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Vol. 2 of 3

BURDICK

COPY

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

CAROL ENGLISH and ERIC ENGLISH

Petitioner/Appellants

vs.

JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation

Defendant/Respondent

Appealed from the District Court of the Seventh *Judicial*

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

Hon. Jon J. Shindurling, District Judge

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By ______________________ *Deputy*

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Entered on ATS by ______

42947

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO

14 APR 22 PM 4:23

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

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, v. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20; Defendants.	Case No. CV-2013-0004868-OC DEFENDANT JAMES TAYLOR, D.O.'S REPLY MEMORANDUM IN SUPPORT OF FIRST MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant James Taylor, D.O., by and through counsel of record, and submits the following Reply Memorandum in Support of his First Motion For Summary Judgment.

ARGUMENT

1. **The *Terra-West* Decision.**

Plaintiffs contend that the Idaho Supreme Court's decision in *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010), is dispositive in their favor of the issues raised by the health care defendants. Their arguments are incorrect for two reasons: (A) *Terra-West* did not clarify or overturn the *Griggs* decision which is the controlling law of this case and (B) the Plaintiffs' failed to provide notice as outlined in *Terra-West*.

A. ***Terra-West* did not Clarify or Reverse the *Griggs* Decision.**

The dispute in *Terra-West* **did not** involve the addition of new parties. Rather, the plaintiff, Terra-West, filed a motion to amend the complaint to foreclose on a second mechanic's lien. *Id.* at 395. Idaho Mutual was already a party to the action by way of the original complaint filed by Terra-West. *Id.* at 394. Thus, the dispute centered around plaintiff's **ability to add a new claim against an already named defendant**. That is not this case.

There is no dispute that Plaintiffs in the present action **did not** name Dr. Taylor or EIRMC in the original complaint or even in the first amended complaint. No claims for medical negligence were commenced with Plaintiffs' filing of the original or first amended complaint.

This factual scenario was a significant distinction to the Idaho Supreme Court. With the distinct facts of *Terra-West* in mind, the Idaho Supreme Court analyzed its decision in *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989). That analysis is extremely important to the determination of the issues involved in this case. First, the court stated, "...our decision in *Griggs* is distinguishable from the case at bar because it concerned the timeliness of a third-party complaint,

which is categorically different than a motion to amend to add a new claim against a party who is already part of the action." *Id.* at 399 (emphasis added). That language is significant to this Court's decision in the case at hand.

In our case, Plaintiffs are not in the same position as the plaintiff in *Terra-West*. In fact, the motion to file a second amended complaint filed by these Plaintiffs is, as the *Terra-West* Court stated, categorically different than a motion to amend to add a new claim against a party who is already part of the action. Rather, these Plaintiffs by their motion to amend fully intended to add new claims for medical negligence against a doctor and a hospital who were not parties to the original or first amended complaints. The Idaho Supreme Court was very specific that the factual situation of this case should be treated differently than the factual situation in *Terra-West* when it stated:

> In the context of a third-party complaint, there may be a good reason to prefer the more cumbersome method of requiring the filing of an independent action against the third party to commence the proceedings. Under IRCP 14(a), a motion for leave to file a third-party complaint, even if the proposed complaint is attached to the motion, does not give any notice to the third party that it may be subject to an impending action. Because the third party would not be served with the motion for leave to file the third-party complaint, **the third party may discover, after the expiration of the applicable statute of limitations, that a previously filed motion to which the third party had no notice, commenced the proceedings**. Such a rule is contrary to the purposes of any statute of limitations....

Id. at 399-400 (emphasis added).

In the context of this case, there is no distinction between filing a motion for leave to file a third-party complaint and a motion for leave to file an amended complaint designed only to add new claims against new parties. There is no dispute that Plaintiffs in this case filed the second motion to amend their complaint for the sole purpose of adding two new parties and claims of medical

negligence against those two parties. Plaintiffs did not give any notice to the new parties of the motion or the proposed second amended complaint. The fact is, the scenario which caused concern to the Idaho Supreme Court in *Terra-West* and prompted a statement that a more cumbersome process was justified in those circumstances is exactly what happened in the case at hand. Dr. Taylor was not served with the motion to amend the complaint or the proposed second amended complaint. Plaintiffs do not dispute this fact. Dr. Taylor only discovered, after the expiration of the applicable statute of limitations, that a previously filed motion (of which he had no notice) commenced medical malpractice proceedings against him. As noted by the Court in *Terra-West*, allowing that to occur, as requested by these Plaintiffs, is contrary to the very purposes of the statute of limitations.

It is not Dr. Taylor who is ignoring or misapplying Idaho law. With regard to the issue of timely commencing an action, this case is nearly identical to the facts in *Griggs*. Based on the facts of this case, as clearly indicated by *Terra-West*, the Idaho Supreme Court would not distinguish this case from *Griggs*. Rather, there is no doubt that the Idaho Supreme Court would apply the holding in *Griggs* to the facts of this case. For those reasons, the *Griggs* decision is the binding precedent which mandates the dismissal of Plaintiffs' claims against Dr. Taylor and EIRMC and no further analysis is necessary.

B. **Proper Notice Was Not Given.**

Plaintiffs assert that under the Terra-West decision, all that is required to add a new party to a lawsuit is (1) to file a motion to amend the complaint naming the new party prior to the expiration of the statute of limitations and (2) provide the new party with notice of the substance of the claim against the new party. Even if Plaintiffs' interpretation of *Terra-West* were correct (and it is not as

referenced above), Plaintiffs did not provide sufficient notice to Dr. Taylor or EIRMC. Regarding the issue of notice, the Court began its analysis by stating:

> An **important part of the analysis** in many of the cases discussed above involves **whether the defendant had 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.

Id. at 399 (emphasis added). A plain reading of this language requires more than a mere letter or a telephone call to provide proper notice. As noted by the Idaho Supreme Court, in each case, the party received actual notice of the change in the pleading by either (1) receiving a copy of the proposed amended complaint or (2) receiving a copy of the motion to amend which itself contained a detailed explanation of the substance of the proposed amendment.

By way of example, Justice Jones, writing for the majority, noted that central to the *Rademaker* Court's decision was the fact that the defendant had been served with a motion that "fully and comprehensively" laid out the substance of the proposed amendment **prior to the expiration of the statute of limitations**. *Id.* at 399.

Our Supreme Court then stated:

> In this case, because Idaho Mutual was not dismissed from the case following the invalidation of the first lien, the motion for leave to file the amended complaint gave notice to Idaho Mutual within the six-month jurisdictional time limit that Terra-West was seeking to foreclose the second lien. ... Furthermore, the proposed amended complaint was attached to the motion for leave to amend, which further demonstrates that Idaho Mutual **had notice of the commencement of the** foreclosure **action within the** six-month **time limitation**.[1]

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[1] In fact, because of the notice, Idaho Mutual was provided with an opportunity to oppose Terra-West's motion to amend the complaint to foreclose on the second mechanic's lien before the motion was granted. *Id.* at 395. No such opportunity has ever been provided to Dr. Taylor or EIRMC.

Id. (emphasis added).

In this case, it is undisputed that although the Motion to Amend the first Amended Complaint was filed on or about December 10, 2013, Plaintiffs never served Dr. Taylor with a copy of the motion or the proposed second amended complaint until he was actually served with the Second Amended Complaint on March 21, 2014. *See Affidavit of James Taylor, D.O., page 2, para. 2-3.* Plaintiffs do not dispute the fact that they did not even attempt to serve Dr. Taylor until after December 19, 2013–the date the statute of limitations expired. As such, unlike the defendant in *Terra-West* and the cases cited therein, Dr. Taylor never received notice of the commencement of the action against him within the appropriate statute of limitations. In light of the *Terra-West* decision, this fact alone should be sufficient grounds for the Court to grant Dr. Taylor's motion for summary judgment.

Without citing applicable Idaho authority[2], Plaintiffs contend that they gave sufficient notice to the health care defendants by way of letters, telephone calls,[3] and the Prelitigation Screening procedure. Citing *Longo v. Pennsylvania Electric Co.*, 618 F. Supp. 87 (W.D. Pa. 1985)[4], Plaintiffs

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[2] Other than blithely stating that *Terra-West* cited favorably other cases which allegedly allowed letters or phone calls as sufficient notice, Plaintiffs provided no additional analysis.

[3] As referenced in the prior filings, Dr. Taylor received only one letter prior to the expiration of the statute of limitations. That letter was vague at best with regard to a potential claim against Dr. Taylor especially in light of the unrefuted statements made by Plaintiffs to Dr. Taylor that they did not want nor intend to sue him.

[4] *Longo* was a FRCP 15(c) case in which the newly added defendant argued that there was a mistaken identity because plaintiff had named M. Caupellotte instead of Frank J. Carpellotti d/b/a Carp Transit. M. Carpellotti Trucking was owned by the defendant's mother. The federal district court held that because the two entities shared the same address and the defendant spoke with plaintiff shortly after the accident, there was no prejudice to the defendant by the amended complaint because he had received notice of the institution of the action and knew that but for a mistake

argue that as little as a phone call can provide sufficient notice. Plaintiffs' Memorandum at page 5. Once again, Plaintiffs overlook significant language contained in *Terra-West* and other Idaho decisions.

If a simple phone call or letter were sufficient to provide the notice required by the statute of limitations, why would the Idaho Supreme Court have stated, "In the context of a third-party complaint, there may be good reason to prefer the more cumbersome method of requiring the filing of an independent action against the third party to commence the proceedings"? *Terra-West* at 399. Clearly in the context of an amendment adding new parties, the Idaho Supreme Court concluded that more was required than simply filing a motion to amend with a copy of the complaint attached such as actually filing an independent action before the statute of limitations expired.

The Court in *Terra-West* also specifically referred to the newly named defendant receiving notice of the commencement of proceedings against him. *Id.* at 400 ("...the third-party may discover, after the expiration of the applicable statute of limitations, that a previously filed motion to which the third-party had no notice, commenced the proceedings.") Allowing a party to provide notice to a non-party by simply sending a letter or making a telephone call would open a Pandora's Box for Idaho judges attempting to determine whether or not actual notice was received by the new party.

On the other hand, as stated by the Idaho Supreme Court, when adding a party to ongoing litigation, the better rule is to file an independent action before the statute of limitations expires. Then, there is no question that the action is timely and no need to argue about whether a party did or did not receive adequate notice. That rationale is consistent with the Court's decision in *Terra-*

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concerning identity, the action would have been brought against him. *Id.* at 90. There was no specific reference as to how the defendant had notice of the institution of the action.

West that a party to an action receives notice of the substance of a new claim against that party when the party is served with a copy of the motion and proposed amended complaint prior to the expiration of the statute of limitations. It did not say that notice was provided by way of a letter or phone call.

Likewise, our Supreme Court has held that a conversation with the manager of the defendant which included filling out documentation concerning the injury and email correspondence between the plaintiff and the insurer for the defendant was not sufficient notice. *Ketterling v. Burger King, Corp.*, 152 Idaho 555, 558, 272 P.3d 527 (2012). There the Court stated that even if the manager and insurance agent had notice of the injury, "that would not be sufficient to impart 'notice of the institution of the action'" as required by IRCP 15. *Id.* The Court ruled that "Rule 15(c) speaks of notice of the institution of the action, rather than learning of the plaintiff's injury and desire to be compensated for the same. Whether HB Boys had notice of *potential* litigation, or whether it would be prejudiced in defending against any action, is not the relevant inquiry." *Id.* Clearly, Idaho law on the subject does not comport with Plaintiffs' argument in this case.

Plaintiffs also contend that by participating in the Prelitigation Screening process, the health care defendants received sufficient notice of the commencement of a medical negligence action against them. The prelitigation screening procedure was designed specifically for the purpose of encouraging consideration of claims informally and **without the necessity of litigation.** *See, Idaho Code §6-1005.*[5] As such, the process was never designed for the purpose of giving notice to a party

[5] Prelitigation screening panel proceedings are not a civil lawsuit, nor are they an adjunct to a civil lawsuit. They are entirely separate informal and non-binding proceedings in which the rules of evidence do not apply, no record is kept, there is no cross-examination or rebuttal, there is no appeal, and the proceedings are **closed even to the parties themselves** <u>except when they are presenting their own testimony and argument</u>. *Rudd v. Merritt*, 138 Idaho 526, 537, 66 P.3d 230 (2003).

of the commencement of a medical negligence action. It was designed to avoid litigation. If the filing of a prelitigation screening application was sufficient notice of the commencement of an action or even sufficient notice of the substance of an action, there would be no need to toll the statute of limitations during the process only to allow the statute to begin running again once the procedure was completed which is exactly how the process works.

Furthermore, in this particular case, very little information was provided by Plaintiffs to the health care defendants through the prelitigation process. The application itself was very vague and consisted of 37 words total to describe the allegations against the health care providers. Many prelitigation applications are filed and hearings completed which never spawn formal litigation. Filing a request for or participating in a prelitigation screening panel does not equate to filing a lawsuit against a party or even giving a potential party sufficient notice that a law suit will be commenced within the statutory time. Additionally, Plaintiffs specifically advised Dr. Taylor that they did not want or intend to file suit against him. *See*, *Taylor Affidavit*, p. 2, para. 5. Plaintiffs have not challenged Dr. Taylor's statement. Even under Plaintiffs' reading of *Terra-West*, they failed to give Dr. Taylor proper notice of the initiation or commencement of a medical negligence claim against him prior to December 19, 2013.

2. **Idaho State Law Applies.**

In the brief which Plaintiffs incorporate by reference, they encourage the Court to apply federal law or the law of other jurisdictions with regard to when an action is commenced. Such a request is inappropriate when Idaho law is clear on the subject matter at issue. *Terra-West* and

Griggs have clearly spoken to the issue and there is no need to apply the law of some other jurisdiction.

The fact that the original and first amended complaints were removed to federal court does not require this Court to apply federal law. In light of the fact that this case was removed to federal court pursuant to diversity of citizenship, the federal court was required to refer to Idaho law in deciding the issue of whether the action was timely commenced against the health care defendants. For example, in the brief Plaintiffs incorporated by reference, they rely heavily on the First Circuit's decision in *Nett v. Gross*, 306 F.3d 1153 (2002). There, the First Circuit determined that "...it was unclear under Massachusetts law whether the filing of a motion for leave to amend constitutes the commencement of the action for purposes of the statute of repose, or, as the district court held, the amended complaint itself must be filed within the statutory period." *Id.* at 1155. As such, the First Circuit certified the question to the Massachusetts Supreme Court and then applied the Massachusetts law as dictated by the highest court of that state. Idaho law should be applied to this case rather than ignored as suggested by Plaintiffs.[6]

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[6] The other federal cases cited by Plaintiffs in their incorporated brief can also be distinguished. *Rademaker* was federal question case under the Merchant Marine Act of 1920; *Korwek* was a federal antitrust case and it was a motion to intervene not amend the complaint. *Sheets* was a claim under the Federal 1933 Securities Act. *Flood* was a 1983 action and it applied North Carolina law. *Mauney* was a North Carolina state case that added a claim not a new defendant. *Northwestern* was a diversity action but the amendment was to add a new claim not a new party. However, it applied New York state law. *Derdiarian* was a federal question case under Section 11 of the 1933 Securities Act it also was an amendment to add a claim not a new defendant. *Mason* was also a federal question case alleging claims under 18 USC 1962 and RICO. *In Re Integrated* was a federal question case under the 1933 Securities Act along with bankruptcy issues. *Gloster* was apparently a diversity case involving wrongful death with a potential claim under the Federal Employers Liability Act. The court simply relied on Federal Rule 5 in rendering its decision. It did not apply Pennsylvania state law as it should have. Pennsylvania law is clear that it is the filing of the complaint, not the filing of a motion to amend that "commences an action." See

CONCLUSION

There is no dispute that the statute of limitations in this case expired on December 19, 2013. There is no dispute that Plaintiffs' original and first amended complaints did not name Dr. Taylor nor did those pleadings state a claim for medical negligence. There is no dispute that on December 10, 2013, Plaintiffs filed in federal court a motion to amend their complaint again with a proposed second amended complaint attached to the motion. There is no dispute that Plaintiffs filed a second amended complaint in federal court on January 16, 2014–nearly one month after the statute expired. There is no dispute that Dr. Taylor was not served with a copy of the motion to amend or the proposed second amended complaint. There is no dispute that Dr. Taylor was first served with the Second Amended Complaint on March 21, 2014.

Based upon the facts of this case, both *Terra-West* and *Griggs* demand that the action against Dr. Taylor be dismissed. To hold otherwise would be contrary to the purposes of Idaho Code §5-219. Therefore, Dr. Taylor respectfully requests that the claim against him contained in the Second Amended Complaint be dismissed with prejudice as it is time barred by Idaho Code §5-219(4).

Dated this 22nd day of April, 2014.

THOMSEN HOLMAN WHEILER, PLLC

By:
J. Michael Wheiler, Esq.

Aivazogulou v. Drever Furnaces, 613 A.2d 595 (Superior Ct. PA 1992); *Schach v. Ford Motor Co.*, 210 FRD 522 (MD PA 2002). Had *Gloster* properly applied Pennsylvania state law, the outcome would have been different.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 22nd day of April, 2014, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

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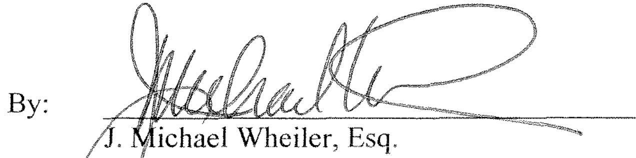
By: 
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JMW/7200.019/003 Reply Brief in Support MSJ

BONNEVILLE COUNTY
IDAHO FALLS, IDAHO

2014 JUN 23 PM 4:40

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, v. COOK INCORPORATED, and Indiana Corporation; COOK MEDICAL INCORPORATED, and Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC; and Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	Case No. CV-2013-4868 OPINION AND ORDER GRANTING MEDICAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I.
FACTS AND PROCEDURE

Carol and Eric English ("Plaintiffs") allege that on September 17, 2011, Eastern Idaho Health Services, Inc. ("EIRMC") and Dr. James Taylor ("Dr. Taylor") (collectively referred to as the "Medical Defendants") committed medical negligence that injured Carol while using a particular medical device. On September 13, 2013, Plaintiffs filed this suit against Cook Incorporated; Cook Medical Incorporated; Cook Medical Technologies, LLC; and Does 1-20 (the "Cook Defendants") alleging products liability theories involving the medical device used on September 17, 2011. On

September 16, 2013, the Idaho State Board of Medicine received Plaintiffs' claim for medical malpractice pre-litigation hearing. On September 17, 2013, Plaintiffs filed an amended complaint. Plaintiffs did not include the Medical Defendants nor any medical negligence theories in either of these complaints.

On October 31, 2013, the Cook Defendants filed a Notice of Removal that removed this state action to federal court based on diversity of citizenship. On December 10, 2013, Plaintiffs filed a Motion for Leave to File Second Amended Complaint. Plaintiffs' Motion for Leave to File Second Amended Complaint was not served upon the Medical Defendants. On January 16, 2014, the federal court granted Plaintiffs' Motion for Leave to File Second Amended Complaint and Plaintiffs filed their Second Amended Complaint the same day. In Plaintiffs' Second Amended Complaint, Plaintiffs' claimed medical negligence and named the Medical Defendants.

On January 17, 2014, Plaintiffs and Cook Defendants stipulated that the Second Amended Complaint deprived the federal court of jurisdiction. On January 21, 2014, the federal court dismissed the case for lack of jurisdiction and the case was remanded back to Idaho State Court. On January 27, 2014, Plaintiffs filed their Second Amended Complaint, which was already filed in federal court, in the Idaho state action. On February 25, 2014, EIRMC was served with Plaintiffs' Second Amended Complaint. Dr. Taylor was served on March 21, 2014.

