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Wickel v. Chamberlain Appellant's Reply Brief 2 Dckt. 41514

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN WICKEL, an individual, Plaintiff/Appellant/Cross-Respondent v. DAVID CHAMBERLAIN, D.O., Defendant/Respondent/Cross-Appellant	Supreme Court Docket No. 41514-13

CROSS-APPELLANT REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho for Bonneville County.

Honorable Jon J. Shindurling, District Judge, Presiding.

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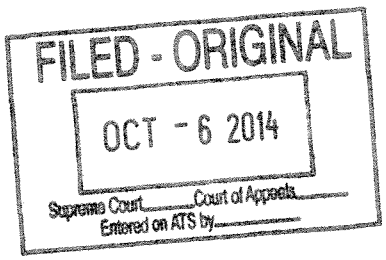

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I. STATEMENT OF THE CASE

Chamberlain herein incorporates his statement of the case as set forth in his Cross-Appellant Brief.

II. ARGUMENT

A. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT THE LOCAL STANDARD OF HEALTH CARE PRACTICE IN IDAHO FALLS WAS INDETERMINABLE WITH REGARD TO THE PPH PROCEDURE.

Under I.C. § 6-1012, the standard of care is indeterminable *only* "if there be no other like provider in the community." Wickel contends that the local standard of care is indeterminable in this case because it is similar to *Hoene v. Barnes*, 121 Idaho 752 (1992), wherein this Court held:

> Under the **unique circumstances** of this case, there was no provider of PDA surgery by a cardiovascular surgeon in Idaho other than Dr. Barnes and his colleagues who practiced as a professional association. Because these physicians all practiced together and were part of one business entity, we treat them as one provider under the statute. Therefore, we conclude under I.C. § 6-1012 that the standard of health care practice in the community ordinarily served by St. Luke's was indeterminable.

Id. at 754 (emphasis added).

Wickel attempts to compare this case with *Hoene* because he could not get any of the general surgeons in Idaho Falls that he contacted to speak with his expert about the standard of care. However, this case is easily distinguishable from *Hoene*. In *Hoene*, "the plaintiff first demonstrated that no health care provider other than the defendant or his business associates practiced in the local community." *Morris v. Thomson*, 130 Idaho 138, 147 (1997). As this Court described, the *Hoene* case was a "unique circumstance" because there was literally no other health care provider other than the defendant and his partners that practiced in the local community. That is clearly not the case here. There were general surgeons other than Chamberlain and his partners that practiced and

performed the PPH procedure in the community.[1]

This Court has made it clear in *Morris v. Thomson*, 130 Idaho 138 (1997), that whether or not Wickel could find a local health care provider willing to speak with Scoma about the local standard of care is irrelevant to the analysis. In *Morris*, the plaintiff argued that the situation was like the "unique circumstances" in *Hoene* because the other local doctors were unavailable or biased in favor of the defendant making the local standard of care indeterminate. That is essentially the same argument Wickel is making in this case.[2] This Court held:

> In the case at bar, Morris argues that a situation similar to that in *Hoene* has occurred. **Morris argues that doctors practicing in the Emmett community at the relevant time were either unavailable or biased in favor of Thomson and thus that Morris' expert, Dr. Giles, could properly testify regarding the standard of care in communities similar to Emmett. Morris, however, has ignored the central premise of our decision in *Hoene*. In that case, the plaintiff first demonstrated that no health care provider other than the defendant or his business associates practiced in the local community (Boise) and thus that the local standard of care was indeterminable. Only then did we turn to "similar communities" to establish the relevant standard of care.** Under § 6-1012, Morris cannot establish the local standard of care by reference to similar communities until she has demonstrated that the standard of care in Emmett was indeterminable **due to the absence of other health care providers in the community**. In this case, however, Morris has failed to establish that no other health care provider was practicing in Emmett at the time of Jessie's birth through which her expert could have familiarized himself with the local standard of care. Because she did not demonstrate that the standard of care in Emmett was indeterminable, Morris could not use the standard of care in similar communities.

Id. at 147.

