7-14-2011

Arregui v. Gallegos-Main Appellant's Brief Dckt. 38496

IN THE SUPREME COURT OF THE STATE OF IDAHO

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.	)	**Supreme Court No. 38496-2011** **APPELLANT'S OPENING BRIEF**

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

HONORABLE RENAE HOFF, PRESIDING DISTRICT JUDGE

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A. Nature of the Case

This case involves Plaintiff-Appellant Martha Arregui's (hereinafter "Arregui") claim for bodily injuries brought against her chiropractic physician for negligently causing Arregui to suffer a stroke when treating Arregui on June 4, 2007. This appeal is brought by Arregui from the district court's order granting summary judgment to Defendants-Respondents Rosalinda Gallegos-Main, D.C., and her clinic - Full Life Chiropractic, P.A., (collectively hereinafter, "Chiropractor Main"). The grant of summary judgment was precipitated by the district court's order striking the *Affidavit of Sarah Tamai, D.C.*, who was Arregui's expert witness on the applicable standard of chiropractic care. At the time of her deposition, Arregui's expert had not spoken to a local chiropractor concerning the applicable standard of care. Nevertheless, by the time the expert signed her affidavit opposing summary judgment, she had familiarized herself with the local standard of care, and explained in her affidavit how she went about doing so. The district court still struck the Tamai Affidavit by invoking the "sham affidavit" doctrine, finding the expert's affidavit contradicted the expert's previous deposition testimony on the familiarization of the local standard of care.

The heart of this appeal challenges the district court's use of the "sham affidavit" doctrine in the above manner. Additionally, Arregui contends our legislature did not intend for Idaho Code §§ 6-1012 and 6-1013 of the Medical Malpractice Act to apply to claims brought against "chiropractic" physicians. The remainder of this Opening Brief shall show Arregui's appeal is just.

B. Course of Proceedings Below

Arregui filed suit on April 1, 2009, in Canyon County, Idaho. R., Vol. I, pp. 5-8. In her Complaint, Arregui alleges, *inter alia*, that Chiropractor 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. R., Vol. I, p. 7, ¶7.

Chiropractor Main filed her *Answer to Complaint and Demand for Jury Trial* on or about April 21, 2009. R., Vol. I, pp. 9-14. In her answer, "Defendant Rosalinda Gallegos-Main, an individual, admits that she owes Plaintiff a duty regarding her treatment as a licensed chiropractor . . . ." R., Vol. I, p. 10, ¶7 (emphasis added). When Answering the Complaint, Chiropractor Main made no reference to the Medical Malpractice Act (Idaho Code § 6-1001 *et seq.*), and did not defend on the grounds that Arregui had to comply with the mandates contained in Idaho Code §§ 6-1012/6-1013. *See generally* R., Vol. I, pp. 9-14.

On August 16, 2010, Arregui disclosed Dr. Sarah Tamai, D.C., as an expert witness who would testify at trial on Arregui's behalf. R., Vol. I, pp. 32-33. On October 15, 2010, Arregui tendered a report authored by Dr. Tamai outlining her opinions on whether Chiropractor Main breached the standard of care when treating Arregui. R., Vol. I, pp. 142-148. A few days later, on October 19, 2010, counsel for Chiropractor Main took the deposition of Dr. Tamai. R., Vol. I, pp. 94-111. At this time, Dr. Tamai had not familiarized herself with the standard of care in Nampa-Caldwell, at the place where and at the time when the stroke had occurred.

Not long after completing the deposition of Dr. Tamai, Chiropractor Main filed her motion for summary judgment, on October 26, 2010. R., Vol. I, pp. 58-60. In this

motion, Chiropractor Main argued, for the first time, that Arregui's claims are subject to Idaho Code §§ 6-1012/6-1013, and Arregui's "failure to meet those requirements is grounds for dismissal of Plaintiff's claims as a matter of law." *Id.*

