

4-30-2015

Strong v. Intermountain Anesthesia, P.A. Clerk's Record v. 4 Dckt. 42514

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Vol. 4 of 6

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

THOMAS L. STRONG AND BRIAN K. HAWK,

Plaintiff's/Appellants

ORIGINAL

vs.

INTERMOUNTAIN ANESTHESIA, P.A. AND
MARCUS E. MURPHY, M.D.

Defendant's/Respondent's

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Stundin/By Magistrate Judge

Lowell N. Hawkes
1322 E. Center
Pocatello, ID 83201

Attorney for Appellant

Kevin J. Scanian
1087 W. River Street, Suite 300
Boise, ID 83701

Attorney for Respondent

Filed this _____ day of _____, 20____.

Clerk

By _____

42514

FILED - ORIGINAL
APR 30 2015
Supreme Court _____ Court of Appeals
Entered on ATS by BSE

Shindwling
10/2 CE

BONNEVILLE COUNTY
2010 OCT 25 PM 4:40

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FAX FILED ON 10/25/2010

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**AFFIDAVIT OF JEFFREY R.
TOWNSEND IN SUPPORT OF
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FOR
FAILURE TO PROSECUTE, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Ada)

I, JEFFREY R. TOWNSEND, being first duly sworn upon oath, deposes and states:

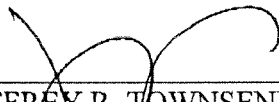
1. I am an attorney licensed to practice in the State of Idaho, and am an attorney of record for Defendant Intermountain Anesthesia, P.A. and Marcus R. Murphy, M.D. in the above-referenced matter.

2. I make this Affidavit on my personal knowledge and belief of the matters stated herein.

3. Attached hereto as Exhibit "A" is a true and correct copy of relevant portions of the Legislative Council's report of November 1975 on its study of medical malpractice.

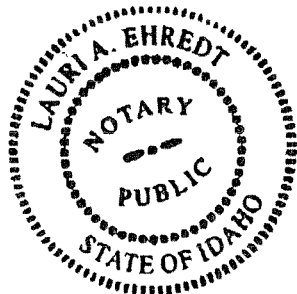
4. Attached hereto as Exhibit "B" is a true and correct copy of relevant portions of the transcript of the hearing on Defendants' Motion to Dismiss and Motion for Summary Judgment dated September 7, 2010.

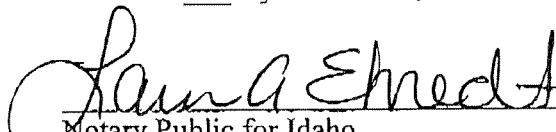
FURTHER YOUR AFFIANT SAYETH NAUGHT.



JEFFREY R. TOWNSEND

SUBSCRIBED and SWORN to before me this 25th day of October, 2010





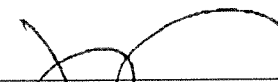
Notary Public for Idaho
Residing in Boise
My commission expires: 08/18/2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2010, I caused to be served a true copy of the foregoing **AFFIDAVIT OF JEFFREY R. TOWNSEND IN SUPPORT OF SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PROSECUTE, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**, by the method indicated below, and addressed to each of the following:

Lowell N. Hawkes
Ryan S. Lewis
Lowell N. Hawkes, Chartered
1322 East Center
Pocatello, ID 83201
Facsimile (208) 235-4200

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy



Kevin J. Scanlan
Jeffrey R. Townsend

Legislature of the State of Idaho]

[First Regular Session
[Forty-third Legislature

IN THE SENATE
SENATE CONCURRENT RESOLUTION NO. 117
BY STATE AFFAIRS COMMITTEE

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A CONCURRENT RESOLUTION

DIRECTING A LEGISLATIVE COUNCIL STUDY OF MEDICAL MALPRACTICE INSURANCE AND REQUIRING THE COMMITTEE TO REPORT TO THE SECOND REGULAR SESSION OF THE FORTY-THIRD IDAHO LEGISLATURE.

Be It Resolved by the Legislature of the State of Idaho:

WHEREAS, the cost and unavailability of medical malpractice insurance has resulted in hardships to the medical profession and health care providers; and

WHEREAS, the cost of medical malpractice insurance is passed on to the public in the form of fees and hospital costs; and

WHEREAS, unavailability of medical malpractice insurance could result in a reduction of medical service available to the public.

NOW, THEREFORE, BE IT RESOLVED by the First Regular Session of the Forty-third Idaho Legislature, the Senate and the House of Representatives concurring therein, that the Legislative Council is hereby authorized and directed to appoint a committee of five members to undertake and complete a study of legislative solutions to the problems inherent in medical malpractice insurance in Idaho and report to the Second Regular Session of the Forty-third Idaho Legislature its findings, together with proposed legislation if necessary.

BE IT FURTHER RESOLVED that the chairman of the House Business Committee and the chairman of the Senate Commerce and Labor Committee shall serve on the committee thus created, and shall jointly recommend to the Legislative Council names to fill the remaining membership of the committee.

SCR117



November - 23

Legislative Council Committee
on
Medical Malpractice Insurance
Statehouse - Room 420
November 13, 1975

MINUTES

The chairman, Senator Vern Bransley, called the meeting to order at 10:05 a.m. Committee members present were Senators Saxvik and Klein, and Representatives Kraus and Twillegar. Advisory members present were Senator Mitchell and Representatives Fitz, Emery, Kannevick, Hammond and Gines. Representative Andersen was also present. In addition to those testifying before the committee, the following people were in attendance: R.C. Fields, attorney, Idaho Hospital Assn.; John Bengston, attorney, Idaho State Bar; L. H. Coeho, attorney, Idaho State Bar; Ronald L. Kull, Executive Director, Idaho State Bar; John C. Kepworth, attorney, Idaho State Bar; Robert B. Montgomery, M.D., Idaho Medical Association; Al Kuykendall, M.D.; James H. Hawley, M.D.; Roy J. Ellsworth, M.D., Idaho Medical Association; Donald R. Bjornson, M.D.; Idaho Medical Association; Paul S. Street, attorney; Armand L. Bird, Idaho Medical Association; Don W. Sower, Idaho Medical Association; Sidney Elliott; and Rudy Barchas, Deputy Attorney General. Staff members present were Van Hoff and Willis.

David Vaughan, Deputy Director of the Department of Insurance, reviewed the closed and open claim information accumulated by the department indicating the amounts paid by insurers for medical malpractice claims. As closely as possible, claims expense, including attorneys fees, were broken out of the figures. Copies of those figures are on file in the Legislative Council office. A question and answer session followed.

Bob Bushnell, General Counsel of the Department of Health and Welfare, reported on the status of the court case involving the constitutionality of S.B. 1186, which limited the maximum liability of doctors in malpractice cases. The decision of the district court ruling the act unconstitutional has been appealed to the Supreme Court.

Dr. B. L. Kreilkamp, President of the Idaho Medical Association, submitted a statement of the position of the association, citing continued increases in premium rates and the need for additional attention to the problem. He reviewed what was taking place, particularly with respect to peer review and provision for disabled physicians. Representative Fitz asked about the compulsory medical malpractice insurance required in S. B. 1186. Dr. Kreilkamp said that he supported the legislation, and noted that the Board of Medicine had by regulation provided for those in an "inactive" status. The inactive license would not permit the licensee to practice medicine. The doctor also pointed out that the board was not privy to disciplinary action taken by local hospitals toward misconduct by doctors.

November - 24.

Dr. Tom McDevitt, Pocatello, noted the severe increase in premiums over the last few years, and spoke of the undesirability of passing these increased costs on to the patients. He wanted to go uninsured and substitute bonding or savings. This is impossible under current law. He didn't believe there was a real crisis, and supported the right of patients to sue for whatever negligence was involved in the actions of a doctor. Dr. McDevitt recommended a change in the statute of limitations and the repeal of compulsory insurance.

John D. Hutchison, representing the Idaho Hospital Association, stated that hospitals required insurance, and that this insurance covered nurses. He estimated the cost per bed, per day, of such insurance at between two and seven dollars, depending on the hospital. This cost must be considered in considering legislative proposals. He also said that legislation would be required before hospitals could disclose review information to the board of medicine for the purpose of screening doctors. He cited legislative proposals out of Indiana, Utah and Oregon as options to be considered.

Armand L. Bird, executive secretary of the Idaho Board of Medicine, explained the conduct of the board in disciplinary actions and mandatory insurance problems. He said that there are currently 229 "inactive" licenses through the emergency rule procedure. Bird also cited three instances where the malpractice crisis had resulted in retirement from medicine.

Larry Duff, representing the Idaho Trial Lawyers Association, presented the position of that group. Appendix A to these minutes contains that statement. The committee recessed for lunch at 11:52 a.m., and reconvened at 1:39 p.m.

Edward A. Draper, Bonner-Boundary District Medical Society, said that more than three doctors had retired from practice in whole or in part because of the malpractice crisis. This did not include the number who chose not to come to Idaho because of the unfavorable insurance climate. Even if legislative goals are achieved in the next session, a grim period follows before it will get better. He himself retired from the practice in June. Primary complaints were registered against the mandatory insurance requirements and the "claims made" policies now issued.

Gene Thomas, attorney for the Idaho Medical Association, cited the need to make insurance available at a reasonable cost. There is much law on the books now which provides for policing and regulation. The association is within months of setting up a captive insurance company to provide a measure of self insurance through a company owned by the association and hospitals. He also reviewed the current status of the suit on S.B. 1186. Thomas then presented the committee with rough drafts of four pieces of legislation tentatively recommended by the association. They are attached to these minutes as Appendix B, and provide bills on: 1. Res Ipsa Loquitur; 2. Early notice of claims; 3. Removal of the ad damnum clause from complaints; and 4. Pre litigation screening of claims.

The association is also considering legislation on incremental payments as losses occur, rather than a lump sum judgment, and readopting portions of

November - 25

S.B. 1186 which are not controversial. A question and answer session followed.

Dave Vaughan presented the committee with a summary of legislation enacted by other states, and, among other things, pointed out that Idaho was not well enough populated to provide an adequate rate base for predicting losses. This will hinder a reciprocal insurance company composed of doctors and hospitals.

The committee began discussing the direction to be taken under the terms of the resolution creating it. The chairman ruled without objection that advisors may fully participate in the decisions of the committee. He recommended that the committee address those legislative matters which could be handled immediately, and defer the balance until the first week of the session.

Following a discussion, there was general consensus that the mandatory insurance provisions in S.B. 1186 should be repealed.

Representative Kennevik cited difficult problems with the claims made policies currently being written. He said that if a reciprocal insurance company cannot be established, perhaps a workmen's compensation approach should be considered.

Senator Brassey said that the final report to the council will be that the committee has met and will meet again early in the session to consider the legislation submitted at such a late date that earlier study was impossible.

Representative Kennevik moved, seconded by Representative Kraus, that the committee adjourn and that the staff be instructed to prepare legislation deleting mandatory medical malpractice insurance from the law. The motion passed unanimously and the committee adjourned at 4:31 p.m.

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APPENDIX B, DRAFT #1

11/10/75
(TITLE TO BE PROVIDED)

TITLE _____

BILL NO. _____

Be it enacted by the legislature of the state of Idaho:

Section 1. Findings, Purpose and Definitions.

(to be drafted)

Section 2. In any action for damages due to injury or death of any person, brought against any licensed physician and surgeon or against any licensed acute care hospital* on account of alleged errors, omissions, negligence or other wrongful acts or omissions in the provision of hospital, medical or any other kind of health care, the plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that, as respects such an action against a

*This may be expanded to include such additional providers of health care as professional service corporations made up of physicians or dentists, physicians' assistants, nurse practitioners, dentists, registered nurses, nurse anesthetists, physician therapists, licensed practitioners, etc. and persons vicariously liable for their negligence.

November - 37

physician and surgeon, such defendant then and there negligently failed to meet the standard of medical practice of the community in which such care allegedly was or should have been provided, or, as respects such an action against a hospital, that it then and there negligently failed to meet the standard of acute care hospital practice of the community in which such care allegedly was or should have been provided, and in either case that such failure proximately caused the damages complained of.

Section 3. The applicable standard of practice, the defendant's failure to meet said standard and the causal relationship of such failure to the injury or health condition complained of must be established by such a plaintiff by direct testimony of one or more knowledgeable and competent expert witnesses. Such testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness; (b) that the said expert opinion can be testified to with reasonable medical certainty; and (c) that such witness possesses professional knowledge and expertise coupled with actual knowledge respecting the community and the technical matters to which the question is addressed.

November - 38

Section 4. The relevant standard of practice in any such action shall be the standard in the particular geographical area ordinarily served by the licensed general hospital at or nearest to which the hospital, medical or health care in question allegedly was or should have been delivered, as such standard existed on the date of the alleged provision or failure to provide the disputed care, which time shall not be extended by reason of a continuing course of care, by a delay in discovery or awareness of the claim or by any other consideration; provided, if the claim is against a hospital or physician and surgeon who at the pertinent date was the sole hospital or sole such practitioner in the particular community where the negligence allegedly occurred, then proof of the standard of care in such matters in similar Idaho communities of comparable size at said time shall also be admissible evidence to prove the standard of care in the case on trial.

November - 44

APPENDIX B, DRAFT #4

11/10/75

TITLE TO BE PROVIDED

TITLE

BILL NO.

Be it enacted by the legislature of the state of Idaho:

Section 1. Findings, Purpose and Definitions. (to be drafted)

Section 2. The Idaho State Board of Medicine, in alleged malpractice cases involving claims for damages against physicians and surgeons practicing in the State of Idaho and

in such cases against licensed acute care general hospitals operating in the State of Idaho, are directed to cooperate in providing a hearing panel in the nature of a special civil grand jury and procedure for pre-litigation consideration of

*An appropriate commission representative of Idaho acute care hospitals, appointed by the Governor from nominees submitted by the Idaho Hospital Association to be provided for in final draft of legislation.

**This may be expanded to include such additional providers of health care as professional service corporations made up of physicians or dentists, physicians' assistants, nurse practitioners, dentists, registered nurses, nurse anesthetists, physician therapists, licensed practitioners, etc. and persons vicariously liable for their negligence.

November 15

bodily injury and wrongful death claims for damages arising out of alleged negligence in the provision of hospital or medical care in the State of Idaho, which proceedings shall be voluntary and non-binding, but nonetheless compulsory as a condition precedent to suit. Programs developed and maintained under the authority of this Act shall at all times be confidential, privileged proceedings immune from civil process. Formal rules of evidence shall not apply and such proceedings shall be expeditious and informal. The Board of Medicine and said

shall jointly

~~hospital authority~~ appoint an appropriate panel or panels to accept and hear complaints of such negligence resulting in damages, made by or on behalf of any patient who is an alleged victim of such negligence. Said panels, in cases of claims against physicians, shall include two persons who are licensed to practice medicine in the State of Idaho. In cases involving claims against hospitals, at least one member shall be a then serving administrator of a licensed acute care general hospital in the State of Idaho, in which cases there shall be only one physician member of such panel. One additional member of each such panel shall be appointed by the Commissioners of the Idaho State Bar in all such cases, which person shall be a resident lawyer licensed to practice law in the State of Idaho, and shall

Appendix L

MEDICAL MALPRACTICE

Summary of Report

The Legislature directed the Legislative Council to undertake and complete a study of legislative solutions to the problems inherent in medical malpractice. Senate Concurrent Resolution No. 117 directed that a report be made to the Second Regular Session of the Forty-third Idaho Legislature with legislation if necessary.

As soon as the committee was formed, various interested groups were contacted to provide resource information. Although representatives from many groups offered testimony, information and opinion, the results were inconclusive. Particularly nettlesome, however, was the inability to get insurers to say that one piece of legislation or another would result in increased availability or reduced cost.

The committee received notice that the medical profession was in the process of drafting legislation which they felt would provide solutions to the problem. However, the committee recommended that those bills, together with any other legislation which would later come up, be taken directly to the appropriate committees of the House and Senate for consideration.

~~In its final report, the committee did not recommend or endorse any legislation. However, a number of measures relating to medical malpractice insurance were introduced during the 1976 session, and four of these were passed. In brief, these provide for a change in the expiration date to January 1, 1978, for any joint underwriting association created because of unavailability of malpractice insurance; mandatory statistical reporting of a number of particulars for malpractice suits; mandatory use of a pre-litigation screening committee before filing a malpractice suit; and provisions concerning the nature and use of expert testimony in malpractice suits.~~

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SEPTEMBER 7, 2010

THE COURT: We will be on the record in Case No. CV-06-7149, Strong versus Intermountain Anesthesia. Present on behalf of the plaintiff is Lowell Hawkes, in the courtroom. Present by telephone on behalf of the defendants is Kevin Scanlan.

This is the time set for hearing with regard to the defendants' motion to dismiss for failure to prosecute or, in the alternative, motion for summary judgment.

I have received considerable filings from the defendant in that regard. I have not yet received anything from the plaintiff.

MR. HAWKES: That's true, Your Honor. My understanding is this was a scheduling conference today. The motion to lift the stay was, in the alternative, with the other. Kevin had filed --

THE COURT: Well, I have signed an order lifting the stay.

MR. HAWKES: Yes, without a hearing. The practical problem we have here is that this case was in bankruptcy, and so the case is an asset of the bankruptcy, and I have never been able to get the -- either the trustee or Craig Jorgensen, the attorney in

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bankruptcy, to tell me whether the trustee released this case as an asset. So I'm not even totally comfortable being here asserting some claim over this case when it was.

Now Kevin and I have talked about it candidly, and we both have been a little frustrated trying to get information, but I do not have anything that tells me the trustee released this case without claim, and so I had understood that we were here to have a status conference and to schedule it, and then hopefully we can figure that out and see if I even have authority to act.

THE COURT: Mr. Scanlan?

MR. SCANLAN: Well, Judge, we filed the motion to lift the stay and had an order granted to that effect. And contemporaneously with that, we filed our motion to dismiss and motion for summary judgment, which has been noticed up to be heard today.

As far as I can tell, it's ripe. And, you know, ultimately, this is a case that has wallowed for over four years since it was originally filed. And if at this point Mr. Hawkes doesn't have -- if Mr. Hawkes doesn't have any basis or authority to proceed in the case, I think that it's ripe to be dismissed.

And if -- I think that, you know, we have

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submitted the documents relative to our position on the motion to dismiss, as well as, if we needed to get to it, the motion for summary judgment, but I don't know that I have anything further to add to the filings that have been submitted to the Court.

THE COURT: All right. Well, I had anticipated we were addressing the summary judgment dismissal issues today.

I have reviewed the submissions of Mr. Scanlan, and it appears to me, from the PACER report, or the PACER printout, that this matter was discharged and closed by the Bankruptcy Court on May 15, 2008. The trustee was dismissed or discharged, so I don't know what there is left to -- I mean, it's been two years that the bankruptcy case has been over.

MR. HAWKES: I don't have any problem with that, Your Honor. This is a matter of Federal law. This case became an asset, and I don't know whether it was disclosed. If it was disclosed, then the trustee --

THE COURT: Well, you asked for the matter to be stayed so that the --

MR. HAWKES: No, I didn't ask. That's Federal law. It's stayed automatically. I probably gave the Court notice of that, but --

THE COURT: Well, you gave me an affidavit.

MR. HAWKES: Yeah, advising that, because there's not a process whereby something is sent out automatically.

THE COURT: Yeah, I understand that.

MR. HAWKES: And I don't have any beef with Craig Jorgensen, but even including face-to-face efforts, I've said, I need to know, Craig, was this case disclosed as an asset? Because it is an asset, whether disclosed or not.

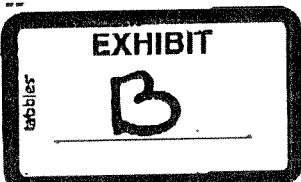
And the way I read the motion, or what my understanding was, is we were simply going to have some scheduling here today. I don't think just because a case is dismissed that I suddenly have authority and ownership of this case.

I've seen people -- certainly read cases where people go to jail for not disclosing an asset and treating it as their own after a bankruptcy. And that's my concern here. I don't want to get in that box.

THE COURT: Well, the trustee didn't conduct any supplemental proceeding.

MR. HAWKES: No. It's my understanding it got dismissed, but if they don't disclose the case as an asset on the schedules, then somebody could be in

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1 serious trouble down the road if somebody pops up and
 2 says, hey, here's an asset that we didn't get to deal
 3 with in the bankruptcy. You go to jail.
 4 THE COURT: I have now lifted the stay.
 5 Whether your client's in trouble or not, I don't know,
 6 but we're going to proceed.
 7 MR. HAWKES: That's your call.
 8 THE COURT: Yeah, it's my call.
 9 MR. HAWKES: It's the Federal overlay that I'm
 10 concerned about.
 11 THE COURT: And I'm sure Jim Pappas will let me
 12 know if I'm out of line, but that's my order.
 13 So where do we go from there?
 14 MR. HAWKES: Well, if that's where it is, I
 15 would request a reasonable amount of time, if I've
 16 got to deal with a summary judgment, to get
 17 authorized, so that the Court, this Court doesn't put
 18 me in jeopardy of asserting ownership over an asset
 19 that I'm making a record here today I am not asserting
 20 ownership over, in the absence of clear authority
 21 from the Court that this claim -- that any claim to
 22 this case has been released. Give me some reasonable
 23 time to --
 24 THE COURT: How much do you need?
 25 MR. HAWKES: Give me 60 days.

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1 with nothing occurring as far as anyone either
 2 involving the bankruptcy trustee, getting -- making an
 3 effort to reopen the case or doing anything of that
 4 nature, at this point, we have now got a case that's
 5 more than four years old, and it's two years post the
 6 closure of the bankruptcy. We've got witnesses who,
 7 one, we've lost track of and, two, have moved out of
 8 state outside of our jurisdiction.
 9 We think at this point that it's appropriate
 10 for the Court to evaluate this case and make a
 11 determination on the failure to prosecute.
 12 THE COURT: All right. Well, I'm going to
 13 reset the dismissal summary judgment issue for the 1st
 14 of November at 9:30.
 15 I'll give you that much time, Mr. Hawkes, to
 16 get a response. That's 60 days roughly.
 17 MR. HAWKES: Okay.
 18 THE COURT: And we'll -- this has been lying
 19 dormant for a long time. Sixty days isn't going to
 20 hurt anything. I'll give you 60 days to figure out
 21 where you are. We'll hear this thing at that time,
 22 9:30, November 1st.
 23 All right?
 24 MR. SCANLAN: Thank you, Judge.
 25 THE COURT: All right. Thank you.

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1 THE COURT: Do you have any problem with that,
 2 Mr. Scanlan?
 3 MR. SCANLAN: Well, Your Honor, I actually -- I
 4 think that at this point in time that the Court should
 5 be in a position to actually make the determination on
 6 the --
 7 THE COURT: I understand that. Mr. Hawkes is
 8 saying that he feels like he is compromised because he
 9 doesn't feel like, without confirmation that this
 10 claim itself has been freed up by the Bankruptcy
 11 Court, that he has authority to proceed, even though I
 12 have lifted the stay.
 13 MR. SCANLAN: Well, I think that the -- I think
 14 that the materials that we submitted demonstrates that
 15 the asset wasn't disclosed in the bankruptcy, and that
 16 for that reason judicial estoppel should cause it to
 17 be dismissed.
 18 But more significantly, we have had more than
 19 two years, and I have made efforts for approximately
 20 a year now to take steps to try to get this thing
 21 moved along, which really shouldn't be my burden; it
 22 should be the burden of Mr. Hawkes, Mr. Strong's
 23 attorney.
 24 By contacting Lowell Hawkes, apprising him of
 25 my concerns and trying to push this thing forward,

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1 MR. HAWKES: Thank you, Your Honor.
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 3 (Proceedings Concluded)
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BONNEVILLE COUNTY
OCT 25 PM 4:22

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE TO
MOTION TO DISMISS FOR
FAILURE TO PROSECUTE, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

COME NOW Defendants Intermountain Anesthesia, P.A. ("Intermountain Anesthesia") and Marcus E. Murphy, M.D. ("Dr. Murphy"), by and through their counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., and hereby respectfully submit this Reply to Plaintiffs' Response to Defendants' Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment.

In this motion Defendants seek the following orders from this Court:

- 1) That Plaintiffs' lawsuit, including the claims of both Brian Hawk and Thomas Strong, be dismissed in its entirety for failure to prosecute;

- 2) That Defendant Intermountain Anesthesia be awarded summary judgment because Plaintiffs' Complaint was not timely filed as to it; and
- 3) That all Defendants be granted summary judgment with regard to the claims of Brian Hawk based on the doctrine of judicial estoppel.

In opposition to Defendants' Motion, Plaintiffs fail to identify any disputed material fact, and offer no legal argument or authority in opposition to Defendants' Motion to Dismiss for Failure to Prosecute, or to Defendants' Motion for Summary Judgment against Brian Hawk based on judicial estoppel¹. Accordingly, Defendants respectfully request that Plaintiffs' lawsuit be dismissed in its entirety pursuant to Idaho Code § 41(b) for failure to prosecute, and/or that the claim of Brian Hawk be dismissed based on the doctrine of judicial estoppel. With regard to Defendants' Motion for Summary Judgment based on Plaintiffs' failure to timely file their lawsuit against Intermountain Anesthesia, Defendants assert that Idaho Code § 6-1001 does not apply to claims against Intermountain Anesthesia, and therefore the tolling provision of § 6-1005 is also inapplicable to such claims.

FAILURE TO PROSECUTE

It is appropriate to dismiss a lawsuit for failure to prosecute where the plaintiff delays prosecution, without justification, and the defendant is prejudiced thereby. As set forth in Defendants' moving papers, an unexplained delay of 16 months justifies dismissal of a plaintiff's lawsuit. *Day v. CIBA Geigy Corp.*, 115 Idaho 1015, 712 P.2d 611 (1985).

In the instant matter the following facts are undisputed:

- 1) The prosecution of Plaintiffs' action was stayed pending resolution of Brian Hawk's bankruptcy petition;

¹ Plaintiffs' lengthy fact rendition (significant portions of which are disputed by defendants) and the various affidavits submitted are not addressed herein as they are wholly irrelevant to the motions pending before the Court and appear to simply be an effort by plaintiffs to distract the Court from the issues that have been presented in defendants' motion.

- 2) The bankruptcy petition was dismissed on May 15, 2008;
- 3) The Plaintiffs did nothing to prosecute their claims for more than 24 months after the bankruptcy proceeding was dismissed, despite repeated inquiries by Defendants' counsel regarding Plaintiffs' intentions;
- 4) Witnesses Waid and Schmalz are no longer with Intermountain Anesthesia; Nurse anesthetist Waid's whereabouts are unknown and Nurse Anesthetist Schmalz has moved out of state; and
- 5) Witness Robert Hague passed away.

Plaintiffs have delayed prosecution of their claims for over 2 years after resolution of Hawk's bankruptcy. Plaintiffs have offered no justification for this lengthy and unnecessary delay. The delay has prejudiced Defendants' ability to defend against Plaintiffs' claims: it is now over 6 years since the incidents occurred; it has been over 2 years since the bankruptcy was resolved; memories are obviously stale; Mary Waid's whereabouts are unknown; Christian Schmalz is beyond the jurisdiction of this Court; and Robert Hague is deceased. All of these prejudices are a direct result of Plaintiffs' delay, and could have been avoided had Plaintiffs diligently prosecuted their claims.

Pursuant to Rule § 41(b) of the Idaho Rules of Civil Procedure, and the Idaho Supreme Court's decisions in *Day v. CIBA Geigy Corp.*, 115 Idaho 1015, 712 P.2d 611 (1985), and *Roberts v. Verner*, 116 Idaho 575, 777 P.2d 1248 (1989), Defendants respectfully request that Plaintiffs' lawsuit be dismissed in its entirety.

**FAILURE TO TIMELY FILE LAWSUIT
AGAINST INTERMOUNTAIN ANESTHESIA**

It is undisputed that the statute of limitations for filing a medical malpractice claim is two years, and that the statute began to run on Plaintiffs' claims from the date of their procedures, June 25, 2004. Plaintiffs did not file their claim against Intermountain Anesthesia until

December 20, 2006. Plaintiffs' lawsuit was untimely filed, as to Intermountain Anesthesia, unless the statute of limitations for the plaintiff's claims against Intermountain Anesthesia was tolled pursuant to Idaho Code § 6-1005.

The tolling provision of Section 6-1005 does not apply to Plaintiffs' claims against Intermountain Anesthesia because Intermountain Anesthesia is not a physician, surgeon, or an acute care general hospital. Pursuant to its express terms, Idaho Code § 6-1001 applies only to physicians, surgeons, or acute care general hospitals. It does not apply to professional corporations, nurses, nurse practitioners, certified registered nurse anesthetists, urgent care facilities, nursing homes, intermediate care facilities, or any other individual or medical-legal entity.

The rules of statutory interpretation are well settled in Idaho.

Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). Construction of a statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004).
State v. Locke 239 P.3d 34, 35 (Ct. App. 2010)

In this case, the language of Idaho Code § 6-1001 is plain and unambiguous. Therefore, there is no occasion to resort to statutory interpretation, and the statute must be given its plain,

obvious, and rational meaning. Pursuant to § 6-1001 prelitigation hearings are only required for malpractice claims against “physicians and surgeons . . . or against licensed acute care general hospitals . . .” By its terms, § 6-1001 does not apply to professional corporations, or to medical facilities other than acute care general hospitals. There is no occasion for this court to engage in statutory interpretation to enlarge the scope of § 6-1001 beyond its expressed terms.

Should this Court engage in statutory interpretation of § 6-1001, however, it has the duty to ascertain the legislative intent and give effect to that intent. Plaintiffs offer no evidence that the legislature intended to include professional corporations, medical facilities or practices other than acute care general hospitals within the parameters of § 6-1001. To the contrary, the fact that the legislature specifically listed “acute care general hospitals” to the exclusion of other medical facilities where physicians and/or surgeons practice, is evidence of the legislature’s intent to limit the scope of required prelitigation hearings to only claims against physicians, surgeons and acute care general hospitals. This interpretation is further support by statutory language of § 6-1012.

Section 6-1012 states, in relevant part, the following:

In any case, claim or action for damages due to injury or to death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home or any person vicariously liable for the negligence of them or any of them, on account of the provisions of or failure to provide health care or on account of any matter incidental or related thereto, such Plaintiff or claimant must . . . prove . . . that such Defendant then and there negligently failed to meet the applicable standard of health care practice . . .

The language of § 6-1012 clearly shows that the legislature intended to include all health care providers within its scope. Had the legislature intended to include all health care providers and health care facilities within the scope of § 6-1001, it could have used language and terms similar to that of § 6-1012. The fact that the scope of § 6-1012 is so broad, and that the scope of

§ 6-1001 is so narrow, demonstrates the legislature specifically intended to limit the scope of § 6-1001 to physicians, surgeons, and acute care general hospitals to the exclusion of all other health care practitioners and health care facilities.

Furthermore, the legislature selective listings of covered individuals and entities in § 6-1001 and § 6-1012 indicates that the legislature did not intend to include all medical malpractice claims within the scope of § 6-1001. Idaho's Medical Malpractice Act (Idaho State Code Title 6, Chpt. 10) arose out of concern about the cost and availability of medical malpractice insurance. In 1975 the Idaho Legislature directed the Legislative Council to undertake and complete a study of the legislative solutions to the problems inherent in medical malpractice. As part of the study the medical association submitted some specific bills; including two bills which were ultimately amended to become Idaho Code §§ 6001 and 6012. (See Affidavit of Jeffrey R. Townsend ("Townsend Aff." ¶ 3).

