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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Deputy Clerk - Cardinale, Korby

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JULENE DODD, and WILLIAM DODD,

Plaintiffs,

-vs-

RORY JONES, ESQ., and JONES WILLIAMS FUHRMAN GOURLEY, P.A., and DOES 1-50,

Defendants.

Case No. CV01-21-18926

ORDER ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT AND PENDING MOTIONS

Twelve motions are before the Court, including three motions for summary judgment: (1) Plaintiffs' October 4, 2022 motion for partial summary judgment; (2) Defendants' December 12, 2022 motion for summary judgment; and (3) Plaintiffs' January 20, 2023 motion for summary judgment related to their breach of contract claim.

In addition, six motions to strike, and/or prohibit testimony, are before the Court including: (1) the October 31, 2022, motion to strike the declarations of various witnesses filed by Defendants; (2) the November 7, 2022, motion to strike the October 4, 2022 declaration Fred Simon, M.D. filed by Defendants; (3) the December 23, 2022, motion to strike the November 19, 2022 Amended Declaration of Fred Simon, M.D. filed by Defendants; (4) the December 23, 2022, motion in limine regarding the testimony of Rebecca Czarnik, R.N. filed by Defendants;

(5) the January 19, 2023, motion to strike the December 30, 2022 Second Supplemental Declaration of Fred Simon, M.D., filed by Defendants; and (6) the February 2, 2023, motion to strike the January 30, 2023 Second Supplemental Declaration of Fred Simon, M.D. filed by Defendants.

In addition, Plaintiffs have filed two (2) motions to amend the scheduling order on January 3, 2023 and March 3, 2023 as well as one (1) motion to amend their complaint to include a claim for punitive damages on October 18, 2022.

The Court has considered the submissions filed by each party in support of their own motions, and in opposition to the cross motions, the oral arguments held in this case on February 13, 2023 and March 6, 2023, as well as the record in this case, and enters this order on all pending motions before the Court.

I. FACTS

A. Mrs. Dodd's medical experiences.

Plaintiffs Julene and William Dodd are husband and wife. (Declaration of William Dodd filed Oct. 4, 2022, "W. Dodd Decl." ¶ 4) In June of 2017, Mrs. Dodd saw her primary care physician, Dr. Cherise Tarter, for breathing difficulties. (Declaration of Julene Dodd in Support of Plaintiffs' Motion for Partial Summary Judgment filed on Oct. 4, 2022, "J. Dodd Decl." ¶¶ 4-5.) Mrs. Dodd was prescribed an inhaler, and when that did not alleviate her symptoms, a CT scan was performed and revealed that Mrs. Dodd had a large hiatal hernia, putting pressure on one of her lungs. (*Id.* ¶¶ 4-5.)

On August 2, 2017, Dr. Forrest Fredline performed an endoscopy that confirmed the CT scan findings. (*Id.* ¶ 6.)

On August 16, 2017, Mrs. Dodd was admitted to St. Alphonsus Hospital in Nampa, Idaho for an elective hiatal hernia repair, which was performed by Dr. Fredline. (*Id.* ¶ 7.) The following day, Mrs. Dodd was given enemas and experienced abdominal pain that became worse after each enema. (*Id.* ¶¶ 9-11.) Mrs. Dodd collapsed on August 19, 2017 and a C.T. scan was performed, indicating she had free fluid throughout her abdomen. (*Id.* ¶ 12.) Mrs. Dodd underwent emergency surgery and learned that her abdomen was full of fecal matter. (*Id.*)

Mrs. Dodd was eventually transferred to Vibra Hospital on September 19, 2017. (*Id.* ¶ 14.) She was unable to move her limbs on her own, had a wound vacuum closure devise placed on her abdomen, a tracheotomy with speaking valve, a urinary catheter, and a nutritional catheter. (*Id.* ¶ 15.) Mrs. Dodd required observation and care on a 24-hour basis and had no strength in her arms and legs. (*Id.*) She could only speak in a faint whisper, had difficulty swallowing, and developed a large pressure sore from being in a hospital bed for such a long time. (*Id.*)

Mrs. Dodd was transferred from Vibra Hospital to Sunny Ridge Nursing facility on November 22, 2017. (*Id.* ¶ 18.) She still needed wound care because she had infections in her abdomen, could not move her limbs on her own, suffered from depression, required aggressive treatment for constipation, and was on a combination of thirty-three (33) different medications. (*Id.*)

On December 14, 2017, Mrs. Dodd had a brain MRI and was subsequently transferred to St. Alphonsus in Nampa, Idaho for brain infection treatment. (*Id.* ¶ 20.) After this treatment, Mrs. Dodd was transferred back to Sunny Ridge, where she continued to convalesce until March 2018, when she was released to go home. (*Id.* ¶¶ 20-21.) She was still unable to walk, had to use a wheelchair, and needed 24-hour nursing care for three months. (*Id.* ¶ 21.) Mrs. Dodd

outlines the continued medical care that she needed in 2020 and 2021, the state of her marriage following her medical experiences, as well as what her life has been like since her medical experiences described in this case. (*See id.* ¶¶ 41-52.) William Dodd similarly outlines how Mrs. Dodd's life has changed after her medical experiences, as well as what his relationship with her is like following their experiences. (*See* W. Dodd Decl. ¶¶ 29-31.)

B. Rory Jones as attorney for Plaintiffs.

Mrs. Dodd met attorney Rory Jones through her brother, Jeff Day. (J. Dodd Decl. ¶ 22.) Mr. Jones represented Mrs. Dodd in her divorce approximately twenty years prior to her hernia surgery. (*Id.*) When Mr. Day learned that Mrs. Dodd's condition at the hospital had deteriorated, he called Mr. Jones in August of 2017, informed Mr. Jones of her situation, and that Mrs. Dodd and Mr. Dodd would need legal help to cover the costs of Mrs. Dodd's healthcare. (Declaration of Jeff Day filed Oct. 4, 2022, "J. Day Decl." ¶¶ 5-6.) Mr. Day drove Mr. Jones to St. Alphonsus to see Mrs. Dodd while she was in the Intensive Care Unit. (*Id.* ¶ 7.) Mr. Jones spoke with Mr. Dodd at the hospital. (W. Dodd Decl. ¶¶ 14-15.)

On November 3, 2017, Mr. Jones came to Sunny Ridge with a Contingent Fee Agreement, which Julene and William signed, and in which the Dodds retained Jones Gledhill Fuhrman Gourley, P.A. "to render legal services on behalf of J[u]lene Day Dodd for Medical Malpractice" and William Dodd for "loss of consortium and other claims and/or potential causes of action against St. Alphonsus Medical Center and all treating Physicians." (J. Dodd Decl. ¶ 25, Ex. 1.)

Mrs. Dodd testified that she "had little contact with Mr. Jones or any representative of his firm" over the following eighteen (18) months, though she would call the firm every two or three months, but received "few details." (*Id.* ¶ 26.) Mrs. Dodd visited with Mr. Jones in his office in

July of 2018. (*Id.* ¶ 31.) William states that between March 8, 2018 and June 23, 2020, he did not have contact with Mr. Jones or anyone at his firm. (W. Dodd Decl. ¶ 21.)

Mr. Jones testified that during 2018 and 2019, he consulted with medical malpractice attorneys in the area to either associate with, or who could take over Mrs. Dodd's case; they uniformly advised him that a perforated jejunum would not be a violation of the applicable standard of care in Mrs. Dodd's case, and that an infection secondary to the underlying surgery is a warned complication and not a violation of the standard of care if appropriate antibiotics were dosed, prescribed, and delivered. (Declaration of Rory Jones filed Nov. 7, 2022, "Jones Decl." ¶ 6.) Mr. Jones also testified that he consulted with physicians about the standard of care and received the same information. (*Id.* ¶¶ 8-9.) Mr. Jones testified that he informed Mrs. Dodd that he was having trouble finding doctors to support her case and that he was considering turning the case over to, or associating with, other attorneys to assist. (*Id.* ¶ 14.)

On August 13, 2019, Mr. Jones filed a Pre-Litigation Application and Claim with the Board of Medicine ("Board") and represented Mrs. Dodd in a hearing before the Board on October 24, 2019. (J. Dodd Decl. ¶ 32.) The Board issued its opinion on November 8, 2019, but served it on November 13, 2019. (Jones Decl. ¶ 11.)

Mr. Jones filed a Complaint and Demand for Jury Trial on behalf of Julene Dodd and William O. Dodd, Jr., Plaintiffs, against Forrest Fredline, M.D. and St. Alphonsus Regional Medical Center, Nampa, Defendants, in Canyon County in Case CV14-19-11966 on December 12, 2019 (the "underlying medical malpractice action"). (Req. for Judicial Notice in Supp. of Pls.' Mot. for Partial Summ. J. filed Oct. 4, 2022, Ex. 2.) That Complaint alleged claims for medical negligence, repondeat superior, agency by estoppel/non-delegable duty, damages, and attorney's fees. (*Id.*)

The Dodds allege that the statute of limitations for Mrs. Dodd's underlying medical malpractice action expired on December 8, 2019, and that Mr. Jones did not file the Dodds' lawsuit until December 12, 2019. (Compl. filed Dec. 6, 2021 ¶ 38; J. Dodd Decl. ¶ 34.) Mr. Jones testified that he mistakenly calendared the filing deadline from the November 13, 2019 date, as opposed to the November 8, 2019 date; as a result, Mr. Jones admits that he filed Mrs. Dodd's case beyond the statute of limitations deadline. (Jones Decl. ¶ 11.)