In an effort to overcome the motion for summary judgment, Arregui lodged her *Memorandum in Opposition to Defendants' Motion for Summary Judgment* (R., Vol. I, pp. 130-135), and filed the *Affidavit of Sarah Tamai, D.C.* (R., Vol. I, pp. 136-148). For purposes of the motion for summary judgment "only," Arregui conceded to the application of Idaho Code §§ 6-1012/6-1013. R., Vol. I, p. 131. In conjunction with this concession, Arregui's expert, Dr. Tamai, was asked to familiarize herself with the local standard of care in a manner consistent with the procedures outlined in Idaho Code §§ 6-1012/6-1013. This was done, and the method of doing so was explained by Dr. Tamai in her affidavit. R., Vol. I, p. 137. Based upon this familiarization process, Arregui contended that she met the proof elements from Idaho Code §§ 6-1012/6-1013. *Id.*

Thereafter, on November 16, 2010, Chiropractor Main filed her *Motion to Strike the Affidavit of Sarah Tamai, D.C.* In the motion to strike, Chiropractor Main argued, *inter alia*, the Tamai Affidavit was untimely and violative of the "sham affidavit" doctrine.

On November 23, 2010, Chiropractor Main's motion to strike and motion for summary judgment came before the district court. After hearing oral argument, the district court granted both the motion to strike the Tamai Affidavit and the motion for summary judgment from the bench. Tr., pp. 38-43. This was followed by the entry of the district court's written *Order Granting Defendant's Motion to Strike Affidavit and Motion for Summary Judgment* filed on November 24, 2010. R., Vol. II, pp. 237-239.

On December 3, 2010, Arregui made her motion for reconsideration, in part, on the premise that the Tamai Affidavit does not involve the "manufacturing of evidence which the 'sham affidavit' doctrine was designed to preclude." R., Vol. II, pp. 242-245. Arregui also presented the following alternative argument:

> 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.

R., Vol. II, pp. 257-260.

On January 27, 2011, the district court took oral argument on the motion for reconsideration and denied the same. Interestingly, when ruling, the district court did note that she found, "no deception on the part of the chiropractor [Dr. Tamai]" (Tr. p. 62, Ll. 4-6), but concluded "the plaintiff has failed to demonstrate that the motion in this case should be granted, and I stand on the prior conclusions, page 36 through 40 of the transcript of the prior hearing." Tr., p. 64, Ll. 14-20. "Having closely reviewed that, I cannot conclude that there was error or that reconsideration should be granted here today." *Id.*

Arregui timely filed her *Notice of Appeal* on January 28, 2011. R., Vol. II, pp. 332-335.

C. Statement of Facts

Arregui alleged that on or about June 4, 2007, Chiropractor Main, in her capacity as a health care professional, treated Arregui for a condition then existing in her back and neck. R., Vol. I, p. 6. In their Answer, the "Defendants admit that on or about June 4,

2007 Defendant Rosalinda Gallegos-Main treated Plaintiff." R., Vol. I, p. 7 (emphasis added).

Arregui likewise alleged that on or about the same date, Chiropractor Main owed Arregui a duty to medically treat her in a competent and non-negligent manner, and in conformance with the applicable community standard of chiropractic care. R., Vol. I, p. 7. In their Answer to the Complaint, "Defendant Rosalinda Gallegos-Main, an individual, admits that she owes Plaintiff a duty regarding her treatment as a licensed chiropractor . . . ." R., Vol. I, p. 10 (emphasis added).

Arregui further alleged that on or about the same date, Chiropractor Main failed to meet the applicable community standard of chiropractic care, was negligent and/or reckless in the acts or omissions, and breached the duty owed to Arregui when she caused Arregui to suffer a stroke during a manipulation of the neck. R., Vol. I, p. 7.

Although Chiropractor Main denied these latter allegations in the Answer to the Complaint, Arregui offered affirmative proof in the form of direct, expert testimony that Chiropractor Main breached the applicable standard of health care practice in the locale where the chiropractic care was provided – the Nampa/Caldwell community. R., Vol. I, pp. 138-139.

IV. ISSUES PRESENTED ON APPEAL

A. Did the District Court err when applying the "Sham Affidavit" Doctrine and by Striking the Affidavit of Sarah Tamai, D.C., Plaintiff's Expert Witness on the Applicable Standard of Chiropractic Care?