On March 14, 2014, EIRMC filed Defendant Eastern Idaho Health Services, Inc. DBA Eastern Idaho Regional Medical Center's Motion for Summary Judgment ("EIRMC's Motion for Summary Judgment"). On April 4, 2014, Dr. Taylor filed Defendant James Taylor, D.O.'s First Motion for Summary Judgment ("Dr. Taylor's Motion for Summary Judgment"). Both motions for summary judgment have the same relevant facts, make nearly identical arguments, and Plaintiffs arguments apply to both parties. Therefore, this Court will address the motions together.

II.
STANDARD OF REVIEW

In *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991), the Supreme Court outlined the standard for granting or denying a motion for summary judgment, staying:

> It is well established that 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. Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. Likewise, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. However, the plaintiff's case must be anchored in something more than speculation and a mere scintilla of evidence is not enough to create a genuine issue. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions.

(Internal citations and quotations omitted).

III.
ANALYSIS

In a malpractice action, the injured party has two years from the date that the cause of action accrued to commence an action. I.C. §5-219(4). However, the statute of limitations is tolled during pre-litigation proceedings for medical malpractice actions. I.C. §6-1005. In relevant part, I.C. §6-1005 says "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."

Plaintiffs' complaint alleges that the injury occurred on September 17, 2011. On September 16, 2013, the Idaho State Board of Medicine received Plaintiffs' pre-litigations screening request. On November 18, 2013, the pre-litigation screening panel filed its decision with the Idaho State

Board of Medicine. Combined, these actions caused the applicable statute of limitations to be extended to December 19, 2013. All parties agree that this is the correct date.

Plaintiffs filed their Motion for Leave to File a Second Amended Complaint on December 10, 2013, but did not file the actual Second Amended Complaint until January 16, 2014. Therefore the issue before this Court is whether the December 10, 2013, filing of Plaintiffs' Motion for Leave to File a Second Amended Complaint commenced the action against the Medical Defendants.

I.R.C.P. 3(a) governs the commencement of civil actions and states, "a civil action is commenced by the filing of a complaint, petition or application with the court." In the case of a third-party complaint, an action is still commenced by the filing of a complaint. I.R.C.P. 3(a); *Griggs v. Nash*, 116 Idaho 228, 234, 775 P.2d 120, 126 (1989). However, the Supreme Court addressed the flexibility of I.R.C.P. 3(a) in the context of requests for leave to file amended complaints in *Terra-W., Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010). In *Terra-W., Inc. v. Idaho Mut. Trust, LLC*, the plaintiff filed a mechanics lien against the subject property for work performed in improving the land. The defendant had an interest in the property and filed a motion to dismiss the first mechanics lien. *Id.* at 395, 247 P.3d at 622. The court granted the motion to dismiss, but the defendant was not dismissed from the law suit. *Id.* Before the statute of limitations ran, the plaintiff filed motion for leave to file a second mechanics lien along with a copy of the proposed lien. *Id.* The district court granted the request eight months after the expiration of the statute of limitations. *Id.* Idaho Mutual appealed and the Supreme Court upheld the district court on the grounds that the "filing of the motion to amend the complaint commenced proceedings pursuant to Idaho's mechanic's lien statute." *Id.* at 396, 247 P.3d at 623.

However, the Supreme Court qualified this holding by saying that Idaho Mutual, as a party to the suit, had notice of the proposed amendment because the request and proposed amendment were

served upon Idaho Mutual. *Id.* at 399, 247 P.3d at 626. The Supreme Court conditioned the relaxing of the I.R.C.P. 3(a) filing requirement on the defendants having notice of the substance of the proposed amendment. *Id.* The Supreme Court explained that the substance of the proposed amendment was either a copy of the proposed amendment or sufficiently descriptive text included in the amendment itself. *Id.* The Court then reasoned that because the third-party is not served with the request for leave to file an amended complaint under I.R.C.P. 14(a), the third-party has no notice of the pending action. *Id.* at 400, 247 P.3d at 627.

While discussing *Griggs v. Nash*, the Supreme Court explained that a third-party complaint is "categorically different than a motion to amend to add a new claim against a party who is already part of the action." *Terra-W, Inc.* at 399, 247 P.3d at 626. While not directly holding such, the suggested Court also suggested that filing a separate action and attempting to consolidate might be the better course of action when dealing with third-party complaints. *Id.*

The Medical Defendants argue that under *Griggs v. Nash* and *Terra-W., Inc. v. Idaho Mut. Trust, LLC* the statute of limitations expired while Plaintiffs December 10, 2013, Motion for Leave to File Second Amended Complaint was pending. Plaintiffs argue that under *Terra-W., Inc.*, the statute of limitations requirements were satisfied by the filing of Motion for Leave to File a Second Amended Complaint.

The record shows that Plaintiffs did not meet the I.R.C.P. 3(a) filing requirements outlined in *Griggs*. *Id.* at 234, 775 P.2d at 126. While this case has some similarities with *Terra-W, Inc.*, the facts of this case lack certain key elements that would allow this Court to apply the relaxed filing requirement in *Terra-W., Inc.*

In the present case, as in *Terra W., Inc.*, Plaintiffs filed their motion before the expiration of the statute of limitations and attached the proposed amended complaint. However, unlike *Terra-W.,*

Inc., Plaintiffs did not serve the Medical Defendants with a copy of the proposed amended complaint before the expiration of the statute of limitations. The Supreme Court conditioned the relaxing of the I.R.C.P. 3(a) filing requirement on the defendants having notice of the substance of the proposed amendment. *Terra-W., Inc.* at 399, 247 P.3d at 626. The Supreme Court explained that the substance of the proposed amendment was either a copy of the proposed amendment or sufficiently descriptive text included in the amendment itself. *Id.* In light of the Supreme Court's language in *Terra-W., Inc.* and Plaintiffs' failure to serve the Medical Defendants before the expiration of the statute of limitations, this Court cannot extend the *Terra-W., Inc.* holding to the present facts.

Plaintiffs argue that by requiring that Defendants have actual notice before the expiration of the statute of limitations, this Court would place additional burdens on Plaintiffs that are not present in original filings. Plaintiffs base this argument on the fact that a defendant to the original claim need only be served within six months of the filing, which would permit the defendant discovering liability after the statute of limitations.

Even though the issue of third-party complaints was not before the court in *Terra-W., Inc.*, the Supreme Court suggested that third-party complaints are a different matter. The foundation for this distinction appears to be notice given to the proposed third-parties. The Supreme Court specified that notice prior to the expiration of the statute of limitations was required for the relaxing of the I.R.C.P. 3(a) filing requirement. *Terra-W., Inc.* at 399, 247 P.3d 626. While the Supreme Court did not specify the reasoning for this requirement, justice suggests to enjoy this benefit, the plaintiff must take steps to mitigate damage potentially suffered by the potential defendant.

This conclusion is not unjust because Plaintiffs had the ability to file a new action against the Medical Defendants that would have guaranteed preservation of Plaintiffs' claim. On the same note, a simple request for leave to amend does not put potential third-parties on notice that they are

involved in legal action. The court is not bound to grant the request. The request only gives the third-parties notice that they may become involved in legal action and does not advise them of any legal liability.

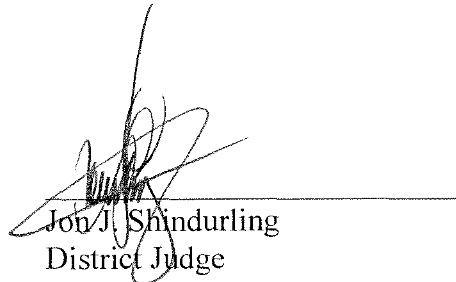
Therefore, Plaintiffs' December 10, 2013, Motion for Leave to File a Second Amended Complaint did not commence the action and Plaintiffs did not commence the action until after the statute of limitations expired.

IV.
CONCLUSION

For the foregoing reasons, Eastern Idaho Health Services, Inc. DBA Eastern Idaho Regional Medical Center's Motion for Summary Judgment is GRANTED. James Taylor, D.O.'s First Motion for Summary Judgment is GRANTED. Counsel for Defendants shall submit an appropriate form of judgment.

IT IS SO ORDERED.

Dated this 13 day of June, 2014.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of June, 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.

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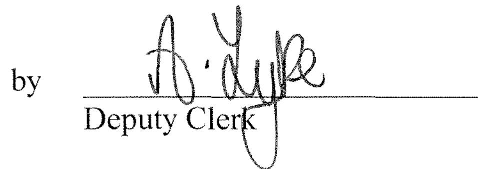
by 
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BONNEVILLE COUNTY
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho corporation; and DOES 1-20, Defendants.	Case No.: CV-2013-4868 **JUDGMENT OF DISMISSAL WITH PREJUDICE**

JUDGMENT IS ENTERED AS FOLLOWS: Plaintiffs' Second Amended Complaint and Jury Demand against Eastern Idaho Health Services, Inc. dba Eastern Idaho Regional Medical Center is dismissed with prejudice with Plaintiffs taking nothing thereunder.

DATED this 27 day of June, 2014.

Jon J. Shindurling, District Judge

RECEIVED
JUN 2 3 2014
BY:

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document upon the following this 30 day of June, 2014.

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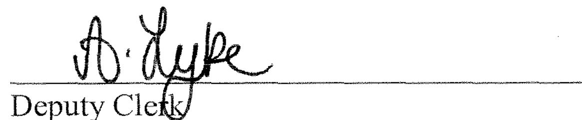

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DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

IN THE DISTRICT COURT OFTHE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN ANDFOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	Case No. cv-2013-4868 **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

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ORIGINAL

COME NOW Plaintiffs Carol English and Eric English ("Plaintiffs"), and move this Court, pursuant to Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure to reconsider its Opinion and Order Granting Medical Defendants' Motions for Summary Judgment issued on June 23, 2014 ("Opinion").

I. INTRODUCTION

On or about March 14, 2014, Defendant Eastern Idaho Health Services, Inc., dba Eastern Idaho Regional Medical Center ("EIRMC") filed a Motion for Summary Judgment against Plaintiffs asserting that the statute of limitations had passed on Plaintiffs' claims against EIRMC. Subsequently, on April 4, 2014, Defendant James Taylor, D.O. ("Taylor") filed his own Motion for Summary Judgment against Plaintiffs, again on the premise that Plaintiffs' claims were precluded by the statute of limitations. Oral arguments on EIRMC and Taylor's (collectively "Medical Defendants") Motions for Summary Judgment were held on May 5, 2014, and the Court issued its Opinion and Order Granting Medical Defendants' Motions for Summary Judgment on June 23, 2014 ("Opinion"). Plaintiffs now move this Court to reconsider its Opinion. Plaintiffs hereby incorporate the facts previously raised to the Court in the parties' briefing on the Motions for Summary Judgment, but additionally notes that on April 9, 2014, the federal court entered an order clarifying that Plaintiffs' Second Amended Complaint "was effectively filed on December 10, 2013, the date it was filed with Plaintiffs' Unopposed Motion to Amend." (*See* Federal Dkt. 20, attached at Exhibit A).

II. STANDARD

The Idaho Supreme Court has explained the standard applicable to a motion for reconsideration as follows:

> The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B). On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. However, a motion for reconsideration need not be supported by any new evidence or new authority. When deciding a motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered; in other words, if the original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration, and if the original order was governed by a different standard, then that standard applies to the motion for reconsideration.

Fragnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012) (internal citations omitted).

III. ARGUMENT

A. Federal Law Requires that Medical Defendants' Motion for Summary Judgment Should Have Been Denied.

1. The Question of When the Amended Complaint was Deemed Filed is a Procedural Question, not a Question of Substantive Law, and is Therefore Governed by the Federal Rules of Civil Procedure.

At the time Plaintiffs brought their Motion to Amend, this case was pending in federal court. Judge Lodge ordered that the Second Amended Complaint was deemed filed on December 10, 2013. However, this Court failed to acknowledge or recognize the federal court's order with no analysis as to whether the underlying issue is procedural or substantive. Critical to the determination of when the Second Amended Complaint adding the Medical Defendants as defendants to the action was deemed filed is whether the question of filing of the Second Amended Complaint is a matter of procedure or

substantive law. The Motion for Leave to File Second Amended Complaint was filed December 10, 2013, while this matter was pending in federal court. On January 16, 2014, the federal court granted Plaintiffs' Motion for Leave to File Second Amended Complaint and Plaintiffs filed their Second Amended Complaint, which included the Medical Defendants, the same day. Later, when questions arose regarding the date that the Second Amended Complaint was deemed filed, Judge Lodge entered an Order clarifying that "Plaintiffs' Second Amended Complaint was effectively filed on December 10, 2013, the date it was filed with Plaintiffs' Unopposed Motion to Amend." (Federal Dkt. 20). Judge Lodge's clarification reflects standard procedural law in federal court that an amended complaint is deemed filed on the day the motion to amend is filed. *See Mayes v. A&F Info. Sys., Inc.,* 867 F.2d 1172, 1173 (8th Cir. 1989); *Buller v. Owner Operator Ind. Driver Risk Retention Group, Inc.,* 461 F. Supp. 2d 768, 777 (S.D. Ill. 2006)(collecting federal court cases holding amended complaint is deemed filed when motion to amend is filed).

The issue of when the action against Medical Defendants commenced is a procedural issue. In fact, this Court acknowledges in its Opinion, the procedural nature of the issue by holding Medical Defendants' Motion for Summary Judgment is not unjust because "Plaintiffs had the ability to file a new action against the Medical Defendants that would have guaranteed preservation of Plaintiffs' claim." (Opinion, p. 6). As the Court also notes in its Opinion, the Idaho Supreme Court acknowledged as much in *Terra-West, Inc. v. Idaho Mutual Trust, LLC,* 150 Idaho 393, 247 P.3d 620 (2010), where the "[Idaho Supreme] Court also suggested that filing a separate action and attempting to consolidate might be the better course of action when dealing with third-party complaints." (Opinion, p. 5 (citing *Terra-West* at 399, 247 P.3d at 626)). In other

words, the Court states that had Plaintiffs followed a different ***procedure*** (filing a new action instead of moving for leave to amend), Plaintiffs' claims would have survived. As explained below, because the key issue in determining whether Plaintiffs' claim had commenced was a matter of procedure, and because this matter was pending before the federal court at the time Plaintiffs filed their Motion for Leave to File Second Amended Complaint with the attached Second Amended Complaint, the Court must apply federal procedural law.

2. Because when the Action "Commenced" is a Procedural Matter Governed by Rule 3 of the Federal Rule of Civil Procedure, Federal Law Applies.

The Federal Rules of Civil Procedure automatically apply "in *all* civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1 (emphasis added); *see also Califano v. Yamasaki*, 442 U.S. 682, 699-700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). "It is, of course, well-settled that in a suit based on diversity of citizenship jurisdiction the federal courts apply federal law as to the matters of procedure but the substantive law of the relevant state." *Hiatt v. Wadlow*, 75 F.3d 1252, 1255 (8th Cir. 1996)(*citing Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.1188 (1938)). "When a situation is covered by one of the Federal Rules, the question facing the Court is a far cry from the typical relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144 (1965). "Thus, the full-blown *Erie* analysis—first determining whether a matter is substantive or *procedural* and then applying state law on substantive matters — does not apply if the matter in question is covered by a Federal

Rule of Civil Procedure." *Hiatt*, 75 F.3d at 1258. Consequently, because this action was before the federal court at the time the Motion for Leave to File Second Amended Complaint and the Second Amended Complaint were filed, the Federal Rules of Civil Procedure must be applied.

3. Federal Procedural Law Dictates that an Action "Commences" Against a Defendant Added to an Action Through an Amended Complaint at the Time the Motion for Leave is Filed.

The wording of Rule 3 of the Federal Rules of Civil Procedure and Rule 3 of the Idaho Rules of Civil Procedure regarding when an action is "commenced" is nearly identical. While Idaho courts have arguably addressed when an action "commences" under Rule 3 against a third-party defendant, Idaho courts have not yet directly addressed the time at which an action commences as against a defendant which was not previously a party to an existing suit.[1] The federal courts, however, have addressed this very issue. Under the interpretation of Rule 3 of the Federal Rules of Civil Procedure, an amended complaint which adds additional defendants is deemed filed on the date on which the Motion for Leave to File Amended Complaint is filed. In fact, in *Terra-West*, the Idaho Supreme Court acknowledged, citing *Mayes v. AT&T Info. Sys., Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) as an example, that under Rule 3 of the Federal Rule of Civil Procedure, "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." *Terra-West, Inc. v. Idaho Mutual Trust, LLC*, 150 Idaho 393, 398, 247 P.3d 620, 625 (2010). Importantly, in *Mayes*, the question in front of the

[1] It should be noted that in *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) the Idaho Supreme Court provides no analysis as to why it determined that, even though the plaintiff brought a motion for leave to file a third-party complaint within the statute of limitations period, the complaint was untimely because the actual third-party complaint itself was not filed until after the court ruled on the motion for leave eight months later.

Eighth Circuit regarding when an action "commences" under Rule 3 was nearly identical to the question currently before this Court. In *Mayes,* the plaintiff timely filed a motion to amend to add her union, an indispensable party, to the lawsuit as a defendant. The district court granted her motion, and the plaintiff filed her amended complaint, which, by that time, was beyond the applicable statute of limitations. The union subsequently moved for summary judgment because the amended complaint itself was filed six days after the statute of limitations. The district court granted the union's motion, and the suit was subsequently dismissed. The Eighth Circuit overturned the decision, stating:

> "A civil action is commenced by filing a complaint with the court." Amended complaints may not be filed until the court has ordered leave to do so. A number of courts have addressed the situation where the petition for leave to amend the complaint has been filed prior to expiration of the statute of limitations, while the entry of the court order and the filing of the amended complaint have occurred after the limitations period has expired. In such cases, the amended complaint is deemed filed within the limitations period.

Mayes, 867 F.2d 1172, 1173 (8th Cir. 1989)(internal citations omitted); *Buller v. Owner Operator Ind. Driver Risk Retention Group, Inc.,* 461 F.Supp.2d 768, 777 (S.D. Ill. 2006)(collecting federal court cases holding amended complaint is deemed filed when motion to amended is filed). Under Rule 3 of the Federal Rules of Civil Procedure, an action against a defendant not previously a party to the litigation is considered to have "commenced" at the time the motion for leave to amend was filed, not at the time when the amended complaint is subsequently filed after the grant of leave to amend by the court.

Because Idaho has never addressed the issue of when an action "commences" with regard to a defendant added through an amended complaint filed as a result of a motion for leave to amend, there is no conflict with the federal procedure which has

directly addressed this question. Because there is no conflict with federal procedural law on this issue, federal procedural law must be applied. *See National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316, 84 S.Ct. 411, 414, 11 L.Ed.2d 354 (1964). Federal procedure requires that this Court recognize that the date upon which the action "commenced" against the Medical Defendants was December 10, 2013, the date upon which the Motion for Leave to File Second Amended Complaint was filed. Judge Lodge, through his Order dated April 9, 2014, clarifying his Order on Plaintiff's Motion for Leave to Amend, also affirmatively stated, in comport with federal courts' interpretation of Rule 3 of the Federal Rules of Civil Procedure, that Plaintiffs' Second Amended Complaint was "effectively filed on December 10, 2013, the date it was filed with Plaintiffs' Unopposed Motion to Amend." (Federal Dkt. 20, Ex. A). Because December 10, 2013, was within the statute of limitations period, the action against Medical Defendants was "commenced" timely, and the Court should have denied Medical Defendants' Motion for Summary Judgment.

