10-2-2013

Conner v. Hodges Appellant's Reply Brief 2 Dckt. 40742

IN THE SUPREME COURT OF THE STATE OF IDAHO

RYAN CONNER and JAMI LEIGH STEINMEYER-CONNER, Plaintiffs/Appellants, v. BRYAN F. HODGES, M.D., and JOHN DOES I-V, persons or entities, Defendant/Respondent.	DOCKET NO. 40742-2013

APPELLANT JAMI LEIGH CONNER'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of Ada County

Honorable Ronald J. Wilper
District Judge, Presiding

Philip Gordon
Bruce S. Bistline
GORDON LAW OFFICES, CHTD.
623 West Hays Street
Boise, ID 83702-5512

Attorney forAppellant Jami Leigh Conner

Raymond D. Powers
Portia L. Rauer
POWERS,TOLMAN, PLLC
345 Bobwhite Court, Suite 150
Boise, Idaho 83707

Attorneys for Respondent Bryan F. Hodges, M.D.

Donald W. Lojek
LOJEK LAW OFFICES, CHTD.
623 W. Hays Street
Boise, Idaho 83702

Attorney for Appellant Ryan Conner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

Respondent, Bryan F. Hodges, M.D. (hereinafter Dr. Hodges) has argued to this Court to affirm the District Court's order granting summary judgment. The basic premise of this argument is an interpretation of this Court's decision in *Stuard v. Jorgenson*, 150 Idaho 701, 249 P.3d 1156 (2011) which does not appear to Appellant Mrs. Jami Leigh Conner (hereinafter Mrs. Conner) to correctly reflect this Court's holding in that case. The interpretation of *Stuard* urged by Dr. Hodges is only possible if decades of prior decisions are either ignored, overruled or treated as providing a different standard for claims against physicians than for claims against all other professionals. Moreover, as the particular circumstances of this case demonstrate, the interpretation of *Stuard* urged by Dr. Hodges will lead not only to absurd results, but to results which afford cases such as this one an effective statute of limitations period of zero days simply because of the existence of tests that would never be utilized normally but, if utilized, would show only the **possibility** of actionable damage. Such an outcome should be legally intolerable. If it is not, then the applicable statute of limitations I.C. § 5-219(4) is unconstitutional both facially or as applied.

Separately, if Mrs. Conner is precluded from bringing a medical malpractice action because of circumstances which were not and could not be discernable by anybody from any medical record actually in existence, then it is appropriate to consider her breach of contract claim. This claim is possible only under the very unique circumstances of this case which do not involve a claim for damages due to injury or death occasioned by medical malpractice. Due to these circumstances the preemptive statute, which usually precludes breach of contract actions in medical malpractice cases (I.C. § 6-1012), has no application in this case and does not pose an

obstacle to this action being brought as a breach of contract action.

II. ARGUMENT

A. MRS. CONNER'S CAUSE OF ACTION DID NOT ACCRUE UNTIL SHE BECAME PREGNANT AND HER CLAIM FOR DAMAGES ARISING FROM THAT PREGNANCY SHOULD NOT BE TREATED AS TIME BARRED.

1. Summary Judgment should have been denied utilizing the "some damage" exception without reliance upon the "objectively ascertainable" tool.

Mrs. Conner maintained that a proper utilization of the "some damage" exception to I.C. § 5-219(4) precluded the entry of summary judgment and that the District Court erroneously perceived this matter as one in which the "objectively ascertainable" analytical tool needed to be utilized.

a. This case can be fully resolved by application of the "some damage" exception to I.C. § 5-219(4).

This argument is premised upon this Court's decisions spanning 20 years beginning with *Stephens v. Stearns*, 106 Idaho 249, 678, P.2d 41 (1984) and continuing through *Parsons Packing, Inc. v. Masingill,* 140 Idaho 480, 95 P.3d 631 (2004).

In these decisions, this Court has repeatedly and without any response from the Legislature utilized the "some damage" exception to I.C. § 5-219(4) to resolve cases which were filed more than two years after the occurrence of professional malpractice. In all cases the record clearly demonstrated that on a readily discernable date actionable damages resulted from circumstances set in motion by defective professional services. In some of these cases, the Court determined that "some damage" occurred at the time of the act because that is when actionable damage occurred. *See, e.g. Anderson v. Glenn*, 139 Idaho 799, 87 P.3d 286 (2003). In other

cases, even though there were deficient professional services which generated a risk of subsequent actionable damage (a defective tax return, an unrecorded deed), the "some damage" exception led to a determination that the actionable damage did not occur at the time of the conduct **but at some later clearly determinable date**. *See, e.g. Parsons Packing, Inc. v. Masingill, supra,* and *Streib v. Veigel,* 109 Idaho174, 706 P.2d 63 (1985)(emphasis added).[1]

Not one of these cases mentioned or utilized the "clearly ascertainable" analytical tool and none have been overturned. Indeed, this Court has clearly affirmed in *Stuard v. Jorgenson,* 150 Idaho 701, 249 P.3d 1156 (2011) that the role of "objectively ascertainable" is simply an analytical tool to be used in determining when 'some damage' has occurred." *Conway v. Sonntag,* 141 Idaho 144, 146-147, 106 P.3d 470, 472-73 (2005). Thus, unquestioned precedent demonstrates that there are cases in which factual circumstances render the "objectively ascertainable" tool unnecessary to the determination of whether or not "some damage" has occurred.

Dr. Hodges does not appear to challenge this argument. He merely asserts that utilization of the "objectively ascertainable" analytical tool as used in this Court's decision in *Stuard v. Jorgenson* compels a dismissal of Mrs. Conner's malpractice claim. This argument sidesteps the Mrs. Conner's assertion that the "objectively ascertainable" analytical tool need not be utilized in every case and that it has no proper application in this action.

