. In this I don't -- maybe it's in here and I missed it.

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Do you have any continuing chiropractic education courses that you've attended?
A. Yes.
Q. Are those listed?
A. No.
Q. What have you done in that regard?
A. There are annual seminars all over that are available and I will take those. I mean I could get those for you.
Q. No. Are you required to do that under California --
A. Yes.
Q. -- to be licensed in California?
A. Yes.
Q. And you're current?
A. Yes. That's where my license is, the current license. I couldn't be licensed if I didn't complete that.
Q. All right. In addition to -- and I'm switching gears with you for a second.
In addition to looking at the documents we've talked about that you reviewed prior to coming here today to prepare for your deposition, did you talk to anyone other than Mr. Monteleone or Mr. Johnson about this deposition?
A. I told my front office staff that I would be coming to a deposition.

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Q. Did you talk to anyone else about it?
A. I also e-mailed the LeTip group that I would not be making a meeting today because of the deposition.
Q. Have you talked to anyone other than the attorneys I mentioned about this case?
A. I talked to my husband about it.
Q. Anyone else?
A. I mentioned to Jake that I took the case and I was writing a report.
Q. Okay. And is your husband a chiropractor?
A. No.
Q. And do you have children?
A. One.
Q. How old?
A. Almost two.
Q. Little boy or little girl?
A. Little girl.
Q. That's nice.
Before we get into these, your reports, have you ever had a patient experience a stroke while in your clinic?
A. No.
Q. Do you know of that ever occurring with any practitioner chiropractic physician who you have an acquaintanceship with?
A. No.

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Q. Do you know of any instance that you've learned of in your private practice where a person as a patient has experienced a stroke that was the result of chiropractic care?
A. Repeat the beginning of the question.
MR. GREENER: Can you read it back? I think it was the way I wanted it. Maybe I will rephrase it if it doesn't make any sense.
(Record read.)
THE WITNESS: Is that a chiropractor or just anybody?
BY MR. GREENER:
Q. Anyone as a result of chiropractic care.
A. No.
Q. In your opinion is the risk of a stroke from cervical adjustment by a chiropractor a risk that is an acceptable risk in going about diagnosing, caring, and treating for patients as a chiropractor?
MR. MONTELEONE: Object to the form.
THE WITNESS: Acceptable risk to whom?
BY MR. GREENER:
Q. To the patient.
In terms of the percentage of its occurrence and the rarity of its occurrence.
A. I am not sure if I'm answering the question of how

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you asked it. But a stroke is relatively very rare and that wouldn't preclude a person from going to see a chiropractor.
Is that what you're --
Q. Yes. You answered my question.
A. Okay.
Q. And because of the extremely rare nature of a stroke under these circumstances, is that something that you are looking for in every patient that comes in with a headache and a neck ache?
A. Yes. It's part of my differential diagnosis.
Q. How do you go about doing that?
A. It's primarily symptoms. The orthopedic tests have been shown to be not necessarily accurate or helpful. George's maneuver is --
Q. George's, for example.
A. -- one of them.
Yes. So it would be primarily based on what the symptoms of are of how the patient presented.
Q. And what are the symptoms in your mind, in your opinion as a doctor of chiropractic, would alert you to a person being a potential stroke victim or in the process of having a stroke?
A. The obvious signs would be someone who would have difficulty speaking, some slurring of speech, some acute dizziness, inability to state day or time, year. Basically

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presenting to that day. Those are the very obvious ones.
Q. Okay. When you say acute dizziness, in other words, a more severe dizziness than just "I'm dizzy"? I'm kind of dizzy today, for example.
A. Yes. Well, not everybody. But, in general, I would say that that would be a fair statement.
Q. For example, when people are laying down -- whether they are in the chiropractic clinic or wherever -- and they get up, a lot of people experience dizziness upon arising; is that right?
A. Yes. That's why I always tell people to take a breath in before you come up. Come up off the table.
Q. So if a person was on your chiropractic table --
A. Yes.
Q. -- and sat up and said, "oh, I'm dizzy," would that be a sign to you that that person was experiencing stroke?
A. It would be in the back of my mind. I would make sure. I would say are you okay to stand up? Take a deep breath. Rest. Stay here. Don't move until you feel like you can stand or move on your own.
Q. And if they are able to stand up and move on their own, you would feel comfortable letting them depart your clinic?
A. No. I would want to make sure. I would check on

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them.
We have open adjusting, it's not rooms. So I can see them as they go from the treating area over to the waiting area to the door.
So I would check their eyes, make sure they can track, follow my fingers. Ask them, make sure do you know where you are, do you know what day it is, can you speak.
Q. And if they can do all of those things, you would feel comfortable having them depart?
MR. MONTELEONE: Object to the form. Incomplete hypothetical.
THE WITNESS: If they felt that they were able to leave on their own.
MR. GREENER: I haven't mark these yet and I am going to.
Off the record for a minute.
(Discussion off the record.)
BY MR. GREENER:
Q. Back on.
Are you familiar with a PICA stroke? Do you know what that is?
A. A PICA?
Q. Yes.
A. No.
Q. Are you familiar with the subarachnoid stroke?

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A. I know the word; but symptoms --
Q. You don't know.
A. -- diagnosis? No.
Q. And you don't have any opinion on what could or could not cause a PICA stroke in a human being?
A. No.
Q. That's no, you do not?
A. No, I do not.
Q. Let's turn our focus now to your expert opinions in this case.
Do you hold your opinions on a more probable than not basis? That is, is your opinion based upon a better than 50 percent?
A. My opinion based on 50 percent of what?
Q. Are you familiar with the term reasonable chiropractic certainty?
A. No.
Q. So you can't tell me if you hold your opinions to a reasonable chiropractic certainty or on a more probable than not basis?
A. I don't know what reasonable chiropractic certainty is.
Q. Okay. Let's leave it.
Are you familiar with the term on a more probable than not basis? Are you familiar with those terms?

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A. Yes. As a general statement, yes.
Q. Do you hold your opinions that you are going to express in this case on a more probable than not basis?
A. Yes.
Q. And what does that mean to you? When you say it's more probable than not.
A. I would say if you hear the sound of hooves, think horses, not zebras if you live in California.
Q. Can you say it again?
A. If you hear the sound of hooves, think horses not zebras. So in general common things occur commonly and rare things do not.
Did I confuse you?
Q. No, I just couldn't hear zebra.
A. Oh.
Q. All right. Let's talk about your opinion.
How much time did you put in preparing your opinion that you have in your expert report of October 15, 2010?
A. Total time?
Q. Yes.
A. Probably in the neighborhood of six hours including research.
Q. Six hours including research?
A. Uh-huh.

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Q. Have you sent a bill for your time?
A. No.
Q. Do you know what the total bill is?
A. No.
Q. Do you plan to?
A. Yes. I don't work for free.
Q. And out of the six hours including research --
A. Yes.
Q. -- how much was spent on research?
A. Three. Two to three.
Q. Pardon?
A. Two to three.
Q. And how was the balance of the six hours spent?
A. Looking at the research, looking at the records, and writing a report.
Q. How much time did you spend -- if you can break it out. I know you're not going to be able to say 10 minutes here and five minutes here. I am not asking for that.
A. Okay.
Q. We have two to three hours on research. Would that have been -- what would that have involved exactly? What research did you do?
A. I did an online research. I looked at the records that we mentioned previously. I reviewed the e-mails.
Q. E-mails from Mr. Johnson?

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A. With -- yeah, that included the records. So I wanted to make sure I had all of the records because they were sent in different e-mails.
Q. All right.
A. I went back and looked at my research in terms of journals, the chiropractic journals.
Q. And those are referenced in the expert report you prepared, correct?
A. I believe so.
MR. GREENER: We are up to Exhibit 6; are we not?
MR. MONTELEONE: 7 I believe.
MR. GREENER: 7.
(Exhibit 7 marked for identification.)
BY MR. GREENER:
Q. Here is Exhibit 7. And that is a copy of your expert report of October 15.
A. Yes.
Q. And that was prepared by you. It's a multi-page document. It hasn't been Bates numbered yet, but it looks like the body of it -- do you have a page number on this, Doctor?
A. A page number meaning -- I mean I believe it's seven pages. Is that what you are asking?
Q. Is it seven pages in length?
I guess would you do me a favor? We don't have a

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Bates number on this. You have a pen there. Let's circle -- let's number each page and circle it in the lower right-hand corner just so we have a reference. If I ask you a question, I will know what page we are on.
A. Okay.
Q. Tell me when you're done.
A. Okay.
Q. I have seven pages. This is your report to Sam Johnson dated October 15, 2010.
I think there is a copy of your signature on page 6, correct?
A. Yes.
Q. And then just for the record, page 7 references six items. And what do we have here on page 7?
A. The references.
Q. Yes.
What are they?
A. Do you want me to read them?
Q. No, no. What's their significance to your opinion? Are these materials you used to developing your opinion?
A. Yes.
Q. Does this detail your research?
A. Yes.
Q. All right. And so maybe we can kind of go through

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this to pin down with a little bit more precision the two to three hours on research.
Item number 1 makes reference, on page 7 of Exhibit 7, to Leslie M. Wise, professor of clinical sciences at Sherman College of Straight Chiropractic, a power point presentation of August 10, 2008, at a certain reference.
Did you pull this up on the Internet?
A. Yes.
Q. You didn't attend this, you just --
A. No.
Q. What use did you make of this?
A. This was -- these are noted in the report in parentheses.
Q. Is this the first time -- when you were preparing your report, was that the first time you ever reviewed this particular power point presentation?
A. Yes.
Q. You never reviewed it before?
A. No.
Q. Did you ever talk to Dr. Wise?
A. No.
Q. What was your purpose in reviewing this?
A. I was looking for a standard of care that was clean and easily understood and something that was, I felt, representative of the standard of care in chiropractic.

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Q. And did you find all of your questions in that regard answered with the Leslie M. Wise power point?
A. All of my questions?
Q. Yes. Regarding standard of care.
A. I felt that it was appropriate.
Q. Was there any other part -- was there anything else that you relied upon in determining what the standard of care was?
A. Those are documented in number 2 and number 3.
Q. All right. And number 4 as well?
A. Number 4 is the definition of torticollis.
Q. And what about numbers 5 and 6? Did they have anything to do with standard of care?
A. No. Those are referencing pettibon.
Q. 1 through 3 would be where you gleaned the standard of care?
A. Yes.
Q. What in terms of the standard of care as it relates to this case did you obtain from the Leslie M. Wise power point presentation?
A. Where it's stated here, the quote:
"The level at which the average, prudent provider in a given community would practice. It is how similarly qualified practitioners would have managed

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the patient's care under the same or similar circumstances."
Q. So that is a direct quote from Dr. Wise?
A. Yes.
Q. That's not your definition of standard of care?
A. No.
Q. And this does make reference to in a given community. Would that then be -- if we look at this then, and we're looking now at page 1 of the report that you prepared in the second paragraph where you write:
"An apt definition of standard of care can be defined as 'The level at which the average, prudent provider in a given community would practice. It is how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances.'"
End of quote.
I read this correctly, didn't I?
A. Yes.
Q. And do you adopt that standard of care for the purposes of your opinion in this case?
MR. MONTELEONE: Object to the form.
THE WITNESS: Did I?
/ / /

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BY MR. GREENER:
Q. Do you agree with that standard of care for the purposes of your opinion in this case?
A. Yes.
Q. So if I am understanding that correctly then, that would be the level at which the average, prudent provider in Caldwell or Napa, Idaho, would practice?
MR. MONTELEONE: Object to the form.
THE WITNESS: Perhaps given community could be the chiropractic profession.
BY MR. GREENER:
Q. Well, do you understand where Dr. Main's clinic is located?
A. No. I know it's in Idaho, but no.
Q. With this language here, wouldn't the standard of practice be applied have to be the level at which the average, prudent provider in the community in which she practices?
A. Well, that's what I was saying before --
MR. MONTELEONE: Excuse me for interrupting, Dr. Tamai.
Object to the form.
THE WITNESS: I was saying that a given community would be or could be also construed as chiropractic profession, not necessarily a physical location.

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BY MR. GREENER:
Q. And where do you -- how do you obtain that construction from this language?
A. It says the level at which an average, prudent provider in a given community.
A community can be a physical location, but it can also be a -- it could chat on an Internet site. I mean a group. So you can have a community of chiropractors.
Q. Do you know if there is any different standard of practice of chiropractic physicians in Caldwell, Idaho, than, for example, other locations in the country including California?
MR. MONTELEONE: Object to the form.
THE WITNESS: I don't know Caldwell. I don't know.
BY MR. GREENER:
Q. All right. In terms of the standard of practice, is there anything else that you obtained -- let me ask it this way -- from Dr. Wise power point presentation, other than what you specifically set forth in your report?
A. Other than what I put in the report?
Q. Yes.
A. I don't believe so, no.
Q. And then the Council on Chiropractic Practice Clinical Practice Guideline. Did I read that correctly?

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A. Yes.
Q. Third edition 2008.
You took that off the Internet as well, right?
A. Yes. I have also seen a hard copy of it.
Q. What is that?
A. That is a guideline that is put together that -- there are two. So the CCP, the Council on Chiropractic Practice Clinical Practice Guideline, and the Guidelines for Chiropractic Quality Assurance and Practice Parameters, Proceedings of Mercy Center Consensus Conference.
Those two documents in general in the chiropractic community are the basis or the guidelines that are often quoted in standard of care referencing treatment guidelines.
Q. Do you know if they are followed in the State of Idaho?
A. I do not.
Q. Do you know if they are adopted by any chiropractic board in the State of Idaho?
A. Adopted by the board?
Q. Yes. Do you know?
A. I don't know if there's a board in Idaho. I believe it's national.
Q. And do you know if any of these references that you have there -- such as the Council on Chiropractic Practice Clinical Practice Guideline or the Guidelines for

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Chiropractic Quality Assurance and Practice Parameters, Proceedings of Mercy Center Consensus Conference -- do you know if those have been adopted by the legislature in the State of Idaho?
A. Which legislature?
Q. The Idaho legislature.
A. For chiropractors?
Q. Yes. As being applicable to chiropractors.
A. Repeat the beginning of the question.
Q. I just want to know do you know whether or not the Idaho legislature has adopted any of these for chiropractic practitioners in the State of Idaho to be applicable --
A. I don't know that the legislature has control over chiropractor's practice.
Q. So your answer is no, you don't know?
A. I don't know.
Q. How about in California? Has the California legislature adopted any of these guidelines that you have referenced?
A. As I stated previously, I don't think the legislature has reference or controls what happens to the chiropractic profession in California.
Q. You have a chiropractic board in California; do you not?
A. We do.

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Q. Do you know if your -- what is it called?
A. I don't know what it's called off the top of my head.
Q. Do you know if --
A. California Board of Examiners. I believe that's what it is called.
Q. But whatever name it is called, do you know whether or not that board or that entity --
A. Yes.
Q. Let me back up.
A. Okay.
Q. Would that be -- who licenses you? Is it the Board of Examiners for chiropractors or --
A. Yes, yes.
Q. Do you know if whoever licenses you has adopted the items set forth in footnotes 2 and 3 of your expert report that's Exhibit No. 7?
A. Is there more to the question?
Q. I'll ask it again.
A. Okay.
Q. Let's do it individually. Do you know if the board that licenses you in California has ever formally adopted the Guidelines for Chiropractic Quality Assurance and Practice Parameters, Proceedings of Mercy Center Consensus Conference so that they are mandatory requirements

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on you as a chiropractor practicing in California?
A. I do not know.
Q. Would you know if that had occurred?
A. Yes.
Q. And --
A. I hope so.
Q. Thank you.
I would like to ask you the same question. Do you know if the board that licenses you has adopted the Council on Chiropractic Practice Clinical Practice Guideline, Third Edition 2008 referenced in footnote number 2 to your expert report Exhibit 7 so that it is binding on chiropractors practicing in the State of California?
A. I do not know.
Q. And do you know if the power point by Leslie M. Wise has been adopted by the board that licenses you in the State of California so that it is binding on chiropractors in California?
A. I do not know.
Q. Does the practice of chiropractic in California in terms of standard of care vary from community to community within California, to your knowledge?
MR. MONTELEONE: Object to the form.
THE WITNESS: I do not believe so.
The California board licenses us, but the

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governing board is the national board.
BY MR. GREENER:
Q. Okay. What's the name of the national board?
A. National Board of Chiropractic Examiners.
Q. And does the National Board of Chiropractic Examiners, do you know whether they have adopted any of these same items that we have just been talking about -- specifically footnotes 1, 2 and 3 to your expert report -- so that any of those, according to the national board, are binding on chiropractors practicing in the United States of America?
A. I do not know that.
Q. You would know if it had occurred, wouldn't you?
MR. MONTELEONE: Object to --
THE WITNESS: I don't know.
MR. MONTELEONE: -- the form.
THE WITNESS: If they sent a letter to me, I would know.
BY MR. GREENER:
Q. Do you know if the national board has adopted any policies or guidelines that you can point me to that apply to standard of care of chiropractors in the United States?
A. I do not know.
I know they have a Web site and they are responsible for licensing.

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Q. I have asked you about whether the standard of care varies within the State of California. Do you, in your opinion -- strike that.

Do you know, as a practicing chiropractor in the United States, if there is any kind of a difference at all between chiropractors practicing in California and chiropractors practicing in Idaho?

MR. MONTELEONE: Object to the form.

THE WITNESS: In terms of standard of care --

BY MR. GREENER:

Q. Yes.

A. -- expectations or the way they practice?

Q. In terms of the standard of care that is applicable to them in their practice.

A. I do not know.

Q. So, for example, if we talk about the Mercy guidelines, you know what I'm talking about, don't you?

A. I do. That was number 3.

Q. Yeah. That's number 3.

So you don't know, as we sit here today, if I understand your question (sic) correctly, whether the Mercy guidelines have been adopted by the State of Idaho as their standard of practice?

A. I do not know.

Q. Same question with regard to number 2.

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You do not know, do you?

A. The number 2?

Q. Is the --

A. Oh, the CCP guidelines?

Q. Yes.

A. I don't know if they have adopted it formally as the standard of care --

Q. In Idaho.

A. -- for chiropractors in California or Idaho.

I don't know if there is such a document.

Q. I have got off course and we will probably come back to that again; but, hopefully, not repeating areas we have covered.

I want to make sure I fully understand your six hours in preparing this. And we have talked about -- do you know how much time out of that six hours you spent on footnote number 1? The Leslie Wise materials.

A. How much time I spent on reading it or --

Q. Yes. Reading it, working with it, doing whatever you did with it.

A. However long it took me to find it on the Web site online and going through and looking at the power point presentation.

I am not sure what you're asking.

Q. I just wondered how long you spent reviewing it. Getting it online, getting it offline, reviewing it. How long did you spend doing that?

A. I don't know. I didn't know that I would be asked this question, so I didn't even pay attention.

Q. Did you keep track of your time so you could accurately bill Mr. Johnson?

A. Actually it's more of an estimate.

Q. Well, I understand that.

A. Okay.

Q. I'm not trying to -- I'm just trying to find out how much time you spent, to the best of your recollection. All you can tell me is your best recollection. You don't need to say it was 20 minutes or 10 minutes and 50 seconds. I understand you can't do that.

I just want to get a glimpse, if you will, of how much time you spent on these various items.

Let's talk about Leslie Wise's power point again. How long is it in terms of what you downloaded? Is it 50 pages? 100 pages, 10 pages?

A. I believe it was somewhere in the neighborhood of 20 screens, pages.

MR. GREENER: Okay. I guess we would ask for a copy of exactly what the doctor reviewed and that's attached to her report, Counsel.

Can we have an agreement that we will get that?

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MR. MONTELEONE: That's fine.

BY MR. GREENER:

Q. Okay. So about 20. Would it be 20 sheets this size?

A. It was a power point presentation online. I don't know.

Q. You didn't download it?

A. No.

Q. Okay. Do you have a memory as to -- can you give me any recollection as to how long it took you to read it and digest it?

A. Read it and digest it? To read it probably took me -- I don't know -- 10, 15 minutes.

And digest it? I mean I probably digested it the whole time I was trying to prepare the report to see whether it was appropriate.

Q. So it took you about 10 minutes to read it?

A. Uh-huh. Just to read each screen.

Q. And the same question regarding the CCP practice guidelines, item number 2 on page 7 of your expert report.

How long is that document?

A. Very long. I did not read the whole thing. I looked in there for the clinical practice -- for what was in terms of applicable to the report, what I wanted, what I was looking for, what I had an idea of what I wanted to write.

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I looked in there to see what would be appropriate for -- they had recommendations for a lot of different scenarios. But in terms of an intake and a re-exam, that's what I looked at.
Q. How many pages?
A. How many pages of what?
Q. Did you look at then? How many pages of that lengthy treatise did you look at? Five? 10?
A. Probably -- no. I looked at probably in the neighborhood of probably 20. Maybe 15. Those are pages.
Q. Have you provided what you looked at to Mr. Johnson?
A. Well, I put it in the note here. It's -- what I looked at is written in the report. It's here.
Q. Oh, everything --
A. This is referencing what I wrote in the report. So according to the -- if you look back on page 1?
Q. Yes.
A. And it says -- the third paragraph.
Q. Yes.
A. "There are also several documents which serve as guidelines for the chiropractic community and these include the" -- I will say the CCP, which is 2; and then the Guidelines for Chiropractic Quality Assurance and Practice Parameters is number 3. The Mercy guidelines.

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Q. Right.
A. So the CCP. And then it continues on from page 1. That's what is in the CCP.
Q. Is that all that you would have read from the CCP, which is footnote number 2, that would start at the bottom of page 1, go through page 2 and onto page 3, or did you read more of it?
A. No. I read more it.
Q. But you took this directly out of it?
A. Correct.
Q. What I am asking is did you ever provide Mr. Johnson a copy of what you were focusing on out of the CCP?
A. No.
Q. Could you do that? I would like to just be able to know what part of that, I don't want to read the whole thing if you didn't look at it. I want to know what part of the CCP guideline you actually looked at.
A. I could go back online and look at it.
Q. And then let Mr. Monteleone or Johnson know.
A. Okay.
Q. And then can you tell me how much time you spent on that? Reviewing it.
A. No, not really. Because all of these -- so one, two, three, and I looked at a lot of other items in

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different places to try to formulate my opinion. And I came down to these.
Q. That's fine if you can't.
Item number 3. How many pages of that did you pull off the Web site or the --
A. I don't know.
Q. Would you be able to go back and find them and give them to Mr. Johnson?
A. Yes.
Q. Do you know how much time you spent on that or would you have the same --
A. I would have the same. It was altogether.
Q. If we put the items one, two, and three together in terms of the amount of time that you spent with it, can you give me your best recollection as to how much time you spent with those in terms of reading them?
A. Within the two to three hours that I --
Q. Yes.
A. Probably an hour and 45 minutes.
Q. Okay.
A. I mean I looked at -- those are the ones that I really took a close look at. When I was looking online to see if there are -- because I know about these -- to see if there were other guidelines, there really wasn't anything that I felt was as good of a guideline or referenced as much

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as these two.
Q. And then the Wikipedia. How much time did you spend with that looking at torticollis?
A. As long as it took me to type it in and then read the page.
Q. One page?
A. Yeah.
Q. And then the team training seminars. Are those lengthy?
A. The entire booklet, yes, is lengthy.
Q. How much time did you spend with 5 and 6 on page 7?
A. That I knew what I was looking for, so maybe five, 10 minutes.
Q. So we have that much time then. How much time did you spend reviewing the records, the medical records, the chart from Dr. Gallegos-Main?
A. A lot. I looked at it probably three hours. So that's not included in the six hours of the actual report writing.
So when you said how much time was for the report, I didn't include that in that total. So it would be nine hours total. Because three hours of looking at the deposition, the letter, and -- both depositions, the letters.

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Q. And you said you looked at a portion of the plaintiff's deposition. What portion did you look at?
A. When they were asked about what happened when she went to go see Dr. Gallegos-Main.
Q. Is that the only portion of plaintiff's deposition that you looked at?
A. Yes.
Q. All right. And so then I take it we have covered everything you were doing in terms of reading, research, reviewing documents.
So according to my calculations, such as they are, I have that that would have taken you -- with the three hours on the depositions and records -- that would have taken you probably with the other items footnoted a total of about, probably we are up to about five or six hours, aren't we?
A. Repeat that.
Q. Could you just break down for me your best recollection? Now that we have talked about these things. We've talked about three hours for the depositions --
A. Yes.
Q. -- for the medical records, the chart of Dr. Gallegos-Main.
And so then can you just kind of break down for me your best recollection now after going through what you did

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online and the like with the time now?
I would like to just kind of hastily get through this and have an idea as to how much time you spent on these various efforts out of the full nine hours. We have three hours really well accounted for. I am a little bit vague on how much time in total you spent on the Internet search.
Can you just help me out with that? I would like to know that. And then how much time you spent writing and rewriting and things.
A. What I was explaining is that I had six hours initially. So the three hours was looking online, looking at these guidelines, looking online at the power point presentation, looking at other documents that I ended up not using or not feeling were appropriate.
There were the three hours of looking at the actual depositions and letters and other materials that were e-mailed to me. And then I would say the remaining three hours was actually composing the report.
Q. Do you recall any of the documents that you looked at that were not appropriate or that you looked at, but didn't --
A. No.
Q. Did you ever talk to anyone from the plaintiff's family?
A. No.

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Q. Do you feel you have done everything you need to do to develop your opinions in this case?
Is there anything else you would like to do?
A. I would like to speak with the plaintiff or look perhaps at the entire deposition to see if there is perhaps more clarity I could come to in terms of what was stated that happened.
Q. Why is that? Why would you like to do that?
A. Because I mentioned earlier I'm confused as to what actually transpired on that day.
Q. Other than that, is there anything that you feel you would need to do to finalize your opinion?
A. My opinion on?
Q. Your report.
A. No. I feel like my report describes what I feel were perhaps missing pieces of the standard of care in examination.
MR. GREENER: Let's take a break and we will get into your opinions and, hopefully, be done.
(Recess held.)
BY MR. GREENER:
Q. Let's go back on the record.
I know you recognize you are still under oath.
I want to take care of this, then I want to continue on with your opinions in this case. But just so I

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don't neglect to mark this.
Here is Exhibit No. 8.
(Exhibit 8 marked for identification.)
BY MR. GREENER:
Q. This is I believe your rough draft, or your draft, your first draft, of September 16, 2010, that you sent to Mr. Johnson.
It contains essentially the same footnotes that you have in Exhibit 7, your final report. But it also has an e-mail on the last page that does not appear in Exhibit 7, which is an e-mail from I believe you to Mr. Johnson of September 21, 2010. "Opinion on two points we discussed today."
And I have correctly identified the document, haven't I?
A. Yes.
Q. And the only difference I can see, just for starters, between your report, Exhibit 7, and the prior draft of Exhibit (sic) 16, that's Exhibit 8, is found if we go to your signature page on Exhibit 8.
That does not include -- let me find it. It does not include what would be the two paragraphs at the bottom of page 5 of Exhibit 7. Am I reading this correctly?
A. Yes.
Q. And that is the only difference, isn't it?

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A. Yes. I believe so.
Q. And then the e-mail of September 21, 2010, the last page of Exhibit 8. Let's talk about that for just a minute.
What was your purpose in preparing and sending this?
A. I'm sorry, I missed it. Where are you?
Q. The last page of Exhibit 8, your draft.
A. Oh, the e-mail.
Q. It's the e-mail of September 21, 2010.
A. Okay.
Q. It's my birthday.
A. Oh.
Q. So what was your purpose in preparing this?
A. This was in response to the subject line the opinions on two points we discussed today. So that was the day that we had the conversation that we talked about.
Q. And if you would focus with me on the first full paragraph where you say in the second sentence:
"The first question as to whether an adjustment was contraindicated is a little complicated."
Why did you regard it to be complicated?
A. As I stated in here, to me, in words from school, contraindication would mean that there would be, there

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are -- there's evidence to say that doing something would create a negative result.
So a contraindication to taking an x-ray would be pregnancy. So there would be negative result of taking an x-ray of not necessarily the mom, but the unborn fetus and there could be damage to the fetus. That's where I took contraindication to be.
The second sentence said I could feel comfortable saying that a manual or diversified adjustment would be contraindicated if Dr. Gallegos-Main's diagnosis of torticollis is correct.
Q. Okay.
A. Because of the confusion, as I was stating earlier, between the deposition of the plaintiff and the defendant, then I said:
"If I take only Ms. Arregui's testimony, she complained of tiredness, neck pain, and crookedness, not necessarily dizziness, which was on Dr. Gallegos-Main's exam form."
And that "would not be a contraindication to a manual adjustment."
So then taking Dr. Gallegos-Main's diagnosis of torticollis and her written documentation of dizziness, it wouldn't be a contraindication to mean that something -- a

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negative result would occur.
So something such as taking an x-ray of an unborn fetus where you could have permanent damage to the growing infant, but it's not a conservative or pain-free approach to helping Ms. Arregui.
Q. So the bottom line, if I am understanding this correctly, is if you take Dr. Main's records and her testimony that the plaintiff presented with the torticollis and with dizziness, in your opinion it would not be a deviation of the standard of care with that type of presentation to do a diversified or a manual adjustment, but it would be a judgment call by the chiropractor under those circumstances?
MR. MONTELEONE: Object to the form.
THE WITNESS: There was a lot to that question.
BY MR. GREENER:
Q. Yeah. Let me ask it this way.
A. Okay.
Q. If a person presented to you on June 4 of 2007 with a torticollis that you diagnosed and complaining of dizziness, based upon those two factors alone, would you consider it to be a deviation of the standard of care to do a cervical adjustment, manual or diversified cervical adjustment, to that person?
MR. MONTELEONE: Object to the form.

