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English v. Taylor Appellant's Reply Brief Dckt. 42947

IN THE SUPREME COURT OF THE STATE OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs/Appellants, v. JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho corporation, Defendants/Respondents.	SUPREME COURT CASE NO. 42947 Seventh Dist. Case No. CV-2013-4868

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District
For the County of Bonneville

Honorable Jon J. Shindurling, Presiding

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INTRODUCTION

The plaintiffs, Carol English and her husband, Eric, brought this action after Carol suffered a stroke from a procedure meant to stop her nosebleed. Defendant and appellee James Taylor, D.O., performed an epistaxis embolization procedure at defendant appellee Eastern Idaho Health Services, Inc., dba Eastern Idaho Regional Medical Center ("EIRMC"). The procedure was meant to inject a small amount of PVA (polyvinyl alcohol) foam embolization particles into Mrs. English's maxillary artery, where they would cause a clot and stop the nosebleed. During the procedure, the cap of the catheter broke, releasing all of the particles into Mrs. English's arteries, causing a stroke.[1] The central question in this case (though not on this appeal) is whether the catheter was defective or whether Dr. Taylor or the EIRMC nurses assisting him altered or misused the product, causing the excessive particles to enter Mrs. English's arteries, as the manufacturer claims.[2] After the incident, EIRMC disposed of the catheter, which they were asked to preserve, making it more difficult to answer this question.[3]

The plaintiffs originally filed this action against the manufacturer of the catheter (the "Cook defendants").[4] They also filed an Application and Claim for Medical Malpractice Prelitigation with the Idaho State Board of Medicine,[5] as they were required

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1 *See* R. vol. 1, p. 11, ¶¶ 4-6.

2 *See id.* p. 32.

3 *Id.* p. 89, ¶ 3.

4 *Id.* pp. 9-15.

5 *Id.* pp. 46-47, ¶ 2.

to do to pursue claims against Dr. Taylor and EIRMC.[6] (Dr. Taylor and EIRMC will be referred to as the "medical defendants.") Before the prelitigation screening panel could issue its advisory opinion, the Cook defendants removed this lawsuit to federal court, based on diversity jurisdiction.[7] After the plaintiffs received the advisory opinion and within the statute of limitations (which was tolled during the pendency of the prelitigation proceedings),[8] the plaintiffs filed a motion to amend their complaint to assert claims against Dr. Taylor and EIRMC with the amended complaint attached.[9] The federal court granted the motion to amend after the statute of limitations on the medical claims had expired. The amendment destroyed diversity, the basis for federal jurisdiction, so the case was remanded to the Seventh Judicial District Court, which granted the motions of Dr. Taylor and EIRMC to dismiss on the grounds that the complaint against them was untimely. The plaintiffs appealed. Dr. Taylor and EIRMC have filed separate briefs in response to the plaintiffs' opening brief. Because their briefs make many of the same arguments, the plaintiffs will address both briefs in this single reply brief.

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[6] IDAHO CODE ANN. § 6-1001 (such proceedings "shall be . . . compulsory as a condition precedent to litigation").

[7] *See* R. vol. 1, pp. 95-99 (the case was removed October 29, 2013) & p. 47, ¶ 3 (the advisory opinion was issued November 18, 2013).

[8] *See* IDAHO CODE ANN. § 6-1005.

[9] *See* R. vol. 1, pp. 102-17.

ARGUMENT

1. Federal law determines the effect of filing a motion to amend under the Federal Rules of Civil Procedure, and, under federal law, the amended complaint was deemed filed as of the date of the motion to amend.

The medical defendants claim that Idaho law governs both the limitations period and the commencement of the limitations period in a diversity case such as this.[10] The plaintiffs do not disagree. The statute of limitations was two years, and it started to run on September 17, 2011,[11] when Carol English suffered her stroke. Instead, what plaintiffs claim is that federal law governs the effect of a motion to amend filed under Federal Rule of Civil Procedure 15.[12]

The medical defendants' suggestion that the procedural issues related to a motion to amend based on Federal Rule of Civil Procedure 15 is an argument never raised before the district court ignores a substantial part of the record. The entire motion for reconsideration briefing and oral argument focused on the federal law regarding motions to amend under Rule 15, which is not raised on appeal.[13]

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[10] *E.g.*, Resp't James Taylor, D.O.'s Br. ("Taylor Br.") at 22; Resp't EIRMC's Br. ("EIRMC Br.") at 23 (citations omitted).

[11] IDAHO CODE ANN. § 5-219(4).

[12] *See, e.g., Loudenslager v. Teeple,* 466 F.2d 249, 250 (3d Cir. 1972) ("the construction and application of Rule 15 of the Federal Rules of Civil Procedure . . . is entirely a matter of Federal practice," governed by federal law); *Heiser v. Ass'n of Apt. Owners,* 848 F. Supp. 1482, 1487 (D. Haw. 1993) (in diversity cases, state law applies on questions related to statutes of limitations, but the federal rule will generally apply in determining whether an amendment to a complaint relates back) (citation omitted); *Fed. Leasing, Inc. v. Amperif Corp.,* 840 F. Supp. 1068, 1071 (D. Md. 1993) (the federal rule governs the relation back of amendments, even in the face of a conflicting, less generous state law).

