8-11-2011

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

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,

Supreme Court No. 38496

Canyon County District
Court No: CV-09-03450*C

RESPONDENT'S BRIEF

Appeal from the Third Judicial District, Canyon County, Idaho
HONORABLE RENAE J. HOFF, Presiding

Order of Judgment appealed from: The Final Judgment signed and filed on December 2, 2010; the Order Denying Appellant's Motion for Reconsideration signed January 28, 2011 and filed on January 31, 2011.

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STATEMENT OF THE CASE

Nature of the Case.

This is a medical malpractice case involving allegations of chiropractic physician malpractice. Plaintiff Martha Arregui ("Appellant") appeals the November 23, 2010 oral ruling of the Honorable Judge Renae J. Hoff (and the subsequent order and final judgment entered on November 24th and December 2nd respectively) that granted summary judgment for Defendants Dr. Rosalinda Gallegos-Main ("Dr. Main") and Full Life Chiropractic, P.A. ("Respondents"). Respondents contend that the decision of the District Court should be affirmed in all respects because the District Court correctly ruled that: (1) the Affidavit of Appellant's expert Sarah Tamai, D.C. ("Dr. Tamai") is a "sham" affidavit and does not comply with the admissibility requirements of IRCP 56(e); (2) Dr. Tamai's deposition testimony as to the standard of care did not comply with the threshold requirements of I.C. § 6-1013 (c)(1) and IRCP 56(e); (3) Appellant's argument that claims of professional negligence against Respondents are not subject to I.C. §§ 6-1012 and 6-1013 was not timely raised and is erroneous as a matter of law; and (4) Dr. Tamai's affidavit was untimely filed and, therefore, was subject to being stricken.

This brief will explain how these determinations are correct under Idaho Law. Simply stated, Dr. Tamai's affidavit failed to meet the admissibility requirements of IRCP 56(e), the District Court properly concluded it was insufficient to create an issue of material fact and summary judgment in favor of Respondents is correct on all legal grounds.

Statement of Facts.

On June 4, 2007, Appellant visited the chiropractic office of Dr. Main on two occasions. Dr.

Main noted that Appellant presented with pain caused by torticollis, a condition resulting in the twisting or locking of the neck to one side sometimes caused by temporary muscle spasms, and complained of dizziness. Dr. Main indicated that she treated Appellant briefly that morning by utilizing a Pettibon Tendon Ligament Muscle Stimulator ("PTLMS") device as well as an ArthroStim device, both designed to help loosen the treated muscles. Use of these devices to loosen tight muscles in a patient is not a chiropractic adjustment. Dr. Main's records and testimony do not indicate that she performed a cervical chiropractic adjustment of Appellant's neck and Dr. Main denies having performed a chiropractic adjustment because of the stiffness of Appellant's neck. Appellant returned later in the evening of June 4, 2007 in order to consider a plan for on-going chiropractic care with Dr. Main to help treat her neck and/or back pain. Appellant, however, contends that she received a cervical adjustment from Dr. Main during one of her two visits on June 4th. Appellant went to the emergency room at Weiser Memorial Hospital on June 5, 2007 complaining of the same symptoms and was evaluated and released. Several weeks later, Appellant was diagnosed by another health care provider as having suffered a stroke in the posterior inferior cerebellar artery, more commonly referred to as a "PICA" stroke.

Course of Proceedings.

Appellant filed her lawsuit on March 31, 2009 alleging that Dr. Main and her chiropractic clinic committed malpractice because the treatment given on June 4, 2007 allegedly caused Appellant to suffer a stroke. (*See* Clerk's Record on Appeal (hereinafter "R."), at p. 000005-8.) In support of her allegations, on August 16, 2010, Appellant disclosed Dr. Tamai as her 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." (R., p. 000032-35.) Respondents then disclosed their experts on September 30, 2010 which included disclosure of an Idaho chiropractor, Robert Ward Robert Ward III, DC. (R., p. 0000046-48.)

Respondents scheduled the deposition of Dr. Tamai in Oceanside, California on October 19, 2010. (R., p. 000168-210.) On October 15, 2010, Appellant produced an expert report authored by Dr. Tamai which set forth her opinions. (R., p. 000142-147.) During her deposition, Dr. Tamai admitted she did not possess the requisite facts to testify as an expert in this case as she had no knowledge of the relevant standard of care in Idaho or specifically Nampa/Caldwell, Idaho on June 4, 2007. (R., p. 000201 at 132:10-19.) Dr. Tamai also confirmed that she did not have any additional opinions and would not be doing any additional work. (R., p. 000207 at 152:16-22.)

On October 26, 2010 Respondents filed and timely served their Motion for Summary Judgment, accompanied by the appropriate briefing, affidavit, and notice of hearing which was scheduled for hearing on Tuesday, November 23, 2010 at 9:00 am. (R., p. 000058-129.) Respondents' motion sought summary judgment on Appellant's claims due to Appellant's failing to submit affirmative proof by direct expert testimony that Dr. Main violated the local standard of care as required by I.C. §§ 6-1012 and 6-1013. (*Id.*)

On November 12, 2010, three days beyond the deadline, Appellant filed and served her Opposition to Respondents' Motion for Summary Judgment together with an untimely Affidavit of Sarah Tamai, D.C. ("Tamai Affidavit"). (R., p. 000130-148.) Plaintiff's entire argument against

Respondents' Motion for Summary Judgment was that the applicable expert testimony required by I.C. §§ 6-1012 and 6-1013 was contained in the Tamai Affidavit. (R., p. 000131.)