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THE WITNESS: So a minimal baseline, I would say no. But to be conservative and I guess reasonable or as little pain being created to the patient as possible, I don't think that an adjustment would be rendered -- should be rendered in that instance.
BY MR. GREENER:
Q. But when you say you don't think an adjustment should be rendered in that instance, if I'm understanding you correctly, you're not saying --
A. A diversified adjustment.
Q. I will start over.
Well, what is your distinction between a diversified and a manual adjustment? You make reference to both here.
A. There are different kinds. A diversified is the technique. So it's like activator is a technique or SOT is a technique. Where a manual adjustment is hands-on, but it's not necessarily diversified.
Q. All right. And so would there be a difference in terms of whether you used diversified or manual?
A. I wouldn't use either.
Q. Now in stating that -- I want to make sure I understand this -- is it or is it not -- well, pardon me.
In stating that you wouldn't do it under those circumstances where a person presents with torticollis and

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with dizziness, in your opinion would it be a deviation from the standard of care for a chiropractic physician to do a diversified adjustment on that person?
MR. MONTELEONE: Object to the form.
THE WITNESS: Deviation from?
BY MR. GREENER:
Q. A violation of the standard of care.
A. So in reference to what would be an average, prudent provider?
Q. Yes.
A. I would say that it would be a deviation because an average -- so average means in the middle, right? So you have either side. And there's some that may attempt to do an adjustment and others that wouldn't.
In the middle I would say probably more of practitioners in chiropractic wouldn't do an adjust in that instance if they had torticollis.
Q. And you understand that Dr. Gallegos-Main has testified that because of her diagnosis of torticollis and because of the other considerations such as dizziness, she maintains she did not do an adjustment diversified or manual?
A. Yes. I saw that in the deposition and I saw that in the notes.
Q. Do you have any reason to disbelieve her other

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than -- do you have any reason to disbelieve her position on that?
A. Her specifically? No. But taking Ms. Arregui's testimony with that, there is -- the events don't correlate.
Q. Just so we can narrow down on this. What is it about Ms. Arregui's testimony that doesn't correlate with that particular position?
A. Is that how you pronounce it? Sorry.
Q. Yeah. I think so.
A. Ms. Arregui states that she went in and she was not feeling well and she waited and she was told to come back later for an adjustment.
According to what I read in the deposition, it appeared that Dr. Gallegos-Main did work on her in the morning of the manual -- the PTLMS and the ArthroStim. But the plaintiff states that that happened, something happened in the afternoon.
So I actually went back and reviewed it and I was trying to get a time line as to when, when something occurred, whether it was actually hands-on. I know that they met twice on that day. But I don't know -- it sounds like Dr. Gallegos-Main said something happened -- you know, that Daniella was perhaps there in the morning, but she was there for sure in the afternoon. And I believe the plaintiff was saying she wasn't there.

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So that's all I have to look at. I was, like I said, I was rather confused. So I don't know what happened.
Q. From just the description of what was done in the morning in the first session on June 4 of 2007 by Dr. Main to the plaintiff, what is your understanding of what the plaintiff is saying occurred?
A. What I understood is that she went, she was not feeling well, she waited until the end of Dr. Main's adjusting hours. And they met.
So I don't know if she performed the x-ray in the morning, I don't know if she performed the x-ray in the afternoon. I think she performed it in the morning, read it, marked it, and then tried to review it with her in the afternoon.
I believe that a brief examination perhaps was performed in the morning. But I don't know when this woman Daniella came to drive her home. I don't know if that was in the morning or the afternoon.
Q. When you say morning and afternoon, is it your understanding -- and I'll tell you why I'm asking this.
It's my understanding that the plaintiff presented and came in complaining of the severe headache and other symptomology, dizziness, at some point in time earlier in the day and then returned after 5:00 for a session and signed up for additional treatments. And that there wasn't

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anything really in the afternoon per se.
Is that your understanding or am I missing the boat here?
A. No. I think that that's what I was reading is that -- so typically chiropractors, if they work a full day, have a morning session and somewhere around, you know, starts 8:00, 9:00, 7:00, whatever, and ends somewhere between 11:00 and noon.
And that's when I'm thinking if she came twice, that that's when she came, at the end of that morning into afternoon session. And then she came back, yes, later that night.
Q. Did you understand either of the individuals -- Dr. Main or the plaintiff -- to testify there was any treatment given to the plaintiff when she returned for the second time on June 4?
A. That's what I was confused as to.
Q. You don't know?
A. I don't know.
Q. If there was no treatment on the second occasion and if it was just she was just there to go to an explanatory course about what future chiropractic treatment could do or not do for her and if we assume that to be the case, would that alter your opinion on the standard of care?
MR. MONTELEONE: Object to the form.

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THE WITNESS: Not necessarily. Because I don't know -- so obviously at some point she was not feeling well enough to drive and had this woman Daniella come and pick her up because she couldn't drive home.

Now did Daniella come and pick her up in the morning and then return her back to Dr. Main's office in the afternoon?

BY MR. GREENER:

Q. Let me see if I can help out here.

A. Please.

Q. It's my understanding that Daniella was with her when they came back. And Daniella was an employee of the plaintiff. Do you understand that?

A. Okay.

Q. Is that, do you -- do you understand those facts?

A. I heard that she worked in the same location. I didn't know she was an employee.

Q. Okay. And it's my understanding, tell me if you have any facts to dispute this, that when they came back, they came back for this informative session on whether or not to sign up for more chiropractic care over a long period of time with Dr. Gallegos-Main. And that was late in the -- that was the early evening of June 4 of 2007.

And they both attended the class and they both signed up. And at that time the plaintiff also complained

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of not only the torticollis, the headache and the neck ache and dizziness, but also complained of some numbness in her face. Do you understand that?

A. Okay.

No. I read in there something about Bell's palsy, but I didn't know what it was in reference to.

Q. So then it's my understanding that she left with Daniella and that -- after that evening session. And that Gallegos-Main tried to call her to see how she was doing.

That would be within the standard of care, wouldn't it?

MR. MONTELEONE: Object to the form.

THE WITNESS: I don't know if it's within the standard of care.

BY MR. GREENER:

Q. Okay. Well, in any event, it's my understanding that she left, walked out with Daniella. And that those are the circumstances of the second appearance by the plaintiff at the Gallegos-Main clinic.

Do you have any reason to dispute that?

A. I don't know. Like I said, I was confused.

Q. If the facts as I related them to you are correct, would that have any effect on your opinions in this case?

MR. MONTELEONE: Object to the form.

THE WITNESS: Object to my opinions on the case?

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BY MR. GREENER:

Q. No, no. Would that have any effect.

I'm not objecting to your opinions.

A. I didn't know what you were saying.

Q. No. Counsel objected to my question.

I want to know if my -- let me start over.

A. Please.

Q. Do you understand my understanding of the facts in the second visit as I have related them to you?

A. Yes.

Q. Okay. If my understanding of the facts are correct on what happened on the second visit, that there, in essence, was no chiropractic treatment rendered at all, it was an informational session, does that have any effect on your opinions in this case?

A. No. Because then that means the examination and whatever work was performed was done in the morning, but it still -- no, that doesn't change it.

Q. All right. And I want to make sure I understand this because, number 1, I have understood that you -- I understood earlier today that you indicated that you will perform a cervical adjustment on patients who present with a torticollis. If I misunderstood you, correct me.

A. Yes. So I will correct you.

Q. What?

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A. I will correct you.

I would do an adjustment, but not a diversified adjustment. I may do an activator adjustment, which is an instrument that basically has a very light impulse. If I were to do an adjustment, that would be the type I would do.

Q. And is the activator similar at all to the pettibon instrument or the ArthroStim?

A. I would say more similar to the ArthroStim.

Q. Any difference?

A. Yes.

Q. Any difference in what regard?

A. The ArthroStim -- A-R-T-H-R-O-S-T-I-M, arthro like joint, and then S-T-I-M. The ArthroStim is handheld similarly, but it is electrical. It's loaded so it can give repetitions of a very light impulse.

And it has different heads. Basically it can be a single tip, a rounded tip, a double pronged, or a larger double pronged. And it can, instead of the activator, which is a single impulse, the ArthroStim can do different frequencies. So it can be very separated like the activator -- one click, one click -- or it can go kind of a medium or it can do sort of a repetitive.

Q. Do you know any chiropractic materials in writing or otherwise that would indicate that either the ArthroStim or the pettibon device used by Dr. Main can cause or

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contribute to a stroke in a human being?
A. Do I know of any materials that would indicate that?
Q. Yes.
A. No.
Q. In your opinion are those both modalities that you would use with a person who presented with torticollis?
A. I wouldn't use the PTLMS on somebody's neck.
Q. Why is that?
A. It's pretty hard. I mean it's a deep manual. If someone has torticollis, they're oftentimes very pain sensitive anyway.
Q. Do you know if she used that on her neck or on --
A. I don't.
Q. -- her thoracic?
A. I don't. It just said PTLMS on her records.
Q. And it can be pulled a notch back so the impact is not as great; can it not?
A. I don't know what kind she has. There are different ones that are out there. So the one we have in the office, yes. But I don't know what kind she had.
Q. Here is Exhibit 9.
(Exhibit 9 marked for identification.)
BY MR. GREENER:
Q. Can you identify this for me?

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A. I believe that looks like the PTLMS from one angle, but I can't tell.
Q. Is that the type you have in your office?
A. No.
Yes, this is it. The first page I couldn't tell; the second page I can.
Q. And it is what again?
A. A PTLMS. Pettibon tendon ligament muscle stimulator.
Q. And is that the one that you -- you have one like that in your office?
A. That's what I was saying. No, we have a different one.
Q. Can I see that for a minute?
A. Yes.
Q. Do you know of any problems with the use of this particular device in terms of treating torticollis?
A. Do I know?
Q. You said you wouldn't use it. But do you know of any contraindication for using that on a person with torticollis other than increasing, perhaps, pain?
A. No.
Q. Here is Exhibit 10.
(Exhibit 10 marked for identification.)
/ / /

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BY MR. GREENER:
Q. Can you identify that for me, please?
A. This is the ArthroStim.
Q. And Exhibit 10. Do you have one of those in your office?
A. Yes.
Q. Do you use it?
A. Yes.
Q. And in your opinion this could be used on a person with torticollis?
A. Yes.
Q. And torticollis and dizziness?
A. Dizziness as a separate or with the torticollis?
Q. Yeah. Torticollis and dizziness.
A. It would be okay.
Q. And same question with Exhibit No. 9. The PTLMS. In your opinion could that be used with the standard of care on a person with torticollis and dizziness?
MR. MONTELEONE: On the neck?
MR. GREENER: Yes.
MR. MONTELEONE: Object to the form.
THE WITNESS: I wouldn't use it on the neck.
BY MR. GREENER:
Q. Whether you would or would not, in your opinion does it deviate from the standard of care or do you have any

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basis to render an opinion on that?
MR. MONTELEONE: Object to the form.
THE WITNESS: I am no longer certified in the technique. But when they demonstrated us using it, they did not have us run it on the back of someone's neck. Came up to the upper traps here.
BY MR. GREENER:
Q. Do you have an opinion as to whether the use of it on the neck would be a deviation from the standard of care?
MR. MONTELEONE: Same objection.
BY MR. GREENER:
Q. And maybe you do and maybe you don't.
A. No. I wouldn't say it was a deviation from standard of care, but it wouldn't be -- it was not how they demonstrated using the instrument.
Q. Can you tell me then -- and I want to go back to Exhibit 7 and go through that in a little bit more detail.
Could you just give me the opinions that you're prepared to testify to in court?
A. Can I give you my opinions that are not stated in here?
Q. No, no. Just set that aside. I just want you to tell me -- I don't think they are going to allow you to get on the stand and read that.
A. Okay.

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Q. I want to know what you're going to testify to in court.
MR. MONTELEONE: Object to the form. That's a tough question to answer unless the questions at trial are pending.
MR. GREENER: I don't think -- with all due respect, I don't think she's going to be able to get on the stand and read her opinion. I want to know what she is going to testify to.
I have her report and I understand that. I think I'm entitled to know what her express verbal opinions are going to be rather than her written.
MR. MONTELEONE: Right. All I'm saying is I don't know how any witness can answer that unless a question is pending for that witness to answer.
Her opinions are outlined in her report. I object to the form.
MR. GREENER: I thought I asked the question.
BY MR. GREENER:
Q. Can you tell me what are your opinions regarding whether or not Dr. Gallegos-Main deviated from the standard of care in her diagnosis, care, and treatment of the plaintiff on June 4 of 2007?
MR. MONTELEONE: Object to the form.
THE WITNESS: So just verbally what I think --

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BY MR. GREENER:
Q. Yes.
A. -- that she didn't?
Q. Exactly. I would like to know what you are critical of in terms of her diagnosis, care, and treatment.
A. As I stated in the report, the biggest thing that I had a problem with, just as a treat -- another chiropractic physician, was the fact that she -- so Martha -- Arregui?
Q. You're close.
A. Sorry.
-- presented initially in 2005 and she did a very basic examination. And then she returned in 2007 complaining of a new condition. And Dr. Gallegos-Main did a re-exam. However, for billing purposes, it would have been labeled as a re-examination, but it should have been a new examination because it was a new complaint.
So she was an existing patient, correct; however -- for example, if you had come to see me previously for a lower back issue and we treated it or not treated it, and you came back two years later and said you know what, now I have a shoulder problem, and if I didn't do a complete examination, a new examination of that shoulder, I believe that that is not good judgment on the part of the practitioner.

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Q. Do you believe that's a deviation of the standard of care?
MR. MONTELEONE: Object to the form.
THE WITNESS: That's what I'm saying. Standard of care for an average, prudent provider? Yes.
But, you know, you were asking before if the national board had adopted this as a standard of care or the California board has adopted it. I can't say with certainty yes or no because I don't know if it was adopted or not.
BY MR. GREENER:
Q. Okay. So just to refine this down. It's your opinion that her examination on June 4, because of presenting with a new symptomology that had not been presented in 2005, required a re-examine -- required a real examination rather than just a re-examination?
A. Yes.
Q. Okay. Let me take a step back.
The 2005 diagnosis, care, and treatment that you talk about in your report, Doctor, in your opinion does anything that Dr. Main did or didn't do in 2005 have any effect on what occurred in 2007 in terms of your opinion?
A. In terms of treatment of that injury?
Q. Yes.
A. No.
But as a reference point to say -- say in 2005 she

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had done -- she had had the same complaint and an examination had been done then, then a re-examination may have been more appropriate.
However, because in 2005 it was completely different set of chief complaints that she had come to Dr. Main for, taking that into consideration looking at 2007, she really didn't do much of an OPQRST.
Q. What is that?
A. OPQRST is a simple way that they taught us in school to break down a subjective complaint.
Q. What does it stand for?
A. O -- there's some variance depending on what people say. But O is object. What is it, what is the problem. P is pain. So a lot of times is it painful, what kind of pain, where is the pain. Quality. Q is quality. The type. So is it dull, is it throbbing, is it sharp, is it achy. S is sight. So show exactly where it is. And T is timing.
Q. What is it?
A. Timing. Is it better in the morning, is it worse at night.
Q. When did it onset?
A. When did it start. You know, what are things -- P can also be palliative. That's why I was saying there's some variance. What makes it better, what makes it worse.

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And then oftentimes in there is rating the pain on a scale of one to 10. So one being very minimal, 10 being excruciating.

And that oftentimes is the intake, the subjective part of what the patient will bring to you, or you should be asking them. They say a lot of it can come from the symptoms of what a patient has. Sometimes it's not so much the examination, it's a lot of times being very good at looking at what the patient is telling you.

Q. Just to kind of move us along.

A. That's fine.

Q. Listen to this question carefully. I want to make sure we are on the same page.

If I understand your testimony correctly, what Dr. Gallegos-Main did or did not do in 2005 doesn't have any relationship to what occurred in terms of the diagnosis, care, and treatment of the plaintiff on June 4 of 2007?

A. What I'm saying is that in terms of occurrence, yes, she did not do a complete examination.

Q. In 2005 -- 7?

A. 2007.

Q. She did a complete exam in 2005.

A. There were some things that were missing, but it was more complete than the 2007 for sure.

Q. Well, in your opinion was there anything done in

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2005 that deviated from the standard of care?

MR. MONTELEONE: Object to the form.

THE WITNESS: Like I said before, I don't know if there is -- if the national board adopted that standard of care.

BY MR. GREENER:

Q. But in your opinion. In your opinion was there anything done --

A. My standard of care?

Q. Yes.

A. In 2005 it really wasn't a great exam to begin with. But it was not the same body part, it wasn't the same complaint.

It was just those records I think were provided as a base or a reference point.

Q. But you can't tell me whether there was a deviation from the standard of care in 2005 in terms of her diagnosis, care, and treatment?

MR. MONTELEONE: Object to the form.

THE WITNESS: I don't think she was ever really treated.

BY MR. GREENER:

Q. In terms of what Dr. Main did.

A. No. I think there were some things that were missing. But the standard of care as you're trying to ask

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me for is -- I would have done it differently.

Q. You would have done it differently --

A. Yes.

Q. -- but do you know of any standard of care that was violated by that?

That's what I'm trying to find out. If you do, tell me; if you don't, tell me that.

MR. MONTELEONE: Object to the form.

THE WITNESS: As stated in the report there were -- in the 2005 visits or visit, I think she didn't make the second visit. So the subjective part, the clinical profile, if you look on page 1 at the bottom, one, two, three, four, five, and six.

BY MR. GREENER:

Q. Page? Which one at the bottom?

MR. MONTELEONE: Which exhibit number?

THE WITNESS: Exhibit No. 7, page 1, at the bottom where it started with 1, 2 -- and then continue onto page 2 -- 3, 4, 5, 6.

BY MR. GREENER:

Q. Yeah.

A. In 2005 that was covered much better. Where she sort of dropped the ball a little bit was on the examination in 2005.

Q. And where did she drop the ball in that regard?

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A. There is somehow patient noted, but she didn't really mention -- she did one, I think one or two, maybe three orthopedic tests, which for each body part there can be anywhere from two at minimum to, you know, however many you wanted to do, say like the lumbar probably has at least 15 that you could probably use or do to help you in your diagnosis.

Q. Are they discretionary or are they essential?

A. It depends on what the problem the patient is presenting with.

Q. Are there any essential tests that she didn't do in your opinion?

A. She didn't mention anything about muscle involvement. She did dermatomes and she did myotomes in 2005. But I didn't see that in 2007.

Q. In all fairness, isn't the 2005 exam -- let me strike that and back up.

Have you done IMEs? Independent medical examination evaluations.

A. No, I have not.

Q. Have you ever looked at other chiropractor's chart notes and records?

A. IMEs?

Q. No. Have you ever had occasion to review other chiropractors chart notes or records to see how complete

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they are, to see what is written down and what's not?
A. In passing perhaps with other colleagues, but not for the purposes of reviewing the quality of their chart notes.
Q. In doing this in passing, have you noticed that some chiropractic physicians are more detailed in what they are writing down in the chart notes and in their records than others?
A. Yes.
Q. And isn't that kind of part of human nature that some people are more meticulous about writing down each and everything they do and others simply don't write down as thoroughly as others?
A. To a degree. But if you have a chart note and someone came in to see you and if you were to pass that on to, say, even another chiropractor, perhaps even an MD says what happened on this visit, you would want to be able to explain to them what transpired.
If there is nothing written down, they don't have anything to reference as to what they had, what they complained of, what you did.
Q. But that would mean that maybe the chiropractor failed to adequately record everything done?
A. Yes.
Q. But it doesn't necessarily lead to the conclusion

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that the chiropractor because of not recording something and actually having done it violated the standard of care, does it?
MR. MONTELEONE: Object to the form.
THE WITNESS: But if they didn't write it down, how do you know it was done?
BY MR. GREENER:
Q. Well, if you believe the chiropractor and he or she says it's done.
A. But that's hard to say. I mean if you take it on good faith, perhaps. But if you're trying to track someone's treatment, then it's not helpful.
Q. Let's go back for just a minute. I would like to have this understanding with you so we can move through this as expeditiously as possible.
In the second paragraph of Exhibit 7, you say:
"An apt definition of standard of care can be defined as 'The level at which the average, prudent provider in a given community would practice. It is how similarly qualified practitioners would have managed a patient's care under the same or similar circumstances.'"
Let's use that as the criteria or the definition when I ask you -- going forward -- when I ask you do you

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have an opinion on whether, what are your opinions on standard of care in terms of this particular case.
Can we have that understanding? I think that might be the easiest way to do it.
A. Okay. Yes. That would be great.
Q. Okay. Now going back to that.
Then you have talked about -- and let's focus on your opinions on the deficiency in the exam or the re-examine. What are those?
A. As I stated in the report --
Q. Okay. Why don't you cite me where you are in the report.
A. Okay. We are in Exhibit 7. And page 3, the first paragraph. The last sentence starts:
"Lacking is follow up by Dr. Gallegos-Main adding to her intake as to the onset of her current chief complaint as well as palliative or provocative measures for her three complaints other than icy hot for her right wrist/thumb pain and weakness."
Q. In your opinion is the deviation of the standard of care within the definition we are talking about for her to have failed to record that in her chart?
A. Yes.

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MR. MONTELEONE: Object to the form.
THE WITNESS: Yes.
BY MR. GREENER:
Q. Anything else other than that failure to record with regard to this point?
A. The next paragraph states --
Q. Let's stay with this point for a minute.
Anything else other than the failure to record in the notes, in the chart notes?
A. For?
Q. For the last sentence of that first full paragraph on page 3 of Exhibit 7.
A. Is there anything else for the OPQRST? No.
Q. Is there anything else about that particular sentence other than the failure to record that in her chart notes that you're saying is a deviation of the standard of care?
A. No, that was the initial one.
Q. Okay. All right. Go on with the next one.
A. The next paragraph starts with Dr. Gallegos-Main. And she did range of motion, myotome is for muscle and dermatome is sensory for the skin. And that's checking the levels of each nerve in either the neck or the lower back.
And so because Ms. Arregui -- gosh, I'm not saying it right.

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Q. You can just say the plaintiff.
A. Okay. The plaintiff was complaining of the right wrist and thumb, she did do a check of the dermatomes and the reflexes.
Q. Okay. Isn't this all in 2005?
A. Yes. That's what you asked for.
Q. Okay. No. I wanted to know about 2007. I'm sorry. Let's leave 2005.
Let's go to your deviation of standard of care in 2007.
A. That would be the next page on page 4.
Q. And where does that start?
A. It is the one, two, three, fourth paragraph. Well, fifth if you include -- because the very top one is a continuation.
Q. Right.
"Based on," right?
A. Yes -- no. The next one. "Moving onto."
Q. Okay.
A. Moving onto examination (sic) performed June 4, there's no subsequent OPQRST -- that we just discussed -- or her new complaint.
Q. Okay. And that's the recordkeeping issue?
A. That's recordkeeping.
She's -- eight out of 10 was circled. But on the

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deposition, the plaintiff said she doesn't recall, she might have verbally stated it, but she doesn't recall actually marking it.
And I basically explained in this paragraph why, as I just stated to you previously, why because although she was a returning patient, it was a new chief complaint. So she should have done a much better job of taking the OPQRST, taking the history of what happened, if there are any new issues that happened in the last two years that might affect either this new chief complaint or just affect her health history in general.
Q. So you're critical of her history that she took that she recorded in the chart notes?
A. Uh-huh.
Q. You don't feel that those comply to the standard of care; is that correct?
A. No. That's correct.
Q. Okay. And then anything else about the history?
A. That's the history. I mean the OPQRST is --
Q. So we have covered the history?
A. The history was that specific chief complaint, but she also didn't find out if there was anything that transpired in the past two years, sometimes patients don't realize, that might affect the new issue of why they are there.

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Q. And then let's go to the -- we get into the exam section. Let me back up for a minute.
I'm sorry. Strike that.
Go to the last paragraph on page 4. There you talk about -- and we don't need to read it specifically. But you talk about the examination.
Do you have an opinion as to whether or not the examination deviated from the standard of care?
A. Yes.
Q. And your opinion is yes, it did.
In what respect did it?
A. She marked range of motion, but she didn't mention anything about, again, about soft tissue. So soft tissue meaning muscles, ligaments, tendons, skin, palpable pain in certain areas.
She only marked that there was one orthopedic test that was performed. And even with torticollis, it's very painful to move, even if she attempted to do some other ones, she didn't mark it on the form that they couldn't perform them. It was just -- the assumption was, that I took looking at the examination form, that it wasn't done.
Q. In your opinion that could have been due to the inability because of pain of the patient in having the test performed?
A. It's possible.

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Q. So you don't know whether or not Dr. Main attempted to or considered performing those other tests?
MR. MONTELEONE: Object to the form.
BY MR. GREENER:
Q. Or do you know if she did?
A. I don't know.
Q. Okay. And go ahead then.
The leg check really has nothing to do with the PICA stroke, does it?
A. The leg check is -- no. The leg check is to see if you have a patient either prone or supine, S-U-P-I-N-E, on the table, that is, to see if they have what's called a functional short leg. So an anatomic short leg, but functionally it can be from muscle spasm.
Q. That paragraph deals with her exam, which you are critical of.
Let me be clear on this. In terms of your opinion on the examination performed by Dr. Gallegos-Main, are you critical of the examination or of what was recorded?
In other words, was she a poor record keeper?
A. I have no way --
MR. MONTELEONE: Object to the form.
THE WITNESS: I have no way to make that distinction.
/ / /

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BY MR. GREENER:
Q. Okay. Then next we go onto the top of page 5 onto the x-ray, right?
A. Yes.
Q. And what is your opinion -- which is part of the exam, of course, right?
A. Yes.
Q. What is your opinion on the x-rays performed?
A. She, as I stated in this paragraph, she did one view. Typically two views are considered a full series. If you do -- she did a lateral, so looking from the side.
Whereas, a complete view would be to take a look at it from the other dimension, from the front or the back. And she only did one.
And if she was stating that she did pettibon, I have some familiarity with it -- and this I don't think has changed since I have taken the classes -- but a full pettibon series they consider seven views to be a complete pettibon series.
Q. Okay.
A. So of those five are cervical views and two are lumbar.
Q. In the last sentence of, I think it's the first full paragraph on page 5, you write:
"With Ms. Arregui in torticollic

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spasm, according to Dr. Gallegos-Main, both would be appropriate based on a complete examination and history, though I personally might have exchanged the PTLMS for the vibracussor, a vibration instrument associated with the ArthroStim, all of which are used in my personal practice."
I read that correctly, didn't I?
A. Yes.
Q. And we've talked about that, right?
A. Yes.
Q. That's your comment and your opinion on that particular subject?
A. That is my personal opinion.
Q. In the next sentence, the first full sentence of the next paragraph, this really is your opinion, isn't it?
"In summary, Dr. Gallegos-Main DC performed both 2005 and 2007 examinations below the standard of care within the chiropractic" possession -- "within the chiropractic profession." Pardon me. "There are several instances where she failed to gather case history information and then failed to perform a complete

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examination of the affected areas."
I read that correctly, didn't I?
A. Yes.
Q. Isn't that the essence of your opinion?
A. Yes.
Q. And then you go on to indicate that you're assuming that the medical reports are true and complete.
And then you go on and talk about some of the other matters that we have already discussed.
I want to make sure I am clear on this. Do you have any other opinions other than what you have -- you and I have talked about here on whether or not Dr. Gallegos-Main deviated from the standard of care?
MR. MONTELEONE: Object to the form.
THE WITNESS: Any additional opinions not stated here?
BY MR. GREENER:
Q. Yes.
A. Not that come to me right now, no.
Q. All right. And I want to just touch quickly on the last paragraph. In the last paragraph of page 5, you write:
"Lastly, when Ms. Arregui began to experience dizziness and uneven gait, and her inability to drive herself home, this

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should have alerted Dr. Gallegos-Main that Ms. Arregui was having an unexpected reaction and as a health professional, Dr. Gallegos-Main should not have let her leave alone without assistance at a minimum and requested emergency room transport at a" minimum (sic).
A. Maximum.
Q. I read that correctly, didn't I?
A. No. You put minimum at the very end instead of maximum.
Q. Maximum. You have the maximum and the minimum. Pardon me. Thank you.
And are you saying in your opinion the standard of care required Dr. Main to do the things that you're mentioning here or is this just an observation?
A. An observation.
MR. MONTELEONE: Object to the form.
THE WITNESS: Observation.
I don't think that there's anything written down. But for patient safety and other people's safety -- you know, I think this is independent of being a health care professional as well. If you see someone who is not able to drive themselves or ambulate alone, they should be -- require some sort of help.

