12-31-2015

English v. Taylor Respondent's Brief Dckt. 42947

IN THE SUPREME COURT OF THE STATE OF IDAHO

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/Respondents.	Supreme Court Docket No. 42947 Bonneville County Case No.: CV-2013-4868

RESPONDENT EASTERN IDAHO HEALTH SERVICES, INC. d/b/a EASTERN IDAHO REGIONAL MEDICAL CENTER'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville

Honorable Jon J. Shindurling, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

Other Authority

I. STATEMENT OF THE CASE

A. Nature of the Case

This is a medical negligence and products liability case wherein Carol English and Eric English ("Plaintiffs") failed to commence their medical negligence action against Eastern Idaho Health Services, Inc. d/b/a Eastern Idaho Regional Medical Center ("EIRMC") and James Taylor, D.O. ("Dr. Taylor") within the applicable statute of limitations. As a result of the untimely filing, EIRMC and Dr. Taylor were granted summary judgment and dismissed from the matter.

B. Course of Proceedings

The district court granted EIRMC's and Dr. Taylor's motions for summary judgment on June 23, 2014 on the basis that pursuant to Idaho Supreme Court case law precedent Plaintiffs did not commence their action against EIRMC and Dr. Taylor until after the applicable statute of limitations had expired. R. Vol. 2, pp. 214-220.

On October 29, 2014 the district court denied Plaintiffs' motion for reconsideration; holding that pursuant to the *Erie* doctrine the commencement of the statute of limitations is a substantive issue, hence, state law controls, and pursuant to Idaho state law Plaintiffs did not commence their action against EIRMC and Dr. Taylor until after the applicable statute of limitations had expired. R. Vol. 2, pp. 320-327. The trial court entered an "Order Granting Motion for Rule 54(b) Certification of Judgments of Dismissal of Medical Defendants and Rule 54(b) Certification" on January 21, 2015. R. Vol. 2, pp. 336-338.

C. Statement of Facts

Counsel for Plaintiffs repeatedly assured counsel for EIRMC that Plaintiffs would not file a lawsuit against EIRMC. As late as April 26, 2013, Plaintiffs' counsel once again assured counsel for EIRMC that Plaintiffs would not be initiating a lawsuit against EIRMC in this matter. R. Vol. 1, p. 144. On September 13, 2013, Plaintiffs filed a Complaint in Idaho state court against Cook Incorporated, Cook Medical Incorporated, Cook Medical Technologies, LLC ("Cook Defendants"), and Does 1-20. R. Vol. 1, pp. 9-15. The Complaint was brought pursuant to the provisions of Idaho Code § 6-1401 *et seq.* (the Idaho Product Liability Act). R. Vol. 1, pp. 9-10. Plaintiffs' September 13, 2013, Complaint did not state a claim for medical negligence nor did it name EIRMC as a defendant. R. Vol. 1, pp. 9-15. On September 17, 2013, Plaintiffs filed an Amended Complaint against the Cook Defendants and Does 1-20. R. Vol. 1, pp. 16-23. The Amended Complaint was brought pursuant to the provisions of Idaho Code § 6-1401 *et seq.* R. Vol. 1, pp.16-17. Plaintiffs' September 17, 2013, Amended Complaint did not state a claim for medical negligence nor did it name EIRMC as a defendant. R. Vol. 1, pp. 16-23.

On October 31, 2013, the Cook Defendants filed a Notice of Removal removing this state court action to federal court under diversity of citizenship. R. Vol. 1, p. 1. On November 5, 2013, the Cook Defendants filed an Answer to Plaintiffs' Amended Complaint in federal court. R. Vol. 1, p. 50. On December 10, 2013, Plaintiffs filed in federal court a Motion for Leave to File Second Amended Complaint to add EIRMC and Dr. Taylor as parties and add claims for medical negligence. R. Vol. 1, p. 50. Plaintiffs did not serve copies of the Motion for Leave to File Second Amended Complaint or the proposed Second Amended Complaint upon EIRMC.

The federal court granted Plaintiffs' Motion for Leave to File Second Amended Complaint on January 16, 2014. R. Vol. 1, p. 50. Plaintiffs filed their Second Amended Complaint in federal court on January 16, 2014. *Id.* The January 16, 2014 Second Amended Complaint for the first time raised a claim of medical negligence and for the first time named EIRMC as a defendant.

On January 17, 2014, Plaintiffs and the Cook Defendants entered into a stipulation agreeing:

> 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 mater be remanded to the Seventh Judicial District of the State of Idaho, Bonneville County.

R. Vol. 1, p. 52.

Pursuant to the 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 . . .

R. Vol. 2, p. 291.

On January 27, 2014, Plaintiffs' Second Amended Complaint was filed in Idaho state court. R. Vol. 1, p. 35. According to the Second Amended Complaint Plaintiff Carol English underwent an epistaxis embolization procedure on September 17, 2011. R. Vol. 1, p. 36. The

Fifth Cause of Action in the Second Amended Complaint alleges medical negligence against EIRMC. R. Vol. 1, p. 41. Counsel for Plaintiffs contacted counsel for EIRMC via telephone on February 3, 2014 regarding acceptance of service of process and was told that per company policy EIRMC would have to be served through its registered agent. R. Vol. 1, p. 47. February 3, 2014 was the first time EIRMC was notified that a lawsuit had been filed against it. EIRMC was served with a copy of the Plaintiffs' Second Amended Complaint and state court Summons on February 25, 2014. R. Vol. 1, p. 3.

Plaintiffs' application and claim for medical malpractice prelitigation hearing against EIRMC and Dr. Taylor (consisting of a mere thirty-seven words) was stamped as received by the Idaho State Board of Medicine on September 16, 2013. R. Vol. 1, pp. 46-47. The Advisory Opinion of the prelitigation screening panel was received by the Idaho State Board of Medicine on November 18, 2013. R. Vol. 1, p. 47. There is no dispute that the statute of limitations on any claims by Plaintiffs against EIRMC expired on December 19, 2013. R. Vol. 1, p. 72.

On March 4, 2014 (after the federal district court remanded this case back to state court, was divested of jurisdiction, and after EIRMC had been served with the Second Amended Complaint) Plaintiffs filed a Rule 60 Motion to Clarify Docket Entry Order in federal court. R. Vol. 2, pp. 283-284. Contrary to Plaintiffs' Statement of Facts, there was no challenge to their lawsuit prior to them filing their Rule 60 motion in federal court. Plaintiffs must have realized their statute of limitations mistake because their Rule 60 Motion to Clarify was filed in federal court ten (10) days before EIRMC even filed and served its motion for summary judgment on March 14, 2014 and before Dr. Taylor was even served with process. Because EIRMC was

never a party to the federal court proceedings and because copies of Plaintiffs' Motion to Clarify were never served upon EIRMC, Plaintiffs' Motion to Clarify was unopposed. The federal court entered an order on the Motion to Clarify on April 9, 2014. R. Vol. 2, p. 240.