Once he realized that Mrs. Dodd's complaint was untimely, Mr. Jones still acknowledged that Mrs. Dodd would need medical testimony to recover damages for the August 2017 operation and related care. (*Id.* ¶ 12.) However, instead of recovering against St. Alphonsus and/or Dr. Fredline, her claim would be against his malpractice insurance. (*Id.*) Mr. Jones thus continued to try to obtain individuals who could provide medical testimony to support Mrs. Dodd's claim, and he opted to wait to tell her about the late-filed complaint to determine if he could do so. (*Id.* ¶¶ 12-13.)

On May 22, 2020, Mrs. Dodd met with Mr. Jones, at which time Mr. Jones informed Mrs. Dodd that he had missed the filing deadline by four days. (Jones Decl. ¶ 20; Decl. of Julene Dodd in Supp. of Pls.' Mot. for Summ. J. as to Breach of Contract Claim, or in the Alternative, for Partial Summ J. at 4, ¶ 14.)

C. This lawsuit and its procedural history.

On January 5, 2022, Plaintiffs filed their First Amended Complaint for Damages ("Amended Complaint") against Mr. Jones and the firm, alleging the following claims: (1) professional negligence; (2) breach of contract; (3) fraudulent concealment; and (4) declaratory relief. (Am. Compl. at 11-16.) Plaintiffs seeks damages, as well as attorney's fees and costs. (*Id.* at 16-17.) Defendants filed their answer to the Complaint on January 25, 2022.

1. **Plaintiffs' pending motions**.

On October 4, 2022, Plaintiffs filed: (1) Plaintiffs' Motion for Partial Summary Judgment, (2) a Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability, (3) a Notice of Lodging of Foreign Authority in Support of Plaintiffs' Motion for Partial Summary Judgment, (4) a Request for Judicial Notice in Support of Plaintiffs' Motion for Partial Summary Judgment,[1] (5) the Declaration of Fred Simon, M.D., in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability ("Simon Decl."), (6) the Declaration of Julene Dodd in Support of Plaintiffs' Motion for Partial Summary Judgment ("J. Dodd Decl."), (7) the Declaration of Mary S. Amschel, Esq. in Support of Plaintiffs' Motion for Partial Summary Judgment ("Amschel Decl."), (8) the Declaration of William Dodd ("W. Dodd. Decl."), (9) the Declaration of Khristen S. Vachal-Reese, Esq. ("Vachal-Reese Decl."), (10) the Declaration of Jeff Day ("J. Day Decl."), and (11) the Declaration Angelo L. Rosa, Esq. in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability ("Rosa Decl."); all filings are in support of the Plaintiffs' Motion for Partial Summary Judgment.

Plaintiffs also filed the Amended Declaration of Julene Dodd in Support of Plaintiffs' Motion for Partial Summary Judgment on October 31, 2022 ("Am. J. Dodd Decl."), the Amended Declaration of Fred Simon, M.D. in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability on November 19, 2022 ("Am. Simon Decl."), the Second Supplemental Declaration of Fred Simon, M.D. on December 30, 2022 ("Second Supp. Simon Decl."), and the Second Supplemental Expert Opinion Report of Fred Simon, M.D. on January 30, 2023

[1] On October 7, 2022, Defendants filed a Reply and Objection to Request for Judicial Notice. On October 14, 2022, Plaintiffs filed a Memorandum in Opposition to Defendants' Reply and Objection to Request for Judicial Notice. The Court addressed the request for judicial notice in a separate order dated March 23, 2023.

("1/30/23 Second Supp. Simon Decl."); all filings are in support of Plaintiffs' Motion for Partial Summary Judgment. Also on December 30, 2022, Plaintiffs' filed Plaintiffs' Omnibus Memorandum (1) in Preliminary Reply to Opposition of Motion for Partial Summary Judgment as to Liability and (2) Opposing Pending Motions to Strike Declarations of Dr. Fred Simon.

Defendants filed a Notice that Fredline Deposition is Substituted for Fredline Declaration on December 8, 2022, as well as Defense Response to Plaintiffs' Motion for Partial Summary Judgment on December 23, 2022. Plaintiffs filed a Plaintiffs' Reply to Defendants' Objection to Plaintiffs' Motion for Partial Summary Judgment on February 28, 2023.

On October 18, 2022, Plaintiffs filed Plaintiffs' Motion for Leave to Amend First Amended Complaint to Seek Punitive Damages Against Defendant as well as a Memorandum in Support of Plaintiffs' Motion foe Leave to Amend First Amended Complaint to Seek Punitive Damages Against Defendants. On November 7, 2022, Defendants filed Defendants' Memorandum in Opposition to Motion to Amend to Add Claim for Punitive Damages, along with the Declaration of Rory Jones ("Jones Decl."), the Declaration of Gary L. Cooper ("Cooper Decl."), and the Declaration of Forrest Fredline, MD ("Fredline Decl."). Plaintiff's filed Plaintiffs' Reply Memorandum in Support of Motion for Leave to Amend First Amended Complaint to Seek Punitive Damaged Against Defendants on December 30, 2022.

On January 3, 2023, Plaintiffs filed Plaintiffs' Motion for (1) Order Extending Expert Disclosure Deadlines; and (2) Order Shortening Time for Ruling, along with the declaration of Angelo L. Rosa, Esq. in support of such motion. Defendants filed their opposition to this motion on January 9, 2023. Plaintiffs filed a reply on February 6, 2023, along with a declaration of Angelo Rosa.

On January 20, 2023, Plaintiffs filed Plaintiffs' Motion for Summary Judgment as to Breach of Contract Claim or, in the Alternative, for Partial Summary Judgment, along with a memorandum in support, the declaration of Angelo L. Rosa, Esq. in support ("1/20/23 Rosa Decl."), the declaration of Julene Dodd in support ("1/20/23 J. Dodd Decl."), the declaration of William Dodd in support ("1/20/23 W. Dodd Decl."), and the declaration of Becky Czarnik, R.N. in support ("Czarnik Decl."). Defendants filed their opposition to this motion on February 17, 2023, and Plaintiffs filed their reply on February 28, 2023.

On March 2, 2023, Plaintiffs filed Plaintiffs' Motion for Relief From Case Scheduling Order, asking the Court to relieve Plaintiffs "of any adverse consequences stemming from their supplementation of the expert opinions of Rebecca E. Czarnik." (Mot. for Relief from Case Scheduling Order filed Mar. 2, 2023 at 2.) Oral argument was requested only if "this Court deems proper." (*Id.* at 5.) The Court has sufficient information to decide this motion and does so herein.

2. <u>Defendants' Motion for Summary Judgment</u>.

On December 12, 2022, Defendants filed a Defendants' Motion for Summary Judgment, a memorandum in support, the declaration of Gary Cooper ("12/12/22 Cooper Decl."), and the declaration of Joshua Barton, M.D. ("Barton Decl."). Plaintiffs filed Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment on January 30, 2023, along with the Declaration of Angelo L. Rosa, Esq. in Opposition to Defendants' Motion for Summary Judgment ("1/30/23 Rosa Decl.") and the Second Supplemental Expert Opinion Report of Fred Simon, M.D. ("1/30/23 Second Supp. Simon Decl."). Defendants filed their reply in support of the motion for summary judgment on February 6, 2023.

3. <u>Defendants' motions to strike and motions in limine</u>.[2]

Also pending before the Court are Defendants' motions to strike, as follows:

(1) On October 31, 2022, Defendants' filed Defendants' Motion to Strike the Declarations of Various Witnesses, as well as a memorandum in support, which Plaintiffs filed oppositions to on November 7, 2022, December 30, 2022, and January 3, 2023. Defendants' filed replies on January 3 and 5, 2023.

(2) On November 7, 2022, Defendants filed a motion to strike the October 4, 2022 declaration Fred Simon, M.D. along with a memorandum in support.

(3) On December 23, 2022, Defendants filed a motion to strike the November 19, 2022 Amended Declaration of Fred Simon, M.D. as well as a memorandum in support. On December 29, 2023, Defendants filed a supplemental brief regarding the motion to strike the Amended Declaration of Fred Simon, M.D.

(4) On December 23, 2022, Defendants' filed a Motion in Limine Re: Testimony of Rebecca E. Czarnik, R.N. along with a memorandum in support. On December 30, 2022, Defendants filed a supplement regarding this motion. Plaintiffs filed their opposition to the motion in limine to exclude the testimony of Becky

[2] In addition to the motions to strike described herein, on November 4, 2022, Plaintiffs filed Plaintiffs' Motion for Order Striking Defendants' Motion to Strike along with the declaration of Angelo L. Rosa in support, which Defendants opposed in a filing on November 7, 2022. The Court denied Plaintiffs' motion to strike in an order dated November 14, 2022.

