7-23-2013

Conner v. Hodges Appellant's Brief 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 OPENING BRIEF

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

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises out of a medical malpractice litigation. The case presents, with respect to I.C. § 5-219(4), a statutory interpretation/application issue and a related constitutional challenge.

The action was dismissed on summary judgment on the basis that it had been filed after the applicable statute of limitations had become a bar. In reaching this conclusion, the District Court found that the Plaintiff's (hereinafter "Mrs. Conner") cause of action accrued on the date of the ligation procedure.[1] This finding was premised upon evidence which demonstrates that if a physician could be found who would ignore the legal and ethical problems presented by performing intrusive, pain producing, risk producing, costly and medically unnecessary medical procedures, it was possible on and after the date of the ligation to have determined that the left fallopian tube was not fully occluded. The District Court did not consider it relevant that before Mrs. Conner tested positive for pregnancy (two and one half years after the ligation procedure), no information existed which suggested that the tube was not fully occluded.

B. Course of Proceedings Below

While the case history is complicated by a series of motions related to the adequacy of service, the case history for the purpose of this appeal is simple.

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[1] In this case the ligation, which technically means "cutting," was performed by electrocautery, a procedure which is expected to cause damage to the tube sufficient to permanently fully occlude it. While this does not actually result in a cutting of the tube it is, in the records uniformity referred to as a tubal ligation procedure performed by means of electrocautery.

1. The action was filed on April 22, 2011. The original action was filed on behalf of Ryan Conner and Jami Leigh Steinmeyer-Conner individually, Kabraya Steinmeyer (now Conner), Makiyah Steinmeyer (now Conner), and Uriah Conner through guardians ad litem. (R.000007-000016).

2. Defendant, Bryan Hodges, M.D. (hereinafter "Hodges") filed an answer on November 4, 2011. (R.000017-000022).

3. After a period of discovery, Hodges filed a Motion for Summary Judgment on November 1, 2012. The motion was supported by a Memorandum (R.000063-000088), an Affidavit of Counsel tendering excerpts form the record (R.000026-000077), and an Affidavit of Lee Self, M.D. (R.000058-000062).

4. The Plaintiffs responded on November 26, 2012 with a Memorandums in Opposition (Jami Conner (R.000109-000133) and Ryan (R.000134-000140), a supporting Affidavit of Plaintiff Jami Leigh Conner (R.000106-000108), and an Affidavit of Counsel tendering records. (R.00089-000105). Plaintiffs filed an additional Affidavit of Philip Welch, M.D. on November 28, 2012. (R.000141-000148).

5. Also, on November 28, 2012, the claims, if any, of Plaintiffs Uriah R. Conner, Kabrya A.Conner, Makiyah I. Conner, the breach of contract claim of Ryan Conner and all claims for battery, negligent misrepresentation, intentional infliction of emotional distress of any Plaintiff were dismissed with prejudice. (R.000149-000150).

6. On December 3, 2012, Hodges filed Reply Memorandums as to each of the remaining Plaintiffs (Jami-R.000151-000179, Ryan-R.000171-000177). Hodges filed no additional

affidavits.

7. A hearing was held on December 10th and a Memorandum Decision (R.000188-000203) and Judgment (R.000204-000205) followed on January 9, 2012.

8. Between January 17, 2012 and February 4, 2012 filings occurred relative to what Hodges considered to be an error in the Memorandum Decsion and these filings concluded with the entry of an Amended Memorandum Decision and Order. (R.000206-000230, R.000188-000217).

9. Notice of Appeal was filed February 19, 2012. (R.000218-000233).

C. Statement of Facts

By the time she was 21 years old Mrs. Connor had two children and found herself to be physically and economically at her limit. [2] The fathers of the children were either absent or of little help.[3] Confronted with these circumstances, she decided that she would get sterilized. At that point she arranged with Hodges, who was caring for her during her pregnancy, to perform a tubal ligation as soon as possible after the birth of her second child. [4] The procedure was performed on January

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[2] Deposition Jami Leigh Steinmeyer-Conner, pp. 35:22-36:15, R.00035-00036, Exhibit A, Affidavit of Portia L. Rauer In Support of Defendant's Motion for Summary Judgment, R.00026-00057 (hereinafter "Depo. Jami, pp. 35:22-36:15, R.00035-00036).

[3] Depo. Jami, p.118:4-7, R.39 and Depo. Jami Conner, p. 120:2-5, R. 93, Affidavit of Donald Lojek Re: Defendants Motion for Summary Judgment, R.000089-000105 (hereinafter "Depo. Jami, pp. 120:2-5, R.000093) and Depo. Jami, p.118:4-7, R.000093).

[4] Depo. Jami, pp. 36:15-38:16, R.000036.

31, 2007.[5] It was her understanding of the procedure that Hodges would be doing so much damage to her fallopian tubes that it was very unlikely that, absent additional surgery to either of them, they would ever function to allow an ovum to make it into her uterus and that, even with additional surgery, the odds of ever becoming pregnant again were not good.[6]

Following the procedure, Mrs. Conner had appointments with Hodges on four different occasions prior to May of 2007 and she saw him again in August of 2007. During these appointments, Hodges never expressed any concern for whether the sterilization procedure had been successful and he never discussed the possibility of or the potential for doing any additional testing to make sure that both tubes were successfully ligated.[7]

Mrs. Conner did not have sexual intercourse until after she started to go out with Ryan Conner in October of 2008. They moved in together in December of 2008 and at that point began to have unprotected sex.[8] Mrs. Conner discovered she was pregnant in June of 2009.[9] (She filed this action on April 22, 2011.) Following the delivery of her third child, Mrs. Conner underwent a post-partum tubal ligation performed by Darren Weyhrich. M.D.

Philip Welch, M.D., who has reviewed Dr. Weyhrich's records, has concluded based upon a reasonable medical certainty that Mrs. Conner's left fallopian tube was "never ligated or damaged

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[5] Affidavit of Jami Leigh Conner Re: Defendant's Motion for Summary Judgment, filed November 28, 2012, R.000106-000108, ¶ 3 (hereinafter Aff. Jami ¶3, R.000107).

[6] Aff. Jami ¶3, R.000107.

[7] *Id.*

[8] Depo. Jami, pp.131:7-132:14, R.000095.

[9] Depo. Jami, p. 52:8-17, R.000038.

in any significant way during the course of the procedure performed by Hodges in January 2007."[10] Dr. Welch concludes, based upon a reasonable medical certainty, that Hodges, despite his agreement to perform a bilateral tubal ligation only performed a unilateral tubal ligation (right side).[11] Dr. Welch opines that the only reasonable explanation for this conduct was that Dr. Hodges failed to adequately locate the fallopian tube and, as a consequence, cauterized a similar part of the female pelvic anatomy known as the "round ligament" – an error which has been reported in medical literature.[12] Dr. Welch also explains that the "round ligament" is not a true ligament in that it does not connect any bone to any other bone, that it is not involved in the reproductive process, and that it is tissue which is merely incidental to the female reproductive organs. He opines that if the round ligament had been cauterized as Hodges claims to have ligated the left fallopian tube, Mrs. Conner would not have suffer any anatomical difficulties or loss of function.[13] He states, based upon a reasonable medical certainty, that other than the harm she suffered by becoming pregnant again (including a difficult pregnancy and a second tubal - both of which led to medical complications) Mrs. Conner was not injured because of Hodges' failure to ligate the left fallopian tube.[14]

While the Hodges challenges Mrs. Conner's claim that he failed to do a bilateral tubal ligation, he has not challenged Dr. Welch's conclusions that if the round ligament was ligated instead

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[10] Affidavit of Philip Welch, M.D. Re: Opposition to Motion for Summary Judgment, filed November 28, 2012, R.000141-148, ¶4 (hereinafter Aff. Welch ¶ 4, R.000143).

[11] Aff. Welch ¶5, R.000143.

[12] *Id.* ¶6, R.000143-000144.

[13] *Id.* ¶7, R.000144-000145.