Plaintiffs did not cite to or mention the April 9, 2014, federal court order in their briefing opposing EIRMC's and Dr. Taylor's motions for summary judgment or during the May 5, 2014, hearing on EIRMC's and Dr. Taylor's motions for summary judgment. R. Vol. 1, pp. 69-121; 194-201; Tr., pp. 17-26; 32-33. The state district court granted EIRMC's and Dr. Taylor's motions for summary judgment on June 23, 2014. R. Vol. 2, pp. 214-220. The first time Plaintiffs disclosed the April 9, 2014, federal court order was when they attached it as part of their Motion for Reconsideration filed on July 7, 2014. At the hearing on Plaintiffs' Motion for Reconsideration, Judge Jon J. Shindurling commented on the April 9, 2014 federal court order:

> What gives me, really, concern here, Ms. Casperson, is this going back to Judge Lodge in March -- after he's tendered jurisdiction to this Court -- ex parte, without notice to the defendants who are now in the case, and getting an additional order from Judge Lodge. That seems to me to be a violation of ethical rules, if nothing else.
>
> . . .
>
> I would not have had any trouble had you approached him but notified the parties that there was a hearing on the matter.
>
> . . .
>
> . . . [T]hey have a right to notice that you've filed a motion because it deals with their substantive rights in this case.

Tr.. pp. 41-43; LL. 1-7; 24-25; 1, 4-6.

The district court denied Plaintiffs' Motion for Reconsideration on October 29, 2014. R.

Vol. 2, pp. 320-327.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Is EIRMC entitled to attorney's fees and costs on appeal pursuant to Idaho Code § 12-121 and Rules 40 and 41 of the Idaho Appellate Rules?

III. ARGUMENT

A. Summary of Argument

This case is a matter of Plaintiffs failing to commence their action against EIRMC within the applicable statute of limitations. On appeal Plaintiffs have flipped or reversed the way this case was presented to the district court. At the district court level, EIRMC and Dr. Taylor moved for summary judgment on the basis that Plaintiffs did not commence the present lawsuit against them until after the statute of limitations had expired. The district court, pursuant to this Court's decisions in *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) and *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010), granted EIRMC and Dr. Taylor summary judgment in this matter. R. Vol. 2, pp. 214-220.

Next, Plaintiffs attempted to argue that the commencement of their state derived action against EIRMC for statute of limitations purposes was a procedural issue as opposed to a substantive issue and that Rule 3 of the Federal Rules of Civil Procedure and the federal case law interpreting said rule governed this matter. However, the district court, pursuant to overwhelming federal law precedent, held the commencement of the statute of limitations is a substantive issue, Idaho state law controls, and accordingly denied Plaintiffs' motion for reconsideration (upholding the grant of summary judgment to EIRMC and Dr. Taylor). R. Vol.

2, pp. 320-327.

EIRMC will present its arguments in this brief in the order such arguments were presented to the district court so that the reasoning and decisions of the district court can be more easily followed on appeal.

Idaho Supreme Court case law precedent provides that in a situation where a party files a motion for leave to file a third party complaint the third party action does not commence until, pursuant to Rule 3(a) of the Idaho Rules of Civil Procedure, the third party complaint is filed with the court (not when the motion for leave is filed). *Griggs v. Nash*, 116 Idaho 228, 234, 775 P.2d 120, 126 (1989). Idaho Supreme Court case law precedent provides that in a situation where an individual or entity is not a party to a lawsuit when an existing party files a motion to add the individual or entity to the lawsuit the non-party must receive notice of the impending action/substance of the proposed amendment prior to the expiration of the applicable statute of limitations. *Griggs v. Nash*, 116 Idaho 228, 234, 775 P.2d 120, 126 (1989); *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 399-400, 247 P.3d 620, 626-627 (2010). Idaho Supreme Court case law precedent further provides an exclusive "either/or" list of what this Court regarded as sufficient notice of the impending action/substance of the proposed amendment: 1) Serving the non-party with a copy of the motion for leave to amend along with the proposed amended complaint; or 2) Serving the non-party with a copy of the motion for leave to amend which fully and comprehensively lays out the substance of the proposed amendment. *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 399-400, 247 P.3d 620, 626-627 (2010).

Applying Idaho case law precedent to this case there is no question that EIRMC is

situated exactly like the third party in the *Griggs* case; consequently the rationale and notice concerns of *Griggs* apply to this case. EIRMC was not a party when this case was in federal court and when Plaintiffs filed their Motion for Leave to File Second Amended Complaint (attempting to add new causes of action and new parties, including EIRMC). EIRMC was never served with the Motion for Leave to File Second Amended Complaint (which included the proposed Second Amended Complaint).

Accordingly, Plaintiffs' action against EIRMC and Dr. Taylor was not commenced until the actual filing of Plaintiffs' Second Amended Complaint on January 16, 2014, which was twenty-eight (28) days after the applicable statute of limitations had run on December 19, 2013. Thus, Plaintiffs' Second Amended Complaint against EIRMC is barred by Idaho Code § 5-219(4) as extended by the tolling provisions of Idaho Code § 6-1005. EIRMC was appropriately granted summary judgment.

Plaintiffs' contention that federal rules of civil procedure and federal law govern when their state law cause of action against EIRMC commenced for purposes of Idaho statute of limitations in this state court action is without merit. It is repugnant to the notions of fair play and due process to propose that a federal rule of civil procedure and the federal case law interpreting such a rule could apply to an Idaho state court case (the only case EIRMC has ever been a part of), supersede Idaho law, and enlarge/modify a party's exposure to liability that it would not otherwise have under Idaho state law.

Nevertheless, even if federal law is examined it is clear that such law mandates that Idaho law controls this matter. The question at issue in this matter is: When was Plaintiffs' medical

negligence action commenced against EIRMC for purposes of Idaho's statute of limitations? Obviously, Fed. R. Civ. P. 3 and 15 do not answer this question because such a question can only be answered by Idaho state law. Accordingly, pursuant to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny, statutes of limitations are substantive for *Erie* purposes and thus state law (statutes and case law) determines when an action commences for statute of limitation purposes. Further, any reliance by Plaintiffs upon the ex parte order they received from the federal court is unfounded because the order is void, resulting from the federal court's lack of jurisdiction at the time when Plaintiffs filed their motion and when the order was entered. Therefore, this Court's decision in *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) is the controlling law that defines when Plaintiffs' action was commenced against EIRMC for statute of limitations purposes, and pursuant to *Griggs*, Plaintiffs' action was not commenced until after the statute of limitations had expired. Accordingly, EIRMC respectfully requests that this Court affirm the district court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment and Opinion and Order Denying Plaintiffs' Motion for Reconsideration.

B. **Idaho case law precedent requires affirmance of the district court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment because such precedent holds that Plaintiffs' claims against EIRMC did not commence until the filing of the Second Amended Complaint on January 16, 2014, which was twenty-eight (28) days after the statute of limitations had expired.**

1. *Griggs v. Nash* requires dismissal of Plaintiffs' action against EIRMC.