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BY MR. GREENER:
Q. Do you have any facts, though, that would show that Ms. Arregui was unable to drive or was unable to walk?
A. Nothing other than her testimony at the deposition. That's all the record that I have.
Q. So I want to make sure I understand this. You are not going to express an opinion in this case then that Dr. Gallegos-Main's failure to either drive or make sure that the plaintiff was driven home was a deviation from the standard of care?
MR. MONTELEONE: Object to the form.
THE WITNESS: I don't think that that is required; but, again, recommended.
BY MR. GREENER:
Q. Something you would do?
A. I would do, yes.
Q. And the second part of that. In your opinion was -- we know Dr. Main didn't send Ms. Arregui to an emergency room or to any medical doctor.
In your opinion was her failure to do that under the circumstances a deviation of the standard of care?
MR. MONTELEONE: Object to the form.
THE WITNESS: Was a deviation? No. I think as I understand your question.
/ / /

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BY MR. GREENER:
Q. Okay. Then you said you hadn't seen the medical records from Weiser.
A. No.
Q. And I will show those to you. Here is Exhibit -- I will put it right here. Exhibit 11.
(Exhibit 11 marked for identification.)
BY MR. GREENER:
Q. I want to go through these quickly if we can. Exhibit 11 is a multi-page document. It's an emergency room record from 6/5 of '07 at the Memorial Hospital in Weiser.
It's got Bates numbers. Those are these numbers right here, Doctor. ARR183, 00183. Do you see that?
A. Yes.
Q. And the one I have have those numbers consecutively, hopefully, up to 187.
Are we on the same document?
A. Yes.
Q. You have not seen this before?
A. No.
Q. Can you read this -- I'll represent to you, just to move this along, the doctor's name is Wootton, W-O-O-T-T-O-N. Do you see that?
A. Yes.
Q. Can you read the nursing assessment? I can't read it very well myself.
A. Reports went to chiropractor for neck pain -- looks like CD. Nausea?
Q. That's all right. Let's move along with this.
The final impression at the bottom is cervical spasm, migraine headache.
That doesn't deviate to too great an extent by the diagnosis of Dr. Gallegos-Main, does it?
MR. MONTELEONE: Object to the form.
BY MR. GREENER:
Q. Let me ask you this. In your opinion is that a diagnosis that is different from torticollis?
A. As the terms of ICD code, perhaps.
Q. In your mind as a chiropractic physician.
A. Well, spasm. There are different codes for muscle spasm. So, you know, muscle -- right cervical spasm indicates muscle, but, like I was saying, I don't know what the ICD9 code is because there are different codes, but it would be similar.
Q. The way that you understand the plaintiff to have presented, could this have also been a migraine headache?
A. I don't recall headache being mentioned in the 2007.
Q. All right. There are various tests done. If we look at the -- look at the second page, Bates number 184.

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I think this is the physician's signature in the lower left-hand corner. There he goes through the history, the physical, and his diagnosis.
His diagnosis is cervical muscle spasm, migraine headache, right? Do you see that?
A. Yes.
Q. And then his plan was, if we look at plan, to discharge her with Ibuprofen, with Vicodin, with . . .
A. I think it says Flexeril.
Q. Yeah. Flexeril. Exactly.
And what are the last two entries?
A. Follow up PMD something. I don't know. I can't read it. I don't know what it says.
Q. So here we have a medical doctor who is looking at this plaintiff on the next day with the symptomology doing the tests that he did and sending her home, right?
A. I thought it was -- oh, no. Same day.
Okay. The next -- I thought she saw -- no. It was the 4th.
Q. Yes. This is the next day.
A. Okay.
Q. Is that of any significance to you in terms of your opinion?
A. No.
Q. Okay. You do not disagree with

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Dr. Gallegos-Main's diagnosis, do you?
A. No. It's a working diagnosis.
Q. So you told me, I believe, about all of the areas in Dr. Gallegos-Main's diagnosis, care, and treatment of the plaintiff where there was a deviation from the standard of care; have you not?
A. Yes.
Q. Okay. Let's see if we can get through this quickly.
MR. GREENER: What are we up to? 12?
MR. MONTELEONE: 12.
(Exhibit 12 marked for identification.)
BY MR. GREENER:
Q. Here is what I am going to represent to you is the chart from Dr. Gallegos-Main's clinic. And if we look at it, I guess the first page doesn't have a Bates number on it, but if you look at the second page in the lower right-hand corner it is OneLife00002. And it continues on through Bates number on this last kind of foldout deal, this is -- where is it? -- it's right there. OneLife00040.
Are we on the same document?
A. Yes.
Q. Is this the chart that you reviewed?
A. I think so. I haven't looked at it yet, but I think so.

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Q. Let's go to Bates number 18. Can you do that for me, please?
A. Okay.
Q. And this particular document -- this is on the plaintiff. If we look in the upper right-hand -- well, look at the right-hand margin.
Can you find the date where it says under rehab care start date 6/4/07? Do you see that?
A. Yes.
Q. And what do you find recorded here based upon your background and expertise as a chiropractor?
A. What do I find?
Q. What has she recorded on this particular page?
A. She's recorded a visit frequency, recommended visit frequency with three times a week with her initials.
Q. And under complications, cervical, what has she recorded there?
A. Spinal degeneration. It looks like there's two circles. One encompassing one and two and then the second one circling two.
And below that it says cervical. And it looks like head forward posture and reversed curve.
Q. And we're talking about lordotic curve?
A. No. A reverse curve is a kyphotic.
Q. Kyphotic.

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Okay. And under notes, what has she written there?
A. I don't know.
Q. You can't tell?
A. No.
Q. And what is this chart? Pardon me.
What is this part of her chart called, to your understanding?
A. I don't know what she would call this. Maybe recommendations?
Q. Are you critical of any of her recordkeeping on this page? Bates number 18.
A. There really isn't much here. I think this is for pettibon.
Q. Pardon me?
A. Looking at the rest of the page, I think this is for pettibon.
Q. And go to page 19.
Well, let me ask you this. Are you critical of anything done on that page in terms of recordkeeping?
A. Well, if she's doing pettibon, she doesn't have anything marked as to what -- I mean she just has the basic rehab care goals, but she doesn't say -- I am assuming the three is next to increased strength. But it doesn't say what she is supposed to do.

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Q. In the upper left-hand corner of the next page, Bates 19 of Exhibit 13 --
A. Okay.
Q. -- there it shows an exam.
Have you seen that before?
A. This page?
Q. Yes.
A. Yes.
Q. And she has recorded things she has done on her exam. Is there anything that she hasn't done here that you would be critical of in terms of standard of care that would have been required?
A. Well, this isn't really an examination. It shows what her x-ray was.
Q. Okay.
A. You can see under the exam where the box is C1. In the parentheses you can see that these are what the recommended numbers should be and what the plaintiff's are.
But you can also see that she is missing from disk height down as well as the little dots right here to the left of the spine are the markings of where you would put the A to P markings.
I'm assuming -- the date isn't down, but I am assuming it's the 4th.
Q. And what critical information is missing from this

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that in your opinion should be there?
A. Well, if she's doing pettibon -- well, she didn't do the x-rays, so there is no way she can have the markings here.
Q. Is it your testimony she didn't do an x-ray on the June 4th?
A. She did just a lateral x-ray, but she didn't do the rest of the pettibon x-rays.
If she were doing rehab for pettibon, as stated on page 18, she would need the other ones.
Q. Let's go to Bates number 20. In the daily treatment notes, if you would look under visit number 1.
Did you note this when you were reviewing these documents?
A. I saw it. And I didn't know what the C-slash -- I don't know if it's L or chief complaint. Maybe C/C.
But I saw stiffness in neck and dizziness and initials.
Q. And then in the next entry called to check up in p.m., no answer.
Do you see that?
A. Yes.
Q. Would that be something that would be -- if she called to check on her that evening, would that be something that would be in compliance with the standard of care in

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your opinion?
MR. MONTELEONE: Object to the form.
THE WITNESS: Standard? I think that's more of a preference. I don't know if it's a standard of care.
BY MR. GREENER:
Q. Next page. Does that include her physical exam?
A. Yes.
I think part of it too is what she marked on the previous page on OneLife20 is what she did as well.
Q. That's right. Right at the top.
A. Uh-huh.
Q. Okay. Let's leave that. Set that aside.
So we have covered every criticism that you have of her chart note-taking, correct?
A. Of the examination, yes.
Q. Any other deficits in her chart notes?
A. Well, at the bottom of that page you were asking about -- let me see. Page 21.
At the top she has a word I can't read. Cervico-genic vertigo. And she has torticollis and some range of motion with yes circled, which I am assuming is painful, but I don't know what that means.
And she didn't do a motor check. She did do a dermatome check.
But in here on her examination form, she has a

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place where you can do additional notes. And she has four orthopedic tests and only one was circled.
As I was saying before, I don't know. Maybe she did do them and couldn't perform them, but it wasn't marked.
Q. I want to get into that in just a minute.
A. Okay.
Q. So I will hand you what is marked as Exhibit 14.
MR. MONTELEONE: Should we make it 13, Counsel?
MR. GREENER: I thought -- oh, I'm sorry.
MR. MONTELEONE: The chart is 12.
MR. GREENER: Did I miss one? Pardon me.
MR. MONTELEONE: Yeah.
(Exhibit 13 marked for identification.)
BY MR. GREENER:
Q. Here is Exhibit 13. Pardon me.
A. This looks like an extra one. I think I have one.
Do you have one of these?
Q. That's for the court reporter.
A. Oh.
Q. I have handed this to you. It's Exhibit 13. Now I have to find it in my stuff.
I'm going to represent to you that Exhibit 13 are Dr. Gallegos-Main's responses to interrogatories.
Did you have a chance to look at these?
A. I have never seen this before.

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Q. All right. Then I want to go through this with you real quickly. And I would like to have you look at -- for starters -- if you would, please, page 12.
Just in the interest of time -- forgive me. Let's go to page 14. And on page 14 Dr. Gallegos-Main is responding to interrogatory number 18, which says:
"Please set forth in specific detail each and every examination of plaintiff you performed; and, for each examination please state."
And then there are various items requested.
And then the answer really starts, that I want to focus with you on, starts right at the bottom of the second full paragraph right under answer to interrogatory number 18.
Do you see where it says "during plaintiff's second visit on May 10, 2005"?
A. Yes.
Q. And I want to read -- I would like to have you read along with me and make sure I'm reading accurately. And it says:
"Plaintiff began by watching an orientation video. Following the orientation video, defendant and plaintiff discussed the information contained on the

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video and reviewed the treatment plan selected by plaintiff. Defendant then performed a basic exam of plaintiff before making any adjustment, including looking at her feet, looking at her spine, and performing other standard checks, which is common with all new patients. Plaintiff was then escorted to the adjustment room and defendant performed her first adjustments on plaintiff. Defendant adjusted plaintiff's cervical spine at C4 using an activator tool and also made adjustment at C6 using the diversified technique. Defendant then used the ArthroStim device on vertebrae T4-T9. Defendant" then "used the Thompson technique adjustment on plaintiff's pelvis."

Was there anything about what is described here that would have been a deviation of the standard of care at this 2005 session?

MR. MONTELEONE: Object to the form.

THE WITNESS: With this general statement, no. But looking at the exam form, yes. Because it says performing standard checks, but not that many --

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BY MR. GREENER:

Q. They are not recorded.

A. -- checks were done.

Q. Bad recordkeeping.

MR. MONTELEONE: Object to the form.

BY MR. GREENER:

Q. Right?

A. I would say so or bad examination.

Q. Okay. Then if we will drop down to the second paragraph -- or the last full paragraph on page 15. This has to do with plaintiff on June 4, 2007; does it not?

A. Yes.

Q. And there it says plaintiff presented to defendant -- you know, maybe it would be easier for me to just identify this.

Would you read on that answer from there to the end? And then I would like to ask you if you see anything that is set forth there that is in violation of the standard of care?

A. Okay. So start at the very beginning?

Q. Where it says plaintiff presented to defendant.

A. Okay. Plaintiff presented to defendant --

Q. Just --

A. Oh, just read it?

Q. -- read it to yourself.

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A. Oh, okay.

Q. Read over to, if you would, the beginning of interrogatory number 19.

A. 19?

Q. Yeah, on the next page. Just stop there.

A. Okay.

(Pause in proceedings.)

THE WITNESS: Okay.

BY MR. GREENER:

Q. If her answers set forth in the section that we have been talking about from pages 15 through 16 of the responses to plaintiff's first set of interrogatories request for production of documents and request for admissions are accurate in terms of what happened, is there anything there that is recorded that would be a deviation of the standard of care?

MR. MONTELEONE: Object to the form.

THE WITNESS: She didn't do an examination. I mean she examined, but -- okay. Can I explain?

BY MR. GREENER:

Q. Yeah. Sure.

A. In the sentence where it says:

"Nothing in the x-rays caused defendant any concern. Defendant then examined plaintiff and gave what treatment

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she could based upon plaintiff's current status."

If she had done a complete examination, I would say that that is a fair and accurate judgment. But you can't really recommend a treatment plan if you haven't done a fair examination.

Q. So you're quarreling with whether or not she did a fair and complete examination?

A. Yes.

Q. Under circumstances where a patient presents in a lot of pain and is requesting immediate relief, would a reasonable chiropractor maybe not do an extensive examination, but do an abbreviated form of an examination?

A. Yes.

Q. And that's acceptable and within the standard of care, isn't it?

MR. MONTELEONE: Object to the form.

THE WITNESS: Yes.

But they couldn't recommend a complete treatment plan based on a modified or a brief examination.

BY MR. GREENER:

Q. In terms of taking a history -- let's take that component -- likewise, when a patient presents in a significant amount of pain and is a repeat patient, can there be certainly an abbreviated kind of history done just

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in terms of focusing on where is the pain, what is going on?
A. Yes.
Q. And that would not be contrary to the standard of care?
A. Focusing on pain and finding out what is going on. But then also trying to complete a palpatory examination or at least marking what -- if they couldn't perform something, noting that. I have done that before. I know that they cannot do these other orthopedic tests that would be probably within the standard of care and I would note that on the chart.
Q. Of course, some patients could present -- you have patients present in such an amount of pain that you can't do any orthopedic exams, right?
A. You could try to do -- there's two cervical compression and distraction where they really don't have to move where you try to lift and compress. You could do those at minimum.
Q. And that's part of the exam; but going back to the history.
When someone is coming in and they're really having problems, have you on occasion taken a real abbreviated history in terms of where is the pain, what is going on here, you have seen the patient before, and then you don't go into anything really much further on the

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history?
A. I would do more than that on the history.
Q. What would you do?
A. If they came with the same complaint of torticollis and spasm?
Q. Right.
A. How long have you had it, has it gotten worse. The P part of OP. Has it gotten worse, has anything made it better. Have you seen anyone else, have you gone to see your primary care physician. What other things have you tried at home. Are you sleeping through the night. Knowing if the pain is keeping them up at night is an indicator oftentimes of how severe it is.
Q. And you don't know whether Dr. Main did that or did not do that?
A. I do not know that.
Q. Would you record all of that during taking the history while this person is in a lot of pain? Would you go through all of that and record all of that?
A. I would chart note very quickly. Basically whatever makes it worse, makes it better. Pain started last Tuesday, has gotten worse. Or pain was really bad last week, has gotten slightly better, but not good. Scale of one to 10.
Q. So just talking about what we have been talking

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about here with a person presenting with a tremendous amount of pain, doesn't a chiropractor approach that patient with what is functionally necessary for the patient under the patient's circumstances where they are there in that type of physical condition?
A. I am not sure I understand your question. "Functionally necessary"?
Q. Yeah. You didn't understand that term.
In other words, what will best get that patient from point A to point B where you can see if you can do something to alleviate the pain or determine what else to do?
A. Is the chiropractor equipped for a torticollis?
Q. Let's use torticollis. Strike that. I think we have covered everything we need to do there.
So you are not going to do any additional work and modify your opinion, I trust?
A. Not that I --
MR. MONTELEONE: Object to the form.
THE WITNESS: Not that I am aware of. Unless something in terms of evidence comes up that someone would ask me to render my opinion upon.
MR. GREENER: Counsel, if there is any additional work done, we would like to be advised of it, if there are any modifications. We would like to take the deposition or

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get updated on the deposition of the witness on that.
BY MR. GREENER:
Q. In your opinion are chart records in terms of completeness all that important if the chiropractic physician was able to reach a correct diagnosis?
A. Chart notes are very important.
Q. But a doctor can maybe not completely fill out the chart notes and still reach a correct diagnosis and properly diagnosis and care for a chiropractic patient?
MR. MONTELEONE: Object to the form.
THE WITNESS: It's possible, but a lot more likely if do you a complete examination.
MR. GREENER: Okay. That's all I have. Thank you very much.
MR. MONTELEONE: Let me ask a few questions to clarify things a little bit.

EXAMINATION

BY MR. MONTELEONE:
Q. If you would look at Exhibit 13, which are Dr. Gallegos-Main's answers to plaintiff's first set of discovery and go to interrogatory 28, please.
MR. GREENER: What page is that on?
MR. MONTELEONE: That is on page 20.
/ / /

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BY MR. MONTELEONE:
Q. Okay. And in there the plaintiff asks the defendant chiropractor:
"Did you render any treatment to plaintiff which is not recorded in your medical records?"
And Dr. Gallegos-Main responded:
. . . "Defendant responds that all treatments and appointments which defendant had with plaintiff are reflected in the chart notes and records produced herewith . . ."
Did I read that correctly?
A. Yes.
Q. Does that give you some level of comfort that if any treatment was rendered, it should be recorded in Dr. Gallegos-Main's notes?
MR. GREENER: Object to the form.
THE WITNESS: Yes.
BY MR. MONTELEONE:
Q. And the fact that certain items, particularly three of the four orthopedic tests, are not shown to have been performed in Dr. Gallegos-Main's records, does that give you a level of comfort that, in fact, those tests were not performed and it was not simply a recordkeeping

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oversight?
MR. GREENER: Same objection.
THE WITNESS: Yes.
BY MR. MONTELEONE:
Q. Same series of questions with respect to interrogatories 29 and 30.
Interrogatory number 29 asks Dr. Gallegos-Main did she receive any information from any nurse, doctor, or other health care provider about plaintiff's medical conditions.
And she responds:
. . . "she did not receive any information from anyone about plaintiff's medical condition that are not recorded in her OneLife medical records."
Did I read that correctly?
A. Yes.
Q. And does that give you a basis from which to believe as an expert witness in this case that if something was in the medical record, it occurred; and if it was not in the medical record, it did not occur?
MR. GREENER: Object to the form.
THE WITNESS: I take what was written in the record as what happened.
BY MR. MONTELEONE:
Q. And then with respect to interrogatory number 30

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from the defendant. Dr. Gallegos-Main was asked "did you give any recommendations or orders for treatment" that are not recorded in your medical records.
And Dr. Gallegos-Main, the defendant, responded "that all of her recommendations and orders for treatment are recorded in the OneLife medical records."
Does that also give you a level of comfort that if something is in the medical record, it occurred; if it's absent, it did not occur? And we are not talking about a matter of simply medical recordkeeping oversight?
MR. GREENER: Same objection.
THE WITNESS: Yes.
BY MR. MONTELEONE:
Q. When you were talking about OPQRST, what does the R stand for?
A. Radiation.
Q. And is that used in the diagnostics model, is that referring to the type of pain the patient is experiencing?
A. Not the type, that's quality.
Radiation is if it goes, if it travels. So if it's localized to one area or if it moves to another place.
Q. Any reference in the defendant's medical records from the 2007 visit that Martha Arregui was experiencing any radiating pain?
A. No. From what I saw, it was the neck. I believe

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it was the right side of the neck.
Q. And from reviewing the defendant's medical records, is it your understanding that the working diagnosis was torticollis?
A. Yes.
Q. Now has it been long known in the professional chiropractic community that vertebrobasilar artery strokes can be caused by diversified manual adjustment of the cervical region?
MR. GREENER: Object to the form. Lacks foundation.
THE WITNESS: If it is applied with too much force or too much rotation. Possibly.
BY MR. MONTELEONE:
Q. And is there literature that discuss that association between VBA strokes and cervical adjustments?
A. There is such in the literature. It's very rare, but there is medical research on that.
Q. In the literature that discusses it, do those VBA strokes occur in people under 45?
MR. GREENER: Object to the form.
THE WITNESS: Yes.
BY MR. MONTELEONE:
Q. When Dr. Gallegos-Main, the defendant in this action, treated Martha Arregui, was Martha under 45 years of

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age?
A. I believe she was 39 or 40, so yes.
Q. Why is there this known association between VBA strokes and cervical manipulation? What's the anatomy and physiology that is going on that supports that association?
MR. GREENER: Object to the form. Lacks foundation.
THE WITNESS: The anatomy is reference to the circle of Willis. As the vertebral artery goes up the neck, it circles around the atlas, which is the C1, and can be stressed with a lot of excessive rotation.
BY MR. MONTELEONE:
Q. Does that artery travel through the foramen of C1?
A. Yes.
Q. Does that make the artery particularly susceptible to injury when the cervical region is torqued on as in a cervical manipulation or adjustment?
A. If it's done with too much force or rotation, yes.
Q. In the name of saving time here, I just want to touch on a couple of things that counsel asked about.
Do you recall Mr. Greener asking you about acceptable risk for the patient?
A. Yes.
Q. Does acceptable risk for the patient require that the patient be fully advised of the risks, benefits, and

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alternatives of a given procedure so they have informed consent?
A. Informed consent is part of our initial paperwork. So a stroke is mentioned -- I don't believe it's mentioned specifically with a cervical adjustment. But it says it's mentioned in there that this is a possibility; very rare, but it's there.
Q. In reviewing Dr. Gallegos-Main's chart, did she ever mention that stroke was a possible outcome from her chiropractic visit with Martha Arregui?
A. Not that I --
MR. GREENER: Object to form.
THE WITNESS: Not that I recall.
BY MR. MONTELEONE:
Q. You were asked by counsel about whether you're mindful of certain risk categories that a patient that you work on may have.
Does that include the potential risks for a VBA stroke resulting from a cervical manipulation?
A. Yes. It's something that is mentioned a lot in the community. And it's something that I think all chiropractors are aware of and don't want to want to happen to them.
Q. In reading Martha Arregui's deposition transcript, the portions that were provided to you, did it contain a

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description of a cervical rotational adjustment?
A. She -- according to her deposition, she didn't know what it was. But she said that her head -- she said her head was rotated from side to side when she was both face down and face up. So I don't know.
According to the patient, I mean according to the plaintiff -- I'm just trying to recall from the deposition. The patient said she was face down and her head was rotated from side to side, both face down and face up. According to her testimony she doesn't know if that was an adjustment or not. But her head was rotated. So I don't know because she doesn't know.
Q. Would the rotation of the head as described by Martha Arregui in her deposition be consistent with a cervical rotational adjustment in chiropractic?
MR. GREENER: Object to the form.
THE WITNESS: It's possible. It could also be the range of motion, but it's possible it was an attempt to an adjustment as well.
BY MR. MONTELEONE:
Q. Even with it being done with face up and face down?
A. You can do a cervical adjustment face up or face down.
Q. Right.

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But with the description that the head was turned side to side in both the face down or supine position as well as face up, is it more likely that that is a cervical rotational adjustment than a simple ROM check?
MR. GREENER: Same objection.
THE WITNESS: Yes. Because you wouldn't necessarily need to do range of motion both prone and supine, but I don't know.
BY MR. MONTELEONE:
Q. To wrap up. I want to ask you about what a reasonable and prudent chiropractor would do. I want to get away from this term standard of care.
With a diagnosis of torticollis, was it reasonable and prudent for Dr. Gallegos-Main to have performed any cervical rotational adjustment presuming that adjustment occurred?
MR. GREENER: Object to the form.
THE WITNESS: No. If reasonable and prudent is the basis that you're taking it for, no. That would not be a recommended treatment.
BY MR. MONTELEONE:
Q. And it would, therefore, by definition, be unreasonable and imprudent for a cervical rotational adjustment to be performed on a patient with torticollis?
MR. GREENER: Same objection.

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THE WITNESS: Yes.
MR. MONTELEONE: I don't have any further questions.

FURTHER EXAMINATION

BY MR. GREENER:

Q. Just so I can be clear on this. Counsel mentioned other orthopedic tests.

Give me just a list of the orthopedic tests that in your opinion Dr. Gallegos-Main should have performed that the records do not reflect that she did.

A. As I mentioned before, there's cervical compression and cervical distraction. She performed the shoulder depression test, but she did not perform -- there's an extension rotation. There are a couple of different names for it, so I don't know what you would call it.

There is Soto Hall, which was on the form, which was not marked either. There is -- she didn't have any radiation, but there are other tests to check for impingement coming down through the arm.

Q. Do you do those if you don't have the radiation?

A. Not at that time, no.

If she started -- no. According to Exhibit 13 when she started having the numbness in the face and in the arm, if she had come in for an examination at that point, I

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would have done those, yes.

Q. Any others?

A. Off the top of my head there's Spurling's, there's Jackson's. Yergason's is shoulder, but you can use it for the neck as well. I believe it's spelled Y-E-R-J-E-S-O-N (sic).

Q. Do you know if the standard of care requires all of those tests be performed under the circumstances that Ms. Arregui presented on on June 4, 2007?

MR. MONTELEONE: Object to the form.

THE WITNESS: If the standard of care is what we discussed as the sentence in my report, I don't think it's written down that all of those tests need to be performed, but I don't know. But I would say some of them.

BY MR. GREENER:

Q. And then as we sit here today, you're unable to form an opinion on whether or not there was actually an adjustment or it was a range of motion test in the two instances that counsel discussed with you, correct?

A. Yes. Because there's conflicting statements in the depositions.

MR. GREENER: Okay. Thank you. That's all.

MR. MONTELEONE: Off the record.

(Discussion off the record.)

MR. MONTELEONE: It was pointed out by madam court

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reporter, a copy of the transcript upon its review by the court reporting service will be provided to this witness, who will review it for accuracy and make any changes to the copy as if it were the original.

THE REPORTER: And return the original to?

MR. MONTELEONE: And the original would be returned to counsel for the defense, Dick Greener.

(Whereupon, at 2:30 p.m., the deposition session held October 19, 2010, was concluded.)

* * * * *

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DECLARATION UNDER PENALTY OF PERJURY

I, Sarah Tamai, D.C., hereby declare under penalty of perjury that the foregoing is my deposition under oath; that these are the questions asked of me and my answers thereto; that I have read my deposition and have made any corrections, additions or changes that I deem necessary.

Dated this _____ day of _____, 20___.

_____
Sarah Tamai, D.C.

REPORTER'S CERTIFICATE

I, Sandra J. Skari, Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the witness in the foregoing deposition was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the foregoing cause; that the deposition was then taken before me at the time and place therein named; that said deposition was reported by me in shorthand and later transcribed under my direction, and the preceding pages contain a true record of the testimony of the witness; and I do further certify that I am a disinterested person and am in no way interested in the outcome of said action or connected with or related to any of the parties in said action or to their respective counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of October 2010.

Sandra J. Skari, RPR, CSR
Certificate No. 7691

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Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Rosalinda Gallegos-Main ("Dr. Gallegos-Main") and Full Life Chiropractic, P.A. (collectively the "Defendants"), by and through their counsel of record, Greener Burke Shoemaker P.A., hereby submit their Reply Memorandum in Support of their Motion for Summary Judgment.

I. INTRODUCTION

Defendants filed their motion for summary judgment on October 26, 2010. The motion was supported by a memorandum, an affidavit from counsel with several exhibits including all relevant excerpts from the deposition of Plaintiff's disclosed standard of care expert, and a statement of undisputed facts. The summary judgment motion is based on Plaintiff's inability to meet the requirements of I.C. §§ 6-1012 and 6-1013 regarding expert testimony as to the local standard of care.

On Wednesday, November 10, 2010, counsel for Plaintiff provided an untimely "courtesy copy" of Plaintiff's opposition brief. The "courtesy copy" was not signed. On Friday, November 12th, Defendants received, via facsimile, Plaintiff's final, signed version of her opposition brief and the Affidavit of Sarah Tamai, D.C., without exhibits. On Monday, November 15th, Defendants received a second copy of the Affidavit of Sarah Tamai, D.C. this time with exhibits attached.

II. ARGUMENT

A. Plaintiff Concedes That Idaho Law Requires An Expert Opinion Regarding the Standard of Care For Chiropractic Physicians In The Nampa/Caldwell Area.