[14] *Id.* ¶¶8-9, R. 145.

of the left fallopian tube, that fact, other than leaving her susceptible to pregnancy, caused her no harm. Instead, Hodges has filed the Affidavit of Lee Self, M.D. in support of the proposition that there are medical procedures which could have been preformed upon Mrs. Conner at any time during the two and one half years between the failed tubal ligation and the pregnancy which would have demonstrated that Mrs. Conner's left fallopian tube was not fully occluded.[15] Dr. Welch acknowledged that these procedures exist and that they could in theory have been used to determine whether one or both fallopian tubes were fully occluded. He explained that the procedures are both invasive procedures which cause pain and which involve risks of infection and other complications. Depending upon the test, the costs are between $500 and $10,000.[16]

Dr. Welch also explained:

a. that there was nothing in the medical records which would warrant a diagnosis which would justify conducting either of these procedures on Mrs. Conner and subjecting her to the risks and consequences of either procedure;

b. that, based upon the records in this case, no physician could properly submit a claim for payment of the charges of performing either of the identified procedures upon Mrs. Conner to any third party payer because there was no diagnosis to support performing either of the procedures;

c. that in view of the fact that there was no reason to perceive that the testing was medically

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[15] Affidavit of Lee Self, M.D., filed November 1, 2012, R.000058-000062, specifically ¶¶ 5-7.

[16] Aff. Welch ¶10, R.000146-000147.

necessary or appropriate, any physician who had performed either of the procedures on Mrs. Conner would have been acting unethically and contrary to the express language of the Hippocratic Oath; and

d. that based upon the records in the case, any physician who recommended that Mrs. Conner undergo a medically unnecessary, risk producing, pain producing and expensive procedure would be subject to review and sanctioning by the applicable medical licensing or certifying board(s).[17]

Hodges made no attempt to challenge or refute any part of Dr. Welch's opinions relative to the lack any medical justification for utilizing on Mrs. Conner either of the procedures Dr. Self claims were available. Hodges also made no attempt to challenge or refute Dr. Welch's opinion that there were legal, ethical and economic barriers which would preclude utilization of either of these invasive, risk producing, pain producing and expensive medical procedure solely to verify that Mrs. Conner's fallopian tubes were both fully occluded.

II. ISSUES PRESENTED UPON APPEAL

A. Given the facts of this case does I. C. § 5-219(4) preclude Mrs. Conner from pursuing a negligence claim against Hodges?

B. If, given the facts of this case, I. C. § 5-219(4) precludes Mrs. Conner from pursuing a negligence claim against Hodges, is the statute unconstitutional, in such an application?

C. Given the unique facts of this case does Mrs.Conner have a breach of contract

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[17] Aff. Welch ¶¶ 11-15, R.000146-000147.

claim against Hodges for his failure to ligate both of her fallopian tubes as he contracted to do?

III. ATTORNEY FEES ON APPEAL

Mrs. Conner is aware of no legal basis upon which attorney fees on appeal could be granted to any party.

IV. ARGUMENT

A. Summary of Argument

This case presents the Court with the challenge of determining when a cause of action accrued with respect to an unknown and, for all practical purposes, unknowable injury which resulted from medical malpractice which itself was equally unknown and unknowable.

In making this determination, the first step is to identify the correct analytical lens through which to examine the record. The District Court concluded that it was required to utilize the "objectively ascertainable" analytical tool that has been used in some prior cases in order to determine when the Mrs. Conner's cause of action accrued. Mrs. Conner contends that utilization of the "objectively ascertainable" tool was inappropriate as to her claim because her circumstances do not involve an ample chain of events or the type of medical problem which would make it difficult to identify when an injury was manifest. Given the facts of this case, the "some damage" exception should have been applied without reliance upon the "objectively ascertainable" tool. If the "some damage" exception is utilized as it has been utilized over nearly 30 years, Mrs. Conner's complaint was filed within two years of the accrual of her cause of action.

The District Court concluded that it was compelled by this Court's decision in *Stuard v.*

Jorgenson, 150 Idaho 701, 249 P.3d 1156 (2011) to utilize the "objectively ascertainable" analytical tool in a manner that ignored the fact that until Mrs. Conner tested positive for pregnancy, her medical record did not contain objective evidence supporting the existence of "some damage." Instead, the District Court, relying upon evidence demonstrating that if a physician had been willing to unethically and inappropriately subject Mrs. Conner to one of two invasive, risk producing, pain producing, expensive and medically unnecessary tests, the possibility of a negligent failure to fully occluded her fallopian tube would have been revealed. Mrs. Conner submits that the "objectively ascertainable" tool was developed by this Court to guide the determination of when, in a long chain of events, there is sufficient evidence that the "some damage" could be said to have occurred. It was never intended to be used and should not have been used for the purpose of determining when it was possible to have confirmed that a negligent act might have occurred. This is especially true where, as in this case, there is no reason to think that any physician would have agreed to perform the tests in question on Mrs. Conner for the sole purpose of determining if negligence might have occurred.

If the "objectively ascertainable" tool was applied by the District Court in a manner which is consistent with the intention underlying the holding in *Stuard v. Jorgenson,* 150 Idaho 701, – P.2d – (2011), then either that case was wrongly decided or it is necessary to explicitly overrule a substantial body of long-standing decisions because the "objectively ascertainable" tool will render the "some damage" useless. If negation of the "some damage" exception is the intent of the holding in *Stuard,* then I.C. § 5-219(4) will have the effect of being an absolute and unconstitutional bar to any action not involving fraudulent concealment or a foreign body left in a patient, which is filed more than 2 years after negligent professional conduct (except conduct associated with improving

real property as to which there a tolling period of up to a 6 years pursuant to I.C. § 5-241).

As the facts of this case amply demonstrate, applied without the benefit of a remediating "some damage" exception, I.C. § 5-219(4) will have the effect producing a plethora of unjust outcomes in malpractice cases in which the fact of actual injury and of negligence is not known to anyone based upon the contemporaneously existing information. Mrs. Conner submits that these circumstances demonstrate that, as noted by Justice Bistline many years ago, without some limiting exception, the I.C. § 5-219(4) is not constitutional. *Streib v. Veigel,* 109 Idaho 174, 179-180, 706 P.2d 63, 68-69 (1985) (Justice Bistline, specially concurring).

Even if she is precluded from proceeding on this matter as a medical malpractice action, this case presents an unusual set of circumstances in which, notwithstanding I.C. § 6-1012, Mrs. Conner can proceed on a breach of contract claim.

B. Scope of Review

With respect to the District Court's decision to grant summary judgment to Hodges, this Court exercises free review and in that review utilizes the same standard which should be used by a trial court in ruling on a motion for summary judgment. *Grabicki ex rel. Thompson v. and Zimmerman ex rel. Thompson's Auto Sales, Inc.*, 2013 Ida. LEXIS 170, 5-7 (Idaho, May 23, 2013). To the extent that this action requires interpretation of a legislative enactment, this action presents a question of law over which this Supreme Court exercises *de novo* review. *V-1 Oil Co. v. Idaho State Tax Commission*, 134 Idaho 716, 718, 9 P.3d 519, 521 (2000). Where, as here, the record contains no dispute as to the facts which are material to the determination of the motion, only a question of law remains, over which this Court exercises free review. *Lockheed Martin Corp. v.*

Idaho State Tax Comm'n, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006).

With respect to the District Court's determination that no Constitutional protections prevented applying I. C. § 5-219(4) so as to preclude Mrs. Conner from bring a medical malpractice claim against Hodges, this Court exercises free review. *Credit Bureau of E. Idaho, Inc. v. Lecheminant*, 149 Idaho 468, 469, 253 P.3d 1188, 1190 (2010).

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

1. The case can be resolved based upon the "some damage" exception.

I.C. § 5-219(4), as applicable in this case, was enacted in 1971. This Court has hypothesized that this statute was enacted in reaction to its decision in *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1969) in which the "discovery exception" was judicially engrafted upon the exiting two year statue of limitations applicable to medical malpractice claims arising from a mis-diagnosis. *Holmes v. Isawa*, 104 Idaho 179, 181-182, 657 P.2d 476 478-479 (1983). For several years following its enactment, the Court did not have occasion to consider how I.C. § 5-219(4) should be applied in cases involving professional malpractice claims in which there was an appreciable length of time between the act complained of and the occurrence of the injury upon which the tort claim was based.