Also, on December 13, 2022, Plaintiffs filed Plaintiffs' Motion for Order Striking Defendants' Motion for Summary Judgment along with the declaration of Angelo L. Rosa, Esq. in support. Defendants' filed their opposition on December 15, 2022, along with the declaration of Anthony Budge. The Court denied this motion to strike on the record in open court on December 16, 2022 and entered a written order to that effect on December 22, 2022. (*See* Ct. Min. filed Dec. 16, 2022.)

Czarnik on February 6, 2023, along with the declarations of Angelo L. Rosa and Becky E. Czarnik, R.N. Defendants' filed a reply on February 8, 2023.

(5) On January 19, 2023, Defendants filed a motion to strike the December 30, 2022 Second Supplemental Declaration of Fred Simon, M.D., and a memorandum in support. Plaintiffs filed an opposition on February 9, 2023.

(6) On February 2, 2023, Defendants filed a motion to strike the January 30, 2023 Second Supplemental Expert Opinion Report of Fred Simon, M.D. Defendants filed a reply to Plaintiffs' opposition to striking the declarations of Dr. Simon on February 8, 2023.

II. STANDARD

A. Summary Judgment and Motions to Strike.

"The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Ciccarello v. Davies*, 166 Idaho 153, 158–59, 456 P.3d 519, 524–25 (2019) (citing Idaho R. Civ. P. 56(a)). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Id.* 166 Idaho at 159, 456 P.3d at 525 (citations omitted). "In order to survive a motion for summary judgment, the non-moving party must 'make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.'" *Id.* (citations omitted). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Hollingsworth v. Thompson*, 168 Idaho 13, 17, 478 P.3d 312, 316 (2020) (citations omitted). "The fact that the parties have filed cross-motions for summary judgment does not

change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Intermountain Forest Mgmt., Inc. v. La. Pac. Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001) (citations omitted)

The admissibility of expert testimony is a threshold matter that is distinct from whether the testimony raises genuine issues of material fact sufficient to preclude summary judgment. *Summerfield v. St. Luke's McCall, Ltd.*, 169 Idaho 221, 228, 494 P.3d 769, 776 (2021) (citation omitted). The "liberal construction and reasonable inferences standard does not apply" when determining the admissibility of expert testimony. *Id.* 169 Idaho at 228-29, 494 P.3d at 776-77 (citation omitted). Instead, "the trial court must look at the witness' affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible." *Id.* 169 Idaho at 229, 494 P.3d at 777 (citation omitted).

A district court's evidentiary rulings and its decision whether to grant a motion to strike are reviewed under an abuse of discretion standard. *Lepper v. E. Idaho Health Servs., Inc.*, 160 Idaho 104, 108, 369 P.3d 882, 886 (2016) (citation omitted); *see also Mallonee v. State*, 139 Idaho 615, 623, 84 P.3d 551, 559 (2004). When evidence presented in opposition to a motion for summary is challenged as being inadmissible, the trial court must determine the admissibility of the evidence before ruling on the motion. *Ryan v. Beisner*, 123 Idaho 42, 45, 844 P.2d 24, 27 (Ct. App. 1992); *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012). Affidavits which consist of conjecture, conclusory allegations as to ultimate facts, or conclusions of law are to be disregarded. *See, e.g. Helca Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 782, 786, 839 P.2d 1192, 1196, 1200 (1992). If the affidavit contains some inadmissible matter, the whole affidavit need not be stricken or disregarded; the court may strike or disregard the

inadmissible parts and consider the rest of the affidavit. *Marty v. State*, 122 Idaho 766, 769, 838 P.2d 1384, 1387 (1992) (citing Moore's Federal Practice, Vol. 6, part 2, § 56.22(1) (1988)).

B. Discovery Violations and Sanctions.

Appellate courts conduct "a review of the record to determine if the finding of the trial court that there was a discovery violation is supported by substantial and competent evidence." *Easterling v. Kendall*, 159 Idaho 902, 909, 367 P.3d 1214, 1221 (2016) (citation omitted). Appellate courts review the actual sanction imposed under an abuse of discretion standard. *Id.* (citation omitted). "To determine whether a trial court has abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion consistent with applicable legal standards; and (3) reached its decision through the exercise of reason." *Id.* (citation omitted).

C. Motion to Amend to Add Punitive Damages.

Idaho Code § 6-1604(2) provides that a party may amend its pleadings to include a prayer for relief seeking punitive damages, after filing a pretrial motion and following a hearing before the Court. "The court shall allow the motion to amend the pleadings [to add a claim for punitive damages] if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." Idaho Code § 6-1604(2); *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 311, 233 P.3d 1221, 1233 (2010) (citing Idaho Code § 6-1604(2)). A trial court's ruling on a motion to amend a complaint to add a claim for punitive damages is reviewed for an abuse of discretion. *Id.* (citing *Todd v. Sullivan Constr. LLC*, 146 Idaho 118, 121, 191 P.3d 196, 199 (2008)).

III. DISCUSSION

A. Defendants' motion to strike the declarations of various witnesses is granted in part and denied in part.

On October 31, 2022, Defendants moved to strike the following declarations filed on October 4, 2022: (1) Mary S. Amschel, Esq.; (2) William Dodd; (3) Angelo L. Rosa, Esq.; and (4) Khristen S. Vachal-Reese, Esq., as well as the Amended Declaration of Julene Dodd in Support of Plaintiffs' Motion for Partial Summary Judgment filed on October 31, 2022, in whole or in part.

Defendants' motion to strike the declaration of Mary S. Amschel is granted in part and denied in part. In paragraphs 2 through 42 of Ms. Amschel's declaration, she provides extensive testimony about the discovery and meet and confer undertakings in this case, attaching voluminous discovery requests to that testimony—none of which is relevant to deciding the pending motions for summary judgment. (*See* Amschel Decl. ¶¶ 2-42, Exs. 1-36.) Such testimony is stricken. Similarly, Defendants' motion to strike the declaration of Angelo Rosa filed on October 4, 2022 is granted for the same reasons and such declaration is excluded. In addition, Paragraphs 43 through 51, 58 through 70, and 72 through 75, and the corresponding exhibits to such paragraphs of Ms. Amschel's declaration are stricken on the grounds of relevance and hearsay.

Defendants' motion to strike the Amended Declaration of Julene Dodd and the Declaration of William Dodd is granted in part and denied in part, as set forth in the attached Exhibit 1 to this order, based upon the objections made by Defendants. The declaration of Khristen S. Vachal-Reese, Esq. is stricken in its entirety because it is not signed under oath, as required by Idaho Code § 9-1406(1).

B. Defendants' Motion in Limine Re: Testimony of Rebecca E. Czarnik, R.N. is granted and Plaintiffs' motions for relief from the scheduling order or to amend the scheduling order are denied.

On December 23, 2022, Defendants filed a Motion in Limine Re: Testimony of Rebecca E. Czarnik, R.N. in connection with the expert disclosure made by Plaintiffs on November 3, 2022. (Mot. in Limine Re: Test. of Rebecca E. Czarnik, R.N. at 1; Decl. of Anthony Budge filed Feb. 10, 2023, Ex. A). Also on December 23, 2022, Plaintiffs filed Plaintiffs' Second Supplemental Expert Disclosure in this case, attaching Ms. Czarnik's expert report for the first time. (Pls.' Second Suppl. Expert Witness Disclosure filed Dec. 23, 2022, Ex. 5.) Defendants filed a supplement to its motion in limine, asking the Court to prohibit Ms. Czarnik's testimony in her newly disclosed expert report. (Defs.' Suppl. to Mot. in Lim. Re: Test. of Rebecca E. Czarnik, R.N. filed Dec. 30, 2022 at 2.)

On January 3, 2023, *Plaintiffs* filed a motion to extend the Court's scheduling order, asking to extend *Defendants'* January 3, 2023 expert witness deadline so that Defendants' would wait to file *their* expert disclosures and "cross-examin[e]/respond[] to Ms. Czarnik." (Pls.' Mot. for (1) Order Extending Expert Disclosure Deadlines; and (2) Order Shortening Time for Ruling filed Jan. 3, 2023 at 3.) Defendants' opposed Plaintiff's request, arguing that such motion was an attempt to excuse Plaintiffs' late filing of Ms. Czarnik's expert opinions. (Defense Opp'n to Pls.' Mot. for Order Extending Expert Disclosure Deadlines filed Jan. 9, 2023 at 11-15.)

On March 3, 2023, Plaintiffs filed a motion for relief from the scheduling order asking the Court to find that Ms. Czarnik's expert disclosures submitted after November 4, 2022 were proper supplementation, citing excusable neglect. (Pls.' Mot. for Relief from Case Scheduling Order filed Mar. 3, 2023 at 2.)