Plaintiff is required to prove by "**direct expert testimony**...that [Defendants]...failed to meet the applicable **standard of health care practice of the community** in which such care...was or should have been provided." I.C. § 6-1012 (emphasis added). In her opposition brief, Plaintiff concedes that she must provide expert testimony regarding the health care practice of chiropractic physicians in the Nampa/Caldwell area. Plaintiff does not dispute that her entire case must be dismissed if she is unable to provide direct expert testimony regarding the local community standard of care. See *Jones v. Crawforth,* 147 Idaho 11, 205 P.3d 660 (2009); *Mains*

v. Cach, 143 Idaho 221, 141 P.3d 1090 (2006); *Hough v. Fry,* 131 Idaho 230, 233, 953 P.2d 980, 983 (1998).

B. **Dr. Tamai's Deposition Testimony Supports Defendants' Motion for Summary Judgment and Plaintiff Concedes That Only Dr. Tamai's Subsequent, Contradictory Affidavit Testimony Could Prevent Summary Judgment.**

Dr. Tamai was deposed on October 19, 2010 in Oceanside California. In her deposition, Dr. Tamai provided clear testimony that she does not possess the knowledge to affirmatively prove by direct expert testimony that Dr. Main breached the applicable standard of care of a chiropractic physician practicing in Caldwell, Idaho on June 4, 2007 or any other date. Dr Tamai testified that:

- she is not licensed as a chiropractic physician in Idaho (SUMF at ¶ 3);
- she has never been to Idaho (SUMF at ¶ 4);
- she had not spoken with any chiropractic physician in Idaho to determine the local standard of care (SUMF at ¶ 5);
- she doesn't know what the local standard of care is for a chiropractic physician practicing in Caldwell, Idaho is (SUMF at ¶ 6);
- Dr. Tamai had only talked to one chiropractic physician in Idaho, Dr. Eri Crum, for "about three minutes" to touch base with him to see if Plaintiff's attorneys in this case were good guys (SUMF at ¶ 7);
- Dr. Tamai does not know if there is a different standard of care for chiropractic physicians practicing in Caldwell, Idaho or for chiropractic physicians practicing anywhere else in the country (Affidavit of Counsel in Support of Motion to Strike ("Aff. of Counsel") at ¶ 4 and Ex. C at 77:18-78:20);
- Dr. Tamai's opinions stated in her report and deposition are final. She will not be performing any additional work or modification of her opinions (Aff. of Counsel at ¶ 4, and Ex. C at 132:10-19 and 152:16-22).

In her opposition brief, Plaintiff completely ignores Dr. Tamai's deposition testimony. Plaintiff cannot challenge the fact that Dr. Tamai's deposition testimony is completely insufficient to establish the local standard of care for chiropractic physicians practicing in the Nampa/Caldwell area or in the state of Idaho in general.

Plaintiff instead argues that the deposition testimony should be ignored because Dr. Tamai has provided an affidavit that contains new, contradictory opinions. Plaintiff concedes

that this affidavit testimony is the only source of testimony for Plaintiff as to the local standard of care for chiropractic physicians in the Nampa/Caldwell area for June of 2007.

C. Dr. Tamai's Affidavit Is Inadmissible and Cannot Prevent Summary Judgment.

Faced with imminent dismissal of her case, Plaintiff has now haphazardly presented the court with an untimely affidavit from Dr. Tamai. This affidavit comes less than a month following Dr. Tamai's deposition and is in contradiction to her testimony given during that deposition. This affidavit, filed in support of Plaintiff's opposition to Defendants' motion for summary judgment, was filed and served three days late in contravention of this Court's Scheduling Order.

Plaintiff's late argument essentially is that summary judgment can't be granted because Dr. Tamai's late and contradictory affidavit fix all of the problems with Plaintiff's lack of direct expert testimony as to the local standard of care pursuant to I.C. § 6-1012 and 6-1013. Dr. Tamai's affidavit, however, should, pursuant to law, be dismissed as it is untimely, it is a sham affidavit which openly contradicts very recent deposition testimony, and it lacks the required foundation for an expert opinion in that it does not have any sufficient explanation as to the reasons for Dr. Tamai's new and contradictory testimony. Defendants have filed a motion to strike the affidavit of Dr. Tamai addressing all of these issues.[1]

The admissibility of expert testimony is an issue that is separate and distinct from whether that testimony is sufficient to raise genuine issues of material fact sufficient to preclude summary judgment. *See Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45

[1] In order to avoid tedious duplication, Defendants refer the Court to the arguments asserted in Defendants Memorandum in Support of Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C. Those arguments are incorporated herein by reference.

P.3d 816 (2002) *citing to Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

Rule 56(e) of the Idaho Rules of Civil Procedure states that affidavits must contain facts that are admissible in evidence and must show that the affiant is competent to testify to the matters in the affidavit. *See Petricevich v. Salmon River Canal, Co.*, 92 Idaho 865, 869, 452 P.2d 362, 366 (1969); *Gem State Ins. Co. v. Hutchinson*, 145 Idaho at 14, 175 P.3d at 176; I.R.C.P. 56(e). Thus, if the admissibility of evidence presented in opposition to a motion for summary judgment is challenged, the court must first make a threshold determination as to the admissibility of the evidence "before proceeding to the ultimate issue whether summary judgment is appropriate." *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999) (quoting *Ryan v. Beisner*, 132 Idaho 42, 45, 844 P.2d 24, 27 (Ct. App. 1992).)

For all of the reasons stated in the Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C., the Court should make the threshold determination that Dr. Tamai's affidavit testimony is inadmissible and cannot be utilized to prevent summary judgment. Without Dr. Tamai's affidavit, Plaintiff has absolutely no evidence that can prevent summary judgment. Instead, Plaintiff can only look to Dr. Tamai's deposition testimony that unquestionably supports dismissal of this case at summary judgment.

CONCLUSION

For the reasons explained above, Defendants' Motion for Summary Judgment should be granted. Plaintiff concedes that Dr. Tamai's affidavit testimony is the only testimony in the record that can prevent summary judgment and that affidavit testimony is deficient and should be stricken as a matter of law.

DATED this 16th day of November, 2010.

GREENER BURKE SHOEMAKER P.A.

By _____
Richard H. Greener
Loren K. Messerly
Attorneys for Defendants Rosalinda Gallegos-Main
And Full Life Chiropractic, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of November, 2010, a true and correct copy of the within and foregoing instrument was served upon:

Sam Johnson
Johnson & Monteleone, L.L.P.
405 South Eighth Street, Suite 250
Boise, ID 83702
[Attorneys for Plaintiff]

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ Email

_____
Richard H. Greener
Loren K. Messerly

ORIGINAL

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Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

MOTION TO STRIKE THE AFFIDAVIT OF SARAH TAMAI, D.C.

Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A. ("Defendants"), by and through their counsel of record, Greener Burke Shoemaker P.A., object to and hereby move this Court to strike the Affidavit of Sarah Tamai, D.C. ("Affidavit") which was filed in support

of Plaintiff's Opposition to Defendants' Motion for Summary Judgment. The Affidavit was untimely served and filed on Friday, November 12, 2010.

This Motion to Strike is made on the following grounds:

1. The filing of the Affidavit was outside the filing deadline requirements imposed by Idaho Rules of Civil Procedure Rule 56(c);
2. The Affidavit directly contradicts deposition testimony and should be stricken pursuant to the sham affidavit doctrine; and
3. The Affidavit improperly contains expert opinions of Sarah Tamai, D.C. without proper foundation.

A Memorandum in Support of Defendants' Motion to Strike is filed concurrently herewith.

DATED this 16th day of November, 2010.

GREENER BURKE SHOEMAKER P.A.

By _____
Richard H. Greener/Loren K. Messerly
Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of November, 2010, a true and correct copy of the within and foregoing instrument was served upon:

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Johnson & Monteleone, L.L.P.
405 South Eighth Street, Suite 250
Boise, ID 83702
[Attorneys for Plaintiff]

- ☐ U.S. Mail
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- ☒ Hand Delivery
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- ☐ Email

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Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THE AFFIDAVIT OF SARAH TAMAI, D.C.

Defendants Rosalinda Gallegos-Main ("Dr. Main") and Full Life Chiropractic, P.A. (collectively hereinafter "Defendants"), by and through their counsel of record, Greener Burke Shoemaker P.A., respectfully submit this Memorandum in support of their Motion to Strike the Affidavit of Sarah Tamai, D.C. ("Motion to Strike") which was filed in support of Plaintiff's

Opposition to Defendants' Motion for Summary Judgment ("Defendants' MSJ") which is scheduled to be heard on November 23, 2010 at 9:00 a.m. before this honorable Court.

FACTS

Plaintiff disclosed her experts on August 16, 2010. In her disclosures she identified Sarah Tamai, DC in Oceanside, California as an expert who would testify as to "whether the Defendant Dr. Gallegos-Main met the standard of skill and care ordinarily exercised by chiropractic physicians in similar setting and in like circumstances. Dr. Tamai's testimony will include her opinion that the Defendant Dr. Gallegos-Main failed to meet the standard of healthcare practice when treating Plaintiff on or about June 4, 2007." (*See* Affidavit of Counsel in Support of Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C. ("Aff. of Counsel") at ¶ 2 and Ex. A.) Defendants disclosed their experts on September 30, 2010. In their disclosures, Defendants' disclosed that Robert Ward III, DC would testify to "the standard of care for the practice of chiropractic medicine in Idaho at the time in question," among other things. (*See* Aff. of Counsel at ¶ 3 and Ex. B.)

On Friday October 15, 2010 Plaintiff produced an expert report from Sarah Tamai, D.C. detailing her opinions in this matter. On Tuesday, October 19, 2010 Defendants took the deposition of Sarah Tamai, D.C. in Oceanside, California. During that deposition Dr. Tamai detailed what her testimony would be in this litigation and then stated that she did not have any additional opinions and that she would not be doing any additional work. (*See* Aff. of Counsel at ¶ 4 and Ex. C at 132:10-19 and 152:16-22.)

On Tuesday, October 26, 2010 Defendants filed and timely served their Motion for Summary Judgment, Memorandum in Support, Affidavit of Counsel in Support and Notice of Hearing reflecting a hearing date scheduled for Tuesday, November 23, 2010 at 9:00 am

(collectively hereinafter "Defendants' MSJ"). Defendants' MSJ seeks summary judgment on Plaintiff's claims due to Plaintiff's failure to meet the requirements of I.C. §§ 6-1012 and 6-1013 in failing to provide direct expert testimony as to the local standard of care and Defendants breach of the local standard of care.

On Friday, November 12, 2010, three days beyond the deadline to do so, Plaintiff filed and served her Opposition to Defendants' MSJ along with an Affidavit of Sarah Tamai, D.C. in support of her opposition ("Tamai Aff."). Plaintiff opposes Defendants' MSJ by arguing that the applicable expert testimony necessary under I.C. §§ 6-1012 and 6-1013 is contained in the Tamai Aff.

Defendants now move this Court to strike the Tamai Aff. filed on November 12, 2010 in support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment as the Affidavit was filed outside of the requirements of IRCP 56(c), the Affidavit is in direct contradiction to the deposition testimony of Dr. Tamai given less than one month prior, the Affidavit does not provide an explanation as to why her testimony has changed and the Affidavit does not contain the proper foundation to be admissible.

ARGUMENT

A. Standard.

The admissibility of expert testimony is an issue that is separate and distinct from whether that same testimony is sufficient to raise genuine issues of material fact sufficient to preclude summary judgment. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002) *citing to Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997). The liberal construction and reasonable inferences standard that is applied to testimony in determining if there is a genuine issue of material fact, ***does not*** apply when

deciding if that same testimony of the witness would be admissible. *Dulaney,* 137 Idaho at 163; *see also Rhodehouse v. Stutts,* 125 Idaho 208, 868 P2d 1224 (1994). Whether the testimony of the witness is admissible or not is determined under IRCP 56(e) which requires admissible evidence in the affidavit which shows that the affiant is competent to testify to the matters contained therein. In a medical malpractice action, in order for a standard of care expert's testimony to be competent, the expert must show that she is familiar with the local standard of care and must show how he/she familiarized herself with the local standard of care. *See Kolln,* 130 Idaho at 331.

Further, in medical malpractice cases, experts testifying as to the local standard of care must meet the foundational requirements required by Idaho Code § 6-1013 which are: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses the professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his/her expert opinion is addressed. *See Dulaney*, 137 Idaho 160, 164. The Tamai affidavit on its face does not comply with these requirements.

B. Affidavit Untimely.

Pursuant to the Idaho Rules of Civil Procedure, a party seeking to oppose a motion for summary judgment is required to serve opposing briefing and affidavits "at least 14 days prior to the date of the hearing." I.R.C.P. 56(c). This Court's Order Setting Case for Trial and Pretrial Conference ("Scheduling Order"), dated September 29, 2009, supports the provisions of IRCP 56(c) in stating that "[a]ll motions for summary judgment shall be filed and noticed in compliance with I.R.C.P. Rule 56(c)."

The hearing on Defendants' motion for summary judgment was properly set with this Court for November 23, 2010. Notice of the hearing was properly filed with the Court and served on the Plaintiff by hand delivery on October 26, 2010. Pursuant to Rule 56(c), specifically incorporated into the Court's Scheduling Order, the Plaintiff's opposing briefing and affidavit was required to be filed and served no later than Tuesday, November 9, 2010. Instead, Plaintiff's opposition and supporting affidavit from Dr. Tamai was filed and served at 4:29 p.m. on Friday, November 12, 2010. This failure to comply with the Court's scheduling order is a stand-alone basis for striking both the affidavit and Plaintiff's opposition brief.

The prejudice to Defendants is undeniable. Rather than fourteen days until the hearing, Defendants received the opposing affidavit only eleven days prior to the hearing. More importantly, Defendants had four days instead of seven days to draft their responsive pleadings. In fact, because of the timing of the disclosure at 4:30 p.m. on a Friday evening, Defendants had only two working days to file their reply brief as well as the responsive pleadings to address the Tamai Aff.

In *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236 (1999), the Idaho Supreme Court overturned a summary judgment ruling by the District Court where the moving party had untimely filed an additional affidavit outside the 28-day requirement. The non-moving party filed a Motion to Strike which the District Court denied, stating there was no showing of prejudice. *Sun Valley Potatoes*, 133 Idaho at 3. In reversing the summary judgment, the court ruled:

> Rule 56(c) requires the moving party to serve the motion along with supporting brief and affidavits not less than twenty-eight days before the hearing. The purpose is to give the opposing party an adequate and fair opportunity to support its case. The rule requires the adverse party, if it chooses, to respond with an opposing brief and affidavits no less than fourteen days prior to the hearing. Again, the purpose is to give the moving party an adequate opportunity to respond.

Sun Valley Potatoes, 133 Idaho at 6. In accordance with the precedent of the ruling in *Sun Valley Potatoes*, this Court should strike the untimely filed Tamai Aff.

Undoubtedly Plaintiff will attempt to argue that the affidavit would have been filed on time but for difficulties reaching Dr. Tamai during the two-weeks following the filing of Defendants' motion for summary judgment. This is not a valid excuse for avoiding the filing and service requirements of Rule 56. However, the reality is that Plaintiff has had over a year and half to obtain the necessary testimony to meet the requirements of IC §§ 6-1012 and 6-1013. Plaintiff knew or should have known when she filed her complaint on March 31, 2009, that she would need an expert to testify as to the local standard of care. Even if Plaintiff was somehow not aware of the requirements of IC §§ 6-1012 and 6-1013 at the time she filed her complaint, it is obvious that Plaintiff should have been aware of these requirements by August 16, 2010 when Plaintiff disclosed Dr. Tamai as an expert witness in this case who would be addressing the standard of care. (*See* Aff. of Counsel at ¶ 2 and Ex. A.) Plaintiff should have ensured at that time that her chosen and designated expert, Dr. Tamai, a California chiropractor, had familiarized herself with the local standard of care. However, when Dr. Tamai was deposed on October 19, 2010, just over three months after Dr. Tamai was designated as an expert by Plaintiff, it was abundantly clear Dr. Tamai did not have any knowledge as to standard of care in the State of Idaho. (*See* Defendants Statement of Undisputed Material Facts ("SUMF") at ¶¶ 2-7.) Further it was abundantly clear that Dr. Tamai had not made any attempt to obtain knowledge as to the standard of care in the State of Idaho. (*Id.*)

IRCP 56(f) provides a remedy for a party if they are faced with problems in obtaining an affidavit in order to oppose a motion for summary judgment. Plaintiff did not even attempt to

file a motion for 56(f) relief in this instance; no doubt she knew that she had no excuse or reason for not being able to timely file her opposition and any supporting affidavits.

Now, faced with a motion for summary judgment, Plaintiff is trying, at the last minute, to patch together some testimony as to the local standard of care. Those last minute actions do not meet the requirement of good cause for allowing a late filed affidavit. *See, e.g., Maxwell v. Baptist Memorial Hospital-DeSoto, Inc.*, 15 So.3d 427, 429-36 (Miss. Ct. App. 2008) (striking affidavits, granting summary judgment to defendant, and noting that the plaintiffs "had almost two years from the time their complaint was filed to obtain expert medical testimony in some acceptable form"); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991) (confirming that Court's inherent power and discretion to "fashion an appropriate sanction for conduct which abuses the judicial process" includes the discretion to dismiss a lawsuit outright and therefore any less severe sanction is also within that discretion).

Defendants have abided by the requirements of IRCP 56 and the requirements of this Court regarding notice and briefing of summary judgment motions. Plaintiff has plainly violated the requirements of both IRCP 56 and the requirements of this Court by simply filing her opposition and supporting affidavit late. Accordingly the Tamai Aff. should be stricken.

C. Dr. Tamai's Affidavit Is Not Admissible Because It Directly Contradicts Her Deposition Testimony.

Courts have consistently held that parties are not allowed to prevent summary judgment by filing "sham" affidavits that directly contradict deposition testimony. *See, e.g., Boise Tower Associates, LLC v. Washington Capital Joint Master Trust*, 2007 WL 1035158, 12-13 (D. Idaho 2007) ("[Courts] have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn

deposition) without explaining the contradiction or attempting to resolve the disparity.") (quoting *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999)); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998-99 (9th Cir. 2009) ("[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.") (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991)); *see also Matter of Estate of Keeven*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994) ("[A] sham affidavit which directly contradicts prior testimony may be disregarded on a summary judgment motion . . . .").

The "sham affidavit" rule is well established in our federal courts and state courts. Essentially the "sham affidavit" rules are in place to preclude a party from creating an issue of fact to prevent summary judgment by simply submitting an affidavit which directly contradicts prior deposition testimony by the affiant. Without such a rule in place, the utility of summary judgment as a procedure for screening out sham issues of fact would be destroyed.

Here, Plaintiff is attempting to do precisely what our federal and state courts have worked to eliminate through the "sham affidavit" rules. Plaintiff is attempting to put forth expert testimony of Dr. Tamai to overcome summary judgment which is in complete contradiction to the expert testimony that Dr. Tamai gave under oath in her deposition less than one month ago. The contradictions in Dr. Tamai's affidavit are as follows:

1. Local Standard of Care in Idaho.

In her deposition, Dr. Tamai was very clear that she did not know what the standard of care was for a chiropractic physician practicing in the State of Idaho and she made it very clear that she had not attempted to determine what that standard was. (*See* SUMF ¶¶ 2-7.) Dr. Tamai

also testified that she would not be doing any additional work and that she did not have any additional opinions. (*See* SUMF ¶ 15; Aff. of Counsel at ¶ 4 and Ex. C at 132:10-19 and 152:16-22.)

Now, in her affidavit of November 12, 2010, Dr. Tamai states that she is familiar with the local standard of care for the Nampa/Caldwell area in June of 2007. (*See* Tamai Aff. at ¶ 3, 4, 9.) Tamai's explanation for this contradictory evidence is that she has now spoken with a local practitioner and confirmed the standard of care is the same. This explanation is inadequate as discussed in greater detail below in Section D of this brief.

2. Local Standard of Care in California.

During her deposition and in her expert report of October 15, 2010, Dr. Tamai defines the standard of care as "[t]he level at which the average, prudent provider in a given community would practice. It is how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances." (*See* Tamai Aff. at Ex. B, p. 1.) This definition of the standard of care was taken by Dr. Tamai from a PowerPoint presentation prepared by Leslie M. Wise, D.C. which Dr. Tamai found on the internet. (*See* Aff. of Counsel at ¶ 4 and Ex. C at 77:18-78:20.) Dr. Tamai testified that she wasn't sure if this definition of the standard of care by Leslie M. Wise, D.C. was part of the standard of care in California or if it part of the standard of care nationally. (*See* Aff. of Counsel at ¶ 4 and Ex. C at 84:15-85:15.)

Now, in her affidavit of November 12, 2010, Dr. Tamai states that her opinions are based upon "standards of care in Oceanside, California in June 2007." (*See* Tamai Aff. at ¶ 3.) Tamai's Aff. does not give any explanation as to this contradicting statement.

3. Standard of Care Nationally.

During her deposition, Dr. Tamai testified that she did not know if there was a national standard of care for chiropractic physicians or what, if anything, that standard would entail. (*See* Aff. of Counsel at ¶ 4 and Ex. C at 85:20-86:15.)

Now, in her affidavit of November 12, 2010, Dr. Tamai testifies that the "national standards of care applicable to chiropractors throughout the United States are the same as the standards of care I have followed in my chiropractic practice in California." (*See* Tamai Aff. at ¶ 9.) Tamai's Aff. does not give any explanation as to this contradicting statement.

4. Treatment by Dr. Main – Adjustment.

In her deposition, Dr. Tamai indicated that she could not give an opinion as to whether Dr. Main actually performed a cervical adjustment to Plaintiff on June 4, 2007 or if Dr. Main had merely performed a range of movement test as reflected in Dr. Main's chart notes. (*See* Aff. of Counsel at ¶ 4 and Ex. C at 163:16-21.)

Now, in her affidavit of November 12, 2010, Dr. Tamai states, "Defendant's decision to apply a cervical adjustment to her patient was a breach of the prevailing community standards of care in June 2007 in the Nampa-Caldwell area of Idaho." (*See* Tamai Aff. at ¶ 7.) Tamai's Aff. does not give any explanation as to this contradicting statement.

5. Treatment by Dr. Main – Emergency Room Evaluation.

In her deposition, Dr. Tamai conceded that her opinions detailed in her October 15, 2010 report, regarding Dr. Main's actions to ensure Plaintiff was seen safely home or further evaluated at a hospital, were not opinions based on the standard of care but were Dr. Tamai's own personal recommendations. (*See* Aff. of Counsel at ¶ 4 and Ex. C at 133:14-134:24.)

Now, in her affidavit of November 12, 2010, Dr. Tamai states that Dr. Main breached the standard of care when she allegedly "failed to call paramedics or other emergency medical

personnel or even to assist Plaintiff." (*See* Tamai Aff. at ¶¶ 5 and 8.) Tamai's Aff. does not give any explanation as to this contradicting statement.

Allowing an affidavit that completely contradicts deposition testimony is contrary to the law and patently unfair to the moving party on summary judgment. Defendants have expended many hours preparing their motion for summary judgment. Defendants proceeded with an expert deposition in California, at Defendants expense. Defendants are entitled to rely upon the deposition testimony provided by Plaintiff's local standard of care expert who was disclosed months earlier. Plaintiff should not be able to avoid summary judgment by the tardy submission of an affidavit that purportedly touches on all the necessary elements to prevent summary judgment in contradiction of the affiant's prior sworn testimony. That affidavit cannot be used to cover up all the holes in Plaintiff's case that were uncovered through cross-examination at Dr. Tamai's deposition. Dr. Tamai's new affidavit testimony is a sham affidavit and should be stricken as a matter of law.

D. Affidavit Contains Legal Deficiencies In Foundation.

Plaintiff argues that its contradicting affidavit testimony is acceptable because the new testimony is based on new evidence that Dr. Tamai obtained by talking with a chiropractor in Idaho subsequent to her deposition. This is not newly discovery evidence that was previously unavailable to Plaintiff. Rather, this "new" evidence has been available to Plaintiff since the inception of this case. There is a distinct difference which the Court should note between new evidence and the Plaintiff actually preparing her case. In this instance, there is no new evidence. It is just that when faced with a motion for summary judgment, Plaintiff decided to attempt to piece together the required expert testimony.

As an initial matter, allowing an expert to speak with a local practicing health care provider is acceptable under Idaho statute for an out of state expert to familiarize themselves with the local standard of care. However, foundational issues must still be met to allow for such testimony to be admissible. In medical malpractice cases, experts testifying as to the local standard of care must set forth the foundational requirements required by Idaho Code § 6-1013 which are: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses the professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his/her expert opinion is addressed. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002).

Further, for an expert's testimony to be competent pursuant to IRCP 56(e), the expert must show that she is familiar with the standard of care and must show how she familiarized herself with the standard of care. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

In this case, Dr. Tamai's November 12, 2010 affidavit contains only broad generalizations. She states that she has "educated myself regarding the local standards of care prevailing in Nampa-Caldwell are of Idaho as they existed in June 2007.....I have spoken with a local chiropractor, who maintained a chiropractic practice, in Caldwell, Idaho, in June 2007.....This chiropractor indicated to me that he was familiar with the local standards of care..." (*See* Tamai Aff. at ¶ 2.)

Dr. Tamai's affidavit **does not** state who the local chiropractor is that she spoke to; how long she spoke to the local chiropractor; how long that chiropractor has been practicing in the

area; what techniques that chiropractor regularly utilizes in his/her practice; what the qualifications of the local chiropractor are; what the local chiropractor told her about the local standard of care; and/or how the local chiropractor knows the local standard of care. Without such facts, Dr. Tamai's assertions lack adequate competency/foundation to be admissible under IRCP 56(e). *See* I.R.C.P. 56(e); *Kolln*, 130 Idaho at 323.

Dr. Tamai's November 12, 2010 affidavit does not meet the foundational requirements to be admissible into evidence and should therefore be stricken as a matter of law.

CONCLUSION

The affidavit of Dr. Tamai is untimely; it contains inadmissible evidence because it directly contradicts prior deposition testimony; there is not explanation as to why contradicting testimony is being provided; and it lacks the foundation required under IC § 6-1013 and IRCP 56(e) to be admissible. For any one of these reasons and for all of these reasons Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C. should be granted.

DATED THIS 16th day of November, 2010.

GREENER BURKE SHOEMAKER P.A.

By _____
Richard H. Greener/Loren K. Messerly
Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of November, 2010, a true and correct copy of the within and foregoing instrument was served upon:

Sam Johnson
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405 South Eighth Street, Suite 250
Boise, ID 83702
[Attorneys for Plaintiff]

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ Email

Richard H. Greener
Loren K. Messerly

ORIGINAL

FILED
A.M. P.M.
NOV 16 2010
CANYON COUNTY CLERK
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Attorneys for Defendants Rosalinda Gallegos-Main
and Full Life Chiropractic, P.A.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

MOTION FOR ORDER SHORTENING TIME ON DEFENDANTS' MOTION TO STRIKE

Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A. ("Defendants"), by and through their counsel of record, Greener Burke Shoemaker P.A., hereby move this Court, pursuant to Rule 7(b)(3) of the Idaho Rules of Civil Procedure and this Court's Civil Case Scheduling Order, for an order shortening time for Defendants' Motion to Strike the Affidavit of

Sarah Tamai, D.C. ("Defendants' Motion"). Defendants seek expedited relief on the basis that the hearing on Defendants' Motion for Summary Judgment ("MSJ") is set to commence in this matter at 9:00 a.m. on November 23, 2010. The Affidavit of Sarah Tamai, DC was filed by Plaintiff in support of her opposition to Defendants' Motion for Summary Judgment. Pursuant to IRCP 56(e), any affidavits submitted in support of or in opposition of any motion for summary judgment must be admissible in evidence. Accordingly, it is appropriate that Defendants' Motion to Strike be heard in conjunction with Defendants' Motion for Summary Judgment.

DATED this 16th day of November, 2010.

GREENER BURKE SHOEMAKER P.A.

By _____
Richard H. Greener/Loren K. Messerly
Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of November, 2010, a true and correct copy of the within and foregoing instrument was served upon:

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[Attorneys for Plaintiff]

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Richard H. Greener/Loren K. Messerly

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE AFFIDAVIT AND MOTION FOR SUMMARY JUDGMENT

For the reasons stated in this Court's oral ruling issued on November 23, 2010, the Defendant's Motion to Strike the Affidavit of Sarah Tamai, D.C., filed on November 16, 2010, is GRANTED, and Defendant's Motion for Summary Judgment, filed on October 26, 2010, is also GRANTED.

DATED this _____ day of November, 2010. NOV 24 2010

Judge Renae Hoff

APPROVED AS TO FORM:

JOHNSON & MONTELEONE, L.L.P.

By: _____
Sam Johnson
Attorneys for Plaintiff

GREENER BURKE SHOEMAKER P.A.