In *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989), two defendants moved for leave of the district court to file a third-party complaint against an attorney for legal malpractice. *Id.* at

234, 775 P.2d at 126. A copy of the proposed third-party complaint was attached to the motion. *Id.* The motion for leave was made within the two-year statute of limitations, but the district court did not rule on the motion until eight (8) months later and the third-party complaint was filed at least fourteen (14) days after the two-year statute of limitations had expired. *Id.* Faced with the foregoing facts, this Court stated: "The primary issue presented is whether the two-year statute of limitations contained in I.C. § 5-219(4) had run **before the action against the attorney was commenced**." *Id.* at 229, 775 P.2d at 121.

Answering that primary issue, this Court concluded:

> Therefore, we conclude that the action of EMSI and Van Gelder against Trout for malpractice accrued by at least September 9, 1985. To avoid being barred by I.C. § 5-219(4), an action by EMSI and Van Gelder for professional malpractice based on Trout's alleged failure to inform them of the value of the property must have been commenced by September 9, 1987.
>
> **On January 29, 1987, EMSI and Van Gelder filed a motion pursuant to I.R.C.P. 14(a) for leave to file a third-party complaint against Trout. A copy of the third-party complaint was attached to the motion.** On September 8, 1987, the trial court signed an order granting EMSI and Van Gelder leave to file their third-party complaint. The order was filed on September 10, 1987. **The third-party complaint was filed on September 23, 1987. Pursuant to I.R.C.P. 3(a), an action is commenced by the filing of a complaint. Therefore, the action contained in the third-party complaint was not commenced until September 23, 1987. This was at least 14 days after the two-year statute of limitations had run. Therefore, we affirm the trial court's ruling that the third-party complaint was barred by I.C. § 5-219(4).**

Id. at 234, 775 P.2d at 126 (emphasis added).

In *Griggs*, there is no question that the motion, along with a copy of the proposed complaint, was filed long before the statute of limitations had run yet this Court properly ruled that the claim against Trout for professional negligence was not commenced until it was actually

filed as required by I.R.C.P. 3(a). This Court was squarely presented with, analyzed, and issued a decision on the question of whether a motion for leave to add a new party to a lawsuit commences with the filing of the motion for leave or with the actual filing of the complaint for purposes of the statute of limitations. This Court held that that in such a situation a lawsuit commences with the actual filing of the complaint for statute of limitations purposes.

The present matter fits squarely within the *Griggs* case. There is no dispute that Plaintiffs' action against EIRMC accrued on September 17, 2011. Applying I.C. § 6-1005 and Idaho case law precedent interpreting such statute, any action against EIRMC by Plaintiffs must have been commenced by December 19, 2013. On December 10, 2013, Plaintiffs filed in federal court a motion for leave to amend their complaint to add new parties (EIRMC and Dr. Taylor) and new causes of action (medical malpractice) to their complaint and attached a copy of their proposed amended complaint. The order granting the motion to amend was filed on January 16, 2014 and Plaintiffs' Second Amended Complaint was also filed on January 16, 2014. Pursuant to I.R.C.P. 3(a) and *Griggs* Plaintiffs' action against EIRMC was not commenced until the actual filing of the Second Amended Complaint on January 16, 2014.[1] This is at least twenty-eight (28)

[1] *See also Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 795, 41 P.3d 220, 223 (2001) (emphasis added) ("**A civil action is commenced by the filing of a complaint with the court** . . ."); *Cuevas v. Barraza*, 152 Idaho 890, 895, 277 P.3d 337, 342 (2012) (emphasis added) ("Although this Court has not specifically addressed the issue, the Court of Appeals has held that **service and filing of a motion for leave to file a counterclaim, even where the proposed counterclaim is attached, is not the equivalent of service and filing of the counterclaim itself.**"); *Denton v. Detweiler*, 48 Idaho 369, 373, 282 P. 82, 83 (1929) (emphasis added) ("While an amendment setting up no new cause of action or claim, and making no new demand, related back to the filing of the original complaint, and the running of the statute of limitations is arrested at that point, **if the amendment introduces a new or different cause of action and**

days after the applicable statute of limitations had run. Accordingly, Plaintiffs' action against EIRMC is barred by I.C. § 5-219(4) and EIRMC was properly granted summary judgment in this matter.

2. *Terra-West, Inc. v. Idaho Mutual Trust, LLC* did not overturn or clarify *Griggs* and this Court's reasoning in *Terra-West* supports the dismissal of EIRMC in this matter.

The dispute in *Terra-West, Inc. v. Idaho Mutual Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010) did not involve the addition of new parties to a lawsuit. Instead, the plaintiff in *Terra-West, Inc.* filed a motion to amend its complaint to foreclose on a second mechanic's lien against the defendant, who was already a party to the lawsuit by way of the original complaint. *Id.* at 394-395, 247 P.3d at 621-622. This Court held that because the defendant in *Terra-West, Inc.* was already part of the lawsuit and was served with the motion for leave to amend as well as the proposed amended complaint it had notice of the commencement of the foreclosure action within the statutory time period. *Id.* at 399, 247 P.3d at 626. Thus, this case is distinguishable because EIRMC was not named in the original complaint or even the first amended complaint and no claims for medical negligence were made in Plaintiffs' original or first amended complaint. In addition, unlike the defendant in *Terra-West, Inc.* EIRMC was not served and did not receive a copy of Plaintiffs' motion for leave to amend or the proposed second amended complaint before the expiration of the statute of limitations. Therefore, the holding of *Terra-West* has no applicability to this matter.

However, this Court's reasoning in *Terra-West, Inc.* and discussion of *Griggs* supports

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makes a new or different demand, the statute continues to run until the amendment is filed.").

the grant of summary judgment in favor of EIRMC in this matter:

> . . . **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**. 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. Under I.R.C.P. 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 a 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, which functions to prevent stale claims and to protect a defendant's reasonable expectation that his earlier conduct can no longer give rise to liability.** *See Hawley v. Green*, 117 Idaho 498, 501, 788 P.2d 1321, 1324 (1990). However, the same rationale does not apply in this case. As mentioned above, Idaho Mutual was served with the motion for leave to amend, as well as the proposed amended complaint. Idaho Mutual, unlike a party that has not yet been joined, had notice of the substance of the proposed amendment before the six-month period expired under Idaho Code section 45-510. Consequently, *Griggs* is distinguishable because this case does not present the same notice concern.

Id. at 399-400, 247 P.3d at 626-627 (emphasis added).

EIRMC's position in this matter is identical to the position of the proposed third party (Trout) in the *Griggs* 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. Plaintiffs did not provide any notice to EIRMC of the motion to amend or the proposed second amended complaint. It is undisputed that EIRMC was not served with the motion to amend or the proposed second amended complaint. Thus, unlike the defendant in *Terra-West*, EIRMC did not have notice of the substance of the proposed

amendment before the applicable statute of limitations expired. Consequently, the rationale and notice concerns of *Griggs* apply to this case.