The first such case appears to be *Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984). The analysis of the statute of limitations defense at issue in *Stephens* is mildly complicated by the fact that in cases involving the construction of buildings and homes there is a separate statute, I.C. § 5-241, which has the effect of tolling the statute of limitations until discovery or for a maximum of six years. The negligence complained of stemmed from a failure of an architect to insure the construction of an adequately safe stairway and the conceded last act of negligence was the failure

to appreciate the defect during the final building inspection. The injuries for which compensation was sought resulted from a fall that occurred about 4 years after the last inspection, and suit was filed a year later. The defendant argued that the act complained of (negligent inspection) occurred more than two years prior to the filing of the complaint.

After concluding that I.C. § 5-241 would be rendered meaningless unless it was treated as a limited discovery exception to I.C. § 5-219(4), the Court went on to conclude that the Plaintiff's cause of action accrued on the date of the fall – the event giving rise to actionable damage caused by the negligence. This holding was premised upon the stated view that:

> It is axiomatic that in order to recover under a theory of negligence, the plaintiff must prove actual damage. As a general rule "the statute of limitations does not begin to run against a negligence action until some damage has occurred." W. Prosser, Handbook of the Law of Torts § 30 (4th ed. 1971) (footnote omitted).

Id., 106 Idaho at 254, 678 P.2d at 46.

Blake v. Cruz, 108 Idaho 253, 698 P.2d 315(1984), appears to be the first medical malpractice case which presented the Court with the opportunity to determine how I.C. § 5-219(4) should be applied in a case in which there was an appreciable lapse of time between the negligent conduct and occurrence of the injury for which recovery was sought.[18] In that case, the negligence

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[18] The Court considered the application of I.C. § 72-915(4) in a medical malpractice case prior to its decision in *Blake v. Cruz, supra.* However, in *Holmes v. Isawa, supra.*, the record reflected that the condition which the Dr. Isawa failed to diagnose, glaucoma, was a condition which progressively worsened and, as a consequence, the Court was not called upon to evaluate the application of the statute in those situations in which there is no gap of time between the negligent conduct and the occurrence of the injury (worsened vision) for which recovery was being sought. *See, Hawley v. Green,* 117 Idaho 498, 504, 788 P.2d 1321, 1326 (1990). Since the decision in *Isawa, supra.* there have been many other decisions in which the Court concluded that the damage for which recovery was being sought coincided with the alleged negligent act. *See, e.g. Theriault v. A.H. Robins Co.*, 108 Idaho 303, 698 P.2d 365 (1985).

complained of stemmed from a physician's failure to diagnose rubella in the course of treating a pregnant patient. About seven months later the patient gave birth to a "rubella baby" with severe birth defects. Allowing for weekends and holidays, the action was filed exactly two years after the day on which the child was born. The defendant argued that the negligent act complained of occurred two years and seven months prior to the filing of the action and was therefore barred by the limitation imposed by I.C. § 5-219(4). In a very brief discussion of the statute of limitations issues, the Court cited to *Stephens v. Stearns, supra* and Professor Prosser in support of the proposition that a cause of action does not accrue until there is a conjunction of negligence and the occurrence of an injury for which recovery is sought. The Court held that in view of the fact that the cause of action plead was "wrongful birth", the cause of action could not logically be said to have accrued before the birth of the defective child occurred.

In *Streib v. Veigel,* 109 Idaho 174, 706 P.2d 63 (1985), the Court analogized an improperly prepared tax return to a "spring gun" which did not "get tripped" until it was audited by the IRS several years later. The Court concluded that the fact of negligence (like the setting of the spring gun), standing alone did not trigger accrual of the cause of action. Rather, the Court held that accrual did not occur until there was a conjunction of "some damage" and the negligence that caused that damage. In *Streib,* the damage which triggered accrual was not the continuously discernable fact that a defective return had been filed but rather the fact that following an audit of the return, penalties and interest were assessed.[19]

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[19] It is worth noting that in reaching this holding in *Strieb v. Veigel, supra,* the Court distinguished its holding from the result in *Owyhee County v. Rife*, 100 Idaho 91, 593 P.2d 995 (1979) by noting that in accountant malpractice case, the negligent accounting work (failure to

The "some damage" test has been applied in many other cases in which the negligent act did not immediately cause damage. In all of the cases, the cause of action accrued not when the act occurred but rather when the damage resulted from the act. *See, Parsons Packing, Inc. v. Masingill,* 140 Idaho 480, 95 P.3d 631 (2004)(when a the debtor defaulted on a note that was not properly secured due to attorney malpractice), *Anderson v. Glenn,* 139 Idaho 799, 87 P.3d 286 (2003) (when a grantor of a negligently prepared trust lost of control of property rights and income by conveyance of the property to the trust), *B & K Fabricators by & ex rel. Brown v. Sutton*, 126 Idaho 934, 894 P.2d 167 (1995) (when attorney fees begin to be incurred to recant the negligently prepared affidavit even though the full extent of the damage could not be known until the related case was dismissed as a result of the contents of the affidavit), *Bonz v. Sudweeks,* 119 Idaho 539, 808 P.2d 876, (1991) (when an investor backed out of a real estate development agreement due to a cloud on title attributable to negligent failure to record a *lis pendens*), *Griggs v Nash*, 116 Idaho 228, 775 P.2d 120 (1989) (as to different negligent acts when attorney fees started to be incurred and when defense was undertaken to a lawsuit), *Mack Fin. Corp. v. Smith*, 111 Idaho 8, 720 P.2d 191 (1986) (when a loan based on faulty financial returns was determined to be uncollectible in bankruptcy).

These decisions are premised upon and often refer to the Court's early recognition that "the negligent conduct is continuing in nature until it produces damage" *Streib v. Veigel,* 109 Idaho 174,179, 706 P.2d 63, 68 (1985). Thus, it has been said that all that the negligent conduct does is to create the potential for damage to occur at a later date. *Parsons Packing Inc. v. Masingill.* Over

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identify embezzlement during annual audits) coincided with the actionable injury every year that audit failed to identify the funds embezzled during the period being audited. Thus, some damage coincided with the completion of each audit.

the 30 years spanned by these decisions, the Legislature has made no effort to change or abrogate the "some damage" exception.

In this case, Hodges negligently failed to cauterize Mrs. Conner's left fallopian tube. This act did not cause her to become pregnant, the injury for which she has sued him. Hodges' failure to cauterize the left fallopian tube, like the defective tax return in *Streib* or the unrecorded document in *Bonz v. Sudweeks, supra,* merely created the potential for the actionable damage to occur. The record contains no evidence demonstrating that, beyond dispute, Mrs. Conner became pregnant more than two years prior to April 22, 2011 (the date this action was filed). This being the case, proper application of the "some damage" exception precludes a determination on summary judgment that Mrs. Conner's cause of action accrued more than two years prior to the filing of her complaint.

2. On the present record, this case presents no occasion for the use "objectively ascertainable" tool in determining when some damage occurred.

The "objectively ascertainable" tool was first described and utilized in *Davis v Moran,* 112 Idaho 703, 735 P.2d 1014 (1987). The plaintiff sued for spinal cord damages alleged to have been caused by excessive radiation during cancer treatment. Several months after the end of radiation therapy, the plaintiff begin to experience symptoms which were, after about 5 months of medical evaluation (14 months after the termination of radiation), diagnosed as being related to a radiation caused spinal cord injury. Suit was filed just under 28 months following the end of radiation therapy. The diagnosing physician indicated that the radiation poisoning would have been impossible to detect at the time that it occurred but did not indicate that the damage was impossible to detect at anytime within 24 months following the end of radiation therapy. Thus, the Court was presented with a case in which the record did not permit the identification of a specific date upon

which an injury became manifest. Recognizing these unusual circumstances and feeling constrained not to hinge accrual upon either the date of the negligent act or the date of discovery, the Court concluded:

> However, just as in *Streib v. Veigel*..., where we held that a flexible reading of I.C. § 5-219(4) was necessary to avoid an absurd result in that case, by the same token in cases involving alleged radiation treatment a cause of action does not accrue until the fact of injury becomes objectively ascertainable (emphasis added).