With respect to Defendants' motion in limine, Plaintiffs argue that Defendants "have no legitimate reason for filing" the motion in limine and that Defendants have had ample time to obtain a rebuttal expert in anticipation of Plaintiffs' disclosures on damages. (Pls.' Mem. in Opp'n to Defs.' Mot. in Lim. Excluding Test. of Becky Czarnik, R.N. filed Feb. 6, 2023 at 2.) Plaintiffs also argue that their November 3, 2022 expert disclosure complied with the Court's scheduling order. (*Id.* at 4.) Further, Plaintiffs argue that "a simple comparison of the disclosure [on November 3, 2022] with the report [on December 23, 2022] demonstrates there is no variance between the two, only more detail." (*Id.* at 3.) Plaintiffs contend that the December 23, 2022 report was a proper supplementation under Idaho Rule of Civil Procedure 26(b)(4)(A)(i). (*Id.*) Plaintiffs also point to paragraph 11 of the Declaration of Rebecca Czarnik, filed on January 3, 2022, as justification for the December 23, 2022 disclosure, in which Ms. Czarnik testifies that, "The preparation and submission of my report of opinions was unexpectedly interrupted for several weeks due to the death of a member of my immediate family." (*Id.* at 4, n.5.; Decl. of Rebecca E. Czarnik, R.N. in Opp'n to Defs.' Mot. in Lim. Excluding Test. of Becky Czarnik, R.N. at 4, ¶ 11.) Plaintiffs cite *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006) and *Brauner v. AHC of Boise*, LLC, 166 Idaho 398, 401, 459 P.3d 1246, 1249 (2020) in support of their motion. (Pls.' Mem. in Opp'n to Defs.' Mot. in Lim. Excluding Test. of Becky Czarnik, R.N. filed Feb. 6, 2023 at 4-7.)

Defendants cite *Easterling v. Kendall*, 159 Idaho 902, 367 P.3d 1214 (2016) and *Farr v. Mischler*, 129 Idaho 201, 923 P.2d 446 (1996) and argue that Ms. Czarnik's November 3, 2022 witness disclosure does not comply with the Court's scheduling order and therefore her subsequent report and testimony should be excluded as untimely. (Reply in Supp. of Mot. in Lim. Re: Test. of Rebecca E. Czarnik, R.N. filed Feb. 8, 2023 at 2-3.) The Court agrees.

Scheduling orders are governed by Idaho Rule of Civil Procedure 16. Rule 16(e) outlines the sanctions a court may impose if a party fails to comply with its scheduling order, and states:

> **(e) Sanctions.**
>
> (1) *Grounds.* The court may sanction any party or attorney if a party or attorney:
> (A) fails to obey a scheduling or pretrial order;
> (B) fails to appear at a scheduling or pretrial conference;
> (C) is substantially unprepared to participate in a scheduling or pretrial conference; or
> (D) fails to participate in good faith.
>
> (2) *Sanctions Allowed.* The court may make such orders as are just, and may, along with any other sanction, make any of the orders allowed under Rule 37(b)(2)(A). Also, in addition to or in the place of any other sanction, the court must require the party or the party's attorney, or both, pay any expenses incurred because of noncompliance with this rule, including attorney's fees, unless the court finds noncompliance was substantially justified or that circumstance are such that such an award of expenses would be unjust.

Idaho R. Civ. P 16(e). Idaho Rule of Civil Procedure 37(b)(2)(A) lists the additional sanctions that a Court may impose when a party fails to comply with its scheduling order, and states:

> (2) *Sanctions Where the Action is Pending.*
>
> (A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent, or a witness designated under Rule 30(b)(6) or 31(a)(4), fails to obey an order to provide or permit discovery, including an order under Rule 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
>
> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) striking pleadings in whole or in part;
> (iv) staying further proceedings until the order is obeyed;
> (v) dismissing the action or proceeding in whole or in part;
> (vi) rendering a default judgment against the disobedient party; or
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination and initiating contempt proceedings.

Idaho R. Civ. P. 37(b)(2)(A)(i)-(vii). In addition, Rule 37(c)(1) outlines the consequences for failing to comply with a disclosure requirement ordered by the Court pursuant to a Rule 16 scheduling order. Such party "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Idaho R. Civ. P. 37(c)(1).

Parties also have a duty to supplement their discovery responses under Idaho Rule of Civil Procedure 26(e), which states:

> **(e) Supplementing Responses.**
>
> (1) *In General.* A party who has responded to an interrogatory, request for production, or request for admission, which response was complete when made, is under no duty to supplement the response to include information subsequently acquired, except:
>
> (A) in a timely manner if the party learns that in some material respect the disclosure or response was incorrect when made or, if correct when made, is no longer true and a failure to amend the response is in substance a knowing concealment;
>
> (B) a party is under a duty to supplement in a timely manner the identity and location of persons having knowledge of discoverable matters; and
>
> (C) by agreement of the parties; upon timely submission of discovery requests for supplementation; or by order of the court.
>
> (2) *Expert Witnesses.* A party must supplement in a timely manner the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.
>
> (3) *Sanction for Failure to Supplement.* The court may exclude the testimony of any witness or the admission of evidence not disclosed by a supplementation required by this rule.

Idaho R. Civ. P. 26(e)(1)-(3).

Pursuant to the Court's scheduling order in this case, entered on March 7, 2022, Plaintiffs were ordered to identify and disclose all expert witnesses to be used at trial by November 4, 2022. (Order Governing Proceedings and Setting Trial (Jury Trial) filed Mar. 7, 2022 at 4.)

Defendants were ordered to identify and disclose all expert witnesses to be used at trial by January 3, 2023. (*Id.*) The scheduling order required that "[c]ontemporaneously with the deadline for disclosure for any expert witness, and regardless of whether there is a pending interrogatory seeking such information, the party disclosing any expert(s) must also provide all information concerning such expert as is required by I.R.C.P. 26(b)(4)(A)(i) and (ii). (*Id.*) Idaho Rule of Civil Procedure 26(b)(4)(A)(i) sets forth:

> (4) *Trial Preparation: Experts.*
>
> (A) Discovery of an Expert Expected to Testify. A party must disclose to the other parties by answer to interrogatory, or if required by court order, the identity of any witness it expects to ask to present evidence under Rule 702, 703 and 705, Idaho Rules of Evidence.
>
> (i) What Must be Disclosed: Retained Experts. For individuals retained or specially employed to provide expert testimony in the case or who are employees of the party:
>
> • a complete statement of all opinions to be expressed and the basis and reasons for the opinion must be disclosed;
> • the data or other information considered by the witness in forming the opinions;
> • any exhibits to be used as a summary of or support for the opinions;
> • any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
> • the compensation to be paid for the testimony; and
> • a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Idaho R. Civ. P. 26(b)(4)(A)(i). Under the Court's scheduling order, the last day to complete fact discovery is January 9, 2023 and the last day to complete expert discovery is April 3, 2023. (Order Governing Proceedings and Setting Trial (Jury Trial) filed Mar. 7, 2022 at 4.)

In determining whether the trial court abuses its discretion in imposing a sanction for a discovery violation, appellate courts will first look to whether a discovery violation occurred. *Easterling*, 159 Idaho at 909, 367 P.3d at 1221 (citation omitted). The Court's scheduling order

incorporated the required disclosures under Rule 26(b)(4)(A)(i) in the expert deadline and thus, Plaintiffs were required to disclose a complete statement of *all opinions* to be expressed by their retained experts on or before November 4, 2022. The Court finds that Plaintiffs' November 3, 2022 disclosure related to Ms. Czernik does not comply with the Court's scheduling order. In that November 3, 2022 disclosure, no expert report is disclosed. (Decl. of Anthony Budge filed Feb. 10, 2023, Ex. A at 5-8.) Instead, the disclosure states, "[a] report of expert opinion is being prepared." (*Id.*, Ex. A at 5.) The disclosure further states that the scope of Ms. Czarnik's opinions will include, damages, and then lists only general categories of damages, *i.e.*, current and future medical and non-medical needs, costs, qualify of life damages, and pain and suffering. (*Id.*, Ex. A at 5-6.) The disclosure also lists the information Ms. Czarnik will consider, and discloses her curriculum vitae and her rate of compensation. (*Id.*, Ex. A at 6-7, 37-40.) There are no actual opinions as to the amount or extent of damages disclosed. Such opinions were required to be disclosed by November 4, 2022 per the Court's scheduling order, and the November 3, 2022 disclosure fails to comply with that order. As a result, any damage opinions offered by Ms. Czarnik and disclosed after November 4, 2022 are untimely.

The Court further finds that Plaintiffs' Second Supplemental Expert Witness Disclosure filed on December 23, 2022 is not merely a supplementation under Rule 26(e)(2). The December 23, 2022 Second Supplemental Expert Witness Disclosure adds the opinions and subject matter missing from the November 3, 2022 disclosure. That disclosure adds a 43-page report that identifies extensive future medical care, medical procedures, diagnostic studies, therapy, medication, equipment, case management, evaluations, home care, home assistance, transportation, and surgeries that Ms. Dodd will need in the future. (Pls.' Second Suppl. Expert Witness Disclosure filed Dec. 23, 2022, Ex. 5.) The report also anticipates Mrs. Dodd's life

expectancy as well as quantifies and identifies damages ranging from $1,630,461.09 to $1,652,296.82. (*Id.*, Ex. 5 at 11.)