The bill regarding prelitigation hearings provided, in relevant part:

The Idaho State Board of Medicine, in alleged malpractice cases involving claims for damages against physicians and surgeons practicing in the State of Idaho and _____* in such cases against licensed acute care general hospitals operating in the State of Idaho, ** are directed to cooperate in providing a hearing panel in the nature of a special civil grand jury and procedure for prelitigation consideration of bodily injury and wrongful death claims for damages arising out of alleged negligence of the provision of hospital or medical care in the State of Idaho . . .

The note tied to the double astrix ("**") reads as follows:

This may be expanded to include such additional providers of health care as professional service corporations made up of physicians or dentists, physician's assistants, nurse practitioners, dentists, registered nurses, nurse anesthetists, physician therapists, licensed practitioners, etc. and persons vicariously liable for their negligence.

The Idaho Legislature passed § 6-1001 in 1976 without expanding the scope of the statute to include professional service corporations, or other medical care providers other than

physicians, surgeons and acute care general hospitals. Conversely, the bill regarding the requirement of proof of negligence by expert testimony also was drafted to include only claims against "any licensed physician and surgeon or against any licensed acute care hospital* . . ." The astrix included language to expand the scope to other medical care providers, just as did the bill regarding prelitigation hearing panels. Idaho Code § 6-1012, however, was enacted with the broader language.

In enacting the medical malpractice act, the Idaho legislature was obviously cognizant of the option of broadening the scope of § 6-1001 and 6-1012 to include professional corporations and additional medical providers, as well as those who may be vicariously liable for their negligence. The legislature chose to limit the scope of § 6-1001 to physicians, surgeons and acute care general hospitals, to the exclusion of all others – including "professional service corporations made up of physicians or dentists, physician's assistants, nurse practitioners, dentists, registered nurses, nurse anesthetists, physician therapists, licensed practitioners, etc. and persons vicariously liable for their negligence." The legislature did not intend for the prelitigation hearing requirements of § 6-1001 to apply to claims against professional corporations, nurse anesthetists, or those vicariously responsible for their negligence. Accordingly, plaintiffs' claims against Intermountain Anesthesia, and any claims based on the alleged negligence of the nurse anesthetists, are not subject to § 6-1001.

The tolling provision of § 6-1005 applies only to claims subject to the prelitigation hearing requirement of § 6-1001; claims against physicians, surgeons, and acute care medical hospitals. The tolling provision of § 6-1005 does not apply to Plaintiffs' claims against Intermountain Anesthesia, or to the allegations against the nurse anesthetists, because such claims are not subject to the prelitigation hearing requirements of § 6-1001. Plaintiffs did not

file their claims against Intermountain Anesthesia, or the nurse anesthetists within the two year statute of limitations. Accordingly, Intermountain Anesthesia is entitled to judgment as a matter of law.

Plaintiffs are attempting to bootstrap allegations of negligence against the nurse anesthetists to Dr. Murphy for purposes of avoiding the statute of limitations. As set forth in plaintiffs' opposition to this motion, their claims are premised principally on the alleged negligence of the nurse anesthetists, that CRNA Christian Schmalz allegedly turned up the volume of Propofol and left the operating table during Mr. Strong's procedure, and that CRNA Jeff Taylor did not give Brian Hawk enough medication during his procedure to control his pain. Plaintiffs' claims for injuries arising out of the alleged negligence of the nurse anesthetists are not subject to § 6-1001. Plaintiffs are attempting an end run around the two year statute of limitations for claims against nurse anesthetists by naming Intermountain Anesthesia as a defendant. The tolling provision of § 6-1005 was not intended to be a loophole for plaintiffs to avoid compliance with the statute of limitations.

Interpreting the term "physician" to include any medical facility where a physician or surgeon is employed is inconsistent with the language of § 6-1001. By way of example, the fact that registered nurses and nursing homes are specifically listed in § 6-1012, yet left out of § 6-1001, indicates that the legislature did not intend to impose the prelitigation hearing requirements of § 6-1001 to a claim of medical malpractice against a registered nurse in a nursing home. If "physician" is defined as any facility that employs a physician, however, then the claim against the nurse and nursing home would be subject to § 6-1001; a result not intended by the legislature.

Idaho Code § 6-1001 was not intended to apply to professional corporations, or any medical provider other than physicians, surgeons and acute care general hospitals. The broad

expansion of § 6-1001 proposed by plaintiff was specifically considered, and rejected, by the Idaho Legislature. Expanding the scope of § 6-1001 to allow a plaintiff to maintain a claim against a professional corporation based on the alleged negligence of nurse anesthetists, was not intended by the legislature, and would permit the plaintiff to avoid the applicable statute of limitations for claims against nurse anesthetists. In this case, Plaintiffs' claims against Intermountain Anesthesia were untimely, and should be barred by the two year statute of limitation.

JUDICIAL ESTOPPEL

Plaintiffs fail to offer any legal argument or authority in opposition to Defendants' Motion to dismiss Brian Hawk's claim based on the doctrine of judicial estoppel. Indeed, Plaintiffs do not even address the issue in their opposition brief.

Plaintiffs' opposition fails to address the very issues for which this court continued the hearing on this motion. When this motion initially came up for hearing on September 7, 2010, plaintiffs' counsel acknowledged that Brian Hawk's civil claim is an asset subject to the bankruptcy proceedings, but stated he did not know if the civil matter had been disclosed in the bankruptcy proceeding or whether the bankruptcy trustee had released the civil claim as an asset. Plaintiffs' attorney requested 60 days to discovery whether there was any claim to Brian Hawk's civil action. (Townsend Aff. ¶ 4). Plaintiffs' opposition fails to identify what steps, if any, plaintiffs' attorney took to resolve the questions raised during the prior hearing. The opposition offers no evidence that Brian Hawk disclosed his civil claim as an asset in the bankruptcy proceeding, or that the trustee released the claim as an asset prior to termination of the bankruptcy proceedings.

The following facts remain undisputed:

1. Brian Hawk filed a request for a prelitigation hearing asserting a medical malpractice claim against Dr. Murphy on May 24, 2006, approximately 4½ months prior to filing a petition for bankruptcy on October 9, 2006.
2. He filed an amended property schedule on November 11, 2006.
3. He failed to identify his claims, or potential claims, against Dr. Murphy in the schedule of assets, or the amended schedule of assets.
4. He filed this civil action on December 20, 2006, approximately 2½ months after filing his bankruptcy petition.

In general, judicial estoppel precludes a party from gathering an advantage by taking one position in a legal proceeding, and then seeking a second advantage by taking an incompatible position in a second proceeding. *A&J Construction Co., Inc. v. Wood*, 141 Idaho 682, 116 P.3d 12 (2005). In the bankruptcy context, the doctrine of judicial estoppel precludes a Plaintiff from asserting a cause of action in a civil action if the Plaintiff knew of the claim during his bankruptcy proceedings and failed to identify the claim in a reorganization plan or to list the claim in his schedules or disclosure statements. *A&J Construction Co., Inc. v. Wood*, 141 Idaho 682, 116 P.3d 12 (2005). The duty to disclose all assets and potential assets continues after the initial filing, since a debtor is required to amend his or her financial statements if circumstances change, and judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset. *A&J Construction Co., Inc. v. Wood*, 141 Idaho 682, 116 P.3d 12 (2005).

It is undisputed that Brian Hawk knew of his potential, and actual, cause of action against Dr. Murphy and Intermountain Anesthesia during the pendency of this bankruptcy, and that he failed to identify the claim in his schedules or disclosure statements. Therefore, under the

doctrine of judicial estoppel, Brian Hawk's claims should be dismissed.

CONCLUSION

The facts set forth in Defendants' Motion are undisputed. Plaintiffs did not file their Complaint against Intermountain Anesthesia within two years of the incident and alleged injuries. Plaintiffs failed to prosecute their claims for over two years after the resolution of Brian Hawk's bankruptcy despite every right and obligation to do so. The delay has prejudiced Defendants' ability to defend against Plaintiffs' allegations. Brian Hawk was aware of his claim against Defendants during the pendency of his bankruptcy, yet failed to identify it in schedules or disclosure statements.

For the reasons set forth above, and as set forth in Defendants' moving papers, Defendants respectfully request that this Court order (1) that all claims against Intermountain

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2010, I caused to be served a true copy of the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS FOR FAILURE TO PROSECUTE, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**, by the method indicated below, and addressed to each of the following:

Lowell N. Hawkes
Ryan S. Lewis
Lowell N. Hawkes, Chartered
1322 East Center
Pocatello, ID 83201
Facsimile (208) 235-4200

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy

for Kevin J. Scanlan (ISS 7647)

80

10 OCT 29 2010

Lowell N. Hawkes (ISB #1852)
Ryan S. Lewis (ISB #6775)
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Telephone: (208) 235-1600
FAX: (208) 235-4200
Attorneys for Plaintiffs

**IN THE SEVENTH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO**
The Honorable Jon J. Shindurling

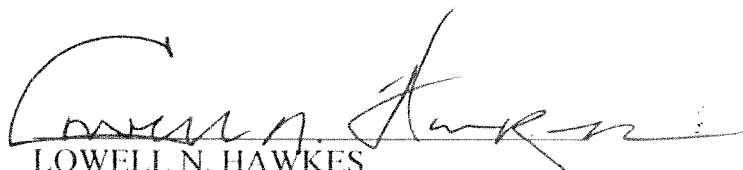
THOMAS L. STRONG and)
BRIAN K. HAWK,)
)
Plaintiffs,)
)
vs.)
)
INTERMOUNTAIN ANESTHESIA, P.A.)
AND MARCUS E. MURPHY, M.D.,)
)
Defendants.)

Case No. CV-06-7149

**NOTICE OF REOPENING OF
BANKRUPTCY and
AUTOMATIC STAY ORDER
(11 U.S.C. § 362)**

PLEASE TAKE NOTICE THAT pursuant to the Order of United States
Bankruptcy Judge Jim D. Pappas entered October 29, 2010 reopening the bankruptcy of
Brian Hawk the automatic stay provisions of 11 U.S.C. § 362 are in effect.

DATED this 29th day of October, 2010


LOWELL N. HAWKES

* * * Memory TX Result Report (Oct. 29. 2010 2:09PM) * * *

1) Lowell Hawkes
2)

Date/Time: Oct. 29. 2010 2:07PM

File No.	Mode	Destination	Pg(s)	Result	Page Not Sent
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Reason for error

- E. 1) Hang up or line fail
- E. 2) Busy
- E. 3) No answer
- E. 4) No facsimile connection
- E. 5) Exceeded max. E-mail size

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 Attorneys for Plaintiffs

**IN THE SEVENTH JUDICIAL DISTRICT COURT
 BONNEVILLE COUNTY, IDAHO**
 The Honorable Jan J. Shindlerling

THOMAS L. STRONG and
 BRIAN K. HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A.
 AND MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV-06-7149

**NOTICE OF REOPENING OF
 BANKRUPTCY and
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 (11 U.S.C. § 362)**

PLEASE TAKE NOTICE THAT pursuant to the Order of United States
 Bankruptcy Judge Jim D. Pappas entered October 29, 2010 reopening the bankruptcy of
 Brian Hawk the automatic stay provisions of 11 U.S.C. § 362 are in effect.

DATED this 29th day of October, 2010


 LOWELL N. HAWKES

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, et al,)
)
 Plaintiffs,)
)
 -vs.-)
)
 INTERMOUNTAIN ANESTHESIA, P.A.)
 et al,)
 Defendants.)
 _____)

Case No. CV-2006-7149

MINUTE ENTRY

10 NOV -3 17:49

7TH JUDICIAL DISTRICT OF IDAHO
BONNEVILLE COUNTY CLERK

On November 1, 2010, at 10:05 AM, a Motion for Summary Judgment came on for hearing before the Honorable Jon J. Shindurling, District Judge, sitting in open court at Idaho Falls, Idaho.


Ms. Nancy Marlow, Court Reporter, and Ms. Grace Walters, Deputy Court Clerk, were present. Mr. Lowell Hawkes appeared on behalf of the plaintiff. Mr. Kevin Scanlan appeared on behalf of the defendant.

The Court received a Notice of Bankruptcy and Notice of Stay filed by Lowell Hawkes dated October 29, 2010.

Mr. Scanlan voiced his views of the notice and stay.

The Court stayed this matter until further notice.

Court was thus adjourned.



JON J. SHINDURLING
District Judge

c: Lowell Hawkes
Kevin Scanlan

CLERK OF DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO

14 APR 11 PM 3:57

Richard E. Hall
ISB #1253; reh@dukescanlan.com
Kevin J. Scanlan
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**NOTICE OF HEARING RE:
DEFENDANTS' RENEWED
MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

[TIME CORRECTION ONLY]

PLEASE TAKE NOTICE, Defendants have set for hearing before this Court their RENEWED MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT. Said motion shall be heard on the 12th day of May, 2014 at 10:00 am before the Honorable Jon J. Shindurling.

**DEFENDANTS' RENEWED MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT [TIME CORRECTION] - 1**

671 .

DATED this 11th day of April, 2014.

DUKE SCANLAN & HALL, PLLC

By: Kevin J. Scanlan
Richard E. Hall—Of the Firm
Kevin J. Scanlan—Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of April, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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Kevin J. Scanlan
Kevin J. Scanlan

14 APR 14 AM 10:59

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Facsimile: (208) 342-3299

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**NOTICE OF CHANGE OF FIRM
NAME AND ADDRESS**

NOTICE IS HEREBY GIVEN that during the course of the stay of this matter, the law firm of Hall Farley Oberrecht & Blanton, P.A. dissolved and counsel of record for Defendants, Richard E. Hall and Kevin J. Scanlan, are now with the law firm of DUKE SCANLAN & HALL, PLLC. The address for Richard E. Hall and Kevin J. Scanlan has changed, and it is hereby requested that all pleadings, correspondence and other matters be served on said counsel

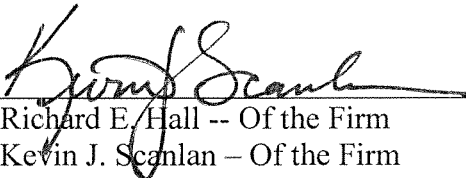
ORIGINAL 823

at the following:

DUKE SCANLAN & HALL
1087 W. River Street, Ste. 300 (83702)
Post Office Box 7387
Boise, Idaho 83707

DATED this 10 day of April, 2014.

DUKE SCANLAN & HALL, PLLC


By: 
Richard E. Hall -- Of the Firm
Kevin J. Scanlan -- Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of April, 2014, I caused to be served a true copy of the foregoing, by the method indicated below, and addressed to each of the following:

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Ryan S. Lewis
Lowell N. Hawkes, Chartered
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Facsimile (208) 235-4200

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DISTRICT COURT
NADIA DEANE DIVISION
BONNEVILLE COUNTY, IDAHO

14 APR 14 AM 10:59

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' RENEWED
MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

COME NOW Defendants Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D. (collectively "Defendants"), through their counsel of record, Duke Scanlan & Hall, PLLC, and submit the following memorandum of points and authorities in support of their Renewed Motion to Dismiss, or Alternatively, Motion for Summary Judgment.

**I.
INTRODUCTION**

Although Plaintiffs Thomas L. Strong and Brian K. Hawk (collectively "Plaintiffs") were successful in convincing this Court to stay this action after Mr. Hawk's bankruptcy proceedings

were reopened, Defendants continue to be entitled to dismissal of Plaintiffs' claims against them with prejudice for the reasons cited in their originally filed briefing. *See Memorandum in Support of Defendants' Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment* (June 26, 2010); *Reply Memorandum in Support of Defendants' Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment* (Oct. 4, 2010).

Mr. Hawk's claims should still be dismissed on the basis of judicial estoppel. Although Mr. Hawk placed this suit before the bankruptcy court after he was granted a discharge, the fact remains that this suit is not listed in the asset schedule upon which Mr. Hawk's chapter 7 discharge was based, nor was that asset schedule ever amended to reflect these claims. Accordingly, because this claim was not properly disclosed to the bankruptcy court by Mr. Hawk, he is now estopped from pursuing it before this Court.

Further, because the record before this Court still demonstrates a lack of any prosecution of this matter for a period of more than 12 months since Mr. Hawk's bankruptcy proceedings were again closed, as well as a failure to prosecute the reopened bankruptcy proceedings and the claims asserted in this matter by Mr. Strong that are unaffected by Mr. Hawk's bankruptcy, dismissal of this matter is warranted pursuant to Idaho Rules of Civil Procedure ("IRCP") 40(c) and 41(b). Dismissal pursuant to Rule 40(c) is warranted because Plaintiffs will be unable to demonstrate good cause for their failure to take reasonable steps in causing either Mr. Hawk's reopened bankruptcy proceedings or this action to be prosecuted in a similar fashion. Similarly, dismissal pursuant to Rule 41(b) is warranted because the record also demonstrates that Plaintiffs' lack of prosecution of claims has resulted in prejudice to the Defendants, including the inability to conduct any discovery concerning an alleged injury that happened nearly ten years ago, the death of a key witness who passed away before he could be deposed, and current

absence of several other key witnesses from this jurisdiction. This prejudice flows from Plaintiffs' inaction and provides ample basis for this matter to be dismissed in its entirety pursuant to Rule 41(b).

Finally, the claims against Intermountain Anesthesia should be dismissed on the basis of the applicable statute of limitations. Although this matter is thoroughly briefed in the June 26, 2010, and October 4, 2010, memoranda referenced above, Defendants have provided new authority showing that because the claims against Intermountain Anesthesia were not before the prelitigation screening panel and, thus, the statute of limitations applicable to those claims was not tolled by Idaho Code § 6-1005, Plaintiffs' claims against Intermountain Anesthesia were not timely and should be dismissed with prejudice.

II. FACTUAL AND PROCEDURAL HISTORY

This is an action for medical malpractice in which Plaintiffs Thomas L. Strong and Brian K. Hawk (collectively "Plaintiffs") generally allege negligence in the conduct of Defendants relative to anesthesia care provided to plaintiffs on June 25, 2004, when each plaintiff underwent a separate surgical implant procedure to place a neuron stimulator. The surgeries were performed by Catherine Linderman, M.D., at Eastern Idaho Regional Medical Center in Idaho Falls, Idaho. (Complaint and Jury Demand, ¶ 5.) The anesthesia was administered to plaintiffs by certified registered nurse anesthetists ("CRNA") Christian Schmalz and Mary Waid. On May 24, 2006, both Plaintiffs filed separate prelitigation screening requests against Defendant Murphy with the Idaho State Board of Medicine, pursuant to Idaho Code § 6-1001 et seq. (Affidavit of Kevin J. Scanlan in Support of Defendant Intermountain Anesthesia, P.A.'s Motion to Dismiss (hereinafter "First Scanlan Aff."), Exs. A, B). Defendant Intermountain Anesthesia was not named in the prelitigation screening panel requests. (*Id.*).

On November 10, 2006, the prelitigation screening panel hearings were conducted in the matter, and on November 20, 2006, the panel's advisory opinions on both matters were issued by the Idaho State Board of Medicine. (*Id.*, ¶¶ 5-7; Exs. C, D.) Thereafter, on December 20, 2006, plaintiffs jointly filed a complaint for medical malpractice in this Court, naming as defendants Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D. (*See* Complaint and Jury Demand). No lawsuit had been filed by plaintiffs against Intermountain Anesthesia concerning plaintiffs' alleged injuries in this matter prior to the filing of plaintiffs' Complaint on December 20, 2006.

Plaintiff Brian Hawk filed a petition for bankruptcy in the U.S. Bankruptcy Court, District of Idaho, on October 9, 2006. (First Scanlan Aff., ¶¶ 8 and 9, Exs. E & F). He filed an amended property schedule on November 11, 2006. (*Id.*, ¶ 10, Ex. G). Mr. Hawk failed to identify his claim, or potential claim, against Defendants in the schedule of assets, or the amended schedule of assets, despite previously filing a request for a Prelitigation Screening Panel hearing, and then filing the civil action less than two months after filing the amended schedule of assets. On January 23, 2007, Lowell Hawkes, Mr. Hawk's attorney in the civil matter, informed defense counsel in the civil matter, that he was "in touch with the Trustee," but had not been authorized as special counsel (*Id.*, ¶ 12, Ex. I).

On March 7, 2007, this Court issued a stay pending Mr. Hawk's bankruptcy proceeding. On April 23, 2008, the bankruptcy trustee issued his Supplemental Final Accounting, certifying that the estate had been fully administered, and requesting that the case be closed and the Trustee be discharged. (*Id.*, ¶ 11, Ex. H) On May 15, 2008, the Bankruptcy Court issued an order approving the Trustee's Supplemental Final Report, discharging the Trustee and closing the case. (*Id.*, ¶ 8, Ex. E).

Based on a subsequent period of inaction (more than 24 months) since the bankruptcy estate was closed, Defendants filed a motion to dismiss and motion for summary judgment on the basis of failure to prosecute, judicial estoppel, and the applicable statute of limitations on June 29, 2010, along with a motion to lift the stay. This Court entered an order lifting the stay on July 20, 2010. At the hearing set for the motion to dismiss and motion for summary judgment on September 7, 2010, Plaintiffs' counsel appeared and raised, for the first time, issues concerning non-disclosure of this litigation as an asset in bankruptcy. (Affidavit of Kevin J. Scanlan in Support of Motion to Lift Stay ("Third Scanlan Aff."), Ex. G, pp. 5-10). Based on these concerns, this Court granted Plaintiffs' counsel 60 days to address issues concerning the bankruptcy proceedings. (*Id.*, Ex. G, p. 10). Subsequently, Mr. Hawk's counsel appeared in bankruptcy court and filed a Motion to Reopen Chapter 7 Case and supporting affidavit on September 27, 2010. (*Id.*, Ex. E). On October 29, 2010, the bankruptcy court issued an order reopening Mr. Hawk's chapter 7 case. (*Id.*, Ex. F). Shortly thereafter, during a November 1, 2010 hearing, over Defendants' counsel's objections, this Court orally ruled that this matter was stayed until the underlying bankruptcy matter was resolved and issued a minute entry reflecting that ruling. (*Id.*, Ex. H).

As the docket history of the bankruptcy action reflects, Mr. Hawk's counsel took no action to further the bankruptcy proceedings until October 22, 2012. (*Id.*, Ex. F). The docket history shows that the bankruptcy court ordered Mr. Hawk's counsel to produce a status report to the court on September 14, 2012. (*Id.*). Shortly afterwards, on October 11, 2012, the trustee filed a motion for turnover, stating that Mr. Hawk had wrongfully refused to tender this action to the bankruptcy estate. (*Id.*, Exs. D, F). On October 22, 2012, Mr. Hawk made his only filing in the bankruptcy action since the case was reopened, opposing the motion for turnover and contending

that records concerning the medical malpractice action were readily available to the trustee. (*Id.*, Exs. D, F). Ultimately, the trustee determined that this action was of no value to the bankruptcy estate and the bankruptcy court issued an order closing the case. (*Id.*, Exs. A, B, I).

Relevant factual and procedural history is also fully set forth in the *Memorandum in Support of Defendants' Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment* (June 26, 2010) and *Reply Memorandum in Support of Defendants' Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment* (Oct. 4, 2010), which are incorporated herein by reference as if set forth in full.

III. ARGUMENT

Because the majority of the arguments in support of Defendants' motions were fully briefed prior to the stay, which briefing is incorporated herein, Defendants only write briefly to address additional issues that have arisen since the reopening of the bankruptcy matter and imposition of the stay of this action in November 2010.

A. Standards for Decision

“The doctrine of judicial estoppel sounds in equity and is invoked at the discretion of the court.” *Mowrey v. Chevron Pipeline Co.*, 155 Idaho 629, 632, 315 P.3d 817 (2013) (quoting *McAllister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578, 581 (2013)). A court acts within its discretion when it: (1) correctly perceives the issue as one of discretion; (2) acts within the outer boundaries of its discretion and consistently with legal standards applicable to the specific choices available to it; and (3) reaches its decision by an exercise of reason. *Id.* (quoting *McAllister*, 154 Idaho at 894, 303 P.3d at 581).

A decision to dismiss a case for inactivity pursuant to IRCP 40(c) is partially discretionary. *Morgan v. Demos*, Dkt. No. 40170, 2014 WL 1053321, at *5-6 (Idaho Mar. 19,

2014) (slip op.). The determination of whether good cause has been shown not to dismiss the case is discretionary. *Id.* If the court, in its discretion determines that good cause has not been shown, dismissal of the action is mandatory. *Id.* at *6.

The determination of whether to dismiss an action for failure to prosecute pursuant to IRCP 41(b) is also discretionary. *Gerstner v. Wash. Water Power Co.*, 122 Idaho 673, 677, 837 P.2d 799, 803 (1992).

B. Recently issued authority by the Idaho Supreme Court confirms that Plaintiff Brian Hawk's claims are barred by judicial estoppel, regardless of whether the bankruptcy estate was reopened to address those claims.

As the Idaho Supreme Court recently ruled in two cases, where a debtor in bankruptcy omits a cause of action from his initial bankruptcy schedule of which he has reason to know at the time such bankruptcy schedule is filed, he is barred from later asserting that claim by the doctrine of judicial estoppel, regardless of whether the bankruptcy schedules are subsequently amended to include the claim. *See Mowrey v. Chevron Pipeline Co.*, 155 Idaho 629, 315 P.3d 817 (2013); *McAllister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013). The facts of these cases, which are strikingly similar to the case at bar, demonstrate that Mr. Hawk's claims against Defendants are barred by the doctrine of judicial estoppel.

In *McAllister*, the plaintiff, Doherty, brought a medical malpractice claim against a medical clinic and a general practice physician, Dixon, based on Dixon's alleged failure to perform diagnostic tests that resulted in the loss of Doherty's eye. 154 Idaho at 892-93, 303 P.3d at 579-80. The treatment was sought on September 12, 2004. *Id.* at 892, 303 P.3d at 579. Doherty filed for chapter 13 bankruptcy on July 25, 2005, and his bankruptcy plan was confirmed on September 6, 2006. *Id.* at 893, 303 P.3d at 580. Doherty did not list any potential claims against Dixon on his asset schedules. *Id.*

Doherty commenced an action against Dixon and his clinic on September 6, 2006. *Id.* Doherty received a bankruptcy discharge on January 21, 2009. Dixon's counsel learned of Doherty's bankruptcy in August of 2009 and raised the issue of judicial estoppel. *Id.* As a result, Doherty reopened the bankruptcy estate on August 26, 2009, amended his asset schedules to reflect the suit against Dixon, and joined McAllister, the bankruptcy trustee, as a party plaintiff. *Id.* Dixon filed a motion for summary judgment on the basis of judicial estoppel, which the district court granted. *Id.*

On appeal, the Idaho Supreme Court affirmed the dismissal, finding that Doherty was fully charged with knowledge of his claim against Dixon at the time of the filing his initial bankruptcy schedules. *Id.* at 896-97, 303 P.3d at 583-84. In doing so, the court also rejected Doherty's argument that the amended schedule cured the initial non-disclosure, noting that such a ruling would create incentives for non-disclosure because it would allow the debtor to potentially avoid proper disclosure by simply waiting until the issue of judicial estoppel was raised and then amending the asset schedule. *Id.* Under this scheme, if the issue of judicial estoppel was never raised, then the debtor would deprive the bankruptcy estate of an asset. *Id.* Finally, the Supreme Court rejected the argument that the non-disclosure was the result of mistake or inadvertence, finding that Doherty was fully chargeable with the knowledge to make the appropriate disclosures on his asset schedule at the time it was filed. *Id.* at 898-99, 303 P.3d at 585-86. *McAllister* is nearly indistinguishable from this matter.

The Idaho Supreme Court recently reiterated the *McAllister* holding in *Mowrey*. In that matter, the plaintiff, Mowry, was injured during the course of his employment with a trucking company while at defendant Chevron's bulk petroleum facility. 155 Idaho at 630, 315 P.3d at 818. Based on loss of income as the result of the injury, Mowry and his wife filed for bankruptcy

on September 8, 2005. *Id.* at 630-31, 315 P.3d at 818-19. No claims against Chevron were listed on the Mowrys' property schedules. *Id.* at 631, 315 P.3d at 819. In July of 2006, Mowry was advised that he might have a claim against Chevron. *Id.* Mowry did not amend his property schedule after being informed of the claim against Chevron. *Id.* Mowry was not represented by counsel in bankruptcy court, but his bankruptcy filings were prepared with the assistance of counsel. *Id.* On May 4, 2007, the bankruptcy court entered an order closing the estate. *Id.* On June 19, 2007, Mowry filed his complaint against Chevron. *Id.* On January 19, 2011, Chevron filed a motion for summary judgment, arguing that Mowry's claims should be dismissed on the basis of judicial estoppel because they were not disclosed on his bankruptcy schedules. *Id.* On January 28, 2011, Mowry filed a motion to reopen the bankruptcy estate to amend his petition and disclose the claim against Chevron, which was granted. *Id.*

On July 13, 2011, the district court granted Chevron's motion for summary judgment on the basis that Mowry was judicially estopped from pursuing his claims due to his failure to disclose the claim on the original bankruptcy petition. *Id.* The court further found that reopening the bankruptcy estate and amending the petition did not cure the initial non-disclosure because Mowry was chargeable with knowledge of the Chevron claim at the time he filed bankruptcy. *Id.* The district court denied a subsequent motion for reconsideration, brought on the basis that the bankruptcy petitions were prepared by Mowry's attorney, and Mowry had cured his non-disclosure by reopening the estate. *Id.* Relying on *McAllister*, the Idaho Supreme Court affirmed the district court, finding that Mowry was chargeable with knowledge of the Chevron claim at the time of his initial bankruptcy filing and the failure to include the claim on the bankruptcy schedules was not sufficiently inadvertent to avoid application of judicial estoppel. *Id.* at 632-34, 315 P.3d at 820-22. *Mowry* is also squarely applicable to this matter and further compels

dismissal of Mr. Hawk's claims.

As the docket history from Mr. Hawk's bankruptcy action demonstrates, he was well aware of his potential claims against Defendants when he sought bankruptcy protection on October 9, 2006, having filed his application for prelitigation screening panel hearing for those claims on May 24, 2006. In fact, in an affidavit submitted to the bankruptcy court, Mr. Hawk's attorney notes that he was representing Mr. Hawk in this action prior to Mr. Hawk's decision to file bankruptcy. (Third Scanlan Aff., Ex. E, ¶ 2). This affidavit also notes that Mr. Hawk was represented by counsel throughout his bankruptcy proceedings. (*Id.*). Despite his awareness of this action and representation by counsel in the bankruptcy proceedings, Mr. Hawk failed to list this action on his bankruptcy asset schedules and the claim was not dealt with during the pendency of the bankruptcy proceedings. It was only after Defendants successfully got the stay lifted that Mr. Hawk determined the need to have this matter dealt with by the bankruptcy court, resulting in nearly three years of additional delay due to Mr. Hawk's failure to prosecute both this matter and the bankruptcy matter.

This factual scenario presents an even better case for application of judicial estoppel than that in *McAllister* or *Mowry* because, in this case, Mr. Hawk had already taken legal action to pursue this claim by seeking a prelitigation screening panel when he filed his initial bankruptcy schedules, but nonetheless failed to include this claim. Mr. Hawk's subsequent reopening of the bankruptcy estate did nothing to cure that failure. As pointed out in *Mowry* and *McAllister*, a finding that Mr. Hawk is not estopped from pursuing this action because of that non-disclosure would incentivize Mr. Hawk and other similar situated litigants to take a wait-and-see approach to disclosure of assets in bankruptcy proceedings. Accordingly, Mr. Hawk's claims against Defendants should be dismissed with prejudice on the basis of judicial estoppel.