In addition, as noted by this Court in *Terra-West*, allowing a previously filed motion to which a third party had no notice commence an action is contrary to the very purpose of the statute of limitations. Important purposes are served by statute of limitations. "The policy behind statutes of limitation is protection of defendants against stale claims, and protection of the courts against needless expenditure of resources." *Higginson v. Wadsworth*, 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 in excess of the time established by the legislature by virtue of I.C. § 5-219(4) and I.C. § 6-1005. Not only would this prevent EIRMC from receiving prompt notice of the claim as intended by the statute, it would also prevent the finality and stability which the statute of limitations was designed by our legislature to achieve. Pursuant to Idaho law, the action against EIRMC was commenced, as required by Idaho Code § 5-219(4) and I.R.C.P. 3(a), when the Second Amended Complaint was actually filed with the federal court on January 16, 2014. Thus, Plaintiffs' medical negligence action against EIRMC was commenced twenty-eight (28) days after the statute of limitations had expired on any claims against EIRMC. Accordingly, EIRMC respectfully requests that this Court affirm the district court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment.

3. Proper notice was not given in this case and therefore the district court's Opinion and Order Granting EIRMC's and Dr. Taylor's Motions for Summary Judgment should be affirmed.

In *Terra-West*, this Court analyzed the issue of notice. This Court stated:

> 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**.

Terra-West, Inc., 150 Idaho at 399, 247 P.3d at 626 (emphasis added).

As an example, this Court noted that in *Rademaker v. E.D. Flynn Expert Co.*, 17 F.2d 15, 17 (5th Cir. 1927) "central to the court's analysis was the **defendant had been served with the motion prior to the expiration of the statute of limitations**, and the motion 'fully and comprehensively' laid out the substance of the proposed amendment." *Id.* (Emphasis added).

Similarly, in *Nett v. Bellucci*, 774 N.E.2d 130 (Mass. 2002), a case cited to in *Terra-West, Inc.* and cited to multiple times in Plaintiffs' appellate brief, the party to be added to the amended complaint "**was served with the motion to amend, and was informed that it had been filed with the court, prior to the expiration of the statute of repose.**" *Id.* at 138 (emphasis added). In fact, as the Massachusetts Supreme Court noted: "**Local rule 15.1(b) requires that the motion to amend be served on the proposed defendant prior to filing of the motion, a rule that guarantees service on the defendant prior to the expiration of the statute of repose.**" *Id.* (Emphasis added).

This Court in *Terra-West* then went on to state:

> **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. Terra-West served Idaho Mutual with the motion pursuant to I.R.C.P. 5(a), which requires a party filing a motion for leave to amend to serve the written motion on each party to the case affected by the motion. Idaho R. Civ. P. 5(a). 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.

Terra-West, Inc., 150 Idaho at 399, 247 P.3d at 626 (emphasis added).

It is undisputed in this case that while Plaintiffs' motion for leave to amend the first amended complaint was filed on December 10, 2013, Plaintiffs never served EIRMC with a copy of the motion or the proposed second amended complaint. Thus, unlike the defendant in *Terra-West* and the defendants in *Rademaker* and *Nett*, EIRMC never received notice of the commencement of the action against it within the appropriate statute of limitations. This fact alone is sufficient to affirm the district court's grant of summary judgment in favor of EIRMC.

Without citing to any Idaho authority and overlooking the significant and exclusive language contained in *Terra-West* cited above, Plaintiffs contend that they gave sufficient notice to EIRMC by way of discussions and the prelitigation screening procedure. In support of such a proposition Plaintiffs cite to four (4) cases. Since it is Idaho state law (*Griggs* and *Terra-West*) which controls the issue before this Court, the decisions cited by Plaintiffs that were rendered in the context of federal question cases and utilized federal law can be distinguished on that basis alone. *See Rademaker v. E.D. Flynn Export Co.*, 17 F.2d 15 (5th Cir. 1927) (federal question under Merchant Marine Act of 1920 where the defendant was served with the motion prior to the

expiration of the statute of limitations, and the motion 'fully and comprehensively' laid out the substance of the proposed amendment); *Mayes v. AT&T Information Sys., Inc.*, 867 F.2d 1172 (8th Cir. 1989) (action brought pursuant to 29 U.S.C. § 160(b)); and *Moore v. State*, 999 F.2d 1125 (7th Cir. 1993) (action brought pursuant to 42 U.S.C. § 1983). *Longo v. Pennsylvania Electric Co.*, 618 F. Supp. 87 (W.D. Pa. 1985) is distinguishable because it was wrongly decided and should have applied Pennsylvania law, which like Idaho law, is that an action is commenced only by filing a complaint, not by filing a motion for leave to amend. [2]

Clearly, this Court has decided that in a situation where an amendment is adding new parties to a lawsuit more is required than a simple telephone call or letter:

> . . . 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. Under I.R.C.P. 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 a 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.

Terra-West, Inc., 150 Idaho at 399-400, 247 P.3d at 626-627.

Allowing a party to provide notice to a non-party by a simple telephone call or letter

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[2] *See Aivazoglou v. Drever Furnaces*, 613 A.2d 595, 598 600 (Pa. Super. Ct. 1992) ("Plaintiffs nevertheless urge this court to adopt a new rule declaring that statutes of limitations are tolled by the filing of a petition for leave to amend in the trial court. We decline plaintiffs' offer." . . . ". . . we hold, consistent with prior appellate court decisions, that an action is commenced only by filing with the prothonotary a praecipe for writ of summons, a complaint, or an agreement for an amicable action."); *Schach v. Ford Motor Co.*, 210 F.R.D. 522, 523 (M.D. Pa. 2002) ("Pennsylvania case law makes clear that filing of a motion for leave to amend does not toll the statute of limitations.")

would create a nightmare in attempting to determine whether or not actual notice was received by the new party prior to the expiration of the statute of limitations. As acknowledged by this Court in *Griggs* and *Terra-West, Inc.*, the better rule is to require the filing of an independent action before the statute of limitations expires. Then, there is no question that the action is timely and the court system is spared from vague and ambiguous arguments about whether a party received or did not receive adequate notice. This is also consistent with this Court's rationale and decision in *Terra-West, Inc.* 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. *Terra-West, Inc.*, 150 Idaho at 399, 247 P.3d at 626.

Additionally, even if a telephone call or letter could be considered notice (which it cannot as discussed above) Plaintiffs' discussions with counsel for EIRMC never involved notice of the commencement of a lawsuit or the substance of the claims against EIRMC. In fact, the conversations between Plaintiffs' counsel and counsel of EIRMC consisted of Plaintiffs' counsel assuring counsel for EIRMC that Plaintiffs were not going to initiate a lawsuit against EIRMC. R. Vol. 1, p. 140-141, 144. The only correspondence received from Plaintiffs' counsel merely stated that Plaintiffs would pursue their claims wherever they might lead, it was possible the Cook defendants will try to blame Dr. Taylor and the hospital, that it would be up to the Cook defendants as to whether it really wanted to implicate either Dr. Taylor or the hospital, and that Plaintiffs would have no reason to implicate Dr. Taylor and the hospital unless the Cook defendants pushed things in that direction. R. Vol. 1, p. 141. There was nothing in the

correspondence regarding the filing of a lawsuit against EIRMC by Plaintiffs or the substance of any claims by Plaintiff against EIRMC. Accordingly, Plaintiffs' claim that notice was provided through discussions with counsel for EIRMC is without merit.