A district court has authority to sanction parties for non-compliance with scheduling orders, including prohibiting parties from introducing untimely disclosed evidence under both Rules 16(e) and 37(b)(2)(A) and 37(c)(1). *Easterling*, 159 Idaho at 911, 367 P.3d at 1223. Here, sanctions under Rules 16(e) and 37 are appropriate. Although Plaintiffs claim that they did not disclose Ms. Czarnik's opinions sooner because Ms. Czarnik experienced a death in her family, Plaintiffs have not provided the Court with sufficient information to determine whether there was a legitimate reason or excusable neglect as to why they did not offer these new opinions by November 4, 2022. For example, Plaintiffs did not disclose when they retained Ms. Czarnik, when she began working on this case or reviewing material in this case, nor when the death occurred and the timeline in which Ms. Czarnik's report preparation was interrupted. Thus, in short, the Court finds that Plaintiffs have failed to provide an adequate justification or excusable neglect for the late disclosure.

Moreover, Plaintiffs' failure was not harmless. Ms. Czarnik's report was extensive, and disclosed 12 days before Defendants' expert disclosures were due, all while the parties were engaged in extensive briefing on several motions before the Court. *See, e.g., Cummings v. Stephens*, 157 Idaho 348, 361, 336 P.3d 281, 294 (2014). Ms. Czarnik's testimony set forth in the December 23, 2022 Second Supplemental Expert Witness Disclosure and her subsequent declarations in this case are excluded.

Further, the Court denies Plaintiffs' requests to amend the scheduling orders to accommodate and excuse Plaintiffs' late expert witness disclosures. Extensions are governed by Idaho Rule of Civil Procedure 2.2. For good cause, a Court may extend a deadline because of

excusable neglect, if the requested extension is made after the applicable deadline. Idaho R. Civ. P. 2.2(b)(1)(B). Here, there is no good cause or excusable neglect that exists to extend the expert deadlines, for the same reasons set forth above.

In addition, and setting aside whether it is appropriate for Plaintiffs to move to amend Defendants' expert deadline, the Court finds that there is no acceptable excuse advanced by Plaintiff for the late disclosures in this case. This case was initiated on December 6, 2021 and the Amended Complaint was filed on January 5, 2022. The parties themselves stipulated to the deadlines set forth in the Court's scheduling order. Neither good cause nor excusable neglect has been shown. The Court therefore denies Plaintiffs' requests to amend the scheduling order to essentially permit their late expert disclosures in this case.

C. The October 4, 2022 and November 19, 2022 declarations of Fred Simon, M.D. are stricken because they lack foundation, and Dr. Simon's new opinions submitted after November 4, 2022 are excluded as untimely.

1. <u>October 4, 2022 Declaration of Dr. Simon</u>.

On October 4, 2022, Plaintiffs filed the Declaration of Fred Simon, M.D. in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability. Dr. Simon testified that he is Board Certified by the American Board of Surgery in General Surgery and has been a physician for 41 years, and licensed to practice in Idaho for 34 years. (Simon Decl. ¶¶ 4, 5, 6, 8.) Dr. Simon testified that between 2016 and 2018, he was a general and trauma surgeon with Portneuf Medical Center in Pocatello, Idaho and practiced trauma general surgery and some intensive care in Gooding, Idaho. (*Id.* ¶ 10.) Dr. Simon testified that he has "actual professional knowledge and experience" about: (1) the proper and safe technique in performing a laparoscopic hiatal hernia repair; and (2) the postoperative care of the patient. (*Id.* ¶ 15.) He further testified that he is "familiar with the standard of care by which healthcare providers are bound to provide in the

Idaho medical community," which is based upon "being licensed to practice medicine in the State of Idaho for thirty-four (34) years, and my affiliation as a locum tenens general surgeon and trauma surgeon with Portneuf Medical Center in Pocatello, Idaho" and his engagements as a plaintiff's expert in medical malpractice claims in Idaho between 2012 and the present. (*Id.* ¶ 20.)

As to the standard of care, Dr. Simon testified that his opinion addresses whether the acts and omission of representatives of St. Alphonsus Hospital—Nampa fell below the standard of care owed by providers in the healthcare community of Ada County, Idaho, between August 16 and August 19, 2017. (*Id.* at 3, ¶ 14.) Dr. Simon testified that such "standard of care applicable to the postoperative care of a patient includes early recognition of patient deterioration, recognition of changes in vitals, recognition of changes in physical examination, [and] recognition of signs of sepsis with rapid intervention." (*Id.*, Ex. 3 at 2.) "Care includes adequate nursing evaluation, documentation and recognition of significant changes with direct communication with medical staff." (*Id.*)

As to breach of the standard of care, Dr. Simon testified that the "healthcare professionals" who were "responsible for administering" Mrs. Dodd's "postoperative care" breached the standard of care by: (1) identifying symptoms indicating the presence of sepsis (manifested in both the decline in vital statistics and the patient's vocalization of increasing pain) but failed to take appropriate investigative and corrective action; (2) failed to identify indications of potential onset of sepsis through inattention and neglect; and/or (3) failed to undertake a timely investigation of the indications of sepsis until the patient's condition had reached critical status on postoperative day three. (*Id.*, Ex. 3 at 2-3.)

As to causation, Dr. Simon testified that as a result of the above breaches, Mrs. Dodd suffered from sepsis, was admitted to the ICU on full ventilatory support with pulmonary failure, renal failure and the development of complex abscess formation due to a delay in care. (*Id.*, Ex. 3 at 3.) Mrs. Dodd's laparoscopic fundoplication with hiatal hernia surgery took place on August 16, 2017. (*Id.*, Ex. 3 at 2.) Three days later on August 19, 2017, Mrs. Dodd received a CT scan at which time, a jujunal enterotomy of 50% bowl wall size was identified with gross contamination of the entire abdominal cavity with enteric contents. (*Id.*) Mrs. Dodd underwent an operation to address the identified issue and was thereafter placed in intensive care on a ventilator. (*Id.*) Dr. Simon described the "delay" in Mrs. Dodd's care as a result from Mrs. Dodd's "deterioration" of her pulse rate, severe tachypnea, low blood pressure, oxygen desaturation and abdominal symptoms, occurring "earlier" than August 19, 2017, and "very probabl[y] in the late evening of August 18, 2017." (*Id.*) Thus, presumably, it is Dr. Simon's opinion that had Mrs. Dodd's "healthcare providers" identified her incidental enterotomy "earlier" or "in the late evening of August 18, 2017," it would have lowered the incidence of "full outright sepsis and septic shock with organ failure and subsequent abscess formation." (*Id.*)

Defendants moved to strike Dr. Simon's declaration on November 7, 2022, arguing that there is insufficient foundation for Dr. Simon's testimony to establish: (1) that he has actual knowledge of the standard of care for Saint Alphonsus in Nampa and Dr. Forrest Fredline; and (2) the applicable standard of care for performing hiatal hernia surgery and for post-surgical treatment and the timing of appropriate treatment for a patient with a jejunal injury. (Mem. in Supp. of Mot. to Strike Decl. of Expert Witness Fred Simon M.D. filed Nov. 7, 2022 at 7-8.) Defendants also argued that Dr. Simon's declaration fails to offer an opinion as to whether Mrs. Dodd's hiatal hernia surgery was performed incompetently. (*Id.* at 8-9).

2. <u>November 19, 2022 Amended Declaration of Dr. Simon.</u>

On November 19, 2022, which is 15 days after Plaintiffs' expert disclosures were due, Plaintiffs filed the Amended Declaration of Fred Simon, M.D. in Support of Plaintiff's Motion for Partial Summary Judgment as to Liability. Dr. Simon again testifies that his opinion is directed at whether the acts and omission of representatives of St. Alphonsus Hospital in Nampa fell below the standard of care owed by providers in the health care community of Ada County, Idaho, between August 16 and August 19, 2017. (Am. Simon Decl. at 4, ¶ 14.)

In this amended declaration, Dr. Simon lists additional material that he relies on to "supplement" his opinion,[3] provides additional information about his experience and contacts with healthcare facilities in Idaho,[4] and for the first time—identifies that he is familiar with the local standard of care for performing a laparoscopic hiatal hernia repair and the postoperative care for the patient who receives such repair in *Nampa*, Idaho, as it existed in 2017. (*Id.* at 7-8, ¶ 19; Ex. 3 at 3.) Dr. Simon also testifies, for the first time, that in connection with preparing his expert opinion, he "re-confirmed the standard of care applicable to the healthcare services" provided to Ms. Dodd at the time they were conducted through "consultation with a gastrointestinal and endoscopic surgeon with over thirty years of practice based in Ada County."

[3] Dr. Simon lists material produced on August 3, 2022, which were provided to him "after the issuance of [his] initial report," Forrest Fredline, DO's declaration dated October 28, 2022, and Defendants' Motion to Strike dated September 9, 2022. (Am. Simon Decl. at 6, ¶ 16(g), (h), and (i).)

[4] Dr. Simon adds that he served as a locum tenens general and trauma surgeon in Pocatello, Idaho and a locum tenens surgeon in Gooding, Idaho. He testified that he has knowledge of the care provided in the Sun Valley/Ketchum area and testified that he is familiar with the care in Idaho Falls, Idaho. He also mentions that he has toured health care facilities in Nampa, Idaho, and interviewed for surgical positions in Caldwell and Sandpoint, Idaho. (Am. Simon Decl. ¶¶ 10, 19.)