C. Plaintiffs' claims against Defendants should be dismissed pursuant to Rule 40(c)

In addition to the failure to prosecute previously discuss in Defendants' original memorandum of points and authorities in support of this motion, the nearly three years of delay resulting from the reopening of the bankruptcy action and stay of this matter are directly attributable to Plaintiffs and has resulted in further prejudice to Defendants, warranting dismissal of this matter pursuant to IRCP 40(c). Under Rule 40(c), "[i]n the absence of a showing of good cause for retention, any action, appeal or proceeding, except for guardianships, conservatorships, and probate proceedings, in which no action has been taken or in which the summons has not been issued and served, for a period of six (6) months shall be dismissed." Idaho R. Civ. P. 40(c) (emphasis added). The applicability of that rule to a situation similar to that presented in this matter was recently discussed in the Idaho Supreme Court's decision in *Morgan v. Demos*, Dkt. No. 40170, 2014 WL 1053321 (Idaho Mar. 19, 2014) (slip op.).

In *Morgan*, the Idaho Supreme Court was asked to review the district court's decision to dismiss a medical malpractice action pursuant to Rule 40(c) for inactivity. *Id.* at *4. The plaintiff had brought suit against the defendants in that action after his wife allegedly passed away due to complications from an angiogram. *Id.* at *1. Trial in the case was delayed by the plaintiff's repeated failure to disclose his expert's complete and accurate testimonial history, finally leading the court to enter an order prohibiting the expert from testifying. *Id.* at *1-3. The plaintiff sought permissive appeal of the order barring the expert's testimony, which was ultimately refused by the Idaho Supreme Court. *Id.* at *3. While the motion for permissive appeal was pending, the district court inactivated the case file. *Id.* The district court was not made aware that leave for permissive appeal had been denied until 21 months later, when the plaintiff's son, an attorney who had worked as an associate attorney for their original counsel, filed a motion to reopen the

case and reconsider the order excluding the expert's testimony. *Id.* The defendants responded by filing a motion for dismissal pursuant to Rules 40(c) and 41(b), along with a motion for sanctions. *Id.* The district court dismissed the case pursuant to Rule 40(c), denied plaintiff's motion to reconsider, and imposed sanctions against the plaintiff. *Id.*

On appeal, the plaintiff argued that the court had abused its discretion in dismissing the case pursuant to Rule 40(c) because plaintiff did not receive notice of the proposed dismissal from the court and the plaintiff demonstrated good cause for delay in prosecution. *Id.* at *4-5. The Supreme Court rejected these arguments, first finding that dismissal under the rule was mandatory, not discretionary. *Id.* at *4-5. The court noted that an action that had been inactive for more than six months must be dismissed pursuant to Rule 40(c) in absence of a showing of good cause for the inactivity. *Id.* Any exercise of discretion in deciding a Rule 40(c) motion is rooted in the determination of whether good cause existed for the matter not to be dismissed. *Id.* at *5. “[I]n order to show good cause under Rule 40(c), a party must present sworn testimony by affidavit or otherwise setting forth facts that demonstrate good cause for retention of a case.”

The Supreme Court then held as follows concerning the *Morgan* plaintiff's showing of good cause:

At the hearing on [plaintiff's] motion to reopen, his current counsel acknowledged that action should have been taken soon after this Court refused to entertain [plaintiff's] appeal. [plaintiff] put forth only one reason why his case should be retained—the neglect of his former counsel, Lowell Hawkes. However, [plaintiff] provided no affidavit or other sworn testimony from Mr. Hawkes or anyone else that would explain why [plaintiff's] case sat dormant for a remarkable twenty one [sic] months.

The district court did not abuse its discretion in dismissing [plaintiff's] case pursuant to Rule 40(c). The district court stated that if no action has been taken for at least six months, it “must dismiss this case” in the absence of a showing of good cause for retention. The district court determined that good cause for

retention was not shown because “the only reason given for 21 months of inactivity was attorney neglect.” The district court acted within the bounds of its discretion and reached its decision in an act of reason in concluding that a bare declaration of attorney neglect does not constitute good cause.

Id. at *5-6. The Supreme Court also rejected the plaintiff’s argument that Rule 40(c) was inapplicable because he did not receive the notice referenced in the rule, finding that the defendants’ filing of a motion to dismiss constituted adequate notice. *Id.* at *6. Much the same result is warranted here due to the remarkable similarity of this matter to *Morgan*.

Plaintiffs first raised the issue of the potential need to reopen the bankruptcy case during a hearing in this matter on September 7, 2010, over two years after the original bankruptcy action was closed by Mr. Hawk’s discharge on May 15, 2008. (Third Scanlan Aff., Exs. G, J). Over a month and a half after the issue of reopening the estate was raised by Mr. Hawk, on October 27, 2010, he filed a motion to reopen the bankruptcy proceedings to address the status of this case as an asset of the bankruptcy estate. (*Id.*, Exs. E, F). It was this action that precipitated this Court’s decision to stay this matter on November 1, 2010. (*Id.*, Ex. H, p. 7:6-18).

As revealed by the docket history of the bankruptcy action, Mr. Hawk took no further action to move that case forward for nearly two full years after the request to reopen the case was filed. (*Id.*, Ex. F). On September 14, 2012, the bankruptcy court finally ordered Mr. Hawk to provide a status report, noting “[t]his case was reopened on 10/29/10. Nothing filed since Trustee appointed on 10/29/10. Please advise.” (*Id.*, Ex. F, Dkt. No. 52). Shortly thereafter, on October 11, 2012, the bankruptcy trustee filed a motion for turnover of this matter, noting that Mr. Hawk had, as of the date of the motion, failed to provide relevant information concerning this matter to the trustee. (*Id.*, Exs. D, F). Mr. Hawk responded, contending that any information necessary to the trustee’s determination of the value of the claim was available at any time. (*Id.*, Ex. C). On

December 11, 2012, the court granted the trustee's motion for turnover on the condition that the trustee and Mr. Hawk's counsel meet and confer concerning the value of this case. (*Id.*, Ex. F, Dkt. No. 56). Finally, on February 26, 2013, the trustee made the following report to the court:

I, R. Sam Hopkins, having been appointed trustee of the estate of the above-named debtor(s), report that I have neither received any property nor paid any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to Fed R Bank P 5009, I hereby certify that the estate of the above-named debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee. Key information about this case as reported in schedules filed by the debtor(s) or otherwise found in the case record: This case was pending for 28 months. Assets Abandoned (without deducting any secured claims): \$ 147781.16, Assets Exempt: Not Available, Claims Scheduled: \$ 195368.73, Claims Asserted: Not Applicable, Claims scheduled to be discharged without payment (without deducting the value of collateral or debts excepted from discharge): \$ 195368.73.

(*Id.*, Ex. F). A few days later, on February 28, 2013, the court closed the case. (*Id.*, Ex. A).

As the docket history from the bankruptcy action demonstrates, Mr. Hawk was well aware of this action when he sought bankruptcy protection on October 9, 2006, having filed his application for prelitigation screening panel hearing on this action on May 24, 2006. Despite this fact, Mr. Hawk failed to list this action on their bankruptcy asset schedules nor was the claim dealt with during the pendency of the bankruptcy proceedings. Then, only after Defendants successfully got the stay lifted and moved to dismiss this action, did Mr. Hawk determine his need to have this matter dealt with by the bankruptcy court, resulting in nearly three years of additional delay due to his failure to prosecute both this matter and the bankruptcy matter. This period of inaction without justification constitutes grounds for dismissal under Rule 40(c).

The same rationale applies to those claims raised by Mr. Strong. In fact, the argument in

favor of dismissing Mr. Strong's claims is even more compelling because he was not a party to the bankruptcy action and could have proceeded to prosecute his claims against Defendants in Mr. Hawk's absence. As the plain language of Idaho Rule of Civil Procedure 20(a) provides, joinder of plaintiffs with similar claims in the same action is permissive, not mandatory. Idaho R. Civ. P. 20(a) ("All persons *may* join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action." (emphasis added)). Here, Mr. Strong has failed to prosecute his claim for nearly eight years based solely on a bankruptcy filing by a coplaintiff whose claims need not have been joined with his own. There is no good cause for this inaction. In fact, Defendants requested that Mr. Strong agree to bifurcate his claims from those of Mr. Hawk, even going so far as to provide a stipulation to bifurcate, but received no response from Plaintiffs' counsel. (Third Scanlan Aff., ¶ 18, Ex. K).

For these reasons, the claims of both Plaintiffs should be dismissed pursuant to Rule 40(c).

D. Plaintiffs' claims against Defendants should be dismissed pursuant to Rule 41(b).

For all of the reasons discussed in Part III.B, *supra*, for Plaintiffs' claims to be dismissed on the basis of their unjustified inaction in this matter, so too should their claims be dismissed pursuant to Rule 41(b). Under Rule 41(b), "a defendant may move for dismissal of an action or of any claim against the defendant" "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." Idaho R. Civ. P. 41(b). In determining whether an action should be dismissed for failure to prosecute "the district court must consider [1] the length of delay caused by the failure to prosecute, [2] the justification, if any, for such delay, and [3] the

extent of any resultant prejudice.” *Gerstner v. Wash. Power Co.*, 122 Idaho 673, 677, 837 P.2d 799, 803 (1992). “The emphasis of the court’s analysis should be on the prejudice to the defendant and not on the length of the delay per se.” *Id.* “Prejudice must consist of more than general concerns about the passage of time and its effect on the memories of witnesses and the ability to prepare a case. There must be actual, demonstrated prejudice to the moving party.” *Id.* “The movant must demonstrate prejudice by actual instances of his or her inability to adequately and effectively prepare the case, occasioned by the non-movant’s lack of prosecution.” *Id.* at 678, 837 P.2d at 804.

Defendants have been prejudiced, and will continue to be prejudiced if forced to proceed with defense of this action due the undue amount of time this matter has been pending and their inability to conduct discovery due to Mr. Hawk’s invocation of the bankruptcy stay and Mr. Strong’s unexplained failure to proceed with his claim in Mr. Hawk’s absence. If this matter proceeds, Defendants will now be forced, ten years after the date of alleged injury, to engage in fact discovery, querying witnesses and records custodians whose memory of the events underlying this claim has been eroded by the passage of time. Further, as indicated in the previously filed affidavit of Dr. Murphy, one of the treating CRNAs for Mr. Hawk, Robert Haig, passed away on June 11, 2009, robbing Defendants of a key witness due to Plaintiffs’ inaction. (Aff. of Marcus E. Murphy, M.D., Oct. 4, 2010, ¶¶ 4-6). Also, another of the treating CRNAs, Mary Waid, retired prior to 2010. (Second Scanlan Aff., ¶ 13). Her whereabouts are currently unknown. (*Id.*). Another of the treating CRNAs, Christian Schmalz, left the State of Idaho and relocated to Washington. (*Id.*). For these reasons, as well as those set forth in Defendants’ previously filed memorandum in support of motion to dismiss for failure to prosecute, all claims

asserted by Plaintiffs¹ should be dismissed pursuant to IRCP 41(b).

E. Plaintiffs' claims against Defendant Intermountain Anesthesia are barred by the applicable statute of limitations.

Defendants' discussion of the reasons for dismissal of the claims against Intermountain Anesthesia on the basis of the applicable statute of limitations is fully set forth in their previously filed *Memorandum in Support of Motion to Dismiss or, Alternatively, Motion for Summary Judgment*, pp. 8-11 (June 29, 2010), and their *Reply to Plaintiffs' Response to Defendants' Motion to Dismiss or, Alternatively, Motion for Summary Judgment*, pp. 3-9 (Oct. 25, 2010). Defendants, however, felt it necessary to bring a recent decision from this Court on this very issue to the Court's attention.

In *Woodington v. Eastern Idaho Health Services, Inc.*, Bonneville County Case No. CV-2010-2258 (Idaho Dist. Ct. May 1, 2013), Judge Dane Watkins dismissed claims against Defendant Intermountain Anesthesia and a CRNA employed by Intermountain Anesthesia based upon the Plaintiffs' failure to timely file claims against Intermountain Anesthesia. (Third Scanlan Aff., Ex. J). In that matter, Judge Watkins found that the applicable two-year statute of limitations for medical malpractice claims, set forth in Idaho Code § 5-219(4), is tolled by the provisions of Idaho Code § 6-1005. (*Id.*, Ex. J., p. 9). Judge Watkins also found, however, that he tolling provisions of § 6-1005 only apply to claims against parties against whom a claim was filed before the prelitigation screening panel. (*Id.*, Ex. J., pp. 9-10). In *Woodington*, the plaintiffs did not assert a claim against Intermountain Anesthesia before the prelitigation screening panel. (*Id.*). As a result, Judge Watkins found that the claims against Intermountain Anesthesia were not tolled by § 6-1005, meaning that although the claims asserted against the defendants that were

¹ Furthermore, although Mr. Strong was not a party to the bankruptcy proceeding that engendered much of the delay in this matter, his claims were subject to similar delay in prosecution after the bankruptcy court entered orders that had the practical effect of dissolving the stay.

before the panel were timely, the claims against Intermountain Anesthesia were barred by Idaho Code § 5-219(4). (*Id.*). The same result is warranted in this matter.


In absence of the tolling provided by § 6-1005, the statute of limitations on the Plaintiffs' claims against Intermountain Anesthesia ran on June 25, 2006. Because Plaintiffs' Complaint in this action was not filed until December 20, 2006, Plaintiffs' claims against Intermountain Anesthesia are timed barred and should be dismissed.

V.
CONCLUSION

For the foregoing reasons, Defendants respectfully request that their motion be granted and Plaintiffs' claims be dismissed with prejudice.

DATED this 10th day of April, 2014.

DUKE SCANLAN & HALL, PLLC

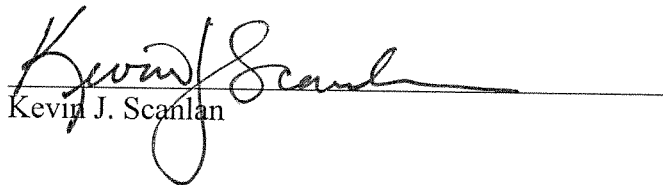
By: 
Richard E. Hall—Of the Firm
Kevin J. Scanlan—Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Lowell N. Hawkes
Ryan S. Lewis
Lowell N. Hawkes, Chartered
1322 East Center
Pocatello, ID 83201
Facsimile (208) 235-4200

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy


Kevin J. Scanlan

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO
14 APR 14 AM 10:59

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**DEFENDANTS' RENEWED
MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

COME NOW Defendants Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D., through their counsel of record, Duke Scanlan & Hall, PLLC, and pursuant to Idaho Rules of Civil Procedure 40(c), 41(b) and 56, renew their previously filed Motion to Dismiss, or Alternatively, Motion for Summary Judgment.

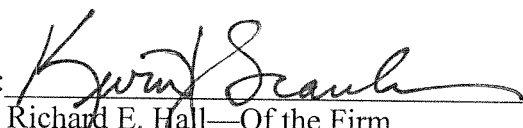
This motion is supported by the pleadings, records, and affidavits on file in this matter, Defendants' June 29, 2010, Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment and supporting documents, and the supporting memorandum and

affidavit filed concurrently herewith.

ORAL ARGUMENT IS REQUESTED.

DATED this 10th day of April, 2014.

DUKE SCANLAN & HALL, PLLC

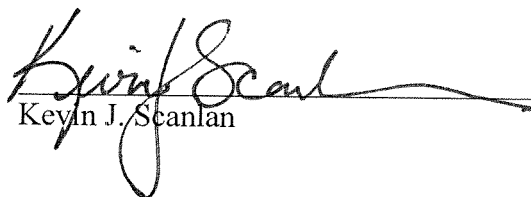
By: 
Richard E. Hall—Of the Firm
Kevin J. Scanlan—Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Lowell N. Hawkes
Ryan S. Lewis
Lowell N. Hawkes, Chartered
1322 East Center
Pocatello, ID 83201
Facsimile (208) 235-4200

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy


Kevin J. Scanlan

ORIGINAL

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO

14 APR 14 AM 10:59

Richard E. Hall
ISB #1253; reh@dukescanlan.com
Kevin J. Scanlan
ISB #5521; kjs@dukescanlan.com
DUKE SCANLAN & HALL, PLLC
1087 W. River St, Ste. 300
P.O. Box 7387
Boise, Idaho 83707
Telephone: (208) 342-3310
Facsimile: (208) 342-3299

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**AFFIDAVIT OF KEVIN J. SCANLAN
IN SUPPORT OF DEFENDANTS'
RENEWED MOTION OR,
ALTERNATIVELY, MOTION
SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Ada)

Kevin J. Scanlan, being first duly sworn upon oath, deposes and states:

1. I am an attorney licensed to practice in the State of Idaho, and am an attorney of record for Defendant Intermountain Anesthesia, P.A. and Marcus R. Murphy, M.D. in the above-referenced matter.

2. I make this Affidavit on my personal knowledge and belief of the matters stated

herein.

3. Attached hereto as **Exhibit A** is a true and correct copy of a March 3, 2013, Order Approving Trustee's Report of No Distribution and Closing Case from District of Idaho Bankruptcy Court Case No. 06-40526-JDP.

4. Attached hereto as **Exhibit B** is a true and correct copy of a February 28, 2013, Order Approving Trustee's Report of No Distribution and Closing Case from District of Idaho Bankruptcy Court Case No. 06-40526-JDP.

5. Attached hereto as **Exhibit C** is a true and correct copy of Mr. Hawk's October 22, 2012, Response to Motion for Turnover filed in District of Idaho Bankruptcy Court Case No. 06-40526-JDP.

6. Attached hereto as **Exhibit D** is a true and correct copy of an October 11, 2012, Motion for Turnover filed by the Chapter 7 Trustee in District of Idaho Bankruptcy Court Case No. 06-40526-JDP.

7. Attached hereto as **Exhibit E** is a true and correct copy of an October 27, 2010, Verified Application to Reopen Chapter 7 Case and supporting affidavit filed by Mr. Hawk in District of Idaho Bankruptcy Court Case No. 06-40526-JDP.

8. Attached hereto as **Exhibit F** is a true and correct copy of the docket history from District of Idaho Bankruptcy Court Case No. 06-40526-JDP.

9. Attached hereto as **Exhibit G** is a true and correct copy of the transcript of the hearing held before this Court on September 7, 2010.

10. Attached hereto as **Exhibit H** is a true and correct copy of the transcript of the hearing held before this Court on November 1, 2010.

11. Attached hereto as **Exhibit I** is a true and correct copy of a May 15, 2008, Order

Approving Trustee's Supplemental Report, Discharging Trustee and Closing the Estate entered in District of Idaho Bankruptcy Court Case No. 06-40526-JDP.

12. Attached hereto as **Exhibit J** is a true and correct copy of a Memorandum Decision and Order Re: Motion to Strike and Motions for Summary Judgment entered by the Hon. Dane Watkins in *Woodington, et al. v. Weber, et al.*, Bonneville County Case No. CV-2010-2258.

13. Plaintiffs' counsel has not contacted me or taken any other action to prosecute this litigation of which I am aware since the March 3, 2013, Order Approving Trustee's Report of No Distribution and Closing Case was issued.

14. It has now been nearly ten years since the injuries at issue in this action allegedly occurred.

15. It has now been nearly eight years since the prelitigation screening panel issued its report and recommendation concerning this matter.

16. Defendants were not able to depose either Plaintiff or their witnesses prior to the stay.

17. Defendants were unable to conduct any discovery prior to the stay.

18. Attached hereto as **Exhibit K** is a true and correct copy of a February 2, 2007, letter to Plaintiffs' counsel, along with a proposed stipulation to bifurcate Mr. Hawk's and Mr. Strong's claims. I received no response to this communication from Plaintiffs' counsel.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


Kevin J. Scanlan

SUBSCRIBED and SWORN to before me this 10th day of April, 2014.



K. Moorhouse

Notary Public for Idaho

Residing in Boise

My commission expires: 9/6/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Lowell N. Hawkes
Ryan S. Lewis
Lowell N. Hawkes, Chartered
1322 East Center
Pocatello, ID 83201
Facsimile (208) 235-4200

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy

Kevin J. Scanlan

Kevin J. Scanlan

EXHIBIT A

Certificate of Notice Page 1 of 3
UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re:

Brian K Hawk
1185 Spruce St
Pocatello, ID 83201

Security No.: [REDACTED]
Employer's Tax I.D. No.: [REDACTED]

Debtor

Mary Ellen Hawk
1185 Spruce St
Pocatello, ID 83201

Security No.: [REDACTED]
Employer's Tax I.D. No.: [REDACTED]

Joint Debtor

Case Number: 06-40526-JDP

Chapter Number: 7

ORDER APPROVING TRUSTEE'S REPORT OF NO DISTRIBUTION AND CLOSING CASE

IT APPEARING to the Court that the Trustee in this case has filed a report of no distribution and the Trustee has performed all duties required in the administration of this estate;

IT IS ORDERED that the report is APPROVED, the Trustee is DISCHARGED from and relieved of the trust; the surety or sureties thereon are released from further liability thereunder, except any liability which may have occurred during the time such bond was in effect and the case is CLOSED.

AUDIT NOTICE: If prior to the receipt of this notice, the Bankruptcy Trustee took possession of any money, checks or other property and that property has not been returned to you, please contact the U.S. Trustee at (208) 334-1300.

Dated: 2/28/13

Elizabeth A Smith
Clerk, U.S. Bankruptcy Court

Certificate of Notice Page 2 of 3
United States Bankruptcy Court
District of Idaho

In re:
Brian K Hawk
Mary Ellen Hawk
Debtors

Case No. 06-40526-JDP
Chapter 7

CERTIFICATE OF NOTICE

District/off: 0976-4

User: csomsen
Form ID: oclose7

Page 1 of 2
Total Noticed: 1

Date Rcvd: Mar 01, 2013

Notice by first class mail was sent to the following persons/entities by the Bankruptcy Noticing Center on Mar 03, 2013.
db/jdb +Brian K Hawk, Mary Ellen Hawk, 1185 Spruce St, Pocatello, ID 83201-3927

Notice by electronic transmission was sent to the following persons/entities by the Bankruptcy Noticing Center.
NONE. TOTAL: 0

***** BYPASSED RECIPIENTS *****

NONE. TOTAL: 0

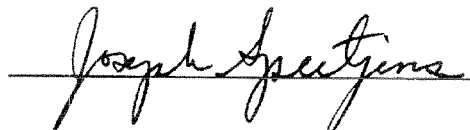
Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Mar 03, 2013

Signature:



District/off: 0976-4

User: csomsen
Form ID: oclose7

Page 2 of 2
Total Noticed: 1

Date Rcvd: Mar 01, 2013

The following persons/entities were sent notice through the court's CM/ECF electronic mail (Email) system on February 28, 2013 at the address(es) listed below:

Craig R Jorgensen on behalf of Debtor Brian Hawk biggunlaw@cablone.net,
info.jorgensenlaw@gmail.com
David Wayne Newman on behalf of U.S. Trustee US Trustee ustp.region18.bs.ecf@usdoj.gov
Mary P Kimmel on behalf of U.S. Trustee US Trustee ustp.region18.bs.ecf@usdoj.gov
R Sam Hopkins awilliams@qwestoffice.net, shopkins@ecf.epiqsystems.com
US Trustee ustp.region18.bs.ecf@usdoj.gov

TOTAL: 5

EXHIBIT B

DISTRICT OF IDAHO

In Re:

Brian K Hawk
1185 Spruce St
Pocatello, ID 83201

Security No.:
Employer's Tax I.D. No.:

Debtor

Mary Ellen Hawk
1185 Spruce St
Pocatello, ID 83201

Security No.:
Employer's Tax I.D. No.:

Joint Debtor

Case Number: 06-40526-JDP

Chapter Number: 7

ORDER APPROVING TRUSTEE'S REPORT OF NO DISTRIBUTION AND CLOSING CASE

IT APPEARING to the Court that the Trustee in this case has filed a report of no distribution and the Trustee has performed all duties required in the administration of this estate;

IT IS ORDERED that the report is APPROVED, the Trustee is DISCHARGED from and relieved of the trust; the surety or sureties thereon are released from further liability thereunder, except any liability which may have occurred during the time such bond was in effect and the case is CLOSED.

AUDIT NOTICE: If prior to the receipt of this notice, the Bankruptcy Trustee took possession of any money, checks or other property and that property has not been returned to you, please contact the U.S. Trustee at (208) 334-1300.

Dated: 2/28/13

Elizabeth A Smith
Clerk, U.S. Bankruptcy Court

EXHIBIT C

Lowell N. Hawkes (ISB #1852)
LOWELL N. HAWKES, CHARTERED
1322 East Center
Pocatello, Idaho 83201
Telephone: (208) 235-1600
FAX: (208) 235-4200
Attorneys for Hawk

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO
The Honorable Jim D. Pappas**

In Re:

BRIAN K. HAWK and
MARY ELLEN HAWK,

Debtors.

)
)
) Case No. CV-06-40526-JDP
) Chapter 7

)
) **RESPONSE OF MALPRACTICE**
) **CLAIM COUNSEL TO**
) **TRUSTEE'S MOTION FOR**
) **TURNOVER**
) **OF PROPERTY & RECORDS**
)
)

Counsel of record in the pending medical malpractice proceedings in Bonneville County responds to the Trustee's Motion of October 11, 2012 as follows:

1. Of record in this case is the *Affidavit of Counsel in Support of Verified Application to Reopen (Docket #53)* dated October 27, 2010.
2. That prior *Affidavit* makes it clear that at no time have the Debtors or their counsel ever "refused to surrender" any records or documentation to the Trustee. To the contrary, the *Affidavit* explains that this Bankruptcy was originally closed by the

**RESPONSE OF MALPRACTICE CLAIM COUNSEL TO TRUSTEE'S MOTION
FOR TURNOVER OF PROPERTY & RECORDS — Page 1**

In Re: Brian K. Hawk and Mary Ellen Hawk

Trustee without notice to medical malpractice counsel and *after* counsel had specifically invited and requested a meeting with the Trustee to determine the Trustee's interest, if any, in the underlying medical malpractice case.

3. The entirety of the medical malpractice records are available to the Trustee and his counsel at my office at any time during normal business hours — as they have always been from the outset.

DATED this 22nd day of October, 2012.


LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2012 I sent by fax and electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing or other Notice to the following counsel:

R. Sam Hopkins, Trustee,
P.O. Box 3014
Pocatello, Idaho 83206-FAX 478-7976
Email: ID07@ecfcbis.com

James A. Spinner
Service & Spinner
1335 E. Center
Pocatello, Idaho 83201
FAX: 232-1808
Email: spinjim@cableone.net

Craig R. Jorgensen
602 S. 5th Avenue
Pocatello, ID 83201
FAX 232-8867
Email: biggunlaw@cableone.net

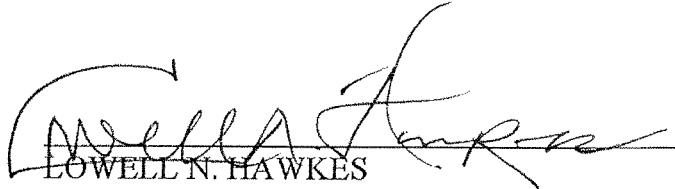

LOWELL N. HAWKES

EXHIBIT D

same to the Trustee. You are hereby notified that the Trustee has requested an Order compelling the turnover of the property or recorded information listed in the above motion.

Dated this: October 11, 2012

/s/ R. Sam Hopkins
R. Sam Hopkins, Trustee

CERTIFICATE OF MAILING

I hereby certify that on Thursday, October 11, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the individuals with the term "ECF" noted next to their name. I further certify that, on the same date, I have mailed by United States Postal Service the foregoing document to the following non-EM/ECF Registered Participant(s) listed below.

U.S. Trustee, ECF
Brian and Mary Hawk 1185 Spruce St. Pocatello, ID
Craig R. Jorgensen, ECF

By: /s/ Jessica Jackman
Jessica Jackman
Case Administrator

EXHIBIT E

Lowell N. Hawkes (ISB #1852)
LOWELL N. HAWKES, CHARTERED
1322 East Center
Pocatello, Idaho 83201
Telephone: (208) 235-1600
FAX: (208) 235-4200
Attorneys for Debtors Hawk

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO
The Honorable Jim D. Pappas**

In Re:

BRIAN K. HAWK and
MARY ELLEN HAWK,

Debtors.

)
)
)
)
)
)
)
)
)
)
)

Case No. CV-06-40526-JDP
Chapter 7

**VERIFIED
APPLICATION TO REOPEN**

Pursuant to Rule 5010, Debtors move the Court to reopen this case for purposes of resolving with the Trustee an issue of an unscheduled potential asset not dealt with in the prior proceedings. Specifically, Debtors move the Court to reopen for the purpose of resolving with the Trustee all issues relative to either abandonment or assertion of a claim to any interest in the Debtors' medical malpractice case, Bonneville County, Case No. CV-06-7149, captioned as *Tom L. Strong and Brian K. Hawk vs. Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D.*

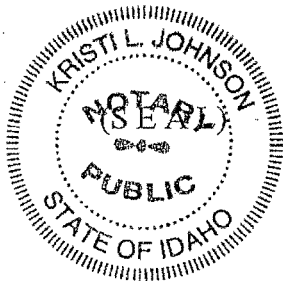
This Application is supported by the Affidavit of State Court litigation Counsel filed herewith.

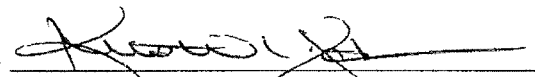
DATED this 27th day of October, 2010.

LOWELL N. HAWKES, CHARTERED


LOWELL N. HAWKES

SUBSCRIBED AND SWORN TO before me October 27, 2010.




NOTARY PUBLIC FOR IDAHO
Residing at Pocatello
My Commission expires April 21, 2015

CERTIFICATE OF SERVICE

I certify that on this 27th day of October, 2010 I faxed a copy of the foregoing to R. Sam Hopkins, Trustee, P.O. Box 3014, Pocatello, Idaho 83206-3014; FAX 478-7976; and Hand Delivered a copy to Craig R. Jorgensen, 920 E. Clark, Pocatello, Idaho 83205-4904; and James A. Spinner of Service & Spinner, 1335 E. Center, Pocatello, Idaho 83201.


LOWELL N. HAWKES

Screening Panel proceedings asserting anesthesia medical negligence on June 26, 2004 at the EIRMC in Idaho Falls. Following Prelitigation proceeding that claim was filed as Bonneville County Case No. CV-06-7149, captioned *Tom L. Strong and Brian K. Hawk vs. Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D.*

3. When I became aware of the Bankruptcy filing I notified the Bonneville County, Seventh Judicial District, State Court Judge, the Honorable Jon J. Shindurling, and a stay on the state court proceedings was put into effect. However, Defense counsel in the State case filed Motions seeking to dispose of the case after I had given actual notice to them of the statutory automatic stay in 11 U.S.C. § 362.

4. During the early pendency of these bankruptcy proceedings there was some exchange of correspondence and information from my office to Trustee Hopkins that ending with my request for a meeting with the Trustee to try and resolve any issues relative to any claim by the Trustee to the malpractice claim as an asset of the bankruptcy. However, the Bankruptcy was closed without addressing that issue or any formal abandonment to the Debtors of any claim to the malpractice damages case.