The argument that the "objectively ascertainable" tool has no application here is premised

---

[1] These outcomes are completely consistent with the concept that "negligence" describes a confluence of various factors – duty, an act which breaches the duty, injury caused by breach and damages flowing from the injury. *E.g. McDevitt v. Sportsman's Warehouse Inc.,* 151 Idaho 280, 283, 255 P.3d 1166,1169 (2011).

upon the fact that from its inception this analytical tool has been utilized in those instances in which there are complicated circumstances which confound the effort to identify precisely the date on which the plaintiff first incurred actionable damages. In some cases, those complicating circumstances arise from a record demonstrating a long or convoluted sequence of events flowing from the breach of relevant standards of care, *see, e.g. Chicoine v. Bignall,* 122 Idaho 482, 835 P.2d 1293 (1992). In others, the determination is complicated by the fact that the record suggests that actionable damages have first incurred more than two years prior to the filing of the case but nothing in the record provides objective medical proof that would support a determination of when actionable damages were first incurred. *See, e.g. Davis v. Moran,* 112 Idaho 703, 709, 735 P.2d 1014, 1020 (1987) and *Hawley v. Green,* 117 Idaho 498, 788 P.2d 1321 (1990). No such complicating circumstances are present in this case. There is only one date upon which "some damage" could be said to have occurred – the date of conception (a question of fact). Under these circumstances, the District Court unnecessarily resorted to the use of "objectively ascertainable" analytical tool.

Dr. Hodges does argue that Mrs. Conner's own conduct, filing an action which initially included a claim for battery and which still includes a claim for breach of contract, "proves that Ms. Steinmeyer-Conner believed she was damaged because of her continuing fertility." Respondent's Brief pp. 21-22. This argument has many flaws.

First, it attempts to capitalize on what is an unavoidable consequence of pleading a case to which the "some damage" exception properly applies. In 1983 when Mr. Streib filed his action against Mr. Veigel, he did so because prior to filing and five or six years after the defective tax return was prepared in 1976, he was audited and **at that time** incurred actionable damages. Given

that **he could not file his action until he had actionable damages,** he could not file within the two years. The decision in *Streib v. Veigel,* 109 Idaho 174, 706 P.2d 63 (1984) makes it clear that a person who has, by virtue of professional malpractice, been placed in a position of being exposed to an unknown risk of later occurring damage has not at the point of the deficient conduct been actionably damaged.

Second, Dr. Hodges' argument hinges upon a distortion of the nature of the damages that Mrs. Conner has suffered. It is clear from the Complaint that had there been no pregnancy, there would be no damages. R. 9-11, Complaint ¶¶ 12-17. Mrs. Conner has never alleged that she suffered an actionable damage on or between the date of the defective surgery and the date upon which she became pregnant. Indeed, since she did not know that Dr. Hodges had failed to apply any electrocautery to her left fallopian tube, it is unimaginable how she could have made a claim for any damage during the period between the surgery and the pregnancy. Moreover, she has not prayed for or sought to collect damages for the cost of the surgery performed by Dr. Hodges or any discomfort associated with that surgery. She would have had the cost and discomfort of the botched tubal ligation even if it had been done properly. Her actionable damages only began to accumulate when she became pregnant.

Third, Dr. Hodges' argument conflates the concept of actionable conduct with actionable damage. In the context of the battery claim, the damages asserted are those resulting from the pregnancy which are alleged to be caused by an unwanted touching in the course of completing only a **unilateral** tubal ligation. R. 13, ¶ 36. In this regard, while the actionable conduct occurred at the time of the surgery, Mrs. Conner had no actionable damage until she became pregnant. It was at that point that the risk created by the conduct manifested itself as damage.

Before that she, like Mr. Streib, was a victim with a difficulty to discover tortious conduct. She was exposed to a consequent **potential** for a bad outcome but she had not suffered one and, but for becoming pregnant, would have never suffered any actionable damage. Similarly, in the context of the breach of contract claim, Mrs. Conner's actionable damages arise only when she became pregnant. At that time damages connected to the deficient performance gave rise to a breach of contract claim as a result of the deficient performance of the contract, i.e., that which Dr. Hodges promised to do. In both instances, the fact that she can, knowing what she knows now, allege that actionable conduct occurred at the time of the surgery, does not demonstrate that she ever agreed that she suffered any actionable damage at the time of surgery.

Because Dr. Hodges, relies upon the erroneous assumption that the "objectively ascertainable" analytical tool should be utilized in all professional malpractice cases, he has not responded to the argument that it never should have been utilized in this action. Dr. Hodges cites no authority to support his effort to convert the "objectively ascertainable" analytical tool from a tool into **the test** which must be used in all professional malpractice cases.

b. Even if it were appropriate to utilize the "objectively ascertainable" analytical tool in this action, the District Court, in doing so, relied upon irrelevant evidence.

With respect to the tests which were proposed by Dr. Self, the record compels the following conclusions:

1. The suggested tests are invasive, risk producing, pain producing and expensive procedures. R. 145-146, ¶ 9.
2. The tests were not supported by any diagnosis and, therefore, were medically unnecessary. R. 146, ¶¶ 11-12.

3. In the absence of a diagnosis demonstrating that testing was medically necessary, a physician who performed either of the tests could not properly submit a claim for reimbursement to private or governmental health care sureties. R. 146-147 ¶ 13

4. A physician could not ethically or legally justify performing either of the tests identified by Dr. Self without a diagnosis demonstrating that the testing was **medically** necessary. R. 147 ¶¶ 11-12.

5. The tests identified by Dr. Self could do nothing more than demonstrate that the tube is not fully occluded. *See* Affidavit of Lee Self M.D., R. 59-61, ¶¶ 2, 5-7.

6. Mrs. Conner was advised by Dr. Hodges that even with a properly performed ligation procedure, there is a very small risk that a tube would not be fully occluded. R. 36, pp. 38:17-39:13.

Given these undisputed facts, the mere existence of these tests is irrelevant to the resolution of the question posed in *Chicoine v. Bignall*, 122 Idaho 482, 835, P.2d 1293 (1992) – is there objective proof that would support the existence of some actual damage? *Id.* at 487, 835 P.2d at 1298. This is a question which is materially different from whether it is theoretically possible to generate objective proof supporting the potential for actionable damage through unnecessary, invasive and expensive tests. It is clear that the tests in question were not performed on Mrs. Conner. This being the case, the potential, even the probability that those tests might have revealed a less than fully occluded left fallopian tube, is simply not relevant.