Plaintiffs attempt to equate the filing of a prelitigation screening panel request with actual notice that a lawsuit has been filed against EIRMC is equally without merit. The prelitigation screening procedure was designed specifically for the purpose of encouraging consideration of claims informally and without the necessity of litigation. Idaho Code § 6-1005.[3] The process, which is entirely overseen by the Idaho State Board of Medicine, was never designed for the purpose of giving notice to a party of the commencement of a medical negligence action. It was designed to avoid litigation. *See Mitchell v. Bingham Memorial Hospital*, 130 Idaho 420, 425, 942 P.2d 544, 549 (1997) ("The legislature therefore declared that it is in the public interest to encourage nonlitigation resolution of claims against physicians and hospitals by providing for prelitigation screening of such claims.") Indeed, 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 and for thirty (30) days thereafter, which is how the process works.

Further, very little information was provided by Plaintiffs to EIRMC and Dr. Taylor

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[3] "Prelitigation screening panel proceedings are not a civil lawsuit, nor are they an adjunct to a civil lawsuit. They are entirely separate proceedings. The prelitigiation screening panel proceedings are informal and nonbinding, the rules of evidence do not apply, no record is kept, there is no cross-examination or rebuttal, the proceedings are closed even to the parties except when they are presenting their own testimony and argument . . ." *Rudd v. Merritt*, 138 Idaho 526, 531, 66 P.3d 230, 235 (2003).

through the prelitigation process. Plaintiffs prelitigation screening application in this case was very vague and consisted of a mere thirty-seven (37) words. Also, numerous prelitigation screening panels are filed and hearings completed which never result in formal litigation. Thus, the filing of a prelitigation screening panel request does not equate to the filing of a lawsuit against a party or even give a potential party notice that a lawsuit will be commenced within the statutory time. This is similar to the situation in *Ketterling v. Burger King Corp.*, 152 Idaho 555, 558, 272 P.3d 527, 530 (2012) wherein this Court stated that even if the manager and insurance agent of a restaurant had notice of an injury "that would not be sufficient to impart 'notice of the institution of the action'" as required by I.R.C.P. 15. This Court went on to state ". . . notice of an injury within the limitations period is not the same as notice of the filing of the lawsuit within the limitations period." *Id.* (citing *Winn v. Campbell*, 145 Idaho 727, 730, 184 P.3d 852, 855 (2008)). "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.*

Accordingly, a prelitigation screening panel request does not equate to the filing of a lawsuit against a party nor does it give a potential party sufficient notice that a lawsuit will be commenced within the applicable statute of limitations. Thus, there is no dispute that EIRMC had no notice of a lawsuit being filed against it until February 3, 2013; forty-six (46) days after the statute of limitations had run. Consequently, the situation present in this case places EIRMC exactly in the same position as the third-party defendant in *Griggs* and requires dismissal of EIRMC from this action. Therefore, EIRMC respectfully requests that this Court affirm the district court's Opinion and Order Granting EIRMC's and Dr. Taylor's Motions for Summary

Judgment.

C. **It defies logic that a federal rule or federal law could govern EIRMC in this matter where the federal court never had jurisdiction over EIRMC.**

EIRMC was never part of the federal lawsuit and the federal court never had jurisdiction over EIRMC in said lawsuit. Plaintiffs admit that once they filed their Second Amended Complaint on January 16, 2014, the federal court was deprived of subject matter jurisdiction. R. Vol. 1, p. 52. The federal court agreed that it lacked subject matter jurisdiction. R. Vol. 2, p. 291. When service of process was effected on EIRMC it was with a state court summons. Thus, the federal court never had personal jurisdiction over EIRMC because "service of process is the due process procedure that vests a court with jurisdiction over a person . . ." *McGloon v. Gwynn*, 140 Idaho 727, 730, 100 P.3d 621, 624 (2004). Accordingly, it is illogical that a federal rule or federal law could affect EIRMC's substantive rights in this state court lawsuit and/or supersede Idaho law when the federal court never had subject matter over the claim involving EIRMC and never had personal jurisdiction over EIRMC.

D. **Federal case law is clear that in a diversity action the question of when an action commences for statute of limitations purposes is a substantive question governed by state law, therefore Idaho state law governs this matter.**

The determinative issue/question in this case is: when was Plaintiffs' medical negligence action commenced against EIRMC for purposes of Idaho's statute of limitations? Contrary to Plaintiffs' sophistry, this question cannot be answered by the Federal Rules of Civil Procedure, whether it is Rule 3 or Rule 15. The United State Supreme Court has held that the Federal Rules of Civil Procedure do not answer the question of when a cause of action derived from state law

commences for purposes of the state's statute of limitations: "In our view, in diversity actions [Federal] 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." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980). In a concurring opinion, Ninth Circuit Court of Appeals Chief Judge (at the time) Kozinkski concisely summarized *Walker*:

> Confronted with a state substantive rule (the statute of limitations) and a federal procedural rule fixing the date when a civil action commences, **the Court held that there was no conflict because the two rules dealt with different questions**. *Id.* at 750-51, 100 S. Ct. 1978. **The federal rule, the Court noted, set the date for the commencement of the action for the purpose of measuring various time periods internal to the lawsuit**. *Id.* at 751, 100 S. Ct. 1978. **The rule wasn't meant to affect the time when the statute of limitations was tolled by commencement of the lawsuit**. *Id.* at 751-53, 100 S. Ct. 1978. **The latter was a matter of state substantive law**. Because the federal procedural rule and the state substantive rule could co-exist peaceably within their respective spheres, the Court concluded that each could be given full effect: **The state rule would perform the backwards-looking function of determining whether the action was brought within the statute of limitations, whereas the federal rule would determine when the action began for the forward-looking purpose of measuring time periods applicable to the litigation**. *Id.* at 750-53, 100 S. Ct. 1978.
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> . . . **a broad reading of the federal procedural rule could impinge on the substantive state law right by extending the statute of limitations. This would have led to the "'inequitable administration' of the law" by giving these plaintiffs greater rights than they would have enjoyed in state court**, "solely because of the fortuity that there is diversity of citizenship between the litigants." *Id.* at 753, 100 S. Ct. 1978 (internal citation omitted).

Makaeff v. Trump Univ., LLC, 715 F.3d 254, 272-73 (9th Cir. 2013) (Kozinski, J., concurring) (emphasis added).

Likewise, Rule 15 of the Federal Rules of Civil Procedure does not answer the question of when a claim arising out of Idaho state law is commenced for purposes of Idaho's statute of

limitations. In fact, Plaintiffs never made the argument at the district court level that Fed. R. Civ. P. 15 was somehow controlling or determinative in this matter; Plaintiffs focused exclusively on Fed. R. Civ. P. 3. This appeal is the first time Plaintiffs have made such an argument regarding Fed. R. Civ. P. 15. This Court has repeatedly held that it "will not consider issues that are raised for the first time on appeal." *Bell v. Idaho Dept. of Labor*, 157 Idaho 744, 749, 339 P.3d 1148, 1153 (2014) (citing *Sadid v. Idaho State Univ.*, 151 Idaho 932, 941, 265 P.3d 1144, 1153 (2011). Accordingly, Plaintiffs reliance on *Hanna v. Plumer*, 380 U.S. 460 (1965) and *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) and attempt to avoid the *Erie* doctrine in this case is misplaced and without merit because the issue or question in dispute in this matter is obviously not answered by the Federal Rules of Civil Procedure.