5. I subsequently learned that the malpractice damages claim had not been formally scheduled on the schedule filed with this Bankruptcy Court.

6. Recently Defense counsel in the malpractice case moved the Court to vacate the State Court Stay and to reopen the State case and dismiss and dispose of the malpractice claims. Because of the uncertain position I had been placed in without either

an abandonment of the malpractice claim back to the Debtors or this Bankruptcy Court's authority to proceed with that claim, I asked for and received until Monday, November 1st as a deadline to resolve the uncertainty issue with the Federal Bankruptcy Court.

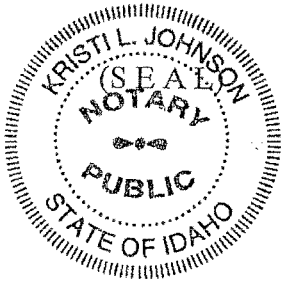
7. Since then, and relative to that November 1st deadline, I have conferred with both Craig Jorgensen, the Debtors' bankruptcy counsel of record, and attorney Jim Spinner, who has been attorney for Trustee Hopkins in multiple bankruptcy proceedings, and have been advised by both that the proper procedure is to reopen the bankruptcy to formally resolve the issue. In followup, I was advised this morning by attorney Jim Spinner that he had spoken with Trustee Hopkins whose desire and request was that the Debtors reopen the case as he does not desire to be the initiating party but will become involved after the case is reopened.

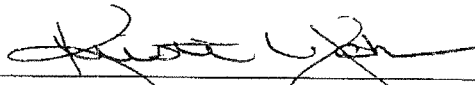
8. Therefore I respectfully request that this bankruptcy case be reopened to resolve the malpractice claim issue so Debtors and myself are not in the position of jeopardy that could arise from any later assertion by the Trustee that either myself or Debtors asserted acts of ownership or rights over an unscheduled asset or that I acted without property authority.

DATED this 27th day of October, 2010.


LOWELL N. HAWKES

SUBSCRIBED AND SWORN TO before me October 27, 2010.




NOTARY PUBLIC FOR IDAHO
Residing at Pocatello
My Commission expires April 21, 2015

CERTIFICATE OF SERVICE

I certify that on this 27th day of October, 2010 I faxed a copy of the foregoing to R. Sam Hopkins, Trustee, P.O. Box 3014, Pocatello, Idaho 83206-3014; FAX 478-7976; and Hand Delivered a copy to Craig R. Jorgensen, 920 E. Clark, Pocatello, Idaho 83205-4904; and James A. Spinner of Service & Spinner, 1335 E. Center, Pocatello, Idaho 83201.


LOWELL N. HAWKES

EXHIBIT F

CLOSED

**U.S. Bankruptcy Court
District of Idaho [LIVE] (Pocatello)
Bankruptcy Petition #: 06-40526-JDP**

Assigned to: Jim D Pappas
Chapter 7
Voluntary
No asset

Date filed: 10/09/2006
Date reopened: 10/29/2010
Date terminated: 02/28/2013
Debtor discharged: 04/23/2007
Joint debtor discharged: 04/23/2007
341 meeting: 11/15/2006
Deadline for objecting to discharge: 01/16/2007
Deadline for financial mgmt. course: 01/02/2007

Debtor disposition: Standard Discharge
Joint debtor disposition: Standard Discharge

Debtor**Brian K Hawk**

1185 Spruce St
Pocatello, ID 83201
BANNOCK-ID

██████ / ITIN: ██████████

represented by **Lowell N Hawkes**

1322 E Ctr
Pocatello, ID 83201
(208) 235-1600
Email: lnhchartered@yahoo.com
TERMINATED: 12/12/2012

Craig R Jorgensen

POB 4904
Pocatello, ID 83205-4904
(208) 237-4100
Fax : (208)232-8867
Email: info.jorgensenlaw@gmail.com

Joint Debtor**Mary Ellen Hawk**

1185 Spruce St
Pocatello, ID 83201
BANNOCK-ID

██████ / ITIN: ██████████

represented by **Lowell N Hawkes**

(See above for address)
TERMINATED: 12/12/2012

Craig R Jorgensen

(See above for address)

Trustee**R Sam Hopkins**

POB 3014
Pocatello, ID 83206
208-478-7978

U.S. Trusteerepresented by **Mary P Kimmel****722**

US Trustee

Washington Group Central Plaza
720 Park Blvd, Ste 220
Boise, ID 83712
208-334-1300

OFFICE OF THE US TRUSTEE US
DEPT
720 Park Blvd., Ste. 220
Boise, ID 83712
(208) 334-1300
Email: ustp.region18.bs.ecf@usdoj.gov

David Wayne Newman

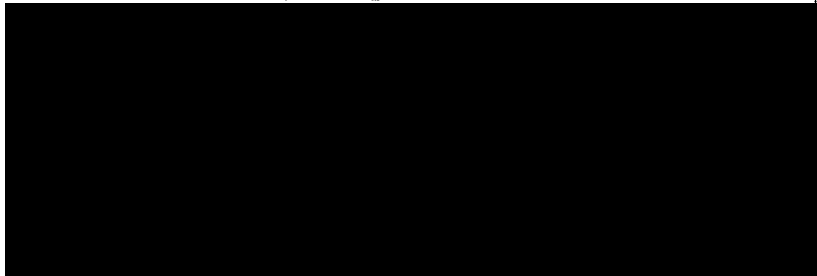
OFFICE OF THE US TRUSTEE US
DEPT
720 Park Blvd., Ste. 220
Boise, ID 83712
(208) 334-1300
Email: ustp.region18.bs.ecf@usdoj.gov

Filing Date	#	Docket Text
10/09/2006	<u>1</u> (51 pgs)	Chapter 7 Voluntary Petition . Receipt Number 705650, Fee Amount \$299 Filed by Brian K. Hawk, Mary Ellen Hawk (Jorgensen, Craig) Modified on 10/11/2006 (Anderson, Clyde).
10/09/2006	<u>2</u>	Social Security Statement - SEALED Document Filed by Debtor Brian K. Hawk, Joint Debtor Mary Ellen Hawk. (Jorgensen, Craig)
10/09/2006	<u>3</u> (1 pg)	Disclosure of Compensation by Craig R. Jorgensen Filed by Debtor Brian K. Hawk, Joint Debtor Mary Ellen Hawk. (Jorgensen, Craig)
10/09/2006	<u>4</u> (6 pgs)	Chapter 7 Statement of Current Monthly Income and Means Test Calculation - Form 22A Filed by Debtor Brian K. Hawk, Joint Debtor Mary Ellen Hawk. (Jorgensen, Craig)
10/09/2006	<u>5</u> (4 pgs)	Exhibit D- Individual Debtor's Statement of Compliance with Credit Counseling Requirement Filed by Debtor Brian K. Hawk, Joint Debtor Mary Ellen Hawk. (Jorgensen, Craig)
	6	First Meeting of Creditors with 341(a) meeting to be held on 11/15/2006 at 09:00 AM at Pocatello - US Courthouse Pocatello. Objections for Discharge due by 01/16/2007.

723

10/10/2006		(admin,)
10/10/2006	<u>7</u> (1 pg)	Set Deficiency Deadlines Credit Counseling Date: 10/25/2006. Employee Income Record Due: 10/25/2006. (nl,)
10/10/2006		Financial Management Deadline: - 341 Meeting Date: 11/15/2006. Financial Management Certificate Due: 1/2/2007. (nl,)
10/10/2006	<u>8</u> (1 pg)	Income Tax Turnover Order (Ch. 7) (nl,)
10/10/2006	<u>9</u> (2 pgs)	Certificate of Credit Counseling Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk (RE: related document(s) <u>7</u> Set Deficiency Deadlines). (Jorgensen, Craig)
10/10/2006	<u>10</u>	Employee Income Records (SEALED) Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk (RE: related document(s) <u>7</u> Set Deficiency Deadlines). (Attachments: <u>1</u> Supplement Joint Debtor paystub) (Jorgensen, Craig)
10/12/2006	<u>12</u> (2 pgs)	BNC Certificate of Mailing - Ch.7 Income Tax Turnover Order Service Date 10/12/2006. (Admin.)
10/12/2006	<u>13</u> (2 pgs)	BNC Certificate of Mailing - Deficiency Notice Service Date 10/12/2006. (Admin.)
10/13/2006	<u>14</u> (4 pgs)	BNC Certificate of Mailing - Meeting of Creditors Service Date 10/13/2006. (Admin.)
11/17/2006	<u>15</u> (10 pgs)	Amended Schedule[s] B - Amount \$40781.16, C., Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk. (Jorgensen, Craig)
11/17/2006	<u>16</u> (1 pg)	341(a) Meeting Minutes - Debtor Present. (Hopkins, R)
11/22/2006	<u>17</u> (7 pgs; 2 docs)	Amended Chapter 7 Statement of Current Monthly Income and Means Test Calculation - Form 22A Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk. (Jorgensen, Craig)
	<u>19</u>	As required by 11 U.S.C. Sec. 704(b)(1)(A), the United

11/24/2006	(1)	States Trustee has reviewed the materials filed by the debtor(s). Having considered these materials in reference to the criteria set forth in 11 U.S.C. Sec. 707(b)(2)(A), and, pursuant to 11 U.S.C. Sec. 704(b)(2), the United States Trustee has determined that:(1) the debtor's(s') case should be presumed to be an abuse under section 707(b); and (2) the product of the debtor's current monthly income, multiplied by 12, is not less than the requirements specified in section 704(b)(2)(A) or (B). As required by 11 U.S.C. Sec. 704(b)(2) the United States Trustee shall, not later than 30 days after the date of this Statement's filing, either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States Trustee does not consider such a motion to be appropriate. Debtor(s) may rebut the presumption of abuse only if special circumstances can be demonstrated as set forth in 11 U.S.C. Sec. 707(b)(2)(B). Filed by U.S. Trustee US Trustee. (Reynard, Janine)
11/24/2006	<u>18</u> (2 pgs)	BNC Certificate of Mailing - Clerk's Notice of Presumed Abuse Service Date 11/24/2006. (Admin.)
11/30/2006	<u>20</u> (2 pgs)	BNC Certificate of Mailing - Notice of Abuse Service Date 11/30/2006. (Admin.)
12/07/2006	<u>21</u> (37 pgs; 2 docs)	Reply to (related document(s): <u>19</u> UST Statement of Presumed Abuse,,,,, filed by U.S. Trustee US Trustee) Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk (Attachments: <u>1</u> Exhibit Child Support Report) (Jorgensen, Craig) Modified on 12/8/2006 to note the Notary electronic signature is missing (drh,).
12/08/2006	<u>22</u> (2 pgs)	Objection to Debtor's Claim of Exemptions Filed by Trustee R Sam Hopkins. Objection to Claim of Exemption Due: 1/8/2007. (Hopkins, R)
12/22/2006	<u>23</u> (13 pgs; 2 docs)	Motion to Dismiss Case For Presumption of Abuse under 707b Filed by U.S. Trustee US Trustee. (Attachments: <u>1</u> Exhibit Debtors' Amended Means Test)(Reynard, Janine)
01/08/2007	<u>24</u> (1 pg)	Notice of Requirement to Complete Course in Financial Management - (RE: related document(s) Financial Management Certificate due) Financial Management Certificate due 2/7/2007. (cms,)

01/10/2007	<u>25</u> (2 pgs)	BNC Certificate of Ma - Notice of Requirement to Complete Course in Financial Management. Service Date 01/10/2007. (Admin.)
01/18/2007	26	<p>Order Granting Objection to Debtor's Claim of Exemption</p> <p>The trustee in this case required that the Court not allow certain exemptions claimed by the debtor pursuant to 11 U.S.C. Section 522. Notice of the trustees request was sent to the debtor and a request for hearing has not been made within the time period allowed in that notice.</p> <p>Based upon the foregoing and good cause appearing therefor, the following exemptions are DISALLOWED to</p>  <p><i>This Notice of Electronic Filing is the Official ORDER for this entry. No document is attached.</i></p> <p>This document served on debtor at the address of record.</p> <p>(Related Doc # <u>22</u>). Signed on 1/18/2007. (cms,)</p>
01/19/2007	<u>27</u> (2 pgs; 2 docs)	Financial Management Course Certificate Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk (RE: related document(s) <u>24</u> Notice of Requirement to Complete Course in Financial Management). (Attachments: <u>1</u> Supplement Joint Debtor Certificate) (Jorgensen, Craig)
01/19/2007	<u>28</u> (2 pgs)	Supplement to <i>Financial Mgmt Certificates</i> Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk (RE: related document(s) <u>27</u> Financial Management Course Certificate,). (Jorgensen, Craig)
04/20/2007	<u>29</u> (2 pgs)	Withdrawal <i>U.S. Trustee's Motion to Dismiss</i> Filed by U.S. Trustee US Trustee (RE: related document(s) <u>23</u> Motion to Dismiss Case For Presumption of Abuse under 707b Filed by U.S. Trustee US Trustee. (Attachments: # 1 Exhibit Debtors' Amended Means Test)(Reynard, Janine) filed by U.S. Trustee US Trustee). (Reynard, Janine)

04/23/2007	<u>30</u> (2 pgs)	Order Discharging Debtor Signed on 4/23/2007 (RE: related document(s) 6 Meeting (Chapter 7)). (cms,)
04/25/2007	<u>31</u> (3 pgs)	BNC Certificate of Mailing - Order of Discharge. Service Date 04/25/2007. (Admin.)
05/07/2007	<u>32</u> (1 pg)	Trustee's Notice of Assets & Notice to Creditors Filed by Trustee R Sam Hopkins. Claims due by 8/6/2007. Proofs of Claim due by 8/6/2007. (Hopkins, R)
05/09/2007	<u>33</u> (5 pgs)	BNC Certificate of Mailing - Notice of Assets Service Date 05/09/2007. (Admin.)
12/20/2007	<u>34</u> (22 pgs)	Trustee's Final Report and Accounting. (Hopkins, R)
12/20/2007	<u>35</u> (1 pg)	Chapter 7 Trustees Notice of Final Accounting and Right to Object Filed by Trustee R Sam Hopkins. Objections to Trustees Report due 1/10/2008. (Hopkins, R)
12/20/2007	36	<p>Prior to the filing of the Final Accounting in this case, the Trustee submitted it to the U.S. Trustee. The U.S. Trustee has reviewed and approved the Chapter 7 Final Accounting in accordance with the January 1999, Amended Memorandum of Understanding between the Executive Office of the United States Trustee and the Administrative Office of the United States Courts.</p> <p style="text-align: center;">Ilene Lashinsky, United States Trustee</p> <p style="text-align: center;"><i>This is a TEXT ENTRY - No document is attached.</i></p> <p>. (McClendon, Gary)</p>
12/22/2007	<u>37</u> (3 pgs)	BNC Certificate of Mailing - Notice of Final Accounting Service Date 12/22/2007. (Admin.)
01/14/2008	<u>38</u> (2 pgs)	Order of Distribution for R Sam Hopkins, Trustee Chapter 7, Fees awarded: \$416.40, Expenses awarded: \$45.35; Awarded on 1/14/2008 Signed on 1/14/2008. (cms,)
01/29/2008	<u>39</u> (1 pg)	Turnover of Funds of Intermountain Gas Co in the amount of \$ 1.63 Filed by Trustee R Sam Hopkins . (cms,)
	<u>40</u>	Trustee's Supplemental Final Report. Rule 5009:

04/11/2008	(2	5/11/2008. (Hopkins, F
	41	<p>Prior to the filing of the Supplemental Final Accounting, the Trustee submitted it to the U.S. Trustee. The U.S. Trustee has reviewed and approved it in accordance with the January 1999, Amended Memorandum of Understanding between the Executive Office of the United States Trustee and the Administrative Office of the United States Courts. The U.S. Trustee has no objection to either the Trustee's certification that the estate has been fully administered or the Trustee's request that the case be closed.</p> <p style="text-align: center;">Robert D. Miller Jr., United States Trustee</p> <p style="text-align: center;"><i>This is a TEXT ENTRY - No document is attached.</i></p>
04/17/2008		. (McClendon, Gary)
05/15/2008	<u>42</u> (1 pg)	Order Approving Trustee's Supplemental Final Report, Discharging Trustee and Closing the Estate Signed on 5/15/2008. (drh,)
05/17/2008	<u>43</u> (2 pgs)	BNC Certificate of Mailing - Order Approving Trustee's Supplemental Final Report, Closing Case Service Date 05/17/2008. (Admin.)
10/27/2010	<u>44</u> (6 pgs; 2 docs)	Motion to Reopen Chapter 7 Case . Fee Amount \$260 Filed by Debtor Brian K Hawk, Joint Debtor Mary Ellen Hawk (Attachments: <u>1</u> Affidavit Supporting Verified Application to Reopen) (Hawkes, Lowell)
10/28/2010	45	Receipt of Motion to Reopen Case(06-40526-JDP) [motion,mreop] (260.00) Filing Fee. Receipt number 2863578. Fee amount 260.00. (U.S. Treasury)
10/29/2010	<u>46</u> (1 pg)	Order Granting Motion To Reopen Case (Related Doc # <u>44</u>) Signed on 10/29/2010. (drh)
10/29/2010	<u>47</u> (1 pg)	Notice Appointing R Sam Hopkins as the Trustee in the Reopened Case. Filed by U.S. Trustee US Trustee. (Kimmel, Mary)
10/31/2010	<u>48</u> (3 pgs)	BNC Certificate of Mailing - PDF Document Service Date 10/31/2010. (Admin.)

11/03/2010	<u>49</u> (3 pgs)	BNC Certificate of Ma - Notice Appointing Trustee in a Reopened Case Service Date 11/03/2010. (Admin.)
10/27/2011	50	Request to the Trustee to provide an update on case status. Status request due date 11/28/2011. (tw)
11/28/2011	<u>51</u> (1 pg)	Status Report Filed by Trustee R Sam Hopkins. (Hopkins, R)
09/14/2012	52	Request to the Debtor's Attorney to provide an update on case status. Status request due date 10/14/2012. **This case was reopened on 10/29/10. Nothing filed since Trustee appointed on 10/29/10. Please advise. (tw)
10/11/2012	<u>53</u> (2 pgs)	Motion for Turnover Filed by Trustee R Sam Hopkins Objections To Motion for Turnover due 11/5/2012. (Hopkins, R) Modified on 10/12/2012 to show correct due date (cs).
10/12/2012		Notification by the Clerks Office: correction made on the date the order is due. No further action is required. (RE: related document(s) <u>53</u> Motion for Turnover filed by Trustee R Sam Hopkins) (cs)
10/22/2012	<u>54</u> (3 pgs)	Response to (related document(s): <u>53</u> Motion for Turnover filed by Trustee R Sam Hopkins) Filed by Debtor Brian K Hawk (Hawkes, Lowell)
11/13/2012	<u>55</u> (1 pg)	Notice of Hearing Filed by Trustee R Sam Hopkins (RE: related document(s) <u>53</u> Motion for Turnover Filed by Trustee R Sam Hopkins Objections To Motion for Turnover due 11/5/2012., <u>54</u> Response to). Motion to Turnover Property hearing to be held on 12/11/2012 at 09:00 AM Pocatello - US Courthouse, Bankruptcy/Magistrate Courtroom for <u>54</u> and for <u>53</u> , (Hopkins, R)
	56	Hearing Held Appearances: Lowell Hawkes, Counsel for Debtors Malpractice Claim; R. Sam Hopkins, Trustee Report of Proceedings: Comments by the Trustee and Mr. Hawkes, with questions by the Court. After discussion, the Court GRANTS the motion and orders

12/11/2012		<p>the Debtors to turn over any books, records or information etc., on condition that the Trustee first meet with Mr. Hawkes. Trustee to submit an appropriate order with these conditions. The meeting is to take place in advance of entry of the order. Trustee may withdraw the motion at any point. [ESR: CS]</p> <p>(RE: related document(s) <u>53</u> Motion for Turnover filed by Trustee R Sam Hopkins) (drh)</p>
02/26/2013		<p>Chapter 7 Trustee's Report of No Distribution: I, R Sam Hopkins, having been appointed trustee of the estate of the above-named debtor(s), report that I have neither received any property nor paid any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to Fed R Bank P 5009, I hereby certify that the estate of the above-named debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee. Key information about this case as reported in schedules filed by the debtor(s) or otherwise found in the case record: This case was pending for 28 months. Assets Abandoned (without deducting any secured claims): \$ 147781.16, Assets Exempt: Not Available, Claims Scheduled: \$ 195368.73, Claims Asserted: Not Applicable, Claims scheduled to be discharged without payment (without deducting the value of collateral or debts excepted from discharge): \$ 195368.73. Filed by Trustee R Sam Hopkins. (Hopkins, R)</p>
02/28/2013	<p><u>57</u> (2 pgs; 2 docs)</p>	<p>Order Approving Trustee's Report of No Distribution and Closing Case (Ch.7) Signed on 2/28/2013. (cs)</p>
	<p>58</p>	<p>Court's Certificate of Service re <u>57</u> Order Approving Trustee's Report of No Distribution and Closing Case (Ch.7)</p> <p>A notice of entry of the related document has been served on Registered Participants as reflected by the Notice of Electronic Filing. A Notice of Entry has also been served by First Class Mail Addressed to:</p>

02/28/2013		Lowell N Hawkes 1322 Ctr Pocatello, ID 83201 (RE: related document(s) <u>57</u> Order Approving Trustee's Report of No Distribution and Closing Case (Ch.7)) (cs)
03/03/2013	<u>59</u> (3 pgs)	BNC Certificate of Mailing - Order Approving Trustee's Report of No Distribution and Closing Estate (Ch.7) Notice Date 03/03/2013. (Admin.)

PACER Service Center			
Transaction Receipt			
06/24/2013 10:37:40			
PACER Login:	ds8614	Client Code:	26-001
Description:	Docket Report	Search Criteria:	06-40526-JDP Fil or Ent: filed Doc From: 0 Doc To: 99999999 Term: included Format: html Page counts for documents: included
Billable Pages:	5	Cost:	0.50

EXHIBIT G

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG and)	
BRIAN K. HAWK,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. CV-06-7149
)	
INTERMOUNTAIN ANESTHESIA, P.A.,)	
and MARCUS E. MURPHY, M.D.,)	
)	
Defendants.)	

DEFENDANTS' MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT
SEPTEMBER 7, 2010

BEFORE THE HONORABLE JON J. SHINDURLING

Idaho Falls, Bonneville County, Idaho

COPY

NANCY MARLOW, CSR
 Official Court Reporter
 605 North Capital Avenue
 Idaho Falls, Idaho 83402
 TELEPHONE (208) 529-1350 Ex. 1194

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A P P E A R A N C E S

FOR THE PLAINTIFFS: LOWELL N. HAWKES, ESQ.
 Lowell N. Hawkes, Chartered
 1322 East Center
 Pocatello, Idaho 83201

FOR THE DEFENDANTS: KEVIN J. SCANLAN, ESQ.
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 702 W. Idaho, Suite 700
 Post Office Box 1271
 Boise, Idaho 83701

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DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT.	4-11

E X H I B I T S
(No Exhibits)

1 SEPTEMBER 7, 2010
 2
 3 THE COURT: We will be on the record in Case
 4 No. CV-06-7149, Strong versus Intermountain
 5 Anesthesia. Present on behalf of the plaintiff is
 6 Lowell Hawkes, in the courtroom. Present by telephone
 7 on behalf of the defendants is Kevin Scanlan.
 8 This is the time set for hearing with regard to
 9 the defendants' motion to dismiss for failure to
 10 prosecute or, in the alternative, motion for summary
 11 judgment.
 12 I have received considerable filings from the
 13 defendant in that regard. I have not yet received
 14 anything from the plaintiff.
 15 MR. HAWKES: That's true, Your Honor. My
 16 understanding is this was a scheduling conference
 17 today. The motion to lift the stay was, in the
 18 alternative, with the other. Kevin had filed --
 19 THE COURT: Well, I have signed an order
 20 lifting the stay.
 21 MR. HAWKES: Yes, without a hearing. The
 22 practical problem we have here is that this case was
 23 in bankruptcy, and so the case is an asset of the
 24 bankruptcy, and I have never been able to get the --
 25 either the trustee or Craig Jorgensen, the attorney in

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1 submitted the documents relative to our position on
 2 the motion to dismiss, as well as, if we needed to get
 3 to it, the motion for summary judgment, but I don't
 4 know that I have anything further to add to the
 5 filings that have been submitted to the Court.
 6 THE COURT: All right. Well, I had anticipated
 7 we were addressing the summary judgment dismissal
 8 issues today.
 9 I have reviewed the submissions of Mr. Scanlan,
 10 and it appears to me, from the PACER report, or the
 11 PACER printout, that this matter was discharged and
 12 closed by the Bankruptcy Court on May 15, 2008. The
 13 trustee was dismissed or discharged, so I don't know
 14 what there is left to -- I mean, it's been two years
 15 that the bankruptcy case has been over.
 16 MR. HAWKES: I don't have any problem with
 17 that, Your Honor. This is a matter of Federal law.
 18 This case became an asset, and I don't know whether it
 19 was disclosed. If it was disclosed, then the
 20 trustee --
 21 THE COURT: Well, you asked for the matter to
 22 be stayed so that the --
 23 MR. HAWKES: No, I didn't ask. That's Federal
 24 law. It's stayed automatically. I probably gave the
 25 Court notice of that, but --

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1 bankruptcy, to tell me whether the trustee released
 2 this case as an asset. So I'm not even totally
 3 comfortable being here asserting some claim over this
 4 case when it was.
 5 Now Kevin and I have talked about it candidly,
 6 and we both have been a little frustrated trying to
 7 get information, but I do not have anything that tells
 8 me the trustee released this case without claim, and
 9 so I had understood that we were here to have a status
 10 conference and to schedule it, and then hopefully we
 11 can figure that out and see if I even have authority
 12 to act.
 13 THE COURT: Mr. Scanlan?
 14 MR. SCANLAN: Well, Judge, we filed the motion
 15 to lift the stay and had an order granted to that
 16 effect. And contemporaneously with that, we filed our
 17 motion to dismiss and motion for summary judgment,
 18 which has been noticed up to be heard today.
 19 As far as I can tell, it's ripe. And, you
 20 know, ultimately, this is a case that has wallowed for
 21 over four years since it was originally filed. And if
 22 at this point Mr. Hawkes doesn't have -- if Mr. Hawkes
 23 doesn't have any basis or authority to proceed in the
 24 case, I think that it's ripe to be dismissed.
 25 And if -- I think that, you know, we have

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1 THE COURT: Well, you gave me an affidavit.
 2 MR. HAWKES: Yeah, advising that, because
 3 there's not a process whereby something is sent out
 4 automatically.
 5 THE COURT: Yeah, I understand that.
 6 MR. HAWKES: And I don't have any beef with
 7 Craig Jorgensen, but even including face-to-face
 8 efforts, I've said, I need to know, Craig, was this
 9 case disclosed as an asset? Because it is an asset,
 10 whether disclosed or not.
 11 And the way I read the motion, or what my
 12 understanding was, is we were simply going to have
 13 some scheduling here today. I don't think just
 14 because a case is dismissed that I suddenly have
 15 authority and ownership of this case.
 16 I've seen people -- certainly read cases where
 17 people go to jail for not disclosing an asset and
 18 treating it as their own after a bankruptcy. And
 19 that's my concern here. I don't want to get in that
 20 box.
 21 THE COURT: Well, the trustee didn't conduct
 22 any supplemental proceeding.
 23 MR. HAWKES: No. It's my understanding it got
 24 dismissed, but if they don't disclose the case as an
 25 asset on the schedules, then somebody could be in

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1 serious trouble down the road if somebody pops up and
 2 says, hey, here's an asset that we didn't get to deal
 3 with in the bankruptcy. You go to jail.
 4 THE COURT: I have now lifted the stay.
 5 Whether your client's in trouble or not, I don't know,
 6 but we're going to proceed.
 7 MR. HAWKES: That's your call.
 8 THE COURT: Yeah, it's my call.
 9 MR. HAWKES: It's the Federal overlay that I'm
 10 concerned about.
 11 THE COURT: And I'm sure Jim Pappas will let me
 12 know if I'm out of line, but that's my order.
 13 So where do we go from there?
 14 MR. HAWKES: Well, if that's where it is, I
 15 would request a reasonable amount of time, if I've
 16 got to deal with a summary judgment, to get
 17 authorized, so that the Court, this Court doesn't put
 18 me in jeopardy of asserting ownership over an asset
 19 that I'm making a record here today I am not asserting
 20 ownership over, in the absence of clear authority
 21 from the Court that this claim -- that any claim to
 22 this case has been released. Give me some reasonable
 23 time to --
 24 THE COURT: How much do you need?
 25 MR. HAWKES: Give me 60 days.

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1 with nothing occurring as far as anyone either
 2 involving the bankruptcy trustee, getting -- making an
 3 effort to reopen the case or doing anything of that
 4 nature, at this point, we have now got a case that's
 5 more than four years old, and it's two years post the
 6 closure of the bankruptcy. We've got witnesses who,
 7 one, we've lost track of and, two, have moved out of
 8 state outside of our jurisdiction.
 9 We think at this point that it's appropriate
 10 for the Court to evaluate this case and make a
 11 determination on the failure to prosecute.
 12 THE COURT: All right. Well, I'm going to
 13 reset the dismissal summary judgment issue for the 1st
 14 of November at 9:30.
 15 I'll give you that much time, Mr. Hawkes, to
 16 get a response. That's 60 days roughly.
 17 MR. HAWKES: Okay.
 18 THE COURT: And we'll -- this has been lying
 19 dormant for a long time. Sixty days isn't going to
 20 hurt anything. I'll give you 60 days to figure out
 21 where you are. We'll hear this thing at that time,
 22 9:30, November 1st.
 23 All right?
 24 MR. SCANLAN: Thank you, Judge.
 25 THE COURT: All right. Thank you.

10

1 THE COURT: Do you have any problem with that,
 2 Mr. Scanlan?
 3 MR. SCANLAN: Well, Your Honor, I actually -- I
 4 think that at this point in time that the Court should
 5 be in a position to actually make the determination on
 6 the --
 7 THE COURT: I understand that. Mr. Hawkes is
 8 saying that he feels like he is compromised because he
 9 doesn't feel like, without confirmation that this
 10 claim itself has been freed up by the Bankruptcy
 11 Court, that he has authority to proceed, even though I
 12 have lifted the stay.
 13 MR. SCANLAN: Well, I think that the -- I think
 14 that the materials that we submitted demonstrates that
 15 the asset wasn't disclosed in the bankruptcy, and that
 16 for that reason judicial estoppel should cause it to
 17 be dismissed.
 18 But more significantly, we have had more than
 19 two years, and I have made efforts for approximately
 20 a year now to take steps to try to get this thing
 21 moved along, which really shouldn't be my burden; it
 22 should be the burden of Mr. Hawkes, Mr. Strong's
 23 attorney.
 24 By contacting Lowell Hawkes, apprising him of
 25 my concerns and trying to push this thing forward,

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1 MR. HAWKES: Thank you, Your Honor.
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 3 (Proceedings Concluded)
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REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF BONNEVILLE)

I, NANCY MARLOW, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, all witnesses named in the foregoing proceeding were duly sworn to testify to the truth and nothing but the truth.

That said proceeding was taken down by me in shorthand at the time and place therein named and thereafter reduced to computerized transcription under my direction, and that the foregoing transcript contains a true and verbatim record of said proceeding and complies with the rules to the best of my ability and limitations of my computer software.