Respondents filed a Motion to Strike the Affidavit of Sarah Tamai, D.C. ("Motion to Strike") on November 16, 2010 arguing that the Tamai Affidavit was untimely filed pursuant to IRCP 56(c), that it was a sham affidavit that directly contradicted Dr. Tamai's deposition testimony, and that it lacked proper foundation to be admissible as it failed to meet the requirements of IRCP 56 and I.C. § 6-1013. (R., p. 000217-000233 and 000149-210.) Appellant did not file an opposition to the Motion to Strike.

The District Court made an oral ruling on November 23, 2010 as follows:

> 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 Appellant'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.

(Transcript on Appeal (hereinafter "T") at 39:17-42:22). The District Court issued it's written order on November 24, 2010 Granting Respondents' Motion to Strike and Granting Respondents' Motion for Summary Judgment. (R., p. 000237-239.) The District Court issued Final Judgment on December 2, 2010. (R., p. 000240-241.)

Appellant filed a Motion for Reconsideration on December 3, 2010 and a Memorandum in Support on December 15, 2010 which contained no new facts and one new argument. The new argument asserted that I.C. § 6-1012 does not apply to chiropractic physician malpractice cases. (R., p. 000242-260.) Respondents filed their Opposition to Plaintiff's Motion for Reconsideration on January 20, 2011. (R., p. 000261-325.) The District Court issued an oral Order denying Appellant's Motion for Reconsideration on January 27, 2011 stating as follows:

> This matter comes before me today on a motion to reconsider after final judgment was entered, and this motion comes before me under IRCP 11(a)(2)(B).
>
> And I do want to cite specifically the case of *Carroll v. Nakatani*, 342 F.3d. 934, 945 (9th Cir. 2003). And I quote, 'While Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.' 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[4] (3d ed.2000). Indeed, 'a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law. ... A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'
>
> . . . .

> Plaintiff further argues . . . alternatively, that Section 6-1012 and 6-1013 do not apply to chiropractors. So hence, the defendant has raised a new argument on reconsideration.
>
> The defendant asserts in their briefing that the motion should have been brought under 59 (e) instead of 11(a)(2)(B). But both rules -- under both rules, the Court must exercise discretion in deciding the motion.
>
> The defendant further points out, as noted, that the plaintiff is impermissibly rearguing issues that have already been rejected by the courts.
>
> Defendant further emphasizes that the affidavit was untimely and, again, there was no explanation. Clearly, the affidavit was filed untimely and clearly the affidavit contradicted prior deposition testimony.
>
> I conclude that 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. Having closely reviewed that, I cannot conclude that there was error or that reconsideration should be granted here today.

(T., p. 62:21–64:20). The District Court issued a written order on January 28, 2011. (R., p. 000336-337.) Appellant filed her Notice of Appeal that same day. (R., p. 000332-335.) Appellant now brings her appeal challenging the granting of summary judgment and final judgment that dismissed her case in its entirety and the subsequent denial of the motion to reconsider.

Course of Dr. Tamai's Testimony.

In order to put this matter into proper perspective a summary and chronological course of the testimony of Dr. Tamai must be discussed.

Expert Report – October 15, 2010.

On October 15, 2010, Appellant produced an expert report from Dr. Tamai. (R., p. 000142-147.) It is significant that, in her report, Dr. Tamai provides a definition of standard of care which

acknowledged the applicability of a local standard of care for a finding of chiropractic physician malpractice. Specifically, the definition of the appropriate standard of care in her report was "[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." (R., p. 000142.) Dr. Tamai's report does not explain if or how she familiarized herself with the local standard of care for a chiropractic physician in the Nampa/Caldwell area within the relevant timeframe at issue.

Dr. Tamai's report also detailed three criticisms wherein Dr. Tamai opined that Dr. Main failed to meet the standard of care, as defined by Dr. Tamai. The three criticisms were as follows:

1. That Dr. Main performed both the 2005 and 2007 examinations below the standard of care as Dr. Main failed to gather case history information and failed to perform a complete examination. (R., p. 000146.)
2. That a traditional or diversified chiropractic adjustment would be contraindicated for the June 4, 2007. (R.., p. 000146.)
3. That when Appellant began to experience dizziness and uneven gate she should not have been left alone or allowed to leave without assistance from Dr. Main. (R., p. 000146.)

Dr. Tamai's report did not outline any other criticisms of Dr. Main's treatment of Appellant. In fact, Dr. Tamai's report agrees with Dr. Main's use of both the Arthrostim and PTLMS devices on June 4, 2007 stating that ". . .both would be appropriate based on a complete examination and history . . ." (R., p. 000146.)

Dr. Tamai's criticisms of Dr. Main were inquired into during Dr. Tamai's deposition, as will be explained in the next section. Dr. Tamai literally backed away from testifying that any of these criticisms violated the applicable standard of care or had any causal relationship to the condition complained of by the Plaintiff.

Deposition Testimony – October 19, 2010.

On October 19, 2010, only four days after Dr. Tamai's October 15th report was produced, Respondents took the deposition of Dr. Tamai in Oceanside, California. (R., p. 000168-210.) During her deposition, Dr. Tamai admitted that:

1. Her definition of standard of care was taken from a PowerPoint Presentation and that she was not aware of the source for that definition or if that definition has been adopted by the National Chiropractic Board or even the California Chiropractic Board. (R., p. 000186 at 71:9-22, 000187 at 76:14-77:5, 000189 at 84:15-85:23 and 000197 at 116:4-9.)
2. That she did not know if there were any national standard of care for chiropractors. (R. p. 000189 at 85:4-23.)
3. That she did not know if there were differences between chiropractic physicians practicing in California or chiropractic physicians practicing in Idaho. (R., p. 000190 at 86:4-15.)
4. That she did not know the standard of care for a chiropractic physician practicing in Caldwell, Idaho on June 4, 2007 as she had never been to Idaho, was not licensed as a chiropractic physician in Idaho and had not spoken with any

chiropractic physician in Idaho regarding standard of care. (R., p. 000170 at 7:15-19. 000177 at 37:20-22 and 000177-178 at 37:23-38:20.)