It is beyond dispute that when a federal court exercises diversity jurisdiction the forum state's substantive law applies and controls. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Statutes of limitations are substantive for *Erie* purposes. *Guar. Trust Co. v. York*, 326 U.S. 99, 109-110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). It is well established that in diversity cases state law governs not only the limitations period but also the commencement of the limitations period. *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949); *Guar. Trust Co. v. York*, 326 U.S. 99, 109-110, 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, there is no question that *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) is the substantive law that applies, controls, and dictates the outcome of this matter.

The United States Supreme Court case of *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980) is on point in this matter and Plaintiffs' attempt to distinguish it is without merit. In *Walker*, the U.S. 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 purposes of tolling the state statute of limitations." *Id.* at 741. In said case the U.S. 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 U.S. Supreme Court went on to state in *Walker*:

> 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 federal court should be substantially the same, so far as legal rule determine the outcome of the 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 on-recovery a federal court in a diversity case should follow State law."

Id. at 745.

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 applies and Idaho law interpreting when a lawsuit commences for statute of limitations purposes governs the issue of when Plaintiffs' state law action commenced. 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 are arguing the exact opposite. Plaintiffs contend that this Court should follow federal law and by doing so come to a result that would be completely 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 multitude of cases that follow *Erie* 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 case Plaintiffs cite to in their opening brief as standing for the proposition that federal procedural law is clear that an amended complaint is deemed filed as of the date the motion to amend is filed actually holds:

> The Court concludes that **the issue of when this action commenced** as a class action for purposes of removal under CAFA **is governed by state law, not federal law.** As the *Schillinger* court regognized, "**in cases for which state law provides the rule of decision, federal courts apply state statute of limitations, 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**) . . .
>
> "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. (internal citation omitted). This rule is based on the familiar principles enunciated 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. *See Walker*, 446 U.S. at 744-45, 100 S. Ct. 1978. *See also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

Buller Trucking Co. v. Owner Operator Indep. Driver Risk Retention Group., 461 F. Supp. 2d 768, 775 (S.D. Ill. 2006) (emphasis added).

Thus, under the facts of this case this 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 determined by the district court in its 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; it was not until the actual filing of the second amended complaint that the action was commenced. Consequently, Plaintiffs did not commence the action against EIRMC and Dr. Taylor until after the statute of limitations had expired. Morever, even construing *Terra-West, Inc.* as a modification of the holding in *Griggs*, Plaintiffs failed to provide notice of the impending action/substance of the amendment in either of the two exclusive ways provided for by this Court in *Terra-West, Inc.* Accordingly, Plaintiffs' claims against EIRMC and Dr. Taylor are barred by the statute of limitations. Therefore, the district court's decisions granting summary judgment for EIRMC and Dr. Taylor and denying Plaintiffs' motion for reconsideration should be affirmed.

E. **The April 9, 2014 ex parte Order obtained by Plaintiffs in federal court is void and has no value or applicability to this matter because the federal court was without jurisdiction.**

On March 4, 2014 (after the federal court remanded this case back to state court, was divested of jurisdiction, and after EIRMC had been served with the Second Amended Complaint) Plaintiffs filed a Rule 60 Motion to Clarify Docket Entry Order in federal court. R. Vol. 2, pp. 283-284. Because EIRMC was never a party to the federal court proceedings and because copies

of Plaintiffs' Motion to Clarify were never served upon EIRMC, Plaintiffs' Motion to Clarify was unopposed. Interestingly, Plaintiffs must have realized that they had a problem with the statute of limitations with regard to EIRMC and Dr. Taylor because they filed their motion with the federal court before EIRMC or Dr. Taylor had even moved for summary judgment on the issue. The federal court entered an order on the Motion to Clarify on April 9, 2014. R. Vol. 2, p. 240.

"**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) (emphasis added). "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.2d 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.) "'**Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.**'" *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012, 140 L.Ed. 2d 210 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868)).

Accordingly, because 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 matter.[4]

F. **This Court should not overturn the holdings of *Griggs v. Nash* and *Terra-West, Inc. v. Idaho Mutual Trust, LLC* as urged by Plaintiffs; this case is a matter of Plaintiffs failing to follow established Idaho law.**

The last ten (10) pages of Plaintiffs' opening appellate brief is dedicated to urging this Court to overturn its decisions in *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989) and *Terra-West, Inc. v. Idaho Mutual Trust, LLC*, 150 Idaho 393 (2010). However, the statute of limitations problem was self-created and self-inflicted by Plaintiffs failure to follow Idaho law.

[4] Plaintiffs knew about the order for 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 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, 108 (2013) (reciting district court's rationale for denying Campbell's Motion for Reconsideration).

1. Plaintiffs' statute of limitations problem was self-inflicted by failing to read, understand, and/or follow Idaho law.

The only reason this matter ever ended up in federal court in the first place was because of Plaintiffs failure to follow Idaho law. 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/should have filed the present suit against the Cook Defendants, Dr. Taylor, and EIRMC at the same time in state court (September 2013) and then had several options. One option was to serve process upon all parties and then enter into a stipulation or move the district court for an order staying the entire litigation until the prelitigation proceedings involving EIRMC and Dr. Taylor had concluded. Another option was to serve process upon all parties and then enter into a stipulation or move the district court for an order staying the litigation with respect to EIRMC and Dr. Taylor until the prelitigation proceedings concluded while proceeding with the litigation against the Cook Defendants. Another option was to simply wait until the prelitigation proceedings involving EIRMC and Dr. Taylor had concluded and then serve process upon all parties. Yet another option was for Plaintiffs to serve process upon the Cook Defendants and then wait to serve process upon EIRMC and Dr. Taylor until the conclusion of the prelitigation proceedings.

Any one of the foregoing actions on the part of Plaintiffs would have avoided the Cook Defendants removing the action to federal court. Any one of these actions on the part of Plaintiffs would have avoided Plaintiffs having to seek leave of the court to amend their complaint to add Dr. Taylor and EIRMC as defendants and add new causes of action. In addition to the foregoing actions, Plaintiffs could have moved the state court to amend the complaint to add Dr. Taylor and EIRMC as defendants when the Cook Defendants moved for removal of the action to federal court in October of 2013. Plaintiffs could have also filed a separate state court action against EIRMC and Dr. Taylor and then moved to consolidate said action with the action against the Cook Defendants when they attempted to remove the same. 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.

Thus, to avoid problems like the ones Plaintiffs created and inflicted upon themselves in this matter one must only follow well-established Idaho law and take one of the many paths outlined above. Therefore, Plaintiffs request to overturn Idaho case law precedent as a way to remedy problems that they created for themselves should not be permitted. Consequently, EIRMC would request that this Court decline Plaintiffs' invitation to overturn Idaho case law precedent.