I further certify that I have no interest in the events of this action.

Dated this 24th day of October, 2010.

NANCY MARLOW, CSR, in and for the State of Idaho

EXHIBIT H

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, et al,)
)
) Plaintiffs,)
) vs.) Case No. CV-06-7149
) INTERMOUNTAIN ANESTHESIA, P.A.,)
) et al,)
) Defendants.)

MOTION TO DISMISS SUMMARY JUDGMENT MOTION
NOVEMBER 1, 2010

BEFORE THE HONORABLE JON J. SHINDURLING

Idaho Falls, Bonneville County, Idaho

COPY

NANCY MARLOW, CSR
Official Court Reporter
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FOR THE PLAINTIFF: LOWELL N. HAWKES, CHARTERED
 LOWELL N. HAWKES, ESQ.
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PAGE

MOTION TO DISMISS SUMMARY JUDGMENT MOTION. . . . 4-9

E X H I B I T S
(No Exhibits)

1 NOVEMBER 1, 2010

2
3 THE COURT: We will be on the record then in
4 Case No. CV-06-7149, entitled Strong versus
5 Intermountain Anesthesia. Present on behalf of the
6 plaintiff is Lowell Hawkes. Present on behalf of the
7 defendant is Kevin Scanlan.

8 MR. SCANLAN: Yes, Your Honor.

9 THE COURT: This is the time set for hearing
10 with regard to the motion to dismiss the last motion
11 for summary judgment. I have received -- well, where
12 is that bankruptcy notice that was with this? It was
13 right there on top.

14 I have received an automatic stay from the
15 Bankruptcy Court with regard to a Bankruptcy Chapter
16 VII filed by the Hawks. Different Hawks than --

17 MR. HAWKES: Hawk.

18 THE COURT: Hawk.

19 MR. HAWKES: Brian and Mary Ellen Hawk.

20 THE COURT: Yes, the Hawks.

21 MR. HAWKES: Yeah.

22 THE COURT: I was going to say it's unrelated
23 to Lowell.

24 MR. HAWKES: Unrelated.

25 THE COURT: All right. So does that put us in

1 neutral again?

2 MR. HAWKES: I believe it does, Your Honor.

3 THE COURT: Mr. Scanlan, did you receive this
4 order from Judge Pappas?

5 MR. SCANLAN: We received that notice sometime
6 midafternoon on Friday. And I guess what I take from
7 that notice is that the bankruptcy has been reopened.

8 THE COURT: Right.

9 MR. SCANLAN: And I have no other notice other
10 than Mr. Hawkes' materials that he submitted
11 indicating that as a result of that the automatic stay
12 provisions are going to derail this case.

13 THE COURT: Well, I don't know that it derails
14 it. It just puts it in kind of limbo for a minute.

15 Just so that we're clear, I've received a
16 Notice of Bankruptcy, Notice of Reopening the
17 Bankruptcy and Automatic Stay signed by Mr. Hawkes,
18 which was dated 29 October 2010. I have received an
19 order reopening the estate in bankruptcy and
20 appointing trustee signed by Judge Pappas. I have
21 received the appointment of R. Sam Hopkins as the
22 trustee dated October 29th. And it would appear that
23 the stay is now again in place. I don't know that we
24 can do anything about that, except you can approach
25 the trustee and try to get it set aside so you can

1 proceed.

2 MR. SCANLAN: Well, and I guess the way that
3 this case has progressed, one thing that I would
4 encourage the Court to consider is the fact that we
5 have other parties to this case.

6 THE COURT: I understand, but I don't want to
7 tangle with the Honorable Pappas.

8 MR. SCANLAN: I'm not suggesting my clients.
9 I'm suggesting that there is also another plaintiff.

10 THE COURT: I understand that, but at least a
11 portion of this now is in the possession of the
12 trustee as an asset of an estate in bankruptcy. I
13 have an obligation under Federal law to stay
14 everything until that's resolved. Now the trustee can
15 say, I'm not interested in this, or the trustee can
16 say, I'm going to come in and participate, but the
17 State Court jurisdiction is now superceded by Federal
18 jurisdiction, and there is nothing I can do.

19 MR. SCANLAN: And --

20 THE COURT: Unless you want me to sever. And
21 that request has not been made.

22 MR. SCANLAN: Okay. And at this point in time,
23 do we have any notice that this case has ever been
24 identified as an asset to the bankruptcy?

25 THE COURT: I don't know. All I know is that

1 under law, if the Hawks file a Chapter VII, any claim
2 that they have may be a potential asset. I don't know
3 what the filing is. That's the purpose of the
4 temporary stay is to kind of put things on hold until
5 that can all get sorted out.

6 MR. SCANLAN: Okay. So is the Court entering a
7 new stay in this case?

8 THE COURT: I didn't. Judge Pappas did.

9 MR. SCANLAN: Okay.

10 THE COURT: I'm staying it pursuant to the
11 Federal order.

12 Now if you want to get relief from the trustee,
13 I will be happy to proceed, but I've got to have it --
14 I've got to have that authorization. And I don't
15 think that would be particularly hard to get, but it's
16 up to you.

17 So the matter will be stayed until further
18 notice.

19 Anything else?

20 MR. HAWKES: I would be happy to tell you,
21 Your Honor, how frustrating it's been at my end. It's
22 not my desire to delay this at all.

23 THE COURT: Oh, I understand that.

24 MR. HAWKES: I have been going crazy to try to
25 get people to do something. And it was only Wednesday

1 that I finally heard from Jim Pappas. Not -- excuse
2 me, Jim Spinner, who usually represents Trustee
3 Hopkins, that they wanted the debtors to reopen it.

4 When it boiled down to it, I think maybe
5 everybody was dragging their feet because it takes
6 \$250 to reopen it. So I think that's why
7 Craig Jorgensen and Hopkins were not getting back to
8 me, or whatever. So I am ready to go with this case,
9 but I am frustrated, and I am going to say, no more
10 screwing around.

11 You may remember some years ago in Northern
12 Idaho an attorney went to prison because an old car
13 that was transferred to a brother-in-law or something
14 didn't get disclosed as an asset. And that's what I
15 have been worried about here, just to be safe.

16 THE COURT: Well, and that's why I'm being
17 careful. I don't want to go to prison, either.

18 MR. HAWKES: Thank you, Your Honor.

19 THE COURT: I appreciate that. But there are
20 ways to get through this now if we will just take it
21 step-by-step.

22 MR. HAWKES: Well, we have it now where they
23 have to deal with it.

24 THE COURT: Yeah.

25 MR. HAWKES: Thank you.

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THE COURT: All right. Thank you.

MR. SCANLAN: Thank you, Your Honor.

THE COURT: Thank you. You may be excused.

(Proceedings Concluded)

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REPORTER'S CERTIFICATE

I, NANCY MARLOW, Certified Shorthand Reporter and Official Court Reporter, Seventh Judicial District, in and for the State of Idaho, do hereby certify that the foregoing transcript is a true and accurate record of the proceedings had on the dates and at the place therein named, as stenographically reported by me and thereafter reduced to computerized transcription under my direction, and the foregoing transcript contains a true and verbatim record of said proceeding to the best of my ability.

I further certify that I have no interest in the events of this action.

Dated this 9th day of May, 2013.

NANCY MARLOW, CSR, in and
for the State of Idaho

EXHIBIT I

UNITED STATES BANKRUPTCY COURT
District of Idaho [LIVE]

In Re:)
)
Brian K Hawk)
)
 [REDACTED] Security No.: [REDACTED])
 Employer's Tax I.D. No(s):)
)
Mary Ellen Hawk)
)
 [REDACTED] Security No.: [REDACTED])
 Employer's Tax I.D. No.:)
)
 Debtor(s))

Case No.: 06-40526-JDP
Chapter: 7

***ORDER APPROVING
TRUSTEE'S SUPPLEMENTAL
FINAL REPORT,
DISCHARGING TRUSTEE AND
CLOSING THE ESTATE***

The Supplemental Final Report having been considered and found to be in proper order;

IT IS ORDERED that the accounts of said Trustee are APPROVED, the Trustee is DISCHARGED from and relieved of the trust; the surety or sureties thereon are released from further liability thereunder, except any liability which may have accrued during the time such bond was in effect and the estate is CLOSED.

Dated: 5/15/08

Jim D Pappas
United States Bankruptcy Judge

EXHIBIT J

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

DISTRICT COURT
7TH JUDICIAL DISTRICT
BONNEVILLE COUNTY ID

Case No. CV-2010-2258

PATRICK AND CINDY WOODINGTON,)
individually, as husband and wife, and as a)
marital community,)

Plaintiffs,)

vs.)

EASTERN IDAHO HEALTH SERVICES,)
INC., assumed business name EASTERN)
IDAHO REGIONAL MEDICAL CENTER;)
DON WEBER, M.D.; ROBERT L. CACH,)
M.D.; JAY MARSDEN, CRNA;)
INTERMOUNTAIN ANESTHESIA, P.A.,)

Defendants.)

**MEMORANDUM DECISION AND
ORDER RE: MOTION TO STRIKE
AND MOTIONS FOR SUMMARY
JUDGMENT**

Received by US Mail

MAY 01 2013

DUKE SCANLAN & HALL

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 5, 2007, Patrick Woodington underwent surgery for implantation of a dorsal column stimulator at Eastern Idaho Regional Medical Center ("EIRMC").

On September 2, 2009, the Woodingtons filed a Medical Malpractice Pre-Litigation Screening application with the Idaho State Board of Medicine ("Board").

On April 14, 2010, Patrick and his wife, Cindy Woodington, filed a Complaint naming Eastern Idaho Regional Medical Center ("EIRMC"), Don Weber, M.D., Robert L. Cach, M.D., Jay Marsden, CRNA, and Intermountain Anesthesia, P.A. ("Intermountain") as defendants.

Marsden and Intermountain filed an Answer, asserting the statute of limitations as an affirmative defense, on March 9, 2011.

Marsden and Intermountain filed Motions for Summary Judgment on March 29, 2012 and a Memorandum in Support of Defendant's Motions for Summary Judgment on July 15, 2012.

The Woodingtons filed a Memorandum in Opposition to Defendants' Motion for Summary Judgment and an Affidavit of Counsel in Support of Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Affidavit of Counsel") on July 5, 2012. The Affidavit of Counsel contains two exhibits. Exhibit A is a copy of the prelitigation screening application filed with the Board. Exhibit B is a copy of the prelitigation screening panel's Findings and Recommendations.

Marsden and Intermountain filed a Motion to Strike the Affidavit of Counsel on July 10, 2012.

The Woodingtons filed a Memorandum in Response to Motion to Strike on July 16, 2012.

These matters came on hearing before this Court on July 18, 2012.

II. STANDARD OF ADJUDICATION

A. Motion to Strike

Whether to grant or deny a motion to strike rests within the court's discretion. *State v. Carey*, 152 Idaho 720, 722, 274 P.3d 21, 23 (Ct. App. 2012); *State v. Molen*, 148 Idaho 950, 961, 231 P.3d 1047, 1058 (Ct. App. 2010).

B. Motion for Summary Judgment

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law.” I.R.C.P. 56(c). See *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105; *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2002). The burden is, at all times, on the moving party to demonstrate the absence of a genuine issue of material fact. *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001).

The United States Supreme Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), stated:

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim. On the contrary, Rule 56(c), which refers to “the affidavits, *if any*” (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide the claimants and defendants, respectively, may move for summary judgment “*with or without supporting affidavits*” (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Id. at 323, 106 S.Ct. at 2553 (alterations in original).

When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. American Cleaning Services, Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). Liberal

construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Madrid v. Roth*, 134 Idaho 802, 10 P.3d 751 (Ct. App. 2000).

The Idaho appellate courts have followed the United States Supreme Court's decision in *Celotex*, which stated:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." ...Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327, 106 S.Ct. at 2555 (citations omitted); see *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002); *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002).

A party against whom a summary judgment is sought cannot merely rest on his pleadings but, when faced with affidavits or depositions supporting the motion, must come forward by way of affidavit, deposition, admissions or other documentation to establish the existence of material issues of fact, which preclude the issuance of summary judgment. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001); *Baxter v. Crane*, 135 Idaho 166, 16 P.3d 263 (2000). The non-moving party's case, however, must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2001).

The moving party is entitled to judgment when the non-moving party fails to make a sufficient showing as to the essential elements to which that party will bear the burden of proof at trial. *Primary Health Network, Inc. v. State, Dept. of Admin.*, 137 Idaho 663, 52 P.3d 307 (2002). Facts in dispute cease to be “material” facts when the plaintiff fails to establish a prima facie case. *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018, (1998). In such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial. *Id.*

III. DISCUSSION

A. Motion to Strike

Marsden and Intermountain ask this Court to Strike the Affidavit of Counsel. They argue I.R.E. 413 and I.C. § 9-340C(1) preclude the admission of evidence pertaining to the prelitigation hearing process.

The Woodingtons argue that the Affidavit of Counsel is necessary to confirm claims against Marsden and Intermountain were asserted in their application for prelitigation screening before the Board. The Woodingtons ask that the documentation be admitted for this limited purpose.

I.R.E. 413 provides:

Proceedings of medical malpractice screening panels. Evidence of the proceedings or of conduct or statements made in proceedings before a hearing panel for prelitigation consideration of medical malpractice claims, or the results, findings or determinations thereof is inadmissible in a civil action or proceeding by, against or between the parties thereto or any witness therein.

I.C. § 9-340C provides:

The following records are exempt from disclosure:

...

(10) The records, findings, determinations and decisions of any prelitigation screening panel formed under chapters 10 and 23, title 6, Idaho Code.

I.R.E. 413 appears to act as a complete bar to the admission of evidence of the proceedings before a prelitigation hearing panel. However, without evidence pertaining to the commencement and conclusion of that process, there would be no way to determine whether the statute of limitations was tolled and/or when it expired on the various malpractice claims. The Woodingtons' Affidavit of Counsel should be admitted for that limited purpose. Marsden and Intermountain's Motion to Strike should be granted regarding all other uses of the Affidavit of Counsel.

B. Motion for Summary Judgment

Marsden and Intermountain note that Idaho Code § 5-219 establishes a two-year statute of limitations on professional malpractice claims. They argue that the Woodingtons filed their Complaint more than two years after the September 5, 2007 surgery, which allegedly caused Patrick's injuries. The defendants note that neither of them are physicians, surgeons or an acute care general hospital, which would be subject to the provisions of Idaho Code §§ 6-1001, requiring a prelitigation hearing panel, and 6-1005, tolling the statute of limitations while a claim is pending before the hearing panel.

The Woodingtons argue the plain language of Idaho Code §§ 6-1001 and 6-1005 act to toll the statute of limitations on their claims against Marsden and Intermountain as well as the other defendants.

Idaho Code § 5-219, specifying the statute of limitation applicable in professional malpractice cases, states, in part:

Within two (2) years:

...

4. An action to recover damages for professional malpractice, or for an injury to the person . . . ; . . . the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer The term "professional malpractice" as used herein refers to wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho. . . .

Idaho Code § 6-1001 provides:

The Idaho state board of medicine, in alleged malpractice cases *involving claims* for damages against physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho, is directed to cooperate in providing a hearing panel in the nature of a special civil grand jury and procedure for prelitigation consideration of personal injury and wrongful death claims for damages *arising out of the provision of or alleged failure to provide hospital or medical care* in the state of Idaho, which proceedings shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation. Proceedings conducted or maintained under the authority of this act shall at all times be subject to disclosure according to chapter 3, title 9, Idaho Code. Formal rules of evidence shall not apply and all such proceedings shall be expeditious and informal.

(Emphasis added).

Idaho Code § 6-1005 provides:

[I]n the interest of due consideration being given to such proceedings and in the interest of encouraging consideration of claims informally and without the necessity of litigation, the applicable statute of limitations shall be tolled and not be deemed to run during the time that *such a claim is pending* before such a panel and for thirty (30) days thereafter.

(Emphasis added).

The Idaho Supreme Court has held:

When interpreting a statute, the Court begins with the plain language. “[I]f the statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction.... Statutory interpretation begins with the words of the statute, giving the language its plain, obvious and rational meanings.” *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Further, the Court “[w]ill resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws. There is no need to go beyond the language of the statute, when that language is clear and unambiguous.” *Potlatch Corp. v. United States*, 134 Idaho 912, 914, 12 P.3d 1256, 1258 (2000) (citation and internal quotations omitted).

Pocatello v. State, 145 Idaho 497, 500-501, 180 P.3d 1048, 1051-52 (2008); *Pioneer Irr. Dist. v. City of Caldwell*, 2012 WL 1449597, *3 (Idaho 2012) (“Where a statute is unambiguous, its plain language controls.”). “A statute is ambiguous where the language is capable of more than one reasonable construction.” *Porter v. Board of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004).

The primary function of the Court is to determine and give effect to the legislative intent. Such intent should be derived from a reading of the whole act at issue. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990).

St. Luke's Regional Medical Center, Ltd. v. Board of Com'rs of Ada County, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009).

Section 6-1001 dictates that the prelitigation hearing panel is to consider personal injury claims “arising out of the provision of . . . medical care.” The plain language of Section 6-1001 does not limit the malpractice claims the Board hears to those against physicians, surgeons and acute care hospitals. Rather, the statute requires that any case before it involve a claim against at least one such party. In addition to claims against Marsden and Intermountain, this case involves claims for damages stemming from alleged professional malpractice by EIRMC, Dr. Weber, and Dr. Cach. EIRMC is a

licensed acute care general hospital. Dr. Cach is a physician and surgeon. Dr. Weber is a physician. Consequently, this case falls within the purview of Idaho Code § 6-1001, requiring the compulsory filing of a claim before the Board's prelitigation hearing panel "in alleged malpractice cases *involving* claims for damages against physicians and surgeons . . . or against licensed acute care general hospitals" Section 6-1005, tolls the statute of limitations while "such a claim" is pending. Because this case falls within the purview of Idaho Code § 6-1001, the statute of limitations was tolled during the time that the Woodingtons' claims were pending before the Board's prelitigation hearing panel.

Patrick Woodington underwent surgery and anesthesia on September 5, 2007. It is from this date that the two-year statute of limitations began to run. The Woodingtons filed their claims against Dr. Cach, EIRMC, Dr. Weber and Marsden and "any affiliated medical providers" before the Board on September 2, 2009. Although Marsden is affiliated with Intermountain, the prelitigation screening application never referred to Intermountain by name. Marsden was served with a copy of the application on September 4, 2009. The record does not indicate that Intermountain was ever notified the matter was pending before the Board.

On October 2, 2009, the Board mailed a letter to the Woodingtons' counsel informing him that it would not consider the Woodingtons' claim against Marsden. Whether or not the Board was correct in its determination, that decision effectively disposed of the Woodingtons' claims against Marsden as of that date. The tolling of the statute of limitations as to the claims against Marsden would have ended on November 1, 2009. The Woodingtons did not file their claim against Marsden in this Court until April

14, 2010—after the statute of limitations had expired. Marsden’s motion for summary judgment should be granted.

Intermountain was never named as a defendant before the Idaho State Board of Medicine. Consequently, the Board’s prelitigation hearing process could not toll the statute of limitations on the Woodingtons’ claims against Intermountain. Intermountain’s motion for summary judgment should be granted.

IV. CONCLUSION AND ORDER

Marsden and Intermountain’s Motion to Strike is denied to the extent the Woodingtons’ Affidavit of Counsel sheds light on when the statute of limitations expired. The Motion to Strike is granted as to all other purposes.

Marsden and Intermountain’s Motion for Summary Judgment is granted.

IT IS SO ORDERED.

DATED this 20th day of July 2012.

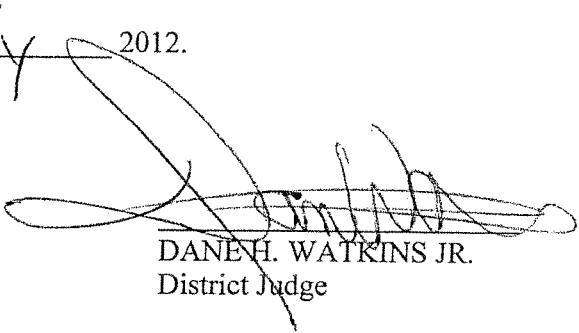

DANEH. WATKINS JR.
District Judge

EXHIBIT K

LAW OFFICE

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J. CHARLES BLANTON	CHRIS D. COMSTOCK
RAYMOND D. POWERS	JILL M. TWEDT
CANDY WAGAHOFF DALE	PORTIA L. JENKINS
J. KEVIN WEST	RANDY F. WERTH
BART W. HARWOOD	KAREN O. SHEEHAN
JOHN J. BURKE	KYLE M. YEARSLEY
KEVIN J. SCANLAN	DANA M. HERBERHOLZ
TAMSEN L. LEACHMAN	MARK J. ORLER
KEELY E. DUKE	

With Attorneys Admitted to Practice Law in
Idaho, Oregon, Washington and Utah

February 2, 2007

VIA FACSIMILE – 208-235-4200

Lowell N. Hawkes
LOWELL N. HAWKES, CHARTERED
1322 East Center
Pocatello, ID 83201

Re: *Strong/Hawk v. Marcus E. Murphy, M.D., et al.*
HFOB File No. 3-235.8

Dear Lowell:

Attached please find a *Stipulation to Bifurcate*, which will allow the actions filed by Mr. Strong and Mr. Hawk in this matter to proceed separately from one another. We believe that the potential prejudice of incorporating two separate and individual surgical procedures into one action will not only confuse the issues for the jury, but also fails to meet the requirements for permissive joinder under the Idaho Rules of Civil Procedure. It makes further sense to bifurcate these actions given the complications which are certain to arise as a result of Mr. Hawk's recent bankruptcy filing.

Based upon the above, we believe bifurcation is appropriate, and request your signature stipulating to such bifurcation. Oddly enough we seem to keep running into this issue; hopefully, you recognize the appropriateness of splitting these two actions under the present circumstances. If you do not agree, please let me know so that we can decide how to proceed.

Thank you for your attention to this issue. If you have any questions as regards to the above, please feel free to contact either myself or Mark Orler.

Very truly yours,

Kevin J. Scanlan

KJS/MJO/adm
Enclosure

RICHARD E. HALL
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W:\3\3-235.8\Stipulation to Bifurcate.doc

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

STIPULATION TO BIFURCATE

COME NOW Defendants Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D., and Plaintiffs Thomas L. Strong and Brian K. Hawk, by and through their respective counsel of record, and hereby stipulate and agree to sever the proceedings and trial of the Complaint by Plaintiffs Thomas L. Strong and Brian K Hawk as against Defendants Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D.

Such stipulation is on the grounds that such bifurcation will avoid confusion of the issues in the action filed by Plaintiffs, and will further avoid complications which may result from Plaintiff Hawk's recent bankruptcy filing.

DATED this ____ day of April, 2014.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By _____
Richard E. Hall – Of the Firm
Kevin J. Scanlan – Of the Firm
Attorneys for Defendants

DATED this ____ day of April, 2014.

LOWELL N. HAWKES, CHTD.

By _____
Lowell N. Hawkes – Of the Firm
Ryan S. Lewis – Of the Firm
Attorneys for Plaintiffs

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO

14 APR 14 AM 10:59

Richard E. Hall
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149


**NOTICE OF HEARING RE:
DEFENDANTS' RENEWED
MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

PLEASE TAKE NOTICE, Defendants have set for hearing before this Court their RENEWED MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT. Said motion shall be heard on the 12th day of May, 2014 at 9:00 am before the Honorable Jon J. Shindurling.

ORIGINAL

DATED this 10th day of April, 2014.

DUKE SCANLAN & HALL, PLLC

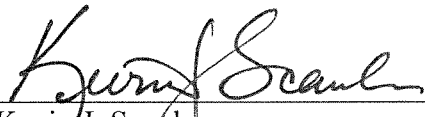
By: 
Richard E. Hall—Of the Firm
Kevin J. Scanlan—Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Lowell N. Hawkes
Ryan S. Lewis
Lowell N. Hawkes, Chartered
1322 East Center
Pocatello, ID 83201
Facsimile (208) 235-4200

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy


Kevin J. Scanlan

Richard E. Hall
ISB #1253; reh@dukescanlan.com
Kevin J. Scanlan
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2014 MAY -5 PM 3: 52

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149


**AMENDED NOTICE OF HEARING
RE: DEFENDANTS' RENEWED
MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT**

PLEASE TAKE NOTICE, Defendants have set for hearing before this Court their
RENEWED MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY
JUDGMENT. Said motion shall be rescheduled to be heard on the 2nd day of June, 2014 at
10:00 am before the Honorable Jon J. Shindurling.



DATED this 5th day of May, 2014.

DUKE SCANLAN & HALL, PLLC

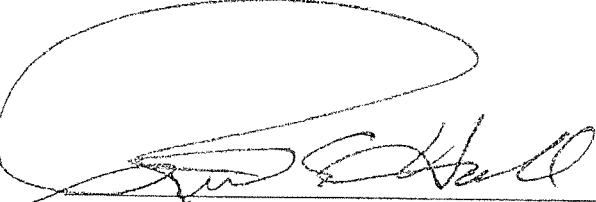
By: 
 Richard E. Hall—Of the Firm
 Kevin J. Scanlan—Of the Firm
 Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Lowell N. Hawkes
 Ryan S. Lewis
 Lowell N. Hawkes, Chartered
 1322 East Center
 Pocatello, ID 83201
 Facsimile (208) 235-4200

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy


 Richard E. Hall

14 MAY 20 AM 9:50

Lowell N. Hawkes (ISB #1852)
Ryan S. Lewis (ISB #6775)
LOWELL N. HAWKES, CHARTERED
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**IN THE SEVENTH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO**
The Honorable Jon J. Shindurling

THOMAS L. STRONG and
BRIAN K. HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A.
AND MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV-06-7149

**PLAINTIFFS' SUPPLEMENTAL
RESPONSE TO DEFENDANTS'
MOTION TO DISMISS
AND
MOTION FOR SUMMARY
JUDGMENT**

Procedural Context

The motion now before the Court was stayed "midstream" after being first filed following notice of a pending bankruptcy by Plaintiff Brian Hawk. The Trustee first closed the bankruptcy after being given notice that this claim may be an asset of the bankruptcy but without making that determination or asserting that it was.

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Because of the potential federal felony exposure to everyone from asserting any “control” over any potential bankruptcy asset, hearing on this motion was stayed by this Court pending presenting the issue to the Bankruptcy Court and Trustee. Shortly thereafter, the Bankruptcy was reopened and the “Automatic Stay” pursuant to 11 U.S.C. § 362 went into effect. At the conclusion of that federal court process the bankruptcy was closed and counsel herein advised Defendants’ counsel of that fact and that Defendants’ stayed motion could now proceed. Ultimately there was never any determination that the claim of Mr. Hawk was an asset of the bankruptcy estate or that the Trustee so contended.

Supplemental Filings

This is Plaintiffs’ Response in supplement to their prior filings. This Supplemental Response addresses the expanded issue of Intermountain Anesthesia, P.A., as a party to the Prelitigation proceedings before the Board of Medicine and the practice of medicine through entities, the *Woodington* decision of Judge Dane Watkins on May 1, 2013, Rules 40 and 41 Dismissal where actual prejudice is shown, and judicial estoppel as it relates to the bankruptcy proceeding.

Previously-filed Filings

Plaintiffs previously filed the following in response to Defendants’ motion:

- *Affidavit of Catherine L. Linderman, M.D.* (10-12-10)
- *Affidavit of Brian K. Hawk* (10-14-10)
- *Affidavit of Mary Ellen Hawk* (10-14-10)

- *Affidavit of Thomas Lee Strong* (10-15-10)
- *Affidavit of TeriLyn Chenoweth* (10-15-10)
- *Affidavit of Counsel* (10-18-10)

Plaintiffs' *Affidavit of Counsel* includes the combined deposition of both Defendants (9-29-10) together with the Exhibits to that Deposition, including the EIRMC medical records on Mr. Strong and Mr. Hawk.

Facts Synopsis

On June 25, 2004 Dr. Catherine L. Linderman scheduled six pain management patients for the permanent surgical implantation of pain-stopping peripheral nerve stimulators. Plaintiff Tom Strong was the first case. During his surgery he was left unattended by a relief “nurse anesthetist” who also negligently doubled the dosage of his IV anesthesia Propofol resulting in Mr. Strong suffering “Negative Pressure Pulmonary Edema.” That condition results in bleeding in the lungs with resultant life-altering loss of lung elasticity.

Defendant Marcus Murphy was Intermountain Anesthesia’s oversight anesthesiologist on June 25, 2004 at EIRMC. Initially, rather than accept full responsibility for the anesthesia mishandling of, and injuries to, Mr. Strong he advised Dr. Linderman that he was going to limit the amount of anesthesia her *remaining* patients would receive! The result was to subject the second patient — Plaintiff Brian Hawk —

to needless terrific pain during his surgery. That outrageous conduct occurred despite clear and unequivocal assurances from Dr. Murphy to Brian Hawk before surgery that he would be given sufficient anesthesia to be comfortable at all times.

Defendant Murphy's essential *medical* defense has been to distance *and absent* himself from any responsibility for the patient care of Mr. Strong and Mr. Hawk that day. However, Dr. Murphy is the signatory supervising anesthesiologist M.D. on both the Pre-Op, Preanesthesia and Post-anesthesia forms and notes in the EIRMC patient charts for both Mr. Strong and Mr. Hawk.¹ **EIRMC-S99,103 & 105; EIRMC-H32, 45 & 46.** Murphy's *legal* affirmative defenses are, incredibly, the assertion of patient fault, third-person fault, and unspecified "intervening causes."

The deposition of Dr. Murphy and the medical record clearly established his asserted medical and legal defenses for which there was *never* any basis in fact or law. **Murphy Depo. 108:3-9** (2nd and 4th Affirmative Defenses of Mitigation and Comparative Negligence), **Murphy Depo. 108:13-24** (3rd Affirmative Defense of Third-party Negligence), **Murphy Depo. 108:25-109:14** (8th Affirmative Defense of Pre-existing

¹ The "Anesthesia Record" for Mr. Strong (**EIRMC-S 104**) also shows the "Anes Provider" for Mr. Strong as CRNA Weight and "MM" that Dr. Murphy admitted stood for him, Marcus Murphy:

Q. And then a slash and your initials, MM?

A. My initials.

— **Murphy Depo 66:15-16**

Condition), **Murphy Depo. 109:16-112:14** (9th Affirmative Defense of Superseding Cause).

* * *

POINT ONE

THE COMPLAINT AGAINST INTERMOUNTAIN ANESTHESIA IS NOT TIME BARRED

Defendants' original motion sought to dismiss Intermountain Anesthesia arguing it was not subject to the tolling provisions of the Prelitigation Screening statutes, *Idaho Code* §6-1001 et seq. because the tolling of medical malpractice claims doesn't apply to entities, only individuals.

Defendants' supplemental filing asks this Court to dismiss Intermountain Anesthesia on the basis of the *Woodington v. Eastern Idaho Health Services*, Case No. CV-2010-2258, decided by Judge Dane Watkins on May 1, 2013. In that case Judge Watkins — according to Defendants' recent supplemental memorandum — held:

“...the tolling provisions of §6-1005 only apply to claims against parties against whom a claim was filed before the prelitigation screening panel. (*Id*, Ex. J., pp. 9-10). In *Woodington*, the plaintiffs did not assert a claim against Intermountain Anesthesia before the prelitigation screening panel.”