B. Did the District Court err In Denying Plaintiff's Motion for Reconsideration?

V. ARGUMENT

A. Standard of Review for Summary Judgment/Reconsideration.

"When reviewing a motion for summary judgment, this Court uses the same standard employed by the trial court when deciding such a motion." *Nation v. State, Dept. of Correction,* 144 Idaho 177, 184, 158 P.3d 953, 960 (2007); *see also Sorenson v. St. Alphonsus Reg'l Med. Ctr., Inc.,* 141 Idaho 754, 758, 118 P.3d 86, 90 (2005). Thus, the following standard of review applies to this appeal:

> The burden of proving the absence of a material fact rests at all times upon the moving party. *McCoy*, 120 Idaho at 769, 820 P.2d at 364; *Petricevich*, 92 Idaho at 868, 452 P.2d at 365. This burden is onerous because even "circumstantial" evidence can create a genuine issue of material fact. *McCoy,* 120 Idaho at 769, 820 P.2d at 364; *Petricevich,* 92 Idaho at 868, 452 P.2d at 365.

Harris v. State, Dept. of Health & Welfare, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992).

> "[A]ll doubts are to be resolved against the moving party." *Ashley v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979). The motion must be denied "if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable [people] might reach different conclusions." *Id.*

Doe v. Durtschi, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

> ...[T]he Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. *Thompson*, 126 Idaho at 529, 887 P.2d at 1036; *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d

> 360, 364 (1991). If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied. *Bonz*, 119 Idaho at 541, 808 P.2d at 878.

State v. Rubbermaid, Inc., 129 Idaho 353, 356, 924 P.2d 615, 618 (1996).

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *Campbell v. Reagan*, 144 Idaho 254, 258, 159 P.3d 891, 895 (2007); *Carnell v. Barker Mgmt. Inc.*, 137 Idaho 322, 329 48 P.3d 651, 658 (2002). When considering a motion to reconsider under I.R.C.P. 11(a)(2), the district court should take into account any new facts or information presented by the moving party bearing on the correctness of the district court's order. *Coeur d' Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

B. The District Court Erred when applying the "Sham Affidavit" Doctrine, and by Striking the Affidavit of Sarah Tamai, D.C., Plaintiff's Expert Witness on the applicable Standard of Chiropractic Care.

The Tamai Affidavit simply does not involve the manufacturing of evidence which the "sham affidavit" doctrine was designed to exclude. As stated in *Boise Tower Associates, LLC v. Washington Capital Joint Master Trust*, 2007 WL 1035158, 12-13 (D. Idaho), a case heavily relied upon by the district court below, 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 a claim for 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 general rule:

> [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. 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 ... .").

After citing to the above rule, the court in *Boise Tower* blandly 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 explicitly 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 does not have any personal knowledge of the facts of the case. An expert, of course, typically testifies on facts made known 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. R., Vol. II, pp. 177-178. 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. She 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).

R., Vol. I, p. 137. 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 manner, shape, or form. Dr. Tamai properly gained familiarity with the local standard of care upon further inquiry into the case, including consulting with other professionals in her field. Unmistakably, 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 this 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.

As noted in *Kennedy v. Allied Mutual Insurance Co.*, 952 F2d 262, 267 (9th Cir. 1991), the "general rule" from the doctrine only applies if the court "make[s] a factual determination that the contradiction was actually a 'sham.'" Here, as referenced above, the district court found "no deception on the part of the chiropractor [Dr. Tamai]". Tr. p. 62, Ll. 4-6. Thus, the district court erroneously applied the "sham affidavit" doctrine to a case that does not involve a sham. This was clear error on the part of the district court.

Furthermore, 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.

R., Vol. II, pp. 206-207.

It is not as though Chiropractor Main ever 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 Chiropractor Main in her motion for summary judgment. Again, this case does not involve the manufacturing of evidence which the "sham affidavit" was designed to exclude. It is not as if we 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 derives from her effort to fully familiarize herself with the local standard of care by consulting with a local professional in her same field who was practicing in the relevant community. Far from being a sham, Dr. Tamai was simply trying to meet the statutory requirements of Idaho Code § 6-1013.

Importantly, the application of the "sham affidavit" doctrine has evolved over time. In fact, 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 of an over-reaching 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 greater force to the testimony of expert witnesses. Unlike lay witnesses, experts do not usually testify from personal knowledge based upon a fixed set of historical facts. Experts testify in the form of opinion and hypotheticals, oftentimes from a presumed set of facts. Plainly put, the Tamai Affidavit does not involve the manufacturing of evidence which the "sham affidavit" doctrine was designed to prevent.