5. That she would not be performing any additional work or modification of her opinions and that her opinions were final. (R., p. 000206 at 152:16-22.)

Dr. Tamai's deposition testimony explaining the standard of care was essentially that which she individually believed was reasonable and prudent. She was absolutely unable to define any standard of care, whether that be in California where she was licensed, nationally or in Idaho.

When asked about her three criticisms of Dr. Main's actions which were outlined in her report Dr. Tamai backed away from those opinions. Dr. Tamai's first criticism in her expert report was that Dr. Main's examinations were incomplete and below the standard of care. However, when questioned about this in her deposition, Dr. Tamai admitted that she agreed with Dr. Main's diagnosis and treatment of Appellant on June 4, 2007; that Dr. Main's examinations from 2005 had nothing to do with what transpired on June 4, 2007; that it is appropriate to not conduct a complete examination when a patient is in extensive pain; and that she was unable to determine if the examination by Dr. Main on June 4, 2007 fell below the standard of care or if Dr. Main's record keeping skills were simply lacking. Dr. Tamai's specific testimony at her deposition on these points reads as follows:

> 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: 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?
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.

(R., p. 000175-176 at 29:15-30:6.)

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.
Q. She did not?
A. Correct.
Q. Okay. That's no, she did not violate the standard of care --
A. Standard of care.
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.

(R., p. 000176 at 30:12-31:6.)

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.

(R., p. 000197 at 116:17-24.)

[Q] 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.
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.
(R., p. 000200 at 128:7-129:24.)

Dr. Tamai's second criticism of Dr. Main in her report was that she believed Dr. Main had performed a traditional or diversified chiropractic adjustment on the Appellant during Appellant's June 4, 2007 visit at Dr. Main's office. However, when questioned about this issue during her

deposition Dr. Tamai admitted that if a patient presented for chiropractic treatments as Appellant did on June 4, 2007, it would not necessarily be a violation of the standard of care to perform an adjustment on the individual. Her specific testimony read:

> 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.
> 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.

(R., p. 000193 at 100:19-101:5.)[1] Dr. Tamai also then later admitted that the records of Dr. Main do not reflect Dr. Main having performed any adjustment of Appellant and that Dr. Tamai was assuming there was an adjustment based upon testimony of Appellant.

> 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?
> A. According to the record, no. According to her records, no.
> Q. And her testimony.

[1] It should be noted that Appellant sought medical treatment at Weiser Memorial Hospital on June 5, 2007 and was diagnosed with the equivalent diagnosis that Dr. Main reached on June 4, 2007. The Weiser Hospital doctor sent Appellant home with a diagnosis of cervical muscle spasm and migraine headache.

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.

(R., p. 000177 at 34:18-35:9.) Dr. Tamai then went on to later admit that not even Appellant's deposition testimony could confirm whether an adjustment had occurred:

Q. [Ms. Arregui'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?

. . . .

A. ***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.***

(R. p. 000208-09 at 159:24-162:1; 163:16-21 (emphasis added).) In other deposition testimony, Dr. Tamai had also explained that performing a cervical adjustment for a patient diagnosed with torticollis violated her own treatment methods but was not that unusual:

Q. In stating that you wouldn't do it under those circumstances where a person presents with torticollis and 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?

A. Deviation from?

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.***

(R. p. 000193-94 at 101:24-102:17 (emphasis added).)

Dr. Tamai's final criticism of Dr. Main was that Appellant testified that she began to experience dizziness and uneven gate during the June 4, 2007 visit to Dr. Main's office and Dr. Tamai believed Appellant should not have been left alone or allowed to leave without assistance from Dr. Main. However, when questioned about this issue during her deposition, Dr. Tamai clarified her opinions as t this issue of Dr. Main's "post-treatment" actions, explaining that they also did not violate the standard of care:

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 Appellant 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.***

(R. p. 000201-202 at 132:20-134:24(emphasis added).)

Dr. Tamai's deposition testimony certainly does not provide the requisite basis for a chiropractic physician malpractice case even without considering the requirements of I.C. §§ 6-1012 and 6-1013. Taking these statutory requirements into account, the record clearly establishes that the deposition testimony of Dr. Tamai does not meet the requisite legal requirements for admissibility of her expert opinion in a chiropractic physician malpractice case.

Tamai's Affidavit – November 12, 2010.

As detailed above, Respondents moved for summary judgment following Dr. Tamai's deposition. In response to that filing on November 12, 2010, less than one month following her deposition, Dr. Tamai submitted an affidavit in support of Appellant's opposition to the summary judgment briefing. (R. p. 000136-148.) Appellant's opposition to Respondents' summary judgment was based upon the Tamai Affidavit and with her sole argument being that the requirements of I.C. § 6-1012 were met with the Tamai Affidavit. (R., p. 000130-135.)

The Tamai Affidavit was filed late in violation of the requirements of IRCP 56 and contained a complete contradiction of Dr. Tamai's deposition testimony given less than thirty (30) days prior. The contradictions of the Tamai Affidavit were significant. First, Dr. Tamai went from knowing nothing about the relevant standard of care in California, any national standard of care or the relevant

Idaho chiropractic standard of care to less than thirty days later knowing that the Idaho standard of care was identical to the standard of care in Oceanside, California:

> I have educated myself regarding the local standards of care prevailing in Nampa-Caldwell area 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. . . . 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. The 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 opinion in this case have been based, namely, the standards of care in Oceanside, California in June 2007.

(R. p. 000136-139 ¶ 3).