4. **Even if There was a Question as to Whether Rule 3 of the Federal Rules of Civil Procedure and its Interpretation Under Case Law Applied, Analysis Under the *Erie* Doctrine Requires that, When a Direct Conflict Between Idaho Law and Federal Law Regarding When an Action "Commences" Against a Defendant Added to an Action Through an Amended Complaint Arises with Regard to a Procedural Issue, Federal Law Trumps.**

A situation similar to the matter before this Court was examined by the United States Supreme Court in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). In *Hanna*, the question at issue was whether the service provisions prescribed by the Federal Rules of Civil Procedure, rather than by state law, should be applied in a diversity action. While the Federal Rules of Civil Procedure allowed service by "delivering a copy of the summons and of the complaint to [a defendant] personally or

by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein," the Massachusetts service statute required service "by delivery in hand." *Id.*, 380 U.S. at 461-62, 85 S.Ct. 1138-39. The petitioner, who filed her claim in the U.S. District Court for the District of Massachusetts, served her complaint pursuant to the service provisions of the federal rule of civil procedure, and the defendant subsequently filed a motion for summary judgment based upon failure to properly serve under Massachusetts law. The District Court granted the defendant's motion for summary judgment. Ultimately, the United States Supreme Court overturned the lower court's ruling, holding that the federal rule of procedure trumped based upon the Constitution's grant of power over federal procedure and Congress's exercise of that power in the Enabling Act. *Id.* 380 U.S. at 473-74, 85 S.Ct. at 1145. In discussing the application of the *Erie* doctrine in that case, the U.S. Supreme Court noted that the crux of the *Erie* doctrine, like the Rules Enabling Act (28 U.S.C. § 2072), is that federal courts are to apply state substantive law and federal procedural law. *Hanna*, 380 U.S. at 465, 85 S.Ct. at 1141. The Court noted, citing to *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, (1945), that "the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" It answered the question in the case of *Hanna* as follows:

> The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point 'outcome-determinative' in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense every procedural variation is

> 'outcome-determinative.' For example, having brought suit in federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts, even though enforcement of the federal time table will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any relevance to the choice of forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather adherence to the state rule would have resulted only in altering the way in which process was served.

Hanna, 380 U.S. 468-69, 85 S.Ct. at 1142-42.

Likewise, in this case, it is clear that when an action "commences" is a procedural issue, as explained above. Just as in the case of *Hanna*, where the petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recover, but rather would have merely altered the way in which process was served, Plaintiffs in this case were not presented with a situation where application of the state rule would wholly bar recovery – rather it would simply impact the means by which Plaintiffs went about adding Medical Defendants. Under *Erie* analysis, when an action "commences" for the purposes of Rule 3 is a procedural issue, and therefore Federal law must be applied.

It should be noted that *Walker v. Armco Steel Corporation*, 446 U.S. 740, 100 S.Ct. 1978 (1980) does not answer or address the question at issue here, because the service requirements at issue in that case were part of a comprehensive statutory scheme which the Court found to be substantive, as "the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." *Walker*, 446 U.S. 751, 100 S.Ct. 1985. Unlike *Walker*, here, pursuant to

the Court's opinion and the dicta found in *Terra-West*, Plaintiffs could have followed a different, more cumbersome procedure to "commence" the action against Medical Defendants as of the same date upon which Plaintiffs filed their Motion for Leave to File Second Amended Complaint, and, the Court states, such action would have been timely under the statute of limitations. There was no alternative method of service in *Walker* which would have fulfilled the service requirements to save the action from being barred by the statute of limitations, i.e., it presented a substantive issue of state law. *Walker* is distinguishable from the situation at hand, and *Hanna* must be applied.

Under Federal Law, and under Judge Lodge's ruling, the Second Amended Complaint adding Medical Defendants to the action was deemed filed on December 10, 2013, the date on which the Motion for Leave to File Second Amended Complaint was filed. This date was well within the statute of limitations. Consequently, Medical Defendants' Motion for Summary Judgment should have been denied.

B. Even if This Situation Did Not Require the Application of Federal Law, Idaho Law Requires that Medical Defendants' Motion for Summary Judgment Not Be Granted.

1. Cases Should Be Decided on their Merits Whenever Possible.

Judicial policy in Idaho has long been that controversies should be determined and disposed of each on their own particular facts and as substantial justice may require. As the Idaho Supreme Court stated in *Stoner v. Turner*, 73 Idaho 117, 121, 247 P.2d 469, 471 (1952):

> The object of statutes and rules regulating procedure in the courts is to promote the administration of justice. Those statutes and rules which fix the time within which procedural rights are to be asserted are intended to expedite the disposition of causes to the end that justice will not be denied by inexcusable and unnecessary delay. But, except as to those which are mandatory or jurisdictional, procedural regulations should not be so

applied as to defeat their primary purpose, that is, the disposition of causes upon their substantial merits without delay or prejudice.

While admittedly, the Court cannot ignore mandatory or jurisdictional procedural requirements, in this case, the Court's determination that it was the filing of the Second Amended Complaint itself, not the filing of the Motion for Leave to File Second Amended Complaint, that "commenced" the action against Medical Defendants, violates Idaho policy that cases be decided on their merits and that procedural regulations should not be applied so as to defeat their purpose of disposition of cases on their merits. As the Court notes in its decision, Plaintiffs' claims against Medical Defendants would have survived had Plaintiffs filed a separate complaint and then attempted to consolidate the case with the case already pending before the Court against the Cook Defendants. Not only does this procedural technicality violate public policy favoring disposition of cases on their merits, it also violates the public policy of judicial efficiency. Certainly requiring Plaintiffs to file a separate case, which in all likelihood would be assigned to a different judge, would bog down the system even more, and result in additional briefing and hearings associated with the motion to consolidate which would necessarily follow, affecting not one, but two judge's dockets.

Moreover, this alternative procedure would not have been allowable or reasonable in federal court, where the case lied at the time. Plaintiffs could not file a case against the Medical Defendants and seek consolidation. There is no procedure to consolidate a state action with a federal court action. Moreover, requiring this procedure would provide the Medical Defendants with the same "notice" they received when the Motion for Leave to File Second Amended Complaint was filed. Plaintiffs would have had no obligation to serve the Second Amended Complaint in a new action to comply

with the statute of limitations. It is nonsensical to require a costly and cumbersome procedure that provides the same "notice" to the Medical Defendants. Dismissal of Plaintiffs' claims against Medical Defendants on a procedural technicality violates public policy favoring resolution of cases on their merits and judicial efficiency.

2. Medical Defendants Had Adequate Notice.

The main basis for the Court's decision in the Opinion revolves around whether Medical Defendants had notice of the fact they were being brought into the lawsuit. The Court based this decision largely on *Griggs v. Equity Mortgage Servs. Inc.*, 116 Idaho 228, 234, 775 P.2d 120, 126 (1989), in which the Idaho Supreme Court held, without explanation, that it was the filing of a third-party complaint, not the filing of the motion for leave associated with the third-party complaint, that constituted the "commencement" of the action against the third-party defendant. The Idaho Supreme Court noted in dicta in *Terra-West* that the reason for the Court's decision in *Griggs* had to do with the lack of notice to the third-party defendant. There is an important distinction between *Griggs* and this matter, however, because *Griggs* was not a medical malpractice action, and therefore the third-party defendant would not have had the notice provided by the statutorily required Pre-litigation Screening Panel before the Idaho Board of Medicine. The purpose of the pre-litigation screening panel is for the panel to receive evidence concerning the plaintiff's claim and at the close of the proceedings provide the parties comments and observations with respect to the dispute. *James v. Buck*, 111 Idaho 708, 709, 727 P.2d 1136, 1137 (1986). Consequently, by its very nature, the parties, including the defendant parties, are given notice of the plaintiff's claim, and furthermore, the fact that the screening panel is called a "pre-litigation" screening panel indicates that the next step in the process is to proceed with

litigation. Medical Defendants had actual notice of the claims at issue and Plaintiffs' plans to move forward with the litigation of its claims through the pre-litigation screening panel process. Because of the pre-litigation screening process, this case is distinguishable from *Griggs*. Therefore, even if Idaho law is applied, Medical Defendants had notice of the claims brought against it as of at least November 18, 2013, when the pre-litigation screening panel rendered its decision. Consequently, if the timeliness of the commencement of an action is dependent upon when a party received notice of the claims being brought against it, then the action "commenced" as of at least November 18, 2013.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion for Reconsideration.

Dated this 7th day of July, 2014

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

DeAnne Casperson

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2014, I caused a true and correct copy of the foregoing to be served via facsimile on the following:

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Attorneys for Defendants Cook Incorporated, Cook Medical Incorporated, and Cook Medical Technologies, LLC

DeAnne Casperson

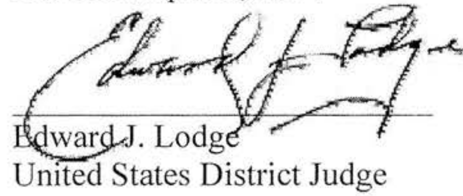
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC, and DOES 1-20, Defendants.	Case No. 4:13-cv-00469-EJL ORDER

Before the Court is Plaintiffs' Unopposed Motion to Clarify Docket Entry Order 13 (Dkt. 19). Docket Entry Order 13 granted Plaintiffs' Unopposed Motion for leave to File Second Amended Complaint. Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, the Court hereby **GRANTS** Plaintiffs' Motion to Clarify (Dkt. 19) and clarifies its Docket Entry Order 13. Specifically, Docket Entry Order 13 did not address the effective commencement of the claims asserted in the Second Amended Complaint filed with Plaintiffs' Unopposed Motion to Amend. The Court hereby clarifies that Plaintiffs' Second Amended Complaint was effectively filed on December 10, 2013, the date it was filed with Plaintiffs' Unopposed Motion to Amend (Dkt. 10).

SO ORDERED.

DATED: April 9, 2014



Edward J. Lodge
United States District Judge

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Attorneys for Plaintiffs

2014 JUL -7 PM 4:51
DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

IN THE DISTRICT COURT OFTHE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN ANDFOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	Case No. cv-2013-4868 **MOTION FOR RECONSIDERATION**

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ORIGINAL

COME NOW Plaintiffs Carol English and Eric English ("Plaintiffs") by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and moves the Court to reconsider its Opinion and Order Granting Medical Defendants' Motion for Summary Judgment ("Opinion") issued on June 23, 2014 for the reasons set forth in the Memorandum in Support file simultaneous herewith.

Dated this 7th day of July, 2014

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

DeAnne Casperson
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2014, I caused a true and correct copy of the foregoing to be served via facsimile on the following:

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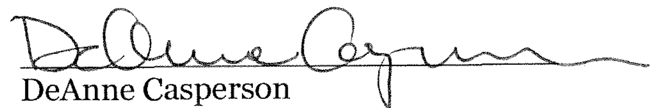
Attorneys for Defendants Cook Incorporated, Cook Medical Incorporated, and Cook Medical Technologies, LLC



DeAnne Casperson

BONNEVILLE COUNTY
IDAHO FALLS, IDAHO
2014 JUL -8 PM 2:58

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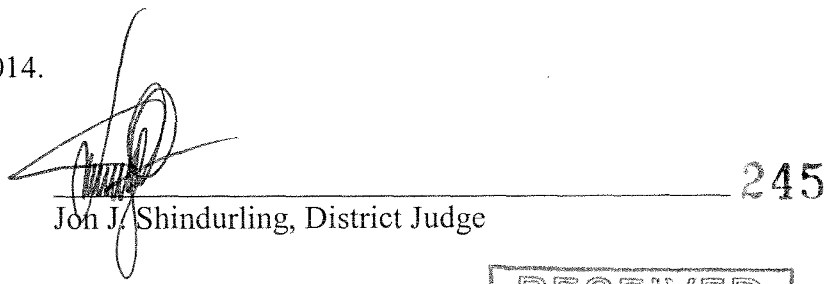
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH Plaintiff, v. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20; Defendants.	Case No. CV-2013-0004868-OC JUDGMENT OF DISMISSAL WITH PREJUDICE

JUDGMENT IS ENTERED AS FOLLOWS: Plaintiffs' Second Amended Complaint and Jury Demand against James Taylor, D.O. is dismissed with prejudice with Plaintiffs taking nothing thereunder.

DATED this 8 day of July, 2014.



Jon J. Shindurling, District Judge

245

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CLERK'S CERTIFICATE OF MAILING

I certify that I am the duly elected and qualified Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville; that I mailed [or delivered by courthouse box] a copy of the foregoing **JUDGMENT OF DISMISSAL WITH PREJUDICE** to the following attorneys this 8 day of July, 2014.

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SMITH & BANKS, PLLC
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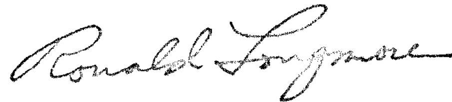
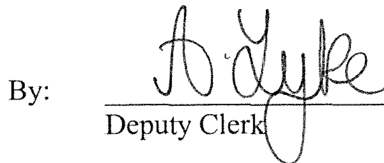


Clerk

By: 
Deputy Clerk

JMW/jd
7200.019\011 judgment dismissal

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO

14 AUG 28 PM 4:42

J. Michael Wheiler, Esq. ISB #3364
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Attorneys for Defendant James Taylor, D.O.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, v. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20; Defendants.	Case No. CV-2013-0004868-OC SECOND AFFIDAVIT OF J. MICHAEL WHEILER

STATE OF IDAHO)
) ss.
County of Bonneville)

J. Michael Wheiler, being first duly sworn upon oath, deposes and states:

1. I am an attorney of record for the Defendant in the above captioned matter. I am over the age of 18 and make this affidavit based on my actual knowledge and belief.

2. Attached hereto as Exhibit "A" is a true and correct copy of an Order dated April 9, 2014 by United States District Court for the District of Idaho.

3. Attached hereto as Exhibit "B" is a true and correct copy of Plaintiffs' unopposed Motion to Clarify filed on March 4, 2014.

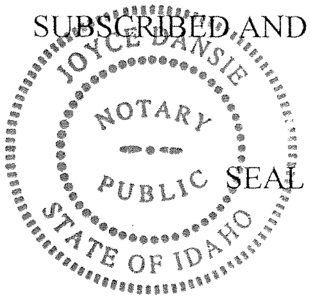
4. Attached hereto as Exhibit "C" is a true and correct copy of Judge Lodge's Order to Remand Case to State Court dated January 21, 2014.

5. Attached hereto as Exhibit "D" is a true and correct copy of the Stipulation between Defendant Cook and Plaintiffs dated January 17, 2014.

Dated this 28th day of August, 2014.

By: [signature]
J. Michael Wheiler

SUBSCRIBED AND SWORN to on oath before me this 28th day of August, 2014.



SEAL

[signature]
Notary Public of Idaho
Residing at:
My Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 28 day of August, 2014, I caused a true and correct copy of the foregoing **SECOND AFFIDAVIT OF J. MICHAEL WHEILER** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

DEANNE CASPERSON ESQ HOLDEN KIDWELL HAHN & CRAPO 1000 RIVERWALK DR STE 200 PO BOX 50130 IDAHO FALLS ID 83405-0130 dcasperson@holdenlegal.com	[X] Mail [ ] Hand Delivery [ ] Facsimile: 208-523-9518 [ ] E-Mail
RALPH L DEWSNUP ESQ DEWSNUP KING & OLSEN 36 SOUTH STATE ST STE 2400 SALT LAKE CITY UT 84111-0024 rdews@dkolaw.com	[X] Mail [ ] Hand Delivery [ ] Facsimile: 801-363-4218 [ ] E-Mail
WILLIAM G DRYDEN ESQ ELAM & BURKE 251 E FRONT ST STE 300 PO BOX 1539 BOISE ID 83701 wgd@elamburke.com	[X] Mail [ ] Hand Delivery [ ] Facsimile: 208-384-5844 [ ] E-Mail
DOUGLAS B KING ESQ WOODEN & MCLAUGHLIN LLP ONE INDIANA SQUARE STE 1800 211 N PENNSYLVANIA INDIANAPOLIS IN 46204 dking@woodmclaw.com	[X] Mail [ ] Hand Delivery [ ] Facsimile: 317-639-6444 [ ] E-Mail
MARVIN M SMITH ESQ SMITH & BANKS 2010 JENNIE LEE DR IDAHO FALLS ID 83404 mmsmith@smithbanks.net	[X] Mail [ ] Hand Delivery [ ] Facsimile: 208-529-3065 [ ] E-Mail

THOMSEN HOLMAN WHEILER, PLLC

By: ______________________
J. Michael Wheiler, Esq.

JMW
7200.019/013 2nd Wheiler Aff

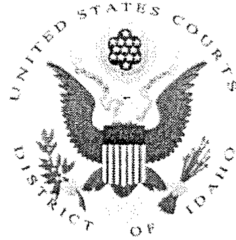
EXHIBIT “A”

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC, and DOES 1-20, Defendants.	Case No. 4:13-cv-00469-EJL ORDER

Before the Court is Plaintiffs' Unopposed Motion to Clarify Docket Entry Order 13 (Dkt. 19). Docket Entry Order 13 granted Plaintiffs' Unopposed Motion for leave to File Second Amended Complaint. Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, the Court hereby **GRANTS** Plaintiffs' Motion to Clarify (Dkt. 19) and clarifies its Docket Entry Order 13. Specifically, Docket Entry Order 13 did not address the effective commencement of the claims asserted in the Second Amended Complaint filed with Plaintiffs' Unopposed Motion to Amend. The Court hereby clarifies that Plaintiffs' Second Amended Complaint was effectively filed on December 10, 2013, the date it was filed with Plaintiffs' Unopposed Motion to Amend (Dkt. 10).

SO ORDERED.



DATED: April 9, 2014

Edward J. Lodge
United States District Judge

EXHIBIT "B"

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dcasperson@holdenlegal.com
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P.O. Box 50130
Idaho Falls, ID 83405-0130

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	**RULE 60 MOTION TO CLARIFY DOCKET ENTRY ORDER** Case No. 4:13-cv-469-EJL Judge Edward J. Lodge

Plaintiffs hereby move the Court for an order clarifying that its Docket Entry Order of January 16, 2014[1] relates back to the date on which Plaintiffs filed their Motion for Leave to File Second Amended Complaint,[2] accompanied by a copy of the Second Amended Complaint itself. This will have the effect of clarifying that the Complaint was filed on December 10, 2013, instead of some other date. This clarification is consistent

[1] Doc. 13.
[2] Doc. 10, filed Dec. 10, 2013.

with existing law as is explained in the accompanying Memorandum of Points and Authorities.

Rule 60 of the Federal Rules of Civil Procedure authorizes courts to clarify their own orders at any time prior to the docketing of an appeal. No such appeal has been docketed in this case, and Plaintiffs submit that the Court has continuing jurisdiction to make the requested clarification.

Dated this 4th day of March, 2014.

HOLDEN, KIDWELL, HAHN & CRAPO

/s/ DeAnne Casperson
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2014, I caused a true and correct copy of the foregoing **RULE 60 MOTION TO CLARIFY DOCKET ENTRY ORDER** to be filed via ECF, which sent notice of the same to the following:

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Attorneys for Defendants Cook Incorporated, Cook Medical Incorporated, and Cook Medical Technologies, LLC

/s/ DeAnne Casperson

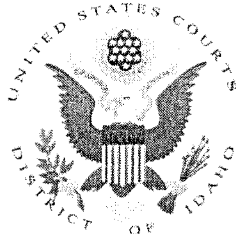
EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC, and DOES 1-20, Defendants.	Case No. 4:13-cv-00469-EJL ORDER TO REMAND CASE TO STATE COURT

The Stipulation (Dkt. 16) of the parties having come before this court and it appearing from the suggestion of the parties that this Court lacks subject matter jurisdiction and the parties having stipulated to remand the case to state court,

IT IS HEREBY ORDERED that the above-entitled action is remanded to the district court of the Seventh Judicial District of the State of Idaho, In and For the County of Bonneville, Case No. CV-13-04868; and the Clerk shall mail a certified copy of this Order to the Clerk of the aforesaid Idaho state court. No costs or attorney fees are taxed pursuant to 28 U.S.C. § 1447(c).



