

9-1-2011

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

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Arregui v. Gallegos-Main Appellant's Reply Brief Dckt. 38496" (2011). *Idaho Supreme Court Records & Briefs*. 3180.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/3180](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3180)

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**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 REPLY BRIEF**

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

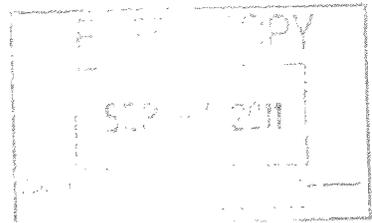
HONORABLE RENAE HOFF, PRESIDING DISTRICT JUDGE

Sam Johnson, ISB No. 4777  
**JOHNSON & MONTELEONE, L.L.P.**  
405 South Eighth Street, Suite 250  
Boise, ID 83702  
[sam@treasurevalleylawyers.com](mailto:sam@treasurevalleylawyers.com)

ATTORNEYS FOR  
PLAINTIFF-APPELLANT

Richard H. Greener, ISB No. 1191  
Loren K. Messerly, ISB No. 7434  
**GREENER, BURKE & SHOEMAKER,  
P.A.**  
950 W. Bannock Street, Suite 900  
Boise, ID 83702  
[rgreener@greenerlaw.com](mailto:rgreener@greenerlaw.com)  
[lmesserly@greenerlaw.com](mailto:lmesserly@greenerlaw.com)

ATTORNEYS FOR  
DEFENDANTS-RESPONDENTS



**I. TABLE OF CONTENTS**

I.	TABLE OF CONTENTS	i
II.	TABLE OF CASES	ii
III.	ARGUMENT IN REPLY	1
	A. Introduction	1
	B. Arregui did not suggest the Sham Affidavit Doctrine does not or should never apply to Testimony given by Expert Witnesses.	2
	CONCLUSION	5

## TABLE OF CASES

### **CASES:**

<u><i>Boise Tower Associates, LLC v. Washington Capital Joint Master Trust</i></u> 2007 WL 1035158, 12-13 (D. Idaho)	2
<u><i>Cochran v. Gritman</i></u> 34 Idaho 654, 203 P. 289	3
<u><i>Evans v. Cavanagh</i></u> 58 Idaho 324, 327, 73 P.2d 83, 86 (1937)	2
<u><i>Kennedy v. Allied Mutual Insurance Co.</i></u> 952 F2d 262, 267 (9 <sup>th</sup> Cir. 1991)	5

### III. ARGUMENT IN REPLY

#### A. Introduction

Defendants-Respondents Rosalinda Gallegos-Main, D.C., and her clinic - Full Life Chiropractic, P.A., (collectively hereinafter, “Chiropractor Main”), proffer in the first sentence of their *Respondent’s Brief* that: “This is a medical malpractice case involving allegations of chiropractic physician malpractice.” *See Respondent’s Brief, p. 1 (emphasis added)*. This case is plainly not a “medical malpractice case”. In fact, Plaintiff-Appellant Martha Arregui (hereinafter “Arregui”) has definitively shown that chiropractic physicians, by express legislative declaration, do not hold a license to practice medicine in the state of Idaho. *See Appellant’s Opening Brief, p. 15*. Idaho Code § 54-704(3) 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).

In spite of this clear legislative declaration that chiropractic physicians do not practice medicine, Chiropractor Main erroneously characterizes the very nature of this case as one involving medical malpractice. The inaccurate characterization of the nature of the case may be innocent enough in the singular, but represents only one exemplar of a string of mischaracterizations that start from the first sentence and run through the remainder of the brief submitted by Chiropractor Main.

At the end of the day, this case involves the district court’s commission of clear error when applying the “sham affidavit” doctrine to a case that does not involve a sham.

In fact, the district court acknowledged the lack of a sham on the record when stating, “And as Mr. Johnson pointed out, I find no – no deception on the part of the chiropractor.” Tr., p. 62, Ll. 4-6 (emphasis added).

**B. Arregui did not suggest the Sham Affidavit Doctrine does not or should never apply to Testimony given by Expert Witnesses.**

The next mischaracterization made by Chiropractor Main, perhaps worthy of a reply, relates to the distinction drawn by Arregui between expert witnesses and fact witnesses. Arregui does not contend on appeal that the “sham affidavit” doctrine does not apply to expert witnesses. Nonetheless, Chiropractor Main incorrectly states, “[Arregui’s] sole argument is that the sham affidavit 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.” *Respondent’s Brief*, p. 21. This statement by Chiropractor Main reflects a serious misunderstanding of Arregui’s position on appeal. Arregui’s point in her Opening Brief is only that there is a distinction between lay witness testimony and expert witness opinions, and the difference in the two ought to be considered when a court is looking to “prevent[] the use of manufactured testimony” in line with the rule taken from *Boise Tower Associates, LLC v. Washington Capital Joint Master Trust*, 2007 WL 1035158, 12-13 (D. Idaho).