(*Id.*, Ex. 3 at 3-4.) Also for the first time, Dr. Simon testifies that "aggressive hydration, broad spectrum antibiotics, and emergent surgical intervention was mandatory." (*Id.* at 9, ¶ 24.)

Defendants moved to strike the November 19, 2022 amended declaration of Dr. Simon on the grounds that it was disclosed in violation of the Court's pretrial scheduling order and is foundationally deficient. (Mem. in Supp. of Mot. to Strike the Am. Decl. of Fred Simon M.D. filed Dec. 23, 2022 at 4-5, 7-12.)

3. <u>December 30, 2022 Second Supplemental Declaration of Fred Simon, M.D.</u>

On December 30, 2022, 56 days after Plaintiffs' expert deadline and four (4) days before Defendants' expert disclosures were due, Plaintiffs filed the Second Supplemental Declaration of Fred Simon, M.D. in this case. In the second supplemental declaration, Dr. Simon specifically states that the "contents of this declaration are additional to, not in lieu or replacement of, my prior submissions." (Second Suppl. Simon Decl. ¶ 2.) Dr. Simon added to his original opinion based upon his review of the transcript of Dr. Forrest Fredline and the declaration of Joshua Barton, M.D. (*Id.* ¶ 3.) Dr. Simon then states that neither the transcript or the declaration of Dr. Barton "alters the opinions reached in my original and supplemental reports of expert opinion or the declarations accompanying those reports." (*Id.* ¶ 4.)

On January 19, 2023, Defendants moved to strike the second supplemental declaration of Dr. Simon on the grounds that it disclosed new opinions that were not previously disclosed, violates the Court's scheduling order, and is still foundationally deficient. (Mem. in Supp. of Mot. to Strike Second Suppl. Decl. of Fred Simon, M.D. filed Jan. 19, 2023 at 3, 5, 6.) In response, Plaintiffs argued that Defendants' motion to strike was frivolous, improper, sanctionable, and constitutes an abuse of the judicial process. (Pls.' Omnibus Resp. to Defs.'

Mots. to Strike (1) Second Suppl. Decl. of Fred Simon, M.D., and (2) Second Suppl. Expert Opinion Report of Fred Simon, M.D. filed Feb. 9, 2023 at 3.)

In determining whether the trial court abuses its discretion in imposing a sanction for a discovery violation, appellate courts will first look to whether a discovery violation occurred. *Easterling*, 159 Idaho at 909, 367 P.3d at 1221 (citation omitted). In this case, Plaintiffs cite Idaho Rule of Civil Procedure 1(b) and argue that they have complied with Rule 26(b)(4)(A)(i). (Pls.' Omnibus Response to Defs.' Mots. to Strike (1) Second Suppl. Decl. of Fred Simon, M.D., and (2) Second Suppl. Expert Opinion Report of Fred Simon, M.D. filed Feb. 9, 2023 at 4.) Plaintiffs also argue that the supplemental declaration of Dr. Simon was required by and complies with Rule 26(e)(2). (*Id.*)

As set forth above, the Court's scheduling order incorporated the required disclosures under Rule 26(b)(4)(A)(i) in the expert deadline and thus, Plaintiffs were required to disclose a complete statement of *all opinions* to be expressed by their retained experts on or before November 4, 2022. The Court finds that the original declaration of Dr. Simon (filed October 4, 2022) and the supplemental declaration of Dr. Simon (filed November 19, 2022) lack foundation, as discussed below, but do not violate the Court's scheduling order or the Idaho Rules of Civil Procedure. The November 19, 2022 supplemental declaration does not offer new opinions but can properly be considered a supplementation, as Dr. Simon purported to provide additional foundation for his original opinions and added to his *existing* opinion, but did not add *new* opinions altogether.[5] *Mains v. Cach*, 143 Idaho 221, 225, 141 P.3d 1090, 1094 (2006) (noting

[5] Arguably, Dr. Simon's testimony in this November 19, 2022 supplemental declaration that: he now knows the standard of care in Nampa, Idaho in 2017, has talked to a gastrointestinal and endoscopic surgeon about the community standard of care, and that "aggressive hydration, broad spectrum antibiotics, and emergent surgical intervention was mandatory," is new information.

expert testimony may change and should not be discounted simply because it is different from prior testimony) (citations omitted).

In contrast, however, the December 30, 2022 second supplemental declaration of Dr. Simon discloses new opinions for the first time, and thus, such opinions are untimely and violate the Court's scheduling order. Dr. Simon's original opinions, from his October 4, 2022 and November 19, 2022 declarations, only address the postoperative care provided to Mrs. Dodd.[6] The second supplemental opinion attempts to add a new opinion as to the performance of the hiatal hernia surgery itself, as well as new opinions as to the aftercare that Dr. Fredline and St. Alphonsus staff was required to provide to Mrs. Dodd. (Second Suppl. Simon Decl. ¶¶ 5, 7(c).)

In addition, Dr. Simon attempts to add new opinions that Dr. Fredline's care fell below the newly identified standards for the performance of the hiatal hernia surgery and the postoperative care of Mrs. Dodd. (*Id.* ¶ 6.) Further, Dr. Simon attempts to offer new opinions about "additional conduct" that fell below the standard or care regarding blind penetration of instruments into the abdomen without direct observation when performing a Laparoscopic Nissen fundoplication in Ada County. (*Id.* ¶ 7(a), (b).) This is not an instance where one party simply supplemented its discovery under Rule 26€(2). The second supplemental declaration adds new opinions and subject matter. Plaintiffs were required to produce the opinions expressed in Dr. Simon's December 30, 2022 declaration on or by November 4, 2022. Plaintiffs

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But, the Court finds that Dr. Simon's original opinion on October 4, 2022 was sufficient to allow such supplements.

[6] The October 4, 2022 and the November 19, 2022 declarations of Dr. Simon state that he was asked to render an opinion on both (1) the elective Nissen fundoplication procedure to correct hiatal hernia and (2) the postoperative care to a patient who receives that surgery. (Simon Decl. at 2, ¶ 14; Suppl. Simon Decl. at 4, ¶ 14). However, Dr. Simon did not in fact provide any opinions as to the standard of care for the performance of such hernia surgery in those declarations.

failed to timely and sufficiently disclosure such opinions and their failure to do so violates section 2(b) and (e) in the Court's scheduling order.

As noted above, a district court has authority to sanction parties for non-compliance with scheduling orders, including prohibiting parties from introducing untimely disclosed evidence under both Rules 16(e) and 37(b)(2)(A). *Easterling*, 159 Idaho at 910, 367 P.3d at 1222. Here, sanctions under both Rules 16(e) and 37 are appropriate. Plaintiffs offer no legitimate reason why they did not offer Dr. Simon's new opinions by November 4, 2022. Additionally, Plaintiffs' failure was not harmless, particularly when coupled with the fact that they were disclosed a mere four days before Defendants' expert disclosures were due, and while the parties were engaged in extensive briefing on several motions before the Court. *See, e.g., Cummings*, 157 Idaho at 361, 336 P.3d at 294. The Court will strike the Second Supplemental Declaration of Fred Simon, M.D. filed on December 30, 2022 and all such testimony in that declaration is excluded.

4. <u>January 30, 2023 Second Supplemental Expert Opinion of Dr. Simon.</u>

On January 30, 2023, which is 87 days after Plaintiffs' expert disclosures were due, Plaintiffs filed the Second Supplemental Expert Opinion of Fred Simon, M.D. in this case. In that second supplemental opinion, Dr. Simon purports to "reaffirm" his previous opinions and "respond to and rebut the testimony of Forrest Fredline, D.O." made on behalf of Defendants. (01/30/23 Second Suppl. Simon Decl. at 2, ¶ 1.) In such declaration, Dr. Simon again offers an opinion about the performance of the nissen fundoplication procedure to correct hiatal hernia performed upon Mrs. Dodd. (*Id.* at 3, ¶ 4.) Such opinion is excluded for the reasons set forth above, to the extent that Plaintiffs intended to offer such opinion in their case in chief. In addition, the Court finds that the remaining testimony in the January 30, 2023 declaration contains new opinions in addition to those produced on October 4, 2022 and are thus excluded

for the same reasons set forth above, to the extent that Plaintiffs intended to present such testimony in their case in chief in this case.

It is unclear whether Plaintiffs intended to use the testimony in the January 30 declaration of Dr. Simon as rebuttal testimony. Thus, to the extent that such testimony is solely for rebuttal, the Court's ruling in this order does not address whether such rebuttal is proper.

In sum, the testimony provided by Dr. Simon in his December 30, 2022 declaration, as well as this January 30, 2023 declaration, are excluded and will not be considered in Plaintiff's case in chief in this matter.

D. The remaining testimony offered by Dr. Simon lacks foundation and thus, summary judgment is granted in favor of Defendants as to Plaintiffs' professional/legal malpractice claim.

Idaho Code § 6-1012 requires that a plaintiff who brings a medical malpractice claim must provide expert testimony establishing that the healthcare provider did not meet the applicable standard of healthcare practice, and provides in relevant part:

> In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including ... any ... nurse practitioner, registered nurse, ... hospital, ... or any person vicariously liable for the negligence of them ... such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence ... with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning.

Idaho Code § 6-1012.