[13] *See* R. vol. 2, pp. 225-319.

The medical defendants do not dispute that, under federal law, an amended complaint is deemed filed when it is submitted to the court with a motion for leave to file it, at least where it is later served without undue delay.[14]

The medical defendants point out that *Buller Trucking,* the case the plaintiffs cited for this proposition in their opening brief, applied state law. But the court in that case noted that "the settled rule *in both* federal and state court is that a complaint is deemed filed as of the time it is submitted to a court together with a request for leave to file the amended pleading."[15] As one court has explained,

> To give sanction to objections to the amendment, that leave to amend must await the actual placement of a judge's signature on an order to amend [and the subsequent filing of the amended pleading with the court], would be to lend impracticality and injustice to federal judicial processes and procedure. This case is an example. The amended complaint was filed on October 3, 1962, properly within the legislative mandate. Argument was heard November 8, 1962. The Court had need for researching and deliberating upon the law as applied to the facts of the case, and this had to be done while applying time and energy to the many other matters in a busy court. The necessary time so consumed (which must always be relative and hardly ever positive) should not and cannot be permitted as an obstacle to justice. Such is the intendment and spirit of the Federal Rules of Civil Procedure.[16]

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[14] *See Buller Trucking Co. v. Owner Operator Indep. Driver Risk Retention Grp., Inc.,* 461 F. Supp. 2d 768, 776-77 (S.D. Ill. 2006) (citations omitted). *See also Mayes v. AT&T Info. Sys.,* 867 F.2d 1172, 1173 (8th Cir. 1989); *Wallace v. Sherwin Williams Co.,* 720 F. Supp. 158, 159 (D. Kan. 1988); *Longo v. Pa. Elec. Co.,* 618 F. Supp. 87, 89 (W.D. Pa. 1985), *aff'd without op.,* 856 F.2d 183 (3d Cir. 1988); *Eaton Corp. v. Appliance Valves Co.,* 634 F. Supp. 974, 982-83 (N.D. Ind. 1984), *aff'd,* 790 F.2d 874 (Fed. Cir. 1986); *Cannon v. Metcalfe,* 458 F. Supp. 843, 847 (E.D. Tenn. 1977); *Derdiarian v. Futterman Corp.,* 36 F.R.D. 192, 194 (S.D.N.Y. 1964); *Gloster v. Pa. R.R. Co.,* 214 F. Supp. 207, 208 (W.D. Pa. 1963).

[15] 461 F. Supp. 2d at 776-77 (emphasis added and citations omitted).

[16] *Gloster,* 214 F. Supp. at 208. *See also Eaton Corp.,* 634 F. Supp. at 983 ("This is the only just and proper result since once leave to amend has been requested and a proposed complaint is on file, the plaintiff has taken those steps within his power

To hold otherwise would negate the intent and purpose of the federal rules, under which the motion to amend was filed.

Because this case was pending in federal court at the time the motion to amend the complaint was filed pursuant to Federal Rule of Civil Procedure 15, federal law applying and interpreting Rule 15 governs the issue. The Rules Enabling Act authorizes the federal courts to adopt rules of practice and procedure that apply in both federal question and diversity-based cases.[17] This Court has already determined that the application of Idaho Rule of Civil Procedure 15 is a procedural issue.[18] Consequently, the federal court's interpretation and application of Federal Rule of Civil Procedure 15 is procedural and governs the dispute. As a result, the amended complaint adding EIRMC and Dr. Taylor as defendants was deemed filed when the motion to amend with the attached amended complaint was filed, making the claims timely.

The plaintiffs argued in their opening brief that the federal district court's April 9, 2014 order clarifying that the plaintiffs' second amended complaint was effectively filed on the day the plaintiffs' motion to amend was filed,[19] "should be dispositive of this

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to toll the statute and must await the appropriate court order.").

[17] *See Shady Grove Orthopedica Assoc. P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 176 L.Ed.2d 311 (2010) (finding that Federal Rule of Civil Procedure 23 governed whether or not a class action could proceed in a diversity case in spite of conflicting state law).

[18] *See Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 397-98, 247 P.3d 620, 624-25 (2010) (recognizing that applying Idaho Rule of Civil Procedure 15 is a procedural issue where the legislature is silent on the issue).

[19] *See* R., vol. 2, pp. 240-41.

appeal."[20] The medical defendants argue that the order is not dispositive because the federal court did not have jurisdiction to enter the order since it was entered after the case was remanded to state court. But a remand order does not deprive a federal district court of jurisdiction in every case.[21] Under 28 U.S.C. § 1447(d), an order remanding a case to state court is generally not reviewable on appeal or otherwise. But there are some exceptions. One allows for limited review of collateral orders, even if the remand order itself is insulated from review under section 1447(d).[22] Here, the plaintiffs did not ask for review of the order of remand; they simply asked the federal district court to clarify its order granting them leave to amend. Federal courts generally retain jurisdiction to clarify their prior orders.[23]

Federal Rule of Civil Procedure 54(b) allows a federal court to revise an order or other decision "at any time" before entry of a final judgment. The court's clarification of its order does not affect the order of remand, and the order granting leave to amend could have a preclusive effect in subsequent proceedings. The federal district court therefore had jurisdiction to enter the order.[24]

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[20] Appellants' Br. at 18.