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[1] For a list of other general surgeons who practiced in Idaho Falls see the *Affidavit of J. Michael Wheiler*, R. Vol. II, p. 268-81. At least one other practice group performed the PPH procedure during January, 2010, as evidenced by the *Affidavit of James L. Richards, M.D.*, R. Vol. III, p. 612-13.

[2] Simply stating that some of the general surgeons did not perform the PPH procedure and some declined to speak with Plaintiff does not provide an adequate record upon which the court could conclude that there were no other providers in the community.

The *Morris* decision follows the plain statutory language of I.C. § 6-1012 which sets forth that the local standard of care is indeterminable *only* "if there be no other like prover in the community." The statute contains no language about whether or not a plaintiff can get a local health care provider to discuss the standard of care, only whether a like provider practiced in the community. Additional language from *Morris* makes this undoubtedly clear.

> As we have already explained, [I.C. § 6-1012] provides that a plaintiff may establish the community standard of care by reference to similar communities **only where no local doctor other than the defendant exists** and the local standard is thus indeterminable.
>
> * * * *
>
> Section 6-1012 provides that plaintiffs may refer to the standard of care in similar communities when the standard of care in the same community is indeterminable **because no doctor other than defendant practices in that community**.

Morris, 130 Idaho 138, 145-146 (emphasis added). Thus, whether a local health care provider other than the defendant is willing to discuss the standard of care with the plaintiff's attorney or their expert is irrelevant.

Even assuming that the availability of a health care provider to discuss the standard of care is relevant, Wickel has failed to show that this was indeed the case. Wickel relies primarily on the Affidavit of Jessica Wilson to show that no general surgeons in Idaho Falls were willing to speak with Dr. Scoma about the standard of care. Ms. Wilson's affidavit is insufficient to establish that no local health care providers were willing to speak with Dr. Scoma.[3]

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[3] The insufficiency of Ms. Wilson's affidavit is briefed in detail in Chamberalin's *Cross Appeal Brief*, Section III, A, 2; specifically pp. 19-20.

B. WICKEL WAS STILL REQUIRED TO ESTABLISH THE LOCAL STANDARD OF CARE AS TO ALL OTHER ISSUES EVEN IF THE STANDARD OF CARE WAS INDETERMINABLE REGARDING USE OF THE PPH DEVICE.

Wickel not only alleged that Chamberlain breached the standard of care with respect to the use of the PPH device, but also alleged, among other things, that Dr. Chamberlain breached the local standard of care by "failing to diagnose Wickel's anal fissure on the initial visit," improperly treated the anal fissure, and "failed to acquire Wickel's informed consent prior to performing medical procedures related to the anal fissure." R. Vol. I, p. 15, para. 20-21.

Wickel has not established that the standard of care was indeterminable with respect to these other claims. In his *Cross-Respondent brief*, Wickel relies upon his contention that because no local general surgeons would speak with Wickel's attorney or their out-of-state expert, Dr. Scoma, about the local standard of care, the standard was indeterminable as to all issues. As discussed in Section A above, the fact that no general surgeon would speak with legal counsel or Dr. Scoma is irrelevant. Even assuming it was relevant, there is no evidence that Wickal or Dr. Scoma attempted to contact other general surgeons in Idaho Falls about these additional alleged breaches.

Wickel also contends that "[a]lternatively, the issues were so intertwined that unless a consulted surgeon had performed surgeries using the PPH device he or she would be incapable of providing any opinion as to the local standard of care" and that "the standard of care cannot be neatly separated out . . . in light of the specialized procedure performed by Chamberlain." *Cross-Respondent Brief*, p. 5. If this were indeed the case, Wickel would need testimony from an expert with specialized knowledge to make such an argument as it is not testimony a lay witness is competent to testify about. *See* I.R.E. 701 & 702. However, he cites no authority or expert

testimony in the record to support this contention. It amounts to nothing more than Wickel's attempt to cover up the failure of Dr. Scoma to discuss the standard of care regarding these additional issues with a local provider or introduce evidence into the record that Chamberlain breached the standard of care regarding the same.