DATED: January 21, 2014

Edward J. Lodge
United States District Judge

EXHIBIT "D"

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dcasperson@holdenlegal.com
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P.O. Box 50130
Idaho Falls, ID 83405-0130

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; and DOES 1-20, Defendants.	Case No. 4:13-cv-469-EJL **STIPULATION FOR REMAND TO THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, BONNEVILLE COUNTY**

Counsel for the parties in this matter hereby stipulate that the Plaintiffs' filing of the Second Amended Complaint in this matter deprives the United States District Court for the District of Idaho of diversity jurisdiction pursuant to 28 U.S.C. § 1447(e) and that the filing of such Second Amended Complaint requires that this matter be remanded to the Seventh Judicial District of the State of Idaho, Bonneville County.

Dated this 17TH day of January, 2014.

/s/

DeAnne Casperson
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
Attorneys for Plaintiffs

/s/

Craig Yabui
ELAM & BURKE
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17TH day of January, 2014, I filed the foregoing electronically through the CM/ECF system, which causes the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

DOCUMENT SERVED: **STIPULATION FOR REMAND TO THE SEVENTH JUDICIAL DISTRICT FOR THE DISTRICT OF IDAHO, BONNEVILLE COUNTY**

ATTORNEYS SERVED:

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Attorneys for Cook Incorporated, Cook Medical Incorporated, and Cook Medical Technologies, LLC

/s/
DeAnne Casperson

14 AUG 28 PM 4:42

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friess@thwlaw.com

Attorneys for Defendant James Taylor, D.O.

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

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, v. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20; Defendants.	Case No. CV-2013-0004868-OC DEFENDANT JAMES TAYLOR, D.O.'S REPLY MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

COMES NOW Defendant James Taylor, D.O., by and through counsel of record, and submits the following Reply Memorandum in opposition to Plaintiffs' Motion For Reconsideration.

FACTS

With one exception, Plaintiffs rely upon exactly the same facts presented during the Motions for Summary Judgment. The additional fact now raised by Plaintiffs (which could easily have been raised at the time of the motions for summary judgment[1]) is that on April 9, 2014, Judge Lodge entered an Order in the federal proceedings stating, "The Court hereby clarifies that Plaintiffs' Second Amended Complaint was effectively filed on December 10, 2013, the date it was filed with Plaintiffs' Unopposed Motion to Amend." *See Exhibit "A" attached to the Second Affidavit of J. Michael Wheiler*. The Order was issued by Judge Lodge pursuant to a Rule 60 Motion to Clarify filed by the Plaintiffs on March 4, 2014. *See Exhibit "B" attached to the Second Affidavit of J. Michael Wheiler.* In as much as Dr. Taylor and EIRMC were **not parties** to the federal proceedings and a copy of the motion was **not served** upon them, Plaintiffs' motion was unopposed. As such, this is the medical defendants' first opportunity to argue against the validity of Plaintiffs' Rule 60 motion.

Of significant note is the fact that the Plaintiffs' Rule 60 motion was filed **after** the federal case was dismissed and the case had been remanded to this Court for further proceedings. According to the History on PACER, an order dismissing the case was entered on January 21, 2014. *See Exhibit "A" attached to the First Affidavit of J. Michael Wheiler*. On that same date, January 21, 2014, Judge Lodge entered an Order To Remand Case To State Court. *See Exhibit "C" attached*

---

[1] Plaintiffs knew about the order almost two weeks before filing their response to Dr. Taylor's motion for summary judgment but failed to raise any arguments regarding the order at that time. Plaintiffs should now be precluded from raising arguments based on evidence which was available to the Plaintiffs at the time of their initial response but which they intentionally chose not to raise for whatever strategic purpose. *See, e.g., Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104 (2013).

to the Second Affidavit of J. Michael Wheiler. In that Order, Judge Lodge noted that "the parties having come before this court and it appearing from the suggestion of the parties **that this Court lacks subject matter jurisdiction** and the parties having stipulated to remand the case to state court, IT IS HEREBY ORDERED that the above-entitled action is remanded to the district court of the Seventh Judicial District of the State of Idaho, In and For the County of Bonneville, Case No. CV-13-04868...." (Emphasis added.) Indeed, on January 17, 2014, Plaintiffs and Defendant Cook stipulated that adding Idaho defendants deprived the United States District Court of jurisdiction pursuant to 28 U.S.C. §1447(e) requiring that the case be remanded to this Court. *See Exhibit "D" attached to the Second Affidavit of J. Michael Wheiler.*

Therefore, prior to the filing of Plaintiffs' unopposed Rule 60 Motion, the parties to the action and the federal court had already acknowledged that the federal court lacked jurisdiction and the case had officially been remanded to this Court for further proceedings.

ARGUMENT

1. The Federal District Court Lacked Jurisdiction to Grant the Motion.

"Once a district court certifies a remand order to state court, it is divested of jurisdiction and can take no further action on the case." *Seedman v. United States District Court*, 837 F.2d 413, 414 (9th Cir. 1988). "It is clear that a remand order ends the federal court's jurisdiction." *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279 n. 3 (9th Cir. 1984) (citing *United States v. Rice*, 327 U.S. 742, 747, 66 S. Ct. 835, 837, 90 L. Ed. 982 (1946). *See also In re Lowe*, 102 F.3d 731, 736 (4th Cir. 1996) ("Accordingly, we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered."); *Brierly v. Alusuisse Flexible Packaging,*

Inc., 184 F.3d 527, 531 (6th Cir. 1999) (". . . a remand to state court divests a district court of jurisdiction such that it may not take any further action on the case."); *Federal Deposit Insurance Corp. v. Santiago Plaza*, 598 F.3d 634, 636 (1st Cir. 1979) ("[o]nce a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action."); *New England Technology Finance, LLC v. Enterprise Resource Procurement, LLC*, 2008 WL 2688099, *2 (D. Arizona 2008) ("'[I]t is clear that an order of remand to state court ends the jurisdiction of the federal court over the case.'") (Citing Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 3d* § 379 at 491.)

Accordingly, since the federal court was without jurisdiction when it entered its April 9, 2014 Order the order is void and has no value or applicability to this Court.

2. **Federal Law Does Not Dictate When the Idaho Statute of Limitations Begins.**

Even if Judge Lodge had jurisdiction to "clarify" his prior order, it is beyond dispute that when a federal court exercises diversity jurisdiction the forum state's substantive law applies and controls. *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Statutes of limitations are substantive for *Erie* purposes. *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). Decisions from the Idaho Supreme Court are controlling authority on questions of Idaho law. *Commissioner v. Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). Thus, for purposes of Plaintiffs' Motion For Reconsideration there is no question that *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) is the substantive law that applies, controls, and should dictate the outcome of this matter.

Plaintiffs cite *Mayes v. AT&T Information Systems, Inc.*, 867 F.2d 1172 (8th Cir. 1989) and

Buller Trucking Co. v. Owner Operator Independent Driver Risk Retention Group, Inc., 461 F.Supp2d 768 (S.D. Ill. 2006), as support for their arguments. *Mayes* was a federal question case in which the plaintiff alleged violation of a collective bargaining agreement and the court applied 29 USC §160(b). The 8th Circuit then simply looked to federal law for guidance on the issue and cited *Rademaker*, *Longo* and *Eaton* as support for its decision. Those cases will be addressed below.

The *Buller* case was a breach of contract and fraud case against an insurance carrier which was originally filed in St. Clair County Illinois. After the plaintiff amended the state court complaint to seek class certification, the defendant removed the case to federal district court pursuant to the Class Action Fairness Act of 2005 (CAFA). *Id.* at 771. The CAFA was not retroactive and applied only to class actions which were commenced on or after the date of enactment. *Id.* at 772. As such, the primary issue before the federal district court was whether the class action was commenced at the time the motion to amend was filed or when the court granted the motion to amend.

In analyzing that issue, the district judge cited a Seventh Circuit case[2] which left open the question of whether state law or federal law should govern the question of whether a motion for leave to amend a complaint "commences" an action for purposes of the CAFA. *Id.* at 774. The district judge then noted as follows:

> The Court concludes that the issue of when this action was commenced as a class action for purposes of removal under CAFA **is governed by state law, not federal law**. As the Schillinger court recognized, "in cases for which state law provides the rule of decision, federal courts apply state statutes of limitations, **including qualifications on those statutes**." 425 F.3d at 334. *Cf. Pace v. DiGugliemo*, 544 U.S. 498, 415, 125 S.CT. 1807, 161 L.Ed.2d 669 (2005)(looking to state law to determine when a pleading has been "properly file" for purposes of a federal statute of limitations); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751, 100

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[2] *Schillinger v. Union Pacific Railroad Co.*, 425 F.3d 330 (7th Cir. 2005).

S.Ct. 1978, 64 L.Ed.2d 659 (1980)(**state law determines when an action commences for statute of limitation purposes**); *Herb v. Pitcairn*, 324 U.S. 117, 120, 65 S.Ct. 459, 89 L.Ed. 789 (1945)("Whether any case is pending in the Illinois courts is a question to be determined by Illinois law.")....

Id. at 775. (Emphasis added.)

The federal district judge then added, "In federal actions based on diversity of citizenship jurisdiction, federal courts apply state law to decide when a lawsuit was commenced for certain purposes, such as computing limitations periods." *Id.* (Emphasis added.) The federal judge noted that this rule was based on the holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) "that federal courts lack constitutional power to fashion broad swathes of federal common law and that, when a federal court sitting in diversity acts in effect as a state court, its application of state law should be controlled by authoritative interpretations of that law by the highest court of that state." *Id.* Therefore, the federal district court judge applied Illinois law to determine the issue (*Fischer v. Senior Living Properties, LLC*, 771 N.E.2d 505 (Ill. App. Ct. 2002). *Id.* at 777.

The *Buller* decision is, therefore, contrary to the argument being pressed upon this Court by Plaintiffs. In fact, *Buller* stands for the proposition that Idaho state law should be applied not federal law. Indeed, the federal district judge in *Buller* was correct in his analysis. The United States Supreme Court has held as follows:

> Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a state of a federal court and whether the remedies be sought at law or may be had in equity.

Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 112, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). The *Erie* doctrine has been consistently applied "with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts." *Id.* at 110.

Walker v. Armco Steel Corp., 446 U.S. 740, 100 S. Ct. 1978, 64 L.Ed.2d 659 (1980) is also a case on point and directly contrary to the position being argued by Plaintiffs herein. The issue as stated by the Supreme Court was "...whether in a diversity action the federal court should follow state law or, alternatively, Rule 3 of the Federal Rules of Civil Procedure in determining when an action is commenced for the purpose of tolling the state statute of limitations." *Id.* at 741. At the outset, the Supreme Court noted, "...we established the rule that 'except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any diversity case is the law of the State." *Id.* at 745.

Most importantly, the Supreme Court held that "In construing *Erie* we noted that 'in essence, the intent of that decision was to insure that, **in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court**." *Id.* (Emphasis added.) Citing *Guaranty Trust*, the Court then stated that it had already concluded that a state statute of limitations should be applied because, "Plainly enough, a statute that would completely bar recovery in a 1983 suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow state law." *Id.*

In this case, we are dealing with an alleged right to recover derived not from the United

States but from the State of Idaho. As such, the *Erie* doctrine should be applied and Idaho state law should dictate the outcome of the case–not federal law. As noted by the United States Supreme Court, in diversity cases, the outcome of litigation in the federal court should be substantially the same as it would be if tried in a State court. Plaintiffs argue that this Court must follow federal law rather than state law and by doing so the Court must fashion an outcome completely different from the outcome mandated by Idaho state law. As noted above, the policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs and *Erie* and its progeny do not permit such an interpretation.

In their initial briefing, Plaintiffs made a similar argument. However, most of the federal cases cited by Plaintiffs at that time had jurisdiction under federal law. Some of those cases were simply adding new claims against a prior named defendant. For example, *Rademaker* was a federal question case under the Merchant Marine Act of 1920 (and it specifically noted "In this state of the pleadings, process was issued and served upon defendant, **before any right of action against it was barred**." The complaint was later amended after the statute had run.) *Korwek* was a federal antitrust case and it was a motion to intervene not amend the complaint. *Sheets* was a claim under the Federal 1933 Securities Act. *Eaton* was a patent claim but there was diversity jurisdiction on the non-patent claims. *Eaton* cited *Rademaker* as its authority. *Flood* was a 1983 action and it applied North Carolina law. *Mauney* was a North Carolina state case that added a claim not a new defendant. *Northwestern* was a diversity action but the amendment was to add a new claim not a new party. *Derdiarian* was a federal question case under Section 11 of the 1933 Securities Act and it was an amendment to add a claim not a new defendant. *Mason* was also a federal question case alleging claims under 18 USC 1962 and RICO. *In Re Integrated* was a federal question case under the 1933

Securities Act along with bankruptcy issues. *Wallace* said it was going to use Kansas state law regarding statutes of limitation but then only cited *Gloster* as authority. *Gloster* was apparently a diversity case involving wrongful death with a potential claim under the Federal Employers Liability Act. The court simply relied on Federal Rule 5 in rendering its decision. It did not apply Pennsylvania state law as it should have. Pennsylvania law is clear that it is the filing of the complaint, not the filing of a motion to amend that "commences an action." See *Aivazogulou v. Drever Furnaces*, 613 A.2d 595 (Superior Ct. PA 1992); *Schach v. Ford Motor Co.*, 210 FRD 522 (MD PA 2002). Had *Gloster* properly applied Pennsylvania state law, the outcome would have been different.

Finally, *Nett* was a 1st Circuit diversity case involving claims of medical malpractice. It applied Massachusetts state law and specifically certified the question "does the filing of a motion for leave to amend constitute the commencement of the action for purposes of the statute?" to the Supreme Court of Massachusetts. That court answered the question yes—the operative date is the date the motion was filed. The point is, the 1st Circuit deferred to the Massachusetts Supreme Court to decide the question. The 1st Circuit did not just apply federal law as Plaintiffs suggest is mandated by federal law.

In this case, the Court properly analyzed Idaho State law and applied that law correctly in determining that Plaintiffs had not timely filed their claim against the medical providers. As such, Plaintiffs' Motion For Reconsideration should be denied.

3. **Application of the Statute of Limitations was Mandatory.**

Plaintiffs assert that this Court should ignore the Idaho Supreme Court's decision in Griggs and that federal "procedural regulations" should be applied so as to dispose of this case on its merits.

As stated in our initial brief, important purposes are served by the Idaho statute of limitations. If this Court accepts Plaintiffs' arguments, the statute of limitations would effectively be extended by judicial decree to a period in excess of the time established by the Idaho legislature. Idaho Code §5-201 unambiguously states that civil actions in this state "**can only be commenced** within the periods prescribed in this chapter...." (Emphasis added.)

Plaintiffs do not dispute that Idaho Code §5-219 is the controlling statute of limitation. That section states that an action to recover damages for professional malpractice must be filed within two (2) years of the cause of action accruing and that 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...." Therefore, applying the language of both statutes, an action for medical malpractice can only be commenced within two (2) years of the act or omission complained of. *Billings v. Sisters of Mercy*, 86 Idaho 485, 488-89, 389 P.2d 224 (1964)[3]. The language of the statutes is mandatory. It is not merely procedural. It is not subject to discretionary application.

In this case, there is no dispute that the act or omission complained of occurred on September 17, 2011. There is also no dispute that (1) Plaintiffs' Prelitigation Screening Panel Application dated September 12, 2013 was stamped as received by the Idaho State Board of Medicine on September 16, 2013; (2) that the Prelitigation Screening Panel filed its Opinion on November 18, 2013; (3) that

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[3] Additionally, as the dissent notes, "Meritorious claims may, it is true, be barred by commencing the running of the statute from the time of the negligent act when discovery is later made. Statutes of limitations in general, however, in their operation cut off both meritorious and unmeritorious claims." *Id.* at 501.

the statute of limitations on any claims against Dr. Taylor expired on December 19, 2013; or (4) that Plaintiffs actually filed their complaint against Dr. Taylor on January 16, 2014.

Plaintiffs attempt to avoid the statute of limitations acting to bar their claims against the medical providers in this case by asserting that applying the statute of limitations is merely procedural and not mandatory. Based upon the plain wording of the statutes and the case law, the Court should decline Plaintiffs' invitation to reconsider its decision.

4. **Proper Notice Was Not Given.**

With regard to the notice argument, Plaintiffs only regurgitate the same arguments they previously made and suggest that the Court simply change its mind. Dr. Taylor refers the Court to his Reply Memorandum and that of defendant EIRMC in addressing this issue. The Court was right the first time and should not change its decision.

CONCLUSION

There is no dispute that the statute of limitations in this case expired on December 19, 2013. There is no dispute that Plaintiffs' original and first amended complaints did not name Dr. Taylor nor did those pleadings state a claim for medical negligence. There is no dispute that on December 10, 2013, Plaintiffs filed in federal court a motion to amend their complaint a third time with a proposed second amended complaint attached to the motion. There is no dispute that Plaintiffs filed a second amended complaint in federal court on January 16, 2014–nearly one month after the statute expired. There is no dispute that Dr. Taylor was not served with a copy of the motion to amend or the proposed second amended complaint prior to December 19, 2013. There is no dispute that Dr. Taylor was first served with the Second Amended Complaint on March 21, 2014.

Based upon the facts of this case, the plain language of the Idaho statutes of limitation, and

the Idaho Supreme Court's decisions in *Terra-West* and *Griggs*, the action against Dr. Taylor was properly dismissed by this Court. To hold otherwise would be contrary to the purposes of Idaho Code §5-219 and the *Erie* doctrine. Therefore, Dr. Taylor respectfully requests that the Court deny Plaintiffs' Motion to Reconsider.

Dated this 28th day of August, 2014.

THOMSEN HOLMAN WHEILER, PLLC

By:
J. Michael Wheiler, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 28 day of August, 2014, I caused a true and correct copy of the foregoing **REPLY BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

DEANNE CASPERSON ESQ HOLDEN KIDWELL HAHN & CRAPO 1000 RIVERWALK DR STE 200 PO BOX 50130 IDAHO FALLS ID 83405-0130 dcasperson@holdenlegal.com	[X] Mail [ ] Hand Delivery [ ] Facsimile: 208-523-9518 [ ] E-Mail
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DOUGLAS B KING ESQ WOODEN & MCLAUGHLIN LLP ONE INDIANA SQUARE STE 1800 211 N PENNSYLVANIA INDIANAPOLIS IN 46204 dking@woodmclaw.com	[X] Mail [ ] Hand Delivery [ ] Facsimile: 317-639-6444 [ ] E-Mail
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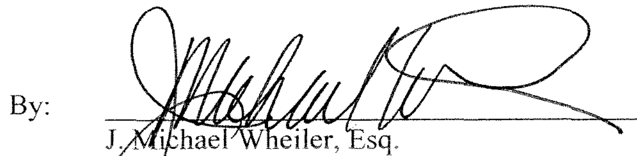
THOMSEN HOLMAN WHEILER, PLLC

By: 
J. Michael Wheiler, Esq.

JMW/7200.019/003 Reply Brief in Support MSJ

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO

14 AUG 23 PM 3:51

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Attorney for Defendant Eastern Idaho Health Services, Inc.