By: _____
Loren K. Messerly
Attorneys for Defendants
Rosalinda Gallegos-Main
and Full Life Chiropractic, P.A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of November, 2010, a true and correct copy of the within and foregoing instrument was served upon:

Sam Johnson
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[Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.]

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Clerk of the District Court

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

MARTHA A. ARREGUI, Plaintiff, v. ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown, Defendants.	Case No. CV 09-3450 **FINAL JUDGMENT**

This matter having been fully resolved by the Court's Order, issued on November 24, 2010, which granted Defendants' Rosalinda Gallegos-Main, and Full Life Chiropractic, P.A., ("Defendants") Motion to Strike the Affidavit of Sarah Tamai, D.C., filed November 16, 2010, and Defendants' Motion for Summary Judgment, filed October 26, 2010, against Plaintiff Martha A. Arregui ("Plaintiff");

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Complaint and Demand for Jury Trial is dismissed with prejudice.

This Judgment may be amended following the Court's determination of Defendants' attorneys fees and/or costs.

DATED this _____ day of December, 2010.

DEC 2 2010

Renae Hoff
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of December, 2010, a true and correct copy of the within and foregoing instrument was served upon:

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Jana faxed

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Attorneys for Plaintiff

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

MARTHA A. ARREGUI, Plaintiff, v. ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown, Defendants.	Case No. CV 09-3450 **PLAINTIFF'S MOTION FOR RECONSIDERATION**

COMES NOW Plaintiff, by and through her attorney of record, Sam Johnson of the law firm Johnson & Monteleone, L.L.P., and pursuant to 11(a)(2)(B) of the Idaho Rules of Civil Procedure, hereby moves this court for the following relief:

RELIEF SOUGHT

1. An order reconsidering the grant of the Defendants' *Motion to Strike the Affidavit of Sarah Tamai, D.C.*

2. As a corollary, Plaintiff further seeks an order reconsidering the grant of summary judgment in favor of the Defendants.

GROUNDS FOR RELIEF

THIS MOTION is made and based upon the premise that the Affidavit of Sarah Tamai, D.C., does not involve the manufacturing of evidence which the "sham affidavit" doctrine was designed to preclude. It is important to note here that Dr. Tamai has been disclosed as an expert witness, not as a fact/eye witness. Accordingly, we do not have the scenario, where an eye witness had originally divulged under oath, during a deposition that the light was "green" and later swore in an affidavit that the same light was "red" in an effort to overcome summary judgment. Instead, we have an expert witness whose affidavit testimony reflects new information the expert learned upon further investigation and upon consultation with other professionals in her field. *See Affidavit of Sarah Tamai, D.C., ¶3.*

THIS MOTION is further made and based upon the premise that, "It has long been judicial policy in Idaho that controversies be determined and disposed of each on its own particular facts and as substantial justice may require. The exercise of judicial discretion should tend to bring about a judgment on the merits." *Bunn v. Bunn*, 99 Idaho 710, 711 (1978).

ORAL ARGUMENT AND BRIEFING

Movant does desire to present oral argument on the motion pursuant to Rule 7(b)(3)(C), of the Idaho Rules of Civil Procedure; the movant likewise reserves the right to submit a memorandum of law within fourteen (14) days in support of this motion pursuant to Rule 7(b)(3)(C) of the Idaho Rules of Civil Procedure; the movant further reserves the right to file a reply brief in accordance with Rule 7(b)(3)(E), of the Idaho Rules of Civil

Procedure after reviewing any opposition papers which may hereafter be filed by the Defendants.

DATED: This 2 day of December, 2010.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on December 2, 2010, I caused a true and correct copy of the foregoing document to be:

❑ mailed ❑ hand delivered ❑ CM/ECF Electronic Filing ❑ transmitted fax machine to: (208) 319-2601	Richard H. Greener Greener, Burke & Shoemaker, P.A. The Banner Bank Building 950 W. Bannock St., Ste. 900 Boise, ID 83702

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Attorneys for Plaintiff

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

MARTHA A. ARREGUI, Plaintiff, v. ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown, Defendants.	**Case No. CV 09-3450** **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION**

INTRODUCTION

This case involves Plaintiff Martha Arregui's (hereinafter "Arregui") claim for bodily injuries brought against her chiropractor for negligently causing Arregui to suffer a stroke. It comes before the Court on Arregui's motion for reconsideration. In her motion, Arregui asks this Court to reconsider its order granting Defendants' *Motion to Strike the Affidavit of Sarah Tamai, D.C.*, and its order granting Defendants' *Motion for*

Summary Judgment. The remainder of this memorandum shall demonstrate Arregui's cause is just.

PROCEDURAL HISTORY

Arregui filed suit on April 1, 2009. *See Complaint and Demand for Jury Trial, on file herein.* In her Complaint, Arregui alleges, *inter alia*, that Defendant Dr. Main owed Arregui a duty to medically treat her in a non-negligent manner, and in conformance with the applicable community standard of chiropractic care. *Id, at* ¶7.

Defendants filed their Answer to Complaint and Demand for Jury Trial, on or about April 21, 2009. *See Answer to Complaint and Demand for Jury Trial, on file herein.* In the Answer to the Complaint, "Defendant Rosalinda Gallegos-Main, an individual, admits that she owes Plaintiff a duty regarding her treatment as a licensed chiropractor . . . ." *Id, at* ¶7 *(emphasis added).* When Answering the Complaint, Defendants however made no reference to the Medical Malpractice Act (I.C. § 6-1001 *et seq.*), and did not defend on the grounds that Plaintiff had to comply with the statutory mandates set forth in Idaho Code §§ 6-1012/6-1013. *See generally Answer to Complaint.*

Thereafter, Arregui disclosed Dr. Sarah Tamai, D.C., as an expert witness who would testify at trial on behalf of Arregui. On October 15, 2010, Arregui produced a report authored by Dr. Tamai which outlined her opinions on whether Defendant Dr. Main breached the standard of care when treating Arregui. In her October 15, 2010, report Dr. Tamai defined the applicable standard of care for chiropractic physicians in the following manner:

> The level at which the average, prudent provider in a given community would practice. It is how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances.

See a true and correct copy of the October 15, 2010, report authored by Dr. Tamai, attached and incorporated into her affidavit as Exhibit "B", on file herein. A few days later, on October 19, 2010, Defendants took the deposition of Dr. Tamai. *See a true and correct copy of the deposition transcript (Tamai Depo. Tr.) of Dr. Sarah Tamai, D.C., attached as Exhibit "C" to the Affidavit of Counsel in Support of the Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C.* During her deposition, Dr. Tamai's same October 15, 2010, written report was marked and attached to the deposition transcript as Exhibit 7. *Tamai Depo. Tr., p. 74, Ll. 15-17.* Further, during her deposition, Dr. Tamai directly quoted the same standard of care contained in her written report, described its origin, and indicated, "I was looking for a standard of care that was clean and easily understood and something that was, I felt representative of the standard of care in chiropractic." *Id. at pp. 74-77.*

Not long after completing the deposition of Dr. Tamai, but more than one year and six months after filing the Answer to the Complaint, Defendants filed their motion for summary judgment, on October 26, 2010. In this motion, the Defendants argued Arregui's claims are subject to Idaho Code §§ 6-1012/6-1013 for the first time, and argued, for the first time, how Arregui's "failure to meet those requirements is grounds for dismissal of Plaintiff's claims as a matter of law." *See Defendant's Motion for Summary Judgment, p. 2.* In an effort to defeat the motion for summary judgment, Arregui lodged her *Memorandum in Opposition to Defendants' Motion for Summary Judgment*, and filed the *Affidavit of Sarah Tamai, D.C.* The same report written by Dr. Tamai and disclosed to Defendants before Defendants took her deposition, and then used and marked as Exhibit 7 to her deposition, was also referenced and appended as Exhibit

"B" to the subsequent Affidavit of Dr. Tamai. *See Affidavit, ¶5, and Exhibit "B" to the Affidavit.* For purposes of the motion for summary judgment only, Arregui conceded to the application of Idaho Code §§ 6-1012/6-1013. *See Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 2.* Arregui next contended that she had in fact satisfied the proof elements from the aforementioned statutes. *Id.*

On November 23, 2010, the Defendants' motion to strike and for summary judgment came before the Court. After hearing oral argument from counsel, the Court granted the motion to strike the Tamai affidavit on the basis that it clearly contradicted her prior deposition testimony. Without the Tamai affidavit, the Court was of course constrained to grant the motion for summary judgment as a corollary. As stated above, Arregui now asks this Court to reconsider its rulings on the motion to strike and the motion for summary judgment.

ARGUMENT

A. The Affidavit of Sarah Tamai, D.C., Does not Involve the Manufacturing of Evidence which the "Sham Affidavit" Doctrine was Designed to Preclude.

This case does not implicate the "sham affidavit" doctrine. As stated in *Boise Tower Associates, LLC v. Washington Capital Joint Master Trust,* 2007 WL 1035158, 12-13 (D. Idaho), the doctrine "prevents the use of manufactured testimony" as a means of creating an issue of fact to overcome summary judgment. The *Boise Tower* case involved a dispute between a lender and a borrower over breach of contract. There, the lender sought to strike the affidavit of the borrower's principal on the basis that it was "replete with sham testimony, statements based upon a lack of personal knowledge, and

hearsay." *Id.* at 12. In addressing the motion to strike, the court referenced the "sham affidavit" doctrine and set forth its basic tenet:

> [Courts] have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity.

Id.

After citing to the above rule, the court next generally indicated, "To the extent that various portions of the affidavit contained conclusions of law, were based on speculation or contradicted Peterson's testimony in his affidavit, they were not considered by the Court." *Id.* at 13. Without delineating the nature of the contradictions in the testimony, the court ultimately granted the motion to strike in part and denied it in part. *Id.* For our purposes here, it may have been helpful if the court in *Boise Tower* had specifically cited to the different versions of the contradictory testimony. Nonetheless, it is clear the evidence in question did not involve the testimony of an expert witness. Rather, it involved the principal of one of the parties – the borrower. In our case here, we are dealing with an expert witness who obviously does not have any personal knowledge of the facts of the case. An expert, of course, testifies on facts made know to the expert. As more information is made know to the expert, her opinions are subject to modification.

Such is the case here. At the time of her October 19, 2010, deposition, Dr. Tamai did not know whether the standard of care she cited in her report was the same standard of care applicable to the Nampa-Caldwell community at the time Arregui suffered the

stroke. At that point in time, Dr. Tamai admittedly had not spoken to a chiropractic physician in the Nampa-Caldwell area to discuss the standard of care in such locality. *Tamai Depo. Tr., pp. 37-38.* After Defendants filed for summary judgment and argued for the first time how Arregui's claim was subject to the provisions of Idaho Code §§ 6-1012/6-1013, Dr. Tamai did, however, familiarize herself with the local standard of care and did so by following the statutory prescripts in Idaho Code § 6-1013:

> [P]rovided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing [her]self with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial. (Emphasis added).

In line with Idaho Code § 6-1013, Dr. Tamai explained the familiarization process in paragraph three (3) of her subsequent affidavit dated November 12, 2010:

> I have educated myself regarding the local standards of care prevailing in the Nampa-Caldwell area of Idaho, as they existed in June 2007. In addition to my education and experience, I have spoken with a local chiropractor, who maintained a chiropractic practice, in Caldwell, Idaho, in June 2007, the time period relevant to this litigation, as it was the time period, when Defendant chiropractically treated Plaintiff, Martha Arregui. It is my understanding that this chiropractor was appropriately licensed in Idaho as a chiropractor and maintained an active practice of chiropractic medicine during the relevant period. This chiropractor indicated to me that he was familiar with the local standards of care for performing chiropractic procedures in the Nampa and Caldwell communities by licensed chiropractors at the time that the chiropractic care at issue in this case was rendered to the patient. This physician further confirmed to me that the local standards of care at that time were, in all respects, consistent with and, in fact, identical to the standards of care upon which my opinions in this case have been based, namely, the standards of care in Oceanside, California in June 2007. (Emphasis added).

There can be nothing wrong with what Arregui and her expert did in the context of this case. As stated above, this case does not actually draw into play the "sham affidavit" doctrine. Here, the evidence in Dr. Tamai's subsequent affidavit was not manufactured or contrived in any shape, matter or form. Dr. Tamai properly gained familiarity with the local standard of care upon her further inquiry into the case, including consulting with other professionals in her field. Dr. Tamai did not testify as an eye witness with personal knowledge about a given fact, only to later change her testimony thereafter. In fact, the same standard of care has been used by Dr. Tamai throughout her involvement in the case. The only aspect of her opinion that is different is that Dr. Tamai confirmed through further examination that the standard of care from which she rendered her opinions was the same standard of care which applied in Nampa-Caldwell on the date in question. Counsel for Defendants anticipated Dr. Tamai may conduct further analysis of the issues in the case by requesting during the deposition to be updated in the event she did:

> MR. GREENER: Counsel, if there is any additional work done, we would like to be advised of it, if there are any modifications. We would like to take the deposition or get updated on the deposition of the witness on that.

See Tamai Depo. Tr., p. 152, L. 23 – p. 153, L. 2.

It is not as though Defendants here have cited to legal authority suggesting that a party cannot familiarize an expert with the local standard of care after a motion for summary judgment has been filed. Especially, like here, where the issue was raised for the first time by the Defendants in the motion for summary judgment. Again, this case does not involve the manufacturing of evidence which the "sham affidavit" was designed to exclude. We do not have an eye witness first testifying the light was red and later

testifying the light was green. Furthermore, consistent with *Boise Tower, supra,* the difference in testimony has been adequately explained by Dr. Tamai. As she states in her affidavit, the difference is derived from her effort to familiarize herself with the local standard of care by consulting with a local professional in her same field.

A recent ninth circuit opinion discusses the need for restraint when applying the "sham affidavit" rule. *See Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009). In *Van Asdale*, the court fluently described the concern surrounding the over application of the "sham affidavit" doctrine:

> The Supreme Court has explained that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Some form of the sham affidavit rule is necessary to maintain this principle. This is because, as we have explained, "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Kennedy*, 952 F.2d at 266 (*quoting Foster v. Arcata Assocs.*, 772 F.2d 1453, 1462 (9th Cir. 1985)).
>
> At the same time, however, it must be recognized that the sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence. Aggressive invocation of the rule also threatens to ensnare parties who may have simply been confused during their deposition testimony and may encourage gamesmanship by opposing attorneys. We have thus recognized that the sham affidavit rule "should be applied with caution." *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993); *see also Nelson v. City of Davis*, 571 F.3d 924 (9th Cir. 2009).

Id. at 999 (emphasis added). The above warnings apply with additional force to the testimony of expert witnesses. Unlike lay witnesses, experts do not testify from personal knowledge based upon a fixed set of historical facts. Experts testify in the form of hypotheticals, often times from a presumed set of facts. Again, such is the case here.

For these reasons, the Court should not have struck the Tamai affidavit from the summary judgment record.

B. An Expert Witness is Permitted if not Expected to make Factual Assumptions when Rendering Opinions.

Defendants also claim Dr. Tamai has been inconsistent in rendering opinions on whether Defendant Dr. Main "actually performed a cervical adjustment to Plaintiff on June 4, 2007 or if Dr. Main had merely performed a range of movement test as reflected in Dr. Main's chart notes." *See Memorandum in Support of Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C., p. 10.* However, as Dr. Tamai explained during her deposition, it is not so much that she has been inconsistent on this point, but more so that the record is in conflict on this point. On several occasions during the course of her deposition, Dr. Tamai made note of the conflict in the record between Arregui's description of the treatment provided compared to Defendant Dr. Main's description of the treatment provided. *See Tamai Depo. Tr., p. 27, Ll. 10-24; p. 34, Ll. 18 – p. 35, Ll. 6; pp. 159 – 161.* When Dr. Tamai presumes a cervical rotational adjustment was done, she has consistently opined that this would be unreasonable and imprudent or contraindicated or in breach of the standard of care. *See Tamai Depo. Tr., p. 161, Ll. 10 – p. 162, Ll. 1; see also Affidavit of Sarah Tamai, D.C. ¶7; see also Dr. Tamai's October 15, 2010, written report, second to last paragraph.*

In situations such as this one here, an expert is permitted if not expected to make factual presumptions when testifying. In *Evans v. Cavanagh*, 58 Idaho 324, 327, 73 P.2d 83, 86 (1937), the Idaho Supreme Court succinctly addressed the role of the expert when faced with conflicting evidence:

> The testimony of an expert as to his opinion is not evidence of a fact in dispute, but is advisory, only, to assist the triers of fact to understand and apply the testimony of other witnesses. Its value depends on, among other things, the expert confining himself in his testimony to the facts incorporated in the question propounded to him, and if he does not assume these facts to be true and base his answer on them, his testimony is worthless and should be rejected. It is for the triers of fact to determine whether the evidence on which the expert bases his opinion is true or not. It is not for the expert to assume the responsibility of determining the truth or falsity-the reliability or unreliability, of the testimony of other witnesses. For this reason he should not be asked to base his opinion on the testimony of other witnesses which he has heard, but the facts which that testimony tends to establish, and which is relied on by the party propounding the question, should be hypothetically stated, and the testimony of the expert should be responsive to that question, and it is his duty to assume those facts to be true.

Citing Cochran v. Gritman, 34 Idaho 654, 203 P. 289. Thus, to the extent Dr. Tamai's testimony in relation to whether Defendant Dr. Main simply tested Arregui's range of motion or performed a cervical adjustment is inconsistent, it is adequately explained on the basis that in one instance Dr. Tamai presumes Arregui's version is true and in other instances presumes Defendant Dr. Main's version is true. This is the role of the expert. As stated in the above quote, "It is not for the expert to assume the responsibility of determining the truth or falsity . . . of the testimony of other witnesses." *Id.* In this case, it is ultimately a question for the jury to determine whether the evidence on which Dr. Tamai bases her opinion is true or not. *Id.*

Accordingly, when Dr. Tamai states in her affidavit that the, "prevailing standards of care for chiropractors treating torticollis as presented by Martha Arregui in June 2007 would dictate that the chiropractor refrain from treating a patient in the manner described by Plaintiff in this case." (Emphasis added). The presumptions imbedded in this aforementioned statement set the table for Dr. Tamai's relating opinion: "Defendant's decision to apply a cervical adjustment to her patient was a breach of the prevailing community standards of care in June 2007 in the Nampa-Caldwell area of Idaho." In other words, when Dr. Tamai presumes the patient's version of treatment is accurate, she likewise presumes Defendant Dr. Main made the decision to perform a cervical adjustment. As Dr. Tamai confessed in her deposition, she does not know who is right – doctor or patient – but it is not her job to make such a determination as that task belongs to the jury. Based upon on the totality of circumstances and the evidence, it is thus for the jury to determine whether or not Defendant Dr. Main performed a cervical adjustment, and thereby violated the applicable standard of care.

For these additional reasons, the Court should not have struck the Tamai affidavit from the summary judgment record.

C. Arregui has Laid the Foundation Required under Idaho Code § 6-1013 for Admitting the Testimony of Dr. Tamai.

A proper foundation has been laid for admitting the opinions of Dr. Tamai. In *Dulaney v. St. Alphonsus Regional Medical Center,* 137 Idaho 160, 164, 45 P.3d 816, 820 (2002), the Idaho Supreme Court delineated the foundational elements under Idaho Code § 6-1013:

> To do so, the plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert can testify to the opinion with a reasonable

> degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his expert opinion testimony is addressed.

There truly can be no doubt that all of the four (4) elements from above have been satisfied by Arregui. Arregui's expert has testified that the opinions set forth in her affidavit and in her October 15, 2010, written report are held to a reasonable degree of medical probability. *See Affidavit of Sarah Tamai, D.C.*, ¶5. The Defendants have not attacked Dr. Tamai's expert on the basis that she lacks professional knowledge and expertise. Nonetheless, the testimony of Dr. Tamai contained in her affidavit which incorporates her *curriculum vitae* as Exhibit "A", together with her professional background described in her deposition more than adequately establishes that Dr. Tamai carries the requisite professional knowledge and expertise to render the opinions she has in this case. Finally, the record establishes Arregui's expert has familiarized herself with the operative community standard of care by following the procedure outlined in Idaho Code § 6-1013, and thereby has acquired "actual knowledge" of the local standard of care.

Since a proper foundation exists for admitting the testimony of Dr. Tamai, her affidavit should not have been struck from the summary judgment record.

D. Arregui Alternatively Contends Idaho Code §§ 6-1012/6-1013 do not Apply to Claims brought against Chiropractic Physicians.

Arregui conceded only for the purposes of summary judgment to the application of Idaho Code §§ 6-1012/6-1013. *See Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 2.* For purposes of her motion for reconsideration, Arregui no longer makes any such concessions. Instead, Arregui takes the alternative

position that the above sections do not apply to claims brought against chiropractic physicians. This seems to be a matter of first impression as no reported case speaks to the application of the above provisions to claims against chiropractic physicians. Worth noting as a starting point for the analysis is the fact the language of the statute does not expressly enumerate "chiropractic physicians" as being subject to its provisions:

> In any case, claim or action for damages due to injury to or death of any person, brought against any physician or surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, physical therapist, hospital or nursing home . . . on the account of the provision of or failure to provide health care . . ..

Thus, the above statutory reference to "any physician" applies to those physicians meeting the definition stated in the Medical Practice Act. *See Idaho Code § 54-1801 et seq.* Under the Medical Practice Act, the term physician means: "[A]ny person who holds a license to practice medicine and surgery, osteopathic medicine and surgery, or osteopathic medicine, provided further, that others authorized by law to practice any of the healing arts shall not be considered physicians for the purposes of this act." *See Idaho Code § 54-1803(3)(emphasis added).* Interestingly, under the Chiropractic Practice Act, the legislature defined the term physician to mean: "[A]ny person who holds a license to practice chiropractic; provided further, that others authorized by law to use the term "physician" shall not be considered physicians for the purpose of this chapter." *See Idaho Code § 54-703(3) (emphasis added).* This Act further provides, "Chiropractic practice, as herein defined is hereby declared not to be the practice of medicine within the meaning of the laws of the state of Idaho defining the same, and physicians licensed pursuant to this chapter shall not be subject to the provisions of

chapter 18, title 54, Idaho Code, nor liable to any prosecution thereunder, when acting within the scope of practice as defined in this chapter." (Emphasis added).

When viewing Idaho Code §§ 6-1012/6-1013 in the context of the other relevant statutory provisions and definitions referenced above, it is clear the legislature intended only for those physicians licensed to practice medicine in the state of Idaho to reap the benefits and protections of Idaho Code §§ 6-1012/6-1013. Since the term physician carries different and distinct meanings under Idaho law the legislature could not have intended to include more than one class of physician in Idaho Code §§ 6-1012/6-1013. In the overall context of the relevant statutory provisions, the legislature must have intended for medical physicians and not chiropractic physicians to be included under the Medical Malpractice Act. In other words, the use of the term "any physician" in Idaho Code § 6-1012 means any physician falling under the purview of Idaho Code § 6-1001 which establishes the prelitigation hearing panel for claims against physicians subject to the Idaho state board of medicine. From the above definitions, chiropractic physicians do not practice medicine within the meaning of the laws of the state of Idaho, and are not subject to the Idaho state board of medicine.

For these additional reasons, the Court should reconsider its grant of the Defendants' Motion for Summary Judgment.

CONCLUSION

Based upon the foregoing, Arregui respectfully asks this Court to reconsider its grant of the motion to strike and the motion for summary judgment. Arregui further asks this Court to reschedule her case for jury trial.

DATED: This 15 day of December, 2010.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on December 15, 2010, I caused a true and correct copy of the foregoing document to be:

❑ mailed ❑ hand delivered ❑ CM/ECF Electronic Filing ❑ transmitted fax machine to: (208) 319-2601	Richard H. Greener Greener, Burke & Shoemaker, P.A. The Banner Bank Building 950 W. Bannock St., Ste. 900 Boise, ID 83702

JOHNSON & MONTELEONE, L.L.P.

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ORIGINAL

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

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Defendants Rosalinda Gallegos-Main ("Dr. Main") and Full Life Chiropractic, P.A. (collectively hereinafter "Defendants"), by and through their counsel of record, Greener Burke Shoemaker P.A., respectfully submit the following Memorandum in Opposition to the Motion for Reconsideration filed by Plaintiff.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed and specifically relevant to the Plaintiff's motion for reconsideration. Plaintiff filed her Complaint on March 31, 2009, alleging that Dr. Main "owed Plaintiff a duty to medically treat Plaintiff in a competent and non-negligent manner, and in conformance with the applicable community standard of chiropractic care" but "failed to meet the

applicable community standard of chiropractic care . . . ." (Complaint at ¶¶ 7-8.) In her expert disclosures of August 16, 2010, Plaintiff disclosed that Sarah Tamai, DC of Oceanside, California would testify as to "whether the Defendant Dr. Gallegos-Main met the standard of skill and care ordinarily exercised by chiropractic physicians in similar setting and in like circumstances. Dr. Tamai's testimony will include her opinion that the Defendant Dr. Gallegos-Main failed to meet the standard of healthcare practice when treating Plaintiff on or about June 4, 2007." (*See* Affidavit of Counsel in Support of Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C., filed on November 16, 2010 ("Aff. of Counsel") at ¶ 2 and Ex. A.). In Defendants' subsequent expert disclosures of September 30, 2010, they disclosed that Robert Ward III, DC would testify to "the standard of care for the practice of chiropractic medicine in Idaho at the time in question." (*See* Aff. of Counsel at ¶ 3 and Ex. B.)

On Friday, October 15, 2010 Plaintiff produced an expert report from Dr. Tamai detailing her opinions. On Tuesday, October 19th Defendants took the deposition of Dr. Tamai in Oceanside, California. During her deposition, Dr. Tamai admitted she had no knowledge of the relevant standard of care in Idaho or specifically Nampa/Caldwell, Idaho and then she stated that she did not have any additional opinions and would not be doing any additional work. (*See* Aff. of Counsel at ¶ 4 and Ex. C at 132:10-19 and 152:16-22.)

On Tuesday, October 26th Defendants filed and timely served their Motion for Summary Judgment, accompanied by the appropriate briefing, affidavit, and notice of hearing (collectively hereinafter "Defendants' MSJ"). Defendants' MSJ was scheduled for hearing on Tuesday, November 23, 2010 at 9:00 am. Defendants' MSJ sought summary judgment on Plaintiff's claims due to Plaintiff's failure to meet the requirements of I.C. §§ 6-1012 and 6-1013 in failing to provide direct expert testimony as to the local community standard of care.

On Wednesday, November 10th one day beyond the deadline to file and serve any opposition brief, counsel for Plaintiff provided an untimely "courtesy copy" of Plaintiff's

opposition brief. The "courtesy copy" was not signed nor was it filed with the Court. On Friday, November 12th three days beyond the deadline to do so, Plaintiff filed and served her untimely Opposition to Defendants' MSJ along with an untimely Affidavit of Sarah Tamai, D.C. ("Tamai Affidavit"). Plaintiff opposed Defendants' MSJ by arguing that the applicable expert testimony required by I.C. §§ 6-1012 and 6-1013 is contained in the Tamai Affidavit.

On November 16th, Defendants filed their Motion to Strike the Tamai Affidavit ("Motion to Strike") because (1) the Tamai Affidavit was untimely filed pursuant to IRCP 56(c); (2) was a sham affidavit that directly contradicted Dr. Tamai's deposition testimony, and (3) lacked proper foundation to be admissible. Plaintiff did not file an opposition to the Motion to Strike.

On November 23rd, the Court heard argument on Defendants' MSJ and Motion to Strike. After arguments, the Court issued its oral ruling:

> I conclude that the affidavit was not filed timely and that there was no request for shortening of time. I further conclude that the affidavit clearly contradicts the prior deposition testimony and that it was clear that at that time, Dr. Tamai was not aware of the local standard of care in this community.
>
> Pursuant to Rule 56(c), the opposing affidavit was not timely filed and clearly contradicts prior testimony. As a result, I am going to grant the motion to strike the affidavit, which leaves the remaining issue, then, of summary judgment. . . . .
>
> And, of course, I cite to Idaho Code Section 6-1012 and 6-1013. 6-1012 clearly provides that as an essential part of the plaintiff's case in chief, they affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence that such defendant, then and there negligently failed to meet the applicable standard of health care practice . . . .
>
> . . . [T]he evidence in this case indicates that that affidavit contradicts prior opinions of Dr. Tamai from a deposition previously held, and that until the filing of that untimely affidavit, she was not familiar with the local standard of care.
>
> As a result, I find that summary judgment is appropriately granted in this case as there is no issue -- genuine issue of material fact.

(*See* Affidavit of Counsel in Support of Opposition to Plaintiff's Motion for Reconsideration, filed concurrently ("2nd Aff. of Counsel"), Ex. A, 36:17-39:22).