Dr. Hodges, while discussing and correctly quoting from *Chicoine,* does not confront the impact that the criteria clearly expressed in *Chicoine* has upon this case. Instead, he attempts to sidestep the deficiency in his reasoning by focusing on the language in *Chicoine* and other cases to

the effect that "objectively ascertainable" does not mean that the fact of actionable damage is actually known to the injured party. *Lapham v. Stewart,* 137 Idaho 582, 587, 51 P.3d 396, 401 (2002). This assertion, while accurate as far as it goes, does not the compel the conclusion that objective evidence of actionable damage exists whenever it is theoretically possible, no matter how invasive, painful or dangerous are the means to generate evidence that the medical care did not provide the intended outcome. Moreover, reaching a determination that the injured person learned of the existence of actionable damages at the same moment that the objective evidence of actionable damage came into existence does not mean that relying upon that objective evidence to fix the date of accrual somehow affronts the "no discovery exception" language of I.C. § 5-219(4). The key question is not, "when does the injured person or anyone else become aware of the existence of actionable damage" but, rather, "when did medical proof come into existence which demonstrated the fact of actionable damage?" There was no medical proof here until June 2009 when the pregnancy test came back positive.

Dr. Hodges, while arguing at length that this Court's decision in *Stuard v. Jorgenson, supra*, does not depart from or conflict with earlier decisions of this Court (Respondent's Brief, 16-21) does argue at length that *Stuard* looks not to what medical proof actually exists but, rather, to what medical proof would be theoretically available. Dr. Hodges, in seeking to justify reliance upon the probable findings of theoretically available testing, does not explain how doing so is anything less that a substantial deviation from the test announced in *Chicoine*.

Dr. Hodges does point out that in *Stuard* this Court indicated that "financial injuries suffered as a result of the alleged legal malpractice... are distinguishable from the personal injury suffered as a result of the medical malpractice in this case. *Stuard, supra,* 150 Idaho at 707, 249

P.3d at 1162 (emphasis added). But when this analysis is followed to the end of the paragraph, it is clear that this Court was distinguishing *Stuard* from other cases on the basis of the substantial physical damage done to Mr. Stuard during the surgery in which healthy tissue was removed and significant medical hardware was installed at the wrong level of Mr. Stuard's back. *Id.* Thus, to the extent that *Stuard* could be said to reflect this Court's disinclination to require the actual existence of medical proof to support the use of the "objectively ascertainable" analytical tool in cases where the malpractice produces substantial and immediate physical injury, the holding reflects nothing more than that "some damage" can be ascertained without any reliance upon the "objectively ascertainable" analytical tool.

Here, while there was an error in the course of a scheduled surgery, there was no healthy tissue removed, there were no medical appliances or hardware installed and there was no demonstrable injury to any portion of Mrs. Conner's anatomy. (The testing Dr. Hodges seeks to rely upon might show a lack of completely destructive injury to the fallopian tube but there is no indication that it could have revealed any injury to the round ligament or to any other tissue).[2] Given these very real and very substantial differences between the medical record in this case and the medical record in the *Stuard* case, it is incumbent upon Dr. Hodges to explain why, under the circumstances of this case, summary judgment was appropriate in the absence of any existing objective medical proof that Mrs. Conner's left fallopian tube was left in pristine condition.

Relying upon this Court's indication in *Stuard* that **if** an MRI had been performed upon

---

[2] Indeed, the scarring that would have been caused to Mrs Conner's round ligament, if it was in fact cauterized, would not in anyone's wildest imagining be sufficient to give rise to a medical malpractice action. For all practical purposes any such nominal scarring would generate no actionable damages. Whereas the damage to Mr. Stuard's back was quite clearly sufficient to give rise to a medical malpractice action.

Mr. Stuard it would have shown that the surgery was performed at the wrong level, Dr. Hodges asserts that this Court held in *Stuard* that, if medical proof of the possibility of malpractice is theoretically available, actionable damage is "objectively ascertainable." This Court never said this in *Stuard* and, in fact, seemed to be most focused upon the extent of the damage caused to Mr. Stuard's body during the negligently-performed surgery. But assuming for the sake of argument that Dr. Hodges is correctly reading *Stuard*, nothing in that decision suggests that this Court perceived that it was evaluating a case in which the fact of malpractice was either not ascertainable at all or not realistically ascertainable.

Here, to the extent that Dr. Hodges wants to argue that Mrs. Conner suffered actionable damage due to the fact that she may have sustained scarring of her left round ligament, he has a problem because he has identified no medical procedure which would, at any point in time, provide objective evidence of that fact. Thus, even assuming that nominal scarring of the round ligament could be rationally said to give rise to actionable damage, summary judgment could not be granted on that basis. The record does not support a finding that Mrs. Conner suffered, at the time of the tubal ligation, any damage to her round ligament.

To the extent that Dr. Hodges wants to argue that because theoretically available testing might have revealed his failure to cause full occlusion of the left fallopian tube her claim accrued at the time of the surgery, he has other problems. Mr. Veigel's failure to provide Mr. Streib with a properly prepared tax return, though presumedly discernable by an audit of that return, was not seen by this Court as giving rise to actionable damage. Thus, so long as *Streib v. Veigel* and other "some damage" cases remain good law, what turns out to be Mrs. Conner's pristine fallopian tube should not be seen as evidence of "some damage." Additionally, while Dr. Hodges has

identified medical tests which would have demonstrated the lack of complete destruction, he has not, based on this record, made any showing of the existence of both medical tests which would demonstrate any actionable damage (lack of full occlusion was possible without negligence) and that would, under the facts of this case, have been even remotely likely to have been performed on Mrs. Conner.

It is one thing to say, in the absence of any record demonstrating that an MRI was not at all likely to be performed on Mr. Stuard, that a person who had suffered Mr. Stuard's injury could have obtained needed evidence of an injury attributable to malpractice from an MRI, (expensive but not invasive, risk producing or pain producing) and that he is, therefore, precluded from arguing that his damage was not objectively ascertainable. It is another thing altogether to say, in the presence of a record demonstrating that arguably available tests were medically unnecessary, not at all likely to be performed on Mrs. Conner and incapable of demonstrating the existence of an injury attributable to malpractice, that the mere possibility of those tests somehow precludes her from arguing that her actionable damage was not objectively ascertainable prior to her impregnation. Dr. Hodges cannot and has not demonstrated that this Court intended such a conclusion. He has also failed to explain why justice would be served if this Court reached such a conclusion.