— **Page 17, Defendants Memorandum in Support**

In other words, Defendants *now* acknowledge that a physician's entity through which he practices and bills patients is an appropriate party for both litigation and prelitigation.

Defendants' have simply missed what was previously set forth at page 32 of the Plaintiffs' October 18, 2010 *Response to Defendants' Motion to Dismiss* served and filed with this Court. Those filings pointed out that Intermountain Anesthesia was in fact named as a party to the Prelitigation process in this case:

In fact, Intermountain Anesthesia *was* named as a party to the Prelitigation process.

See *Affidavit of Counsel*, ¶ 5, Exhibit C

The argument then boils down to one of whether physicians and other healthcare providers can practice exclusively as employees of Intermountain Anesthesia and then seek to have that entity immune from the failings of its employees. It cannot.

It is admitted that Intermountain Anesthesia is a professional corporation that exists to provide anesthesia care to patients:

3. "Intermountain Anesthesia, P.A." is an Idaho professional corporation with offices in Idaho Falls that was created January 25, 1993 for the purposes of providing medical anesthesia care to patients."

— **Complaint & Jury Demand, ¶ 3 (12-20-06)**

* * *

III.

Dr. Murphy admits the allegations contained in paragraph 3 of Plaintiffs' Complaint.

— **Marcus E. Murphy, M.D.'s Answer to Complaint and Jury Demand, ¶ III (2-13-07)**

Defendants' argument ignores those provisions of Idaho law that allow physicians to practice medicine as entities, take the economic and legal advantages of an entity practice, do all their medical practice billings and contracts in the entity name only to then try and hide behind that entity when malpractice occurs. See *Idaho Code* §30-1306:

Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct.

This Court has previously rejected the same argument in *Morgan v. Demos, Chambers & Idaho Heart Institute*, Case No. CV-06-4332. See ***Affidavit of Counsel*, ¶ 4, Exhibit B.**

The September 29, 2010 *Rule 30(b)(6)* deposition of Intermountain Anesthesia and Defendant Murphy brought forth the admissions that Defendant Murphy was an *employee* of Intermountain Anesthesia and the *entirety* of the anesthesia given, and billings, were exclusively through that entity:

Q. ... you've *never practiced anesthesia in Idaho Falls except with Intermountain*, correct?

A. That is correct.

— **Murphy Depo 27:24-28:2**

* * *

Q. Yeah. You *don't do any billing* in your name personally, do you?

A. I do not.

— **Murphy Depo 29:14-16**

* * *

You *don't receive any money directly from patients*, do you?

A. I do not.

— **Murphy Depo 30:1-3**

* * *

Q. *100 percent of the money for your services goes to Intermountain Anesthesia*, who in turn pays you as an employee?

A. *Intermountain Anesthesia pays me as an employee.*

— **Murphy Depo 30:4-8**

This Court has already rejected² on August 28, 2008 in the *Morgan v.*

Demos case the argument Defendants again make:

Here Drs. Chambers and Demos have acknowledged that they are employees of the Idaho Heart Institute. The advantages of a professional corporation require the law to view the corporation as a single legal entity; it would be incongruous to treat the professional liability of the employees separately from the liability of the employer.

Defendants Chambers and Demos are physicians, and the *Idaho Heart Institute is, for the purposes of the statute, a “physician” and the statute of limitation was tolled for the time the claim was before a pre-litigation panel and for 30 days thereafter.*”

— ***Morgan v. Demos, Chambers & Idaho Heart Institute, Bonneville County Case No. CV-06-4332 (8-28-08)***

² This Court’s decision in *Morgan* was made with the benefit of the March 11, 2003 *Memorandum Decision* of The Honorable N. Randy Smith on the same subject in Bannock County Case No. CVPI-01-00070-B. Judge Smith rejected the argument made here stating the professional service corporation statute makes the corporation liable for “any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees .”

A copy of the March 11, 2003 *Memorandum Decision* of Judge Smith is attached to the Supplemental Affidavit of Counsel and referenced therein as paragraph 14.

Intermountain Anesthesia is a proper party and was specifically named in the prelitigation proceedings as shown in the prior filings on this motion. The Intermountain Anesthesia entity argument should be rejected for the same reasons this Court did on August 28, 2008 and Judge Smith did before that on March 11, 2003.

POINT TWO

RULE 40(c) DISMISSAL IS NOT PROPER

Defendants now, by *conclusory* assertions, claim that the Hawk and Strong Complaints should be dismissed because of the *prejudice* of passage of time.³ **Defense Renewed Memo, pp. 14-15.**

Defendants acknowledge the Rule 40(c) standard is “good cause” and also that this case has been delayed by federal law and the bankruptcy “Automatic Stay” under 11 U.S.C. § 362. **Defense Renewed Memo, pp. 11-12.**

Defendants, however, were promptly notified of the second closing of the bankruptcy shortly after that occurred and were in total control of noticing up this motion that was stayed by federal law; noticing up of this motion was specifically discussed between counsel. Any further “passage of time” for the hearing of this motion stayed

³ Defendants also argue that joinder of these two claims was not required, though Defendants themselves never filed any motion to sever. Defendants seek a double-standard.

The October 12, 2010 Affidavit of Catherine L. Linderman, M.D. before this Court explains in great detail that these two claims are totally intertwined in a common anesthesia fact scenario involving six patients on the same day at the EIRMC.

mid-stream by federal law was totally within the control of defense counsel. *See*, **Supplemental Affidavit of Counsel, ¶¶ 9-11.**

POINT THREE

DISMISSAL UNDER RULE 41(b) IS IMPROPER; DEFENDANTS HAVE NOT PROVEN ANY PREJUDICE

Defendants argue that the claims against Defendants should be dismissed pursuant to Rule 41(b) on the basis of “failure to prosecute” citing to *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992). **Defense Renewed Memo, pp. 15-16.** *Gerstner* held that, while Court’s should consider three factors relative to any dismissal under Rule 41(b) the *ultimate* trumping factor in the analysis is whether the Defendant has established *actual prejudice*. The Court said:

Regardless of whether current inactivity, or a prior period of inactivity, has prompted the moving party to request the court to dismiss a case, we believe it is an abuse of discretion to “punish a period of delay” where the defendant has not established prejudice stemming from the delay. Prejudice is an essential factor in the three-part deliberation process; it *must* exist regardless of the length of the delay and rationale for the delay. *Prejudice must consist of more than general concerns about the passage of time and its effect on the memories of witnesses and the ability to prepare a case. There must be actual, demonstrated prejudice to the moving party.*
— *Gerstner v. Washington Water Power Co.* 122 Idaho at 677, 837 P.2d at 803 (1992)

Defendants' have *not* established *any* "actual, demonstrated prejudice" and thus do not satisfy the required standard of *Gerstner*. Defendants merely *conclude* they "have been prejudiced...now be forced, ten years after the date of alleged injury, to engage in fact discovery, querying witnesses and records custodians whose memory has been eroded by the passage of time." **Defense Renewed Memo, pp. 16.** Defendants expressions of *concerns* of *possible* prejudice was specifically rejected by *Gerstner* as mere say-so:

Prejudice *must consist of more than general concerns* about the passage of time and its effect on the memories of witnesses and the ability to prepare a case. ***There must be actual, demonstrated prejudice to the moving party.***
— ***Gerstner v. Washington Water Power Co. 122 Idaho at 677, 837 P.2d at 803.***

Defendants do not claim any witness had *any* information material to *any* specific defense asserted. **Defense Renewed Memo, pp. 16.** It is just as likely the information any non-party witness had would be beneficial to the Plaintiffs.

The absence of information from a non-party witness is no proof of which party to the case that *absent* information would favor. *If it even ever existed.*

In a more recent insurance bad faith case, Defendants sought to preclude an amendment to the pleadings on the basis of "prejudice". ***Weinstein v. Prudential Property & Cas., 149 Idaho 299, 310, 233 P.3d 1221 (2010).*** The Idaho Supreme Court was clear that "prejudice" means something more than mere *declaration* by the

Defendant. The Court held that prejudice requires a “showing” and not a *mere statement* of prejudice:

“Liberty Mutual has failed to show . . . that it was prejudiced by the granting of the motion. . . . Liberty Mutual contends, ‘Allowing Plaintiffs to argue for punitive damages at trial changed the character of the trial and prejudiced Defendants as a result.’ In this cursory allegation, Liberty Mutual does not attempt to explain *how* the character of the trial was changed or *how* it was allegedly prejudiced. . . . Liberty Mutual’s *unsupported statement that it was prejudiced* by the amendment *is insufficient* to show an abuse of discretion.”
— ***Weinstein v. Prudential Property & Cas.*, 149 Idaho 299, 310-11, 233 P.3d 1221 (2010)**

The arguments for dismissal under Rule 41(b) must be denied based on Defendants’ own citation to *Gerstner* and the more recent *Weinstein* decision requiring an *actual* showing of prejudice.

POINT FOUR

JUDICIAL ESTOPPEL IS AN EQUITABLE DOCTRINE THAT SHOULD NOT BE APPLIED ON THESE FACTS

The Defendants argue as a matter of law that Plaintiff Brian Hawk’s claims are barred by the *equitable doctrine* of judicial estoppel citing *McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013), and *Mowrey v. Chevron Pipeline Co.*, 155 Idaho 629, 315 P.3d 817 (2013). **Defense Renewed Memo, pp. 7-10.**

As stated in *McCallister*, judicial estoppel is an equitable doctrine and is discretionary:


“The doctrine of judicial estoppel sounds in equity and is invoked at the discretion of the court. *Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004).” ***McCallister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578 (2013).**

Defendants apply this *equitable* doctrine as a *legal* doctrine.

The entire process connected with the bankruptcy proceedings is set forth in the Supplemental Affidavit of Counsel. See, ***Supplemental Affidavit of Counsel*, ¶¶ 3-10 (5-19-14)**. That *Supplemental Affidavit* makes it clear that the entirety of what occurred was at all times sensitive to compliance with both federal and state law and full disclosure principles. Thus, application of the equitable doctrine of judicial estoppel here would be contrary to equity — the cornerstone of the doctrine sought to be applied.

RESPECTFULLY SUBMITTED this 18th day of October 2010

LOWELL N. HAWKES, CHARTERED


LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I certify that on this 19th day of May, 2014 I faxed a copy of the foregoing to Richard E. Hall and Kevin J. Scanlan of Duke Scanlan & Hall PLLC, 1087 W. Rivers Street, Suite 300, Boise, ID 83707; FAX 208-342-3299.


LOWELL N. HAWKES

14 MAY 20 AM 9:50

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**IN THE SEVENTH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO**
The Honorable Jon J. Shindurling

THOMAS L. STRONG and
BRIAN K. HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A.
AND MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV-06-7149

**SUPPLEMENTAL
AFFIDAVIT OF COUNSEL**

STATE OF IDAHO)
 : ss
BANNOCK COUNTY)

LOWELL N. HAWKES, being first duly sworn states as follows:

1. I am lead counsel for the Plaintiffs herein and make this Supplemental Affidavit on personal and professional knowledge.
2. By reference, I incorporate herein all prior filings, affidavits, and exhibits to those filings and affidavits.

“S”

3. In prior proceedings before this Court I advised the Court that Plaintiff Brian Hawk's bankruptcy schedules had not disclosed his claim herein as a potential asset of the bankruptcy. Our office only learned of the bankruptcy after we had filed the Complaint herein and when I so learned I faxed Mr. Scanlan with that information. The original of the motion now before the Court was actually filed while the original federal stay was in effect and after I had notified Mr. Scanlan that I had just learned of the bankruptcy. While that bankruptcy was still active I corresponded with the Trustee in an effort to meet and resolve any issues relative to the malpractice claim not being scheduled as a potential asset of the bankruptcy estate. The Trustee closed the bankruptcy without addressing the issue or notifying me of the intent to close the bankruptcy.

4. Because federal law makes it a criminal offense for any person to assert possession or control over an asset to which a bankruptcy trustee may have the statutory right all counsel and the Court were at jeopardy herein in proceeding absence clearance from the federal Bankruptcy Judge Jim Pappas and the Trustee.

5. Accordingly, I met with Pocatello attorney James Spinner, legal counsel to the Trustee in Mr. Hawk's bankruptcy, to advise him of the absence of this claim being set forth in the original bankruptcy schedules and my prior correspondence with the Trustee. I told him that I would do whatever he and the Trustee requested or required and that the entirety of my files were open to him and the Trustee but that, given the federal potential criminal liabilities for asserting any measure of control over a potential

bankruptcy asset I could not, and would not, proceed further on the pending malpractice claim until that was resolved before Judge Pappas.

6. Some time after that meeting with Mr. Spinner he phoned me and told me that he and the Trustee, Sam Hopkins, had consulted and their request of me was that our office move to reopen the bankruptcy to make the requisite potential claim disclosures on the record since we were more knowledgeable than they were as to the facts relative to medical malpractice claim. My October 27, 2010 *Verified Application to Reopen* and *Affidavit of Counsel* filed with the Bankruptcy Court set forth the facts explained above.

7. Incidental to Bankruptcy Judge Pappas reopening the bankruptcy I offered the entirety of my case files to Mr. Spinner and the Trustee and provided all that was requested by them. That included written synopses of the claim together with key documents such as the claim booklet and medical records presented to the State Board of Medicine Prelitigation Screening Panel Members.

8. The process relative to the Trustee's determination on a medical malpractice claim as a potential asset is neither quick nor simple; among other things, it involves medical-legal expertise (or consultation) and evaluation of the whole claim and its components in light of exemptions available to the injured party to which the Trustee may have no potential claim. I had no control over that process undertaken by the Trustee, his legal counsel, and any consultant that may be involved.

9. Eventually, and following making the entirety of my files available to the Trustee and his legal counsel, that reopening process concluded and the bankruptcy was closed the second time. There was never any determination that this malpractice claim of Brian Hawk was a non-exempt asset of the Bankruptcy estate; the Trustee ultimately did not contend it was an asset of the Bankruptcy to which he made any claim.

10. Following the Trustee's second closing of the bankruptcy I spoke with Mr. Scanlan — incidental to working with him on other active litigation — that the bankruptcy in this case had now been closed for the second time. We specifically talked about how Mr. Scanlan was now free of the federal Stay that had stopped hearing on this motion “mid-stream” and could reschedule this motion for hearing subject to scheduling and caseload demands.

11. I anticipated, knowing something of the caseload demands we each carried, and having given Mr. Scanlan significant extensions on other litigation in which we were involved that it could take some period of time before he could work this case back into the mainstream of his demanding caseload.

12. During the time interim of the automatic federal bankruptcy stay pursuant to 11 U.S.C. § 362 and the second closing of the bankruptcy (and the resetting of this motion), nothing was said by Mr. Scanlan relative to perpetuating any testimony of any witness or employee of his client or otherwise preserving any evidence that somehow might be susceptible to loss or prejudice during that interim. I certainly would

have consented to and cooperated with the perpetuation of any testimony or preservation of any evidence.

13. Nothing in the recent filings sets forth any *actual* prejudice nor contends that any non-party potential witness, whether an employee of Defendant Intermountain Anesthesia or otherwise, had information that was material to the defense of this case.¹ And the prior deposition of Defendant Murphy established that there was no basis for any of the key affirmative defenses asserted:

His [Defendant Murphy's] recent deposition and the medical record clearly established his asserted medical and legal defenses to be groundless fabrications for which there was *never* any basis in fact or law. **Murphy Depo. 108:3-9** (2nd and 4th Affirmative Defenses of Mitigation and Comparative Negligence), **Murphy Depo. 108:13-24** (3rd Affirmative Defense of Third-party Negligence), **Murphy Depo. 108:25-109:14** (8th Affirmative Defense of Pre-existing Condition), **Murphy Depo. 109:16-112:14** (9th Affirmative Defense of Superceding Cause).

— **Page 3, Plaintiffs Response to Defendants' Motion to Dismiss and Motion for Summary Judgment (10-18-10)**

14. In summary, because this malpractice claim of Brian Hawk was in fact specifically disclosed to the Bankruptcy Court, the Trustee, and legal counsel for the Trustee, it falls outside the scope of those judicial decisions applying “judicial estoppel” against civil claims not disclosed to the Bankruptcy Court.

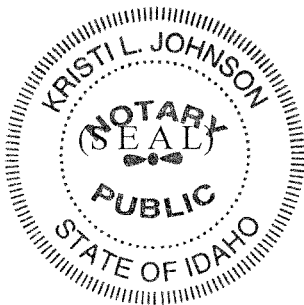
¹ It would be customary and expected that incidental to even the Prelitigation proceedings and prior to suit being filed that Intermountain Anesthesia, its insurer and legal counsel would have statements from any necessary defense witnesses. On the basis of the current non-factual *conclusory* assertions of prejudice it is just as likely that any witness no longer available may have been more helpful to the Plaintiffs' claims and detrimental to the defense than any defense contention that the testimony would have been helpful to the defense.

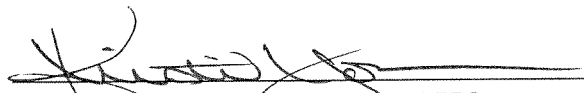
15. Finally, relative to the fact of Intermountain Anesthesia being a party to the Prelitigation Proceedings and that fact bearing upon the customary use by physicians of entities through which they practice medicine, attached hereto is the March 11, 2003 *Memorandum Decision* of The Honorable N. Randy Smith in Bannock County Case No. CVPI-01-00070-B that was previously furnished this Court in the *Morgan* proceedings.

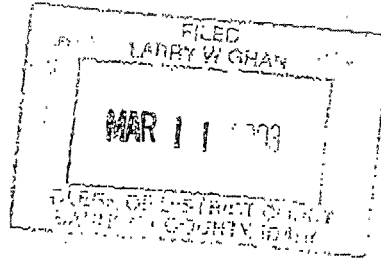
DATED this 19th day of May, 2014


LOWELL N. HAWKES

SUBSCRIBED AND SWORN TO before me May 19, 2014




NOTARY PUBLIC FOR IDAHO
Residing at Pocatello
My Commission expires April 21, 2015



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register No. CVPI01-00070B

FRANK LANE FOSTER and EDITH FOSTER,)
 husband and wife,)
)
 Plaintiffs,)

vs.)

MEMORANDUM DECISION
 & ORDER
 RE: MOTION TO DISMISS

JOHN B. TRAUL, M.D., JOHN TATHAM,)
 CRNA, ANESTHESIA ASSOCIATES OF)
 POCATELLO, P.A. and POCATELLO)
 REGIONAL MEDICAL CENTER,)
)
 Defendants.)

On December 16, 2002, the Court held a hearing on the Motion to Dismiss for Failure to State a Claim upon which Relief may be Granted, filed by Defendants John Tatham, C.R.N.A. (hereinafter referred to as Tatham) and Anesthesia Associates of Pocatello, P.A. (hereinafter referred to as AA). At the

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 MEMORANDUM DECISION & ORDER RE: MOTION TO DISMISS

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hearing, the Court allowed the parties until February 14, 2003 to submit further responses to the motion to dismiss. Since the Court had not received any additional materials on the Motion to Dismiss by February 14, 2003, the Court then took the matter under advisement on that date. The Court now issues its decision. The Court **GRANTS** the Motion to Dismiss as to Defendant Tatham but **DENIES** the Motion as to Defendant AA.

FACTS

On December 15, 1998, Dr. Peter Schossberger, a surgeon with privileges at PRMC, performed back surgery on the Plaintiff Lane Foster. During Mr. Foster's surgery the anesthesiology team consisted of Dr. John B. Traul (hereinafter referred to as Traul) and Tatham both of whom were employees of AA. Neither Traul or Tatham are employees of PRMC, although Traul does have privileges at the facility. Almost immediately following the surgery, Mr. Foster's vision was lost. He is now blind in his right eye and has reduced vision in his left eye.

On June 14, 2000, Plaintiffs filed a pre-litigation request with the State Board of Medicine. The State Board of Medicine filed the Panel's Report and Conclusion on January 11, 2001. The Plaintiffs thereafter filed the Complaint on July 5, 2001 alleging that the defendants, negligently and improperly, failed to take appropriate precautions to protect Mr. Foster's eyes.

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MEMORANDUM DECISION & ORDER RE: MOTION TO DISMISS

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STANDARD OF REVIEW

If, upon a motion to dismiss filed under Idaho Rules of Civil Procedure 12(b)(6), matters outside the pleading being challenged for failure to state a claim upon which relief can be granted are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Idaho Rules of Civil Procedure 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." IDAHO R. Civ. P. 12(b). Indeed, the Idaho Supreme Court has held that when matters outside the pleading, in the form of affidavits, are presented to and considered by the court it is the duty of the court to treat such motion to dismiss as a motion for summary judgment. *Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965); citing *Rush v. G-K Machinery Co.*, 84 Idaho 10, 367 P.2d 280 (1961).

Rule 56(c) of the Idaho Rules of Civil Procedure allows that summary judgment "shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996)

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(quoting IDAHO R. CIV. P. 56(c)); see also *Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995); *Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995). In making this determination, a Court should liberally construe the record in favor of the party opposing the motion and draw all reasonable inferences and conclusions in that party's favor. *Smith*, 128 Idaho at 718, 918 P.2d at 587 (citing *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994)). If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence, summary judgment must be denied. *Id.* (citing *Harris v. Department of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). However, if the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Id.*, 128 Idaho at 718-719, 918 P.2d at 587-88 (citing *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272 (1991)).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Id.*, 128 Idaho at 719, 918 P.2d at 588 (citing *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994)). In order to meet its burden, the moving party must challenge in its motion and establish through evidence the

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absence of any genuine issue of material fact on an element of the nonmoving party's case. *Id.* (citing *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994)). If the moving party fails to challenge an element or fails to present evidence establishing the absence of genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the nonmoving party is not required to respond with supporting evidence. *Id.* (citing *Thomson*, 126 Idaho at 530, 887 P.2d at 1038)). However, if the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of fact. *Id.* (citing *Tingley*, 125 Idaho at 90, 867 P.2d at 964). Summary judgment is properly granted in favor of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Id.* (citing *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988)). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth

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specific facts showing that there is a genuine issue for trial." *Id.* (quoting IDAHO R. CIV. P. 56(e)). The nonmoving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 868 P.2d 473 (1994) (plaintiff who produces mere scintilla of evidence, or otherwise raises only slight doubt as to facts, will not withstand summary judgment); *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the nonmoving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

DISCUSSION

The Defendants argue in their Motion, that the Complaint is barred by the statute of limitations, Idaho Code § 5-219, as it relates to Tatham and AA. The operation was performed on December 15, 1998. The Complaint was filed on July 5, 2001.

Idaho Code § 5-219 provides that actions for professional malpractice or for personal injuries must be filed within two (2) years of the occurrence, act, or omission complained of, stating in part:

4. An action to recover damages for professional malpractice, or for an injury to the person, or for the death of one caused by the wrongful act or neglect

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of another, including any such action arising from breach of an implied warranty or implied covenant; provided, however, when the action is for damages arising out of the placement and inadvertent, accidental or unintentional leaving of any foreign object in the body of any person by reason of the professional malpractice of any hospital, physician or other person or institution practicing any of the healing arts or when the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect or breach in a professional or commercial relationship with the injured party, the same shall be deemed to accrue when the injured party knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of; but in all other actions, whether arising from professional malpractice or otherwise, the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action within the foregoing foreign object or fraudulent concealment exceptions must be commenced within one (1) year following the date of accrual as aforesaid or two (2) years following the occurrence, act or omission complained of, whichever is later. The term "professional malpractice" as used herein refers to wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho. This subsection shall not affect the application of section 5-243, Idaho Code, except as to actions arising from professional malpractice. Neither shall this subsection be deemed or construed to amend, or repeal section 5-241, Idaho Code.

IDAHO CODE § 5-219(4) (1998).

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Therefore, under plain language of the statute, the case was not filed on time. The Plaintiffs however argue that the statute was tolled pursuant to Idaho Code § 6-1005. Idaho Code § 6-1005 states as follows:

There shall be no judicial or other review or appeal of such matters. No party shall be obliged to comply with or otherwise [be] affected or prejudiced by the proposals, conclusions or suggestions of the panel or any member or segment thereof; however, in the interest of due consideration being given to such proceedings and in the interest of encouraging consideration of claims informally and without the necessity of litigation, the applicable statute of limitations shall be tolled and not be deemed to run during the time that such a claim is pending before such a panel and for thirty (30) days thereafter.

IDAHO CODE § 6-1005 (1998).

Therefore, if Idaho Code § 6-1005 applies, the statute would be tolled from the date of the filing for the prelitigation panel to thirty days after the panel's decision. Here, the Plaintiff filed for the panel on June 14, 2000. The panel's decision was published on January 11, 2001. The parties agree that such tolling would make the filing of the complaint within the time necessary to comply with the statute of limitations.

The Court must then determine if Tatham and/or AA are allowed the tolling provisions under 6-1005. Pursuant to Idaho Code § 6-1001 only physicians, surgeons and acute care general hospitals are to be given hearing panels. It states:

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The Idaho state board of medicine, in alleged malpractice cases involving claims for damages against physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho, is directed to cooperate in providing a hearing panel in the nature of a special civil grand jury and procedure for prelitigation consideration of personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide hospital or medical care in the state of Idaho, which proceedings shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation. Proceedings conducted or maintained under the authority of this act shall at all times be subject to disclosure according to chapter 3, title 9, Idaho Code. Formal rules of evidence shall not apply and all such proceedings shall be expeditious and informal.

IDAHO CODE § 6-1001 (1998) (emphasis added.).

The Court must determine if Tatham and/or AA are "physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho." This decision presents an issue of statutory construction, an issue of law, which is subject to free appellate review. *City of Sun Valley v. Sun Valley Co.*, 128 Idaho 219, 221, 912 P.2d 106, 108 (1996); *Harris v. Department of Health and Welfare*, 123 Idaho 295, 297, 847 P.2d 1156, 1158 (1992).

Judicial interpretation of a statute begins with the court's review of the statute's literal words. *State v.*

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Burnight, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *City of Boise v. Indus. Comm'n*, 129 Idaho 906, 909, 935 P.2d 169, 172 (1997). The court must give the language of the statute its plain, obvious, and rational meaning. *Id.* If the court finds the language clear and unambiguous, then it applies the statute according to its plain terms. The court need not resort to legislative history or rules of statutory interpretation. *Id.* The court must give every word, clause, and sentence effect, if possible. *In re Permit No. 36-7200*, 121 Idaho 819, 822, 828 P.2d 848, 851 (1992).

"Physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho" is not defined by the statute. However, the Court finds the language of the statute to be clear and unambiguous. Therefore, it need not resort to legislative history or rules of statutory interpretation. Physicians, surgeons, and acute care general hospitals are the only entities required to go to a screening panel.

Plaintiffs argue that the legislative intent of the statute would indicate that it should be more broadly applied, that Idaho Code §§ 6-1007 and 6-1012 evidence that the legislature intended the words in Idaho Code § 6-1001 to be read to

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encompass all of the medical care providers listed in those statutes. However, the Court disagrees.

Idaho Code § 6-1001 is not ambiguous, therefore the Court need not resort to legislative history to determine legislative intent. Further neither party presented any legislative history to the Court. If the legislature intended a broader group of health care providers to be included in § 6-1001, the Court believes that they would have used the same language as is found in § 6-1007 and § 6-1012. As to statutory interpretation, Idaho Code §§ 6-1007 and 6-1012 address a broader group of health care providers, Idaho Code § 6-1001 does not. Statutes are *in pari materia* if they relate to the same subject. *Grand Canyon Dorries v. Idaho State Tax Comm'n*, 124 Idaho 1, 855 P.2d 462 (1993). Such statutes are construed together to effect legislative intent. *Id.* Where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute. *State v. Barnes*, 133 Idaho 378, 987 P.2d 290 (1999). Therefore, even if the Court were to try to determine legislative intent by rules of statutory interpretation, Idaho Code § 6-1001 is the more specific statute and therefore would not be modified by the more general statutes.

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Lastly, the Idaho State Board of Medicine did not issue a decision regarding the claims of liability against Tatham and AA but only addressed the liability of Traul and PRMC. Since the board did not address the claims of liability against Tatham and AA, it seems their claims were not before the board. Alternatively, those claims were not against physicians, surgeons and/or acute care general hospitals. An agency's interpretation of its statutes is entitled to deference. *Pearl v. Board of Professional Discipline of Idaho State Board of Medicine*, 137 Idaho 107, 44 P.3d 1162 (2002).

Applying the above law to these facts, there is nothing in the record to indicate that Tatham is a physician, surgeon, or acute care general hospital. Therefore, there is no tolling of the statute of limitations during a prelitigation hearing as to Tatham.

There is however evidence in this record that Traul was an employee of AA. Traul became an employee of AA in July 1998 (later becoming a partner in July 1999). Traul and AA stand in relation as master and servant, whereby the negligent acts of the servant, or employee, are imputed to the master, or employer, under the doctrine of *respondeat superior*. *Smith v. Thompson*, 103 Idaho 909, 655 P.2d 116 (Ct.App. 1982). See PROSSER AND KEETON ON TORTS § 72, at 516 (5th ed. 1984). The historical and

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economic genesis of the doctrine of *respondeat superior*, or vicarious liability, lies in the fact that the tort is brought about in the course of an undertaking for the benefit of the master, and that the master possesses the right to control the servant's course of conduct as well as the result to be accomplished through such conduct. See *Mathauser, v. Hellyer*, 98 Idaho 235, 560 P.2d 1325 (1977); *Whalen v. Zinn*, 60 Idaho 722, 96 P.2d 434 (1939); *State ex rel Dept. of Labor and Indus. Services v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct.App. 1990). Because the 'employment' is a factor causing the tort, the law regards the business as a unit and deals with the act of any member of it as the act and responsibility of its principal the employer.

AA was incorporated under the Idaho Professional Service Corporate Act in June 1996 (File number C 115446). The Articles of Incorporation states ¶ 3 in part:

PURPOSES: This corporation may render to the public the professional services that a medical doctor duly licensed under the laws of the State of Idaho is authorized to render, together with allied professional services as defined in Idaho Code Section 30-1303(3), but such professional services shall be rendered only through officers, employees and agents who are legally authorized to practice the above profession.

Further, Idaho Code § 30-1306 (a provision of the Idaho Professional Service Corporate Act) provides that a corporation

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organized under this act shall remain liable for its employees.

It states:

Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services.

The relationship of an individual to a professional corporation organized under this act, with which such individual is associated, whether as shareholder, director, officer or employee, shall in no way modify or diminish the jurisdiction over him of the governmental authority or state agency which licensed, certified or registered him for a particular profession.

IDAHO CODE § 30-1306 (1999).

Therefore, because Traul is a physician, AA is also considered a physician, for the purpose of Idaho Code § 6-1005. The statute would then toll the statute of limitations as to AA for any conduct for which Traul may be responsible.

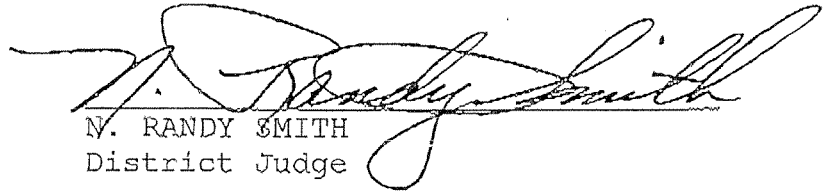
IT IS SO ORDERED.