On November 24th, the Court correctly issued an Order Granting Defendants' Motion to Strike and Defendants' MSJ. On December 2nd, the Court entered Final Judgment which dismissed Plaintiff's Complaint in its entirety with prejudice. On December 3rd, Plaintiff filed her

Motion for Reconsideration asking the Court to reconsider its Order granting the Motion to Strike and, "as a corollary," the Court's Order granting Defendants' MSJ.

On December 15th, Plaintiff filed her Memorandum in Support of Plaintiff's Motion for Reconsideration ("Memorandum"). This Memorandum repeats several arguments raised in prior briefing and unsuccessfully argued at the November 23rd hearing: namely 1) that the sham affidavit doctrine should not apply to preclude this type of expert affidavit testimony; and 2) that the Tamai Affidavit had sufficient facts to lay a foundation for Dr. Tamai's expert knowledge of the local community standard of care. The Memorandum also raised two new arguments: 1) that Plaintiff was blindsided by the Defendants' assertion of the applicability of I.C. §§ 6-1012 and 6-1013; and 2) that I. C. § 6-1012 does not apply to chiropractor malpractice cases. Each of these arguments is incorrect and contrary to the law as will be detailed below.

II. LEGAL STANDARD

Plaintiff's motion is brought pursuant to IRCP 11(a)(2)(B). This rule provides for a review of interlocutory orders, not final judgments. Plaintiff has invoked the wrong rule. Plaintiff did not file her Motion for Reconsideration until December 3, 2010, a day after the Court had entered Final Judgment. Thus, Plaintiff's request for reconsideration must be brought pursuant to IRCP 59(e). *See, e.g., Noreen v. Price Development Co. Ltd. Partnership*, 135 Idaho 816, 820, 25 P.3d 129, 133 (Ct. App. 2001) ("The question whether it is Rule 11(a)(2)(B) or Rule 59(e) that applies here is resolved by our Supreme Court's decision in *Idaho First Nat'l Bank v. David Steed & Assoc., Inc.*, ... Thus, *Steed* establishes that *until entry of a final judgment* or a Rule 54(b) certificate, an order for summary judgment must be considered interlocutory and subject to reconsideration under I.R.C.P. 11(a)(2)(B)." (Emphasis added)).

The decision to grant or deny a motion to reconsider, under either Rule 11(a)(2)(B) or Rule 59(e), rests within the sound discretion of the trial court. The purpose of a motion for

reconsideration is to allow the trial court to correct errors that occurred in its proceedings that would otherwise necessitate appeal. The moving party has the burden of clearly establishing a manifest error of law or fact and the standard for granting such a motion is strict "in order to dissuade repetitive arguments on issues that have already been considered fully by the Court. Granting such a motion means that a court must find that it overlooked matters or controlling decisions which, if it had considered such issues, would have mandated a different result." *Eisert v. Town of Hempstead*, 918 F. Supp. 601, 606 (E.D.N.Y. 1996) (citations and quotations omitted). Plaintiff is unable to show a manifest error of law or fact.

Rearguing old issues or raising issues that should have been raised prior to final judgment is not a valid basis for a reconsideration motion. *See Wilderness Society v. U.S. Forest Service*, 2009 WL 1033711, *2 (D. Idaho 2009) ("Where Rule 59(e) motions are merely being pursued as a means to reargue matters already argued and disposed of and to put forward additional arguments which [the party] could have made but neglected to make before judgment, [S]uch motions are not properly classifiable as being motions under Rule 59(e) and must therefore be dismissed.") (Quotation omitted); *Rhoades v. Arave*, 2007 WL 2344923, *1 (D. Idaho 2007) (". . . Rule [59(e)] offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.' *Carroll v. Nakatani,* 342 F.3d 934, 945 (9th Cir. 2003). A losing party cannot use a Rule 59(e) motion to relitigate old matters or to raise arguments that could have been raised before the entry of judgment.").

In the Memorandum, Plaintiff is impermissibly rearguing issues that were rejected by the Court, and Plaintiff has not provided any arguments to suggest the Court "overlooked matters or controlling decisions." In addition, Plaintiff is now raising a new issue of law that should have been raised prior to final judgment and accordingly can no longer be considered under Rule 59(e). Plaintiff's sole recourse is to pursue an appeal if Plaintiff believes the issues were wrongly decided.

III. ARGUMENT

The Court correctly granted the Motion to Strike and Defendants' MSJ. Rather than bring an appeal of the final judgment, Plaintiff raises old or previously conceded arguments. As discussed below the Court should deny Plaintiff's Motion for Reconsideration.

A. Plaintiff Could Not Have Been Blindsided By the Local Community Standard Issue.

In her Memorandum, Plaintiff repeatedly attempts to convince the Court that she was somehow not given proper notice of the local community standard of care issue. For example, Plaintiff argues, incorrectly, that the Answer "did not defend on the grounds that Plaintiff had to comply with the statutory mandates set forth in I.C. §§ 6-1012/6-1013." Plaintiff then points out several times that Defendants argued I.C. §§ 6-1012 and 6-1013 "for the first time" in their summary judgment motion. (*See* Memorandum at pp. 2 and 3.) Plaintiff hopes to convince the Court that it was excusable that her standard of care expert was not prepared to testify regarding the appropriate local standard of care.

The simple fact is that Defendants could not have known that Plaintiff would utterly fail to comply with the statutory requirements regarding standard of care prior to taking the deposition of Dr. Tamai. Defendants are unclear at what earlier point they had any obligation to assert this defense.

Plaintiff cannot legitimately argue that she was blindsided by the I.C. §§ 6-1012 and 6-1013 issues. The record shows that Plaintiff's own complaint alleged a "duty to medically treat Plaintiff in a competent and non-negligent manner, and in conformance with the ***applicable community standard*** of chiropractic care" and "Defendants fail[ure] to meet the ***applicable community standard of chiropractic care***." (Complaint at ¶¶ 7-8 (emphasis added).) Defendants, in paragraph six of their Answer, specifically denied that they breached the community standard of chiropractic care, and that denial put Plaintiff on notice that she would have to prove that element

of her case. *See, e.g., F.T.C. v. Ameritel Payphone Distributors, Inc.*, 2000 WL 35593261, *2-3 (S.D. Fla. 2000) ("The denial of allegations in a complaint relating to an intrinsic element of plaintiff's claim is sufficient to put those matters in issue and therefore pleading by way of affirmative defense is unnecessary.")(citing Wright & Miller, *Federal Practice and Procedure* § 1271 (1998).)

In addition, the expert disclosures from both Plaintiff and Defendants made reference to the issue. Plaintiff's disclosure of Dr. Tamai stated she would testify regarding "whether the Defendant Dr. Gallegos-Main met the *standard of skill and care* ordinarily exercised by chiropractic physicians *in similar setting and in like circumstances.*" (*See* Plaintiff's Expert Disclosures filed August 16, 2010 @ p. 2 (emphasis added).) The Defendants' standard of care expert's disclosure stated that he would testify to "the standard of care for the practice of chiropractic medicine *in Idaho at the time in question.*" (Emphasis added.)

More importantly, it is clearly irrelevant whether the Defendants had ever raised this issue in any pleading or otherwise. The statute makes clear that evidence of the local community standard of care is a requirement of the Plaintiff's prima facie case. The Plaintiff is required to prove her own case and the Defendants are not required to plead an affirmative defense that addresses the Plaintiff's prima facie case. *See, e.g., Sanden v. Mayo Clinic*, 495 F.2d 221, 224 (8th Cir.1974) ("'[I]f the defense involved is one that merely negates an element of the plaintiff's prima facie case . . . it is not truly an affirmative defense and need not be pleaded despite rule 8(c).'")(quoting 2A J. Moore, *Moore's Federal Practice* §8.27(2), at 1843 (2d ed. 1974)); *Sprague v. Sumitomo Forestry Co., Ltd.*, 709 P.2d 1200, 1203-04 (Wash. 1985) ("It would follow, therefore, that if notice of intent to resell is part of the seller's prima facie case, then lack of such notice would not have to be affirmatively denied.").

Plaintiff is required to be aware of the elements of her own case and there is no legal

requirement that Defendants provide any specific notice to Plaintiff regarding Plaintiff's burden to establish her own prima facie case. Everyone is presumed and required to know the law.

B. A Chiropractor Is a "Provider of Health Care" and Chiropractor Malpractice Cases Require Local Community Standard of Care Testimony, Pursuant to I.C. §§ 6-1012, 6-1013 and Idaho Case Law.

Throughout the briefing regarding Defendants' MSJ, Plaintiff conceded that I.C. §§ 6-1012 and 6-1013 are applicable to chiropractors. Plaintiff now is taking a contrary position arguing that chiropractors should be treated differently than all other health care providers. As an initial matter, this new legal argument is not properly raised after final judgment has already been granted. *See Rhoades*, 2007 WL 2344923 at *1 (D. Idaho 2007) ("A losing party cannot use a Rule 59(e) motion to relitigate old matters or to raise arguments that could have been raised before the entry of judgment."); *see also First Sec. Bank of Idaho, N.A. v. Webster*, 119 Idaho 262, 266, 805 P.2d 468, 472 (Idaho,1991) ("Consideration of I.R.C.P. 59(e) motions must be directed to the *status of the case as it existed when the court rendered the decision upon which the judgment is based.*" (Emphasis added).) On that basis alone, the argument is untimely and should not be considered.

In addition, Plaintiff was correct in conceding the issue. As discussed more fully below, pursuant to a plain language interpretation of the statute and pursuant to Idaho case law, chiropractors clearly are health providers and fall within the catch all provision of I.C. § 6-1012.

The Idaho Courts have not ruled specifically on the applicability of I.C. § 6-1012 to chiropractors. However, the logic for application of this statute to chiropractic physicians is clear. The plain and unambiguous language of I.C. § 6-1012 requires that the Plaintiff "[i]n any case...for damages due to injury...brought against any physician and surgeon **or other provider of health care** . . . on account of the provision of or failure to provide health care . . . plaintiff must . . . affirmatively prove by direct expert testimony . . .that such defendant . . . failed to meet the applicable standard of health care practice of the community in which such care . . . was or should

have been provided. . ." (Emphasis added.) So, the issue, as raised by Plaintiff, is whether a chiropractor should fall within the catchall category of "other provider of health care."

Although ignored in Plaintiff's briefing, Idaho has a case on point that provides a simple test for determining whether various professions would fit within the definition of a "provider of health care" pursuant to I.C. § 6-1012. In *Jones v. Crawforth,* 147 Idaho 11, 205 P.3d 660 (2009), the Idaho Supreme Court found that a cell saver technician fit within the health care providers that are protected by I.C. § 6-1012. The Court found it irrelevant that the cell saver technician did not fit within the specific statutory definitions of the various health care professions listed in I.C. § 6-1012. Instead, the Court noted:

> The plain language of I.C. § 6-1012 makes the statute applicable to actions 'brought against any physician and surgeon or *other provider of health care,* including, *without limitation,* any dentist, ... on account of the *provision of or failure to provide health care* or on account of any matter incidental or related thereto....'(Emphasis added). Respondents argue that the plain language of the statute indicates an intent to be extremely broad in scope through its application to any case brought against any "other provider of healthcare," and the inclusion of the words "without limitation" to the list of other providers. We find this argument to be a valid interpretation of the plain meaning of I.C. § 6-1012. Therefore, Kurtz, as a cell saver technician with an important role in the surgery of Ms. Jones, was a health care provider within the scope of I.C. § 6-1012.

Crawforth, 147 Idaho at 15, 205 P.3d. at 664 (citations omitted). The Court went on to explain:

> Furthermore, this Court in *Hough v. Fry,* 131 Idaho 230, 233, 953 P.2d 980, 983 (1998), stated that "by its plain and unambiguous language, [I.C. § 6-1012] applies when the damages complained of result from providing or failing to provide health care. Thus, to determine if I.C. § 6-1012 applies, courts need only look to see if the injury occurred *on account of the provision of or failure to provide health care.*" (Emphasis added). While there was not a question in *Hough* as to whether someone was a health care provider within the meaning of the statute, the test provided in that case is useful in analyzing B & B's arguments. Ms. Jones's injury did occur on account of the provision of or failure to provide health care by Kurtz. Kurtz's role in the operating room was to gather, clean, and deliver the blood of the patient lost during the surgery into the reinfusion bag, and she was specifically trained as to the dangers of placing a pressure device on a reinfusion bag and of her responsibility to warn the doctor of the dangers. Therefore, Kurtz was providing, or failing to provide, health care at the time of Ms. Jones's death.

Id. at 16.

The same analysis applies in this case and the same result should be reached as in *Crawforth*. Although a chiropractor is not specifically listed in I.C. § 6-1012, that statute is intended "to be extremely broad in scope" and, by its plain language, applies to much more than just the specific listed health care professions. *Id.*

There is no relevant distinction between the chiropractic health care providers and the other health care providers listed in I.C. § 6-1012. In fact, Idaho statute, Title 54, has similar statutory provisions for the licensing and regulating of chiropractors and all the other health care professionals listed in I.C. § 6-1012: dentist (ch. 9), physicians' assistant (ch. 18), nurse practitioner (ch. 14), registered nurse (ch. 14), licensed practical nurse (ch. 14), nurse anesthetist (ch. 14), medical technologist, physical therapist (ch. 22), hospital or nursing home (ch. 16), and chiropractor (ch. 7).

It is clear that a chiropractor is providing health care as contemplated by the statute. Common sense and common knowledge of chiropractic care unquestionably supports the view that chiropractors provide health care. In addition, the statutory definition of chiropractic care, as found in Title 7 of the Chapter 54 (the "Chiropractic Practice Act"), provides:

> (1) The "practice of chiropractic" means:
> (a) To *investigate, examine, and diagnose for any human disease, ailment, injury, infirmity, deformity, or other condition*; and
> (b) To *apply principles or techniques of chiropractic practice* as set forth in section 54-704, Idaho Code, *in the prevention or treatment of any of the conditions listed in subsection (a)* of this section; or
> (c) To offer, undertake, attempt to do or hold oneself out as able to do any of the acts prescribed in subsections (a) and (b) of this section.

(Emphasis added). Any claim of malpractice against a chiropractor based on "the practice [or attempted practice] of chiropractic care" would certainly fit the test found in *Crawforth* and *Hough*: "to determine if I.C. § 6-1012 applies, courts need only look to see if the injury occurred on account of the provision of or failure to provide health care." *Crawforth,* 147 Idaho at 16.

In this case, Plaintiff's Complaint alleged that "Defendants failed to meet the applicable community standard of chiropractic care." Plaintiff has claimed injury that "occurred on account of the provision of or failure to provide health care," and a chiropractor is entitled to the protections of I.C. § 6-1012. Since Plaintiff failed to provide the evidence required by I.C. § 6-1012, summary judgment dismissing Plaintiff's complaint was properly granted.

C. The Tamai Affidavit Was Untimely Filed Without Explanation.

The Court struck the Tamai Affidavit for two independent reasons: "Pursuant to Rule 56(c), the opposing affidavit was not timely filed and clearly contradicts prior testimony. . . ." (*See* 2nd Aff. of Counsel, Ex. A, 36:24-37:1). In her Memorandum, Plaintiff fails to address the untimeliness of the affidavit or the Court's ruling that it was untimely.

The Court correctly struck the untimely affidavit. A party seeking to oppose a motion for summary judgment is required to serve opposing briefing and affidavits "at least 14 days prior to the date of the hearing." I.R.C.P. 56(c). Additionally, this Court's Scheduling Order of September 29, 2009 specifically requires compliance with I.R.C.P. Rule 56(c). The hearing on Defendants' MSJ was properly set with this Court for November 23, 2010 and Notice was properly filed and served via hand delivery on October 26th. Accordingly, Plaintiff's opposition and supporting affidavit(s) were due to be filed and served no later than November 9th. Plaintiff, however, served her opposition and supporting affidavit from Dr. Tamai at 4:29 p.m. on Friday, November 12th.

The motion to strike was properly granted based on the prejudice caused when the affidavit was filed several days too late, leaving Defendants prejudiced in its ability to respond "The rule requires the adverse party, if it chooses, to respond with an opposing brief and affidavits no less than fourteen days prior to the hearing. Again, the purpose is to give the moving party an adequate opportunity to respond." *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 6, 981 P.2d 236 (1999) (striking affidavit as untimely filed).

Plaintiff has never provided the Court with an explanation for the late affidavit, has never filed any briefing in opposition to the motion to strike, did not address the issue at the summary judgment hearing, and still has not addressed the issue in her reconsideration Memorandum. Defendants have abided by the notice and briefing requirements of IRCP 56. Plaintiff plainly violated the requirements of both IRCP 56 and this Court's scheduling order. Accordingly the Tamai Affidavit was properly stricken as untimely.

D. The Sham Affidavit Doctrine Was Properly Applied to Preclude Affidavit Testimony Contradicting Deposition Testimony Without Adequate Explanation.

Defendants fully briefed the sham affidavit issue prior to the summary judgment hearing. In it's ruling, the Court first noted that decisions regarding the admissibility of an affidavit are not governed by the summary judgment standards that give deference to the non-moving party. *See Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002) ("The liberal construction and reasonable inferences standard does not apply, however, when deciding whether or not testimony offered in connection with a motion for summary judgment is admissible. The trial court must look at the witness' affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible.") (Citations omitted). The Court then concluded that the affidavit should be stricken based on the sham affidavit doctrine:

> The defendant further argues that this is a sham affidavit -- and that is the term that has been used in the case law -- because it contradicts Dr. Tamai's deposition testimony and was merely presented today to prevent summary judgment.
>
> Boise Tower versus Washington . . . addresses the issue of sham affidavits in the Ninth Circuit. . . . "The 'sham affidavit' doctrine prevents the use of manufactured testimony as a means of creating an issue of fact to get past summary judgment. Courts have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn testimony by, say, filing a later affidavit that flatly contradicts the party's earlier sworn deposition without explaining the contradiction or attempting to resolve the disparity. The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting prior deposition testimony."

> . . . I further conclude that the ***affidavit clearly contradicts the prior deposition testimony and that it was clear that at that time, Dr. Tamai was not aware of the local standard of care in this community.***
>
> Pursuant to Rule 56(c), the opposing affidavit . . . clearly contradicts prior testimony. As a result, I am going to grant the motion to strike the affidavit . . . .

(*See* 2nd Aff. of Counsel, Ex. A at 35:20-37:3 (emphasis added).)

1. The Sham Affidavit Doctrine Applies To Experts Who Change Their Testimony.

In her Memorandum, Plaintiff repeats the arguments raised during the summary judgment hearing which were previously rejected by the Court. Plaintiff also cannot deny:

- that Dr. Tamai's deposition testimony clearly states that she had no knowledge of the local community standard of care;
- that the Tamai Affidavit contradicted Dr. Tamai's deposition testimony regarding the key issue of local community standard of care;
- that this contradiction was created in order to prevent summary judgment; and
- that Dr. Tamai was not confused during her deposition and her testimony is not being taken out of context.

Plaintiff's sole argument is that the sham affidavit rule does not apply to expert witnesses, *i.e.* clear contradictions and changed testimony from an expert is allowed because experts are allowed to update their testimony at any time. However, many courts have applied the sham affidavit doctrine to expert testimony. *See, e.g.*, *Rohrbaugh v. Wyeth Labs., Inc.*, 916 F.2d 970, 976 (4th Cir. 1990) ("Given the conflicts between [the expert's] affidavit and his deposition testimony, the district court was left not with a genuine issue of material fact, but with trying to determine which of several conflicting versions of [his] testimony was correct .... [T]he district court was justified in disregarding the affidavit."); *Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517, 521 (7th Cir. 1988) ("We can think of no reason ... not to apply [the sham affidavit] rule to [a] case involving the testimony and affidavit of [an] expert witness."); *Magoffe v. JLG Industries, Inc.*, 2008 WL 2967653, 24-30 (D.N.M. 2008) ("[The expert] was cross-examined extensively regarding all of these topics at his deposition. He had access to the pertinent evidence at the time of his earlier deposition testimony and was acting under a subpoena which directed him to bring

that evidence to the deposition. Finally, his earlier deposition testimony does not reflect confusion which calls for clarification in his subsequent affidavit. Far from expressing confusion, doubt, or uncertainty about his testimony or the completeness of his expert reports, Dr. Proctor plainly stated during his deposition that 'there wouldn't be any other changes. The changes expressed in his subsequent affidavit did not arise until Plaintiffs' response to Defendant JLG's motion for summary judgment became due, thereby creating the need to manufacture a "sham fact issue" . . . . Accordingly, Dr. Proctor's affidavit meets all the criteria for exclusion under the "sham affidavit" rule . . . ."); *Lescs v. Dow Chem. Co.*, 976 F. Supp. 393, 398 n.2 (W.D. Va. 1997) ("To the extent that Plaintiff seeks to rely on [the expert's] affidavit ... the court finds this affidavit to be inconsistent with his prior deposition testimony; accordingly, the court will disregard the affidavit."); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 701 S.E.2d 742, 749-50 (S.C. 2010) ("Even if we were to accept [Plaintiff's] argument that [the two experts] were qualified to render an expert opinion, we agree with the trial court that their deposition testimony failed to present evidence of a breach of the standard of care or a genuine issue of material fact regarding proximate cause. [Plaintiff] apparently recognized the clear insufficiency of the [experts'] testimony, for it submitted post-deposition affidavits in an attempt to rescue its malpractice claims. The trial court properly characterized these post-deposition affidavits as 'sham' affidavits.").

As discussed in the above case law, the same basic principles of the sham affidavit rule apply with an expert. Permitting the admission of an affidavit that completely contradicts deposition testimony is contrary to the law and patently unfair to the moving party on summary judgment. An expert must provide adequate explanation of any contradictions. Here, the only explanation provided is that the expert did not know the local community standard. However, the expert's only effort to learn the local community standard occurred ***after*** providing clear and unequivocal deposition testimony and ***after*** Defendants properly brought a summary judgment motion that Plaintiff's could not oppose without changing the expert's testimony.

This is not a mere supplementation based on newly discovered evidence; the expert did not become aware of new evidence that was not already available. This is a complete contradiction based on evidence that the expert failed to gather prior to her deposition. In this case, Defendants proceeded with an expert deposition in California more than two months after the expert was disclosed, at Defendants expense, and Defendants are entitled to rely upon the deposition testimony. Defendants incurred great expense in bringing a valid summary judgment motion based on the clear, unequivocal statements of Plaintiff's expert. Plaintiff should not be able to avoid summary judgment by the tardy submission of an affidavit that purportedly touches on all the necessary elements to prevent summary judgment in contradiction of the affiant's prior sworn testimony. That affidavit cannot be used to cover up all the holes in Plaintiff's case that were uncovered through the expert's deposition. Dr. Tamai's new affidavit testimony is a sham affidavit and should be stricken as a matter of law.

2. The Tamai Affidavit Contains Two Additional Relevant Contradictions That Demonstrate Its Status as a Sham Affidavit.

In addition to the issue of local community standard of care, Dr. Tamai's affidavit contradicts her deposition testimony on *both* key issues of negligence that Plaintiff has raised. These multiple key contradictions, plus the conclusory nature of many of the opinions in the affidavit, clearly show the sham nature of the affidavit. The contradictions point out what often happens when summary judgment threatens to end a case: lawyers draft an affidavit to fit the facts they need, despite the fact that their witness has already testified to the contrary under cross-examination. The sham affidavit doctrine prevents this false/incorrect testimony from undermining the efficacy of summary judgment.

Plaintiff's two negligence claims are most easily referred to as the "treatment" and "post-treatment" negligence claims. Plaintiff came to Dr. Main's chiropractic offices claiming pain in her neck and back. Dr. Main treated Plaintiff (the extent of the treatment is a factual dispute that is

irrelevant to this motion) and then Plaintiff went home. Plaintiff went to the hospital the next day and within a few weeks was diagnosed with a stroke. Plaintiff claims Dr. Main was negligent in the treatment that she alleges caused the stroke (the "treatment" negligence claim) and Plaintiff claims Dr. Main was negligent in sending Plaintiff home after the treatment without some additional medical evaluation or supervision[1] (the "post-treatment" negligence claim).

First, with regard to the post-treatment negligence claim, Dr. Tamai provided expert testimony as to the standard of care for Dr. Main in allegedly sending Plaintiff home alone:

> Q. So I want to make sure I understand this. *You are not going to express an opinion in this case then that Dr. Gallegos-Main's failure to either drive or make sure that the plaintiff was driven home was a deviation from the standard of care?*
>
> . . . .
>
> A. *I don't think that that is required; but, again, recommended.*
>
> . . . .
>
> Q. And the second part of that. In your opinion was -- *we know Dr. Main didn't send Ms. Arregui to an emergency room or to any medical doctor. In your opinion was her failure to do that under the circumstances a deviation of the standard of care?*
>
> . . . .
>
> A. *Was a deviation? No. I think as I understand your question.*

(*See* Aff. of Counsel at ¶ 4 and Ex. C at 132:20-134:24 (emphasis added).) In her affidavit, however, Dr. Tamai is suddenly providing contradictory testimony, testimony that mimics what Plaintiff **had hoped** Dr. Tamai would say: "The doctor also failed to call paramedics or other emergency medical personnel or even to assist plaintiff, once plaintiff was experiencing symptoms of stroke. Each of these amounted to a breach of the applicable standards of care . . . ." (Tamai Aff., p.3, ¶ 8.) That is a glaring contradiction that has never been explained and shows the sham nature of Dr. Tamai's affidavit in opposition to summary judgment.

As to the treatment negligence claim, Dr. Tamai was asked, during her deposition, about

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[1] Dr. Main actually did send Plaintiff home with supervision because Plaintiff was accompanied to the chiropractic offices by a friend and employee, Ms. Chavez, who drove the Plaintiff home after her brief treatment. The factual dispute about who was with Plaintiff that evening after the treatment is irrelevant to this motion.

her claim that Dr. Main's treatment of Plaintiff's neck and back was negligent:

> Q. [Plaintiff's Counsel] *In reading Martha Arregui's deposition transcript, the portions that were provided to you, did it contain a description of a cervical rotational adjustment?*
> A. She -- according to her deposition, she didn't know what it was. But she said that her head -- she said her head was rotated from side to side when she was both face down and face up. *So I don't know. . . .*
> Q. Would the rotation of the head as described by Martha Arregui in her deposition be consistent with a cervical rotational adjustment in chiropractic?
> . . . .
> THE WITNESS: *It's possible. It could also be the range of motion, but it's possible it was an attempt to an adjustment as well.*
> . . . .
> Q. [Defendant's counsel] And then as we sit here today, *you're unable to form an opinion on whether or not there was actually an adjustment or it was a range of motion test* in the two instances that counsel discussed with you, correct?
> A. *Yes. Because there's conflicting statements in the depositions.*

(*See* Aff. of Counsel at ¶ 4 and Ex. C at 159:24-160:19; 163:16-21 (emphasis added).)

Dr. Tamai's deposition testimony honestly recognizes the conflict in the testimony about the treatment Dr. Main provided to Plaintiff. Dr. Tamai admits that she does not know whether a range of motion or a cervical adjustment was performed on Plaintiff. However, her affidavit contradicts that admission and instead asserts that a cervical adjustment did unequivocally occur: "Defendant's decision to apply a cervical adjustment to her patient was a breach of the prevailing community standards of care in June 2007." (Tamai Affidavit, p.2, at ¶7.)

Dr. Tamai's affidavit contains three glaring contradictions and each contradiction goes to a central issue of this case. These contradictions point out the sham nature of her affidavit. The Court correctly struck Dr. Tamai's affidavit.

E. The Tamai Affidavit Did Not Provide Sufficient Facts To Lay Foundation For Dr. Tamai to Provide Expert Testimony About the Local Community Standard of Care.

At summary judgment, the Defendants also sought to strike Dr. Tamai's affidavit based on lack of foundation to offer opinions regarding the local community standard of care. The Court struck Dr. Tamai's affidavit without reaching this issue. Defendants renew their argument that this is yet another, independent basis for striking the Tamai Affidavit.

As with the sham affidavit issue, challenges to the foundation and admissibility of an affidavit are not governed by the summary judgment standards that give deference to the non-moving party. *See Dulaney*, 137 Idaho at 163, 45 P.3d at 819 ("The liberal construction and reasonable inferences standard does not apply, however, when deciding whether or not testimony offered in connection with a motion for summary judgment is admissible."). The *Dulaney* decision explains further the foundation for an expert opinion regarding local community standard of care:

> To avoid summary judgment for the defense in a medical malpractice case, the plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice. In order for such expert testimony to be admissible, the plaintiff must lay the foundation required by Idaho Code § 6-1013. To do so, the plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his expert opinion testimony is addressed.
>
> . . . .
>
> . . . The party offering such evidence must show that it is based upon the witness' personal knowledge and that it sets forth facts as would be admissible in evidence. The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e).
>
> An expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time. The expert must also state how he or she became familiar with that standard of care. . . .

Dulaney, 137 Idaho at 164, 45 P.3d at 820 (citations omitted).