In an attempt to defend the District Court's misplaced reliance upon Dr. Hodges' interpretation of the holding in *Stuard*, Dr. Hodges makes several other flawed arguments. For example, Dr. Hodges argues that *Stuard* applies more clearly to Mrs. Conner than it does to Mr. Stuard because his surgery successfully alleviated his pain and her surgery did nothing to alleviate her ability to conceive. This argument, aside from pointlessly comparing the apple of a condition

determinable with human senses with the orange of a condition determinable only through trial and error, serves only to divert attention from one of the critical distinctions between Mr. Stuard's circumstance and Mrs. Conner's circumstance. Very real, very substantial, and wholly unintended damage was done to healthy portions of Mr. Stuard's spine. In other words, while he subjected himself to the physical injuries contemplated by the surgery, he suffered injuries sufficient to generate actionable damage at the time of the surgery. In Mrs. Conner's case, no real or substantial damage was caused to a portion of her body, which the surgeon intended to render non-functional, or to any other part of her body. In other words, she was not only not damaged in a manner contemplated by the surgical plan, she suffered no actionable damage during the surgery. The fact, if true, that he suffered no pain after the surgery while confusing the situation, does not change the fact that Mr. Stuard suffered substantial unanticipated injuries during the surgery. Mrs. Conner suffered no discernable change in her health following surgery. This does nothing to confuse the facts – she suffered no actionable damage during the surgery or at any time prior to when she conceived her third child more than two years later.

Dr. Hodges argues that Mrs. Conner's continuing fertility was a continuing consequence of the failed procedure and, thus, cannot serve to extend the two year limitation imposed by I.C. § 5-219(4). This argument ignores the conceptual underpinnings of the "some damage" exception which Dr. Hodges argues has not been called into question by the holding in *Stuard*. The holding in *Streib* and other "some damage" cases is premised upon the fact that **placing someone at risk of suffering damage is not enough standing alone to cause accrual of a cause of action**. Until the risk becomes reality, all that exists is the **possibility** of damage which has never been held to be a "continuing consequence" of the original conduct. Dr. Hodges has failed

to demonstrate that this Court intended to overrule these decisions and he has failed to explain why they should be ignored.

Finally, Dr. Hodges argues that Mrs. Conner suffered "some damage" at the time of surgery because in a trial of this case she "likely would have asked for compensation for damages suffered in the negligent surgery." As argued above, this claim is inconsistent with the Complaint's allegations and prayer. More importantly, it is inconsistent with what is possible. The claim attempts to draw strength from language in *Stuard* which could be read as a conclusion that the probability that Mr. Stuard would have claimed damages for the damage done to him in the errant surgery supported the Court's determination that he suffered damage at the time of that surgery. Assuming this reading correctly reflects the Court's reasoning, the conclusion provides no support for applying *Stuard* in this case. Unlike Mr. Stuard, **Mrs. Conner was not injured in any manner that would generate actionable damages during the course of the surgery.**

2. *Stuard*, applied as Dr. Hodges would have it applied, is not consistent with decades of prior decisions of this Court.

Mrs. Conner has argued that *Stuard,* as applied by the District Court and as urged by Dr. Hodges, is in substantial and irreconcilable conflict with decades of decisions of this Court. Since its decision in *Stephens v. Stearns,* 104 Idaho 179, 657 P.2d 476 (1983), this Court has consistently and steadfastly held that a negligence cause of action does not accrue until there is actionable damage and that actionable damage can and often does occur a substantial period of time after the deficient conduct of a professional. In many cases, this rule of law has been applied to defer accrual from the time of negligent conduct to a time many months or years down the road when the risk generated by the conduct results in an actionable damage.

These prior holdings cannot be reconciled with reading *Stuard* as holding that causes of action attributable to medical malpractice accrue at the moment that by some known means, no matter how unlikely it is that means would be employed, it would have been possible at the time of the conduct to know that the conduct was defective and created a risk of future actionable damage. If this were the case, Mr. Streib would have lost on summary judgment because it certainly would have been possible to show that another accountant could have audited the return and found the problem the day after it was filed. Ms. Hawley would have lost on summary judgment because, the defendants would certainly have been able to demonstrate that progressive testing and scanning done in the 5 years following the initial malpractice would have shown that the tumor was changing or progressing. Even Ms. Davis would have lost on summary judgment if Dr. Moran could have shown that highly expensive, invasive, painful and very specialized testing (available only at one location in Germany) could have shown within two months of the initial excessive dose of radiation discernable damage to the mitochondria of the cells impacted by the excessive dose.

Dr. Hodges has attempted to respond to this argument. His first argument is that *Stuard* continues the Court's deference to the Legislature's strong position against a "discovery rule." Respondent's Brief pp. 11-16. If *Stuard* is read as standing for the proposition that Mr. Stuard's action was barred **because he had suffered substantial physical injury at the time of the initial surgery** even though he did not discover that fact until later, then Dr. Hodges' argument, while accurate, still does not support the District Court's application of *Stuard* here. Mrs. Conner did not suffer such physical injury during her surgery. (It is worth noting in this regard that if this is the appropriate reading of *Stuard* then the "some damage" exception never came into play and the

discussion in *Stuard* about the application of the "objectively ascertainable" analytical tool is merely *dicta*). However, if *Stuard* is read, as applied by the District Court and urged by Dr. Hodges, to compel the determination that Mrs. Conner suffered an actionable injury at the time of negligent surgery because there was in existence medically unnecessary, invasive, painful, risky, expensive and unavailable tests, then a claim that *Stuard* is not in conflict with prior decisions of this Court will not sustain scrutiny.

As Dr. Hodges appears to recognize, there is a long line of cases in which the "some damage rule" rule was applied in a manner that resulted in a deferral of the accrual of the cause of action until long after the original conduct. *E.g. Streib* and *Blake v. Cruz,* 109 Idaho 253, 698 P.2d 315 (1984) (both cases cited by Dr. Hodges). Where there were complicated factual circumstances which made it difficult to ascertain when actionable damage was manifested, the Court begin to require that damage be at least objectively ascertainable before it could be said to exist and to trigger accrual. *E.g. Davis v. Moran,* 112 Idaho 703, 705, 735 P.2d 1014 (1987) and *Hawley v. Green,* 117 Idaho 498, 788 P.2d 1321 (1990). These decisions did not explictly address the question of whether in order for something to be objectively ascertainable, the information supporting that determination had to actually exist or be reasonably obtainable. This remaining question was resolved in *Chicoine*. In that case, as Dr. Hodges acknowledges, the Court expressly stated that:

> an action for professional malpractice shall be deemed to have accrued for the purposes of Idaho Code § 5-214(9) **only when there is objective proof** that would support the existence of some actual damage.