[21] *E.g., Barstow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1009-10 (4th Cir. 2014) (a federal district court retains jurisdiction to issue sanctions under Rule 11 and to vacate a remand order under Rule 60(b)(3) following remand of the case to state court).

[22] *City of Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140, 143-44 (1934).

[23] *E.g., Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934); *Abrams v. Sailboat Cutter "Slow Dancer,"* 700 F.2d 569, 569 (9th Cir. 1983).

[24] *E.g., In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 586 (4th Cir. 2006).

The medical defendants claim that the order cannot have a preclusive effect as to them because they were not served with the motion to clarify and did not have an opportunity to object to it. But they were not parties when the motion for leave to amend was filed in federal court. Thus, that court's April 9 order clarifying its earlier order granting leave to amend was not required to be served on the medical defendants. A party may be bound by the effect of an order to which it was not a party or had no opportunity to be heard. For example, a judgment in a class action may bind members of the class who were not parties to the suit,[25] and a party may be bound by an ex-parte temporary restraining order.[26] Similarly, the doctrine of stare decisis can limit the rights of persons who were not parties to the original action that created the limitation on their rights and who had no opportunity to be heard on the issue.[27]

At a minimum, whether the federal court's order clarifying its order granting leave to amend is dispositive or not, it is evidence that the federal court applied the "settled rule" that the amended complaint was deemed filed as of the date of the motion to amend. Because that settled rule is a procedural issue governed by the federal courts under the Rules Enabling Act, the amended complaint was deemed filed on the date the motion to amend was filed, regardless of the federal court's clarifying order. The claims against EIRMC and Dr. Taylor were therefore timely commenced.

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[25] *E.g., Juris v. Inamed Corp.*, 685 F.3d 1294, 1318-19 (11th Cir. 2012).

[26] *See* IDAHO R. CIV. P. 65(b).

[27] *E.g., Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 585, 226 P.3d 524, 527 (2010).

2. If Idaho law applies, the medical defendants had sufficient notice of the plaintiffs' claims against them before the statute of limitations expired for the claims to be deemed filed the same day as the motion to amend.

Even if Idaho law applies, the result should be the same as under federal law.

In *Terra-West, Inc. v. Idaho Mutual Trust, LLC,*[28] this Court followed "'the settled rule in both federal and state court . . . that a complaint is deemed filed as of the time it is submitted to a court together with a request for leave to file the amended pleading.'"[29] Here, it is undisputed that the plaintiffs filed their motion to amend the complaint, together with a copy of the proposed amended complaint, within the statute of limitations.[30] Therefore, under *Terra-West,* this action was timely.

The medical defendants argue that this case is not governed by *Terra-West* but by *Griggs v. Nash,*[31] decided over twenty years earlier. In *Griggs,* this Court affirmed the trial court's decision that a third-party complaint was barred by the two-year statute for attorney malpractice where the third-party complaint was not filed until some fourteen days after the statute of limitations had run.[32] No one in *Griggs* argued that the filing of the motion for leave to file a third-party complaint should have been deemed the filing of the third-party complaint itself or tolled the statute of limitations

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[28] 150 Idaho 393, 247 P.3d 620 (Idaho 2010).

[29] 247 P.3d at 623 (quoting *Buller Trucking,* 461 F. Supp. 2d at 776-77).

[30] *See, e.g.,* Taylor Br. at 7, 15 (the statute of limitations expired on December 19, 2013) & 6 (the plaintiffs' motion to amend was filed December 10, 2013); EIRMC Br. at 2 & 4 (same). *See also* R., vol. 1, pp. 102-17.

[31] 116 Idaho 228, 775 P.2d 120 (1989).

[32] 775 P.2d at 126.

until the motion was granted. The Court simply applied Idaho Rule of Civil Procedure 3(a), which said that an action is commenced by the filing of a complaint, and held the third-party complaint time-barred because it was not filed within the statute of limitations.

This Court in *Terra-West* refused to follow *Griggs* and apply Rule 3(a) to a motion to amend a complaint, finding the filing of a third-party complaint "categorically different from" a motion to amend.[33] The Court noted that the defendant in that case "presupposes I.R.C.P. 3(a) governs the context of when an *amended complaint* commences proceedings. To the contrary, the plain language of Rule 3(a) demonstrates that the Rule is geared toward the filing of an original complaint"; it does not "contemplate[] the situation of an amended complaint."[34] The "first step in amending a complaint is to request permission from the court by filing a motion for leave to amend the complaint," under Idaho Rule of Civil Procedure 15(a).[35]

> Under Rule 3(a), a plaintiff has unilateral control over the timing of the original complaint and bears the responsibility of commencing the proceeding within the applicable time limitation. However, in the context of an amended complaint, the plaintiff only has unilateral control over the timing of the filing of the motion for leave to amend, but does not have unilateral control over when the motion may be granted.[36]

Thus, "there is a substantial difference between the procedure for filing an original complaint under I.R.C.P. 3(a) and the procedure for filing an amended complaint

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33 247 P.3d at 626.