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 the above statute 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. R., Vol. I, p. 138. Chiropractor Main has not attacked Dr. Tamai's expertise 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* (R., Vol. I, pp. 140-141), 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 holds 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. 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. R., Vol. I, p. 131. For purposes of her motion for reconsideration, Arregui no longer made any such concession. Instead, Arregui took the alternative position that the above sections do not apply to claims brought against chiropractic physicians. Of course, when considering the meaning of a statute, the focus of any court is to give effect to the intent of the legislature. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). "Judicial interpretation of a statute begins with an examination of the statute's literal words." *Bonner County v. Kootenai Hosp. Dist.,* 145 Idaho 677, 680-81 (2008). Unless palpably absurd, it is presumed the legislature meant what is clearly stated in the statute. *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

This seems to be a matter of first impression, as no reported Idaho case speaks to the application of the above provisions to claims against chiropractic physicians. Worth noting, as a starting point for the analysis based upon the rules governing statutory interpretation, is the fact the language of the statute (Idaho Code § 6-1012) 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 . . .. (Emphasis added).

Accordingly, 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).

Contrastingly, 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). The Chiropractic Practice 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 there under, 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 then 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, *et seq.*, 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 thus not subject to, or regulated by, the Idaho State Board of Medicine.

Moreover, if the legislature intended to include chiropractic physicians in Idaho Code § 6-1012, it would have made express reference to this class of physicians just as it did under Idaho worker's compensation law:

> "Physician" means medical physicians and surgeons, ophthalmologists, otorhinolaryngologists, dentists, osteopaths, osteopathic physicians and surgeons, optometrists, podiatrists, chiropractic physicians, and members of any other healing profession licensed or authorized by statutes of this state to practice such profession within the scope of their practice as defined by the statutes of this state and as authorized by their licenses.

Idaho Code § 72-102(24).

Lastly, the phrase "other provider of health care" found in Idaho Code § 6-1012 cannot be read so broadly as to include chiropractic physicians. Other provider of health care clearly means providers of health care other than physicians. No doubt, a chiropractor remains a physician even though chiropractic physicians are excluded from the class of physicians defined in Idaho Code § 6-1012. It would be illogical for our legislature to have excluded chiropractic physicians, on the one hand, but nonetheless to

have intended to include them, on the other hand, under the definition of "other provider of health care."

As such, the district court erred when applying Idaho Code §§ 6-1012/6-1013 to the chiropractic physician named in this suit and likewise erred in denying *Plaintiff's Motion for Reconsideration.*

E. To the Extent the Tamai Affidavit was Filed Late, its Untimeliness was adequately Explained, and caused No Prejudice to Chiropractor Main.

Finally, Chiropractor Main claimed below that the Tamai Affidavit was untimely filed without explanation. 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. Although Chiropractor Main professed to suffer prejudice as a result of the timing of the Tamai Affidavit, there clearly had been none. In fact, Chiropractor Main acknowledged any lack of prejudice by stating in her opposition to *Plaintiff's Motion for Reconsideration* that, "Defendants fully briefed the sham affidavit issue prior to the summary judgment hearing." R., Vol. II, p. 272 (Emphasis added). It was Chiropractor Main, after all, who moved the district court to shorten the time frame for hearing the *Motion to Strike the Affidavit of Sarah Tamai, D.C.* R., Vol. II, pp. 234-236. Interestingly, there is no record of an order granting *Defendants' Motion For Order Shortening Time On Defendants' Motion to Strike.*

Ironically, it was Arregui who did not receive the allotted time to respond to *Motion to Strike the Affidavit of Sarah Tamai, D.C.* It 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 Chiropractor Main 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) days notice prejudiced Arregui, as Chiropractor Main has recognized, "Plaintiff did not file an opposition to the Motion to Strike." R., Vol. II, p. 263.

CONCLUSION

Arregui respectfully requests a reversal of the district court's grant of summary judgment in favor of Chiropractor Main.

DATED: This 14 day of July, 2011.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I HEREBY CERTIFY that on this 14 day of July, 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, Esq. Loren K. Messerly, Esq. Greener, Burke & Shoemaker, P.A. The Banner Bank Building 950 W. Bannock St., Ste. 900 Boise, ID 83702

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