Id. 112 Idaho at 709, 735 P.2d at 1020.

The Court went on in a footnote to explain that injury is objectively ascertainable if "objective medical proof would support the existence of an actual injury." *Id.* 709, 1020, FN 4. The Court did not articulate whether it was referring to objective medical proof that actually existed in the medical records, or proof that would have reasonably available, or that was only theoretically available. However, given the context of the discussion (the lack of evidence in the record to support a grant of summary judgment), it is reasonable to conclude that the Court was intending to refer to actual existing medical evidence which would support opinion that injury was manifest by a particular point in time. It simply would have made no sense in context for the Court to be talking about evidence that some test, scan or examination could have been done which would have shown the presence of radiation injury on some theoretical date. Indeed, that was the whole problem presented by the case. Everyone knew that the cellular damage has started to manifest before it was discovered but no one could say when. Hence, summary judgment was not appropriate because no evidence existed which would support a determination that cell damage had started to manifest more than two years prior to the filing of the complaint.

Over the years that have followed the decision in *Davis v. Moran,* this Court has from time-

to-time used the "objectively ascertainable" analysis to determine if there is evidence to support the denial or granting of summary judgment in cases in which there is no obvious point in time or event at which anyone could see that the negligence had caused damage (ie. the some damage exception is not sufficient to the task). *See, e.g., Hawley v. Green,* 117 Idaho 498, 788 P.2d 1321 (1990). (summary judgment could not be granted as to a failure to diagnose a tumor which was visible in 4 to 8 year old x-rays and scans because the medical evidence in the record would not support a determination that it was progressive at the time it was filmed or that it was malignant or otherwise increasingly harmful more than two years prior to when the malpractice screening process was started with the Board of Medicine). *Chicoine v. Bignall,* 122 Idaho 482, 487, 835 P.2d 1293, 1298 (1992) (despite a lengthy litigation during which the alleged negligent act occurred and, for at least part of the time was at issue, damage was not objectively ascertainable until the fact of loss was evidence by an adverse ruling premised upon the alleged malpractice).

The Court has described "objectively ascertainable" as an "analytical tool" for determining if and when "some damage" has occurred. *Id.* 122 Idaho at 487, 835 P.2d at 1298, and *Lapham v. Stewart*, 137 Idaho 582, 586, 51 P.3d 396, 400 (2002). The Court has never said it is the exclusive means for determining when some damage has occurred or that it should always be used in medical malpractice cases.

In this case, unlike in *Hawley* or *Chicoine*, there is no evidence that there is any extended period of time during which there is room for confusion about when the injury might have first become manifest. Pregnancy, unlike tumor activity, is readily determinable as an either/or proposition, and, unlike tumor activity, there is no realistic room for uncertainty about when the

change occurred. Under these circumstances, there is no reason for the Court to utilize the "objectively ascertainable" analytical tool.

D. Even if it were appropriate to utilize the "objectively ascertainable" analytical tool in this action, the District Court utilized it to obtain an answer to the wrong question, and did so by relying upon irrelevant evidence.

1. The "objectively ascertainable" analytical tool is intended to assist the Court in determining when the actionable injury occurred and not when the negligence act may have occurred.

The District Court hinged the award of summary judgment upon the reasoning that:

> Like the plaintiff in *Stuard,* Jami Conner suffered damage that was objectively ascertainable on the date of the surgery because it is undisputed that either a hysterosalpingogram or a chromotubation would have shown that the left fallopian tube had not been successfully ligated. If the Court assumes, as is required on a Motion for Summary Judgment, that the left fallopian tube was not cauterized during the procedure, the plaintiff would have had a medical malpractice claim on an omission theory at the conclusion of the successful surgery.

This analysis overlooks two critical issues.

First, the Court jumps, without justification for doing so, from being told of tests which would show, if performed after the ligation surgery and before the positive pregnancy test (June 2009), that the left tube was not fully occluded to the unsupportable conclusion that those tests would have somehow demonstrated that the left tube was not fully occluded as a result of negligence. This erroneous conclusion is perhaps understandable given that the *postpartum* tubal ligation performed in January 2010, revealed that the left tube was totally intact, but the conclusion is not only unsupported by the record, it is contrary to the record.

Mrs. Conner testified that she was told that there was a small chance the ligation would fail even it correctly performed. (R.000036, pp. 38:17-39:13) There is no evidence to the contrary.

This means, even without negligence, the communication between the ovaries and the uterus might not be successfully and permanently interrupted. On this basis, it was inappropriate for the District Court to conclude that tests which, if performed, would have shown that the tube was not fully occluded, were tests which would have shown that either malpractice or an actionable injury had occurred. Absent the potential for any such showing, the evidence regarding what the tests would demonstrate does not support a determination that the cause of action accrued at the time of the negligent act.

Second, the District Court overlooked the fact that in *Blake v. Cruz, supra, Strieb v. Veigel, supra, Bonz v. Sudweeks, supra* and other cases, this Court has noted that it is possible to commit a negligent act without triggering accrual of a cause of action. However, such an act can continue to exist, like a loaded spring gun, to pose an ongoing risk of causing injury and maturing into an actionable tort. When the gun is tripped and causes injury, a tort claim accrues. Where this happens the Court has repeatedly held, without objection from the Legislature, that the fact that the gun was loaded and cocked more than two years before the action was filed is not determinative of when the cause of action arose.

In this case, as the District Court recognized, if there was a negligent act it was "failure to ligate the tube" but the District Court does not appear to have appreciated that the injury upon which this action is based (getting pregnant) is separate and apart from the negligent act. While the potential for pregnancy existed from the time the faulty surgery was completed, the fact that the negligent act occurred during the surgery did not give rise to an actionable tort for the injury of getting pregnant. Indeed, Mrs. Conner could not have worried about the potential for pregnancy

because she could not have known negligence had occurred.

The totally healthy tube, like Mr. Streib's defective tax return, produced the potential for the injury but neither were, not standing alone, an actionable injury. If Mr. Steib had never been audited then he would have had no claim for the damages occasioned by the audit. If Mrs. Conner had not gotten pregnant then she would have had no claim for the damages occasioned by the pregnancy.

Because the District Court improperly conflated the two inquiries into a single inquiry, it granted Summary Judgement relying upon the existence of tests which, putting aside for now the question of whether they ever would have been administered to Mrs. Conner, could have suggested, (but not demonstrated) that one of her tubes had, as a result of negligence not been ligated. This was done despite the fact that there is no evidence that these tests could have told anyone whether or when Mrs. Conner would become pregnant.[20]

This Court has never given any indication that the "some damage" exception to I.C. § 5-219(4) is or can be satisfied by showing that it would have been possible for the plaintiff to determine that the negligent act might have occurred. Even in Stuard, which the District Court relies upon, this Court acknowledged that the negligence of operating on the wrong level was a distinct consideration from the injury done to Mr. Stuard's body at that level at which the surgery was performed. *Stuard,* 150 Idaho at 706, 249 P.3d at 1161. Here the right operation was done but it

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[20] The fact that Dr. Hodges may have cauterized Mrs. Conner's left round ligament instead of her left fallopian tube, while explaining the conflict between his record of the surgery and the reality of the surgery, is irrelevant to the analysis of "some damage" both because there is no evidence that the cauterization of the round ligament causes any material injury, and because there is no evidence that there is any means for determining if the round ligament was in fact cauterized.

was not done correctly and, as a consequence, the left fallopian tube was left uncauterized and uninjured.

Given these circumstances, the District Court, relying upon evidence which could have been theoretically obtained and which at best would have only been suggestive of a negligent act, erroneously concluded that the date on which Mrs. Conner's cause of action accrued was the date of surgery because at that time negligence was objectively ascertainable.