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

CAROL ENGLISH and ERIC ENGLISH, wife and husband Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho corporation; and DOES 1-20, Defendants.	Case No.: CV-2013-4868 **AFFIDAVIT OF MARVIN M. SMITH OPPOSING PLAINTIFFS' MOTION FOR RECONSIDERATION**

STATE OF IDAHO)
:ss.
County of Bonneville)

MARVIN M. SMITH, after being first duly sworn under oath, deposes and states as follows:

1. I am one of the attorneys of record in this matter for Eastern Idaho Health Services, Inc. d/b/a Eastern Idaho Regional Medical Center and make the following statements based upon my own personal knowledge.

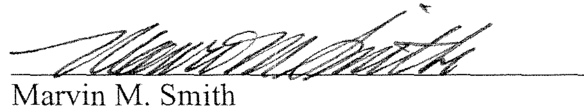
2. Attached hereto as Exhibit "A" is a true and correct copy of an April 9, 2014 Order entered by Judge Lodge in Idaho federal district court case no. 4:13-cv-00469-EJL.

3. Attached hereto as Exhibit "B" is a true and correct copy of a March 4, 2014 Rule 60 Motion to Clarify Docket Entry Order filed in Idaho federal district court case no. 4:13-cv-00469-EJL.

4. Attached hereto as Exhibit "C" is a true and correct copy of a January 17, 2014 Stipulation for Remand to the Seventh Judicial District of the State of Idaho, Bonneville County filed in Idaho federal district court case no. 4:13-cv-00469-EJL.

5. Attached hereto as Exhibit "D" is a true and correct copy of a January 21, 2014 Order to Remand Case to State Court filed in Idaho federal district court case no. 4:13-cv-00469-EJL.

DATED this 28th day of August, 2014.



Marvin M. Smith

SUBSCRIBED AND SWORN to before me this 28th day of August, 2014.

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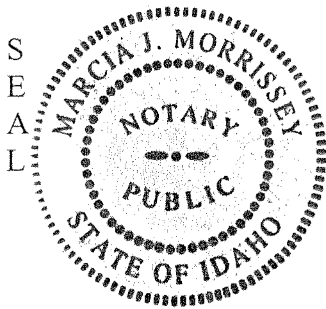
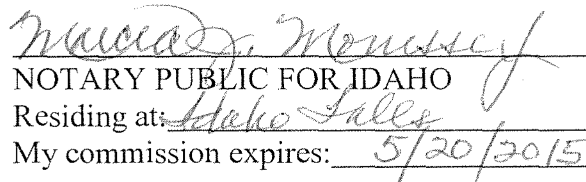




NOTARY PUBLIC FOR IDAHO
Residing at: Idaho Falls
My commission expires: 5/20/2015

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document upon the following this 28th day of August, 2014.

DeAnne Casperson Holden, Kidwell, Hahn & Crapo 1000 Riverwalk Drive, Suite 200 P.O. Box 50130 Idaho Falls, ID 83405-0130	[_] U.S. Mail, postage prepaid [X] Hand Delivery [_] Fax - [_] Overnight Mail
Ralph L. Dewsnup Jessica A. Andrew Dewsnup, King & Olsen 36 South State Street, Ste. 2400 Salt Lake City, UT 84111-0024	[X] U.S. Mail, postage prepaid [ ] Hand Delivery [_] Fax – 801-363-4218 [_] Overnight Mail
William Dryden Craig Yabui Elam & Burke 251 Front Street P.O. Box 1539 Boise, ID 83701	[X] U.S. Mail, postage prepaid [ ] Hand Delivery [_] Fax - [_] Overnight Mail
Douglas B. King Brian D. Burbrink Wooden & McLaughlin One Indiana Square, Ste. 1800 211 N. Pennsylvania Indianapolis, IN 46204	[X] U.S. Mail, postage prepaid [ ] Hand Delivery [_] Fax - [_] Overnight Mail
J. Michael Wheiler Thomsen Holman Wheiler 2635 Channing Way Idaho Falls, ID 83404	[X] U.S. Mail, postage prepaid [ ] Hand Delivery [_] Fax - [_] Overnight Mail

Marvin M. Smith

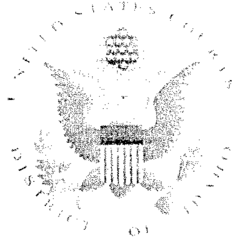
EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC, and DOES 1-20, Defendants.	Case No. 4:13-cv-00469-EJL ORDER

Before the Court is Plaintiffs' Unopposed Motion to Clarify Docket Entry Order 13 (Dkt. 19). Docket Entry Order 13 granted Plaintiffs' Unopposed Motion for leave to File Second Amended Complaint. Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, the Court hereby **GRANTS** Plaintiffs' Motion to Clarify (Dkt. 19) and clarifies its Docket Entry Order 13. Specifically, Docket Entry Order 13 did not address the effective commencement of the claims asserted in the Second Amended Complaint filed with Plaintiffs' Unopposed Motion to Amend. The Court hereby clarifies that Plaintiffs' Second Amended Complaint was effectively filed on December 10, 2013, the date it was filed with Plaintiffs' Unopposed Motion to Amend (Dkt. 10).

SO ORDERED.



DATED: April 9, 2014

Edward J. Lodge
United States District Judge

EXHIBIT B

DeAnne Casperson
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	**RULE 60 MOTION TO CLARIFY DOCKET ENTRY ORDER** Case No. 4:13-cv-469-EJL Judge Edward J. Lodge

Plaintiffs hereby move the Court for an order clarifying that its Docket Entry Order of January 16, 2014[1] relates back to the date on which Plaintiffs filed their Motion for Leave to File Second Amended Complaint,[2] accompanied by a copy of the Second Amended Complaint itself. This will have the effect of clarifying that the Complaint was filed on December 10, 2013, instead of some other date. This clarification is consistent

[1] Doc. 13.
[2] Doc. 10, filed Dec. 10, 2013.

with existing law as is explained in the accompanying Memorandum of Points and Authorities.

Rule 60 of the Federal Rules of Civil Procedure authorizes courts to clarify their own orders at any time prior to the docketing of an appeal. No such appeal has been docketed in this case, and Plaintiffs submit that the Court has continuing jurisdiction to make the requested clarification.

Dated this 4th day of March, 2014.

HOLDEN, KIDWELL, HAHN & CRAPO

/s/ DeAnne Casperson
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2014, I caused a true and correct copy of the foregoing **RULE 60 MOTION TO CLARIFY DOCKET ENTRY ORDER** to be filed via ECF, which sent notice of the same to the following:

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Attorneys for Defendants Cook Incorporated, Cook Medical Incorporated, and Cook Medical Technologies, LLC

/s/ DeAnne Casperson

EXHIBIT C

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; and DOES 1-20, Defendants.	Case No. 4:13-cv-469-EJL **STIPULATION FOR REMAND TO THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, BONNEVILLE COUNTY**

Counsel for the parties in this matter hereby stipulate that the Plaintiffs' filing of the Second Amended Complaint in this matter deprives the United States District Court for the District of Idaho of diversity jurisdiction pursuant to 28 U.S.C. § 1447(e) and that the filing of such Second Amended Complaint requires that this matter be remanded to the Seventh Judicial District of the State of Idaho, Bonneville County.

Dated this 17TH day of January, 2014.

/s/

DeAnne Casperson
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
Attorneys for Plaintiffs

/s/

Craig Yabui
ELAM & BURKE
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17TH day of January, 2014, I filed the foregoing electronically through the CM/ECF system, which causes the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

DOCUMENT SERVED: **STIPULATION FOR REMAND TO THE SEVENTH JUDICIAL DISTRICT FOR THE DISTRICT OF IDAHO, BONNEVILLE COUNTY**

ATTORNEYS SERVED:

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Indianapolis, IN 46204

Attorneys for Cook Incorporated, Cook Medical Incorporated, and Cook Medical Technologies, LLC

/s/
DeAnne Casperson

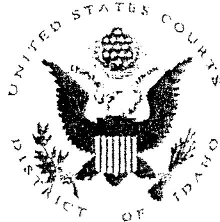
EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LCC, an Indiana LLC, and DOES 1-20, Defendants.	Case No. 4:13-cv-00469-EJL ORDER TO REMAND CASE TO STATE COURT

The Stipulation (Dkt. 16) of the parties having come before this court and it appearing from the suggestion of the parties that this Court lacks subject matter jurisdiction and the parties having stipulated to remand the case to state court,

IT IS HEREBY ORDERED that the above-entitled action is remanded to the district court of the Seventh Judicial District of the State of Idaho, In and For the County of Bonneville, Case No. CV-13-04868; and the Clerk shall mail a certified copy of this Order to the Clerk of the aforesaid Idaho state court. No costs or attorney fees are taxed pursuant to 28 U.S.C. § 1447(c).



DATED: January 21, 2014

Edward J. Lodge
United States District Judge

Certified to be a true and correct copy of original filed in my office.
Elizabeth A. Smith, Clerk
United States Courts, District of Idaho
By [signature] Deputy 1/21/14 Dated

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

CAROL ENGLISH and ERIC ENGLISH, wife and husband Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho corporation; and DOES 1-20, Defendants.	)	Case No.: CV-2013-4868 **EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER'S MEMORANDUM OPPOSING PLAINTIFFS' MOTION FOR RECONSIDERATION**

COMES NOW Defendant Eastern Idaho Health Services, Inc. dba Eastern Idaho Regional Medical Center ("EIRMC"), by and through counsel, and submits its Memorandum Opposing Plaintiffs' Motion for Reconsideration.

STATEMENT OF FACTS

On their motion for reconsideration Plaintiffs rely upon the same facts presented during EIRMC's and Dr. Taylor's Motions for Summary Judgment, with one exception. Plaintiffs now rely on an April 9, 2014 Order entered by Judge Lodge in the federal proceedings. Exhibit A,

attached to the *Affidavit of Marvin M. Smith Opposing Plaintiffs' Motion for Reconsideration* filed concurrently herewith. The Order was entered by Judge Lodge pursuant to a Rule 60 Motion to Clarify Docket Entry Order filed by Plaintiffs on March 4, 2014 (which was after EIRMC had been served with process for the present state court action on February 25, 2014). *Id.* at Exhibit B. Because EIRMC and Dr. Taylor were not parties to the federal proceedings and because copies of Plaintiffs' Motion to Clarify were never served upon them Plaintiffs' motion was unopposed. As a result, this is EIRMC's and Dr. Taylor's first opportunity to argue against the validity of Plaintiffs' Rule 60 motion and the April 9, 2014 Order.

Most importantly, Plaintiffs' Rule 60 Motion was not filed until after the federal action was dismissed for lack of jurisdiction and remanded to this Court for further proceedings. On January 17, 2014, Plaintiffs and Cook Defendants stipulated that adding EIRMC and Dr. Taylor to the federal action deprived the federal court of jurisdiction over the matter and that it should be remanded to this Court. *Id.* at Exhibit C. Pursuant to Plaintiffs and Cook Defendants stipulation, the federal court entered an Order on January 21, 2014, wherein it stated:

> . . . it appearing from the suggestion of the parties that this Court lacks subject matter jurisdiction and the parties having stipulated to remand the case to state court,
>
> IT IS HEREBY ORDERED that the above-entitled action is remanded to the district court of the Seventh Judicial District of the State of Idaho, In and For the County of Bonneville, Case No. CV-13-04868 . . .

Id. at Exhibit D.

Thus, before Plaintiffs even filed their Rule 60 Motion, the Plaintiffs, Cook Defendants, and the federal court had already acknowledged that the federal court lacked subject matter jurisdiction and the case had been remanded to this Court for further proceedings.

ANALYSIS

I. THE FEDERAL COURT LACKED JURISDICTION TO GRANT PLAINTIFFS' MOTION OR ENTER THE APRIL 9, 2014 ORDER BECAUSE THE MATTER HAD BEEN REMANDED TO STATE COURT.

"Once a district court certifies a remand order to state court it is divested of jurisdiction and can take no further action on the case." *Seedman v. United States District Court*, 837 F.2d 413, 414 (9th Cir. 1988). "It is clear that a remand order ends the federal court's jurisdiction." *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279 n. 3 (9th Cir. 1984) (citing *United States v. Rice*, 327 U.S. 742, 747, 66 S. Ct. 835, 837, 90 L. Ed. 982 (1946). *See also In re Lowe*, 102 F.3d 731, 736 (4th Cir. 1996) ("Accordingly, we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered."); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 531 (6th Cir. 1999) (". . . a remand to state court divests a district court of jurisdiction such it may not take any further action on the case."); *Federal Deposit Insurance Corp. v. Santiago Plaza*, 598 F.3d 634, 636 (1st Cir. 1979) ("[o]nce a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action."); *New England Technology Finance, LLC v. Enterprise Resource Procurement, LLC*, 2008 WL 2688099, *2 (D. Arizona 2008) ("'[I]t is clear that an order of remand to state court ends the jurisdiction of the federal court over the case.'") (Citing Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 3d* § 379 at 491.)

Accordingly, since the federal court was without jurisdiction when Plaintiffs filed their Rule 60 Motion and when it entered its April 9, 2014 Order the judgment is void and has no value or applicability to this Court.

II. THE APRIL 9, 2014 ORDER IS NOT NEW EVIDENCE TO CONSIDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION.

While Plaintiffs are not required to present new evidence in a Rule 11(a)(2)(B) motion for reconsideration, their motion is in part based upon this Court now considering an April 9, 2014 Order that was not properly before the Court on the previous motions for summary judgment. Obviously, this Order was known to Plaintiffs almost two weeks before their response to Dr. Taylor's Motion for Summary Judgment was due, however, Plaintiffs failed to submit the same. It is too late to now submit an order that could have, and should have been submitted to the Court prior to the motions for summary judgment that were heard on May 5, 2014. *See Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013) (reciting district court's rationale for denying Campbells' Motion for Reconsideration).

Additionally, this is analogous to the situation of newly discovered evidence under Rule 60(b)(2) of the Idaho Rules of Civil Procedure. The Idaho Supreme Court and I.R.C.P. 60(b)(2) agree that newly discovered evidence is evidence that is in existence at the time of trial but not discoverable with due diligence. *See* I.R.C.P. 60(b)(2); *Savage Lateral Ditch Water Users Association v. Pulley*, 125 Idaho 237, 245, 869 P.2d 554, 562 (1993). As stated above, the information Plaintiff now seeks to introduce existed and was available prior to the motions for summary judgment, however, Plaintiff failed to submit or raise any arguments based upon the order to this Court. Accordingly, the April 9, 2014 is not new evidence and should not be considered by this Court on Plaintiffs' Motion for Reconsideration.

III. IDAHO LAW CONTROLS WHEN AN ACTION IS COMMENCED FOR STATUTE OF LIMITATIONS PURPOSES.

It is beyond dispute that when a federal court exercises diversity jurisdiction the forum state's substantive law applies and controls. *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct.

817, 82 L. Ed. 1188 (1938). Statutes of limitations are substantive for *Erie* purposes. *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). The Idaho Supreme Court is controlling authority on questions of Idaho law. *Commissioner v. Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). Thus, for purposes of Plaintiffs' Motion for Reconsideration there is no question that *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) is the substantive law that applies, controls, and should dictate the outcome of this matter.

Plaintiffs' assertion that federal law controls when an action is commenced in a federal diversity case is without merit and contrary to established law. Any reliance Plaintiffs place upon *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) is misplaced and outdated because *Hanna* was later qualified by *Walker v. Armco Steel Corp.*, 446 U.S. 740, 741, 100 S. Ct. 1978, 1980, 64 L. Ed. 2d 659, 662 (1980) and many other subsequent federal decisions as cited below.

In *Walker*, the United States Supreme Court squarely confronted the issue of "whether in a diversity action the federal court should follow state law or, alternatively, Rule 3 of the Federal rules of Civil Procedure in determining when an action is commenced for the purpose of tolling the state statute of limitations." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 741, 100 S. Ct. 1978, 1980, 64 L. Ed. 2d 659, 662 (1980). In said case the Supreme Court noted that it had already established in earlier precedent that "'**[except] in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the State.**'" *Id.* at 745 (emphasis added).

The Supreme Court went on in *Walker* to state:

> In construing *Erie* we noted that "[in] essence, the intent of that decision was to insure that, **in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal**

> **rules determine the outcome of a litigation, as it would be if tried in a State court**. (citation omitted). We concluded that the state statute of limitations should be applied. 'Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.'

Id. at 745 (emphasis added).

Finally, the *Walker* Court held: "In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Id.* at 751.

The present matter involves an alleged right to recover derived from the State of Idaho not the United States. Accordingly, the *Erie* doctrine should be applied and Idaho state law should determine the outcome of the case, not federal law. As set forth above, in diversity cases the outcome of the litigation in federal court should be substantially the same as it would be if tried in a State court. Plaintiffs in this matter are arguing that this Court should follow federal law instead of Idaho state law and by doing so come to a result that would be completely different and contrary to the outcome mandated by Idaho state law. The policies for diversity jurisdiction do not support such a distinction between state and federal plaintiffs and *Erie* and the cases that follow do not permit such an interpretation. Accordingly, Idaho state law, specifically *Griggs*, is determinative of the outcome in this matter.

A host of federal law and secondary material is in agreement. The Court of Appeals for the Second Circuit has held:

> **As all parties acknowledge, it is well established that in diversity cases state law governs not only the limitations period but also the commencement of the limitations period**. *See Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949); *see also Guar. Trust Co. v. York*, 326 U.S. 99, 109-10, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). The district court appears to have followed the rule for § 1983 actions, in which a state limitations

> period is borrowed but federal law governs when that state limitations period begins to run. (internal citations omitted). It is appropriate to use federal rules to determine when the limitations period begins to run for a claim under 42 U.S.C. § 1983 because the cause of action is created by federal law. **When federal jurisdiction is based on diversity, as it is in this case, however, state substantive law must govern**. *See Guar. Trust*, 326 U.S. at 109-110; *Erie R.R. v. Tompkins*, 304 U.S. 64, 79-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). **A state's rules providing for the start and length of the statute of limitations is substantive law**. *See e.g., Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 235 (8th Cir.), *aff'd*, 521 U.S. 179, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997); *Nev. Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1306 (9th Cir. 1992).

Cantor Fitzgerald v. Lutnick, 313 F.3d 704, 709-10 (2002) (emphasis added).

The Ninth Circuit Court of Appeals has held that the federal civil rule governing commencement of an action (Fed. R. Civ. P. 3) "**does not commence a suit based on state law for purposes of the statute of limitations** . . . [but] does commence a suit based on federal law that has a statute of limitations borrowed from federal law." *Sain v. City of Bend*, 309 F.3d 1134, 1138 (9th Cir. 2002) (internal citations omitted). *See also Tornabene v. Marcial*, 1990 U.S. Dist. LEXIS 14198, *3 (S.D.N.Y. 1990) ("Marcial correctly asserts that, **for statute of limitations purposes, the time at which a diversity action is commenced depends on the laws of the state whose substantive law governs the controversy**." (citations omitted) (emphasis added)); *Durrett v. Leading Edge Prods.*, 965 F. Supp. 280, 286 (D. Conn. 1997) ("**As this is a diversity action arising under Connecticut law, Connecticut state law governs the manner in which the action is to be considered commenced for purposes of the state statute of limitations.**" (citation omitted) (emphasis added); *Reliance Ins. Co. v. Polyvision Corp.*, 390 F. Supp. 2d 269, 272 (E.D.N.Y. 2005) ("**In this diversity case, it is the law of the State of New York that governs the time in which the action must be commenced as well as any applicable toll.**" (citation omitted) (emphasis added)).

Wright and Miller's authoritative treatise on federal procedure concisely states the applicable rule:

> In federal actions based on diversity of citizenship jurisdiction, federal courts apply state law to decide when a lawsuit was commenced for certain purposes, such as computing limitations periods.

4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1052 (3d ed. 1998 & Supp. 2006).