An expert must have actual knowledge of the community standard of care at the time and place of the alleged malpractice in order to testify. *Fisk v. McDonald*, 167 Idaho 870, 880, 477

P.3d 924, 934 (2020) (citation omitted). The expert can demonstrate knowledge of the community standard of care provided by Idaho Code § 6-1013 as follows:

> The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefore is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial.

Idaho Code § 6-1013. Thus, the medical expert must show that he or she is familiar with the standard of health care practice for the relevant medical specialty, during the relevant timeframe, and in the community where the care was provided. *Bybee v. Gorman*, 157 Idaho 169, 174, 335 P.3d 14, 19 (2014) (citations omitted). Further, the medical expert must explain "*how* he or she became familiar with that standard of care." *Id.* (citation omitted). In addition, Rule 56(c)(4) requires that affidavits in support of or in opposition to a summary judgment motion set out facts that would be admissible in evidence and "show that the affiant or declarant is competent to testify on the matters stated." Idaho R. Civ. P. 56(c)(4).

In medical malpractice cases in Idaho, the geographical scope of the relevant community is a factual issue, defined by Idaho Code section 6-1012 as "that geographical area *ordinarily served* by the licensed general hospital at or nearest to which such care was or allegedly should have been provided." *Phillips v. E. Idaho Health Servs., Inc.*, 166 Idaho 731, 751, 463 P.3d 365, 385 (2020) (citing Idaho Code § 6-1012) (italics added); *see also Bybee*, 157 Idaho at 175-77, 335 P.3d at 20-22. "The 'community' is not defined by physical distance from the health care

provider, but rather by the locations from which its patient base is derived. *Id.* (citation omitted). "Idaho Code section 6-1012 also acknowledges that for some specialties, there will be no 'like provider' able to establish the applicable standard of care, and that in those cases, evidence of similar Idaho communities is permitted." *Id.* (citing Idaho Code § 6-1012). In addition, communities may "overlap." *Id.* (citing *Bybee*, 157 Idaho at 176, 335 P.3d at 21; *see also Ballard v. Kerr*, 160 Idaho 674, 688, 378 P.3d 464, 478 (2016); *Ramos v. Dixon*, 144 Idaho 32, 35, 156 P.3d 533, 536 (2007)).

"Regardless of the theory used to establish the relevant community, an expert's statement defining this community must identify the basis of the expert's knowledge of the patient base, and should 'attempt to identify, or even approximate, the frequency [with] which patients from [one locale] elect to receive services' at one provider as opposed to another." *Id.* (citation omitted). "If users of the hospital's services commonly go from one location to the place where the hospital is located, then that location falls within the geographical area which constitutes the community." *Id.* (citation omitted).

1. <u>Dr. Simon has not demonstrated that he is familiar with the standard of care in the community where Mrs. Dodd's hernia surgery and postoperative care occurred—Nampa, Idaho</u>.

"A plaintiff who is unable to find a local expert willing to testify as to the community standard of care is not necessarily prevented from bringing his or her claim." *Fisk,* 167 Idaho at 880, 477 P.3d at 934. "A plaintiff can also establish the standard of care through the testimony of an out-of-area expert." *Id.* (citing *See* I.C. § 6-1013). "However, before an out-of-area expert can testify as to the standard of care, the expert must show that he or she is familiar with the applicable standard in the community in which the defendant practices." *Id.* (citing *Dulaney v. St. Alphonsus Reg'l Med. Ctr.,* 137 Idaho 160, 164, 45 P.3d 816, 820 (2002)). "Furthermore, the

out-of-area expert must explain *how* he or she became familiar with that standard of care in that community. *Id.* (citation omitted).

In this case, Plaintiffs offer the testimony of Dr. Simon as an out-of-area expert. The underlying medical malpractice action identified the Dodds as the plaintiffs and Dr. Fredline and St. Alphonsus Regional Medical Center, Nampa as defendants. (*See* Req. for Judicial Notice in Supp. of Pls.' Mot. for Partial Summ. J. filed Oct. 4, 2022, Ex. 2.) Dr. Fredline is a general surgeon. (Fredline Decl. at 1-2, ¶ 1.) Dr. Fredline performed Mrs. Dodd's laparoscopic Nissen with hiatal repair surgery in Nampa, Idaho, and her postoperative care also occurred in Nampa, Idaho. (*Id.* ¶¶ 6, 7.) Nampa is in *Canyon County*, Idaho.

Dr. Simon was asked to render an opinion on whether "representatives of St. Alphonsus Hospital—Nampa" fell below the standard of care owed by health care providers in *Ada County*. (Simon Decl. at 3, ¶ 14) (emphasis added). In his November 19, 2022 declaration, Dr. Simon also testified that "I am familiar with the local standard of care for this operative procedure and the postoperative care of a patient who has undergone a laparoscopic hiatal hernia repair as that standard existed in Nampa, Idaho in 2017." (Am. Simon Decl., Ex. 3 at 3.) But, Dr. Simon does not adequately explain *how* he became familiar with the standard of care in Nampa, Idaho for either general surgeons or those who provided Mrs. Dodd's postoperative care.

First, Dr. Simon testified that he is familiar with the standard of care for healthcare providers in the *Idaho* medical community, based upon being licensed to practice medicine in the State of Idaho 34 years, his affiliation as a locum tenens general surgeon and trauma surgeon with Portneuf Medical Center in Pocatello, Idaho from 2016-2018, and his engagements as an

expert in the State of Idaho between 2012 and the present.[7] (Simon Decl. ¶¶ 10, 20, and Ex. 3 at 1; Am. Simon Decl. at 3, ¶ 10 and Ex. 3 at 1-3.) However, his conclusory statements are not sufficient to demonstrate that he is familiar with the standard of care for general surgeons, Saint Alphonsus--Nampa, nor any particular healthcare personnel in Nampa, Idaho. *See Kolln v. Saint Luke's Reg'l Med. Ctr*., 130 Idaho 323, 332, 940 P.2d 1142, 1151 (1997) (upholding summary judgment in favor of medical professionals where the doctor and expert at issue were neurosurgeons, but the expert's affidavit failed to indicate how he became familiar with the standard of care for defendants.) Similarly, Dr. Simon does not identify a standard of care in Pocatello, Idaho, nor how any such standard in Pocatello is applicable to Nampa, Idaho, nor whether the same standard applies to or overlaps in both communities. The fact that Dr. Simon has practiced in Idaho does not demonstrate that he is familiar with the standard of care applicable in this case in Nampa, Idaho.

Second, Dr. Simon testified about various other contacts he had in Idaho as the basis for his familiarity with the local standard of care in this case, stating:

> I am familiar with the standard of care in Idaho Falls, Idaho and have toured the medical center, EIRMC. I toured St. Alphonsus Medical Center in the early 2000s as a visitor/consultant on acute care surgery, interviewed in Nampa, Idaho for a private practice general surgical position, interviewed and practiced as a locum tenens surgeon in Gooding, Idaho and interviewed for a general surgical position in Caldwell, Idaho. I have interviewed and toured the medical center in Sandpoint, Idaho as well as having a firm knowledge for decades, the care provided in the Sun Valley/Ketchum area.

[7] Dr. Simon's experience as a plaintiff's expert does not show that he is familiar with the applicable standard of care in Nampa, Idaho in 2017 in this case. He lists at least one trial in which he participated in 2018 trial in Twin Falls, which is after the care here. In addition, even if that case were relevant, Dr. Simon fails to provide any details about the Twin Falls case nor whether it is similar to the case at issue here, nor what the standard of care was, nor whether the same standard applies in this case. (Simon Decl. Ex. 2.)

(Am. Simon Decl. at 3, ¶¶ 10, 19, and Ex. 3 at 1-2.) But Dr. Simon's conclusory statements are not sufficient to demonstrate that he is familiar with the standard of care for either general surgeons, Saint Alphonsus—Nampa, or any other particular healthcare personnel in Nampa, Idaho. He does not testify about the manner in which he obtained his familiarity in Nampa or elsewhere, and his familiarity itself is lacking. *See Bybee*, 157 Idaho at 177, 335 P.3d at 22. For example, Dr. Simon does not demonstrate how he became familiar with a standard of care in Nampa, Idaho by touring medical centers and interviewing for surgical positions in Idaho. Similarly, Dr. Simon does not identify any standards of care for general surgeons, hospitals, or any other particular health care professional in Pocatello, Idaho Falls, Gooding, Caldwell, Sandpoint, or Sun Valley/Ketchum, nor whether such standards in any of these locations are the same in or overlap with those in Nampa, Idaho. Moreover, Dr. Simon's testimony that he interviewed for surgical positions in Nampa and Caldwell, Idaho is insufficient to establish that he is familiar with the standard of care for general surgeons, hospitals, or any other particular health care professional in Nampa, Idaho. In short, Dr. Simon's identified contacts and activities in Idaho do not establish his familiarity with the standard of care applicable in this case in Nampa, Idaho.

Third, Dr. Simon testified that he consulted with a local physician to additionally support his familiarity with the local standard of care, stating:

> …in connection with the preparation of my expert opinion in this case, I re-confirmed the standard of care applicable to the healthcare services provided to Ms. Dodd at the time they were conducted through consultation with a gastrointestinal and endoscopic surgeon with over thirty years of practice based in Ada County.