2. Even if the District Court sought the answer to the right question, it relied in performing the "objectively ascertainable" analysis upon information which should be treated as irrelevant and incompetent.

The fact that there are tests which could have been, but were not, performed and which would have shown that the left fallopian tube was not fully occluded should not, for three reasons, be considered to be relevant information to the utilization of the "objectively ascertainable" analytical tool.

First, the tests could not even tell Mrs. Conner or anyone else that negligence had occurred. As such, they were useless even if somehow the knowledge that negligence had occurred could be useful for the purpose of applying the "objectively ascertainable" analytical tool.

Second, based upon decisions of this Court, which have not been questioned or overturned, only objective evidence which is in existence more then two years prior to the filing of the action can be appropriately considered in applying the "objectively ascertainable" analytical tool.[21] Prior to

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[21] It is noted that in *Stuard v. Jorgenson,* the Court appears to rely upon a test (MRI scan) which could have been performed but was not. However, this decision, though clearly aware of the previous holdings bearing upon this question, neither questions nor overturns those holdings, so practitioners are left to conclude that there is a distinction and that *Stuard* should not be read as overturning prior decisions.

this Court's decision in *Chicoine v. Bignall,* 122 Idaho 482, 835 P.2d 1293 (1992), the question of whether the proof that injury had occurred needed to be in existence at the time of accrual was not explicitly considered. These decisions all resulted in reversals of summary judgment determination simply because the record contained no evidence that would satisfy the *Davis v. Moran* test ("objective medical proof [that] would support the existence of an actual injury"). *See, e.g., Werner v. American-Edwards Lab.*, 113 Idaho 434, 745 P.2d 1055 (Idaho 1987)(the record did not contain any evidence which would support an opinion as to the date upon which an injury was manifest) and *Hawley v. Green*, 117 Idaho 498, 788 P.2d 1321 (1990). However, the circumstances of each case are such that it is difficult to understand how an affidavit, which was filed in support of summary judgment, reflecting that there was a test which could have been done more than two years prior to filing the action that would have shown whether there was or was not injury to the plaintiff, would have changed the Court's analysis in any way.

In *Chicoine v. Bignall, supra,* writing for a unanimous Court, Justice Johnson engaged in a review of decisions which grappled with "some damage" exception which the Court had imposed upon the language of I.C. § 5-219(4) in professional malpractice cases of all types and harmonized that exception with the "objectively ascertainable" criteria being utilized at that point in the medical malpractice cases. *Chicoine* also marks the first time that the Court explicitly addressed whether any evidence which was available or theoretically available, but not actually in existence, could be sufficient to cause an injury to be "objectively ascertainable." As a result of this effort, this Court held:

> Harmonizing the "some damage" rule and the "objectively ascertainable damage" standard, we conclude that an action for professional malpractice shall be deemed to have accrued for

the purposes of I.C. § 5-219(4) **only when there is** objective proof that would support the existence of some actual damage (emphasis added).

Id. 122 Idaho at 487, 835 P.2d at1298. While Court was clear in its conclusion that the objective evidence had to be in existence in order to trigger accrual, it was careful to note that this requirement was not equivalent to a discovery rule because it did not matter whether the plaintiff knew of the existence or content of the evidence or should have known it existed. *Id.* The decision in *Chicoine* identified two questions to be answered in using the "objectively ascertainable" tool – did objective evidence exist at the time of the proposed accrual date and does that evidence support an opinion that injury was manifest on that date.

While *Chicoine* was not discussed, the Court used a similar approach in resolving the statute of limitations question presented in *Brennan v. Owens-Corning Fiberglass*, 134 Idaho 800, 10 P.3d 749 (2000). There the Court determined that both parts of the "objectively ascertainable tool" were satisfied. The Court identified evidence in the record (a medical report reflecting findings which the physician indicated were consistent with asbestosis related injuries) and concluded that it supported the existence of injury as of the date the report was prepared.

Similarly, in *Blahd v. Richard B Smith, Inc.*, 141 Idaho 296, 108 P.3d 996 (2005), the Court relied on the principle that "damages are 'objectively ascertainable' at the point in time when there is objective proof that would support the existence of an actual injury". *Id.* 302, 1002. Finding that there was, the Court concluded that, at the very latest, some damages was objectively ascertainable was when the plaintiff and his architect believed that part of the house was sinking. Since this determination was made more than two years prior to the filing of the action, the action was barred.

Given that there are unchallenged decisions that establish that the first question to be

addressed in applying the "objectively ascertainable" tool is whether there is relevant objective proof in existence at the time of the proposed accrual date, it was improper for the District Court to place any reliance upon the fact that there were tests which could have been but were not done and which, if done, would only have shown that the tubal ligation was not successful.

Third, even if it were appropriate for the District Court in applying the "objectively ascertainable" tool to rely upon tests which had not yet been performed, it was not appropriate to rely upon tests which would at best only show the possibility of malpractice and which in any event were highly intrusive, risk producing, pain producing, expensive, and medically unnecessary. The record in this case demonstrates that the tests which the District Court relied upon were all of these things and more. There were tests which no physician could ethically order for the purpose of confirming that the tubes had been fully occluded by cauterization and which, if ordered for that purpose, could not legally bill to any third party payer. In this regard, this case is distinguishable from *Stuard* even if the intent in that case was to change the law as it is stated in *Chicoine* and as it is applied in *Brennan* and *Blahd.* In *Stuard*, there were x-rays which depicted the problem and the test that the Court concluded would have provided objective proof of damage was an MRI (and admittedly expensive but non-intrusive, non-pain producing and non-risk producing procedure which may or may not have been medically necessary). Thus, even if *Stuard* can be read as authority for relying upon non-existent test results when applying the "objectively ascertainable" tool, it cannot and should not be read as allowing reliance to be placed upon tests which, in addition to having never been performed, were not the least bit likely to be performed under the circumstances for the reason that they were highly intrusive, risk producing, pain producing, expensive, and medically

unnecessary.

E. To the extent that the District Court applied *Stuard v. Jorgenson* consistent with the intentions of this Court, then this Court should reconsider the holding in *Stuard v. Jorgenson* or alternatively declare I.C. § 5-214(4) unconstitutional as it applies to medical malpractice actions.

1. If *Stuard* should be read as supporting the District Court's determination, then there has been a sea change in the law of this State which should be openly declared.

Read and applied as the District Court has read and applied *Stuard*, the decision is in substantial and irreconcilable conflict with decisional law of this state developed over 30 years. As this Court noted in *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (Idaho 2009) after a review of prior decisions :

> These cases stand for the following. The statute of limitations for professional malpractice does not begin to run until the plaintiff would have a cause of action against the professional. *Stephens v. Stearns*, 106 Idaho 249, 254, 678 P.2d 41, 46 (1984). Because some damage is required to have a cause of action for negligence, the cause of action cannot accrue until there is some damage. Id. "[S]ome damage is required because it would be nonsensical to hold that a cause of action is barred by the statute of limitations before that cause of action even accrues." *Lapham v. Stewart*, 137 Idaho 582, 586, 51 P.3d 396, 400 (2002). Negligence that increases the risk that a client will be harmed does not trigger the running of the statute of limitations until harm actually occurs. *Parsons Packing, Inc. v. Masingill*, 140 Idaho 480, 95 P.3d 631 (2004).

Id. 146 Idaho at 661,201 P.3d 634.

If *Stuard* can properly be applied as the District Court applied in this case, then all of these prior cases would have been wrongly decided. For example, in *Stephens* if a second architect had been hired 6 months after the completion of construction and if that architect performed a competent walk through, then he would presumably have noted the negligence and the need for repair. Since this was possible, under the District Court's reading of *Stuard*, accrual should have occurred on date

construction was complete and not at the time of the fall. Similarly in *Strieb,* the defect in the tax return could have been ascertained if the IRS or a competent accountant had reviewed it that same day and because this was possible then under the District Court's reading of *Stuard*, accrual should have occurred the date that the return was filed.