Interestingly, the *Buller Trucking Co. v. Owner Operator Indep. Driver Risk Retention Group, Inc.*, 461 F. Supp. 2d 768 (S.D. Ill. 2006) cited to by Plaintiffs in their motion for reconsideration actually stands contrary to the argument they are presenting to this Court and in accord with the foregoing case law. The primary issue in said case was whether the class action was commenced at the time the motion to amend was filed or when the court granted the motion to amend. The federal district court concluded:

> The Court concludes that **the issue of when this action was commenced** as a class action for purposes of removal under CAFA **is governed by state law, not federal law**. As the Schillinger court recognized, "in cases for which state law provides the rule of decision, federal courts apply state statutes of limitation, including qualifications on those statutes." 425 F.3d at 334. Cf. *Pace v. DiGuglielmo*, 544 U.S. 408, 415, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005) (looking to state law to determine when a pleading has been "properly filed" for purposes of a federal statute of limitations); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980) (**state law determines when an action commences for statute of limitations purposes**) . . .

Id. at 775. (Emphasis added).

Thus, under the facts of this case the Idaho Supreme Court's holding in *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) is controlling and determines when the action in this matter was "commenced" against EIRMC and Dr. Taylor for statute of limitations purposes. As already determined in this Court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment, Idaho law dictates that Plaintiffs Motion for Leave to File a Second

Amended Complaint did not commence the action against EIRMC and Dr. Taylor and Plaintiffs did not commence the action against EIRMC and Dr. Taylor until after the statute of limitations expired. Accordingly Plaintiffs' claims against EIRMC and Dr. Taylor are barred by the statute of limitations. Therefore, Plaintiffs' motion for reconsideration should be denied.

IV. AS SET FORTH ABOVE, IDAHO STATE LAW CONTROLS THE OUTCOME OF THIS MATTER AND THE CASE LAW CITED IN PLAINTIFFS' BRIEF HAS NO APPLICABILITY TO THE CASE AT HAND.

Plaintiffs attempted to make a similar argument (that federal law applied) in their initial briefing opposing summary judgment. However, as set forth above, there is no question that Idaho state law, specifically the Idaho Supreme Court decision of *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) determines the outcome of this case and as such Plaintiffs claims against EIRMC and Dr. Taylor are barred by the statute of limitations. Since it is state law which controls the issue before the Court, the decisions cited by Plaintiffs that were rendered in the context of federal questions cases and utilized federal law can be distinguished on that basis alone. *See Mayes v. AT&T Information Systems, Inc.*, 867 F.2d 1172 (8th Cir. 1989) (action brought pursuant to 29 U.S.C. § 160 (b)); *Rademaker v. Flynn Export Co.*, 17 F.2d 15 (5th Cir. 1927) (federal question under Merchant Marine Act of 1920) (also in that case process was actually issued and served upon the defendant before any right of action against it was barred); *Moore v. Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993) (42 U.S.C. § 1983 action).

Any federal diversity cases follow state law for statute of limitations, including when an action was commenced for statute of limitations purposes pursuant to *Walker* and its progeny cited above. Accordingly, any federal cases cited by Plaintiffs that are based upon federal law or federal diversity cases that look upon state law other than Idaho are distinguishable and have no precedential value because pursuant to controlling Idaho case law precedent (*Griggs*), applicable

Idaho statutes, and applicable Idaho Rules of Civil Procedure, Plaintiffs' action against EIRMC was not commenced until the actual filing Plaintiffs' Second Amended Complaint, which did not occur until at least twenty-eight (28) days after the statute of limitations had run. This Court was correct in granting EIRMC's and Dr. Taylor's Motion for Summary Judgment and therefore Plaintiffs' motion for reconsideration should be denied.

V. APPLICATION OF THE STATUTE OF LIMITATIONS IN THIS CASE WAS MANDATORY AND PURSUANT TO IDAHO LAW.

Plaintiffs essentially argue that this Court should have ignored the Idaho Supreme Court's decision in *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) and the application of the statute of limitations in this case. Such a position is nonsensical. Important purposes are served by statutes of limitation. "The policy behind statues of limitations is protection of defendants against stale claims, and protection of the courts against needless expenditure of resources." *Higginson v. Waddworth*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996) (quoting *Johnson v. Pischke*, 108 Idaho 397, 402, 700 P.2d 19, 25 (1985)). "Statutes of limitation are designed to promote stability and avoid uncertainty with regards to future litigation." *Id.*

If Plaintiffs arguments were accepted in this case the statute of limitations would effectively be extended by judicial decree to a period in excess of the time established by the Idaho legislature by virtue of I.C. § 5-219(4) and I.C. § 6-1005. Not only would this prevent EIRMC and Dr. Taylor from receiving prompt notice of the claim as intended by the statute but it would prevent the finality and stability which the statute of limitations was designed by our legislature to achieve.

In addition, contrary to Plaintiffs allegations they had several options to avoid having their lawsuit end up in federal court in the first place. It has been clear in Idaho since 1988 that "a party allegedly harmed by medical malpractice could commence a civil lawsuit before filing a

request for a prelitigation screening panel. Idaho Code § 6-1001 does not mandate the dismissal of a medical malpractice lawsuit because it is filed before the commencement of the prelitigation screening proceedings." *Rudd v. Merritt*, 138 Idaho 526, 530, 66 P.3d 230, 234 (2003) (citing *Moss v. Bjornson*, 115 Idaho 165, 765 P.2d 676 (1988)).

Pursuant to Idaho law, Plaintiffs could have filed the present suit against the Cook Defendants, Dr. Taylor, and EIRMC at the same time and then had several options. One option was to serve process upon all parties and then enter into a Stipulation to Stay the litigation with respect to EIRMC and Dr. Taylor until the prelitigation proceedings had concluded while proceeding with the litigation against the Cook Defendants. Another option was simply to file the action against all Defendants and then wait to serve the parties until the prelitigation proceedings with EIRMC and Dr. Taylor had concluded. Plaintiffs could have also filed suit against all Defendants, serve the Cook Defendants and then wait to serve EIRMC and Dr. Taylor until the conclusion of the prelitigation proceedings. Any one of these actions on the part of Plaintiffs would have avoided the Cook Defendants removing the action to federal court. Any one of these actions would have avoided Plaintiffs having to seek leave of the court to amend their complaint to add Dr. Taylor and EIRMC as defendants. In addition, Plaintiffs could have filed a separate action against EIRMC and Dr. Taylor at any time and then moved to consolidate the cases. Finally, Plaintiffs could have moved to amend their complaint much earlier than they did to avoid any statute of limitations problems, however, they failed to do so.

For Plaintiffs to consistently ignore Idaho law (resulting in dismissal of their action) and now demand that this Court disregard Idaho Supreme Court case law precedent and the applicable statute of limitations is repugnant. Statutes of limitations are couched in mandatory language and are not subject to discretionary application. Deciding a case based upon the statute

of limitations is an adjudication on the merits. Plaintiffs had ample time (the time dictated by Idaho Code § 5-219(4) plus the generous period of time during which the statute was tolled by the prelitigation screening panel process) in which to commence their claim against EIRMC and Dr. Taylor. Nevertheless, Plaintiffs failed to commence an action against EIRMC and Dr. Taylor as required by I.R.C.P. 3(a) and *Griggs* until after the expiration of the statute of limitations. Therefore, pursuant to Idaho Supreme Court precedent and applicable Idaho statutes and Idaho Rules of Civil Procedure EIRMC would respectfully request that this Court uphold its pending Opinion and Order Granting Defendants' Motions for Summary Judgment and deny Plaintiffs' motion for reconsideration.

VI. EIRMC HAD NO NOTICE OF A LAWSUIT AGAINST IT BY PLAINTIFFS UNTIL AFTER THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS.

Plaintiffs' notice argument is simply a rehashing of the same argument that they previously made to the Court on EIRMC's and Dr. Taylor's Motions for Summary Judgment and is a request that the Court change its mind. EIRMC incorporates by reference as if fully set forth herein its arguments regarding notice and those of Dr. Taylor contained in the Memorandums in Support of Summary Judgment and Replies in Support of Summary Judgment filed previously with the Court by each party.

Plaintiffs attempt to equate the filing of a prelitigation screening panel request with actual notice that a lawsuit has been filed against EIRMC is without merit. Numerous prelitigation screening panel requests are filed against EIRMC and many (if not the vast majority) of such filings never result in the actual filing of a lawsuit against it. Thus, the filing of a prelitigation screening panel request does not equate to the filing of a lawsuit against a party. *See Ketterling v. Burger King Corp.*, 152 Idaho 555, 558, 272 P.3d 527, 530 (2012) ("notice of an injury within

the limitations period is not the same as notice of the filing of the lawsuit within the limitations period." Citing *Winn v. Campbell*, 145 Idaho 727, 730, 184, P.3d 852, 855 (2008)).

Accordingly, there is no dispute that EIRMC had no notice of a lawsuit being filed against it until after the applicable statute of limitations had run. The situation present in this case places EIRMC exactly in the same position as the third-party defendant in *Griggs* and therefore requires dismissal of EIRMC from this action. Consequently, EIRMC would respectfully request that this Court uphold its grant of summary judgment in this matter and deny Plaintiffs' motion for reconsideration.

CONCLUSION

The statute of limitations in this case expired on December 19, 2013. Plaintiffs' original and first amended complaints did not name EIRMC as a defendant and did not state a claim for medical negligence. Plaintiffs filed a motion for leave to file a second amended complaint in federal court on December 10, 2013. EIRMC was not served with a copy of Plaintiffs' motion for leave to file a second amended complaint or the proposed second amended complaint. Plaintiffs' second amended complaint was not filed in federal court until January 16, 2014; twenty-eight (28) days after the statute of limitations against EIRMC expired. EIRMC was not served with the Second Amended Complaint until February 25, 2014.

Based upon the foregoing undisputed facts in this case, the Idaho Supreme Court cases of *Griggs* and *Terra-West* mandate that the action against EIRMC be dismissed. Therefore, EIRMC respectfully requests that this Court uphold its Opinion and Order Granting Defendants' Motions for Summary Judgment and deny Plaintiffs' motion for reconsideration.

DATED this 28th day of August, 2014.

Marvin M. Smith

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document upon the following this 28th day of August, 2014.

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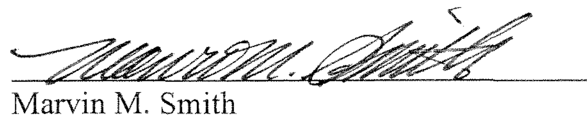

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IN THE DISTRICT COURT OFTHE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN ANDFOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	Case No. cv-2013-4868 **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

ORIGINAL
307

COME NOW Plaintiffs Carol English and Eric English ("Plaintiffs"), and submit this Reply Memorandum in Support of Motion for Reconsideration.

I. INTRODUCTION

In their Memoranda in Opposition to Plaintiffs' Motion for Reconsideration, Defendants James Taylor ("Taylor") and Eastern Idaho Regional Medical Center ("EIRMC") (collectively hereinafter "Medical Defendants"), repeatedly state that, where a case is before the federal court based upon diversity jurisdiction and there is a question regarding the statute of limitations, state substantive law applies. Plaintiffs do not disagree that the statute of limitations itself is a substantive law, and that it must be applied in cases before the federal court based upon diversity jurisdiction. However, Medical Defendants miss the point of Plaintiffs' argument. Plaintiffs do not argue, as Medical Defendants suggest, that Idaho's statute of limitations on medical malpractice actions be ignored or disregarded. Rather, Plaintiffs argue that the manner in which a case "commences" is a **procedural** issue, and, in considering which **procedure** applies to determine when an action "commences," the court must apply federal **procedural** law, as dictated by the Federal Rules of Civil Procedure, the federal Rules Enabling Act, and federal case law interpreting such rules. "Federal Courts must ignore state rules of procedure because it is Congress that has primary authority over the procedures employed in federal court, and this power cannot be trenched upon by the states." *Makaeff v. Trump Univ., LLC,* 7 F.3d 254, 273 (9th Cir. 2013)(Kozinski, J. concurring opinion)(citing *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L. Ed. 1188 (1938)). The distinction between the statute of limitations itself, versus the procedure by which an action commences, is a critical distinction that cannot be ignored. Federal statutory and case law, as well as Idaho law, require that this Court

apply Rule 3 of the Federal Rules of Civil Procedure and federal case law interpretation of such rule to determine when Plaintiffs "commenced" their suit against Medical Defendants because the case was before the federal court when the motion to amend was filed. The Idaho Supreme Court acknowledged in *Terra-West* that the meaning of "commencing proceedings" is not substantive – it is procedural. *Terra-West, Inc. v. Idaho Mutual Trust, LLC,* 150 Idaho 393, 398, 247 P.3d 620, 625 (2011). Consequently, the federal procedure rule applies and the action against Medical Defendants must be deemed to have commenced on December 10, 2013.

II. ARGUMENT

A. The Rule 60 Motion and Order is Inconsequential to the Outcome of this Motion.

Medical Defendants contend that Judge Lodge's April 9, 2014, Order on Plaintiffs' Rule 60 Motion to Clarify Docket Entry Order is "void" and has "no value or applicability to this Court" because this matter had been remanded to state court at the time the Order was entered. *See* EIRMC Opp. Memo. p. 3; Taylor Opp. Memo., p. 4. None of the cases cited by Medical Defendants on this issue apply to a situation where, upon a Rule 60 motion, the federal court clarified an order that was entered prior to remand to state court. While there appear to be no statutes or rules addressing limited jurisdiction by the federal court after remand, the Idaho Rules of Appellate Procedure provide some guidance in a somewhat analogous situation, where a case has been appealed to the Idaho Supreme Court, but the District Court retains jurisdiction over limited matters. One of the limited matters over which the District Court retains jurisdiction and may make rulings upon even after the Idaho Supreme Court has jurisdiction over a matter is "any motion under Rule 60(a) or (b), I.R.C.P." I. A. R.

13(b)(6). Moreover, Rule 60 of the Federal Rules of Civil Procedure permits the District Court to correct clerical mistakes or omissions by motion or on its own, and allows for the District Court to do so even after a case has been appealed (albeit with leave from the appellate court). Fed. R. Civ. P. 60(a). Consequently, it appears from both the Idaho and Federal Civil Rules that a court retains limited jurisdiction to clarify its own orders.

Regardless, however, the Order is inconsequential to the outcome of Plaintiffs' Motion for Reconsideration. Even in the absence of Judge Lodge's clarification, as explained in Plaintiffs' prior briefing, federal case law provides that, for the purposes of Rule 3 of the Federal Rules of Civil Procedure, where a plaintiff files a motion to amend a complaint, the complaint is deemed filed as of the date of the filing of the motion, as opposed to the date the complaint is actually filed after the granting of the motion. *See Mayes v. AT&T Info. Sys., Inc.*, 867 F.2d 1172, 1172 (8th Cir. 1989); *Buller v. Owner Operator Ind. Driver Risk Retention Group, Inc.*, 461 F. Supp. 2d 768, 777 (S.D. Ill. 2006)(collecting federal court cases holding amended complaint is deemed filed when motion to amend is filed). The Idaho Supreme Court has recognized and acknowledged this federal procedural rule in *Terra-West, Inc. v. Idaho Mutual Trust, LLC*, 150 Idaho 393, 398, 247 P.3d 620, 625 (2010). Consequently, even without Judge Lodge's Order, the filing of the Motion for Leave to Amend on December 10, 2013, commenced the action against Medical Defendants for the purposes of Rule 3 of the Federal Rules of Civil Procedure.

B. U.S. Supreme Court Authority, Including *Walker*, Holds that When There is a Federal Rule Directly on Point, the Federal Rule is Applied Without Regard to Any Conflict Between Federal and State Law.

As Plaintiffs pointed out in their prior briefing, when a case is in federal court, no matter what the jurisdictional basis, the Federal Rules of Civil Procedure apply (*see* Fed.

R. Civ. P. 1; *Califano v. Yamisaki*, 442 U.S. 682, 699-700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). In diversity cases, the federal courts apply federal law as to the matters of procedure but substantive law of the relevant state. *Hiatt v. Wadlow*, 75 F.3d 1252, 1255 (8th Cir. 1996)(*citing Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Even *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980), upon which Medical Defendants heavily rely, acknowledges "the policies behind *Erie* and *Ragan* control the issue, whether, **in the absence of a federal rule directly on point**, state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in federal court under diversity jurisdiction." *Id.*, 446 at 752, 100 S.Ct. at 1986. This was reiterated a few sentences later, when the U.S. Supreme Court stated, "There is simply no reason why, **in the absence of a controlling federal rule**, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." *Id.*, 446 U.S. at 752, 100 S.Ct. at 1986. Although Medical Defendants argue repeatedly that *Walker* governs because it addressed a statute of limitations, they fail to assert that the statute of limitations in that state specifically required service of process for an action to be "commenced" within the stated time period. *Walker* does not stand for the proposition that state law trumps Rule 3 as to when a case "commences." In fact, *Walker* specifically held that both the federal procedural rule and the state substantive rule could co-exist. The holding of *Walker* by the U.S. Supreme Court is clearly stated in *Shady Grove*:

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> [I]n *Walker v. Armco Steel Corp.,* 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980), . . we held that Rule 3 (which provides that a federal civil action is " 'commenced' " by filing a complaint in federal court) did not displace a state law providing that " '[a]n action shall be deemed commenced, *within the meaning of this article [the statute of limitations],* as to each defendant, at the date of the summons which is served on him ....' " 446 U.S. at 743, n. 4, 100 S.Ct. 1978 (quoting Okla. Stat., Tit. 12, § 97 (1971); alteration in original, emphasis added). Rule 3, we explained, "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations" or tolling rules, which it did not "purpor[t] to displace." 446 U.S. at 751, 750, 100 S.Ct. 1978. The texts were therefore not in conflict. While our opinion observed that the State's actual-service rule was (in the State's judgment) an "integral part of the several policies served by the statute of limitations," *id.* at 751, 100 S.Ct. 1978, nothing in our decision suggested that a federal court may resolve an obvious conflict between the texts of state and federal rules by resorting to the state law's ostensible objectives.

Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 404, 130 S. Ct. 1431, 1440, 176 L. Ed. 2d 311 n.6 (2010). Just like *Walker,* the federal procedure rule in this case does not conflict with the substantive statute of limitations. In this case, at best, the federal procedural rule arguably conflicts with a state procedural rule.

Fortunately, in *Shady Grove,* the U.S. Supreme Court more succinctly clarified the analysis to be applied in this case: "We must first determine whether [the federal rule in question] answers the question in dispute. If it does, it governs – [state] law notwithstanding – unless it exceeds statutory authorization or Congress's rulemaking power. We do not wade into *Erie's* murky waters unless the federal rule is inapplicable or invalid." *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,* 559 U.S. 393, 398, 130 S.Ct. 1431, 1437, 176 L.Ed.2d 311 (2010) (citing *Burlington Northern R. Co. v. Woods,* 480 U.S. 1, 4-5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987) and *Hanna v. Plumer,* 380 U.S. 460, 463-64, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)).

In the case at hand, there is no doubt that there is a federal rule which is directly on point. Rule 3 of the Federal Rules of Civil Procedure states that "[a] civil action is

commenced by filing a complaint with the court." Rule 3 and the federal case law, acknowledged and cited by the Idaho Supreme Court in *Terra-West,* holds that a complaint is deemed filed for the purposes of Rule 3 when a defendant is added through a motion for leave to amend on the date the motion for leave to amend is filed. *See above* Section II.A. Because there is a federal rule directly on point, that rule must be applied. *See Shady Grove,* 559 U.S. at 398. Further, there is no question that Rule 3 does not exceed statutory authorization or Congress's rulemaking power. As the U.S. Supreme Court noted, "we have rejected every statutory challenge to a Federal Rule that has come before us." *Shady Grove,* 559 U.S. at 407, 130 S.Ct. at 1442. Therefore, pursuant to Rule 3, the action against Medical Defendants is deemed to have been filed on December 10, 2013, the date on which Plaintiffs filed their Motion for Leave to Amend, and the action against Medical Defendants was commenced on December 10, 2013.