Second, she went from testifying that "some" chiropractors will use a cervical adjustment to treat torticollis to now claiming that such treatment is contrary to a "basic chiropractic school teaching" and "failure to follow this basic tenet will likely result in serious injury to the patient." (*Id.* ¶ 6). Third, she previously was unclear about Appellant's testimony and whether Appellant was just remembering the cervical range of motion examination rather than a cervical adjustment, but now the affidavit states that Dr. Tamai is sure that a cervical adjustment was performed: "Defendant's decision to apply a cervical adjustment to her patient was a breach of the prevailing community standards of care . . . ." (*Id.* ¶ 7). Fourth, Dr. Tamai had testified that any alleged failure to call paramedics to assist Appellant was not a violation of the standard of care but now her

affidavit says the opposite: "the doctor also failed to call paramedics or other emergency medical personnel or even to assist Plaintiff, once Plaintiff was experiencing symptoms of stroke in Defendant's office in June 2007. . . . As a result, Plaintiff suffered serious health consequences." (*Id.* ¶ 8). Fifth, Dr. Tamai had testified that there were errors in the record keeping for the examinations in 2005 and 2007 but she had admitted that 2005 was completely irrelevant for obvious reasons and any 2007 examination deficiencies were irrelevant because Dr. Main still reached the correct diagnosis, the same diagnosis reached a day later by another medical doctor. Now, Dr. Tamai's affidavit contains a generic link between the allegedly deficient exams and Appellant's stroke: "Dr. Gallegos-Main's patient examination in both 2005 and 2007 were performed below the standard of care within the chiropractic profession. . . . As a result, Plaintiff suffered serious health consequences." (*Id.*) Sixth and finally, Dr. Tamai previously testified that she was unaware of any national standards adopted for chiropractors but now her affidavit claims, "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. I confirmed this by speaking with a chiropractor who was practicing in the Nampa-Caldwell area of Idaho . . . ." (*Id.* ¶ 9). The affidavit does not explain how speaking with one chiropractic physician in Idaho confirmed that there are national standards for chiropractic care, or for that matter how speaking with a chiropractic physician in Idaho could provide any information would cause Dr. Tamai to change her opinions as to the factual issues of this specific litigation. .

Applying the appropriate legal standards and result in but one conclusion – the affidavit is a classic form of a sham affidavit and in violation of IRCP 56. There is no basis for reversing the

District Court's decision striking the Tamai Affidavit. Judge Hoff's decision should be sustained on appeal.

ADDITIONAL ISSUES ON APPEAL

1. Respondents are entitled to attorney fees and costs on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41 due to the Appellant's failure to identify any misapplication of the law and/or abuse of discretion by the District Court. This argument is addressed in detail later in this brief.

ARGUMENT

I. Standard of Review.

In an appeal from an order granting summary judgment, the Appellate Court's standard of review is the same standard used by the District Court in ruling on a motion for summary judgment. *See Edmunds v. Kraner,* 142 Idaho 867, 871, 136 P.3d 338, 342 (2006); *see also U.S. Bank Nat. Ass'n v. Kuenzli,* 134 Idaho 222, 225, 999 P.2d 877, 880 (2000); *see also First Sec. Bank v. Murphy,* 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). Summary judgment is proper where "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 judgment as a matter of law summary judgment is proper." *Id.*

Summary judgment is "not a disfavored procedural shortcut;" rather, it is the "principal tool... by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Paugh v. Ottman,* 2008 U.S. Dist. LEXIS 52281, *9-10 (D. Idaho 2008) (quoting *Celotex Corp. v. Catrett.* 477 U.S.

317, 377 (1986) (alterations in original)). In evaluating the sufficiency of the materials submitted in opposition to summary judgment, the Court must bear in mind the distinction between the requirements for *admissibility* of expert opinion testimony under Rule 56(e) and the test for *sufficiency* of such testimony in order to oppose a motion for summary judgment. The "admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment." *Edmunds* at 871, 136 P.3d 342. The Court must look at the affidavit or deposition testimony and determine whether it alleges facts, which taken as true, would render the testimony admissible. *Id.* (citing *Dulaney v. St. Alphonsus Reg'l Med. Ctr.* 137 Idaho 160, 163, 45 P.3d 816, 819 (2002)).

In order to determine whether the trial court erred in the granting of summary judgment, it is first necessary to examine the trial court's evidentiary rulings. *Edmunds,* 142 Idaho at 872, 136 P.3d 343. Furthermore, "when reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard." *Id.* "A district court's evidentiary rulings will not be disturbed by this Court, unless there has been a clear abuse of discretion." *McDaniel v. Inland Northwest Renal Care Group – Idaho, LLC,* 144 Idaho 219, 222, 159 P.3d 856, 861 (2007). To determine whether the trial court has abused its discretion, we consider whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its discretion by an exercise of reason. *Shane v. Blair,* 139 Idaho 126, 128-129, 75 P.3d 180, 182-183 (2003) (citing *Sun Valley Shopping Ctr. v. Idaho Power Co.,*

119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)). *See also Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 40, 981 P.2d 1146, 1150 (1999).

Motions to reconsider interlocutory orders are governed by IRCP 11(a)(2)(B) and a motion to alter or amend a judgment is governed by IRCP 59(e). In either case, a court's decision whether to reconsider an interlocutory order or alter or amend a final judgment is also discretionary and will not be disturbed unless there has been a clear abuse of discretion. See *McDaniel* and *Blair*. A motion to reconsider or alter or amend a judgment is only appropriate where "the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law" and should not be used "to raise arguments . . . for the first time when they could reasonably have been raised earlier in the litigation." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (finding court properly denied motion for reconsideration and noting that movant "could reasonably have raised a § 2403 notification or Rule 19 joinder argument prior to the entry of the summary judgment . . . [and] no new evidence has been introduced, and no intervening change in the law has occurred to warrant granting the motion for reconsideration."); *see also Devil Creek Ranch v. Cedar Mesa Reservoir*, 126 Idaho 202, 205, 879 P.2d 1135, 1138 (1994) ("A party filing a motion to reconsider pursuant to Rule 11(a)(2)(B) carries the burden of bringing to the trial court's attention the new facts."); *Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1200-01 (Mass. 2009) (citing numerous cases holding that motion for reconsideration should not serve as occasion to tender new legal theories and discussing whether interlocutory or final judgment).