In this case, the only foundation to Dr. Tamai's opinions regarding the local community standard of care are found in paragraph 3 of Dr. Tamai's affidavit, which in summary states that she "educated [her]self" by speaking with a "local chiropractor" who indicated to her "that he was familiar with the local standards of care for performing chiropractic procedures in Nampa and Caldwell communities" and who confirmed that the "local standards of care...were...identical to

the standards of care upon which [her] opinions in this case have been based..." (*See* Tamai Affidavit, p.2, at ¶ 3.)

The foundational deficiencies in this paragraph are obvious. First, the consulting local chiropractor is not even named and the affidavit does not mention the consulting chiropractor's career work experience, education, or work experience in the Nampa/Caldwell area. The only information provided about the consulting chiropractor is that he had a practice in June of 2007, that he was licensed in Idaho at that time, and that he claimed to know the community standard of care for the Nampa and Caldwell communities.

Conclusory statements are not sufficient to lay a foundation for the consulting expert's expertise regarding the local community standard of care. The expert may claim to know the local community standard of care but the affidavit must lay a foundation that supports that claim. The affidavit contains nothing to support that claim. Merely having an active chiropractic license in June 2007 is not sufficient to lay foundation for expert testimony about the local community standard of care.

In addition, there is no foundation regarding this consulting chiropractor's familiarity with the issues of negligence in this case. The consulting chiropractor does not even specifically mention the standard of care opinions that he has been asked to confirm: namely the issues surrounding alleged symptoms of a stroke and chiropractic treatment that includes an alleged cervical adjustment. The consulting chiropractor does not explain his experience or education in treating patients with symptoms like Plaintiff's symptoms. The consulting chiropractor does not explain how he obtained his knowledge regarding the local community standard of care on these issues. Without addressing these foundational issues, an out-of-state expert cannot ask the Court to rely on the alleged expertise of the consulted local expert.

Several Idaho cases involve similar situations: a medical malpractice case is dismissed on summary judgment because the standard of care expert is out-of-state and does not properly lay a foundation for testifying regarding the local community standard of care. One good example is the *Dulaney* case previously cited. There, the Court found that that affidavit wasn't sufficient and refused to reverse a district court's decision to grant summary judgment. In *Dulaney*, the affidavit in question had many more facts than those provided in this case: the out of town expert was relying upon an anonymous professor (the Court noted the anonymity but did not rule based on that issue), and the professor said that he trained orthopedic physicians that presently practice in Boise, that he'd maintained personal and professional relationships with the physicians in Boise, and that he had taught and lectured in Boise. Despite the detailed affidavit in *Dulaney* the Court still struck the affidavit and granted summary judgment because the affidavit did not relate all of the consulting professor's experience to the time period in question.

In sum, Idaho Courts require sufficient foundation. The affidavit in this case provides virtually no foundation and the foundation provided is clearly insufficient. Thus, the Court would be correct in striking Dr. Tamai's affidavit on this alternate theory, not previously addressed.

IV. CONCLUSION

For all of the above reasons, Defendants respectfully request that this Court enter an order denying Plaintiff's Motion for Reconsideration.

DATED THIS 20th day of December, 2011.

GREENER BURKE SHOEMAKER P.A.

By _____
Richard H. Greener/Loren K. Messerly
Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2011, a true and correct copy of the within and foregoing instrument was served upon:

Sam Johnson
Johnson & Monteleone, L.L.P.
405 South Eighth Street, Suite 250
Boise, ID 83702

[Attorneys for Plaintiff]

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ Email

Richard H. Greener
Loren K. Messerly

ORIGINAL

FILED
A.M. P.M.
JAN 20 2011
CANYON COUNTY CLERK
B RAYNE, DEPUTY

Richard H. Greener, ISB No. 1191
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Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

AFFIDAVIT OF COUNSEL IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

STATE OF IDAHO)
) ss.
County of Ada)

I, Loren K. Messerly, being first duly sworn upon oath, depose and state as follows:

1. I am over the age of 18 years and am an attorney with Greener Burke Shoemaker P.A., attorneys for the Defendants herein.

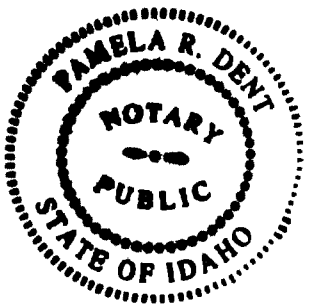
2. Attached hereto as Exhibit A is a true and correct copy of the reporters transcript of the November 23, 2010 hearing on the Defendants' motion for summary judgment proceedings.

DATED this 20th day of January, 2011.

GREENER BURKE SHOEMAKER P.A.

By _____
Richard H. Greener/Loren K. Messerly
Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

SUBSCRIBED AND SWORN before me this 20th day of January, 2011.



_____
Notary Public for Idaho
Residing at Nampa, Idaho
My commission expires 10-24-12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2011, a true and correct copy of the within and foregoing instrument was served upon:

Sam Johnson
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405 South Eighth Street, Suite 250
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[Attorneys for Plaintiff]

- ☐ U.S. Mail
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- ☐ Email

_____
Richard H. Greener/Loren K. Messerly

EXHIBIT A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI, Plaintiff, vs. ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRATIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown, Defendants.	Case No. CV-2009-3450 REPORTER'S TRANSCRIPT

BEFORE

THE HONORABLE RENAE HOFF
DISTRICT COURT JUDGE

Third Judicial District
Canyon County

BE IT REMEMBERED that the above-entitled action pending in the above-entitled court, came on regularly for hearing at 10:45 a.m. on November 23, 2010, at the Canyon County Courthouse, Courtroom 3, Caldwell, Idaho, before the HONORABLE RENAE HOFF, District Judge.

COURT REPORTER: Carole A. Bull, CSR #71

A P P E A R A N C E S

FOR THE PLAINTIFF: JOHNSON & MONTELEONE, LLP
By: Sam Johnson
405 South 8th Street, Suite 250
Boise, Idaho 83702

FOR THE DEFENDANTS: GREENER BURKE SHOEMAKER P.A.
By: Loren K. Messerly
950 West Bannock St., Suite 900
Boise, Idaho 83702

CALDWELL, IDAHO, NOVEMBER 23, 2010, 10:45 A.M.

****

THE COURT: All right. We're taking up the last matter of the day, Martha Arregui versus Rosalinda Gallegos, 2009-3450C.

This matter comes before me today on the defendants' motion for summary judgment and to strike the affidavit of Dr. Tamai. The plaintiffs had moved for continuance, but it was my understanding that that was going to be withdrawn. Is that correct, Mr. Johnson?

MR. JOHNSON: Essentially, it is, your Honor. To the extent that it falls into play with respect to the motion to strike for untimeliness, I suppose it may be referenced, but we're not looking for a ruling on it at this point.

THE COURT: Okay. And then I have Mr. Messerly; is that correct?

MR. MESSERLY: Yes, your Honor.

THE COURT: All right, here on behalf of the defendant.

This matter has been briefed, and I do have the affidavit, obviously, that's at issue, and I

have reviewed the documents and I'm ready to hear argument at this time. Mr. Messerly.

MR. MESSERLY: Thank you, your Honor.

Your Honor, I appreciate this opportunity. I know it's already been a long morning for you. I'll try and be brief with my arguments today.

To start, I guess I would start the argument by saying I believe it's fair and accurate to represent to the Court that plaintiff, in their opposition brief, conceded the points that were raised in the initial motion for summary judgment, namely, that a chiropractor falls within the definition of a health care provider under the Idaho statute 6-1012, and there certainly isn't -- there doesn't appear to be any dispute about that, that 6-1012 requires expert testimony about local standards, local community of experts, and third, that during deposition testimony, the plaintiff's standard of care expert was unable to provide any testimony regarding the local standard of care for the area of Nampa/Caldwell for the time period -- relevant time period, 2007.

And so that based on the record that had been established through -- up to that point and through the deposition that was taken of the

plaintiff's standard of care expert, this case was ripe for being dismissed on summary judgment. And so I believe all those points were conceded in the opposition brief.

The opposition -- certainly, the plaintiff can speak to that, but the opposition brief then brought -- all of its arguments were based on this new affidavit from Dr. Tamai, who, again, had already been deposed in this matter.

So then the question -- I believe the central issue is this motion to strike and whether this affidavit testimony should be stricken or should be allowed to prevent summary judgment.

And our arguments are based on basically two arguments, your Honor. There's a large amount of case law regarding sham affidavits and affidavits that contradict deposition testimony, and the second being that there's also a number of cases, and two in particular that I'm going to point the Court to, that discuss when the local standard of care is not sufficiently -- there's not sufficient foundation laid for an expert testifying in the affidavit as to the local standard of care, then that leaves the case ripe for summary judgment in cases -- the case should be dismissed on summary judgment for failure to provide

sufficient foundation for an expert's testimony about local standard of care, particularly an out-of-state expert.

So speaking first to the sham affidavit, your Honor, the cases -- we cited a number of cases, and they uniformly note that the purpose of the sham affidavit doctrine is to provide all movants with the opportunity to use summary judgment as an effective way to resolve the case. And if parties are allowed to prevent summary judgment merely by creating affidavits through their attorneys that could directly contradict testimony that was elicited through cross-examination at deposition, then summary judgment becomes a worthless avenue of resolving a case because all non-movants would use that as a way to get out of what they've said at deposition.

So in this case, that's what's happened. As I noted earlier, this case was very much ripe for summary judgment. All the deposition testimony from Dr. Main which we provided in the statement of undisputed facts in support of our motion for summary judgment pointed out that Dr. Tamai had absolutely no knowledge of the local standard of care for the Nampa/Caldwell area.

She points out that she was licensed

only in California, has never been to Idaho, doesn't know where Dr. Main, the defendant's clinic, chiropractic clinic, was located in Idaho. She never talked with any physician in Idaho other than a Dr. Crum for just about three minutes to see if the plaintiff's attorneys were good guys, which apparently he confirmed, and I'll confirm that as well.

But Dr. Tamai had not discussed with anyone what the local standard of care was. She readily admitted that. And then to confirm all that, at the end of her deposition testimony, she was asked -- on page 147 of her deposition, she was asked, "I think we've covered everything we need to do there, so you are not going to do any additional work and modify your opinion, I trust?"

And the witness's eventual answer, "Not that I'm aware of, unless something in terms of evidence comes up that someone would ask me to render my opinion upon."

And then again, our counsel, Mr. Greener, "Counsel, if there's any additional work done, we would like to be advised of it. If there are any modifications, we'd like to take the deposition or get an update on the deposition of the witness on that."

So she testified that that was the

extent of her opinions at that time. So that's why then we went to the effort of filing a motion for summary judgment, expended all the fees that go into that, and had this case cued up to be dismissed on summary judgment. And now, through an affidavit that contradicts all that testimony, summary judgment -- the process is being undermined.

So in looking to some of these contradictions, the contradictions are basically threefold. The contra- -- one, this affidavit now. And I would point out the affidavit of Dr. Tamai, pointing to paragraph 3, is now her reversal and saying that she does know what the local standard of care is.

Paragraph 6 and 7, specifically paragraph 7, basically, in this case, I'll represent again, but I think it's fair to say that there are basically two opinions being offered regarding negligence by Dr. Tamai in the breach of the standard of care, one being that Dr. Gallegos-Main, the defendant, in her chiropractic care of the plaintiff, should not have performed a cervical adjustment based on what symptoms she had seen, and the second being that at the end of her treatment that day, she should have done more to make sure that the plaintiff got home safely, either sent her to an emergency room or made

sure that someone was there to take her home.

Those are the two areas where she is claiming that our defendant fell below the standard of care. Both of those opinions are stated very differently in the affidavit testimony and contradict deposition testimony, your Honor.

So I would point the Court first to the deposition testimony, pages 132, 133, 134. On those pages, Dr. Tamai here, where there's cross-examination and we get to the truth of the matter of what Dr. Tamai testifies about about the standard of care, she's asked specifically about her opinion that Dr. Gallegos-Main should not have let her leave alone without assistance at a minimum and requested emergency room transport at a maximum.

When she's asked about that, she says, "I don't think there's anything written down. But for patient safety and other people's safety, you know, I think it's independent of being a health care professional as well. If you see someone who's not able to drive themselves or ambulate alone, they should be -- require some help."

"Do you have any facts" -- the attorney, "Do you have any facts that would show that Ms. Arregui was unable to drive or unable to walk?"

The answer, "Nothing other than her testimony deposition."

And then the question, "So I want to make sure I understand this. You're not going to express an opinion in this case that Dr. Gallegos-Main's failure to either drive or make sure the plaintiff was driven home was a deviation from the standard of care?"

And then her answer, "I don't think that that is required but, again, recommended."

Then later on in the second part of that, "In your opinion, was -- we know Dr. Main didn't send Ms. Arregui to an emergency room or to her medical doctor. In your opinion, was her failure to do that, under the circumstances, a deviation of the standard of care?"

The witness's answer, "Was a deviation? No, I think as I understand your question."

So in both of those responses, the witness points out that she would have done certain things differently but that it's not a breach of the standard of care. She specifically says no when asked is that a deviation of the standard of care. Then in her affidavit testimony, she states a complete contradiction to that.

In paragraph 8, "Dr. Main's patient examinations" -- sorry. Moving to after the semicolon, "The doctor also failed to call paramedics or other emergency medical personnel or even to assist plaintiff, once plaintiff was experiencing symptoms of stroke. Each of these amounted to a breach of the applicable standards of care."

So that would be the -- one of the first -- one of the main issues of this case, the standard of care. The two arguments for standard of care breaches, one of them, in her deposition, she totally states that she's not going to give an opinion about that being a breach of the standard of care, and then in her affidavit, she contradicts that.

The second main argument for a breach of the standard of care in this case is that the doctor shouldn't have done a cervical adjustment based on the symptoms that the patient was having.

So I would reference the Court to pages 159 and 160 and 161 of the deposition testimony again. The attorney asks, "You were asked by counsel about whether you're mindful of certain risk categories that a patient that you work on may have. Does that include the potential risks for a VBA stroke resulting from a cervical manipulation?"

Answer, "Yes, it's something that is mentioned a lot in the community and it's something that I think all chiropractors are aware of and don't want to happen to them."

Question, "In reading Mr. Arregui's deposition transcript, the portions that you were provided with, did it contain a description of the cervical rotation adjustment?"

Answer, "She -- according to her deposition, she didn't know what it was. But she said that her head -- she said her head was rotated from side to side when she was both face down and face up, so I don't know. According to the patient -- I mean, according to the plaintiff -- I'm just trying to recall from the deposition. The plaintiff said she was face down and her head was rotated from side to side both face down and face up. According to her testimony, she doesn't know if that was an adjustment or not, but her head was rotated, so I don't know because she doesn't know."

Question, "Would the rotation of the head as described by Martha Arregui in her deposition be consistent with a cervical rotation adjustment in chiropractic?"

"It's possible. It could also be a

range of motion, but it's possible it was an attempt to be an adjustment as well."

So in this conversation here in her deposition, she's -- the expert, Dr. Tamai, is explaining that she doesn't know whether a cervical adjustment happened. In fact, the only evidence she has that there was actually a cervical adjustment that would breach the standard of care, in her opinion, was from the deposition testimony of plaintiff who has put that name on what happened to her.

But plaintiff also just merely described a rotation of her head which could fit within just a normal range of motion, which Dr. Tamai has testified wouldn't have been a breach of the standard of care. And Dr. Tamai in that testimony indicates that the only reason that she -- the only evidence that that movement of her head was a cervical adjustment is what the plaintiff called it.

The plaintiff, we know in this case, is a layperson. She doesn't know whether she's getting a cervical adjustment or a range of motion. She's a layperson. She's not a chiropractor.

Well, then -- so the testimony from Dr. Tamai is that she can't know basically whether or not a cervical adjustment happened. The testimony

isn't clear, and so, at most, her testimony would be if there was a cervical adjustment, then that cervical adjustment would have breached the standard of care in her opinion, but that's not the testimony that she gives in her affidavit.

In paragraph 7, she says affirmatively, "Defendant's decision to apply a cervical adjustment to her patient was a breach of the prevailing community standards of care in June 2007," again changing dramatically the import of her deposition testimony on a central issue of this case. She's now claiming that she does know that there was a cervical adjustment and that that was a breach of the prevailing community standard.

Based on the sham affidavit doctrine, your Honor, we would ask the Court to strike this affidavit. On the central points of this case, it contradicts deposition testimony and it should not be allowed to prevent summary judgment.

It doesn't give -- and I guess to add to that, the sham affidavit doctrine points out that you can explain what your contradictions are, but in this case, there are no explanations for how she suddenly has this new testimony regarding these two central issues of the case. It doesn't explain why she

suddenly now believes it is a breach of the standard of care for not calling an emergency room doctor. It doesn't explain why she suddenly now knows for sure that there was a cervical adjustment.

Then on the final point, your Honor, I would point to -- in addition to the sham affidavit doctrine, we would rely on the cases that deal with out-of-town doctors who call on local doctors to find out what the local standard of care is.

Specifically, I'd point the Court to two cases, Ramos -- two very recent cases, Ramos v. Dixon, which is 144 Idaho 32, and that's a 2007 case, and Dulaney versus Saint Alphonsus Regional Medical Center, that's 137 Idaho 160.

In both these cases, the Court found -- upheld a decision to grant summary judgment by striking -- well, by finding that the affidavit testimony of an out-of-town doctor was not sufficiently clear as to how they had obtained knowledge of the local of standard of care and, therefore, was not sufficient to preclude summary judgment.

In our case, the only affidavit testimony that we have in the record regarding how Dr. Tamai has now, after the fact, obtained knowledge of the local standard of care is found in paragraph 3.

In paragraph 3, Dr. Tamai includes some conclusory statements about how she now has this knowledge of the local standards of Nampa and Caldwell. She says that she spoke with an anonymous local chiropractor who maintained a chiropractic practice in Caldwell, Idaho in June of 2007.

She said, "It is my understanding that this chiropractor was appropriately licensed in Idaho as a chiropractor and maintained an active practice of chiropractic medicine during the relevant period. The chiropractor indicated to me that he was familiar with the local standards of care for performing chiropractic procedures in Nampa and Caldwell."

And then it also points out that he confirms that the local standards of care were consistent with what she believed were the standards of care in her location in California.

So the deficiencies of this paragraph are several. First, anonymity of the chiropractor. Now, I can't point to an Idaho case that specifically says you can't withhold their name, the underlying name of the local practitioner. The -- I believe it's the Dulaney case, all it says is -- in that case, it says even assuming that the use of an anonymous informant is an acceptable manner of adequate familiarizing an

out-of-town -- an out-of-area physician of the local standard of care, and then it goes on to state why that affidavit still wasn't enough.

So it doesn't -- it doesn't make a conclusion one way or the other whether this is an acceptable form of providing local standard of care by using an anonymous chiropractor. But I think related to that anonymity is if you're going to withhold their name, you have to provide better facts about what their practice is, how long they've been practicing in the area, and most importantly, how do they claim to know what the local practice is in the area of Nampa/Caldwell, and specifically to the standard of care that Dr. Tamai is saying was breached.

How does this doctor -- and nowhere in this document does it say how does this doctor -- sorry -- this chiropractor know that the local standard in Nampa/Caldwell is that if you have symptoms like the plaintiff in this case, you are not to give a cervical adjustment, assuming that there was one. Of course, this case obviously denies that there ever was one.

But even assuming that there was one, where anywhere in this affidavit does it give any foundation for this anonymous chiropractor knowing that the standard of care in Nampa/Caldwell is that if you

come in with the symptoms of this plaintiff, you cannot -- you should not be given a cervical adjustment, that that might harm that person.

Instead, all there is is a conclusory statement that this anonymous chiropractor, who, for all we know, worked for one year in 2007 and is now out of the practice, was familiar with the local standards of care for that one year. We don't know what training that local chiropractor received. We don't know how long they've practiced. We don't know what training they received specific to symptoms like this patient had and how to treat those symptoms. We don't know any of those sorts of facts.

And it's important -- the point of -- I know the Court knows the point of a local standard and requiring an expert to speak to the local community standard is that Dr. Tamai's experience in California and what she believes to be the standard of care in California is not necessarily the same as what it is in Caldwell/Nampa and what's understood by the defendant in this case.

She shouldn't be held to the standards of Dr. Tamai, and if Dr. Tamai wants to say, well, my standards also happen to be the standards in Nampa/Caldwell, then she's got to be able to provide

affidavit testimony to back that up. She's got to be able to say I've talked to this chiropractor, he's got ten years of experience working in this area, he or she, and he or she's been trained in this way about how to handle these symptoms, he agrees with me on this point and this point, that if a person comes in with these symptoms, I shouldn't give chiro- -- I shouldn't give a a cervical adjustment. Those facts should be laid out in this affidavit, and none of them are, your Honor.

So in pointing to the Dulaney case -- and I'm about done here, your Honor. I'm sorry to go on at such length. I hope that I'm not repeating myself too much.

But in the Dulaney case, the Court talks about the affidavit of a -- the local care that the person that they were -- that this out-of-town expert was relying upon was this anonymous professor, and the professor said that he trained orthopedic physicians that presently practice in Boise, that he'd maintained personal and professional relationships with the physicians in Boise, that he had taught and lectured in Boise, all of these facts which are much more than the facts we have in our case, and yet the Court still finds that this wasn't sufficient because they didn't

relate all of these facts to the time period in question.

Well, that's a little different because here in this affidavit, they were careful enough to at least put the date correctly in there to say that this anonymous person knew about the time period in question. But all of these extra facts that would have been -- that should be in there to help give the foundation that's required aren't there.

I mean, much more was given in this Dulaney case, and yet the Court still found that that affidavit wasn't sufficient and then granted -- did not reverse a district court's decision to grant summary judgment because that information was insufficient.

Similarly in the Ramos/Dixon case in 2007, the Court says what occurred in this case demonstrates an error too often made when trying to develop an adequate foundation for the opinion of a medical expert whose experience is outside the relevant community. Plaintiff's counsel simply put Dr. Richter in touch with Dr. Speirs and left it up to Dr. Richter to make a sufficient inquiry into the applicable standard of care.

How an expert becomes familiar with the standard of care is a legal issue, not a medical issue.

There's no reason to believe that Dr. Richter, a physician practicing in New Jersey, would be familiar with the requirements of 6-1012, 6-1013, Rule 56(e). The attorney must be directly involved in advising the expert as to how to learn the applicable standard of care in determining whether the expert has done so.

And that's very important in this case because, as I mentioned, we don't have any facts that would show us how this Dr. Tamai from California, who obviously was completely ignorant to the whole idea of local standard of care, as in her deposition, she readily admits that she hadn't done anything to try to figure out what the local standard of care is. She's totally ignorant to this whole issue, and then we're to conclude that she's now done what's essential just in one paragraph that says she talked to an anonymous chiropractor who worked in 2007, and that's all we're told about this chiropractor.

That's not enough for us to be able to rely on and say, oh, yes. We can't be sure that this chiropractor now knows the local standard of care for Nampa/Caldwell. So, your Honor, so for those two different reasons, your Honor, we'd ask the Court to grant summary judgment in this case based on the sham affidavit doctrine which has been used by courts

readily through the years. And it's uniformly a rule of practice that when deposition testimony is directly contradicted by affidavit testimony, that that affidavit testimony has to be adequately explained, which it hasn't been in this case, and, therefore, it can't be used to preclude summary judgment.

And second, that the local standard of care has not been adequately detailed in this affidavit. And when that happens as well, Courts like in the Dulaney and Ramos case, will grant summary judgment. In fact, I just ask the Court to do that. Thank you.

THE COURT: All right. Thank you.

Mr. Johnson.

MR. JOHNSON: Thank you, your Honor. Good morning to the Court. May it please the Court and counsel, Mr. Messerly.

Of course, your Honor, I'm here on behalf of the plaintiff, Martha Arregui, and I'm prepared to argue in opposition to the entry of summary judgment in this case.

Your Honor, by and large, the facts, at least as they're germane to the current motion, can be stated quite quickly and succinctly. My client went in to visit this chiropractor in June 2007 in a

Caldwell-based chiropractic clinic. And while the chiropractor was treating my client, the chiropractor did some cervical adjustment rotation, worked the neck, for lack of perhaps a better expression, your Honor, and in doing so, caused my patient to undergo a stroke. The stroke is not disputed here on summary judgment.

As a result of the chiropractic care, we brought suit, believing that the chiropractor had been negligent. And, your Honor, we still maintain that the chiropractor was negligent in handling our patient on the day in question.

You know, of course, the summary judgment standard -- oh, by the way, your Honor, one fact that we now know is not in dispute is that, as counsel for plaintiff, I am a good guy. Even this counsel had to concede that point, your Honor. So I'm almost tempted to ask the Court for judicial notice of that, but I won't go so far. I'm sure there are arguments to the contrary.

But, you know, it's interesting, your Honor. Of course, on summary judgment standards, the facts are to be liberally construed and all the inferences are to be drawn -- reasonable inferences are to be drawn in favor of plaintiff, your Honor. And in this particular case, we don't believe that the

defendants have anchored their position consistently with that standard. They're taking information from affidavits and other sources and shedding it in a light most favorable to their position, and then, once doing so, asking for summary judgment.

And so I would just point out that the standard that's been around for a long time, your Honor, if it's applied properly to this case, we would submit that summary judgment is not appropriate here.

You know, part of the summary judgment process, and the case law is consistent with this, I think the Rule 56 is consistent with this, is that a party can't rest upon mere allegations, but in response to the motion, must set forth specific facts. And, your Honor, that's what we've done here.

This is a case where, on summary judgment, the defendants argue that 6-1012 and 13 apply to a chiropractic physician. Your Honor, we thought long and hard about whether or not we wanted to challenge the application of 6-1012 and 13. Ultimately concluded that it was more reasonable, more efficient, and more prosperous to the judicial process to just go ahead and educate our expert on the standard of care by having her consult with local chiropractors that practiced in Caldwell, the spot of the negligence, and

practiced in Caldwell at the time of the negligence on June 4th of 2007, your Honor.

The anonymity -- the affidavit doesn't identify the chiropractor, but this chiropractor has been identified through other means. We disclosed Dr. Robin King, a chiropractic physician here in the Caldwell area, as our rebuttal expert, your Honor. And so although again Dr. Tamai didn't expressly identify him, it's not as though we have an anonymous chiropractic person here educating Dr. Tamai on the local standard of care.

But in any event, we were faced with this decision to either challenge the position of the defendants under 6-1012 and 13. Again, we decided it was easier -- you know, we didn't want to create an issue that would likely be on appeal by whoever the aggrieved party ultimately was, your Honor. So for a host of reasons, strategically, it made sense for us to do what we've done here and have our out-of-town expert familiarize herself with the local standard of care.

And for doing this, we've been accused of submitting sham affidavits, and that's in the briefing and it's reiterated here from counsel's arguments, your Honor. And we certainly don't believe that we have submitted a sham affidavit in this case.

And I would submit to the Court that if you look at the October 15th, 2010 report that Dr. Tamai authored, in light of the October 19th deposition testimony that she gave, including the testimony elicited by Mr. Monteleone during that deposition, and her November 16th affidavit, your Honor, that everything, perhaps barring some trivial inconsistencies, is right down the line.

What we have here is Dr. Tamai announcing in her report that she believes that the standard of care is X. She says that she believes it's X in her deposition, and she confirms that it's X in her affidavit. The only thing in addition to what she did was confirm with someone here locally that the standard of care that she believed applied was in fact the same standard of care that existed at the time of the alleged negligence of Dr. Gallegos.

And so, your Honor, with respect to the foundational analysis -- and we've looked at the case that counsel cited, the Dulaney case, I believe it is, and the reasons for granting summary judgment in that case are certainly distinguishable from the facts of this case, your Honor. In each instance, the Court went off on a reason that doesn't exist here. Either the person who was the supplier of the local standard

of care hadn't practiced in the area or wasn't in the same field or didn't speak to the standard of care at the right time, your Honor. And we've done that here.

We had our expert consult again with Dr. Robin King. She confirmed through him that he was practicing in this area in 2007, that as a result of his practice, he's familiar with the standard of care that applies to the Nampa/Caldwell area. Of course he's familiar with it. He's there practicing in it on a regular, daily basis, your Honor.

And that between the consultations of these two chiropractic physicians, the conclusion is drawn that the standard of care that Dr. Tamai discussed and outlined in her medical report and in her deposition and in her affidavit following her deposition is consistent with the standard that was in place in Nampa/Caldwell at the time my client was caused to suffer a stroke by the actions of the defendant here.

Your Honor, all of the foundational prerequisites are here in the affidavit. And, of course, you know, the 6-1012 and 13 and the judicial gloss that has been painted over it over time has sort of forced plaintiff's lawyers to prepare a formulaic affidavit. I mean, we have to build the affidavit to

meet the buzzwords, the legal buzzwords that spring from the statute and the judicial decisions. That doesn't make it a sham affidavit, your Honor. That just means we're trying to do our best to comply with the governing principles of law here, and that's what we've done in this affidavit, your Honor.