The fact remains that Wickel not only failed to demonstrate that the local standard of care was indeterminable with respect to use of the PPH device, but he has also failed to establish that the local standard of health care practice was indeterminable with regard to the additional alleged breaches. Likewise, Wickel offered no evidence regarding the Idaho Falls standard of health care practice pertaining to diagnosing anal fissures, treating anal fissures, fissurectomy, LIS, dilating the anal canal, or informed consent. Consequently, it was not error for the trial courts to dismiss these claims.

C. THE DISTRICT COURT ERRED WHEN IT FAILED TO TREAT WICKEL'S MOTION FOR RECONSIDERATION AS A RULE 59(e) MOTION AND CONSIDERED THE SUPPLEMENTAL AFFIDAVIT OF DR. SCOMA.

1. *The District Court should have treated Wickel's Motion for Reconsideration as a Rule 59(e) Motion.*

After the district court's granted Chamberlain's *Second Motion for Summary Judgment*, it entered a *Final Judgment* on July 30, 2013. R. Vol. II, p. 416. Wickel then filed a *Motion for Reconsideration* on August 12, 2013, requesting the district court reconsider "its Final Judgment entered on July 30, 2013." R. Vol. III, p. 448. Wickel also filed the *Supplemental Affidavit of Joseph Scoma, M.D.* at that time. Chamberlain believes and argued that the district court should not have considered the *Supplemental Affidavit* and should have treated Wickel's *Motion for Reconsideration* as a Rule 59(e) Motion. R. Vol. III, p. 471-75. The district court denied

Chamberlain's *Motion to Strike the Supplemental Affidavit*. R. Vol. III, p. 529-30.

Wickel contends that Chamberlain's arguments that the district court erroneously considered Scoma's *Supplemental Affidavit* are moot because there was not a true final judgment in this case due to this Court remanding the appeal "to allow for entry of final judgment that does not contain a record of prior proceedings." October 28, 2013, *Order Remanding to District Court*. As a result, Wickel contends that *Boise Mode, LLC v. Donohoe Pace & Partners Ltd.*, 154 Idaho 99 (2013), does not apply because there was a final judgment entered at the time of the reconsideration in *Boise Mode*.

Wickel's argument has no merit. The July 30, 2013 *Final Judgment* was obviously an effective final judgment, or this Court would have dismissed the appeal. *See Doe v. Doe*, 155 Idaho 660 (2013) (dismissing a prior appeal because the judgment did not comply with I.R.C.P. 54(a)). This Court did not do so. Instead, this Court remanded the appeal. Pursuant to I.A.R. 13.3(b), the appeal remained pending during the remand.

Furthermore, pursuant to I.A.R. 13.3(a) the district court only has jurisdiction to take "actions necessary to fulfill the requirement of the remand." In this case, this Court's remand order only gave the district court jurisdiction to enter a revised final judgment. If the there was not an effective final judgment, this Court would have dismissed this appeal and the district court would not have been limited in its jurisdiction.

Thus, the July 30, 2013, *Final Judgment* was an effective final judgment and *Boise Mode* is applicable in this case. The relevant language from *Boise Mode* is as follows:

> Considering the plain language of [I.R.C.P. 11(a)(2)(B)] and its structure, there are two different kinds of orders that may be reviewed. **The first sentence permits a court to reconsider interlocutory orders any time prior to entry of final**

> **judgment** and the second sentence bars the court's reconsideration of orders that are made 1) after entry of final judgment, and 2) pursuant to a party's Rule 59(e) motion. **"This Court has repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate interlocutory orders so long as final judgment has not been entered."** *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 785, 69 P.3d 1035, 1046 (2003) (citing *Telford v. Neibaur*, 130 Idaho 932, 950 P.2d 1271 (1998)); *Sammis v. Magnetek Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997); *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994)).

Id. at 106-107 (emphasis added).