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DATED March 7, 2003



N. RANDY SMITH
District Judge

Copies to:

Lowell N. Hawkes
Richard L. Stubbs
William R. Dalling
John A. Bailey, Jr.

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CERTIFICATE OF SERVICE

I certify that on this 19th day of May, 2014 I faxed a copy of the foregoing to Richard E. Hall and Kevin J. Scanlan of Duke Scanlan & Hall PLLC, 1087 W. Rivers Street, Suite 300, Boise, ID 83707; FAX 208-342-3299.


LOWELL N. HAWKES

9/30 Shindoring

DISTRICT COURT
CLERK OF DISTRICT COURT
BONNEVILLE COUNTY, IDAHO

14 MAY 29 AM 10:11

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Attorneys for Defendants

ORIGINAL

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.

Case No. CV 06-7149

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
RENEWED MOTION TO DISMISS,
OR ALTERNATIVELY, MOTION
FOR SUMMARY JUDGMENT**

COME NOW Defendants Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D. (collectively "Defendants"), through their counsel of record, Duke Scanlan & Hall, PLLC, and submit the following reply memorandum of points and authorities in further support of their Renewed Motion to Dismiss, or Alternatively, Motion for Summary Judgment.

A. The bulk of the Supplemental Affidavit of Counsel and “Fact Synopsis” submitted by Plaintiffs should not be considered in deciding Defendants’ motion.

The centerpiece of Plaintiffs’ opposition to this motion appears to be the Supplemental Affidavit of Counsel. The vast majority of the averments made in this affidavit are inadmissible in evidence and, therefore, should not be considered in the Court’s decision on this motion. When an affidavit is submitted in opposition to a motion to dismiss or a motion for summary judgment, its consideration in opposition to those motions is governed by Idaho Rule of Civil Procedure 56(e). Idaho R. Civ. P. 12(b), 56(e); *State v. Shama Res. Ltd. P’ship*, 127 Idaho 267, 270-71, 899 P.2d 977, 980-81 (1995). “The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge.” *Shama*, 127 Idaho at 271, 899 P.2d at 981. “Only material contained in affidavits or depositions that is based upon personal knowledge or that is admissible at trial [can] be considered by [the] court.” *Id.* As the Idaho Supreme Court recently stated, “the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact.” *Major v. Sec. Equip. Corp.*, 155 Idaho 199, 202, 307 P.3d 1225, 1228 (2013) (quoting *Bollinger v. Fall River Rural Elec. Coop., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012)).

The Idaho Supreme Court took up the admissibility issue in *Shama*, in which it upheld the district court’s exclusion of affidavits submitted by McGary, a party opposing summary judgment, because the affidavits did not meet the Rule 56(e) standard, finding as follows:

The affidavits presented by McGary, on the other hand, do not meet the requirements of Rule 56(e). Rule 56(e) requires that the affidavits be based on the personal knowledge of the affiants and that the affidavits shall present facts that would be admissible in evidence. The McGary affidavits *were not based upon the personal knowledge of the affiants*. The McGary affidavits *made*

generalizations about all of the offerees and investors in Shama and declarations about information supposedly known by the Shama offerees and investors without statements by those individuals. Additionally, the affidavits *made suppositions about the beliefs and expectations of other offerees and investors.* The McGary affidavits also presented *insufficient and nonspecific statements denying that McGary committed securities fraud. These statements were conclusory in nature and were unsupported by any factual basis or foundation.* Finally, the McGary affidavits *contained statements of hearsay* that would not be admissible into evidence. We conclude that because the affidavits were not based on personal knowledge, were insufficient and conclusory in nature, and contained statements of hearsay that would not be admissible into evidence, all in violation of Rule 56(e), the trial court properly rejected the affidavits presented by McGary from consideration when ruling on the Department's motion for summary judgment.

Id. (emphasis added). Mr. Hawkes' affidavit suffers from similar issues and the bulk of it should be excluded from consideration in deciding this motion for the reasons set forth in *Shama*. Each offending paragraph of Mr. Hawkes' affidavit will be discussed in turn:

Paragraphs 3-12: The averments of these paragraphs constitute the type of "insufficient and non-specific statements" that the Idaho Supreme Court refused to consider in *Shama*. While one of the key issues that Mr. Hawkes purports to address in his affidavit is the amount of time this litigation has been pending and the Plaintiffs' diligence in the prosecution of this litigation, the only specific date mentioned in these paragraphs is the October 27, 2010, the filing date of Mr. Hawkes' prior affidavit. General averments of non-specific action taken relative to the bankruptcy trustee, in addition to being of limited relevance, do nothing to add to the record concerning the Plaintiffs' diligence in this matter and, as such, should not be considered by this Court.

Paragraphs 10-12: Defendants, in addition to questioning the factual accuracy of these statements, question the admissibility of these statements for consideration in connection with the motions currently before the Court. The primary issue before this Court is the *Plaintiffs'* diligent prosecution of their claims in this matter. The caseload demands of Defendants' counsel and Mr. Hawkes' purported consideration thereof in choosing whether to act in this matter are of no relevance to the issues currently before this Court and should not be considered.

Paragraphs 13-14: These paragraphs should not be considered because, just like the offending affidavit in *Shama*, they contain legal conclusions. In these paragraphs, Mr. Hawkes offers legal conclusions concerning the validity of Dr. Murphy's defense, whether the Defendants have suffered actual prejudice as a result of delay in this matter, and the applicability of legal precedent applying the judicial estoppel doctrine to Mr. Hawk's claims. These conclusions are the function of this Court, not Mr. Hawkes, and his affidavit on these subjects should not be considered.

For the reasons set forth above, Defendants respectfully request that paragraphs 3-14 of the Supplemental Affidavit of Counsel not be considered in deciding this motion pursuant to Rule 56(e).

Fact Synopsis: An issue related to the Supplemental Affidavit of Counsel is the "Fact Synopsis" submitted by Plaintiffs as part of *Plaintiffs' Supplement Response to Defendants' Motion to Dismiss and for Summary Judgment* ("Opp. Memo."). (Opp. Memo., at 3-5). The Fact Synopsis contains multiple legal and factual conclusions that are unsupported by the Plaintiffs' citations to the record. To the extent this Court considers these statements, Defendants would urge the Court, to the extent it wishes to consider the information set forth in Plaintiffs' Fact

Synopsis, to rely on the cited materials themselves rather than Plaintiffs' characterization of those materials.

B. Claims against Intermountain Anesthesia are barred by the applicable statute of limitations.

Contrary to the Plaintiffs' suggestion, Intermountain Anesthesia was not named as a party to the prelitigation screening panel proceedings, nor could it have been pursuant to Idaho Code § 6-1001. As Idaho Code § 6-1001 provides, the prelitigation screening panel procedures are only applicable to "physicians and surgeons . . . or against licensed acute care general hospitals" I.C. § 6-1001. The non-binding opinion submitted by Plaintiffs from the *Foster v. Traul* matter shares this conclusion, noting "[i]f the legislature intended a broader group of healthcare providers to be included in § 6-1001, the Court believes they would have used the same language as is found in § 6-1007 and § 6-1012." (*Supplemental Affidavit of Counsel*, Ex. A, at 11).

When construing a statutory scheme, statutes that are *in pari materia*, meaning relating to the same subject matter, must be construed together. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003). When construing statutes *in pari materia*, if a statute on "one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." *Id.* In this matter, an *in pari materia* construction of Idaho Code § 6-1001 with Idaho Code § 6-1012 demonstrates legislative intent that only the providers named in § 6-1001 are proper parties to prelitigation screening panel proceedings.

Idaho Code § 6-1012, concerning the standard of care in medical malpractice claims, provides that it is applicable to claims "against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical

therapist, hospital or nursing home. . . .” I.C. § 6-1012. The inclusiveness of this provision, along with the “without limitation” language, demonstrates legislative intent that this provision apply to medical professionals generally. By contrast, § 6-1001 identifies three discrete classes of providers, not including professional associations, who are subject to prelitigation screening panel proceedings. This demonstrates legislative intent to exclude professional associations from those proceedings. This is also consistent with the manner in which the Board of Medicine carries out its duties pursuant to Idaho Code § 6-1001, as noted in the *Woodington* decision previously provided by Defendants. (*Affidavit of Kevin J. Scanlan In Support of Renewed Motion or, Alternatively, Motion for Summary Judgment*, Ex. J, at 9).

Here, although Plaintiffs contend that Intermountain Anesthesia was named in the request for prelitigation screening panel hearing, neither the panel’s decision, nor the request for hearing clearly identifies Intermountain Anesthesia as a party. Exhibit C to the October 18, 2010, affidavit of Lowell Hawkes (“Hawkes Aff.”) contains the Plaintiffs’ requests for prelitigation screening panel. (Hawkes Aff., Ex. C). An examination of these requests shows that they appear to identify Dr. Murphy as a potential defendant and provide his business address. (*Id.*). Directly following this identification is the boilerplate language “Any professional corporation or entity connected with any of the above are also prospective defendants in professional liability litigation.” (*Id.*). This hardly constitutes identification of Intermountain Anesthesia as a Defendant, but instead appears to identify it as Dr. Murphy’s place of business as part of his business address. It appears the prelitigation screening panel shared a similar view, as Intermountain Anesthesia was not mentioned in the prelitigation screening panel’s decision.

Furthermore, under the *in pari materia* interpretation of Idaho Code § 6-1001, Intermountain Anesthesia could not be named as a party before the panel and, as such, claims

against it would not be subject to the tolling provisions of Idaho Code § 6-1005. Accordingly, this Court should dismiss the claims against Intermountain Anesthesia because, without the benefit of the tolling provisions, they were not timely.

Under the reasoning of *Foster*, the same would be true to the extent Plaintiffs contend that Intermountain Anesthesia is liable to the Plaintiffs for the acts or omission of the CRNAs in this matter. As the Court in *Foster* found, non-physician medical professionals, such as CRNAs, are also not included with the language of § 6-1001 and claims against them are not subject to tolling pursuant to § 6-1005. As such, to the extent the claims asserted against Intermountain Anesthesia in this matter are based on the acts or omissions of the CRNAs it employed, those claims are time-barred.

Plaintiffs also argue that they are entitled to assert claims against Intermountain Anesthesia regardless of the statute of limitations by virtue of the doctrine of respondeat superior, which Plaintiffs contend renders Intermountain Anesthesia liable for the acts and omissions of Dr. Murphy as an employee of Intermountain Anesthesia. In support of this contention, Plaintiffs cite to the non-binding decision in *Foster v. Traul*, in which the court found that a claim could be pursued against a professional organization, even though direct claims against the organization were time barred, by virtue of vicarious liability under the doctrine of respondeat superior and Idaho Code § 30-1306. (*Supplemental Affidavit of Counsel*, Ex. A, at 12-14). The Plaintiffs' argument and the reasoning of *Foster* should be rejected, however, because of the exclusive nature of recovery provided by the Idaho Medical Malpractice Act, which provides the sole basis for recovery against Intermountain Anesthesia on the basis of professional negligence.

Idaho Code section 6-1012 provides that when a claim for damages arising from the injury or death of a party is asserted against a health care professional or organization, the sole issue on that claim will be whether the medical professional complied with the standard of health care practice applicable to those providing similar treatment in the same locality at the time of treatment. I.C. § 6-1012; *Hough v. Fry*, 131 Idaho 230, 233, 953 P.2d 980, 983 (1998). “The language of the statute clearly treats the provision of health care as a single act and not a series of steps, each of which must be analyzed to determine professional judgment.” *Hough*, 131 Idaho at 233, 953 P.2d at 983. Section 6-1012 represents the legislature’s determination that liability exposure for healthcare providers “be limited and made more definable by a requirement for direct proof and a departure from the community standard of practice.” *Id.* (quoting 1976 Idaho Sess. Laws 951). Where the act complained of is directly related to the provision of health care, the standard set forth in section 6-1012 will apply. *Id.* Negligence has nothing to do with the application of section 6-1012. *Id.*

Applying the provisions of section 6-1012, the Idaho Supreme Court has held that compliance with the applicable local standard of health care practice is the sole inquiry in medical malpractice cases, to the exclusions of other claims. This principle is evidenced by the Court’s holding in *Hoover v. Hunter*, 150 Idaho 658, 249 P.3d 851 (2011). In *Hoover*, the Idaho Supreme Court upheld the summary dismissal of a medical malpractice claim because the plaintiffs failed to support their claims with proper expert testimony. *Id.* at 663, 249 P.3d at 856. On appeal, the plaintiffs argued that the district court erred in dismissing their fraud claim because they had pled all the facts of fraud with particularity and presented sufficient evidence to create a question of material fact on the issue of fraud. *Id.* The Idaho Supreme Court rejected this argument, adopting the reasoning of the district court:

[T]he gravamen of the claim is an action for . . . wrongful death [I]f it is [a medical professional's misconduct], their failure to do what they should have done that leads to your damages, it is an action in malpractice, . . . and we will treat it as a malpractice action, [a] negligence action.

Id. The Idaho Supreme Court found this holding to be consistent with section 6-1012, noting that regardless of whether a malpractice claim may seem to sound in fraud, tort, or contract, the sole inquiry is compliance with the standard of health care practice, as set forth in section 6-1012. *Id.*

Liability for a claim arising from medical treatment provided by Dr. Murphy, whether direct or vicarious, is governed by the Idaho Medical Malpractice Act. Because this is a medical malpractice action governed by Idaho Code section 6-1012, the Plaintiffs cannot rely upon the common law doctrine of respondeat superior as a means of resurrecting a claim that would otherwise be time-barred by the Idaho Medical Malpractice Act. Accordingly, this Court should find that the Plaintiffs' claims against Intermountain Anesthesia are time-barred and this statutory bar cannot be avoided by invocation of respondeat superior on the basis of Idaho Supreme Court precedent governing the exclusivity of claims under the act in suits for liability arising out of medical treatment.

C. Rule 40(c) warrants dismissal of this matter due to the *Plaintiffs'* failure to demonstrate good cause for prosecution of this case for over one year.

Plaintiffs' primary contention in opposition to Defendants' motion to dismiss this matter is that the delay in this matter is entirely attributable to the bankruptcy stay and the Defendants' actions. Plaintiffs argue, without support, that "Defendants, however, were promptly notified of the second closing of the bankruptcy shortly after that occurred and were in total control of noticing up this motion that was stayed by federal law" (Opp. Memo., at 9). Plaintiffs' attempt to somehow shift the blame for their failure to prosecute this matter to Defendants is

inconsistent with the relevant inquiry under Rule 40(c) and fails to meet the burden imposed on Plaintiffs under that rule.

Plaintiffs' argument conveniently ignores the fact that, while the relevant inquiry under Rule 40(c) is whether good cause has been shown, the inquiry is not whether good cause has been shown for dismissal, but whether good cause exists for more than six months of inactivity on the part of Plaintiffs sufficient to prevent dismissal. Idaho R. Civ. P. 40(c). This is consistent with the plain language of Rule 40(c), which provides "in absence of a *showing of good cause for retention*, any action . . . in which no action has been taken . . . for a period of six (6) months *shall be dismissed*." Idaho R. Civ. P. 40(c) (emphasis added).

The irrelevance of the activities of the defendant in determining whether a plaintiff has shown good cause to justify inactivity was emphasized by the Idaho Supreme Court in *Rudd v. Merritt*, 138 Idaho 526, 533, 66 P.3d 230, 237 (2003), in the context of determining whether the plaintiff had demonstrated good cause for failure to serve a complaint within six months of filing as required by Rules 4(a)(2) and 40(c). In that matter, the plaintiffs appealed the district court's dismissal of a medical malpractice claim pursuant to Rule 4(a)(2) on the basis of the plaintiffs' failure to demonstrate good cause for failing to make timely service of a complaint. *Id.* In affirming the district court, the Idaho Supreme Court held that the defendant's knowledge of the claim and participation in proceedings related to the claim does not constitute a waiver or other excuse for proper service. *Id.* This is the same theory behind Plaintiffs' arguments in opposition to Rule 40(c) dismissal in this matter and those contentions should be similarly rejected.

Here, Plaintiffs contend that Defendants are somehow responsible for any delay in this matter because they were promptly informed of the conclusion of the reopened bankruptcy proceedings and could have filed this motion at any time, but did not do so. In addition to the

fact that there is no support in the record concerning Plaintiffs' alleged communications with Defendants of the termination of bankruptcy proceedings, such communication is irrelevant. The relevant inquiry is why Plaintiffs' presumably also armed with the knowledge that they allegedly conveyed to Defendants concerning the bankruptcy proceedings, took no action in this matter for over one year after those proceedings were terminated and, only then, when served with this motion. Plaintiffs have provided no justification for this inaction, nor is there any, other than a general failure of diligence as discussed in part D, *supra*. As such, Plaintiffs' claim *must* be dismissed under the language of Rule 40(c).

D. Defendants have provided ample evidence of prejudice flowing from Plaintiffs' failure to prosecute this matter.

Plaintiffs' primary argument in opposition to dismissal pursuant to Rule 41(b) is that Defendants have not demonstrated actual prejudice necessary to warrant such a dismissal. This argument completely ignores the evidence Defendants previously provided to the Court, which demonstrates substantial, *actual* prejudice flowing from Plaintiffs' inaction. The only support provided for Plaintiffs' position is a citation to *Weinstein v. Prudential Property and Casualty Insurance Co.*, 149 Idaho 299, 233 P.3d 1221 (2010), which presents a situation factually distinguishable from the case at bar. In *Weinstein*, the Idaho Supreme Court rejected the defendant's claim that it was prejudiced by the district court's allowance of an untimely amendment of the plaintiffs' complaint to assert a claim for punitive damages. *Id.* at 310, 233 P.3d at 1232. The defendant's only identification of prejudice was the statement that "[a]llowing Plaintiffs to argue for punitive damages at trial changed the character of the trial and prejudiced Defendants as a result." *Id.* The court found this was insufficient because the defendant did "not attempt to explain how the character of the trial was changed or how it was allegedly prejudiced." *Id.* The court also noted that prejudice, if any, to the defendant was cured by the fact

that the motion was only six days late and ample time for discovery remained after it was granted and the amendment complaint was filed. *Id.* The situation presented in this matter is easily distinguishable from *Weinstein*.

Here, rather than the blanket assertion that prejudice will result from the passage of time, as made in *Weinstein*, Defendants have come forward with specifically identified evidence of the prejudice that will result if they are forced to try this matter after nearly ten years of delay on the part of the Plaintiffs. Plaintiffs, rather than attempt to refute these assertions, instead characterize them as a blanket assertion of prejudice. As this Court will see from consideration of the briefing, that is simply not the case. (*See Supplemental Memorandum in Support of Motion to Dismiss*, at 2-4; *Defendants' Reply to Plaintiffs' Motion to Dismiss for Failure to Prosecute*, at 2-3; *Memorandum in Support of Defendants' Renewed Motion to Dismiss*, at 15-16; *Affidavit of Kevin J. Scanlan In Support of Renewed Motion or, Alternatively, Motion for Summary Judgment*, Ex. G, at 5:14-6:5). If this matter is not dismissed pursuant to Rule 41(b) as a result of nearly ten years of inaction and delay by the Plaintiffs, real and substantial prejudice to the Defendants will result as set forth in the above-identified briefing.

Plaintiffs also argue, albeit confusingly,¹ that their failure to move forward with prosecution of Mr. Strong's claims in light of the delay in Mr. Hawk's claims is attributable to Defendants because the Defendants did not file a formal motion to bifurcate the claims. This, once again, improperly attempts to shift the Plaintiffs' burden to timely prosecute their claims to the Defendants. As set forth in the affidavit of counsel previously submitted to this Court, Defendants' requested that Plaintiffs bifurcate this matter, a request to which Plaintiffs' never responded. (*Affidavit of Kevin J. Scanlan In Support of Renewed Motion or, Alternatively,*

¹ Plaintiffs make this argument in a footnote to their Rule 40(c) argument, despite the fact that the issue of joinder/bifurcation would be irrelevant to the Rule 40(c) analysis. (Opp. Brief, at 9 n.3).

Motion for Summary Judgment, Ex. K). Plaintiffs should not now be entitled to hide behind Mr. Strong's inaction and place the blame on the Defendants after they failed to work with the Defendants to move Mr. Strong's claim forward or take independent action to diligently prosecute that matter.

Accordingly, the claims of all Plaintiffs should be dismissed as a result of their failure to prosecute.

E. The equities of this matter require dismissal of all claims asserted by Brian Hawk pursuant to the doctrine of judicial estoppel.

As an initial matter, Mr. Hawk contends that this Court cannot dismiss a claim as “a matter of law” on a motion for summary judgment or motion to dismiss when the basis for dismissal is equitable and contend that Defendants seek to apply judicial estoppel as a “legal doctrine.” Hawk provides no explanation for this contention and it is unsupported by applicable precedent as Defendants have requested that this court apply judicial estoppel just as the Idaho Supreme Court has on multiple occasions to dismiss a claim that is barred by equitable considerations. Further, Defendants requested that this Court determine whether judicial estoppel is applicable according to the established discretionary framework. As such, Defendants fail to see how they have asked this Court to act contrary to the principles governing judicial estoppel.

Mr. Hawk's other basis for opposition to Defendants' motion to dismiss his claims on the basis of judicial estoppel is the contention that the application of judicial estoppel to Mr. Hawk would not be equitable. This argument ignores the fact, as pointed out in Defendants' prior briefing, that this matter is factually indistinguishable from other cases in which the Idaho Supreme Court has affirmed the application of the doctrine. (*Memorandum in Support of Defendants' Renewed Motion to Dismiss*, at 7-10). While Mr. Hawk appears to argue that his situation is somehow different, he does not explain how it is different. (Opp. Memo., at 13).

Application of the doctrine of judicial estoppel in this matter is warranted because it furthers the doctrine's purpose. The articulated purpose of judicial estoppel, which was stated by the Idaho Supreme Court in the *McAllister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013), and *Mowrey v. Chevron Pipe Line Co.*, 155 Idaho 629, 315 P.3d 817 (2013), is to maintain the integrity of the judicial process by preventing litigants from gaining advantage in one action by taking positions inconsistent with those taken in another action. As the Idaho Supreme Court explained, it is this principle that has guided its jurisprudence on the interrelationship between bankruptcy filings and judicial estoppel in subsequent, undeclared litigation. As noted in *Mowrey* and *McAllister*:

[t]he question of whether it was [plaintiff's] intent to conceal his claim until bankruptcy proceedings closed—so he can keep any potential recovery instead of satisfying his creditors—is not material; there is certainly a motive and an incentive to try concealing the asset for personal gain. Such concealment undermines the effectiveness of the bankruptcy system. Therefore, the district court did not abuse its discretion when it properly recognized judicial estoppel as applicable to situations of non-disclosure of an asset in an earlier bankruptcy proceeding.

Id. at 633, 315 P.3d at 821 (quoting *McAllister*, 154 Idaho at 895, 303 P.3d at 582) (alterations in original) (emphasis added).

Under this framework, the relevant question, contrary to Mr. Hawk's suggestion, is whether Mr. Hawk was chargeable with knowledge of the bankruptcy claim at the time the original property schedules were filed, which, as the evidence already in the record establishes, he was. (*Memorandum in Support of Defendants' Renewed Motion to Dismiss*, at 10; *Affidavit of Kevin J. Scanlan In Support of Renewed Motion or, Alternatively, Motion for Summary Judgment*, Ex. E). Mr. Hawk's subsequent conduct after the bankruptcy schedules were already filed is irrelevant.


Rather than refute this evidence of his awareness of this action at the time he filed for bankruptcy, Plaintiff Hawk instead contends that judicial estoppel simply should not be applied because it would be inequitable to do so. What Mr. Hawk fails to appreciate, however, is that the equities of the situation are focused on protecting the “effectiveness of the bankruptcy system.” If, as Mr. Hawk suggests, a litigant be allowed to go back and amend his bankruptcy schedules when his non-disclosure is raised through a judicial estoppel motion, as occurred here, the litigant who is not met with such a motion would receive a windfall by being allowed to prosecute a claim that rightfully belonged to the bankruptcy estate. This would create an incentive for non-disclosure of potential claims in bankruptcy, which, as the Idaho Supreme Court has noted “undermines the effectiveness of the bankruptcy system” and is exactly the type of litigation abuse judicial estoppel was created to prevent. Accordingly, the equities of this situation not only support, but require the application of judicial estoppel to Mr. Hawk’s claims and his claims in this matter should be dismissed on that basis.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that their motion be granted and Plaintiffs’ claims be dismissed with prejudice.

DATED this 27th day of May, 2014.

DUKE SCANLAN & HALL, PLLC

By  _____
Richard E. Hall—Of the Firm
Kevin J. Scanlan—Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of May, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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Attorneys for Plaintiffs

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- Hand Delivered
- Overnight Mail
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Kevin J. Scanlan

BONNEVILLE COUNTY
IDAHO FALLS, IDAHO

2014 JUN -9 PM 4:11

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, et al)	
)	
Plaintiff,)	Case No. CV-2006-7149
)	
-vs.-)	MINUTE ENTRY
)	
INTERMOUNTAIN ANESTHESIA,)	
)	
Defendant.)	
_____)	

On June 2, 2014, at 9:47 A.M., a Motion to Dismiss came on for hearing before the Honorable Jon J. Shindurling, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Mary Fox, Court Reporter, and Ms. Amanda Lyke, Deputy Court Clerk, were present.

Mr. Lowell Hawkes appeared on behalf of the plaintiff.

Mr. Richard Hall appeared on behalf of the defendant.

Mr. Hall presented argument in support of defendant's Motion to Dismiss and/or Motion for Summary Judgment.

Mr. Hawkes argued in opposition to the defendant's motion and requested the motion be denied.

Mr. Hall presented additional argument in support of the defendant's motion and requested the Court grant the motion.

After a brief discussion with the parties, the Court took the matter under advisement and will issue a decision in due time.

Court was thus adjourned.



JON J. SHINDURLING
District Judge

c: Lowell Hawkes
Kevin Scanlan

2014 JUL 28 AM 10: 09

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

THOMAS L. STRONG, et al,

Plaintiffs,

v.

INTERMOUNTAIN ANESTHESIA and
MARCUS E. MURPHY. M.D.,

Defendant.

Case No. CV-2006-7149

OPINION AND ORDER GRANTING
DEFENDANTS' RENEWED MOTION
TO DISMISS, OR ALTERNATIVELY,
MOTION FOR SUMMARY JUDGMENT

**I.
FACTS AND PROCEDURE**

On June 25, 2004, Thomas L. Strong ("Mr. Strong") and Brian K. Hawk ("Mr. Hawk") (collectively referred to as "Plaintiffs"), underwent individual surgeries, but both received pain treatment from Dr. Catherine Linderman ("Dr. Linderman"). Mr. Strong alleges that he suffered negative pressure pulmonary edema as a result of negligent supervision and administration of pain medication by a nurse anesthetist. As a result, Dr. Marcus E. Murphy ("Dr. Murphy"), Intermountain Anesthesia's oversight anesthesiologist, ordered a reduction in the pain medication of all of Dr. Linderman's patients. Consequently, Mr. Hawk experienced significant pain during his surgery.

On May 24, 2006, Plaintiffs filed a prelitigation screening request with the Idaho State Board of Medicine ("the Board"). On October 9, 2006, Mr. Hawk filed a petition for bankruptcy in the U.S. Bankruptcy Court, District of Idaho and on November 11, 2006, he filed an amended property schedule. Mr. Hawk did not list his cause of action in the original nor the amended property

schedule. On November 20, 2006, the Board issued its advisory opinions. On December 20, 2006, Plaintiffs jointly filed the complaint in this action against Intermountain Anesthesia and Dr. Marcus E. Murphy (“Defendants”).

On March 7, 2006, this Court stayed this case, pending Mr. Hawk’s bankruptcy proceeding. On April 7, 2008, the bankruptcy trustee issued his Supplemental Final Accounting, and on May 15, 2008, the bankruptcy court approved the trustee’s Supplemental Final Accounting and closed the bankruptcy case.

On July 1, 2010, Defendant filed a Motion to Lift Stay and a Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment. On July 16, 2010, this Court lifted the stay and set the motion to dismiss for a hearing on September 7, 2010. At the hearing, counsel for Plaintiffs raised the issue of non-disclosure of the litigation during the bankruptcy proceedings. This Court granted Plaintiffs 60 days to handle the bankruptcy matters. On October 29, 2010 and on Plaintiffs’ request, the bankruptcy court reopened the case and on November 1, 2010, this Court orally ruled that this case was stayed until the bankruptcy matter was resolved.

Other than a status report filed by the trustee on November 28, 2011, nothing was filed until the trustee filed a Motion to for Turnover October 11, 2012, stating that Mr. Hawk wrongfully refused to turnover documents relating to this case to the bankruptcy estate. Mr. Hawk opposed this motion and the trustee ultimately determined that the action was of no value to the estate. On February 28, 2013, the court entered an order closing the bankruptcy case. On April 14, 2014, Defendants’ filed Defendants’ Renewed Motion to Dismiss, Or Alternatively, Motion For Summary Judgment. On June 2, 2014, this Court held a hearing on Defendants’ motion and now renders its decision.

II.

ANALYSIS

a) Rule 40(c)

The decision to dismiss a case under I.R.C.P. 40(c) is discretionary. *Morgan v. Demos*, 156 Idaho 182, 321 P.3d 732, 736 (2014). The question of whether good cause exists is a factual one that must be shown through sworn affidavit. *Id.*

Rule 40(c) of the Idaho Rules of Civil Procedure governs the dismissal of inactive cases and states:

In the absence of a showing of good cause for retention, any action, appeal or proceeding, except for guardianships, conservatorships, and probate proceedings, in which no action has been taken or in which the summons has not been issued and served, for a period of six (6) months shall be dismissed. Dismissal pursuant to this rule in the case of appeals shall be with prejudice and as to all other matters such dismissal shall be without prejudice. At least 14 days prior to such dismissal, the clerk shall give notification of the pending dismissal to all attorneys of record, and to any party appearing on that party's own behalf, in the action or proceeding subject to dismissal under this rule.

In *Morgan v. Demos*, 156 Idaho 182, 321 P.3d 732, (2014), the Supreme Court upheld this Court when this Court granted a defendant's motion to dismiss under I.R.C.P. 40(c). In *Morgan v. Demos*, this Court granted the defendant's motion to dismiss after the case was inactive for 21 months and this Court found no good cause for the delay other than attorney neglect. *Id.*

This case involved two periods of over six months with no action. The first was between the May 15, 2008, termination of the first bankruptcy stay and the Defendants' July 1, 2010, Motion to Lift Stay and July 1, 2010, Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment. The second was between the February 23, 2013, termination of the second bankruptcy stay and Defendants' April 14, 2014, Renewed Motion to Dismiss, Or Alternatively, Motion for Summary Judgment.

After reviewing the affidavits, this Court finds that Plaintiffs' have not provided just cause for the delays. In exercising its discretion, this Court finds that either or both of these delays are in contrary to the requirements of I.R.C.P. 40(c). Therefore, Defendants' Motion to Dismiss is granted under I.R.C.P. 40(c).

b) Rule 41(b)

The decision whether to grant a motion to dismiss under I.R.C.P. 41(b) is within the sound discretion of the trial court. *Sys. Associates, Inc. v. Motorola Commc'ns & Electronics, Inc.*, 116 Idaho 615, 618, 778 P.2d 737, 740 (1989).