If this Court intended for *Stuard* to be read as it has been read by the District Court, then the absurd results which this Court expressly sought to avoid in *Streib, Davis, Hawley, Chicoine, and Lapham* will, as this case demonstrates, become commonplace. The problem presented by the conflict between the District Court's application of *Stuard* and the existing case law is exacerbated by this Court's holdings indicating this language would suggest that whether a matter presents a question of fact that the injury is objectively ascertainable must be determined on a case-by-case basis. *Bonz v. Sudweeks*, 119 Idaho 539, 543, 808 P.2d 876, 880 (1991). While this language would suggest that the matter presents a question of fact which should be resolved by a jury, this Court has treated this as a matter to be resolved by Court by motions for summary judgment.

It may be that this Court intends to address this confusion by means of modifying the objectively ascertainable tool so that it can be utilized as the District Court has utilized it in this case. However, if this is the Court's intention, then for the sake of edifying the lawyers practicing in Idaho, the citizens of Idaho, and the Legislature which has accepted the some damage exception for nearly 30 years, it is appropriate to overrule all cases discussed above or the Court's disapproval of the decisions in all of those cases should be openly stated.

2. <u>If *Stuard* should be read as supporting the District Court's determination then the "some damage" has been negated and the I.C. § 5-219(4) will be an unconstitutional absolute bar to actions more than two years after the medical care at issue has been provided</u>.

a. As applied by the District Court, *Stuard* renders the "some damage" exception useless.

Read and applied to medical malpractice cases as the District Court has read and applied it in this case, *Stuard* has the effect of wholly negating the "some damage" exception and leaving I.C. § 5-219(4) as an absolute bar to actions not involving fraud or foreign bodies left behind after surgery where the malpractice occurred more than two years prior to the filing of the litigation. It is clear that the "some damage" exception was intended to soften the harsh effect of I.C. § 5-219(4). It is equally clear that this softening effect was not abhorrent to the Legislature which acted within a year to abrogate the judicially adopted discovery exception but has not acted in over 30 years to make any change to the judicially adopted "some damage" exception".[22]

Stuard, as read by the District Court, would cause I.C. § 5-219(4) to work (in virtually all cases) as an absolute bar to a suit filled more than two years after the care at issue. Malpractice is by definition the occurrence of an act or omission which but for negligence should not occur. If this is true, then in most circumstances any non-negligent physician, who conducts the right examination and testing of the patient after the malpractice or who at the time oversees the care provided, should be able to discern that malpractice has occurred. Doing so might require two adversarial physicians on every case and the use of medically unnecessary tests and procedures which are or may be risky, painful, intrusive and expensive (including exploratory surgery). But, when by these means, the

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[22] It is worth noting that even if it were reasonable to think based on the language of the statute that the Legislature actually intended the harsh results that the District Court thought were mandated by the decision in *Stuard*, the events of the past 30 years stand in contradiction to that conclusion. Over the time of its existence the Legislature has demonstrated the capacity to amend statutes that it concludes have been misread by the Court. It failure to do so here stands as compelling evidence that it did not oppose the institution of the "some damage" exception.

malpractice or injury is discernable on the day of the initial care, then the statute would start to run at that time even if no one would ever take the steps necessary to discern it. Indeed, it is doubtful that many people will be able to find a physician who will provide forensic care which is wholly unnecessary other than for protection of legal rights.

In these circumstances, the "some damage" exception will have no application because the "objectively ascertainable" analytical tool will cause the abandonment of any consideration of whether the injury upon which the suit is based actually occurred. As a consequence, the practical effect, if not the actual effect of such an application of *Stuard,* is to leave I.C. § 5-219(4) as functioning as a bar to cases filed more than two years after the negligent action even though injury for which damages are sought has not occurred within that two years.

b. Without the remediating benefit of the "some damage" exception, I.C. § 5-219(4) is unconstitutional as the District Court applied it in this case.

(1) The Court has not previously determined that I.C. § 5-219(4) can be constitutionally applied as it was applied by the District Court in this matter.

There are five reported cases in which the constitutionality of I.C. § 5-219(4) was given any consideration and none of these cases dealt with the questions that will be presented by this case if the District Court's reading of *Stuard* is upheld by this Court.

In *Holmes v. Iwasa,* 104 Idaho 179, 657 P.2d 476 (1983), due process and equal protections challenges were asserted against the statute but the case arose from the failure to diagnose a progressively worsening condition and therefore did not present the Court with need to consider the constitutionality of a statute which started the statute running at the time of the act irrespective of when the injury occurred.

In *Ogle v. De Sano*, 107 Idaho 872, 693 P.2d 1074 (1984), the Court discussed a claim of unconstitutionality that was premised upon the potential that an I.U.D. left behind after it was supposedly removed could be found not to be a foreign body. Having concluded that it was a foreign body, the Court had no need to resolve the constitutional issue.

In *Theriault v. A.H. Robins Company*, 108 Idaho 303, 698 P.2d 365 (1985), the constitutionality of the statute when applied without respect to when the injury was knowable was not addressed in the majority decision. It was raised by Justice Bistline in a dissenting opinion in which he noted that the constitutionality of the statute was not fully resolved by prior decisions and that the statute was on weak constitutional footing because of the manner in which it discriminated against various medical malpractice plaintiffs.

Similarly, in *Streib v. Veigel, supra,* the constitutionality of the statute was not discussed by the majority opinion which applied the "some damage" exception to avoid applying the statute in a manner which produced an absurd result. Justice Bistline, in dissent urged the Court to take up the question of whether the statute was constitutional in view of the abrogation of the discovery rule and in view of the discrimination between classes of plaintiffs.

Finally, in *Hawley v. Green, supra,* the Court applied the "some damage" exception utilizing the "objectively ascertainable" analytical tool to facts which challenged the application of the exception and determined summary judgment should not have been granted.[23] This Court found that

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[23] To reverse the trial court which granted summary judgment, the Court had to ignore the probabilities and hold that summary judgment could not be granted because the record contained no evidence to support a determination that a tumor reflected in 6 and 8 year old x-rays had grown, become more aggressive or otherwise caused increased damage during that time.

applied in this manner the statute did not violate the protections afforded by Article I, § 18 of the Idaho Constitution, nor the right to equal protection under both the State and Federal Constitutions.

Thus, it is apparent that this Court has never determined that I.C. § 5-219(4) can be constitutionally applied in a case such as this one in which there is a substantial separation between the negligent act and the manifestation of the injury upon which litigation is premised.

(2) An application I.C. § 5-219(4) in the manner it was applied by the District Court violates the prohibition against special laws limiting civil actions, Article III, §19, Idaho Constitution.

As is apparent from *Twin Falls Clinic Hosptial Bldg.*, 103 Idaho 19, 644 P.2d 341 (1982), a statute of limitations which treats similarly situated persons differently would violate this protection.

If the District Court's decision is upheld, doctors will be benefitting from different treatment than is afforded to other professionals. Doctors will be protected by *Stuard* (as applied by the District Court) if the fact of negligence or injury is found to be capable of being objectively ascertained, while other professionals will, pursuant to *Chicoine,* be protected only if the injury is, based upon actually available evidence, objectively ascertainable.[24]

Moreover, those patients who like Mrs. Conner are the victims of malpractice, which causes delayed damage, will be treated more harshly than those patients whose injuries surface quickly. For example, if two women undergo tubal ligation surgery and if in both cases the doctor fails to ligate one of the tubes, the woman who becomes pregnant within two years of the surgery will have a right

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[24] Unless *Chicione* is overruled, this would appear to be true even though this Court held in held that the same standards should apply to all.

to sue and the woman who becomes pregnant more than 2 years following the surgery will not.

Finally, people who deal with contractors for the improvement of lands will be treated more favorably than people who deal with doctors for care of their bodies. The former having the benefit of a 6 year statute of repose before the clock starts to tick upon unknowable damages and essentially unknowable negligence. The latter losing their right to proceed reduced before any evidence exists that negligence has occurred and that they have been injured.