Our expert talks about how she actually holds these opinions, that she can testify to these opinions with a reasonable degree of medical -- I think she said "probability." And I know that the word "medical certainty" is often used in medical malpractice cases, but I think "medical probability" and "medical certainty" are certainly phrases that can be used synonymously and interchangeably.

She has made a showing that she possesses professional knowledge and expertise of a chiropractic physician. That hasn't been challenged here. And she, through her affidavit, after familiarizing herself with the local standard of care, has actual knowledge of that standard of care as it existed in the site and at the time.

And there's no question that, you know, Dr. Robin King, a local physician in chiropractic medicine, is in essentially the same field as Dr. Tamai practices down in California. It just so happens that

Dr. Tamai, in her deposition -- you know, she hasn't been retained as an expert before. She's not entirely familiar with the process. Questions were posed to her in a way that asked her to assume certain facts.

And, in fact, I believe during some of the examination of Dr. Tamai, Mr. Greener asked her to assume that the chiropractic physician's version of the disputed facts was in fact the one that he would like her to render her opinions and based on that. And so the doctor had done that.

And I think there were occasions when she did so that the doctor testified that based on what the chiropractic physician has indicated, there may not be a breach of the standard of care. But again, your Honor, we're here on summary judgment and we're not to look at a one-sided statement of a conflicted area of the facts.

In these cases, of course, our expert is allowed to take into consideration the testimony of our client, the patient of Dr. Gallegos's, and everything that that patient said and did and render her ultimate opinions based on the totality of all the evidence, which she did in her report, she did to some degree in a deposition format, and then she did again in her affidavit, your Honor.

And interestingly, I continue to go back to this, the standard of care hasn't changed. You know, that's the part that I struggle with with respect to the sham affidavit sort of concept. If the standard of care had somehow switched and become something different and we were utterly inconsistent on it, your Honor, I suppose it would be easier to accept the arguments offered by the defense in this case. But we aren't. The standard of care hasn't changed.

All we did in response to the motion for summary judgment was educate our out-of-town expert on the local standard of care. The defense pretends like there's this rule that says you can't do that after a motion for summary judgment has been filed and you're stuck with whatever the expert said prior to filing of the motion for summary judgment.

Well, there's no case law or anything to support that, your Honor. In fact, as I read these cases on this standard of care issue, a single case has come back to the same court on several occasions based on motions to reconsider and those sorts of things and kind of matriculates in a moving target sort of fashion.

So, your Honor, we just feel that we were faced with this issue on 6-1012. We didn't want

to again make the argument for purposes of the motion that we didn't have to comply with 6-1012. In light of the circumstances, it was easier just to come into conformity with it, and we believe that we've done that in good faith. And in doing, we believe that summary judgment should not be granted in this case.

Thank you, your Honor. Unless there are any questions that the Court may have, I'm finished.

THE COURT: I do not at this time. Thank you.

All right. Mr. Messerly, you may respond.

MR. MESSERLY: Thank you, your Honor. Just to make it clear, in response to a few of the statements, it is our position that the standard of care has changed in the affidavit.

Our position would be that there is initially a letter written by Dr. Tamai -- or Tamai I guess is how it's being pronounced; I've been getting it wrong all the time -- initially back on October 15th right before her deposition. Those opinions were challenged in her deposition. That's the point of a deposition and why it's trusted above an affidavit is because of the ability to cross-examine.

They were challenged. She backed off

on -- completely backed off on her opinion that Dr. -- that the defendant did something wrong by not sending her to an emergency room after these alleged symptoms of dizziness at the end of their appointment. She completely backed off on that and said, no, that's not a breach of the standard of care, that's not going to be my testimony.

And she also changed her testimony -- or she also confirmed, as I would point out -- and I didn't read this the first time. On page 163 of her deposition, she's asked, let's see, "Do you know if the standard of care" -- I'm sorry.

"And then as we sit here today, you're unable to form an opinion on whether or not there was actually an adjustment or it was a range of motion test in the two instances that counsel discussed with you, correct?"

Answer, "Yes, because there's conflicting statements in the deposition."

And again, she then -- when she's challenged on her claim that there was a cervical adjustment and that, therefore, that's a breach of the standard of care. And then again in her affidavit, they then go right back to what her original opinion was, even through in deposition she was challenged and

she changed her opinion. She gave her true opinion in her deposition, and then they've gone back to her original opinions from her original letter, which again, those aren't as trustworthy, they're not challenged in cross-examination. They should not be used to subvert what she really said in her deposition.

So that's our argument on this in terms of the sham affidavit and why we would call it a sham affidavit. I don't think that's a personal attack on counsel. It's just that that's the term that's used in the case law in terms of when affidavits contradict depositions.

Then as to the foundation for the local standard of care, I would just point out, as the Court likely is already aware, but just to remind the Court, when it was argued that this is summary judgment and, therefore, all benefits, inferences, and such should be granted to the non-moving party. Well, the case law actually, on issues of foundation with regard to the local standard of care as found in Dulaney, is that with foundation questions and whether evidence should be even admissible to be considered on a summary judgment, the liberal construction and reasonable inference standard does not apply, however, when deciding whether or not testimony offered in connection

with a motion for summary judgment is admissible.

So we're not basing that higher standard. Instead, this is just a question of was there sufficient foundation that this -- that Dr. Tamai had knowledge of the local standard of care.

And all of this additional testimony that this anonymous physician is Dr. Robert King, you know, that is not in the affidavit and can't be considered at this point. What his background is can't be considered. None of that was put into the affidavit. The fact that he's still a practicing chiropractor, that wasn't put in the affidavit. Those are all things that have just been proffered now by plaintiff's counsel.

And the case law is clear when it says that, for example, in Dulaney, the professor's conclusory statement that he is familiar with the standard of care in Boise in 1994 is simply not sufficient. And that's all that this affidavit contains is a conclusory statement.

It doesn't say how this anonymous chiropractor came to have the knowledge of the local standard of care. It doesn't even tell us how long he was practicing. Obviously, that would help us to know whether he could really testify to local standard of

care, but it doesn't say that. It doesn't say what training he received about cervical adjustments, he or she. It doesn't say any of this information, your Honor.

So those are the only points that I would add and ask the Court to grant summary judgment. Thank you, your Honor.

THE COURT: All right. Thank you.

The defense has moved to strike the affidavit of Sarah Tamai that was filed on November 15th, 2010 in support of plaintiff's opposition to the motion for summary judgment.

The defendant argues first that the affidavit is untimely under Rule 56(c) and that it is inadmissible under 56(e) and case law. 56(c) Rule of Procedure addresses summary judgment and provides, if the adverse party desires to serve opposing affidavits, the party must do so at least fourteen days prior to the date of hearing.

The defendant further argues that this is a sham affidavit -- and that is the term that has been used in the case law -- because it contradicts Dr. Tamai's deposition testimony and was merely presented today to prevent summary judgment.

Boise Tower versus Washington, this is a

District of Idaho 2007 case, L 1035158, addresses the issue of sham affidavits in the Ninth Circuit.

And I quote, "The 'sham affidavit' doctrine prevents the use of manufactured testimony as a means of creating an issue of fact to get past summary judgment. Courts have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn testimony by, say, filing a later affidavit that flatly contradicts the party's earlier sworn deposition without explaining the contradiction or attempting to resolve the disparity. The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting prior deposition testimony."

I conclude that the affidavit was not filed timely and that there was no request for shortening of time. I further conclude that the affidavit clearly contradicts the prior deposition testimony and that it was clear that at that time, Dr. Tamai was not aware of the local standard of care in this community.

Pursuant to Rule 56(c), the opposing affidavit was not timely filed and clearly contradicts

prior testimony. As a result, I am going to grant the motion to strike the affidavit, which leaves the remaining issue, then, of summary judgment.

Having granted the motion to strike based on the plaintiff's failure to meet its burden with regard to local of standard of care and with regard to contradictory statements, I am called upon at this time to look at the summary judgment issue which the parties have been arguing here before me this morning.

And, of course, I cite to Idaho Code Section 6-1012 and 6-1013. 6-1012 clearly provides that as an essential part of the plaintiff's case in chief, they affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence that such defendant, then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of the purveyor -- alleged purveyor of negligence.

And I also cite, then, 6-1013, which provides under subsection (c) that such expert witness possessed professional knowledge and expertise coupled

with the actual knowledge of the applicable said community standard to which his or her opinion testimony is addressed. It then goes on to say that the section shall not be construed to prohibit or preclude a competent expert who resides elsewhere from adequately familiarizing himself with the standards and practices of a particular area.

In looking at the issue of summary judgment, I also am relying heavily on Dulaney versus Saint Alphonsus, 137 Idaho 160, and that's a 2002 case and the cite that Mr. Messerly in his responding argument made.

And that is, "The liberal construction and reasonable inferences standard does not apply, however, when deciding whether or not testimony offered in connection with a motion for summary judgment is admissible." And I'm going to leave out the cites.

"The trial court must look at the witness's affidavit or deposition testimony and determine whether it alleges facts which, if taken true, would render the testimony of that witness admissible."

"To avoid summary judgment for the defense in a medical malpractice case, the plaintiff must offer expert testimony indicating that the

defendant health care provider negligently failed to meet the applicable standard of care. In order for such expert testimony to be admissible, the plaintiff must lay the foundation required by 6-1013. To do so, the plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the witness has actual knowledge of the applicable standard of care to which his opinion testimony is addressed."

Now, plaintiff has responded with the affidavit in this matter. However, the evidence in this case indicates that that affidavit contradicts prior opinions of Dr. Tamai from a deposition previously held, and that until the filing of that untimely affidavit, she was not familiar with the local standard of care.

As a result, I find that summary judgment is appropriately granted in this case as there is no issue -- genuine issue of material fact.

All of my stated findings and conclusions will stand for the record. Mr. Messerly, you shall draft an order striking the affidavit and

granting summary judgment, submit a copy to opposing counsel.

Mr. Johnson, if you have objection as to form of that order, let me know. If I don't hear objection as to the form, then I'll go ahead and execute it within seven days.

Anything further from either side?

MR. MESSERLY: No, your Honor.

MR. JOHNSON: No, your Honor.

THE COURT: All right. Thank you, folks. We are in recess.

(End of proceedings.)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF CANYON)

I, CAROLE A. BULL, Certified Shorthand Reporter and acting Official Court Reporter of the District Court of the Third Judicial District of the State of Idaho and Notary Public in and for the State of Idaho, do hereby certify:

That said hearing was taken down by me in shorthand at the time and place therein named and thereafter transcribed by means of computer-aided transcription, and that the foregoing transcript contains a full, true, and correct copy of said hearing, consisting of pages 3 through 40, inclusive.

I further certify that I have no interest in the event of this action.

WITNESS my hand and seal this 22nd day of December, 2010.

CAROLE A. BULL, CSR NO. 71
Notary Public in and for the State of Idaho, residing in Caldwell, Idaho.
My commission expires 10-29-2011.

Sam Johnson
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Boise, Idaho 83702
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sam@treasurevalleylawyers.com
Idaho State Bar No. 4777

Attorneys for Plaintiff

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

MARTHA A. ARREGUI, Plaintiff, v. ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown, Defendants.	**Case No. CV 09-3450** **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

INTRODUCTION

On December 2, 2010, Plaintiff Martha Arregui (hereinafter "Arregui") moved this Court to reconsider its order granting Defendants' *Motion to Strike the Affidavit of Sarah Tamai, D.C.*, and its order granting Defendants' *Motion for Summary Judgment*. Thereafter, on January 20, 2011, the Defendants filed *Defendants' Opposition to Plaintiff's Motion for Reconsideration* and the *Affidavit of Counsel in Support of*

Opposition to Plaintiff's Motion for Reconsideration. Nothing more than the Reporter's Transcript of the November 23, 2010, hearing was attached to the *Affidavit of Counsel in Support of Opposition to Plaintiff's Motion for Reconsideration.* (*See Exhibit "A" attached thereto*).

In accordance with Rule 7(b)(3)(E), of the Idaho Rules of Civil Procedure, Arregui now takes this opportunity to submit the following *Reply Memorandum in Support of Motion for Reconsideration.* In doing so, Arregui does not attempt to reply to every point raised by the Defendants in their opposition to the pending motion for reconsideration. To the extent Arregui does not expressly reply here, she relies on the previously recorded filings made by her in this matter.

REPLY

1. The Defendants first argue, "Plaintiff Could Not Have Been Blindsided By The Local Community Standard Issue." *See Defendants' Opposing Memorandum, p. 6.* First, Arregui never uses the term "blindsided" in her motion for reconsideration or in the supporting memorandum. Arregui recognized from the outset an obligation on her part to prove Defendant Dr. Main breached the applicable community standard of "chiropractic" care. However, Arregui was not of the opinion that she must prove such element in strict compliance with Idaho Code §§ 6-1012/6-1013, and only through the offering of direct expert testimony, etc. Arregui, moreover, was not arguing that Defendants necessarily had an obligation to assert the defense before filing the motion for summary judgment. Arregui's only point is that in fact the Defendants did not raise the defense at any time before seeking summary judgment, and therefore Arregui was not precluded from thereafter familiarizing her expert in compliance with Idaho Code in an effort to defeat

the motion for summary judgment. The Defendants have not cited any authority, statutory or otherwise, supporting the proposition that Arregui has to familiarize her expert in compliance with Idaho Code before a motion for summary judgment is brought rather than in response thereto. Especially here where the applicable provisions of Idaho Code do not make specific reference to "chiropractic" physicians. *See Idaho Code §§ 6-1001 and 6-1012.* Rather the statute refers to any physician who holds a license to practice medicine. *Id.* In Idaho, chiropractic physicians clearly do not practice medicine:

> Chiropractic practice, as herein defined is hereby declared not to be the practice of medicine within the meaning of the laws of the state of Idaho defining the same, and physicians licensed pursuant to this chapter shall not be subject to the provisions of chapter 18, title 54, Idaho Code, nor liable to any prosecution thereunder, when acting within the scope of practice as defined in this chapter. (Emphasis added).

See Idaho Code § 54-703(3).

Quite frankly, if the Defendants are correct that the law does not allow a party to come into compliance with Idaho Code §§ 6-1012/6-1013 in response to a motion for summary judgment, then let the law be damned.

2. The Defendants also argue, "The Sham Affidavit Doctrine Applies To Experts Who Change Their Testimony." *See Defendants' Opposing Memorandum, p. 13.* No doubt the sham affidavit doctrine should apply to experts who say one thing and then manufacture evidence to say something different later on. However, that clearly did not happen here. In this case, Arregui's expert first indicated she had not consulted with a local chiropractor about the standard of care, and later testified she had consulted a local chiropractor. But, in the interim, Arregui's expert did in fact speak to a local physician, and so it was not as though she manufactured the evidence by making it up out of whole

cloth. It was true. Additionally, as previously stated and consistently with *Boise Tower Associates, LLC v. Washington Capital Joint Master Trust,* 2007 WL 1035158, 12-13 (D. Idaho), any conflict in her testimony has been adequately explained by Dr. Tamai. As she states in her affidavit, the difference stems from her effort to familiarize herself with the local standard of care by consulting with a local professional in her same field.

3. The Defendants further claim, "The Tamai Affidavit Was Untimely Filed Without Explanation." *See Defendants' Opposing Memorandum, p. 11.* To the contrary, the late nature of the Tamai Affidavit was explained. In fact, the explanation came in the form of a motion under I.R.C.P. 56(f), supported by the Affidavit of Sam Johnson. (*See Rule 56(f) motion and supporting affidavit on file herein*). Although the Defendants have professed to suffer prejudice as a result of the timing of the Tamai Affidavit, there clearly has been none. In fact, the Defendants acknowledged any lack of prejudice by stating in their opposition to the instant motion that, "Defendants fully briefed the sham affidavit issue prior to the summary judgment hearing." (Emphasis added). It was the Defendants, after all, who moved the Court to shorten the time frame for hearing the Defendants' *Motion to Strike the Affidavit of Sarah Tamai, D.C.* (*See Defendants' Motion For Order Shortening Time On Defendants' Motion to Strike, on file herein*). Ironically, it was Arregui who did not receive the allotted time to respond to Defendants' *Motion to Strike the Affidavit of Sarah Tamai, D.C.* The motion to strike was filed on November 16, 2010, and heard only seven (7) days later, on November 23, 2010. Under Rule 7(b)(3) of the Idaho Rules of Civil Procedure, the motion to strike and notice of hearing thereon "shall be filed with the court, and served so that it is received by the parties no later than (14) days before the time specified for the hearing." And, although

Defendants submitted a *proposed* Order Shortening Time on Defendants' Motion to Strike, to Arregui's knowledge it was never issued by the Court. The lack of fourteen (14) day notice prejudiced Arregui, as the Defendants have recognized, such that, "Plaintiff did not file an opposition to the Motion to Strike." *See Defendants' Opposing Memorandum, p. 3.*

CONCLUSION

In summary, the *Affidavit of Sarah Tamai, D.C.*, should not be stricken from the record, since it does not involve the manufacturing of evidence for which the "sham affidavit" doctrine was designed to preclude. Furthermore, the contradictions from the deposition and affidavit testimony have been adequately explained by Dr. Tamai. *See Boise Tower Associates, LLC v. Washington Capital Joint Master Trust,* 2007 WL 1035158, 12-13 (D. Idaho). The legislature did not intend for Idaho Code §§ 6-1012/6-1013 to apply to chiropractic physicians, but only to those physicians holding a license to practice medicine. To the extent the Tamai affidavit was untimely, it should have been excused by Arregui's motion under I.R.C.P. 56(f), seeking additional time to secure it. To the extent the Tamai affidavit was untimely, the Defendants have all but acknowledged they suffered no resulting prejudice. In fact, the record shows it was Arregui who suffered prejudice by not receiving fourteen (14) days to respond to the motion to strike the Tamai affidavit.

Based upon the foregoing reasons and those reasons previously recorded, Arregui respectfully asks this Court to grant her motion to reconsider and allow this case to proceed to jury trial.

DATED: This 24 day of January, 2011.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I HEREBY CERTIFY that on this 24 day of January, 2011, I served a true and correct copy of the foregoing document by delivering the same to each of the following, by the method indicated below, addressed as follows:

☐ mailed ☐ hand delivered ☒ transmitted fax machine to: (208) 319-2601	Richard H. Greener Greener, Burke & Shoemaker, P.A. The Banner Bank Building 950 W. Bannock St., Ste. 900 Boise, ID 83702

JOHNSON & MONTELEONE, L.L.P.

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Attorneys for Plaintiffs

ORIGINAL

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

MARTHA A. ARREGUI, Plaintiff/Appellant, v. ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown, Defendants/Respondents.	**Case No. CV 09-3450** **NOTICE OF APPEAL**

TO: THE ABOVE-NAMED RESPONDENTS, ROSALINDA GALLEGOS-MAIN AND FULL LIFE CHIROPRACTIC, P.A., AND THEIR COUNSEL OR RECORD, RICHARD H. GREENER, GREENER, BURKE & SHOEMAKER, P.A.; THE BANNER BANK BUILDING, 950 WEST BANNOCK STREET, SUITE 900, BOISE, IDAHO 83702, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Plaintiff/Appellant, Martha Arregui, appeals against the above-named Defendants/Respondents to the Idaho Supreme Court from

the order denying Plaintiff/Appellant's motion for reconsideration entered in the above entitled action on the 27th day of January, 2011, by the Honorable Renae Hoff, District Judge, presiding.

2. The above-named Plaintiff/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 I.A.R. 11(a).

3. PRELIMINARY STATEMENT OF ISSUES ON APPEAL:

(a) Whether the district court erred by granting summary judgment in favor of the Defendants/Respondents.

(b) Whether the district court erred in striking the *Affidavit of Sarah Tamai, D.C.*, and when applying the "sham affidavit" doctrine to the facts of this case.

(c) Whether the district court erred in denying Plaintiff/Appellant's Motion for Reconsideration.

4. No order has been entered which has sealed any portion of the record in these proceedings.

5. (a) Is a reporter's transcript requested? Yes.

(b) Plaintiffs/Appellants request the preparation of the following portions of the reporter's transcript in hard copy format: (1) the reporter's transcript from the hearing on Plaintiff/Appellants' Motion for Reconsideration held on January 27, 2011.

6. Plaintiff/Appellant requests the following documents to be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.

(a) All documents filed in support of and in opposition to Defendants/Respondents' Motion for Summary Judgment.

(b) All documents filed in support of and in opposition to Plaintiff/Appellant's Motion for Reconsideration.

7. I certify:

(a) That a copy of this *Notice of Appeal* has been served on the reporter as named below at the addresses set out below:

Carole Bull
Official Court Reporter
1115 Albany St.
Caldwell, Idaho 83605

(b) The estimated fee for preparation of the reporter's transcript has been paid.

(c) The estimated fee of $100.00 for preparation of the Clerk's record has been paid;

(d) The appellate filing fee has been paid; and

(e) Service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED: This 28 day of January, 2011 .

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of January, 2011, I served a true and correct copy of the foregoing document by delivering the same to each of the following, by the method indicated below, addressed as follows:

☐ mailed ☐ hand delivered ☒ transmitted fax machine to: (208) 319-2601	Richard H. Greener Greener, Burke & Shoemaker, P.A. The Banner Bank Building 950 W. Bannock St., Ste. 900 Boise, ID 83702

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiffs/Appellants

ORIGINAL

FILED
A.M. 1:25 P.M.

JAN 31 2011

CANYON COUNTY CLERK
B RAYNE, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants.

Case No. CV 09-3450

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

For the reasons stated in this Court's oral ruling issued on January 27, 2011, the Plaintiff's Motion for Reconsideration, filed on December 2, 2010, is DENIED.

DATED this _____ day of January, 2011.

JAN 28 2011

Judge Renae Hoff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 day of January, 2011, a true and correct copy of the within and foregoing instrument was served upon:

Sam Johnson
JOHNSON & MONTELEONE, L.L.P.
405 South Eighth Street, Suite 250
Boise, ID 83702

[Attorneys for Plaintiff]

- [x] U.S. Mail
- [ ] Facsimile
- [ ] Hand Delivery
- [ ] Overnight Delivery
- [ ] Email

Richard H. Greener
Loren K. Messerly
GREENER BURKE SHOEMAKER P.A.
950 West Bannock Street, Suite 900
Boise, ID 83702

[Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.]

- [ ] U.S. Mail
- [x] Facsimile
- [ ] Hand Delivery
- [ ] Overnight Delivery
- [ ] Email

B Cayne

Clerk of the District Court

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Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MARTHA A. ARREGUI,

Plaintiff/Appellant,

v.

ROSALINDA GALLEGOS-MAIN, an individual; FULL LIFE CHIROPRACTIC, P.A., an Idaho professional association; and John and Jane Does I through X, whose true identities are unknown,

Defendants/Respondents.

Case No. CV 09-3450

REQUEST FOR ADDITIONAL TRANSCRIPT AND CLERK'S RECORD, PURSUANT TO RULE I.A.R. 19

TO: THE ABOVE NAMED APPELLANT(S) AND THE PARTY'S ATTORNEY, AND THE REPORTER AND CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN that the Respondents in the above-entitled proceeding hereby request, pursuant to Rule 19, I.A.R., the inclusion of the following material in the reporter's transcript and the clerk's record in addition to that required to be included by the

I.A.R. and the notice of appeal. Appellant's notice did not specify as to the specific documents requested, so this is merely an attempt to confirm that all the relevant documents will be before the appellate court. Further, Appellant has only asked for the transcript of the hearing on the motion for reconsideration but Appellees are also requesting that the transcript of the Motion for Summary Judgment and the Motion to Strike Affidavit of Dr. Tamai be included in the record to the appellate court. We request the following documents/transcripts for the appellate record:

I. Reporter's Transcript

a. The entire reporter's transcript for the November 23, 2010 hearing on Defendants' Motion for Summary Judgment and Motion to Strike the Affidavit of Dr. Tamai.

b. The entire reporter's transcript for the January 7, 2011 hearing on Plaintiff's Motion for Reconsideration (already specifically requested by Plaintiff.)

II. Clerk's Record

a. Complaint - filed 4/1/09;

b. Answer to Complaint and Demand for Jury Trial - filed 4/21/09;

c. Request for Trial Setting – filed 7/6/09;

d. Order to File Stipulated Trial Dates - filed 7/28/09;

e. Stipulated Trial Dates - filed 8/11/09;

f. Order Setting Case For Trial and PT - filed 9/29/09 ;

g. Stipulation re: Disclosure of Expert Witnesses – filed 7/7/10;

h. Order on Stipulation to Extend D/L for Disclosure of Expert Witnesses – filed 7/12/10;

i. Plaintiff's Disclosure of Expert Witness – filed 8-16-10;

j. Defendants List of Expert Witnesses – filed 9/30/10;

k. Notice of Taking Deposition of Plaintiff's Expert Sarah Tamai – filed 10/12/10;

l. Defendant's Motion for Summary Judgment - filed 10/26/10;

m. Memorandum in Support of Defendants' Motion for Summary Judgment – filed 10/16/10;

n. Affidavit of Counsel in Support of Defendants Motion for Summary Judgment – filed 10/26/010;

o. Defendants Statement of Undisputed Material Facts – filed 10/26/10;

p. Memorandum in Opposition to Defendants Motion for Summary Judgment – filed 11/12/10;

q. Affidavit of Sarah Tamai - filed 11/15/10;

r. Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment – filed 11/16/10;

s. Motion to Strike the Affidavit of Sarah Tamai, D.C – filed 11/16/10;

t. Memorandum in Support of Defendants' Motion to Strike the Affidavit of Sarah Tamai, D.C. – filed 11/16/10;

u. Affidavit Of Counsel In Support Of Defendants' Motion To Strike Affidavit Of Sarah Tamai, D.C. - filed 11/16/10;

v. Motion For Order Shortening Time On Defendants' Motion To Strike, dated 11/16/10;

w. Order Granting Defendants' Motion to Strike Affidavit and Motion for Summary Judgment – filed 11/24/10;

x. Final Judgment - filed 12/2/10;

y. Plaintiff's Motion for Reconsideration – filed 12/3/10;

z. Memorandum in Support of Plaintiffs Motion for Reconsideration – filed 12/15/10;

aa. Defendants Opposition to Plaintiff's Motion for Reconsideration - filed 1/20/11;

bb. Affidavit of Counsel in Opposition to Plaintiff's Motion for Reconsideration - filed 1/20/11;

cc. Reply Memorandum in Support of Motion for Reconsideration – filed 1/25/11;

dd. Order Denying Plaintiff's Motion for Reconsideration - filed 1/31/10;

III. Certification

I certify that a copy of this request was served upon the reporter and clerk of the district court and upon all parties required to be served pursuant to Rule 20.

Dated this 1st day of March, 2011.

GREENER BURKE SHOEMAKER P.A.

By _____
Richard H. Greener/Loren K. Messerly
Attorneys for Defendants Rosalinda Gallegos-Main and Full Life Chiropractic, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of March, 2011, a true and correct copy of the within and foregoing instrument was served upon:

Sam Johnson
Johnson & Monteleone, L.L.P.
405 South Eighth Street, Suite 250
Boise, ID 83702

[Attorneys for Plaintiff]

- [x] U.S. Mail
- [x] Facsimile
- [ ] Hand Delivery
- [ ] Overnight Delivery
- [ ] Email

Richard H. Greener/Loren K. Messerly

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

MARTHA A. ARREGUI,	)	
	)	
Plaintiff-Appellant,	)	Case No. CV-09-03450*C
	)	
-vs-	)	CERTIFICATE OF EXHIBIT
	)	
ROSALINDA GALLEGOS-MAIN, etal.,	)	
	)	
Defendants-Respondents,	)	
And	)	
	)	
JOHN AND JANE DOES, etal.,	)	
	)	
Defendants.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following is being sent as an exhibit:

NONE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15 day of April, 2011.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Randall Deputy

CERTIFICATE OF EXHIBIT

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

MARTHA A. ARREGUI, Plaintiff-Appellant, -vs- ROSALINDA GALLEGOS-MAIN, etal., Defendants-Respondents, And JOHN AND JANE DOES, etal., Defendants.	)	Case No. CV-09-03450*C CERTIFICATE OF CLERK

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including all documents requested.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15 day of April, 2011.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Randall Deputy

CERTIFICATE OF CLERK

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

MARTHA A. ARREGUI,	)	
	)	
Plaintiff-Appellant,	)	Supreme Court No. 38496
	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
ROSALINDA GALLEGOS-MAIN, etal.,	)	
	)	
Defendants-Respondents,	)	
And	)	
	)	
JOHN AND JANE DOES, etal.,	)	
	)	
Defendants.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

Sam Johnson, JOHNSON & MONTELEONE, LLP.

Richard H. Greener and Loren K. Messerly, GREENER BURKE SHOEMAKER PA.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15 day of April, 2011.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Rudell Deputy

CERTIFICATE OF SERVICE