34 *Id.* at 623 (emphasis in original).

35 *Id.* at 624.

36 *Id.*

pursuant to I.R.C.P. 15(a)."[37] This difference in procedure, the Court concluded, justified treating the two differently and applying Rule 15(a) to motions to amend, rather than Rule 3(a),[38] which the medical defendants argue should apply.[39]

The medical defendants argue that the plaintiffs could have and should have filed a separate action against them rather than seeking to amend their complaint to add their claims against the medical defendants. This Court rejected a similar argument in *Terra-West*. In that case, the defendant (Idaho Mutual) argued that "the better rule is to require the plaintiff to initiate a separate foreclosure action and consolidate the cases in order to satisfy the timeliness requirements of [the] Idaho Code"; that approach "'would have avoided the expiration of' the time limitation while the plaintiff's motion to amend was pending, but instead "'Terra-West chose to follow [a] needlessly risky path.'"[40] This Court categorically rejected the argument:

> The approach advocated by Idaho Mutual is contrary to the principles of judicial economy and practicality. Requiring a plaintiff to file a separate action, followed by a motion to consolidate, in order to meet the statutory time requirement, would create needless confusion and duplication . . . .
>
> . . . Under the approach urged by Idaho Mutual, a plaintiff would inevitably be forced to incur additional litigation costs associated with filing a separate action and scarce judicial resources would be wasted by adding an unnecessary case to the court's calendar.

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37 *Id.*

38 *See id.* at 628.

39 *See* EIRMC Br. at 11; Taylor Br. at 22.

40 247 P.3d at 624.

> Moreover, the approach suggested by Idaho Mutual has been rejected by federal courts applying analogous rules of federal procedure. . . .
>
> An analysis of federal cases dealing with the interplay between F.R.C.P. 3 and the effect of filing a motion for leave to amend a complaint supports the conclusion that a motion for leave to amend commences proceedings.[41]

Following the medical defendants' preferred approach in this case (i.e., that the plaintiffs should have filed a separate action against them) has the added problem of forcing the plaintiffs to prosecute two different actions arising out of the same occurrence in two separate jurisdictions, running the risk of inconsistent results. By the time the plaintiffs' motion to consolidate the two cases could be briefed, argued, and decided in state court and an order entered, the Cook defendants would have likely removed the action against them to federal court based on diversity jurisdiction. The medical defendants suggest that the plaintiffs could have then filed a motion to add them to the federal court action, and, if the federal court granted that motion and remanded the case to state court, then moved in state court to consolidate the two actions. But that just adds even more "needless confusion and duplication" and "litigation costs," not to mention needlessly wasting the judicial resources of two different court systems. Moreover, there is no guarantee that the federal court would have allowed the amendment where the plaintiffs already had a case pending in state court against the same defendants they seek to add to the federal action.[42]

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[41] *Id.* at 624-25 (citations omitted).

[42] *Cf.* FED. R. CIV. P. 19(a) ("A person who is subject to service of process *and whose joinder will not deprive the court of subject-matter jurisdiction* must be joined as a party if" certain conditions are met) (emphasis added). Here, the joinder of Dr. Taylor and EIRMC to the federal action would destroy diversity and deprive the federal court of subject-matter jurisdiction. And joinder under federal Rule 20 is permissive;

The medical defendants note that this Court in *Terra-West* distinguished *Griggs* in part because the motion to amend in *Terra-West* added a new claim against a party who was already part of the action, whereas a third-party complaint brings in a new party without any prior notice to the new party that "it may be subject to an impending action."[43] In adopting the "well-settled" federal rule that a motion for leave to amend is deemed to start the action for purposes of the statute of limitations, the *Terra-West* Court cited four federal cases and noted that an "important part of the analysis in many of the cases discussed . . . involves whether the defendant had notice of the substance of the proposed amendment prior to expiration of the statutory time period . . . ."[44] In each of the four federal cases the Court cited, the courts recognized the general rule that the submission of a motion for leave to amend tolls the statute of limitations, "even though technically the amended complaint will not be filed until the court rules on the motion."[45] In two of the cases the courts mentioned notice to the opposing party as a consideration,[46] but in the other two cases timely motions to amend to add new defendants were treated as being filed within the statute of limitations without any

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the court has discretion to join additional parties or not.

[43] 247 P.3d at 626-27.

[44] *Id.* at 626.

[45] *See Moore v. State,* 999 F.2d 1125, 1130-31 (7th Cir. 1993) (citations omitted).

[46] *See id.* at 1131 (denying leave to amend because the motion was not "properly accompanied by the proposed amended complaint that provides notice of the substance of those amendments"); *Rademaker v. E.D. Flynn Export Co.,* 17 F.2d 15, 17 (5th Cir. 1927) (noting that the new defendant was served with process during the limitation period even though the amended complaint was not filed until after).

indication that the new defendant had received prior notice of the claims before the amended complaint was filed and served.[47] Thus, notice is not a sine qua non for application of the rule.