(3) An application of I.C. § 5-219(4) in the manner it was applied by the District Court violates the prohibition against special laws limiting civil actions, Article I, §18, Idaho Constitution and the right to a jury trial. Article I, § 7, Idaho Constitution.

Both Article I, § 18 and Article I, § 7 appear in the section of the Constitution entitled "Declaration of Rights." The Court has previously considered both sections in the context of whether a statute of limitations can work impermissibly to take away a common law remedy. It does not appear that the Court has considered the question of whether applying a statute of limitations, which professes to leave the right to pursue a type of claim intact in but does so in a manner that has the demonstrable effect of wholly precluding any action upon a portion of those claims, is a violation of the right to open courts articulated in Article I, § 18 or the right to a jury trial afforded by Article I, § 7.[25] This is not a case in which there is a narrow statute of limitations, it is a case,which for all practical purposes, the statute of limitations is zero days.

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[25] In *Cummings v. J.R. Simplot Co.*, 95 Idaho 465, 511 P.2d 282, (1973), the Court appears to have ruled that strict application of statute of limitations in I.C. § 72-407 was not a violation of Art. I, § 18, but upon closer look, this conclusion was reached because there was a 4 year limitations period and the appellant failed to show any basis for invalidity of limitation period. *Id.* 468, 285.

The right to have reasonable access to the courts has been held to be a due process right. *Coffelt v. State*, 92 Idaho 235, 238, 440 P.2d 355, 358 (1968). As a due process right, access to the courts is seen as a fundamental right and actions seen as infringements must be examined with strict scrutiny. *Coleman v. State*, 114 Idaho 901, 903, 762 P.2d 814, 816 (1988). *See also, Berry v. Koehler*, 84 Idaho 170, 369 P.2d 1010 (1961). The party seeking the benefit of such an infringement should bear the burden of demonstrating that it is reasonable. *Johnson* v. *California*, 543 U.S. 499, 505-506, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005).

Similarly, the right to a jury trial for the determination of damages in a personal injury action is protected by Article 1, § 7 and, while it may be compromised by certain types of legislative action, that action must be based upon reasonable policy considerations. *Kirkland v. Blaine County Medical Center,* 134 Idaho 464, 467-469, 4 P.3d 1115, 1118-1120 (2000).

Here, the District Court's application of I.C. § 5-219(4) has the effect of cutting off Mrs. Conner's right to pursue a claim before objective evidence supporting either the negligence or the injury even existed. Application of this statute in this manner denies her both access to the courts to pursue what is otherwise a fully legitimate medical malpractice claim and to a jury trial of that claim. This denial would occur despite the fact that her claim is one which she could have pursued if only she had started to have unprotected sex soon enough to become pregnant before 2 short years had passed. Clearly, the statute, as applied by the District Court, will unfairly penalize many malpractice claimants solely because, through no fault of their own, their injury did not become objectively manifest within two years.

The Supreme Court has stated that the purpose of a statute of limitations "is to prevent

fraudulent and stale claims from arising after a great lapse of time while preserving for a reasonable period the right to pursue a claim." (E.A.) *Hawley v. Green, supra,* 117 Idaho at 501, at 1324. But as Justice Bistline noted: "Art. I, § 18 was meant to prevent—the "unjust" and "unfair" closing of this state's courtrooms to injured and oppressed citizens before they have been granted a viable opportunity to enter." *Theriault v. A.H. Robins Co., Inc. supra,* 108 at 310, 698 P.2d at 372. Article I, § 7 similarly must be seen to prevent enactments which deny the right to a jury trial which are manifestly unjust and unfair.

The inherent irrationality of I.C. § 5-219(4), applied as the District Court applied it, is made glaringly obvious when one considers that with respect to the great mysteries of medicine, an injured person would have just two years to bring their claim even if no existing evidence supported a determination that she had suffered an injury but with respect to the more open and understandable matter of home construction, an injured person has up to six years to discover and two more years to bring his claim. Whether it is placed under strict scrutiny or examined for a reasonable relationship to a legitimate purpose, I.C. § 5-219(4), as applied in this case by the District Court, works as an unconstitutional violation of Mrs. Conner's due process rights to access to court and to a jury trial.

3. An application I.C. § 5-219(4), in the manner it was applied by the District Court, violates Mrs. Conner's right to equal protection of the laws, a right protected by the 14th Amendment of the United States Constitution.

While this Court has previously considered equal protection challenges to I.C. § 5-219(4) it has not considered the ones presented by this case. *See, Hawley v. Green, supra.* (plaintiff asserted there was no rational basis to distinguish between deferred damage cases and foreign object or fraudulent concealment cases). As the District Court has applied I.C. § 5-219(4), the statute impermissibly

discriminates between malpractice victims whose injury is evident within two years (though not necessarily to them) and those as to whom there is within two years no evidence of either negligence or damage. Moreover, it would impermissibly discriminate among claims against professionals by triggering accrual in claims against health care providers where the fact of negligence or injury is capable of being objectively ascertained while only triggering accrual in claims brought against other professionals when there is objective evidence of injury must actually exist. It also impermissibly discriminates among against health care providers who committed open and obvious malpractice in which injury manifests within two years by leaving them liable for up to two years while providing an absolute bar to actions against health care professionals who committed malpractice which leads either to an absence of actual evidence of either negligence or damage within two years but as to which some evidence might have been obtained by medically unnecessary and essentially unavailable testing. Finally, as to plaintiffs, there is inherent in Idaho law an impermissible discrimination between medical malpractice claimants in Mrs. Conner's position and individuals who hire professionals to improve real property. While this distinction existed even before *Stuard,* was decided it is exacerbated to the point complete absurdity by the application of *Stuard* in a manner that vitiates the "some damage" exception.

Each of these impermissible discriminations has the effect of unfair differential treatment between persons and their claims, who are by all reasonable standards, similarly situated. This differential treatment allows the favored class of individuals to have open access to the courts and the disfavored class to have no access to the courts, some a right to a jury trial and others no right to a jury trial, some an opportunity to recover their damages and others no real opportunity at all, and some the right to sue within two years of the time when evidence of injury comes into existence and others no

right to sue two years after the fact or possibility of negligence or injury became theoretically discernable.

As to the defendants, health care providers are let off the hook two years after the fact of unknown negligence or injury could have been ascertained whereas all other professionals are on the hook for at least two years after evidence supporting the existence of injury becomes available. As between health care providers, some never actually have risk of being sued for negligence by virtue of little more than good luck of having their malpractice produce delayed injury, which was unknown but which theoretically could have been ascertained, while the disfavored class of are at risk for at least two years.

As the due process rights at stake here are both fundamental in nature, the validity of any justification for these discriminations should be tested by strict scrutiny. *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). I.C. § 5-219(4) has never been subjected to strict scrutiny. The Supreme Court has subjected to analysis under the rational relationship test but never in the context of the interpretation of the "objectively ascertainable" standard utilized by the District Court. Either way, I.C. § 5-219(4) as applied by the District Court, arbitrarily and unreasonably distinguishes between each of the favored and disfavored classes identified above. While it is understandable that some limit on claims is reasonable, this particular demarcation is arbitrary and capricious because there is nothing inherently distinct about an injury which can be discovered within two years and one that takes 30 months to surface and nothing inherently distinct between medical malpractice cases and other professional malpractice cases.

Moreover, there is no logic, reason or permissible basis of distinction between medical

malpractice plaintiffs who are provided less, or, as in Mrs. Conner's case, no actual access to courts and plaintiffs with tort actions arising from the design or construction of improvements to real property who have a total of eight years to discover and prosecute their claims. *Twin Falls Clinic & Hosp. Bldg. Corp., supra.* This unequal and disparate treatment of medical malpractice claims relative to construction malpractice claims is unreasonable. Surely our claims related to the medical care provided to our bodies deserve protection equal to that afforded to the our claims related to the construction of our homes.