Chicoine at 122 Idaho at 487, 835, P.2d at 1298 (emphasis added).

If *Stuard* can be read as causing actionable damage to be "objectively ascertainable"

because if someone had bothered to look they would have discovered the possibility of malpractice, this reading is not only contrary to the holding in *Chicoine* but it will substantially erode the protection afforded to victims of medical malpractice which does not cause actionable damage at the time of the conduct. This erosion will be the by-product of utilizing the "objectively ascertainable" analytical tool not as a means to resolve complicated cases in a manner that protects the malpractice victim from uncertainty (as it was originally intended and applied) but rather as a means to resolve the most clear-cut cases involving late-manifesting actionable damage in a manner that protects the malpractice perpetrator.

Nothing explictly stated in *Stuard* suggests any intention to overrule or modify existing precedent. Indeed, given the clear language and impact of the prior decisions of this Court, the interpretation given to *Stuard* by the District Court and urged by Dr. Hodges cannot be reconciled with the decisions entered by this Court over the last three decades.

B. IF I.C. § 5-219(4) IS TO BE APPLIED TO PRECLUDE PROFESSIONAL MALPRACTICE CLAIMS FILED MORE THAN TWO YEARS AFTER PROFESSIONAL MALPRACTICE WHENEVER IT IS THEORETICALLY POSSIBLE TO DISCERN THAT MALPRACTICE HAS POSSIBLY OCCURRED, THEN IT IS UNCONSTITUTIONAL.

This Court has held in cases, which present different issues than are presented here as a result of the District Court's application of *Stuard*, that I.C. § 5-219(4) is constitutional. The Court has upheld the statute in a case in which summary judgment was sustained on the basis that there was immediate and ongoing progression of loss of vision (some damage) due to negligently undiagnosed glaucoma. *Holmes v. Iwasa,* 104 Idaho 179, 657 P.2d 476 (1983). This Court has also upheld the statute in a case in which summary judgment was overturned due to the absence in the record of evidence that there was a point in time more than two years prior to the filing of the

action at which it could be said that a six year old tumor had grown, become malignant or otherwise progressed. *Hawley v. Green, supra.* However, this Court has never addressed the question of whether the statute is constitutional if it can be applied to the situation at hand. It is Mrs. Conner's contention that such an application of the statute leaves virtually all victims of professional malpractice who have not suffered, at the time of the medical care, any injury giving rise to actionable damages (which does not mean an injury recognized by care providers or known to the victims but rather one that is demonstrated by **available** records) without any meaningful remedy for that malpractice unless they are fortunate enough to suffer actionable damage and get their action filed within two years of the conduct. Thus, the consequence of such an application of the "objectively ascertainable" tool is, for virtually all medical malpractice cases where the defective care does not cause actual actionable damage for more than two years after the conduct, the evisceration of the "some damage" rule (which has been accepted by the Legislature without response) and the adoption of an approach which assures that in virtually all such cases the claim will be time-barred before any actionable injury becomes manifested.

Put otherwise, it does not seem to be fair, just, reasonable or consistent with equitable factors to require people who hire professionals to then hire a second professional to check to see if the first professional met applicable standards in order to protect their legal options. This is even more true when the second professional would have to invade the body in a hospital setting at great expense for a medically unnecessary but perhaps legally necessary procedure.

Dr. Hodges has not challenged Mrs. Conner's articulation of the effect that will flow from a broad application of the "objectively ascertainable" analytical tool in the manner that it has been applied in this case. Dr. Hodges has also not argued that the statute as applied without a

meaningful "some damage" exception is constitutional. Dr. Hodges has chosen instead to nitpick at the legal technicalities related to Mrs. Conner's constitutional challenge of the statute.

1. Mrs. Conner claims that applied as it has been by the District Court, I.C. § 5-219(4) is a special law in violation of Article III, § 19 of the Idaho Constitution.

Dr. Hodges claims that Mrs. Conner lacks standing to raise the claim that physicians, protected by the District Court's reading of *Stuard* will receive greater protection than other professionals subject to a different standard by *Chicoine* and especially professionals in the construction industry who are subject to a six year discovery period pursuant to I.C. § 5-241. To support this assertion Dr. Hodges cites *Ogle v. DeSano,* 107 Idaho 872, 877, 693 P.2d 1074, 1079 (Ct. App. 1984). This decision very briefly discusses standing issues in the context of an equal protection claim (fourteenth amendment and Article I, § 2 of the Idaho Constitution) and simply cannot be read as having any bearing upon standing issues in "special law" challenges. Putting this aside, Mrs. Conner is certainly a person who is disadvantaged by a law which purports to apply to all professionals but which is applied in a manner which affords greater protection to physicians than it does other professionals.

Dr. Hodges also responds that Mrs. Conner fails to show that the law is a "special law" because she has not shown that it does not impart equally to all members of the class to which it applies. This claim ignores the fact that if the "objectively ascertainable" analytical tool can be applied as used by the District Court, all physicians have better protection than is afforded to other professionals and the recipients of medical services have less protection. It ignores the fact that those physicians, who are fortunate enough to commit malpractice, which is theoretically discernable but which does not cause actionable damage, will in effect have absolute protection

while other physicians who are less fortunate (because actionable damage becomes manifest within two years) will be at risk of suit for at least two years or longer in those rare cases in which discernment cannot be shown to be theoretically possible (perhaps *Davis v. Moran* provides an example of such a case). If the law can be applied in this manner, then physicians like Dr. Hodges are advantaged in ways in which no other physician or other professional is advantaged and, of course, patients like Mrs. Conner are the ones who are penalized by virtue of the granting of this special protection.

2. Mrs. Conner claims that applied as it has been by the District Court, I.C. § 5-219 (4) violates the access to justice guarantee afforded to Idaho citizenry in Article I, § 18 of the Idaho Constitution.

Article I of the Idaho Constitution delineates the protected rights of the citizens. Article III of the Idaho Constitution delineates the burdens, duties and restrictions imposed by the Constitution upon the Judiciary Branch of Idaho's government. This being the case, it is odd that the Court has in decades-old and never critically-examined cases held that the provisions of Article I, §18, which protects citizens from governmental action that excludes them from pursuing justice, is really nothing more than a directive to the Courts. *See*, *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765(1944). If this were true, under the structure of the Constitution the protection would have been placed in Article III. As drafted, it makes more sense to recognize that, while as a practical matter it will primarily fall to the Courts to protect Article I, § 18 rights (as it does with most protected rights), the protection is there to assure that **no** branch of government has the power to interfere with the right of access to the Courts.