In any event, the medical defendants here had notice of the plaintiffs' claims against them within the limitations period.

The medical defendants argue that the only way they could have received notice of the plaintiffs' claims was if they were served with a detailed motion for leave to amend or the proposed amended complaint itself. They rely for this argument on *Terra-West,* where the Court noted that, in the federal cases that mentioned notice, the defendant either did or did not have notice of "the substance of the proposed amendment prior to expiration of the statutory time period either because the plaintiff had attached the amended complaint to the motion for leave to amend, or because the text of the motion itself detailed the substance of the proposed amendment."[48] The Court, however, did *not* hold, as the medical defendants claim and the trial court believed, that those were the *only* two ways the defendant could receive notice of the claims against it. For example, in *Longo,* one of the cases the *Terra-West* Court relied on, the court held that the filing of the motion to amend within the statute of limitations was sufficient to make the claim against a new defendant timely even though the motion to amend named the wrong new defendant. The court noted that the correct new defendant was related to the new defendant named in the amended complaint, the two shared the same office,

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[47] *See Mayes v. AT&T Info. Sys., Inc.,* 867 F.2d 1172, 1173 (8th Cir. 1989); *Longo v. Pa. Elec. Co.,* 618 F. Supp. 87, 89 (W.D. Pa. 1985), *aff'd without op.,* 856 F.2d 183 (3d Cir. 1988). *See also* the other cases cited in note 14, *supra.*

[48] 247 P.3d at 626 (emphasis added).

and the correct defendant had had a phone call with the plaintiff three or four days after the accident and about twenty-two months before the plaintiff filed his motion for leave to amend so should not have been prejudiced by being added to the case after the statute of limitations expired.[49]

The Court in *Terra-West* did not consider whether participation in the statutorily required prelitigation process for medical malpractice actions could provide sufficient notice to a newly added defendant because neither *Terra-West* nor the other cases it relied on were medical malpractice actions involving a prelitigation proceeding. But here, the medical defendants participated in a prelitigation proceeding pursuant to Idaho Code sections 6-1001 et seq.

A prelitigation screening panel (PLSP) is "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."[50] The purpose of a grand jury investigation is to determine whether probable cause exists to institute criminal proceedings, and the grand jury investigation is actually part of the criminal case.[51] Similarly, by the terms of the statute, the PLSP is part of the civil process designed to

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[49] *See* 618 F. Supp. at 89-90.

[50] IDAHO CODE ANN. § 6-1001 (emphasis added).

[51] *Bacon v. United States,* 449 F.2d 933, 939-40 (9th Cir. 1971).

provide notice before litigation of claims for injuries arising out of negligent medical care.[52]

The medical defendants argue that the PLSP did not give them sufficient notice of the plaintiffs' claims because "very little information was provided by Plaintiffs to the health care defendants through the vague allegations of the PLSP."[53] In fact, the plaintiffs were required to (and did) serve on the medical defendants "a true copy of the claim to be processed which claim shall set forth in writing and in general terms, when, where and under what circumstances the health care in question allegedly was improperly provided or withheld and the general and special damages attributed thereto."[54] The medical defendants have never claimed that the plaintiffs' prelitigation notice of their claim did not comply with the statute. If they had such a claim, they have waived it by not raising it in the prelitigation proceedings. Except for a statement of jurisdiction, a complaint does not require any more notice than the prelitigation statute requires.[55]

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[52] *See also Lonn v. Corizon Health,* No. 1:14-CV-31-EJL, 2015 WL 5257115, at *3 (D. Idaho Sept. 2, 2015) (the purpose of the PLSP "is to review the plaintiff's evidence and provide the panel's comments and observations regarding the merits of the medical malpractice claim") (citing *James v. Buck,* 727 P.2d 1136, 1137 (Idaho 1986)).

[53] Taylor Br. at 36.

[54] IDAHO CODE ANN. § 6-1007.

[55] *Cf.* IDAHO R. CIV. P. 8(a)(1) (a pleading setting forth a claim for relief "shall contain (1) . . . a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled").

In addition, the plaintiffs' attorneys communicated at length with counsel for the medical defendants concerning the plaintiffs' claims and the bases for them before initiating the prelitigation process.[56]

Moreover, the medical defendants knew the facts on which the plaintiffs' malpractice claims are based better than the plaintiffs knew them. They knew the facts because they were in the operating room when the injury occurred, they were in possession of all the relevant records, and EIRMC had custody of the catheter and could have examined it to determine whether the problem was a defect in the product or a problem with the way it was used before it disposed of the catheter. The medical defendants knew, better than the plaintiffs, the cause of the injury because Mrs. English was sedated when Dr. Taylor performed the procedure on her. And the medical defendants knew the nature of Mrs. English's injury because they treated her for it. Even if the prelitigation notice requirements were more stringent than the notice required for a complaint under Rule 8, the plaintiffs could not have provided more detailed notice of their claims against the medical defendants without discovery, and discovery is not allowed in the prelitigation proceedings,[57] nor could the plaintiffs have obtained discovery before the prelitigation proceedings by filing an action first.[58]

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[56] *See* R. vol. 1, pp. 89-90, ¶¶ 4-7.