The application of these legal standards, to the facts, law and record of this case, can only result in one conclusion; the decision of Judge Hoff should be affirmed as will be more fully explained in the sections below.

II. The District Court Did Not Commit Error When It Concluded that Dr. Tamai's Affidavit Was a Sham Affidavit that Impermissibly Contradicts her Prior Deposition Testimony and Failed to Comply with the Admissibility Requirements of IRCP 56(e).

The question of admissibility of affidavits under Rule 56(e) is a "threshold question to be analyzed before applying the liberal construction and reasonable inferences rules when reviewing motions for summary judgment." *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). "A district court's evidentiary rulings will not be disturbed by this Court, unless there has been a clear abuse of discretion." *McDaniel v. Inland Northwest Renal Care Group - Idaho, LLC*, 144 Idaho 219, 222, 159 P.3d 856, 861 (2007). Here there was no abuse of discretion and Dr. Tamai's Affidavit was properly stricken because it is a sham affidavit.

Appellant's sole argument is that the sham affidavit rule does not apply to expert witnesses, *i.e.* clear contradictions from an expert are allowed because experts are allowed to "update" their testimony at any time. Appellant, however, ignores the case law, cited previously before the District Court, where 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 Appellants' 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 . . . ."); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 701 S.E.2d 742, 749-50 (S.C. 2010) ("Even if we were to accept [Appellant'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. [Appellant] 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."). These cited cases demonstrate that the sham affidavit doctrine has been correctly applied in cases with similar, if not identical, facts presented in the record in this matter.

Experts, like fact witnesses, are all too often willing to change their deposition testimony once they have discovered that their deposition testimony is insufficient to preclude summary judgment. 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. Here, the Tamai Affidavit is rife with contradictions. Almost every paragraph of the affidavit contains an assertion that contradicts clear deposition testimony. The following table summarizes the six contradictions (discussed in more detail above in the Statement of the Case).

Deposition Testimony – R., p.000168-210	**Affidavit Testimony – R., p. 000136-139**
Not aware of local standard of care because has not practiced in Idaho and has not discussed relevant standard of care with any qualified Idaho practitioners. (7:15-19; 37:20-22; 37:23-38:20)	Now aware that local standard of care is identical to standard of care with which she was familiar in Oceanside, CA because she spoke with anonymous practitioner with undisclosed experience and training and discussed undisclosed issues. (¶ 3-4)
Some practitioners would use cervical adjustment to treat torticollis but most (including herself) would not, so prudent practitioner would not. (101:24-102:17)	Basic and fundamental chiropractic tenant, taught in chiropractic school, that you do not perform a cervical adjustment to treat torticollis and "failure to follow this basic tenant will likely result in serious injury to the patient." (¶ 6)
Acknowledges that medical records do not show cervical adjustment and not sure if Appellant is actually merely describing a cervical range of motion examination, which is acceptable, such that no cervical adjustment was ever performed. (159:24-162:1, 163:6-21)	Concludes, "Defendant's decision to apply a cervical adjustment to her patient was a breach of the prevailing community standards of care . . . ." (¶ 7)
Admits that any deficiencies in examination in 2005 are obviously unrelated to stroke in 2007 and any deficiencies in examination in 2007 are irrelevant because still reached the proper diagnosis of torticollis. (135:9–138:2)	Alleges that patient examinations in 2005 and 2007 were below the standard of care and resulted in Plaintiff suffering serious health consequences. (¶ 8)
Admits that any allegations that Dr. Main should have called emergency personnel are irrelevant because this alleged failure would not be considered a violation of the standard of care.	Alleges that "the doctor also failed to call paramedics or other emergency medical personnel or even to assist Plaintiff, once Plaintiff was experiencing symptoms of stroke in

(132:20-134:24)	Defendant's office" and this resulted in Plaintiff suffering serious health consequences. (¶ 8)
Acknowledges that she does not know if there are published national standards for chiropractors. (85:4-23)	States that there are "national standards of care applicable to chiropractors throughout the United States" and they are the same as the standards she follows in her practice. (¶ 9)

With clear contradictions in the Tamai Affidavit, it is Appellant's burden to give an adequate explanation. Appellant's inadequate explanation is that Dr. Tamai was ill prepared for her deposition and had to fix her testimony after speaking with a local standard of care consultant. This complete change of testimony is not based on newly discovered evidence but is based on evidence that the expert failed to gather prior to her deposition. Respondents proceeded with an expert deposition in California more than two months after the expert was disclosed and receipt of Dr. Tamai's expert report. Respondents expended time and resources in proceeding with the deposition and are entitled to rely upon the deposition testimony. Respondents incurred additional expense in bringing a valid summary judgment motion based on the clear, unequivocal statements of Appellant's expert. Appellant 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.

Respondents have also been significantly prejudiced because they have never had the opportunity to cross-examine Dr. Tamai about her alleged knowledge of the local standard of care. During the deposition, Dr. Tamai said she could not and would not testify about the local standard of care; then, in her contradictory affidavit, she claimed new knowledge of the local standard of care but gave no facts to explain how she gained that knowledge. Through her deposition, Respondents

should have had the opportunity to confirm whether or not Dr. Tamai truly had gained an adequate foundation to speak as an expert regarding the local standard of care. *See, e.g.*, *Powell v. Dallas Morning News L.P.*, 2011 WL 1119775, 4 (N.D. Tex. 2011) ("When Defendants took [the expert's] deposition in April 2010, Plaintiffs' designations of subjects on which [the expert] would testify did not include using [him] as an expert on age stereotyping. Defendants had no notice and would be prejudiced if Plaintiffs were permitted to introduce this testimony by way of his declaration after the deposition had concluded.").