The balance of Dr. Hodges' argument relative to Mrs. Conner's Article I, §18 claim fails to address the fact that for Mrs. Conner to prevail on this claim it is not necessary to conclude that

Article I, § 18 precludes limitation and repose statutes which are just, reasonable and fair. Indeed, Mrs. Conner would acknowledge that not all limitation or repose statutes are precluded by Article I, §18. *Theriault v. A.H. Robins Co., Inc.*, 108 Idaho 303, 698 P.2d 365 (1985). However, Dr. Hodges has wholly failed to respond to Mrs. Conner's claim that applied as it has been by the District Court, I.C. § 5-219(4) is not only a manifestly unjust, unreasonable and unfair denial of access to the Courts but it is a judicially-imposed restriction upon access to the courts which appeared to exist after this Court's holding in *Chicoine*. Indeed, one need look no further than I.C. § 5-241 (creating a deferral period of up to six years to discover a defect in the construction of a building) to see how inherently unfair, unjust and unreasonable the District Court's application of *Stuard* is to victims of medical malpractice which by its nature may not result in actionable damages for extended periods of time.

3. Mrs. Conner claims that applied as it has been by the District Court, I.C. § 5-219 (4) violates the right to jury trial set forth in Article I, § 7 of the Idaho Constitution.

Dr. Hodges argues that the Legislature has the power to limit rights and remedies without running afoul of Article I, § 7 of the Idaho Constitution. This assertion fails to acknowledge or grapple with the fact that the legislative power in this regard is not unconstrained by other constitutional considerations. The power to limit rights and remedies that existed at the time that the Idaho Constitution was adopted is constrained by the requirement that the action must be based upon reasonable policy considerations. *Kirkland v. Blaine County Medical Center*, 1343 Idaho 464, 468, 4 P.3d 1115, 1119 (1984). Dr. Hodges has made no attempt to argue that if I.C. § 5-219(4) can and should be applied as it has been applied by the District Court or that the statute can, as to claims such as Mrs. Conner's, be seen as based upon reasonable policy considerations.

Indeed, it is quite difficult to make this argument when it appears that the medical profession which cares for our most important possession – our bodies – will under the District Court's interpretation of *Stuard* be less accountable for negligent conduct than will be other professionals and substantially less accountable than the building professionals who provide services in association with the construction of our homes and buildings.

4. Mrs. Conner claims that applied as it has been by the District Court, I.C. § 5-219(4) denies her the benefit of the equal protection of the laws as assured to her by the 14th Amendment of the United States Constitution.

Mrs. Conner identified four different ways in which I.C. § 5-219(4), applied as it was to this case by the District Court, impermissibly discriminates between identifiable groups of malpractice victims based upon unsupportable criteria including the nature of the object upon which the malpractice occurs, (body, legal case or home) and the time at which the impact of the malpractice manifests itself as actionable damage. She concluded her argument by stating:

> The statutory nullification of the discovery rule coupled with the District Court's application of the "objectively ascertainable" analytical tool which has the effect removing the remediating effect of the "some damage" exception and of leaving plaintiffs like Mrs. Conner with a zero day statute of limitations cannot withstand any level of reason based scrutiny.

Appellant Jami Leigh Conner's Opening Brief at 36.

Dr. Hodges makes no attempt to deny that the claims of identifiable groups of malpractice victims are being treated disparately. Nor does he explain how on any basis it is rational or reasonable to do so. He does not challenge the disparate treatment effected by the statute if applied as it has been by the District Court which affords some victims of professional malpractice open access to courts, a right to a jury trial and due process in the form of a chance to

recover their damages while affording other victims of professional malpractice, such as Mrs. Conner, nothing more than a hollow promise of such rights. He also does not challenge that this disparate treatment turns upon what type of professional is involved and the extent to which the breach of duty, injury and damages are obvious or concealed.

Dr. Hodges does argue based upon *Jones v. State Board of Medicine,* 97 Idaho 859, 555 P.2d 399 (1976) and *Newlan v. State,* 96 Idaho 711, 713-714, 535 P.2d 1348 (1975), that in general terms no "suspect class" and no "fundamental rights" are involved in cases limiting claims. However, these cases do not and cannot make this determination as to all applications of I.C.§ 5-219(4), especially since they both substantially predate the body of law that has been developed since they were decided and upon which the District Court relied.

In *Jones, supra,* the Court did not consider a statute of limitations which generates the disparate impact that the application of I.C. § 5-219(4) has occasioned in this case. At issue was a statute limiting the amount that could be recovered in a medical malpractice action. The Court considered whether this statute impacted fundamental rights protected by Article I, § 18 (but not the right to jury trial or complete denial of process). The Court concluded that it did not but articulated no reasoning for this conclusion. It is clear that a limitation on damages does not generate the claim-precluding impact that the District Court decision generates for cases such as Mrs. Conner's. The statute at issue in *Jones,* while limiting the recovery, did not foreclose it altogether.

In *Newlan, supra,* the Court concluded that no fundamental rights were implicated by the requirement of the recently adopted " Idaho Tort Claims Act" which required claimants against the State to give notice of that claim within 120 days of the negligent conduct sued upon. The

Court concluded that while this requirement differentiated the tort victim injured by state conduct from the tort victim injured by private conduct, it did not violate any fundamental rights because the tort victim injured by state conduct was not being denied the right to sue – just subjected to some additional requirements in order to do so. This reasoning is of no help in resolving Mrs. Conner's constitutional challenge because her challenge is premised upon an application of I.C. § 5-219(4) which has the effect, if applied as it has been by the District Court, of denying her **any** access to the courts, **any** chance at a jury trial and **any** chance of due process. No guessing is required to know that the Court would have responded differently if the Idaho Tort Claims Act had adopted a notice requirement which had the effect of making notice a practical impossibility. Indeed, the Court had already held that the doctrine of sovereign immunity and laws which perpetuated it violated a sense of justice and it was within the Court's power to "snuff it out." *Smith v. State,* 93 Idaho 795, 806, 473 P.2d 937, 948 (1970).