C. Even if it Were Necessary to Make a Determination as to Whether There is a Conflict of Laws Between Federal and State Law, There is no Conflict Because the Issue is not Addressed by State Law.

As the *Walker* court, as well as the *Hanna* court, acknowledged, in the absence of a conflicting state procedure, the federal rules control. *Walker,* 446 U.S. at 747, 100 S.Ct. at 1983 (citing *Hanna,* 380 U.S. at 465, 85 S.Ct. at 1140); *see also National Equip. Rental, Ltd. v. Szukhent,* 375 U.S. 311, 316, 84 S.Ct. 411, 414, 11 L.Ed.2d 354 (1964). Although there is a federal rule directly on point, as explained above, there is no Idaho law specifically addressing when a suit "commences" against a defendant which has been added via a motion for leave to amend a pre-existing complaint. In *Griggs v. Nash,* 116 Idaho 228, 234, 775 P.2d 120, 126 (1989), the facts only pertain to commencement of an action against a third-party defendant. In *Terra-West, Inc. v. Idaho Mutual Trust,*

LLC, 150 Idaho 393, 247 P.3d 620 (2010), the facts addressed the commencement of a cause of action as against a pre-existing defendant. Neither of these cases, nor any other Idaho case, addresses commencement of an action against a defendant added to an action through a motion for leave to amend. Due to the absence of Idaho law on this issue, there is no "direct collision" between federal law on the issue of commencement of an action against a defendant where a motion for leave to amend has been filed and Idaho law. Therefore, federal law must be applied, and suit against the Medical Defendants must be deemed commenced as of December 10, 2013, based on the clearly set forth federal law.

D. Even if There Were a Direct Conflict Between Federal and Idaho Law Regarding When a Suit is Commenced Against a Defendant Added via a Motion For Leave to Amend, the Question of When an Action Commences is a Procedural Issue, and Therefore, Under *Shady Grove*, Federal Law Controls.

Medical Defendants make much of the fact that the Federal Rules do not trump the state statute of limitations, and attempt to parlay case law pertaining to the substantive nature of the statute of limitations to support its argument that Rule 3 of the Federal Rules of Procedure does not apply. While Plaintiffs agree that the statute of limitations itself is substantive law, as is noted in numerous case law quotations provided by Medical Defendants, when the suit "commenced" is a procedural issue independent from the statute of limitations. Medical Defendants' argument avoids any discussion about whether the issue before the Court is procedural or substantive because the issue has been decided already by the Idaho Supreme Court. *See Terra-West, Inc. v. Idaho Mutual Trust, LLC,* 150 Idaho 393, 398 247 P.3d 620, 625 (2011).

There is no question that when this matter "commenced" against Medical Defendants is a procedural issue. This is evident from the fact that both the Court, as

well as Medical Defendants, have suggested a number of different **procedures** that Plaintiffs could have followed in order to "commence" Plaintiffs' cause of action against Medical Defendants. *See Opinion and Order Granting Defendants' Motion for Summary Judgment,* p. 6-7; EIRMC Opp. Memo., p. 11. Moreover, the Idaho Supreme Court acknowledges in *Terra-West* that when a case "commences" is a procedural issue. *See Terra-West,* 150 Idaho 393, 397-98 (2010) (stating, "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 pursuant to I.R.C.P. 15(a)"; and "the Supreme Court has the inherent 'power to fashion the procedures necessary to perform [its] duties.'"). In fact, in *Terra-West,* the Idaho Supreme Court explicitly explained that its interpretation of when an action commences is procedural:

> While the Legislature has the power to enact substantive laws, the Supreme Court has the inherent "power to fashion the **procedures** necessary to perform [its] duties." *City of Boise v. Ada County,* 147 Idaho 794, 802, 215 P.3d 514, 522 (2009). In that case we observed:
>
> > [T]he Legislature has recognized the courts' inherent power in this regard by enactment of [Idaho Code] section 1-1622 which] provides:
> >
> > > When jurisdiction is, by the code, or by any other statute, conferred on a court or judicial officer all means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."
>
> *Id.*at 803, 215 P.3d at 523. In other words, because the Legislature is silent on this issue, it is the Court's responsibility to apply **a meaning of "commence proceedings"** that is consistent with the spirit and policy of Idaho's mechanic's lien statute. 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.

Terra-West, Inc. v. Idaho Mutual Trust, LLC, 150 Idaho 393, 398 247 P.3d 620, 625 (2011)(bold emphasis added). It is not the Legislature that has defined "commence proceedings," but the Idaho Supreme Court, as a procedural issue.

Moreover, *Shady Grove* further indicates that when this action "commenced" against Medical Defendants is a procedural issue, and is governed by Rule 3 of the Federal Rules of Civil Procedure. In *Shady Grove*, the U.S. Supreme Court considered whether the plaintiff could file a class action in diversity to recover interest owed to it or others pursuant to the class action provisions of Rule 23 of the Federal Rules of Civil Procedure or if such an action was precluded by a New York law which disallowed class actions to recover a "penalty" such as statutory interest. While the U.S. Supreme Court made a preliminary determination that Rule 23 was directly on point, and therefore applied regardless of New York state law, the Court engaged in an *Erie* analysis as well. In deciding that the issue before it was one of procedure, and that, therefore, Rule 23 was the correct law to be applied, the Court noted:

> The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445, 66 S.Ct. 242, 90 L.Ed.185 (1946). What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights, it is not. 446, 66 S.Ct. 242 (internal quotation marks omitted).

Shady Grove, 559 U.S. at 407, 1442.

The U.S. Supreme Court further went on to clarify *Hanna*:

> *Hanna* unmistakably expressed the same understanding that compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications:

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> "[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitution restrictions."

> In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure.

Id. at 410.

While Medical Defendants assert that Plaintiffs' reliance upon *Hanna* is misplaced and outdated because *Hanna* was later qualified by *Walker* and other subsequent lower federal court decisions, Medical Defendants fail to acknowledge that *Shady Grove* has clarified both *Hanna* and *Walker*, explaining that as long as the Federal Rule in question both directly addresses the issue before the Court, and regulates procedure, the Federal Rule **must** be applied. Such is the case here, where Rule 3, and the federal case law interpreting Rule 3, are directly on point with regard to when Plaintiffs' action against Medical Defendants commenced, and further, regulate procedure. Rule 3 does nothing to alter or toll the Idaho statute of limitations. As this Court previously acknowledged, both parties agree that the statute of limitations expired on December 19, 2013. Consequently, Rule 3 of the Federal Rules of Civil Procedure must be applied, and Plaintiffs' action against Medical Defendants must be considered to have commenced on December 10, 2013, well within the statute of limitations.

III. <u>CONCLUSION</u>

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion for Reconsideration.

Dated this 4th day of September, 2014

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2014, I caused a true and correct copy of the foregoing to be served via facsimile on the following:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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BONNEVILLE COUNTY
IDAHO FALLS, IDAHO

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, v. COOK INCORPORATED, and Indiana Corporation; COOK MEDICAL INCORPORATED, and Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC; and Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	Case No. CV-2013-4868 OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

I.
FACTS AND PROCEDURE

Carol and Eric English ("Plaintiffs") allege that on September 17, 2011, Eastern Idaho Health Services, Inc. ("EIRMC") and Dr. James Taylor ("Dr. Taylor") (collectively referred to as the "Medical Defendants") committed medical negligence that injured Carol while using a particular medical device. On September 13, 2013, Plaintiffs filed this suit against Cook Incorporated; Cook Medical Incorporated; Cook Medical Technologies, LLC; and Does 1-20 (the "Cook Defendants") alleging products liability theories involving the medical device used on September 17, 2011. On September 16, 2013, the Idaho State Board of Medicine received Plaintiffs' claim for medical malpractice pre-litigation hearing. On September 17, 2013, Plaintiffs

filed an amended complaint. Plaintiffs did not include the Medical Defendants nor any medical negligence theories in either of these complaints.

On October 31, 2013, the Cook Defendants filed a Notice of Removal that removed this state action to federal court based on diversity of citizenship. On December 10, 2013, Plaintiffs filed a Motion for Leave to File Second Amended Complaint. Plaintiffs' Motion for Leave to File Second Amended Complaint was not served upon the Medical Defendants. On January 16, 2014, the federal court granted Plaintiffs' Motion for Leave to File Second Amended Complaint and Plaintiffs filed their Second Amended Complaint the same day. In Plaintiffs' Second Amended Complaint, Plaintiffs' claimed medical negligence and named the Medical Defendants.

On January 17, 2014, Plaintiffs and Cook Defendants stipulated that the Second Amended Complaint deprived the federal court of jurisdiction. On January 21, 2014, the federal court dismissed the case for lack of jurisdiction and the case was remanded back to Idaho State Court. On January 27, 2014, Plaintiffs filed their Second Amended Complaint, which was already filed in federal court, in the Idaho state action. On February 25, 2014, EIRMC was served with Plaintiffs' Second Amended Complaint. Dr. Taylor was served on March 21, 2014.

On March 14, 2014, EIRMC filed Defendant Eastern Idaho Health Services, Inc. DBA Eastern Idaho Regional Medical Center's Motion for Summary Judgment ("EIRMC's Motion for Summary Judgment"). On April 4, 2014, Dr. Taylor filed Defendant James Taylor, D.O.'s First Motion for Summary Judgment ("Dr. Taylor's Motion for Summary Judgment"). Both motions for summary judgment were granted. On July 7, 2014, Plaintiffs filled a motion to reconsider.

II.
STANDARD OF REVIEW

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001). *See also*, *Watson*

v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992); *Slaathaug v. Allstate Ins. Co.*, 132

On a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B), the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). A party filing a motion to reconsider pursuant to Rule 11(a)(2)(B) carries the burden of bringing to the trial court's attention the new facts. *Id.*; *See also Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994).

The trial court has discretion to grant or deny a motion to alter or amend under I.R.C.P. 59(e):

> A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

Coeur d'Alene Mining Co., 118 Idaho at 832, 800 P.2d at 1037, citing *Lowe v. Lym,* 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982).

III.
ANALYSIS

In the *Opinion and Order Granting Medical Defendants' Motions for Summary Judgment,* this Court held Plaintiffs' December 10, 2013, Motion for Leave to File a Second Amended Complaint did not commence the action and Plaintiffs did not commence the action until after the statute of limitations had expired. Plaintiffs now contend, in their Motion for Reconsideration, "this Court failed to acknowledge or recognize the federal court's order with no analysis as to

whether the underlying issue is procedural or substantive." *Plaintiffs Memorandum in Support of Motion for Reconsideration*, p.3. Plaintiffs further contend a determination of whether the underlying issue is procedural or substantive is paramount because, if the issue is procedural, as Defendants claim, it must be governed by the Federal Rules of Civil Procedure and not the Idaho Rules of Civil Procedure. *Id.*

The primary holding in *Erie Railroad v. Tomkins,* 304 U.S. 64, 58 S. Ct. 817 (1938), is when a federal court exercises diversity jurisdiction, the forum state's substantive law controls and federal procedural law controls. Therefore, an analysis must be done on whether the issue of determining the date in which the statute of limitations commences is procedural or substantive.

Plaintiffs argue the issue at hand is procedural and frame their argument in terms that "had the Plaintiffs followed a different procedure (filing a new action instead of moving for leave to amend), Plaintiffs' claim would have survived." *Plaintiffs Memorandum in Support of Motion for Reconsideration*, p.5. While this statement made by Plaintiffs may be true, we are not inclined to base our decision solely on such a statement without additional supporting authority. Rather, this Court adopts the holding of the United States Supreme Court in *Walker v. Armco Steel Corp.,* 446 U.S. 740, 741, 100 S. Ct. 1978, 1980, 64 L. Ed. 2d. 659, 663 (1980), holding: "In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Id.* at 751.

The *Walker* Court even provided an *Erie* analysis on the issue of whether statute of limitations questions are procedural or substantive in nature. That Court applied its previous holding in *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), to the facts in the *Walker* suit:

> In construing *Erie* we noted that "[i]n essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely

> because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." 326 U.S., at 109, 65 S.Ct., at 1470. **We concluded that the state statute of limitations should be applied**. "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." *Id.*, at 110, 65 S.Ct. at 1470.

Id. at 745 (emphasis added).

In other words, the *Walker* Court held that in a suit brought in federal court, solely on the basis of diversity jurisdiction, the result in federal court should be substantially the same as it would be in State court as long as substantive rules determine the outcome of the litigation. In that case, the Court held determining the suit based on the statute of limitations was substantive; therefore, the state law controlled.

Further, a reading of the Practice Commentaries of Federal Rules of Civil Procedure 3 and 4 show they are not to be applied to statute of limitations questions. A portion of the commentary of Rule 3 states:

> When diversity is the jurisdictional basis for the federal action, however, Rule 3 emphatically does not govern for purposes of the statute of limitations. The rule applicable in a diversity case to determine whether the statute of limitations has been satisfied is taken from the law of the state in which the federal court happens to be sitting.
> The case that accounts for the perils of the diversity plaintiff who relies on Federal Rule 3 is Walker v. Armco Steel Corp., 446 U.S. 740, 100 S.Ct. 1978 (1980). It is discussed, with a series of connected matters, in the course of the Commentaries on Rule 4, below. See, e.g., Commentary C4-37.

Fed. R. Civ. P. 3 Practice Commentary U.S. Code Ann. by David D. Siegel.

In addition, a portion of the commentary of Rule 4 provides additional insight:

> Indeed, in some instances even a lawyer with an intimate knowledge of Rule 4 can get tripped up, as in a case based on diversity of citizenship, where, for a statute of limitations measure, neither Rule 3 nor Rule 4 governs. State law does, but nothing on the face of either rule warns of that because it comes from case law.

Fed. R. Civ. P. 4 Practice Commentary U.S. Code Ann. by David D. Siegel.

Plaintiff argues commencement of the suit is independent of the statute of limitations and therefore, the regular substantive requirements of the statute do not apply. In other words, the statute of limitations may be substantive in nature, but the commencement of the statute of limitations is procedural. We disagree. Several courts have held, specifically, the commencement of the statute of limitations is substantive. The Second Circuit Court of Appeals cited *Guaranty Trust Co. v. York*, along with several other cases in stating "As all parties acknowledge, it is well established that in diversity cases state law governs not only the limitations period but also the commencement of the limitations period." *Cantor Fitzgerald v. Lutnick,* 313 F.3d 704, 709 (2002). Further that court stated, "A state's rules providing for the start and length of the statute of limitations is substantive law." *Id.* at 710 (citing *Klehr v. A.O. Smith Corp.,* 87 F.3d 231, 235 (8th Cir.1996), *aff'd,* 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997); *Nev. Power Co. v. Monsanto Co.,* 955 F.2d 1304, 1306 (9th Cir.1992)). The Ninth Circuit Court of Appeals has also held commencement of the statute of limitations, in a federal diversity case, is controlled by state law. In *Sain v. City of Bend,* the court referenced Supreme Court precedent where it clarified when Rule 3 of the Federal Rules of Civil Procedure is applied and when the state's law is applied to issues concerning the commencement of a suit for statute of limitations purposes, "Thus, after *Walker* and *West,* we know the following: Rule 3 does not commence a suit based on state law for purposes of the statute of limitations (*Walker*). However, Rule 3 does commence a suit based on federal law that has a statute of limitations borrowed from federal law (*West*)." *Sain v. City of Bend*, 309 F.3d 1134, 1137-38 (9th Cir. 2002). Because the case at hand is a diversity claim based on state law, the state substantive law controls. The holding in *Sain* is persuasive and we chose to adopt this rationale. Therefore, the commencement of the statute of limitations is viewed in the

same light as all statute of limitations questions in regards to whether it is procedural or substantive in nature and as a result, Idaho law controls.

Plaintiff argues that because the federal rule and the state rule do not conflict, the federal rule must be applied. Given the copious case law applying *Erie* to the issue of whether the commencement of the statute of limitations is procedural or substantive, this Court does not attribute significant weight to that argument. Plaintiff correctly addresses the first prong of *Erie* as making a determination if a federal law adequately addresses the issue at hand. *Erie R.R. Co. v. Tompkins,* 304 U.S. 740, 100 S. Ct. 1978, 64 L.Ed.2d 659 (1980). It is only when in the absence of a federal law directly on point that the *Erie* analysis comes into play. We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 398, 130 S. Ct. 1431, 1437, 176 L. Ed. 2d 311 (2010). In this case, the federal rule does not directly conflict with state law to the extent it renders it invalid. If laws controlling the commencement of the statute of limitations were trumped by Federal Rule of Civil Procedure 3, courts would not have even addressed whether the issue is procedural or substantive. In addition to the commentaries of Rules 3 and 4, several courts, including the Second and Ninth District Courts of Appeal, have specifically addressed whether the commencement of the statute of limitations is procedural or substantive. Therefore, because these courts have analyzed this issue as procedural or substantive, according to *Erie,* they must have first made a determination that Rule 3 does not trump state laws addressing the commencement of the statute of limitations. If the courts would have made a finding that the federal rule was adequate, under *Erie,* an analysis on whether the issue is procedural or substantive would have never been done.

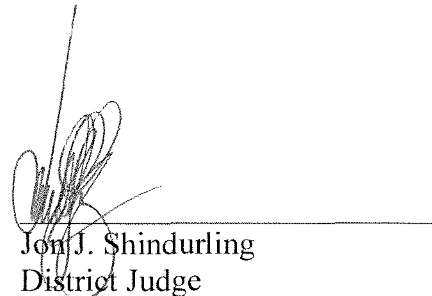
As addressed in the Opinion and Order Granting Defendants Motions for Summary Judgment, *Griggs v. Nash* is the controlling Idaho law that defines when this action was commenced for statute of limitations purposes. Accordingly Plaintiffs' Motion for Leave to File a Second Amended Complaint did not commence the action because the parties did not have adequate notice. Under controlling Idaho Law, Plaintiffs did not commence the actions against EIRMC and Dr. Taylor until after the statute of limitations had expired.

IV. CONCLUSION

For the foregoing reasons, this Court holds the commencement of the statute of limitations is a substantive issue and state law controls. Accordingly, Plaintiff's Motion for Reconsideration is denied.

IT IS SO ORDERED.

Dated this 24 day of October, 2014.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 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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(Attorneys for Eastern Idaho Health Services, Inc.)

J. Michael Wheiler

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(Attorneys for James Taylor, D.O.)

Ronald Longmore
Clerk of the District Court
Bonneville County, Idaho

by
Deputy Clerk

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Facsimile: (801) 363-4218

Attorneys for Plaintiffs

14 DEC 10 PM 4:09

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

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs/Appellants, vs. JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation,, Defendants and Appellees.	**NOTICE OF APPEAL** Case No. cv-2013-4868 Judge Shindurling

TO: THE ABOVE NAMED RESPONDENTS, JAMES TAYLOR, D.O. AND EASTERN IDAHO HEALTH SERVICES, INC. DBA EASTERN IDAHO REGIONAL MEDICAL CENTER, AND THE PARTY'S ATTORNEYS: MARVIN M. SMITH AND

ORIGINAL

MARVIN K. SMITH, SMITH & BANKS, 2010 JENNIE LEE DRIVE, IDAHO FALLS, ID 83404, ATTORNEYS FOR DEFENDANTS EASTERN IDAHO REGIONAL MEDICAL CENTER, AND MICHAEL WHEILER AND RICHARD FRIESS, THOMSEN HOLMAN WHEILER, 2635 CHANNING WAY, IDAHO FALLS, ID 83404, ATTORNEYS FOR DEFENDANT JAMES TAYLOR, D.O., AND THE CLERK OF THE IDAHO SEVENTH JUDICIAL DISTRICT COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Plaintiffs/Appellants appeal against the above-named Defendants/Respondents to the Idaho Supreme Court from the trial court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment, issued June 23, 2014, the trial court's Opinion and Order Denying Plaintiffs' Motion for Reconsideration, issued October 29, 2014, and the trial court's Judgment of Dismissal with Prejudice, dated June 30, 2014 (Honorable Judge Shindurling presiding).