In addition, Appellant wrongly asserts that Dr. Tamai's affidavit "was not manufactured or contrived in any manner, shape, or form." Appellant brief p. 10. As is clear from the table above, almost every substantive statement in the affidavit was manufactured and contrived in order to fix testimony that Dr. Tamai provided during her deposition. Appellate has provided no adequate explanation for how Dr. Tamai could have changed all of her substantive opinions in this case. Dr. Tamai cannot explain away these contradictions by claiming she was confused in her deposition testimony. She had every opportunity to understand the questioning and clarify her answers. The deposition testimony is clear. The obvious explanation for these contradictions is that Plaintiff did not like Dr. Tamai's deposition testimony and decided to alter her testimony in her affidavit to avoid summary judgment. That cannot be an adequate explanation for the contradictions and logic requires the determination that this is a sham affidavit. *Lescs v. Dow Chem. Co.*, 976 F. Supp. 393, 398 n.2 (W.D. Va. 1997) ("To the extent that Appellant 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.").

Dr. Tamai's affidavit testimony directly contradicts her deposition testimony and can be nothing other than a sham affidavit, which was properly stricken by the District Court on this basis alone. Additionally, because the Tamai Affidavit also failed to meet the foundational requirements of I.C. § 6-1013(c)(1) the District Court correctly determined to strike the affidavit. The District Court also properly relied upon the fact that the affidavit was untimely filed. The District Court found that the affidavit failed to meet the admissibility requirements of IRCP 56(e). The net result is that the District Court properly exercised its discretion in making evidentiary rulings when it struck the Tamai Affidavit. Without the defective Tamai Affidavit, Plaintiff had no evidence to oppose Respondents' summary judgment motion and the District Court's Order granting summary judgment and the resulting final judgment dismissing the case should, therefore, be upheld.

III. Dr. Tamai Failed To Comply With The Admissibility Requirements of Idaho Code § 6-1013(c)(1).

Dr. Tamai's deposition testimony and her affidavit, even if both are considered, do not comply with the admissibility requirements of I.C. § 6-1013(c)(1). "Admissibility of expert testimony requires personal knowledge." *Shane v. Blair*, 139 Idaho 126, 129, 75 P.3d 180, 183 (2003). Appellants' expert, Dr. Tamai, is an out of state expert. In order for her opinions as to the Respondents' alleged failure to comply with the local standard of practice to be admissible, she was required to demonstrate that she has actual and personal knowledge of the local standard of health care practice applicable to Dr. Main as required by Rule 56(e) and Idaho Code § 6-1013(c)(1). The question of admissibility of affidavits under Rule 56(e) is a "threshold question to be analyzed before

applying the liberal construction and reasonable inferences rules when reviewing motions for summary judgment." *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994).

It is well settled that experts testifying as to the standard of practice in medical malpractice actions must show that they have familiarized themselves with the standard for a particular profession for the relevant community and time. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000) (citing *Kolln v. St. Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 331, 940 P.2d 1142, 1150 (1997)). They must explain how they became familiar with the local standard of practice for the particular health care professional. *See Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 168, 45 P.3d 816, 824 (2002) ("The witness must demonstrate a knowledge acquired from experience or study of the standards of the specialty of the defendant physician sufficient to enable him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards....").

In this case, the only foundation to Dr. Tamai's opinions regarding the local community standard of care are found in paragraph three of the Tamai's affidavit, which in summary states that Dr. Tamai "educated [her]self" by speaking with an unidentified "local chiropractor" who was licensed and had an "active practice of chiropractic medicine [in Caldwell, Idaho] during the relevant period," who indicated "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..." (R. p. 000137 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. *See Clarke v. Prenger*, 114 Idaho 766, 769, 760 P.2d 1182, 1185 (1988) ("The witness must demonstrate a knowledge acquired from experience or study of the standards of the specialty of the defendant physician sufficient to enable him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards, and not to the standards of the witness's particular specialty if it differs from that of the defendant. It is the scope of the witness's knowledge and not the artificial classification by title that should govern the threshold question of admissibility."). Merely having the license and title of chiropractor and having an active practice at the relevant time does not give any indication of the sufficiency of the consulting chiropractor's "scope of knowledge."

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. Claiming to know the community standard without setting forth facts to explain the basis for that claim is insufficient, as stated repeatedly in the case law. *See Hoover v. Hunter*, 150 Idaho 658, 662-63, 249 P.3d 851, 855-56 (2011) ("[B]eyond conclusory statements that the standard of care was identical, there was no showing that [the alleged expert] had familiarized himself with the local standard of care in Ada County at the time of the procedure."); *Dulaney*, 137 Idaho at 166-67, 45 P.3d at 822-23 *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 168, 45 P.3d 816, 824 (2002) ("The witness must also state how he or she became familiar with that standard of care.").

In addition, the affidavit only states that the consulted chiropractor knew the local standard of care, without any reference to the relevant standard of care issues in this case. The affidavit is devoid of any explanation of how the consulting chiropractor knows the local standard of care for treating torticollis and whether a hypothetical manual adjustment would be acceptable, if not recommended. *See Suhadolnik v. Pressman*, 254 P.3d 11 (Idaho 2011) ("The district court's narrowing of the standard of care to Flomax particularly is not an abuse of discretion because this Court generally identifies the standard of care in terms of the major facts appurtenant to the case."); *Hoover*, 150 Idaho 663, 249 P.3d at 856 (Idaho 2011) ("Beyond that, Mr. Hoover makes no statement that he was familiar with the local standard in Ada County, alleging merely that basic first aid was mandated. These statements, without more, do not show that Mr. Hoover was versed in the standard of care for an emergency arising within an EGD procedure.").