2. The rule proposed by Plaintiffs is the exact opposite of this Court's holding in *Griggs v. Nash* and this Court has already stated in *Terra-West, Inc.* that the rule proposed by Plaintiffs is contrary to the purposes of any statute of limitations and therefore should be rejected.

The rule proposed by Plaintiffs is contrary to this Court's holding in *Griggs v. Nash*, 116

Idaho 228, 775 P.2d 120 (1989) and is contrary to this Court's reasoning in *Terra-West, Inc. v. Idaho Mutual Trust, LLC*, 150 Idaho 393 (2010). In *Griggs*, two defendants moved for leave of the court to file a third party complaint. *Id.* at 234, 775 P.2d at 126. The motion for leave was made within the applicable statute of limitations, however the district court did not rule on the motion until months later and the actual third party complaint was not filed until after the applicable statute of limitations had expired. *Id.* Pursuant to I.R.C.P. 3(a) this Court held that the action was not commenced until the third-party complaint was actually filed with the court and consequently it was barred by the statute of limitations. *Id.*

In *Terra-West, Inc.*, this Court set forth its reasoning for requiring notice to a proposed new defendant of an impending action within the statute of limitations:

> However, 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. **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. Under I.R.C.P. 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 a 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, which functions to prevent stale claims and to protect a defendant's reasonable expectation that his earlier conduct can no longer give rise to liability.** *See Hawley v. Green*, 117 Idaho 498, 501, 788 P.2d 1321, 1324 (1990). **However, the same rationale does not apply in this case. As mentioned above, Idaho Mutual was served with the motion for leave to amend, as well as the**

> **proposed amended complaint. Idaho Mutual, unlike a party that has not yet been joined, had notice of the substance of the proposed amendment before the six-month period expired under Idaho Code section 45–510. Consequently, *Griggs* is distinguishable because this case does not present the same notice concern.**

Terra-West, Inc. v. Idaho Mutual Trust, LLC, 150 Idaho 393, 399-400, 247 P.3d 620, 626-27 (2010) (emphasis added).

Plaintiffs comparison to a defendant named in an original complaint as opposed to a proposed defendant in a motion to amend are vastly different situations. In the case of an original complaint the defendants have been formally named presumably within the applicable statute of limitations. By virtue of the filing, formal notice is given that the defendants are part of a legal action. The plaintiffs are then required to serve the timely filed complaint upon the defendants within a certain amount of time mandated by rule. Defendants have a certain defined amount of time in which they can reasonably rely upon.

However, a simple request for leave to amend does not place potential third-parties on notice that they are involved in a legal action. In fact, the rule proposed by Plaintiffs would ensure that potential third-parties would never receive notice that they might be potentially involved in a legal action and would set no time limit as to when a third party could be dragged into the lawsuit. Conceivably, under Plaintiffs proposal a Plaintiff could file a motion to amend the day before the applicable statute of limitations was set to expire, the court could wait a year to rule on the motion (much like the district court in *Griggs*), and then the unwitting party could be dragged into a lawsuit one year

after the statute of limitations has expired; there is no set timetable like there is with original complaints. Hence, this situation is more closely aligned to and should be treated like the situation of where a party is attempting to add a new party to a lawsuit using the relate back doctrine of I.R.C.P. 15(c), which specifically requires that the party to be added receives notice of the institution of the action within the applicable statute of limitations.

Further, unlike an original complaint, the court is not bound to grant a request for leave to amend. Thus, the two situations are vastly different and the notice concerns addressed by this Court in *Terra-West, Inc.* are valid. Accordingly, Plaintiffs proposed rule should be rejected.

3. Just because some jurisdictions have a different rule than Idaho's concerning the commencement of an action is not a valid reason to overturn well-established Idaho law. Contrary to Plaintiffs assertion, the notice concerns addressed by this Court in *Terra-West, Inc.* are shared by other jurisdictions.

Plaintiffs' final argument in support of their proposal to overturn established Idaho case law precedent with regard to the commencement of an action is that other jurisdictions have established a rule different than Idaho's and so we should change our rule. The only argument posited by Plaintiffs in support of such a position is that other jurisdictions do not share the notice concerns addressed by this Court in *Terra-West, Inc.* However, if one takes closer look at the cases actually cited in the page long footnote of pages 35-36 of Plaintiffs' brief one discovers that, contrary to Plaintiffs' assertion, many jurisdictions share the same notice concerns this Court discussed in *Terra-West, Inc.*

One of Plaintiffs' most prominently cited cases throughout their brief, *Nett v. Bellucci*, 774 N.E.2d 130 (Mass. 2002), is a perfect example. Said case was two certified questions from the United States Court of Appeals for the First Circuit in a diversity action to determine under Massachusetts law when an action is commenced against a party who is added by way of amendment to the complaint. The Massachusetts Supreme Court held that as far as Massachusetts law was concerned the operative date for commencement of an action for purposes of their statutes of repose was the date of filing a motion for leave to amend a complaint to add a party. *Id.* at 143. However, the party to be added to the amended complaint "**was served with the motion to amend, and was informed that it had been filed with the court, prior to the expiration of the statute of repose.**" *Id.* at 138 (emphasis added). In fact, as the Massachusetts Supreme Court noted:

> **Local rule 15.1(b) requires that the motion to amend be served on the proposed defendant prior to the filing of the motion, a rule that guarantees service on the defendant prior to the expiration of the statute of repose,** without even the slight flexibility for service provided by rule 4(j). In other words, whereas timely commencement of an action by the filing of the complaint does not necessarily translate into notification to the defendant until sometime after the expiration of the repose period, **the requirement of prior service under the local rule ensures notification prior to the expiration of the repose period. With that notice and filing, such a defendant is made aware, within the repose period, of the fact that the plaintiff is bringing suit for the alleged prior conduct.**

Id. at 138 (emphasis added).

Obviously, the fact that the party to be added by the amended complaint was required to receive and did receive the motion to amend prior to its filing with the court and prior to the

expiration of the statute of repose evidences the fact that Massachusetts shares the same notice concerns voiced by this Court in *Terra-West, Inc.*

Similarly, as cited previously in this brief (and as recognized by this Court in *Terra-West, Inc.*) in *Rademaker v. E.D. Flynn Export Co.*, 17 F.2d 15 (5th Cir. 1927) "central to the court's analysis was the fact that the defendant had been served with the motion prior to the expiration of the statute of limitations, and the motion "fully and comprehensively" laid out the substance of the proposed amendment." *Terra-West, Inc.*, 150 Idaho at 399, 247 P.3d at 626. In *Simpson v. Hatteras Island Gallery Restaurant, Inc.*, 427 S.E.2d 131 (N.C. Ct. App. 1993) the court notes that the hearing on the motion to amend to add a new party to the action was continued twice at the request of the counsel for the party to be added by the motion to amend. *Id.* at 138. Obviously notice and most likely service of the motion to amend and the proposed amended complaint had been effected on the proposed new party or else its counsel could not have requested two continuances of the hearing.