Dr. Hodges also appears to justify utilization of a "rational relationship" analysis by suggesting that Mrs. Conner agrees that precedent establishes that this is the correct test and that this Court has already made the determination that this is the correct analysis in the context of I.C. § 5-219(4). Mrs. Conner does agree that this Court has previously utilized the "rational relationship" analysis in evaluating a challenge to I.C. § 5-219(4) but this occurred in actions in which the plaintiff did not contend and the Court did not conclude that "fundamental rights" were implicated. *See, Twin Falls Clinic and Hospital Bldg. Corp. v. Hamill,* 103 Idaho 19, 24, 644 P.2d 341, 346 (1982) and *Hawley v. Green, supra.* (Plaintiff, who benefitted from the protection of deferred accrual due to the fact her injury was not shown to be objectively ascertainable more than two years prior to filing argued that there was no rational basis to distinguish between

deferred damage cases and foreign object or fraudulent concealment cases.) It also occurred in another action in which the Court never made a determination that fundamental rights were at issue. *See, Davis v. Moran,* 112 Idaho 703, 735 P.2d 1014 (1987). (The plaintiff who also benefitted from the protection of "objectively ascertainable" analytical tool because the record did not permit a determination that her injury was manifested more than two years prior to filing, asserted that there was no rational basis to distinguish between a person like herself who was consensually exposed to radiation in the medical context (I.C § 5-219(4)) and those who were likely ignorant of an exposure that occurred in a work context (I.C. § 5-242) and benefitted from a longer statute of limitations.) *Davis* is of no value in this action both because the Court did not actually analyze whether a fundamental right was involved but also because the impact of the disparate treatment did not involve claim preclusion as it does here.

Defendant also argues that a constitutional challenge to I.C. § 5-219(4) is precluded by this Court's determination in *Holmes v. Iwasa, supra.* In *Holmes,* the Court found that I.C. § 5-219(4) did not violate equal protection rights because *Holmes* was suffering from a progressively worsening condition and thus was experiencing "some damage" from the date of failure to diagnose until the date on which he discovered the true diagnosis of his condition. Conversely, Mrs. Conner was not experiencing any symptom that could be seen as "some damage." Yet, if *Stuard* is to be applied as it was by the District Court, her claim will be precluded by the statute. Thus, she is getting the same treatment (claim preclusion) despite the fact that her claim is materially different. Even though Mr. Iwasa did not know why his vision was getting worse, he at least had the benefit of awareness of change and had a chance to protect himself. His claim was precluded by the legislative removal of the discovery exception which this Court concluded did

not wholly deprive him of rights. Conversely, Mrs. Conner had no such opportunity to protect herself. Yet, her claim is precluded before anyone (other than perhaps her surgeon and those in the operating room) could even know.

In sum, as the District Court has applied I.C. § 5-219(4), this case presents circumstances in which Mrs. Conner's claim is not being limited but rather being eliminated. This occurs even though her claim is different from other the medical malpractice claims in *Davis* and in *Hawley* only by virtue of the fact is evidence of the existence of tests (which for all practical purposes were not available to her) which would have shown that the surgery was unsuccessful. The irrationality of this result is manifested in the contrasts in how the law, as the District Court has applied it, has different impacts depending on the professional service at issue. Because a construction-related professional was the defendant in *Twin Falls Clinic, supra*, the accrual of the plaintiff's claim was deferred by I.C. § 5-341 (allowing for up to six years to discover a construction defect) before the limitation of I.C. § 5-219(4) became effective. Because a lawyer was the defendant in *Chicoine*, the plaintiff's cause of action did not accrue until evidence of ascertainable damage came into existence. Conversely, because a medical professional is involved, Mrs. Conner's claim became time barred before any evidence of actionable damage came into existence. If these disparities are what the Legislature actually intended then I.C. § 5-219(4), both in general terms and as applied to this case, generates an unconstitutional denial of equal protection of the law as to fundamental rights.

C. GIVEN THE UNIQUE CIRCUMSTANCES OF THIS CASE AND THE EXPLICIT WORDING OF I.C. § 6-1012, MRS. CONNER IS ENTITLED TO PURSUE A BREACH OF CONTRACT CLAIM AGAINST DR. HODGES.

Mrs. Conner has argued that due to the unique circumstances of this case, she is not

precluded by any statute or prior decisional law from bringing this case as a breach of contract action. Unlike any of the cases that Dr. Hodges has pointed to, this case involves a total failure on Dr. Hodges' part to apply electrocautery to totally healthy tissue with the intention of rendering her sterile. If he had adequately identified the fallopian tube and due to defective procedures incompletely cauterized it, then there would be an actionable injury to Mrs. Conner and she would very definitely be limited to a medical malpractice action with associated burdens of proof set out in I.C. § 6-1012. However, there was substantial evidence in the record that he in fact did not apply electrocautery to her left fallopian tube and consequently caused no injury to the tube, actionable or otherwise. If he in fact cauterized the round ligament and Mrs. Conner sought damages for that conduct, I.C. § 6-1012 would no doubt apply. But we cannot determine if he did and, in any event, she has not sought such damages. She is seeking damages for the fact that her fallopian tube was not, as per agreement, cauterized with the result that she was able to conceive again.

Dr. Hodges has argued that pursuant to *Trimming v. Howard,* 52 Idaho 412, 16 P.2d 661 (1932), all claims related to the provision of medical care are actions founded in negligence law and that breach of contract actions are not an available remedy. But *Trimming* cannot be read so broadly as to apply to circumstances not contemplated by the Court in writing that decision. Unlike this case where the actionable conduct was a complete failure to do what was agreed upon, the surgery agreed upon and at issue in *Trimming* was attempted and allegedly botched.

Beyond the fact that the Court in *Trimming* was not called upon to and did not address the question of whether a breach of contract action could be pursued where the agreed upon conduct did not even occur, it appears from this Court's holding in *Hayward v. Valley Vista Care Corp.*,

136 Idaho 342, 33 P.3d 816 (2001) that I.C. § 6-1012 is seen as having preempted the question of contract or negligence in all health care cases **to which it applies** because in all such cases the issue is whether the applicable standard of health care (a tort-based concept) has been met by the health care provider's conduct.