In this case, the district court had granted Chamberlain's *Second Motion for Summary Judgment* and entered an effective final judgment. Thus, pursuant to *Boise Mode* and *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774 (2003), *Telford v. Neibaur*, 130 Idaho 932 (1998), *Sammis v. Magnetek Inc.*, 130 Idaho 342 (1997) and *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63 (1994), "I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate *interlocutory orders so long as final judgment has not been entered*," and it was not proper for the district court to reconsider its decision under IRCP 11(a)(2)(B). The District Court should have only conducted a Rule 59(e) evaluation and determination.

2. *The District Court should not have considered Dr. Scoma's Supplemental Affidavit pursuant to I.R.C.P. 59(e).*

Wickel argues that there was no effective final judgment and therefore there was no judgment to alter or amend under I.R.C.P. 59(e). As discussed above in Section C, 1, there was an effective final judgment. As such, the district court should have treated Wickel's Motion for Reconsideration as a Rule 59(e) motion and analyzed it as such.

The district court is not allowed to consider new evidence in a Rule 59(e) motion. As this Court has stated, "Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective

action short of an appeal. **Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.**" *Barmore v. Perrone,* 125 Idaho 340, 344 (2008) (citing *Coeur d'Alene Mining Co. v. First National Bank of North Idaho*, 118 Idaho 812 (1990)) (emphasis added); *see also Johnson v. Lambros*, 143 Idaho 468 (Ct. App. 2006) (holding that because a motion to amend is brought after a judgment, new evidence may not be presented).

A final judgment had been entered. The district court should have considered Wickel's *Motion for Reconsideration* as a Rule 59(e) motion and should not have considered the *Supplemental Affidavit of Dr. Scoma*. Accordingly, the district court should have made its ruling based upon the status of the evidence at the time it entered its final judgment.

D. THE DISTRICT COURT ERRED IN NOT STRIKING THE SUPPLEMENTAL AFFIDAVIT OF JOSEPH SCOMA, M.D.

1. *The District Court should have granted Chamberlain's Motion to Strike statements in paragraph 3 of Dr. Scoma's Supplemental Affidavit.*

Paragraph 3 of Scoma's *Supplemental Affidavit* states:

> In my prior affidavit, I testified that I had a conversation with Dr. Stephen Schmid, a general surgeon residing and practicing in Twin Falls, Idaho. Dr. Schmid and I generally discussed the performance of hemorrhoidectomies using the PPH device in Twin Falls, Idaho during January 2010. Dr. Schmid stated that he was familiar with the procedure and that he performed hemorrhoidectomies using the PPH device in January 2010. Dr. Schmid told me that in January 2010 there was nothing unique about the manner in which hemorrhoidectomies were performed with the PPH device. He conveyed to me that there were no deviations in how he had been trained to use th PPH device in Twin Falls than anywhere else. During our conversation he said that the standard of care for general surgeons in Twin Falls would be the same regardless of location, i.e., that the standard of care in Twin Falls was a national standard as opposing to including any unique deviations from the national standard of care.

R. Vol. III, p. 420-421.

The statements attributed to Dr. Schmid are entirely conclusory and lack any foundation. There is no foundation to show how Dr. Schmid was familiar with the supposed "national standard of care." Likewise, there is no foundation to show how he knows that there were no deviations in how he had been trained to use the PPH device than anywhere else, especially since there is no evidence that he worked or was familiar with the standard of care "anywhere else."

Despite these obvious foundational deficiencies, Wickel criticizes Chamberlain's objections as making "unreasonable demands for information from a local, consulting physician" without support "by the law and the facts." *Cross-Respondent Brief*, p. 11. Clearly, Wickel is not aware of or conveniently chooses to ignore the law. "If the out-of-area expert consults with an Idaho physician to learn the applicable standard of care, **there must be evidence showing that the Idaho physician knows the applicable standard of care**." *Ramos v. Dixon*, 144 Idaho 32, 37 (2007) (emphasis added).