The affidavit in this case is much more deficient than other cases where the appellate court has upheld the decision to grant summary judgment. In *Dulaney*, the affidavit stated that 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 these details, the *Dulaney* Court found the affidavit inadmissible and granted summary judgment because the affidavit did not relate all of the consulting professor's experience to the specific time period in question. In this case, the affidavit contains even less facts and it never relates "any" of the consulting chiropractor's experience or training regarding the relevant standard of care issues.

In *Suhadolnik*, the Court was provided with the consulting local physician's deposition that contained extensive details of his experience, training, and opinions. With that detail, the Court was able to determine that the consulting physician did not have sufficient knowledge on the central standard of care issue in the case and granted summary judgment. Here, the Appellant has provided no facts or details so the Court has no ability to determine if the conclusory claims regarding the standard of care are actually flawed. This approach is contrary to the case law and must be rejected. In fact, the record establishes that all of Dr. Tamai's conclusory remarks in the affidavit are flawed, which is proven by her deposition testimony. Dr. Tamai is required to provide much greater detail about the consulting chiropractor's experience and training, specifically the experience and training that allowed the chiropractor to provide information detailing the standard of care for treatment by a chiropractic physician in Caldwell, Idaho on June 4, 2007.

The Appellant suggests that the District Court based its decision solely upon the sham affidavit doctrine. We disagree based upon the District Court's statements in the record. (000320-323.) Further, Appellant's position ignores the District Court's decision as to the untimeliness of the affidavit. The argument cannot carry the day for the Appellant as there is a clear legal basis for striking the Tamai Affidavit and granting summary judgment based upon the deficiencies in the affidavit under I.C. § 6-1013(c)(1). This Court in, *Martel v. Bulotti*, 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003) held that an appellate court may affirm on alternate grounds, applying the law to undisputed facts. The Appellant cannot escape the legal authority that the Tamai Affidavit does not meet the foundational requirements of I.C. § 6-1013(c)(1) to allow Dr. Tamai to testify as to the local standard of care.

Pursuant to I.C. 6-1013(c)(1), an expert can only testify as to the local standard of care if the expert establishes the requisite foundation to show how the knowledge was obtained and the clear basis for the opinion. The District Court correctly concluded that the deposition testimony of Dr. Tamai did not contain the sufficient foundational knowledge of the local standard of care for her to present expert opinion testimony. The Tamai Affidavit, even if considered, is deficient on its face in terms of setting forth this required foundation as well. Accordingly, the District Court's ruling on summary judgment should be affirmed.

IV. The District Court Did Not Abuse Its Discretion in Denying the Motion to Reconsider Because No New Facts or Errors of Law Were Presented. Chiropractor Malpractice Cases Require Proof of the Local Community Standard of Care Testimony, Pursuant to I.C. §§ 6-1012, 6-1013 and Idaho Case Law.

The District Court properly exercised its discretion in denying Plaintiff's motion for reconsideration. Appellant's reconsideration motion regurgitated the same arguments based upon the sham affidavit addressed above. In addition, Appellant improperly raised a new legal theory, claiming that I.C. § 6-1012 does not apply to chiropractor physicians. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (motion to reconsider should not be used "to raise arguments . . . for the first time when they could reasonably have been raised earlier in the litigation"); *see also Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1200-01 (Mass. 2009) (citing numerous cases holding that motion for reconsideration should not serve as occasion to tender new legal theories). The District Court properly exercised its discretion in refusing to entertain a new legal theory that should have been raised in the initial opposition to summary judgment. Even if this tardy

legal argument had been considered, the District Court should have properly rejected it for the following reasons.

Appellant argues that I.C. § 6-1012 is inapplicable to chiropractors because chiropractic physicians are not specifically mentioned in the language of the statute. Appellant ignores the language of the statute that states "any physician or surgeon or other provider of health care." Appellant's argument, boiled down to the basics, is that (1) chiropractors are physicians but not medical physicians, (2) the reference to "any physician" in § 6-1012 is only to medical physicians, and (3) the "other provider of health care" cannot refer to any other type of licensed physician. Appellant's argument is flawed in all respects because a chiropractor is both a physician and a provider of health care.

The Idaho Courts have not ruled specifically on the applicability of I.C. § 6-1012 to chiropractors. *See Syth v. Parke*, 121 Idaho 156, 823 P.2d 760 (1991) (underlying lawsuit was malpractice action against chiropractor but no discussion of expert testimony as to the local standard of care). The plain language of the statute makes § 6-1012 applicable to "any physician." Appellant concedes that a chiropractor is defined as a physician, pursuant to the Chiropractic Practice Act. *See* I.C. § 54-703 (" 'Physician' means any person who holds a license to practice chiropractic"). So, as an initial matter, the statute can be interpreted to include a chiropractor physician within the term "any physician." The term "any" is inclusive and general and Appellant has no argument for why "any physician" should not include a chiropractic physician. Appellant provides only a conclusory statement, "the above statutory reference to 'any physician' applies to those physicians meeting the

definition stated in the Medical Practice Act." A chiropractic physician falls within the term "any physician", so § 6-1012 is applicable to chiropractic physicians.