[57] IDAHO CODE ANN. § 6-1003.

[58] *See Moss v. Bjornson,* 115 Idaho 165, 765 P.2d 676, 678 (1988) (the PLSP is a condition precedent to proceeding with district court litigation, "such as filing interrogatories").

The medical defendants argue that, since one of the purposes of PLSPs is to encourage resolution of claims against physicians and hospitals short of litigation,[59] they could not have known that the plaintiffs intended to add them as defendants when they had completed the prelitigation screening process. But the whole purpose of the prelitigation process is to allow the parties to understand their claims and defenses so that they can either resolve the claim short of litigation or proceed with litigation; by statute, they cannot proceed with litigation until they have gone through the prelitigation process.[60]

EIRMC also claims, without citing any authority for the proposition, that "numerous prelitigation screening panels are filed and hearings completed which never result in formal litigation."[61] In fact, of 1,135 hearing requests filed with the Idaho Board of Medicine between 2005 and 2014, only 109, or less than 10%, were resolved at the prelitigation screening stage by settlement, withdrawal, or dismissal of the claim.[62] The overwhelming presumption is that the claims will proceed to litigation.

In any event, the medical defendants knew that they had not resolved the plaintiffs' claims. Indeed, plaintiffs' counsel had tried to avoid litigation against the

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59 *See Mitchell v. Bingham Mem'l Hosp.*, 130 Idaho 420, 942 P.2d 544, 549 (1997).

60 IDAHO CODE ANN. §§ 6-1001 & -1006.

61 EIRMC Br. at 20.

62 *See* Idaho Bd. of Med. 2014 Discipline & Prelitigation Rpt., attached as addendum 1. The report is a matter of public record and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* IDAHO R. EVID. 201(b)(2). This Court may therefore take judicial notice of it.

medical defendants, but defense counsel had rejected these offers.[63] The medical defendants should therefore have known that a lawsuit would be forthcoming.

The medical defendants also argue that the plaintiffs could have filed a lawsuit against them (or named them in the suit the plaintiffs filed against the Cook defendants) before initiating the prelitigation screening process. The medical defendants cannot have it both ways. They cannot argue on the one hand that the purpose of the prelitigation screening process is to avoid litigation while arguing on the other hand that any time a plaintiff wants to amend a complaint to add a medical malpractice claim the plaintiff must file a separate action against the medical provider before seeking prelitigation review in order to avoid the statute of limitations running. The claimed purpose and benefits of prelitigation review would be nullified if a plaintiff had to proceed as if the prelitigation process didn't exist. The plaintiff would have to incur the same filing fee, jury fee, and service fees in every case, whether the case settled after the PLSP or not.

The plaintiffs took the medical malpractice statute at face value. It says that the PLSP is "compulsory as a condition precedent to litigation"[64] and that, during the time the statute of limitations is tolled so that the parties can complete the prelitigation

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[63] *See* R., vol. 1, pp. 89-90.

[64] IDAHO CODE ANN. § 6-1001. *See also James v. Buck*, 727 P.2d 1136, 1137 (Idaho 1986) ("Before a plaintiff can file a medical malpractice suit, . . . he or she is required by statute to *first* file the claim with the State Board of Medicine, which then convenes a prelitigation panel.") (citing IDAHO CODE §§ 6-1001 & -1002).

process, "neither party shall commence . . . litigation involving the issues submitted to the panel . . . ."[65]

The medical defendants point out that this Court in *Moss v. Bjornson*[66] held that the Medical Malpractice Act did not mandate dismissal of a medical malpractice complaint that was filed before the plaintiff requested a PLSP,[67] despite the seemingly clear language of section 6-1001 and the dicta in *James* two years earlier that, "[b]efore a plaintiff can file a medical malpractice suit, . . . he or she is *required* by statute to *first* file the claim with the State Board of Medicine."[68] Thus, the medical defendants argue, the plaintiffs could have named the medical defendants in their complaint against the Cook defendants or filed a separate action against them before filing their request for a PLSP. It would be ironic, however, for a decision (*Moss)* that was meant to further "the settled proposition that, whenever possible, cases should be decided on the merits,"[69] to be used to deny the plaintiffs their day in court.

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65 IDAHO CODE ANN. § 6-1006.

66 115 Idaho 165, 765 P.2d 676 (1988).

67 765 P.2d at 677.

68 727 P.2d at 1137 (emphasis added). The *Moss* Court relied on the provision of the act that says "neither party shall commence *or prosecute litigation* involving the issues submitted to the panel and the district or other *courts having jurisdiction of any pending such claims shall stay proceedings* in the interest of the conduct of such proceedings before the panel." IDAHO CODE ANN. § 6-1006 (emphasis added). *See also Moss,* 765 P.2d at 678. The italicized language, however, could have been construed to apply only to those cases pending when the new statutory scheme took effect.

69 765 P.2d at 678.