The statutory nullification of the discovery rule coupled with the District Court's application of the "objectively ascertainable" 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. As the District Court applied I.C. 5-219(4), it is an unconstitutional denial of equal protection as applied to Mrs. Conner and similarly situated victims of medical malpractice.

F. Even if Mrs. Conner is precluded from pursuing a medical malpractice action, she is, under the unique circumstances of this case, entitled to pursue her Breach of Contract claim.

Mrs. Conner went to Hodges and asked him to perform a bilateral tubal ligation which she understood would result in cauterization of each of her fallopian tubes. She realized that as a consequence of this surgery these tubes would no longer function to pass ova from her ovaries to her uterus. Hodges agreed to perform a bilateral tubal ligation. Mrs. Conner made herself available to him for that purpose. He did not perform that service.

This is not simply case in which it is claimed that Hodges performed the requested surgery and

in the course of doing so made some mistake attributable to lack of due care that caused injury – such as puncturing the bowel or the uterus while getting his instruments into position or while searching for the fimbriate end of the fallopian tube. This is a case in which Hodges agreed to cauterize each fallopian tube and he simply and plainly did not do what he agreed to do. Indeed, as to the left tube, he did not even attempt to cauterize it.

While Plaintiff makes negligence allegations in the section of her Complaint dealing with "Breach of the Duty of Care, Count I," the allegations in the section of the Complaint dealing with "Breach of Contract, Count II" do not contain any negligence related allegations or claims and merely recite the terms of the contract, the failure to perform the contract and the claim of damages.

The District Court concluded that Mrs. Conner's breach of contract claim was precluded by the provisions of I.C. § 6-1012. Mrs. Conner concedes that this section 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 to or death of any person ... on account of the provision or failure to provide health care". This is true because the statute quite clearly goes on to require that in such cases there must be a competent showing of a negligent failure to meet the applicable standard of health care practice. However, Mrs. Conner contends that by its own clear and unambiguous language, I.C. § 6-1012, has no application given the somewhat unusual circumstances of this case.

This Court has regularly and repeatedly held that the interpretation of a statute:

> ".... must begin with the literal words of the statute; those words must be given their plain, usual and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it but simply follows the law as written."

Verska v. Saint Alphonsus Regional Medical Center, 151 Idaho 889, 893, 265 P.2d 502, 506 (2011).

Indeed, it is the duty of the Court to apply an unambiguous statute as written even if the Court questions the rationality of the statute or the public policy it appears to manifest. *Id.*

I.C. § 6-1012 is very clear and unambiguous. Relying on the plain meaning of its language, it applies to cases seeking "damages" for "injury to" or "death of" any person. It is quite clear that the Legislature used both the word "damages" and the word "injury" – an articulation which clearly manifests the intention to refer to different things. Thus, the fact that someone suffered "damages" could not be considered an "injury" as that term is used in the statute. Moreover, given that "injury" is associated with "death", it is apparent that the intention is to refer to bodily injury to a person and not something more generally applicable to someone's life or finances or what might be termed "damages." In sum, it is apparent that the statute is referring to a claim for monetary damages arising from a physical injury or death of any person.

In this case, while it is an unusual occurrence in case related to provision of medical care, Mrs. Conner's claim is premised upon the fact that her left fallopian tube was <u>not injured</u>. In other words her claim is premised not upon the fact of injury but rather on the fact of non-injury. Hence, I.C. § 6-1012, as it was written by the Legislature, has no application to Mrs. Conner's circumstance and cannot therefor be the basis for precluding a breach of contract action.

The cases relied upon by the District Court do not support its conclusion or undermine Mrs. Conner's breach of contract claim. In *Trimming v. Howard,* 52 Idaho 412, 16 P.2d 661(1932), the plaintiff's claims were tort based (negligence, carelessness, failure to exercise ordinary care) and not breach of contract based. Moreover, the claimed conduct was not the failure to do what had been agreed upon but the occurrence of errors during the course of the agreed upon care and the concealment

of those errors as the basis for additional care. On these facts, the Court concluded not that all medical care cases could not involve breach of contract claims but rather that the gist of the "malpractice" claim asserted was tort not breach of contract. Mrs. Conner has separately alleged a breach of contract claim which is not premised in any way on a claim that Hodges acted negligently. Her breach of contract claim is premised only upon the fact that Hodges did not do what he agreed to do.

In *Ogle v. De Sano*, 107 Idaho 872, 693 P.2d 1074 (1984), the plaintiff asserted a negligence claim and a breach of contract claim for the failure to remove and I.U.D. during the course of a related surgery. The evidence clearly demonstrated that both before and after removal the I.U.D. was causing injury. The Court describes the case as one "presented in malpractice." Here, Mrs. Conner's breach of contract claim is not presented in malpractice or negligence and the condition she complains of was not injurious by virtue of failing to treat an ongoing injury.

In *Hough v. Fry*, 131 Idaho 320, 953 P.2d 980 (1998), the plaintiff sued her physical therapist as a result of injuries she sustained in a fall that occurred while she was using a therapy device under the supervision of the therapist. The dispute in *Hough* involved her claim that she could bring the statute did not preclude her from bringing a claim for ordinary negligence (in which no standard of care opinion would be needed). In the course of addressing this argument, this Court concluded, that to determine if I.C.§ 6-1012 applied, "courts need only look to see if injury occurred on account of or in the provision of or failure to provide health care." *Id.* 131 Idaho at 233, 953 P.2d at 983. This language which was relied upon by the District Court does nothing to address the issue in this case because given the plain language of the statute there is, in Mrs. Conner's case, no "injury" which can be used as the datum for determining if I.C. § 6-1012 applies.

In *Bishop v. Owens,* 152 Idaho 617, 272 P.3d 1247 (2012), the plaintiff made no claim asserting that the attorney failed to do any specific act which he had agreed to do. Rather, her breach of contract claim was based on language in the contingent fee agreement indicating that the attorney "shall represent Client in said matter and do all things necessary, appropriate, or advisable, in regard thereto." The Court noted that this is essentially the standard by which malpractice claims are measured and that the contract term was in essence an agreement not to commit malpractice. As such, the Court concluded that the matter pled was really a malpractice action and not a breach of contract claim. Here, Mrs. Conner's claim is not premised upon a claim that Hodges failed to honor some generalized promise to do a good or appropriate surgery but rather upon his failure to cauterize both of her fallopian tubes – a singular and specific term of the contract he made to her.

In *Hayward v. Valley Vista Car Corp.*, 136 Idaho 342, 33 P.3d 816 (2001), the Court concluded that I.C .§ 6-1012 precluded bringing a claim for breach of contract premised on the fact that care provided to the decedent was contrary to the terms of the agreements to provide that care. The fact that I.C. § 6-1012 was applied to preclude a breach of contract action for damages arising from the death of a person does nothing to resolve the question presented in this case. Plaintiff was not killed and she was not injured and her claim is not premised upon either of those eventualities. Indeed, the lack of injury is the whole problem. To be applicable to this action I.C. § 6-1012 would need to provide that it pertained to "any claim for damages arising as a result of providing or failing to provide health care...." or something in the same vein. But as written, it has no application to Mrs. Conner's breach of contract claim.

In sum, while this is an unusual case, it is apparent that a separate claim for breach of contract

(failure to preform an identified and agreed upon injury to the body) and a separate claim for negligence (failure to use a duty of due care which exists independent of the contract in performing the surgery so as to ligate both tubes) have been stated. The Idaho Supreme Court has acknowledged that under such circumstances a breach of contract claim and a negligence claim can both provide a basis for recovery in the same action. *See, e.g. Reynolds v. American Hardware Mut. Ins. Co.,* 115 Idaho 362, 766 P.2d 1243 (1988) and *Hoglan v. First Security Bank of Idaho, N.A.,*120 Idaho 682, 819 P.2d 100 (1991).

V. CONCLUSION

For each and all of the forgoing reasons it is respectfully requested that the Court determine that the District Court erred in granting summary judgment to Defendant.

RESPECTFULLY SUBMITTED THIS 23rd day of July, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2013, I caused the foregoing document to be delivered by the method indicated below and addressed to the following:

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