Incredibly, Wickel still argues in complete contradiction to this Court's holding in *Ramos* that Schmid did not need foundation to testify about the national standard of care. He states: "[n]othing precluded Schmid from telling Scoma that the standard was the national standard but **it was not necessary for Schmid to explain why, how, or on what that statement was based."** *Cross-Respondent Brief*, p. 12 (emphasis added). The *Ramos* Court could not have been more clear on that issue. In order for Dr. Scoma to learn from Dr. Schmid that the applicable standard of care was a national standard of care, there must be evidence showing that Dr. Schmid knew what the national standard of care was. The record is completely void of this required evidence.

Wickel again cites *Watts v. Lynn*, 125 Idaho 341 (1994) for the proposition that "an expert witness may conclude that the local standard of care does not deviate from the national standard of

care of his or her own volition after consulting a local physician." *Cross-Respondent Brief*, p. 11. Wickel ignores the fact that in *Watts*, the expert affidavit "provided the factual background to support his familiarization" with the national standard of care. *Id.* at 346.

There is no foundational testimony showing how Dr. Schmid was familiar with a purported national standard of care or that Dr. Scoma and Dr. Schmid even agreed as to what any alleged national standard was. As such, the district court should have struck paragraph 3 of Scoma's *Supplemental Affidavit* from the record.

2. *This Court should adopt the sham affidavit doctrine and strike the Supplemental Affidavit of Dr. Scoma.*

Wickel contends that this Court should not adopt the sham affidavit doctrine and that the rule does not apply because there is nothing in Scoma's affidavit that contradicts his deposition testimony. He further asserts that any contradictions or changes to Dr. Scoma's testimony goes to his credibility, not to the admissibility, and that experts must be allowed leeway to change their opinions at any time based on the available evidence. However, Scoma's affidavit does not change his expert opinion but deals with the alleged conversation he had with Dr. Schmid.

Dr. Scoma was asked extensively about his conversation with Dr. Schmid during his deposition and provided details about the conversation. He was even asked if he remembered any further details about the conversation, to which he responded "No." When the district court ruled that Dr. Scoma's conversation with Dr. Schmid was insufficient to familiarize Dr. Scoma with the applicable standard of care, Dr. Scoma miraculously and conveniently remembered additional details about his conversation with Dr. Schmid. Dr. Scoma's changing testimony was not based upon new facts or a change in the underlying evidence. The only change that had occurred in the case was

Chamberlain's challenge to Dr. Scoma's Affidavit and the obvious failure to properly familiarize himself with the applicable standard of care.

An expert altering or expanding an opinion is understandable when it is in response to changing or additional evidence that affects his or her opinion. However, such is not the case here. Dr. Scoma did not change his opinion due to new facts or additional evidence. He changed the facts in an effort to make his opinion admissible after it became apparent that he needed to conjure up new facts in order for his opinion to be admissible.

This Court has not adopted the sham affidavit doctrine, preferring that the issues of credibility should not be resolved at summary judgment but should be resolved by the trier of fact. However, whether an expert's opinion is admissible in a medical malpractice action initially is not a matter of credibility and is not a question for the trier of fact to decide. It is a question totally within the discretion of the trial court. The Court should not sanction an expert witness testifying under oath to certain facts relating to the admissibility of expert testimony and then providing different factual testimony later in an obvious attempt to avoid summary judgment. It is inherently unfair and prejudicial to the opposing party. This Court should therefore adopt the sham affidavit doctrine to prevent changing and contradictory testimony that goes to the admissibility of expert testimony and strike the *Supplemental Affidavit of Dr. Scoma.*

E. THERE IS NO EVIDENCE THAT DR. SCOMA WAS FAMILIAR WITH THE APPLICABLE STANDARD OF HEALTH CARE.

There is no evidence to show that Dr. Scoma familiarized himself with the applicable standard of care. Wickel continually asserts that Dr. Schmid "does not need foundation for his statements to Scoma about the fact that the standard is a national standard other than his familiarity

with the discipline at issue in the case." *Cross-Respondent Brief*, p. 15. Wickel goes on to state that Scoma "could have, on his own, made the determination that there was no difference between the standards articulated by Schmid and the national standards." *Id.* at 15-16. Once again, Wickel fails to understand or chooses to ignore the fact that "if the out-of-area expert consults with an Idaho physician to learn the applicable standard of care, there must be evidence showing that the Idaho physician knows the applicable standard of care" (*Ramos*, 144 Idaho at 37) despite this requirement being pointed out to him repeatedly.