Mrs. Conner has demonstrated that given the clear and unambiguous language used by the Legislature in I. C. § 6-1012, that section cannot be read as pertaining to this action. This Court has clearly held that even if the clear and unambiguous language used by the Legislature would lead to what appears to the Court to be a palatably absurd result, the statute must be applied as written. *Verska v. St. Alphonsus Hospital*, 151 Idaho 889, 894-897, 265 P.3d 502, 507-510 (2011).[3]

> Relevant to this case I.C. § 6-1012 provides that:
>
> In any case, claim or action for damages due to injury or death of any person brought against any physician and surgeon or other provider of health care... on account of the provision or the failure to provide health care ....(emphasis added)

While this action is indeed an action for damages on account of the provision or the failure to provide health care **it is not** a case, claim or action for damages "due to injury or death." This is an action for a failure to cause the contracted-for injury (electrocautery of a fallopian tube) which led to pregnancy (life) and a host of foreseeable incidental and consequential damages. As written, I.C. § 6-1012 is clearly and unambiguously not applicable in these circumstances. While it may seem absurd for the Legislature to have carved out this exception to the rule created by I.C. § 6-1012, such an appearance of absurdity is not a concern for the Courts of this State.

---

[3] While the Court's opinion in *Verska* is stated in strong and explicit language, it does not go so far as to say that if the clear meaning of an unambiguous statute leads to an unconstitutional result that the Court is obligated to apply it as written.

Dr. Hodges has not directly confronted this argument. He has, as part of what appears to be an attempt to deflect attention from this argument, inaccurately cited a portion of Mrs Conner's Appellant Brief as a "concession" that the section works to precluded all breach of contract actions. At page 37 of her Appellant's Brief, Mrs. Conner did concede that I.C. § 6-1012 "works to preclude breach of contract actions, which would not require a finding of negligence, in "any case, claim or action for damages due to injury or death of any person...on account of the provision or failure to provide health care ...." Two sentences after this statement in her brief, she argues that as explained above I.C. § 6-1012 does not apply to this action. Dr. Hodges cited this statement without including the underscored language and that citation could easily leave a reader with the false impression that Mrs. Conner has conceded that the section precludes all breach of contract actions.

Without explaining how it could be so, Dr. Hodges proceeds as if the holding of the Court of Appeals in *Ogle v. DeSano,* 107 Idaho 872, 693 P.3d 1047 (Ct. App. 1984) precludes Mrs. Conner's breach of contract claim. While a Court of Appeals decision is binding upon lower Courts, it does not establish the law of this State for the purposes of an appeal to this Court. *State v. Guzman,* 121 Idaho 981, 985-987, 842 P.2d 660, 664-666 (1992). Even beyond the limited impact of a Court of Appeals decision, there are both factual and jurisprudential limits upon the relevance of the holding in *Ogle*.

For precedential purposes, it is clear from an examination of the Court's holding in *Ogle* that the Court gave no consideration at all to the impact that either I.C. § 6-1012 or the complete failure to undertake the agreed upon action had upon the question of whether Ms. Ogle could bring a breach of contract action. Of course, *Hayward v. Valley Vista Care Corp., supra* had not

been decided when this Court considered *Ogle* but that does not change the fact that the decision is not helpful in resolving the issue as it is now before the Court.

Factually *Ogle* is materially distinct from Mrs. Conner's claim. Ms. Ogle was suffering serious health problems due to the presence of an IUD which had been placed by DeSano. She wanted it out and underwent a surgery, which was in part intended to result in the removal of that IUD. The IUD was not removed. Thus, while both *Ogle* and this case involve the failure to perform an agreed upon act, the cases are factually distinguishable in ways which undermine the argument that Mrs. Conner's breach of contract claim is precluded by prior precedent. In Ms. Ogle's case the doctor failed to remove a damage-inducing foreign object and that failure resulted not only in immediately actionable damage for which Ms. Ogle sought a recovery (continuation of serious health problems) but also afforded her protection of the limited discovery rule related to foreign objects left in a person's body–itself an injury-generating actionable damage. In Mrs. Conner's case the doctor failed to damage perfectly normal and healthy human tissue thereby leaving her without any change at all. Thus, in Ms. Ogle's case there is a factual basis which supports the Court's reliance upon *Trimming* but in Mrs. Conner's case no such factual basis exists.

D. DR. HODGES, IF HE PREVAILS, WILL NOT BE ENTITLED TO AN AWARD OF ATTORNEY'S FEES.

Mrs. Conner contends that she has not frivolously, unreasonably or without foundation asserted any arguments she has raised in this appeal. That said, given that the extent of conflict between existing decisional law and the District Court's application of this Court's decision in *Stuard,* the substantial differences between the facts in *Stuard* and the facts of this case, the lack

of clear applicability of *Stuard* as interpreted by the District Court to information of "some damage" which is only theoretically available to a victim of malpractice, and the lack of clear rulings on Constitutional issues raised by the District Court's interpretation of *Stuard*, Mrs. Conner submits that it cannot be said that every aspect of this appeal has been pursued frivolously, unreasonably and without foundation. This being the case, fees should not be awarded even if the Court were to rule in all instances for Dr. Hodges and even if the Court were to consider some of the arguments raised by Mrs. Conner to have been raised frivolously, unreasonably, and without foundation. *Carillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012). It should be apparent to any reader of Mrs. Conner's positions that her arguments are based upon reasonable interpretation of law and are the antithesis of frivolity.

III. CONCLUSION

For each and all of the foregoing reasons as well as those raised by Mrs. Conner in her Opening Brief and before the District Court, it is respectfully submitted that this Court should determine that the District Court erred in granting summary judgment to Dr. Hodges. This case should be remanded to the District Court for further proceedings.

RESPECTFULLY SUBMITTED THIS 2nd day of October, 2013.

GORDON LAW OFFICES, CHTD.

Philip Gordon

GORDON LAW OFFICES, CHTD.

Bruce S. Bistline

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2013, I caused the foregoing document to be delivered by the method indicated below and addressed to the following:

Raymond D. Powers
Portia L. Rauer
Powers Tolman Farley, PLLC
345 Bobwhite Court, Suite 150
P.O. Box 9756
Boise, Idaho 83707

__X_ HAND DELIVERY
_____ U.S. MAIL
_____ OVERNIGHT MAIL
_____ FACSIMILE

Donald W. Lojek
Lojek Law Offices
623 W. Hays Street
Boise, Idaho 83702

__X_ HAND DELIVERY
_____ U.S. MAIL
_____ OVERNIGHT MAIL
_____ FACSIMILE

GORDON LAW OFFICES, CHTD.

Bruce S. Bistline

By: Bruce S. Bistline