In fact, an expert witness is permitted if not expected to make factual assumptions when rendering opinions. In *Evans v. Cavanagh*, 58 Idaho 324, 327, 73 P.2d 83, 86 (1937), the Idaho Supreme Court succinctly addressed the role of the expert when faced with conflicting evidence:

The testimony of an expert as to his opinion is not evidence of a fact in dispute, but is advisory, only, to assist the triers of fact to understand and apply the testimony of other

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

*Citing Cochran v. Gritman*, 34 Idaho 654, 203 P. 289.

Here, Arregui is forced to continue to make the distinction between experts and fact witnesses for a valid reason. She does it because Chiropractor Main first below and now on appeal, through the creation of a table, continues to compare Dr. Tamai's affidavit testimony with her deposition testimony in a disingenuous manner. *Respondent's Brief*, pp. 23-24. In setting up this table, Chiropractor Main primarily attempts to illustrate Dr. Tamai has been inconsistent in testifying about whether Chiropractor Main performed a "cervical adjustment" on Arregui or merely performed a "range of motion" test. *Id.*

However, as Dr. Tamai explained during her deposition, it is not so much that she has been inconsistent on this factual issue, but more so that the record is in conflict on this point. On several occasions during the course of her deposition, Dr. Tamai made note of the conflict in the record between Arregui's description of the treatment provided compared to Chiropractor Main's description of the treatment provided. *See Tamai*

*Depo. Tr.*, p. 27, Ll. 10-24; p. 34, Ll. 18 – p. 35, Ll. 6; pp. 159 – 161, starting at R., Vol. II, p. 168. When Dr. Tamai presumes a cervical rotational adjustment was done, she has consistently opined that this would be unreasonable and imprudent or contraindicated or in breach of the standard of care. See *Tamai Depo. Tr.*, p. 161, Ll. 10 – p. 162, Ll. 1, starting at R., Vol. II, p. 218; see also *Affidavit of Sarah Tamai, D.C. ¶7* at R., Vol. I, p. 138; see also *Dr. Tamai's October 15, 2010, written report, second to last paragraph* at R., Vol. I, p. 146.

Thus, to the extent Dr. Tamai's testimony in relation to whether Chiropractor Main simply tested Arregui's range of motion or performed a cervical adjustment is inconsistent, it is adequately explained on the basis that in one instance Dr. Tamai presumes Arregui's version is true and in other instances presumes Chiropractor Main's version is true. As stated in the passage quoted from *Evans, supra*, "It is not for the expert to assume the responsibility of determining the truth or falsity . . . of the testimony of other witnesses." *Id.* As Dr. Tamai confessed in her deposition, she does not know who is right – doctor or patient – but it is not her job to make such a determination as that task belongs to the jury.

Perhaps most compelling on this front is the fact the district court never found a single inconsistency along the lines of any of the alleged inconsistencies cited in the table created by Chiropractor Main. See *Tr.*, pp. 38-43. The only inconsistency noted by the district court had to do with the fact at the time of her deposition Dr. Tamai had not yet spoken to a local expert, but by the time of the making of her affidavit she had:

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.

*Id at p. 39, Ll. 17-23.*

However, the district court's decision to strike the Tamai Affidavit on the basis of the aforementioned single inconsistency, constituted clear error. The "general rule" from the sham affidavit doctrine only applies if the court, "make[s] a factual determination that the contradiction was actually a 'sham.'" *Kennedy v. Allied Mutual Insurance Co.*, 952 F2d 262, 267 (9<sup>th</sup> Cir. 1991). As previously noted by Arregui, the district court in the instant matter found "no deception on the part of the chiropractor [Dr. Tamai]". Tr. p. 62, Ll. 4-6.

### CONCLUSION

This case is not a medical malpractice case. Rather, it involves a claim for bodily injuries brought by Arregui against her chiropractic physician for negligently causing Arregui to suffer a stroke when treating her on June 4, 2007. It is clear the legislature intended only for those physicians licensed to practice medicine in the state of Idaho to reap the protections of Idaho Code §§ 6-1012/6-1013. Other arguments advanced by Chiropractor Main in *Respondent's Brief* are adequately covered in Arregui's *Opening Brief*, and therefore will not be rehashed here.

Wherefore, Arregui respectfully maintains her request of this Court to reverse the district court's order granting summary judgment in favor of Chiropractor Main.

DATED this 1 day of September, 2011.

JOHNSON & MONTELEONE, L.L.P.



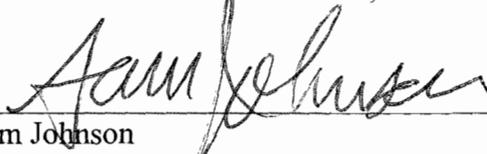
Sam Johnson  
Attorneys for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1 day of September, 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:

<input checked="" type="checkbox"/> mailed <input type="checkbox"/> hand delivered <input type="checkbox"/> 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
---	--

JOHNSON & MONTELEONE, L.L.P.

  
\_\_\_\_\_  
Sam Johnson  
Attorneys for Plaintiff-Appellant