Rule 41(b) governs involuntary dismissals and, in relevant part, says, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." The guidelines employed by the trial court under a Rule 41(b) motion entail a consideration of: (1) the length of delay occasioned by the failure to prosecute; (2) the justification, if any, for such delay; and (3) the resultant prejudice of the delay. *Roberts v. Verner*, 116 Idaho 575, 577, 777 P.2d 1248, 1250 (Ct. App. 1989). The unavailability of a witness that likely had important information is prejudicial when caused by unnecessary delay. *Jackson v. Omnibus Grp., Ltd.*, 122 Idaho 347, 350, 834 P.2d 864, 867 (1992). Under I.R.C.P. 41(b), the plaintiff has an affirmative duty to seek prompt adjudication of his claims. *Nagel v. Wagers*, 111 Idaho 822, 823, 727 P.2d 1250, 1251 (Ct. App. 1986)(overturned on other grounds).

The facts creating the cause of action in this case occurred in 2004. Since the cause of action arose, this case has been delayed by Mr. Hawk's bankruptcy stay, Mr. Hawk's second bankruptcy stay for failure to list this cause of action as an asset, and for Plaintiffs' combined lack of prosecution after the second stay was lifted. The first bankruptcy

proceedings terminated on May 15, 2008; however, nothing was done on the case until Defendants filed their July 1, 2010, Motion to Lift Stay and July 1, 2010, Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment. After the second bankruptcy proceeding terminated, Plaintiffs still did nothing for over a year.

Plaintiffs had the affirmative duty to timely prosecute the case. Plaintiffs have not provided any reasonable explanation for the original failure to disclose this cause of action to the bankruptcy court, the two year delay after the original bankruptcy proceeding terminated, or the one year delay after the bankruptcy proceeding finally ended. This Court finds that any one of these delays was unjustified.


Defendants pointed out that during this prolonged time, one potential witness died, one became undiscoverable, and one moved out-of-state. By citing these specific instances of prejudice, Defendants have affirmatively shown prejudice. Therefore, Defendants' Motion to Dismiss is granted under I.R.C.P. 41(b).

IV. CONCLUSION

For the foregoing reasons, Defendants' Renewed Motion to Dismiss, Or Alternatively, Motion For Summary Judgment is GRANTED.

IT IS SO ORDERED.

Dated this 20 day of July, 2014.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2014, the foregoing document was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

Attorney for Plaintiffs

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1322 East Center
Pocatello, ID 83201

Attorney for Defendants

Richard E. Hall
Kevin J. Scanlan
DUKE SCANLAN & HALL, PLLC
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P.O. Box 7387
Boise, ID 83707

Ronald Longmore
Clerk of the District Court
Bonneville County, Idaho

by 
Deputy Clerk

BONNEVILLE COUNTY
IDAHO FALLS, IDAHO

2014 AUG 12 PM 5:09

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V:\Client Files\2014-001 Hawk v Strong\PLEADINGS\Judgment.doc

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants.


Case No. CV 06-7149

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

All claims asserted in Plaintiffs' Complaint and Jury Demand are dismissed with prejudice.

DATED this 17 day of August, 2014.


Hon. Jon J. Shindurling
District Judge

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BY: ORIGINAL 831

CLERK'S CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 12th day of August, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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- Hand Delivered
- Overnight Mail
- Telecopy



Deputy Clerk

14 SEP -8 AM 9:57

Lowell N. Hawkes (ISB #1852)
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FAX: (208) 235-4200
Attorneys for Plaintiffs

**IN THE SEVENTH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO**
The Honorable Jon J. Shindurling

THOMAS L. STRONG and)
BRIAN K. HAWK,)
)
Plaintiffs-Appellants,)
)
vs.)
)
INTERMOUNTAIN ANESTHESIA, P.A.)
AND MARCUS E. MURPHY, M.D.,)
)
Defendants-Respondents.)

Case No. CV-06-7149

**PLAINTIFFS'
NOTICE OF APPEAL**

TO: THE ABOVE-NAMED DEFENDANTS- RESPONDENTS, THEIR
COUNSEL, AND THE CLERK OF THIS COURT. NOTICE IS HEREBY GIVEN
THAT:

1. Plaintiffs-Appellants hereby appeal to the Idaho Supreme Court from
the *Judgment* entered on August 12, 2014 pursuant to the Court's *Opinion and Order
Granting Defendants' Renewed Motion to Dismiss, or Alternatively, Motion for Summary*

Judgment by the Honorable Jon J. Shindurling granting Defendants' Renewed Motion to Dismiss, and all prior and subsequent orders, judgments, and decisions entered herein.

2. Plaintiffs-Appellants have the right to appeal to the Idaho Supreme Court "as a matter of right" because the Judgment of August 12, 2014 is a "Final Judgment" within the meaning of Rule 11(a)(1) *Idaho Appellate Rules*.

3. Plaintiffs'-Appellants' preliminary statement of issues on appeal:

(a) Errors and omissions of law in granting Defendants' Renewed Motion to Dismiss.

(b) Errors in omissions of fact.

(c) Errors in the application of law to fact and vice-versa.

4. There has been no Order entered sealing all or any portion of the record.

5. Plaintiffs-Appellants request the *entirety* of the court files documents in this case be included in and made part of the Clerk's Record on Appeal *excluding nothing* and including, without exclusion of *any* other thing:

(a) All motion filings of the parties, including memoranda and affidavits.

(b) A reporter's transcript of all motion hearings and proceedings herein, *excluding nothing*, and that the reporter provide electronic disks or other media of all motion hearings and proceedings.

(c) All documents not formally filed by the Court or Clerks but treated as "lodged" with the Court or Clerk, including memoranda, notes, and all papers contained in the court files.

7. I certify that:

(a) A copy of this Notice of Appeal has been served on the reporter.

(b) The fee for preparation of the transcript will be paid upon determination of the amount required.

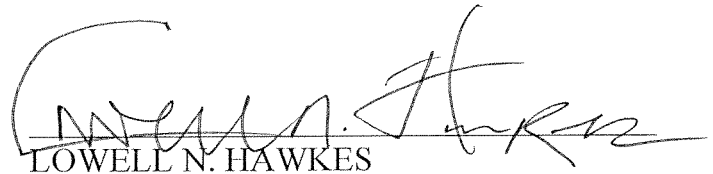
(c) The Clerk of the District Court is being paid \$100.00 with this filing in advance for preparation of the Clerk's Record.

(d) The Supreme Court civil appeal Filing Fee of \$129.00 payable to the Clerk of the District Court is tendered with this filing.

(e) Service has been made upon all parties required to be served pursuant to Rule 20, *Idaho Appellate Rules*.


RESPECTFULLY SUBMITTED this 8th day of September 2014

LOWELL N. HAWKES, CHARTERED


LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I certify that on this 8th day of September, 2014 I faxed a copy of the foregoing to Richard E. Hall and Kevin J. Scanlan of Duke Scanlan & Hall PLLC, 1087 W. Rivers Street, Suite 300, Boise, ID 83707; FAX 208-342-3299.


LOWELL N. HAWKES

836 .

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG and)
 BRIAN K. HAWK,)
)
 Plaintiff-Appellants,)
)
 vs.)
)
 INTERMOUNTAIN ANESTHESIA, P.A.)
 AND MARCUS E. MURPHY, M.D.,)
)
 Defendant-Respondents.)
 _____)

Case No. CV-2006-7149

Docket No.

**CLERK'S CERTIFICATE
OF APPEAL**

Appeal from: Seventh Judicial District, Bonneville County

Honorable Jon J. Shindurling, District Judge, presiding.

Case number from Court: CV-2006-7149

Order or Judgment appealed from: The Court's Judgment entered August 12, 2014.

Attorney for Appellant:

Lowell N. Hawkes

Attorney for Respondent:

Kevin J. Scanlan

Appealed by:

Thomas L. Strong and Brian K. Hawk

Appealed against:

Intermountain Anesthesia, P.A. and Marcus E. Murphy, M.D.

Notice of Appeal Filed:

September 08, 2014

Appellate Fee Paid:

Yes

Was District Court Reporter's Transcript requested?

Yes

If so, name of reporter:

Mary Fox, estimated pages less than 200

Dated: September 10, 2014

RONALD LONGMORE
Clerk of the District Court

By: 

Deputy Clerk

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 Ryan S. Lewis (ISB #6775)
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Attorneys for Plaintiffs

2014 OCT -3 11:11:01
 CLERK OF DISTRICT COURT
 BONNEVILLE COUNTY
 IDAHO

**IN THE SEVENTH JUDICIAL DISTRICT COURT
 BONNEVILLE COUNTY, IDAHO**
 The Honorable Jon J. Shindurling

THOMAS L. STRONG and)
 BRIAN K. HAWK,)
)
Plaintiffs-Appellants,)
)
 vs.)
)
 INTERMOUNTAIN ANESTHESIA, P.A.)
 AND MARCUS E. MURPHY, M.D.,)
)
Defendants-Respondents.)

Case No. CV-06-7149

**PLAINTIFFS'
 AMENDED
 NOTICE OF APPEAL**

Pursuant to the Supreme Court's September 17, 2014 *Notice of Defect*
 Plaintiffs-Appellants hereby file their *Amended Notice of Appeal*.

TO: THE ABOVE-NAMED DEFENDANTS- RESPONDENTS, THEIR
 COUNSEL, AND THE CLERK OF THIS COURT. NOTICE IS HEREBY GIVEN
 THAT:

1. Plaintiffs-Appellants hereby appeal to the Idaho Supreme Court from the
Judgment entered on August 12, 2014 pursuant to the Court's *Opinion and Order*

Granting Defendants' Renewed Motion to Dismiss, or Alternatively, Motion for Summary Judgment by the Honorable Jon J. Shindurling granting Defendants' Renewed Motion to Dismiss, and all prior and subsequent orders, judgments, and decisions entered herein.

2. Plaintiffs-Appellants have the right to appeal to the Idaho Supreme Court "as a matter of right" because the Judgment of August 12, 2014 is a "Final Judgment" within the meaning of Rule 11(a)(1) *Idaho Appellate Rules*.

3. Plaintiffs'-Appellants' preliminary statement of issues on appeal:

(a) Errors and omissions of law in granting Defendants' Renewed Motion to Dismiss.

(b) Errors in omissions of fact.

(c) Errors in the application of law to fact and vice-versa.

4. There has been no Order entered sealing all or any portion of the record.

5. Plaintiffs-Appellants request the Reporter's Transcript in both hard copy and electronic format. Specifically, Plaintiffs-Appellants request the following transcripts:

(a) September 7, 2010 Hearing on Defendants' Motion to Dismiss and Motion for Summary Judgment (Reported by Nancy Marlow)

(b) June 2, 2014 Hearing on Defendants' Defendants' Motion to Dismiss and Motion for Summary Judgment (Reported by Mary Fox)

6. Plaintiffs-Appellants request the *entirety* of the court files documents in this case be included in and made part of the Clerk's Record on Appeal *excluding nothing* and including, without exclusion of *any* other thing:

- (a) All motion filings of the parties, including memoranda and affidavits.
- (b) A reporter's transcript of all motion hearings and proceedings herein, *excluding nothing*, and that the reporter provide electronic disks or other media of all motion hearings and proceedings.
- (c) All documents not formally filed by the Court or Clerks but treated as "lodged" with the Court or Clerk, including memoranda, notes, and all papers contained in the court files.

7. I certify that:

(a) A copy of this *Amended Notice of Appeal* has been served on the following Court Reporters:

Nancy Marlow
Nmarlow@co.bonneville.id.us

Mary Fox
Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
Mfox@co.bonneville.id.us

(b) The fee for preparation of the transcript will be paid upon determination of the amount required. An advanced payment will be made if requested.

(c) The Clerk of the District Court has been paid \$100.00 in advance with the prior *Notice of Appeal* (9-8-14) filing for preparation of the Clerk's Record.

(d) The Supreme Court civil appeal Filing Fee of \$129.00 payable to the Clerk of the District Court was previously tendered with the prior *Notice of Appeal* (9-8-14) filing.

(e) Service has been made upon all parties required to be served pursuant to Rule 20, *Idaho Appellate Rules*.

RESPECTFULLY SUBMITTED this 1st day of October, 2014

LOWELL N. HAWKES, CHARTERED


LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I certify that on this 1st day of October, 2014 I faxed a copy of the foregoing to Richard E. Hall and Kevin J. Scanlan of Duke Scanlan & Hall PLLC, 1087 W. Rivers Street, Suite 300, Boise, ID 83707; FAX 208-342-3299; and by email to Mary Fox, Bonneville County Courthouse, 605 N. Capital Avenue, Idaho Falls, ID 83402; Mfox@co.bonneville.id.us; and Nancy Marlow at nmarlow@co.bonneville.id.us.


LOWELL N. HAWKES

DONNEVILLE COUNTY, IDAHO

2014 OCT -9 PM 4: 56

Richard E. Hall
ISB #1253; reh@dukescanlan.com
Kevin J. Scanlan
ISB #5521; kjs@dukescanlan.com
DUKE SCANLAN & HALL, PLLC
1087 W. River Street, Suite 300
P.O. Box 7387
Boise, Idaho 83707
Telephone: (208) 342-3310
Facsimile: (208) 342-3299

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Attorneys for Defendants/Respondents

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS L. STRONG, and BRIAN K.
HAWK,

Plaintiffs-Appellants,

vs.

INTERMOUNTAIN ANESTHESIA, P.A. and
MARCUS E. MURPHY, M.D.,

Defendants-Respondents.

Supreme Court Docket No. 42514-2014
Bonneville County Case No. CV 06-7149

**RESPONDENTS' DESIGNATION OF
ADDITIONAL RECORD ON APPEAL**

COME NOW the Defendants-Respondents, through their undersigned counsel of record, and pursuant to I.A.R. 28(c), hereby request the following additional documents be included in the clerk's record as follows:

- The reporter's transcript of hearing on Motion to Dismiss/Summary Judgment

Motion held before the district court on November 1, 2010, as transcribed by:

Nancy Marlow, CSR
605 North Capital Avenue
Idaho Falls, ID 83402
Telephone: (208) 529-1350, ext. 1194

RESPONDENTS' DESIGNATION OF ADDITIONAL RECORD ON APPEAL - 1

NANCY MARLOW, CSR
Official Court Reporter
Post Office Box 1671
Idaho Falls, Idaho 83403-1671
Tele: 208-529-1350 Ext. 1194
FAX: 208-528-8348

November 17, 2014

NOTICE OF LODGING

Clerk of the Court
Supreme Court
Post Office Box 83720
Boise, Idaho 83720-0101
FAX: 208-334-2616

RE: Thomas L. Strong and Brian K. Hawk vs.
Intermountain Anesthesia, P.A., and
Marcus E. Murphy, M.D.
Bonneville County Case No. CV-06-7149
Supreme Court No. 42514

Hearings:
Defendants' Motion to Dismiss/Motion for Summary Judgment
September 7, 2010

Total Pages – 12 pgs

Please be advised that the Reporter's Transcript in the above-entitled matter will be filed this date with the Clerk of the District Court, Bonneville County, via mail.

This completes all hearings requested of me in the appeal of this matter.

Sincerely,

Nancy Marlow, CSR
Official Court Reporter

✓Cc: Clerk of the Court

1 Mary Fox, CSR
2 Official Court Reporter
3 Seventh Judicial District
4 Bonneville County Courthouse
5 605 N Capital Ave
6 Idaho Falls, Idaho 83402
7 (208) 529-1350 Ext. 1194
8 E-Mail: mfox@co.bonneville.id.us

6 NOTICE OF TRANSCRIPT LODGED

8 DATE: 11/26/2014

9 TO: Stephen W. Kenyon, Clerk of the Court
10 Supreme Court / Court of Appeals
11 P.O. Box 83720
12 Boise, ID 83720-0101

12 SUPREME COURT DOCKET NO: 42514

13 DISTRICT COURT CASE NO: CV-2006-7149

14 CAPTION OF CASE:

15 THOMAS L. STRONG and BRIAN K. HAWK VS INTERMOUNTAIN

16 ANESTHESIA ET AL.

17 You are hereby notified that a reporter's appellate
18 transcript in the above-entitled and numbered case has
19 been lodged with the District Court Clerk of the County
20 of Bonneville in the Seventh Judicial District. Said
21 transcript consists of the following proceedings,
22 totaling 28 pages:

21 1. MOTION FOR SUMMARY JUDGMENT, JUNE 2, 2014

22 Respectfully,

23 

24 Mary Fox, CSR 1008, RPR

25 cc: District Court Clerk

15 FEB -4 AM 10:00

Lowell N. Hawkes (ISB #1852)
Ryan S. Lewis (ISB #6775)
LOWELL N. HAWKES, CHARTERED
1322 East Center
Pocatello, Idaho 83201
Telephone: (208) 235-1600
FAX: (208) 235-4200
Attorneys for Plaintiffs

**IN THE SEVENTH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO**
The Honorable Jon J. Shindurling

THOMAS L. STRONG and)
BRIAN K. HAWK,)
)
 Plaintiffs-Appellants,)
)
 vs.)
)
 INTERMOUNTAIN ANESTHESIA, P.A.)
 AND MARCUS E. MURPHY, M.D.,)
)
 Defendants-Respondents.)

Case No. CV-06-7149

**PLAINTIFFS'
SECOND AMENDED
NOTICE OF APPEAL**

At the telephonic request of a Deputy Clerk of the Supreme Court, relative to a more specific designation of the Clerk's Record on appeal, Plaintiffs-Appellants hereby file their *Second Amended Notice of Appeal*.

TO: THE ABOVE-NAMED DEFENDANTS-RESPONDENTS, THEIR COUNSEL, AND THE CLERK OF THIS COURT. NOTICE IS HEREBY GIVEN THAT:

1. Plaintiffs-Appellants hereby appeal to the Idaho Supreme Court from the *Judgment* entered on August 12, 2014 pursuant to the Court's *Opinion and Order Granting Defendants' Renewed Motion to Dismiss, or Alternatively, Motion for Summary Judgment* by the Honorable Jon J. Shindurling granting Defendants' Renewed Motion to Dismiss, and all prior and subsequent orders, judgments, and decisions entered herein.

2. Plaintiffs-Appellants have the right to appeal to the Idaho Supreme Court "as a matter of right" because the Judgment of August 12, 2014 is a "Final Judgment" within the meaning of Rule 11(a)(1) *Idaho Appellate Rules*.

3. Plaintiffs'-Appellants' preliminary statement of issues on appeal:

- (a) Errors and omissions of law in granting Defendants' Renewed Motion to Dismiss.
- (b) Errors in omissions of fact.
- (c) Errors in the application of law to fact and vice-versa.

4. There has been no Order entered sealing all or any portion of the record.

5. Plaintiffs-Appellants request the Reporter's Transcript in both hard copy and electronic format. Specifically, Plaintiffs-Appellants request the following transcripts:

- (a) September 7, 2010 Hearing on Defendants' Motion to Dismiss and Motion for Summary Judgment (Reported by Nancy Marlow)
- (b) June 2, 2014 Hearing on Defendants' Defendants' Motion to Dismiss and Motion for Summary Judgment (Reported by Mary Fox)

6. Plaintiffs-Appellants request the *entirety* of the substantive court files documents in this case be included in and made part of the Clerk's Record on Appeal *excluding nothing* substantive and including, without exclusion of *any* other thing in the court files not itemized on the public docket listing:

(a) All motion filings of the parties, including memoranda and affidavits.

- 12/20/2006 Complaint and Jury Demand
- 1/8/2007 Order of Assignment
- 1/17/2007 Defendant: Intermountain Anesthesia, P.A. Notice of Appearance of Kevin J. Scanlan
- 1/17/2007 Defendant: Murphy, Marcus E. MD Notice of Appearance of Kevin J. Scanlan
- 1/17/2007 Affidavit of Kevin J. Scanlan in Support of Defendant Intermountain Anesthesia, P.A.'s Motion to Dismiss
- 1/17/2007 Defendant Intermountain Anesthesia, P.A.'s Memorandum in Support of Its Motion to Dismiss
- 1/17/2007 Defendant Intermountain Anesthesia, P.A.'s Motion to Dismiss
- 2/6/2007 Notice of Appearance (Kevin Scanlan for Marcus E. Murphy, M.D.)
- 2/7/2007 Notice of Hearing 3/13/07 @ 8:30 a.m.
- 2/13/2007 Memorandum in Support of Defendants' Motion to Strike (fax)
- 2/13/2007 Defendants' Motion to Strike (fax)

- 2/14/2007 Marcus E. Murphy, M.D.'s Answer to Complaint and Jury Demand (fax)
- 2/27/2007 Notice of Hearing - 3/13/07 @ 8:30 a.m.
- 3/7/2007 Affidavit of Counsel RE: Bankruptcy Stay
- 3/7/2007 Bankruptcy Stay
- 3/7/2007 Case Status Changed: inactive - Bankruptcy Stay
- 3/12/2007 Notice of Hearing vacated 2/13/07 @ 8:30 a.m. (fax)
- 9/7/2007 Judge Change (batch process)
- 7/1/2010 Motion to Lift Stay
- 7/1/2010 Affidavit of Jeffrey R. Townsend in Support of Defendants' Motion to Lift Stay
- 7/1/2010 Defendants' Memorandum in Support of Motion to Lift Stay
- 7/1/2010 Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment
- 7/1/2010 Affidavit of Kevin J. Scanlan in Support of Defendants' Motion to Dismiss for Failure to Prosecute, or Alternatively, Motion for Summary Judgment
- 7/1/2010 Defendants' Memorandum in Support of Motion to Dismiss for Failure to Prosecute
- 7/1/2010 Notice of Hearing Re: Motion to Lift Stay and Motion to Dismiss (8/11/10@9:00AM)
- 7/9/2010 Order for self-disqualification (Tingey)
- 7/9/2010 Disqualification of Judge - Self (Tingey)

- 7/9/2010 Order of Assignment to Honorable Jon J. Shindurling
- 7/16/2010 Order Lifting Stay
- 7/16/2010 Notice of Hearing - Mtn hrg set 9/7/10 at 11:30 AM
- 9/07/2010 Minute Entry
- 9/7/2010 Notice of Hearing - (11/1/10 at 9:30 AM)
- 9/9/2010 Notice of Deposition Duces Tecum of Defendant Marcus E. Murphy, M.D.
- 9/9/2010 Notice of Deposition Duces Tecum of Defendant Intermountain Anesthesia, P.A. Pursuant to Rule 30(b)(6)
- 9/14/2010 AMENDED Minute Entry (hrg held 9/7/10 at 11:30 AM)
- 9/23/2010 Amended Notice of Deposition Duces Tecum of Defendant Intermountain Anesthesia, P.A. Pursuant to Rule 30(b)(6)
- 9/23/2010 Amended Notice of Deposition Duces Tecum of Defendant Marcus E. Murphy, M.D.
- 9/28/2010 Defendant Intermountain Anesthesia, P.A.'s Objection to Plaintiffs' Amended Notice of Taking Deposition Duces Tecum
- 10/6/2010 Affidavit of Marcus E. Murphy, M.D. In Support of Supplemental Memorandum In Support of Defendants' Motion To Dismiss For Failure To Prosecute, or Alternatively, Motion For Summary Judgment
- 10/19/2010 Plaintiffs' Response to Defendants' Motion to Dismiss and Motion for Summary Judgment
- 10/19/2010 Affidavit of Catherine L. Linderman, M.D.

- 10/19/2010 Affidavit of Brian K. Hawk
- 10/19/2010 Affidavit of Mary Ellen Hawk
- 10/19/2010 Affidavit of Thomas Lee Strong
- 10/19/2010 Affidavit of Terilyn Chenowith
- 10/19/2010 Affidavit of Counsel
- 10/25/2010 Affidavit of Jeffrey R. Townsend in Support of Supplemental Memorandum (fax)
- 10/25/2010 Defendants' Reply To Plaintiffs' Response To Motion To Dismiss
- 10/29/2010 Notice of Reopening of Bankruptcy and Automatic Stay Order
- 11/1/2010 Minute Entry (Hearing date: 11/1/2010)
- 8/1/2013 Transcript Filed - Motion To Dismiss Summary Judgment Motion - Nancy Marlow
- 4/11/2014 Notice Hearing - RE: Defendants Renewed Motion To Dismiss, or Alternatively, Motion For Summary Judgment (Time Corrections Only) (for 5/12/2014 10:00AM)
- 4/14/2014 Defendants' Renewed Motion
- 4/14/2014 Memorandum In Support of Defendants' Renewed Motion
- 4/14/2014 Affidavit of Kevin J Scanlan In Support of Defendants' Renewed Motion To Dismiss, or Alternatively, Motion For Summary Judgment
- 4/14/2014 Notice of Change of Firm Name And Address

- 4/14/2014 Notice of Hearing (Defendants' Renewed Motion for 5-12-14 @ 9:00 AM)
- 5/5/2014 Amended Notice of Hearing (for 6/02/2014 at 10:00AM)
- 5/20/2014 Plaintiffs' Supplemental Response To Defendants' Motion To Dismiss And Motion For Summary Judgment
- 5/20/2014 Supplemental Affidavit of Counsel
- 5/29/2014 Reply Memorandum In Support of Defendants' Renewed Motion
- 6/2/2014 Minute Entry (Hearing date: 6/2/2014 Time: 9:46 am)
- 7/28/2014 Opinion and Order Granting Defendants' Renewed Motion to Dismiss, or Alternatively, Motion for Summary Judgment
- 8/12/2014 Judgment
- 9/8/2014 Plaintiffs' Notice of Appeal
- 9/10/2014 Bond Posted - Cash (Receipt 41181 Dated 9/10/2014 for 100.00)
- 9/10/2014 Clerk's Certificate of Appeal
- 10/3/2014 Plaintiffs Amended Notice of Appeal
- 10/9/2014 Respondent's Designation of Additional Record on Appeal (fax)
- 2/2/2015 This Plaintiffs' Second Amended Notice of Appeal

(b) A reporter's transcript of all motion hearings and proceedings herein, *excluding nothing*, and that the reporter provide electronic disks or other media of all motion hearings and proceedings.

- (c) All documents not formally filed by the Court or Clerks but treated as “lodged” with the Court or Clerk, or otherwise contained in the court files, including memoranda, notes, and all other papers contained in the court files, whether authorship is shown or not.

7. I certify that:

- (a) A copy of this *Amended Notice of Appeal* has been served on the following Court Reporters:

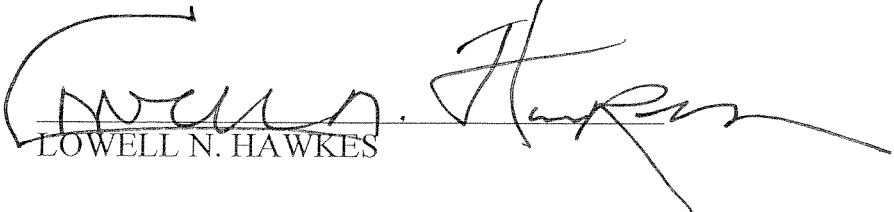
Nancy Marlow
Nmarlow@co.bonneville.id.us

Mary Fox
Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
Mfox@co.bonneville.id.us

- (b) The fee for preparation of the transcript will be paid upon determination of the amount required. An advanced payment will be made if requested.
- (c) The Clerk of the District Court has been paid \$100.00 in advance with the prior *Notice of Appeal* (9-8-14) filing for preparation of the Clerk’s Record.
- (d) The Supreme Court civil appeal Filing Fee of \$129.00 payable to the Clerk of the District Court was previously tendered with the prior *Notice of Appeal* (9-8-14) filing.
- (e) Service has been made upon all parties required to be served pursuant to Rule 20, *Idaho Appellate Rules*.

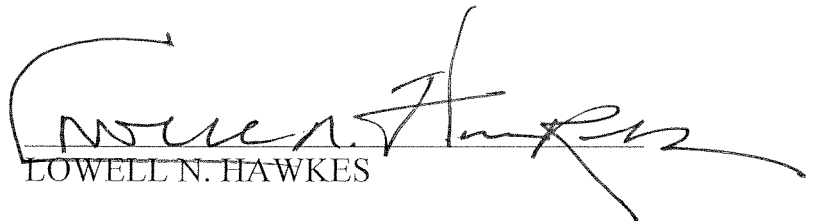
RESPECTFULLY SUBMITTED this 2nd day of February, 2015

LOWELL N. HAWKES, CHARTERED


LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I certify that on this 2nd day of February, 2015 I faxed a copy of the foregoing to Richard E. Hall and Kevin J. Scanlan of Duke Scanlan & Hall PLLC, 1087 W. Rivers Street, Suite 300, Boise, ID 83707; FAX 208-342-3299; and by email to Mary Fox, Bonneville County Courthouse, 605 N. Capital Avenue, Idaho Falls, ID 83402 Mfox@co.bonneville.id.us; and Nancy Marlow at nmarlow@co.bonneville.id.us ; and by first class mail, postage prepaid, to Stephen W. Kenyon, Clerk, Idaho Supreme Court, P.O. Box 83720, Boise, ID 83720-0101.


LOWELL N. HAWKES

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

THOMAS L. STRONG and)	
BRIAN K. HAWK,)	
)	
Plaintiff-Appellants,)	
)	
vs.)	
)	
INTERMOUNTAIN ANESTHESIA, P.A.)	
AND MARCUS E. MURPHY, M.D.,)	
)	
Defendant-Respondents.)	
_____)	

Case No. CV-2006-7149

Docket No. 42514

**CLERK'S CERTIFICATION
OF EXHIBITS**

STATE OF IDAHO)
)
County of Bonneville)

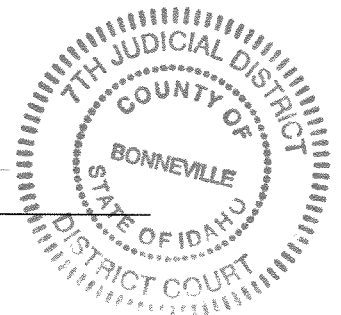
I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination

No Exhibits Reported

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court
this 12 day of March, 2015.

RONALD LONGMORE
Clerk of the District Court

By _____
Deputy Clerk



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

THOMAS L. STRONG and)
 BRIAN K. HAWK,)
)
 Plaintiff-Appellants,)
)
 vs.)
)
 INTERMOUNTAIN ANESTHESIA, P.A.)
 AND MARCUS E. MURPHY, M.D.,)
)
 Defendant-Respondents.)
 _____)

Case No. CV-2006-7149

Docket No. 42514

CLERK'S CERTIFICATE

STATE OF IDAHO)
)
 County of Bonneville)

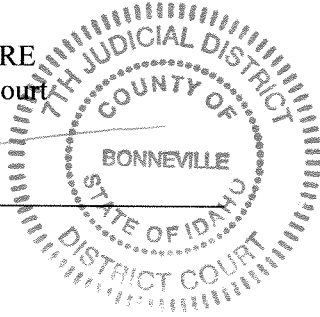
I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the District Court this 20 day of March, 2015.

RONALD LONGMORE
 Clerk of the District Court

By: _____
 Deputy Clerk



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

THOMAS L. STRONG and)
 BRIAN K. HAWK,)
)
 Plaintiff-Appellants,)
)
 vs.)
)
 INTERMOUNTAIN ANESTHESIA, P.A.)
 AND MARCUS E. MURPHY, M.D.,)
)
 Defendant-Respondents.)

Case No. CV-2006-7149

Docket No. 42514

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of March, 2015, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Lowell N. Hawkes
 1322 E. Center
 Pocatello, ID 83201

Kevin J. Scanlan
 1087 W. River Street, Suite 300
 Boise, ID 83701

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE
 Clerk of the District Court

By: _____
 Deputy Clerk