Colorado, who by Plaintiffs own admission, has a similar rule or statute to Idaho governing commencement of claims has had its Courts of Appeal issue a decision acknowledging notice concerns:

> In summary, we hold that if, before the expiration of the appropriate statute of limitations, a plaintiff files a motion to amend accompanied by an amended complaint pursuant to C.R.C.P. 15(a), **and** if the motion [and] amended complaint . . . are served on a defendant before expiration of the statute of limitations, then the statute of limitations is tolled until the trial court rules on plaintiff's motions.

Moore v. Grossman, 824 P.2d 7, 10 (Colo. Ct. App. 1991) (emphasis added).

New York has similar notice concerns:

> . . . The court has ruled that where a plaintiff has served the notice of motion and proposed amended complaint upon a third-party defendant prior to the expiration of the three-year State of Limitations the cause of action was timely interposed. (*Allstate Ins. Co. v. Emsco Homes*, 93 A.D.2d 874.) However, the court has ruled that where the proposed amended complaint was contained in a surreply which **was not sent to the new proposed defendant** (where there was no third-party claim) **until after the Statute of Limitations had expired, the new cause of action was denied untimely**. (*Gagliardi v. New York City Housing Auth.*, 88 A.D.2d 610.)

Landi v. We're Assoc., 124 Misc. 2d 331, 335-336 (N.Y. Sup. 1983) (emphasis added).

Pennsylvania, when faced by similar request from a litigant to change the law as Plaintiffs are doing in this case, responded and held as follows:

> In Pennsylvania, actions for personal injuries must be brought within two years. Plaintiffs concede, as they must, that the procedure employed to add manufacturers as defendants in this case was not calculated to give notice to these defendants that a claim was being made against them until after the period for filing suit had expired. Plaintiffs nevertheless urge this court to adopt a new rule declaring that statutes of limitations are tolled by the filing of a petition for leave to amend in the trial court. We decline plaintiffs' offer.
>
> . . .
>
> **In this case, the plaintiffs had ample opportunity to commence a timely action against the additional manufacturers in the manner provided by the Pennsylvania Rules of Civil Procedure. The rules were promulgated to promote uniformity and to provide procedural due process for all litigants. Rather than adopt an ad hoc exception to the rules and the decisions interpreting those rules, we hold, consistent with prior appellate court decisions, that an action is commenced only by filing with the prothonotary a praecipe for writ of summons, a complaint, or an agreement for an amicable action**. Therefore, we affirm the judgment entered by the trial court.

Aivazoglou v. Drever Furnaces, 613 A.2d 595, 598, 600 (Pa. Super. Ct. 1992) (internal citation omitted) (emphasis added).

Further, notice concerns in the present situation are much like the notice concerns presented in a Rule 15(c) relate-back situation where a party to be added after the expiration of the statute of limitations must have notice of the institution of the action against it prior to the expiration of the applicable statute of limitations. In both cases, previously unnamed parties are being allowed to be added to lawsuits after the statute of limitations has expired and thus it is logical and appropriate that such parties have actual notice of the institution of the action prior to the running of the statute of limitations against them. Therefore, the rationale and holding of *Curry v. Turner*, 832 So. 2d 508, 510-513 (Miss. 2002) (wherein the Mississippi Supreme Court held it was proper to dismiss new defendants added to an amended complaint which was filed after the applicable statute of limitations had expired) is valid and persuasive.

In this case, Plaintiffs had ample opportunity to commence a timely action against EIRMC and Dr. Taylor in the manner provided by Idaho law as outlined above in Section F.1. It was Plaintiffs failure to follow Idaho law which caused them to end up in federal court in the first place. This Court should not adopt an ad hoc exception to Idaho's rules and the Idaho case law interpreting those rules for Plaintiffs who failed to follow Idaho law in the first place. In addition, contrary to Plaintiffs' assertion, the notice concerns addressed by this Court in *Terra-West, Inc.* are shared by several jurisdictions as set forth above. Accordingly, EIRMC requests that this Court reject Plaintiffs' invitation to overturn its decisions in *Griggs* and *Terra-West, Inc.* and affirm the district court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment and Opinion and Order Denying Plaintiffs' Motion for Reconsideration.

G. EIRMC is entitled to its attorney's fees and costs on appeal pursuant to Idaho Code § 12-121 and Rules 40 and 41 of the Idaho Appellate Rules

This Court has held that a party is "entitled to attorney fees on appeal pursuant to I.C. § 12-121 if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation." *Rowley v. Fuhrman*, 133 Idaho 105, 109-110, 982 P.2d 940, 944 (1999). In this case, dismissal of Plaintiffs' action was the result of Plaintiffs failing to follow Idaho law and failing to commence their action against EIRMC and Dr. Taylor within the applicable statute of limitations. *Griggs v. Nash* has been good case law since 1989 and *Terra-West, Inc.* was decided in 2010 yet Plaintiffs ignored both cases. Plaintiffs' arguments with regard to federal law are without foundation and contrary to over seventy-five years of U.S. and federal law case law precedent as set forth above.

Likewise, Plaintiffs call for a change in Idaho law is unreasonable based upon the fact that had they simply followed Idaho law in the first place they could have avoided untimely commencing their lawsuit against EIRMC and Dr. Taylor. Accordingly, Plaintiffs' appeal was brought and pursued frivolously, unreasonably, and without foundation. Consequently, EIRMC is entitled to its attorney's fees and costs on appeal.

IV. CONCLUSION

Pursuant to *Erie* and over seventy-five (75) years of U.S. Supreme Court and federal case law precedent there is no question that Idaho state law governs this matter. Pursuant to I.R.C.P. 3(a) and this Court's holding in *Griggs v. Nash* an action does not

commence against a newly added defendant in a lawsuit until the actual filing of the complaint. Pursuant to *Terra-West, Inc. v. Idaho Mutual Trust, LLC* a motion to amend a complaint only commences the proceedings against an unnamed party if the party to be added received notice of the impending action by receiving a copy of the motion to amend and/or proposed amended complaint prior to the expiration of the applicable statute of limitations.

In this case, Plaintiff failed on both accounts. Plaintiffs filed their second amended complaint, adding EIRMC and Dr. Taylor as parties, after the applicable statute of limitations had expired and did not serve EIRMC with a copy of the motion to amend or proposed amended complaint prior to the expiration of the statute of limitations. Thus, Plaintiffs' action against EIRMC is barred as a matter of law. Accordingly, EIRMC respectfully requests that this Court: 1) Affirm the district court's Opinion and Order Granting Medical Defendants' Motions for Summary Judgment; 2) Affirm the district court's Opinion and Order Denying Plaintiffs' Motion for Reconsideration; and 3) Grant EIRMC its attorney's fees and costs on appeal.

DATED this 29th day of December, 2015.

HAWLEY TROXELL ENNIS
& HAWLEY, LLP

MARVIN M. SMITH

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CERTIFICATE OF SERVICE

I hereby certify that I served two (2) true and correct copies of the foregoing document upon the following this 29th day of December, 2015, by the method indicated below.

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