3. The Court should follow the settled rule followed in other state and federal courts.

In their opening brief, the plaintiffs asked the Court to apply the "settled rule in both federal and state court . . . that a complaint is deemed filed as of the time it is submitted to a court together with a request for leave to file the amended pleading,"[70] regardless of whether new parties added by the amendment had notice of it or not. The plaintiffs offered three reasons for this request: First, it would place new defendants and other defendants on equal footing, since other defendants are not entitled to advance notice of the filing of a complaint against them and may not know that they have been sued until they are served with process, up to six months after the complaint is filed,[71] which could be almost six months after the statute of limitations has run. Here, the medical defendants had timely notice of the claims through the prelitigation process and communications with plaintiffs' counsel, and they knew, through their counsel, that the amended complaint naming them as parties had been filed within a few weeks of when it was filed.[72] Second, the policy reason for treating an amended

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[70] *Terra-West,* 247 P.2d at 623 (quoting *Buller Trucking,* 461 F. Supp. 2d at 776-77).

[71] *See* IDAHO R. CIV. P. 4(2).

[72] *See* R. vol. 1, p. 93. The federal court granted the leave to file the amended complaint on January 16, 2014, and the amended complaint was filed the same day. (R. vol. 1, p. 50.) Plaintiffs' counsel contacted counsel for the medical defendants in early February 2014 to see if they would accept service of the amended complaint adding their clients as defendants, but both attorneys declined to accept service. *Id.* ¶ 2; EIMRC Br. at 4 (plaintiff's counsel called EIRMC's counsel on February 3, 2014). EIMRC was served on February 25, 2014 (EIRMC Br. at 4), and, after avoiding repeated service attempts, Dr. Taylor was finally served on March 21, 2014 (R. vol. 1, p. 93, ¶ 4). Both medical defendants were served well within the time for service of process even if the amended complaint adding them as parties had been filed by December 19, 2013, as the medical defendants claim it should have been.

complaint as filed when the motion to amend is filed applies whether the amendment adds new parties or not. A plaintiff has sole control over when he or she files the original complaint, but a party generally has to obtain leave of court to file an amended complaint.[73] The party can only control when the motion for leave to amend is filed; he or she cannot control when the motion will be heard and decided.[74] Third, the vast majority of jurisdictions do not impose a notice requirement in cases such as this.[75]

The medical defendants ask the Court to reject these arguments. They argue, for example, that a new defendant can check court filings online to see if he has been sued, whereas a newly added defendant must wait until the motion to amend is granted before he can find his name in the electronic docket. Of course, requiring a person to continually check court filings online to see if he or she has been sued would make service of process unnecessary. A party is entitled to wait until he or she has been served before having to respond to a complaint. And deeming an amended complaint filed as of the date the motion to amend is filed actually favors defendants because it shortens the time for them to be served with process.

The medical defendants also argue that the policy considerations courts rely on for the settled rule don't apply here because the plaintiffs could have filed a separate action against them and controlled the timing of that action. But that argument implicates other policy considerations, such as judicial economy, increased litigation

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[73] *See* IDAHO R. CIV. P. 15(a) (after a responsive pleading has been served, a party may only amend "by leave or court or by written consent of the adverse party").

[74] *See Terra-West*, 247 P.3d at 624 (quoting with approval *Nett v. Bellucci*, 774 N.E.2d 130, 136 (Mass. 2002)).

[75] *See* Br. of Apellants at 35, n.88, and cases cited therein.

costs, and the real possibility of inconsistent verdicts from having to pursue separate actions in separate fora because of the removal of the case against the Cook defendants and the lack of federal jurisdiction over the medical defendants.

The medical defendants also dispute the plaintiffs' assertion that other state and federal courts do not require notice of the filing of a motion to amend, citing *Moore v. Grossman*[76] as a state-court decision requiring notice. But for every case where notice was a consideration, there are multiple others where it was not.[77]

The medical defendants also argue that, regardless of what other jurisdictions do, Idaho law, as expressed in *Griggs* and *Terra-West,* is different. But neither *Griggs* nor *Terra-West* is controlling, and the policy considerations on which the general rule is based apply with equal force in Idaho as elsewhere. As this Court recognized in *Terra-West,*

> federal case law provides persuasive authority when interpreting rules under the I.R.C.P. that are substantially similar to rules under the F.R.C.P. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 515, 81 P.3d 416, 420 (2003); *see also Chacon v. Sperry Corp.*, 111 Idaho 270, 275, 723 P.2d 814, 819 (1986) (noting that whenever possible, the Court should "interpret[] our rules of civil procedure in conformance with the interpretation placed upon the same rules by the federal courts.").[78]

The Court, however, does not have to reach these issues. In this case, within the limitations period the medical defendants went through the statutory process the legislature devised to give potential medical malpractice defendants notice of the claims against them. The medical defendants do not argue that the claims against them in the

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[76] 824 P.2d 7 (Colo. Ct. App. 1992).

[77] *See* cases cited in note 14, *supra.*

[78] 247 P.3d at 625.

plaintiffs' second amended complaint are not the same as the claims that were presented and heard in the prelitigation screening process. Where the parties have gone through the statutorily required procedure for airing their claims, the purposes of which are either to resolve the claims or allow the plaintiff to proceed with litigation, the notice concerns this Court expressed in *Terra-West* have been satisfied, and the Court should follow "the settled proposition that, whenever possible, cases should be decided on the merits."[79]

4. The Court should deny EIRMC's request for attorney's fees.

EIRMC has also asked for its costs and attorney's fees on appeal under Rules 40 and 41 of the Idaho Appellate Rules and Idaho Code section 12-121.