There are two different standards of care that Wickel continuously contends Scoma familiarized himself with through Dr. Schmid, the Twin Falls standard and a purported national standard. Chamberlain does not dispute that Schmid knew the Twin Falls standard of care since he practiced there. However, there is no evidence in Scoma's affidavits that Schmid actually conveyed to Scoma what the actual Twin Falls standard was. Scoma's affidavits only state that Schmid made a statement that the Twin Falls standard was the same as a national standard. However, there was no discussion whatsoever about what Schmid thought the national standard was, just a generic, even amorphous, statement about some unclear, unidentified national standard.

This begs the question, how could Dr. Scoma make the determination that there was no difference between the Twin Falls standard and the national standard on his own without any knowledge of 1) what the actual Twin Falls standard of care was, and 2) what Dr. Schmid understood the national standard of care was? Wickel would have the Court assume that Dr. Schmid and Dr. Scoma had the same understanding about what the national standard of care was despite never having had a specific discussion on the subject. Without coming to an understanding about what the other understood the national standard of care was, Dr. Schmid's statement to Dr. Scoma

that the Twin Falls standard was the same as the national standard communicated nothing meaningful to Scoma. While Dr. Scoma and Dr. Schmid may have had such a discussion, there is no evidence in the record evidencing that such in fact occurred.

In summary, the problem with Dr. Scoma's affidavit is described perfectly by this Court's statement in *McDaniel v. Inland Northwest Renal Care Group*, 144 Idaho 219, 233 (2007): "Conclusory statements that an expert is familiar with the local standard because he is familiar with the national standard are insufficient to meet the requirements of Idaho Code § 6-1013."

III. CONCLUSION

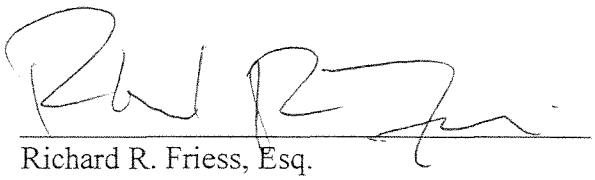
Wickel failed to show that there was an absence of other similarly situated health care providers in the local community. Thus, the District Court erred in holding that the local standard of care for general surgeons in Idaho Falls in January 2010 was indeterminable with respect to the use of the PPH device. Wickel also failed to establish through an expert adequately familiar with the applicable standard of care that Chamberlain breached the local standard of care regarding the additional alleged breaches. Consequently, the trial court did not err in dismissing those claims.

The District Court should have considered Wickel's *Motion for Reconsideration* as a Rule 59(e) motion and made its ruling based upon the record at the time the *Final Judgment* was entered. It erred when it failed to do so and considered the *Supplemental Affidavit of Dr. Scoma*. Further, the district court should have struck Dr. Scoma's *Supplemental Affidavit* because it contained speculative and conclusory statements regarding Dr. Schmid's familiarity with the national standard of care as the purported Idaho standard of care. This Court should also adopt the sham affidavit doctrine to protect the integrity of the judicial system and should order that the *Supplemental Affidavit of Dr. Scoma* be stricken.

Finally, Wickel has failed to establish that Dr. Scoma was familiar with the national standard of care in January, 2010. While Dr. Schmid was likely familiar with the Twin Falls standard of care, he never articulated that standard to Dr. Scoma. While Dr. Schmid told Dr. Scoma that the Twin Falls standard of care was the same as the national standard of care, there is no evidence demonstrating that the two doctors had a common understanding of what the national standard of care was or that Dr. Schmid ws really familiar with any alleged national standard. Wickel has therefore failed to establish that Chamberlain breached the standard of care through the required expert testimony. As a result, all of Wickel's claims against Chamberlain were properly dismissed and this Court should affirm the decision of the trial court.

DATED this 1 day of October, 2014.

THOMSEN HOLMAN WHEILER, PLLC

By: 

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