2. Plaintiffs/Appellants have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rules 11(a)(1) and 11(a)(3) of the Idaho Rules of Appellate Procedure.

3. A preliminary statement of the issues on appeal which the appellants then intend to assert in the appeal include:

a. The trial court's erroneous dismissal with prejudice of Plaintiffs' causes of action against Defendants James Taylor, D.O. and Eastern Idaho Regional Medical Center.

b. The trial court's entry of judgment in favor of Defendants James Taylor, D.O. and Eastern Idaho Regional Medical Center.

c. The trial court's erroneous denial of Plaintiffs' motion for reconsideration.

4. The Plaintiffs/Appellants request the preparation of the reporters' transcripts in electronic format of the following hearings:

a. The May 5, 2014 hearing on Defendants'/Appellees' motions for summary judgment; and

b. The September 8, 2014 hearing on Plaintiffs'/Appellants' motion for reconsideration.

5. The Plaintiffs/Appellants request the following documents be included in the clerk's record in addition to those automatically included under Rule 28 of the Idaho Rules of Appellate Procedure:

a. Defendant James Taylor, D.O.'s motion for summary judgment;

b. Defendant James Taylor, D.O.'s memorandum in support of motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

c. Plaintiffs Eric and Carol English's memorandum in opposition to Defendant James Taylor, D.O.'s motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

d. Defendant James Taylor, D.O.'s reply memorandum in support of motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

e. Defendant Eastern Idaho Regional Medical Center's motion for summary judgment;

f. Defendant Eastern Idaho Regional Medical Center's memorandum in support of its motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

g. Plaintiffs Eric and Carol English's memorandum in opposition to Defendant Eastern Idaho Regional Medical Center's motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

h. Defendant Eastern Idaho Regional Medical Center's reply memorandum in support of its motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

i. The trial court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment;

j. The trial court's Judgment of Dismissal with Prejudice;

k. Plaintiffs Eric and Carol English's motion for reconsideration;

l. Plaintiffs Eric and Carol English's memorandum in support of motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

m. Defendant James Taylor, D.O.'s memorandum in opposition to Plaintiffs Eric and Carol English's motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

n. Defendants Eastern Idaho Regional Medical Center's memorandum in opposition to Plaintiffs Eric and Carol English's motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

o. Plaintiffs Eric and Carol English's reply memorandum in support of motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

p. The trial court's Opinion and Order Denying Plaintiffs' Motion for Reconsideration.

6. I certify:

a. That service of the notice of appeal has been made upon the reporter of the proceedings at issue as named below:

i. Mary Fox, Seventh District Court, Bonneville County Courthouse, 605 North Capital Avenue, Idaho Falls, ID 83402.

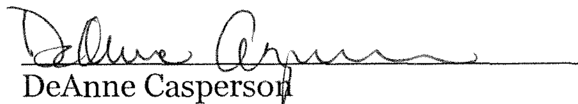
b. That the clerk of the district court has been paid the estimated fees for preparation of the designated reporter's transcript as required by Rule 24;

c. That the estimated fees for preparation of the clerk's record have been paid;

d. The all appellate filing fees have been paid; and

e. Service has been made upon all other parties required to be served pursuant to Rule 20.

Dated this 10th day of December, 2014 HOLDEN, KIDWELL HAHN & CRAPO



DeAnne Casperson

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2014, I caused a true and correct copy of the foregoing to be served via facsimile and U.S. Mail on the following:

Marvin M. Smith
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Douglas B. King
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Attorneys for Defendants Cook Incorporated, Cook Medical Incorporated, and Cook Medical Technologies, LLC

Mary Fox
Seventh District Court
Bonneville County Courthouse
605 North Capital Avenue
Idaho Falls, ID 83402

DeAnne Casperson

2015 JAN 21 PM 1:59
DISTRICT COURT
7TH JUDICIAL DISTRICT
BONNEVILLE COUNTY ID

IN THE DISTRICT COURT OFTHE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN ANDFOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs, vs. COOK INCORPORATED, an Indiana corporation; COOK MEDICAL INCORPORATED, an Indiana Corporation; COOK MEDICAL TECHNOLOGIES, LLC, an Indiana LLC; JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation; and DOES 1-20, Defendants.	Case No. cv-2013-4868 **ORDER GRANTING MOTION FOR RULE 54(b) CERTIFIFCATION OF JUDGMENTS OF DISMISSAL OF MEDICAL DEFENDANTS AND RULE 54(b) CERTIFICATION**

IT IS HEREBY ORDERED that the Opinion and Order Granting Medical Defendants' Motions for Summary Judgment, dated June 27, 2014; Judgment of Dismissal with Prejudice Against Eastern Idaho Health Services, Inc., dated June 30, 2014; Judgment of Dismissal with Prejudice Against James Taylor, D.O.; and Opinion and Order Denying Plaintiffs' Motion for Reconsideration, dated October 29, 2014, are certified as final.

Dated this 20th day of January, 2015.

Bruce L. Pickett
District Judge

RECEIVED
JAN 15 2015
BY:

ORIGINAL

RULE 54(b) CERTIFICATION

With respect to the issues determined by the above judgments or orders it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the above judgment and orders shall be final judgments upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated this 20 day of January, 2015.

Bruce L. Pickett
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of January, 2015, I caused a true and correct copy of the foregoing to be served via U.S. Mail on the following:

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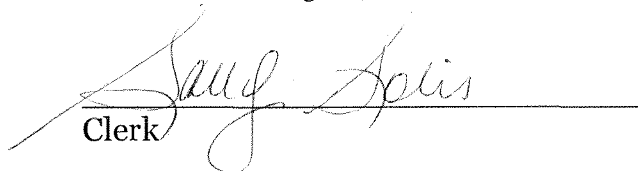

Clerk

BONNEVILLE COUNTY, IDAHO
2015 JAN 28 PM 4:

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OFTHE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN ANDFOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs/Appellants, vs. JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation,, Defendants and Appellees.	**AMENDED NOTICE OF APPEAL** Case No. cv-2013-4868 Judge Shindurling/Judge Pickett

TO: THE ABOVE NAMED RESPONDENTS, JAMES TAYLOR, D.O. AND EASTERN IDAHO HEALTH SERVICES, INC. DBA EASTERN IDAHO REGIONAL MEDICAL CENTER, AND THE PARTY'S ATTORNEYS: MARVIN M. SMITH AND MARVIN K. SMITH, SMITH & BANKS, 2010 JENNIE LEE DRIVE, IDAHO FALLS, ID

ORIGINAL

83404, ATTORNEYS FOR DEFENDANTS EASTERN IDAHO REGIONAL MEDICAL CENTER, AND MICHAEL WHEILER AND RICHARD FRIESS, THOMSEN HOLMAN WHEILER, 2635 CHANNING WAY, IDAHO FALLS, ID 83404, ATTORNEYS FOR DEFENDANT JAMES TAYLOR, D.O., AND THE CLERK OF THE IDAHO SEVENTH JUDICIAL DISTRICT COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Plaintiffs/Appellants appeal against the above-named Defendants/Respondents to the Idaho Supreme Court from the trial court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment, issued June 23, 2014, the trial court's Opinion and Order Denying Plaintiffs' Motion for Reconsideration, issued October 29, 2014, and the trial court's Judgment of Dismissal with Prejudice, dated June 30, 2014 (Honorable Judge Shindurling presiding).These rulings were certified as final pursuant to Rule 54(b) on January 20, 2015.

2. Plaintiffs/Appellants have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rules 11(a)(1) and 11(a)(3) of the Idaho Rules of Appellate Procedure.

3. A preliminary statement of the issues on appeal which the appellants then intend to assert in the appeal include:

a. The trial court's erroneous dismissal with prejudice of Plaintiffs' causes of action against Defendants James Taylor, D.O. and Eastern Idaho Regional Medical Center.

b. The trial court's entry of judgment in favor of Defendants James Taylor, D.O. and Eastern Idaho Regional Medical Center.

c. The trial court's erroneous denial of Plaintiffs' motion for reconsideration.

4. The Plaintiffs/Appellants request the preparation of the reporters' transcripts in electronic format of the following hearings:

a. The May 5, 2014 hearing on Defendants'/Appellees' motions for summary judgment; and

b. The September 8, 2014 hearing on Plaintiffs'/Appellants' motion for reconsideration.

5. The Plaintiffs/Appellants request the following documents be included in the clerk's record in addition to those automatically included under Rule 28 of the Idaho Rules of Appellate Procedure:

a. Defendant James Taylor, D.O.'s motion for summary judgment;

b. Defendant James Taylor, D.O.'s memorandum in support of motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

c. Plaintiffs Eric and Carol English's memorandum in opposition to Defendant James Taylor, D.O.'s motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

d. Defendant James Taylor, D.O.'s reply memorandum in support of motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

e. Defendant Eastern Idaho Regional Medical Center's motion for summary judgment;

f. Defendant Eastern Idaho Regional Medical Center's memorandum in support of its motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

g. Plaintiffs Eric and Carol English's memorandum in opposition to Defendant Eastern Idaho Regional Medical Center's motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

h. Defendant Eastern Idaho Regional Medical Center's reply memorandum in support of its motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein;

i. The trial court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment;

j. The trial court's Judgment of Dismissal with Prejudice;

k. Plaintiffs Eric and Carol English's motion for reconsideration;

l. Plaintiffs Eric and Carol English's memorandum in support of motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

m. Defendant James Taylor, D.O.'s memorandum in opposition to Plaintiffs Eric and Carol English's motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

n. Defendants Eastern Idaho Regional Medical Center's memorandum in opposition to Plaintiffs Eric and Carol English's motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

o. Plaintiffs Eric and Carol English's reply memorandum in support of motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein;

p. The trial court's Opinion and Order Denying Plaintiffs' Motion for Reconsideration;

q. The trial court's Order Granting Motion for Rule 54(b) Certification of Judgments of Dismissal of Medical Defendants and Rule 54(b) Certification.

6. I certify:

a. That service of the amended notice of appeal has been made upon the reporter of the proceedings at issue as named below:

i. Mary Fox, Seventh District Court, Bonneville County Courthouse, 605 North Capital Avenue, Idaho Falls, ID 83402.

b. That the clerk of the district court has been paid the estimated fees for preparation of the designated reporter's transcript as required by Rule 24;

c. That the estimated fees for preparation of the clerk's record have been paid;

d. The all appellate filing fees have been paid; and

e. Service has been made upon all other parties required to be served pursuant to Rule 20.

Dated this 28th day of January, 2015

HOLDEN, KIDWELL HAHN & CRAPO

DeAnne Casperson
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2015, I caused a true and correct copy of the foregoing to be served via U.S. Mail on the following:

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Attorneys for Defendants Eastern Idaho Regional Medical Center

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Attorneys for Defendant James Taylor, D.O.

William Dryden
Craig Yabui
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2015 MAY 29 PM 2:19
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MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OFTHE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN ANDFOR THE COUNTY OF BONNEVILLE

CAROL ENGLISH and ERIC ENGLISH, wife and husband, Plaintiffs/Appellants, vs. JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTERN IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation,, Defendants and Appellees.	**SECOND AMENDED NOTICE OF APPEAL** Case No. cv-2013-4868 Judge Shindurling/Judge Pickett

TO: THE ABOVE NAMED RESPONDENTS, JAMES TAYLOR, D.O. AND EASTERN IDAHO HEALTH SERVICES, INC. DBA EASTERN IDAHO REGIONAL MEDICAL CENTER, AND THE PARTY'S ATTORNEYS: MARVIN M. SMITH AND MARVIN K. SMITH, SMITH & BANKS, 2010 JENNIE LEE DRIVE, IDAHO FALLS, ID

83404, ATTORNEYS FOR DEFENDANTS EASTERN IDAHO REGIONAL MEDICAL CENTER, AND MICHAEL WHEILER AND RICHARD FRIESS, THOMSEN HOLMAN WHEILER, 2635 CHANNING WAY, IDAHO FALLS, ID 83404, ATTORNEYS FOR DEFENDANT JAMES TAYLOR, D.O., AND THE CLERK OF THE IDAHO SEVENTH JUDICIAL DISTRICT COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Plaintiffs/Appellants appeal against the above-named Defendants/Respondents to the Idaho Supreme Court from the trial court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment, issued June 23, 2014, the trial court's Opinion and Order Denying Plaintiffs' Motion for Reconsideration, issued October 29, 2014, and the trial court's Judgment of Dismissal with Prejudice, dated June 30, 2014 (Honorable Judge Shindurling presiding).These rulings were certified as final pursuant to Rule 54(b) on January 20, 2015.

2. Plaintiffs/Appellants have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rules 11(a)(1) and 11(a)(3) of the Idaho Rules of Appellate Procedure.

3. A preliminary statement of the issues on appeal which the appellants then intend to assert in the appeal include:

   a. The trial court's erroneous dismissal with prejudice of Plaintiffs' causes of action against Defendants James Taylor, D.O. and Eastern Idaho Regional Medical Center.

   b. The trial court's entry of judgment in favor of Defendants James Taylor, D.O. and Eastern Idaho Regional Medical Center.

c. The trial court's erroneous denial of Plaintiffs' motion for reconsideration.

4. The Plaintiffs/Appellants request the preparation of the reporters' transcripts in electronic format of the following hearings:

a. The May 5, 2014 hearing on Defendants'/Appellees' motions for summary judgment; and

b. The September 8, 2014 hearing on Plaintiffs'/Appellants' motion for reconsideration.

5. The Plaintiffs/Appellants request the following documents be included in the clerk's record in addition to those automatically included under Rule 28 of the Idaho Rules of Appellate Procedure:

a. Defendant James Taylor, D.O.'s motion for summary judgment, filed April 4, 2014;

b. Defendant James Taylor, D.O.'s memorandum in support of motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein, filed April 4, 2014;

c. Plaintiffs Eric and Carol English's memorandum in opposition to Defendant James Taylor, D.O.'s motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein, filed April 18, 2014;

d. Defendant James Taylor, D.O.'s reply memorandum in support of motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein, filed April 22, 2014;

e. Defendant Eastern Idaho Regional Medical Center's motion for summary judgment, filed March 14, 2014;

f. Defendant Eastern Idaho Regional Medical Center's memorandum in support of its motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein, filed March 14, 2014;

g. Plaintiffs Eric and Carol English's memorandum in opposition to Defendant Eastern Idaho Regional Medical Center's motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein, filed March 27, 2014;

h. Defendant Eastern Idaho Regional Medical Center's reply memorandum in support of its motion for summary judgment and all exhibits and affidavits attached thereto or referenced therein, filed April 4, 2014;

i. The trial court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment, filed June 27, 2014;

j. The trial court's Judgments of Dismissal with Prejudice, filed June 30, 2014 and July 8, 2014;

k. Plaintiffs Eric and Carol English's motion for reconsideration, filed July 7, 2014;

l. Plaintiffs Eric and Carol English's memorandum in support of motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein, filed July 7, 2014;

m. Defendant James Taylor, D.O.'s memorandum in opposition to Plaintiffs Eric and Carol English's motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein, filed August 28, 2014;

n. Defendants Eastern Idaho Regional Medical Center's memorandum in opposition to Plaintiffs Eric and Carol English's motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein, filed August 28, 2014;

o. Plaintiffs Eric and Carol English's reply memorandum in support of motion for reconsideration and all exhibits and affidavits attached thereto or referenced therein, filed September 4, 2014;

p. The trial court's Opinion and Order Denying Plaintiffs' Motion for Reconsideration, filed October 29, 2014;

q. The trial court's Order Granting Motion for Rule 54(b) Certification of Judgments of Dismissal of Medical Defendants and Rule 54(b) Certification, filed January 21, 2015.

6. I certify:

a. That service of the amended notice of appeal has been made upon the reporter of the proceedings at issue as named below:

i. Mary Fox, Seventh District Court, Bonneville County Courthouse, 605 North Capital Avenue, Idaho Falls, ID 83402.

b. That the clerk of the district court has been paid the estimated fees for preparation of the designated reporter's transcript as required by Rule 24;

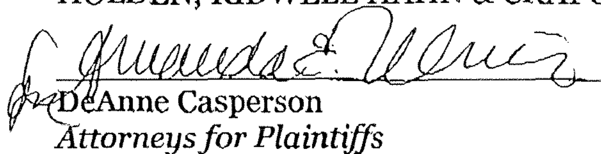
c. That the estimated fees for preparation of the clerk's record have been paid;

d. That all appellate filing fees have been paid; and

e. Service has been made upon all other parties required to be served pursuant to Rule 20.

Dated this 29th day of May, 2015

HOLDEN, KIDWELL HAHN & CRAPO



DeAnne Casperson
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2015, I caused a true and correct copy of the foregoing to be served via U.S. Mail on the following:

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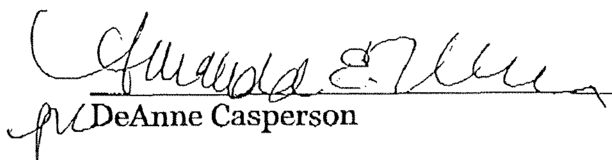


DeAnne Casperson

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

CAROL ENGLISH and ERIC ENGLISH, wife and Husband,

Plaintiff's/Appellant's,

vs.

JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTER IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation,

Defendant's/ Respondent's,

Case No. CV-2013-4868

Docket No. 42947

CLERK'S CERTIFICATION OF EXHIBITS

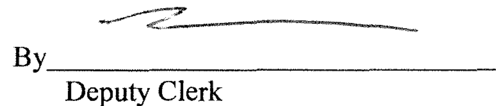
STATE OF IDAHO)
)
County of Bonneville)

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 29 day of June, 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

CAROL ENGLISH and ERIC ENGLISH, wife and Husband,	)	
Plaintiff's/Appellant's,	)	Case No. CV-2013-4868
vs.	)	Docket No. 42947
JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTER IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation,	)	**CLERK'S CERTIFICATE**
Defendant's/ Respondent's,	)	

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 29 day of June, 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

CAROL ENGLISH and ERIC ENGLISH, wife and Husband,)	
Plaintiff's/Appellant's,)	Case No. CV-2013-4868
vs.)	Docket No. 42947
JAMES TAYLOR, D.O.; EASTERN IDAHO HEALTH SERVICES, INC. dba EASTER IDAHO REGIONAL MEDICAL CENTER, an Idaho Corporation,)	**CERTIFICATE OF SERVICE**
Defendant's/ Respondent's,)	

I HEREBY CERTIFY that on the 29 day of June, 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:

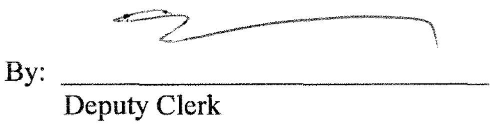
DeAnne Casperson
Holden, Kidwell, Hahn & Crapo, PLLC
P.O. Box 50130
Idaho Falls, ID 83405

J. Michael Wheiler
Thomsen Holman Wheiler, PLLC
2635 Channing Way
Idaho Falls, ID 83404

Marvin M. Smith
Smith & Banks, PLLC
2010 Jennie Lee Drive
Idaho Falls, ID 83404

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