Rule 40 allows costs "as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." The plaintiffs believe that they–not EIRMC--should prevail on their appeal for the reasons stated in their opening brief and in this reply. But if EIRMC were to prevail on appeal, there is a specified procedure for it to follow to obtain a cost award, set out in Rule 40. This Court should not award costs unless and until EIRMC prevails on appeal and follows the required procedure.

Rule 41 does not provide any basis for an award of attorney's fees but merely sets out the procedure to be followed where a party is seeking attorney's fees on appeal.

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[79] *See Moss,* 765 P.2d at 768 (citing *Johnson v. Pioneer Title Co.,* 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983)).

Idaho is an "American rule" state; each party is to bear his or her own attorney's fees absent a statute or contract giving the prevailing party a right to recover fees.[80]

The only basis EIRMC has offered for its request for attorney's fees is section 12-121 of the Idaho Code, which states, "In any civil action, the judge *may* award reasonable attorney's fees to the prevailing party or parties . . . ." (Emphasis added.) Section 12-121 makes any fee award discretionary with the court. The statute is silent as to when a court may award attorney's fees to the prevailing party, but this Court has construed the statute as allowing an award of attorney fees on appeal if the Court "is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation," such as where the appeal "'does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence.'"[81] On the other hand, if there is "a legitimate issue of law, attorney fees may not be awarded."[82] Here, the plaintiffs are not asking the Court to second-guess the trial court on conflicting evidence. Rather, this case presents legitimate issues of law, including whether Idaho law governs the effect of a motion to amend filed under Federal Rule of Civil Procedure 15, whether prior notice of a claim is required in every case under the rule followed by this Court in *Terra-West* and "by the majority of federal and state courts,"[83] and whether the prelitigation process required in medical malpractice

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[80] *Owner-Operator Indep. Drivers Ass'n v. Idaho Pub. Utils. Comm'n,* 125 Idaho 401, 407, 871 P.2d 818, 824 (1994) (citation omitted).

[81] *Rowley v. Fuhrman,* 133 Idaho 105, 109-10, 982 P.2d 940, 945 (1999) (citations omitted).

[82] *Kiebert v. Goss,* 144 Idaho 225, 228, 159 P.3d 862, 865 (2007).

[83] *See Terra-West,* 247 P.3d at 628.

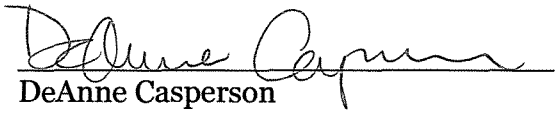
actions provides sufficient notice for the "settled rule" recognized in *Terra-West* to apply here. These are issues of first impression under Idaho law. The plaintiffs should not be penalized for seeking definitive rulings on these issues.

CONCLUSION

Whether this Court concludes that Idaho or federal law applies, and whether notice within the limitations period of a claim against a new defendant to be added is required or not, the action against the medical defendants was timely. The motion to amend was timely filed within the extended limitations period under the Medical Malpractice Act, and the medical defendants had timely notice of the plaintiffs' claims against them through the very means the Idaho Legislature required to provide medical malpractice defendants notice of a patient's claims against them–the prelitigation screening process. The Court should therefore reverse the district court's order of dismissal as to the medical defendants and remand this case for further proceedings, where a jury can determine whether the plaintiffs' damages were caused by a defective product, medical negligence, or both.

Dated this 10th day of February, 2016.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.



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Addendum 1

Idaho Board of Medicine
2014 Discipline and Prelitigation Report

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
DISCIPLINE SUMMARY										
Lic. Revoked/Surrender/Suspend	10	9	3	6	3	3	6	7	2	7
Lic. Denied/Witheld/Withdrawn	3	3	4	5	7	6	3	3	0	2
Lic. Restircted/Limited	6	3	9	12	5	7	6	9	12	14
Rehab S&O-Alcohol/Drugs	2	6	1	8	3	8	16	7	6	6
Hearings, Interviews	7/7	7/3	6/1	4/2	0/5	8/3	0/10	6/2	6/5	4/7
Cases Opened	251	296	254	233	226	191	243	248	209	244
Reprimands/Admonitions	21	26	32	27	23	22	28	24	17	15

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
PRELIT. SCREENING	0									
Hearing Requests	119	104	102	120	125	115	113	115	111	111
Number of Defendents	204	178	175	231	221	227	201	245	201	195
Hearings Completed	114	102	109	103	138	132	120	110	120	102
Findings										
With Merit	19	26	27	19	21	28	19	17	18	17
Without Merit	78	54	62	60	83	73	84	78	88	70
Some/Possible Merit	6	0	7	7	5	8	2	3	3	2
Claims Wdrwn/dsmsd/stld	11	22	13	9	14	10	12	8	3	7