Even if § 6-1012's reference to "any physician" was intended only for medical physicians as defined by I.C. § 54-1801, et seq., Section 6-1012 has the catch all provision "other provider of health care," which clearly is a broad term that would include a licensed chiropractic physician. The common dictionary definition for chiropractic would seem to end the argument: "A system of healing." *See* Encarta® World English Dictionary. 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). Finally, the Idaho Supreme Court noted in a recent decision that a chiropractor is a "health care professional" who provides a type of service similar to a medical doctor or a physical therapist and therefore should be treated equally with those health care professionals. *See Idaho Ass'n of Chiropractic Physicians, Inc. v. Alcorn*, 132 Idaho 486, 487-89, 975 P.2d 219, 220-22 (1999). There is no relevant distinction between chiropractors and the other listed health care providers and counsel is not aware of any case from any other jurisdiction holding that chiropractor experts should not have to know the local standard of care.

The Idaho Supreme Court confirmed that § 6-1012 is intended to have a wide application. In *Jones v. Crawforth,* 147 Idaho 11, 205 P.3d 660 (2009), the Court provides a simple test for determining whether various professions would fit within the definition of a "provider of health care" pursuant to § 6-1012. In *Crawforth*, the 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.* As I.C. § 6-1012 applies to chiropractic care, the District Court properly exercised its discretion in rejecting that argument and denying the motion to reconsider.

V. The Tamai Affidavit Was Untimely Filed.

The District Court also correctly ruled that the untimeliness of the Tamai Affidavit was an independent reason for its being stricken. Although as noted there are multiple other legal reasons for the granting of the motion to strike, it is clear under the law that untimeliness standing alone is a separate legal basis for the District Court to make the discretionary decision to strike the Tamai Affidavit. The District Court was acting within its discretion in rejecting the affidavit on the basis that the affidavit was untimely filed and there was no reasonable explanation for missing the time deadlines.

ATTORNEY FEES ON APPEAL

I. Respondents Are Entitled To Attorney Fees On Appeal Pursuant To Idaho Code & 12-121 And I.A.R. 41(a).

Idaho Rule of Civil Procedure 54(e)(1) governs the award of attorney fees. It states:

> In any civil action the court may award reasonable attorney fees,

> which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

"Idaho Rule of Civil Procedure 54(e)(1) 'creates no substantive right to attorney fees, but merely establishes a framework for applying I.C. § 12-121.'" *Newberry v. Martens*, 142 Idaho 284, 292, 127 P.2d 187, 195 (2005) (citing *Huff v. Uhl*, 103 Idaho 274, 277 n. 1, 647 P.2d 730, 733 n.1 (1982)). According to the Idaho Supreme Court:

> Attorney fees on appeal are appropriate under that statute [Idaho Code § 12-121] only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. Where an appeal turns on the question of law, an award of attorney fees under this section is proper if the law is well settled and the appellant has made no substantial showing that the district court misapplied the law.

Wait v. Leavell Cattle, Inc., 136 Idaho 729, 799, 41 P.3d 220, 227 (2001) (emphasis added) (citation omitted).

Respondents contend that the case authority interpreting the sham affidavit doctrine is clear and it is clear that the District Court did not abuse its discretion. Appellant has repeatedly asked the District Court to accept an affidavit that violated the sham affidavit doctrine. Similarly, the Idaho case authority and Idaho Code §§ 6-1012 and 6-1013 specifically discuss the steps an out-of-area expert must take in order to sufficiently familiarize themselves with the local standard of practice. Despite these clear requirements, Appellant provided a patently deficient affidavit and has passed on

many clear opportunities to amend that affidavit to include the required foundation. Finally, Appellant has raised an eleventh-hour statutory interpretation argument that she undoubtedly did not raise earlier because she knew it lacked any logical support. Based on the record before this Court, Respondents contend that Appellant has unreasonably pursued this appeal and has failed to establish a credible misapplication of the law by the District Court. In light of the substantial expenses incurred as a result of this undertaking, Respondents respectfully request that they be awarded attorney fees on appeal pursuant to Idaho Code § 12-121 and I.A.R. 41(a).

CONCLUSION

The District Court properly concluded that Dr. Tamai's deposition testimony and affidavit failed to comply with the threshold foundational requirements set forth under IRCP 56(e) and I.C. §§ 6-1012 and 6-1013. During her deposition, Dr. Tamai completely failed to provide the opinions that Plaintiff hoped for in order to establish a prima facie case. When faced with summary judgment, Appellant submitted Dr. Tamai's affidavit which was legally deficient under the clear legal requirements of I.C. § 6-1013(c)(1). Further, Dr. Tamai's affidavit was correctly determined to be a "sham affidavit" because of the multiple comprehensive contradictions to her prior deposition testimony and the lack of any reasonable basis for the changes in her testimony. The District Court was also correct in striking the Tamai Affidavit because it was not filed in the requisite timeframes without providing any reasonable explanation for the tardiness.

The District Court properly considered all of these matters and the record before it in granting Respondents' motion for summary judgment and denying Appellant's motion for reconsideration. The, Respondents respectfully request this Court affirm the District Court's

decisions in all respects and that the Respondents be awarded costs and attorney fees for defending against this appeal.

RESPECTFULLY SUBMITTED this 11th day of August, 2011.

GREENER BURKE SHOEMAKER P.A.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of August, 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 Appellant-Appellant]

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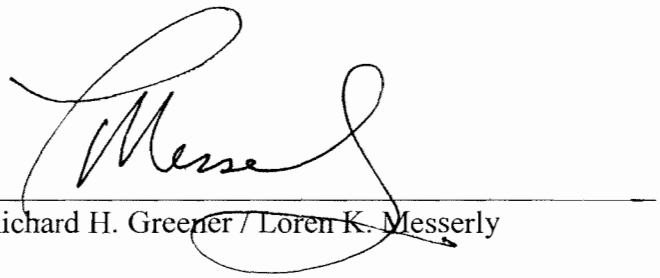

Richard H. Greener / Loren K. Messerly