(Am. Simon Decl. at 8, ¶ 19, and Ex. 3 at 3-4.) He further testified that Dr. Fredline, St. Alphonsus, and "their healthcare providers" failed to meet "the applicable local standard of

healthcare practice of the Treasure Valley, Idaho community…." (*Id.*, Ex. 3 at 4.) However, Dr. Simon's testimony is insufficient to establish that Dr. Simon, or the surgeon he consulted with, are familiar with the applicable standard of care in this case in Nampa, Idaho.

If an out-of-area expert consults with an Idaho physician to learn the applicable standard of care, there must be evidence showing that the Idaho physician knows the applicable standard of care. *Ramos*, 144 Idaho at 37, 156 P.3d at 538 (citing *Dulaney*, 137 Idaho 160, 45 P.3d 816 (2002)). An out-of-area expert must demonstrate how he or she became adequately familiar with the community standard of health care practice, and make it sufficiently clear that the expert consulted with a local specialist who had actual knowledge of the standard of health care practice for the proper class of provider during the relevant time period. *Bybee*, 157 Idaho at 178, 335 P.3d at 23. Here again, Dr. Simon does not testify about a standard of care in Ada County, nor how such standard is applicable in Nampa, Idaho, nor whether the same standard applies to or overlaps in both communities. Moreover, Dr. Simon does not demonstrate how the gastrointestinal and endoscopic surgeon in Ada County that he consulted with has actual knowledge about the standard of care for general surgeons, hospitals, or any other particular hospital personnel in Nampa, Idaho. Dr. Simon's consultation with his identified local physician does not demonstrate his familiarity with the standard of care in Nampa, Idaho.

2. <u>Dr. Simon does not demonstrate that he possesses professional knowledge and expertise about the standard of care applicable to hospitals or any other non-physician hospital personnel</u>.

Neither Dr. Simon's October 4, 2022 declaration nor his November 19, 2022 declaration establish that he has professional knowledge and expertise about a hospital's applicable standard of care, nor the standard of care that applies to any of the nurses who provided Mrs. Dodd's postoperative care. In determining whether an expert witness has actual knowledge of the

applicable community standard of care, "[t]he guiding question is simply whether the affidavit alleges facts which, taken as true, show the proposed expert has actual knowledge of the applicable standard of care." *Fisk*, 167 Idaho at 880–81, 477 P.3d at 934–35 (citation omitted). To determine this, "courts must look to the standard of care at issue, the proposed expert's grounds for claiming knowledge of that standard, and determine—employing a measure of common sense—whether those grounds would likely give rise to knowledge of that standard." *Id.* (citation omitted). "Demonstrating that an expert has actual knowledge of the community standard of care 'is not intended to be an "overly burdensome requirement."'" *Id.* (citations omitted).

In this case, Dr. Simon fails to state that he is trained as a hospital administrator, or experienced in hospital management, nor that the standard of care for a hospital is that for physicians or any other particular hospital personnel. *See Dunlap By & Through Dunlap v. Garner*, 127 Idaho 599, 605, 903 P.2d 1296, 1302 (1994). Other than Dr. Fredline, Dr. Simon does not specifically identify which particular "health care providers" his opinion is directed toward—whether they are nurses, administrators, or other staff or personnel. As a result, Dr. Simon's testimony fails to show that he has professional knowledge and expertise about the standard of care applicable to any such individuals.

In summary, Dr. Simon's testimony in his October 4, 2022 and November 19, 2022 declarations lack sufficient foundation showing that he: (1) is familiar with the local standard of care for general surgeons, hospitals, and "healthcare providers" in Nampa, Idaho, where Mrs. Dodd's surgery and postoperative care occurred; and (2) has professional knowledge and expertise, and actually holds an opinion about, the appliable standard of care for hospitals or any

other non-physician hospital personnel. For the reasons set forth above, Defendants' motions to strike are granted and Dr. Simon's testimony is excluded.

E. Defendants' motion for summary judgment as to Count One is granted and Plaintiffs' motion for summary judgment is denied.

Plaintiffs and Defendants filed cross-motions for summary judgment with respect to Plaintiffs first cause of action for professional negligence against Mr. Jones and Jones Williams Fuhrman Gourley, P.A. A plaintiff asserting a legal malpractice claim must show: "(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) a breach of duty by the lawyer (*i.e.*, the lawyer's conduct fell below the standard of care); and (d) the lawyer's deficient performance proximately caused damages." *Greenfield v. Smith*, 162 Idaho 246, 252, 395 P.3d 1279, 1285 (2017) (citation omitted). "In a legal malpractice case arising out of representation in a civil matter, the plaintiff must be able to demonstrate 'some chance of success' in the underlying case." *Id.* (citation omitted).

In this case, the parties do not dispute that an attorney-client relationship existed between Plaintiffs and Defendants. The parties also do not dispute that Mr. Jones had an obligation to file the underlying medical malpractice action by December 8, 2019, and missed the statute of limitations. The parties do dispute, however, whether missing the deadline to file the underlying medical malpractice action caused Plaintiffs damage, and whether the Plaintiffs have demonstrated "some chance of success" in that underlying case. Plaintiffs argue that Defendants are judicially estopped from defending the medical malpractice action and that the testimony of Dr. Simon demonstrates that Dr. Fredline and Saint Alphonsus—Nampa's conduct fell below the standard of care, thus meeting the "chance of success" threshold. (Mem. of Law in Supp. of Pls.' Mot. for Partial Summ. J. as to Liability filed Oct. 4, 2022 at 12, 18.) Defendants argue that if

the Court strikes Dr. Simon's declarations, the Dodds have no chance of success on the merits. (Defs.' Mem. in Supp. of Mot. for Summ. J. filed Dec. 12, 2022 at 13-14.)

The Court agrees that in striking Dr. Simon's declarations, the Dodds cannot show that they have "some chance of success" in the underlying medical malpractice action. Plaintiffs in medical malpractice actions must affirmatively prove by direct expert testimony that a defendant negligently failed to meet the applicable standard of care, where the care was provided, as such standard existed at the time and place of the alleged negligence, and with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he was functioning. Idaho Code § 6-1012. Plaintiffs have not provided such expert testimony. As a result, Defendants' motion for summary judgment as to Count One is granted, and Plaintiffs' motion for partial summary judgment is denied.[8]

F. Defendant's motion for summary judgment is granted as to Plaintiffs' breach of contract claim.

The parties filed cross-motions for summary judgment with respect to Plaintiff's second cause of action for breach of contract. Defendants argued that a plaintiff's breach of contract action against a former attorney alleging a failure to comply with a standard of care sounds in tort, not contract. (Defs.' Mem. in Supp. of Mot. for Summ. J. filed Dec. 12, 2022 at 19.) Plaintiffs argued that Defendants admit the existence of the Contingent Fee Agreement at issue and argue the merits of their breach of contract claim. (Mem. in Supp. of Pls' Mot. for Summ. J.

[8] In addition, Defendants have submitted the testimony of Dr. Joshua Barton who testified that an injury to the small intestine, like the one suffered by Mrs. Dodd, is a risk of hiatal hernia surgery that can occur when the surgery is performed within the applicable standard of care, and that Dr. Fredline did not breach of standard of care for with respect to Mrs. Dodd's post-operative care. (Barton Decl. ¶ 16.)

as to Breach of Contract Claim, or in the Alternative, for Partial Summ. J. filed Jan . 20, 2023 at 11-15.)

Legal malpractice actions are an amalgam of tort and contract theories. *Bishop v. Owens*, 152 Idaho 616, 620–21, 272 P.3d 1247, 1251–52 (2012) (citation omitted). And, the tort basis of legal malpractice actions flows from the elements of legal malpractice: "(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client...." *Id.* (citations omitted). "The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained." *Id.* (citations omitted). "The contract basis of legal malpractice actions is the failure to perform obligations directly specified in the written contract." *Id.* (citation omitted). As a result, under the abatement rule, breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. *Id.* And breach of that duty is a tort. *Id.*

In this case, Plaintiffs argue that the "the language of the Contingent Fee Agreement itself contains express undertakings," and that Jones Gledhill Fuhrman Gourley, P.A. breached the contract by failing to file the underlying medical malpractice claim within the statute of limitations period. (Mem. in Supp. of Pls.' Mot. for Summ. J. as to Breach of Contract or, in the Alternative, for Partial Summ. J. filed Jan. 20, 2023 at 12.) Under the terms of the Contingent Fee Agreement in this case, the Dodds retained Jones Gledhill Fuhrman Gourley, P.A. to render legal services "for loss of consortium[,] other claims and/or potential causes of action against St. Alphonsus Medical Center and all treating Physicians." (J. Dodd Decl. ¶ 25, Ex. 1 at 1.)

Further, in that agreement the firm had, "the power and authority to settle or to bring suit or such other legal action(s) at such time as they think proper to enforce or collection the above-mentioned claim." (*Id.*) Nowhere in the agreement did the lawyers guarantee a specific outcome in the underlying medical malpractice litigation or agree to a higher standard of care. The Dodds have not pointed to a specific and actionable promise breached by Defendants. The source of the duty at issue here, *i.e.*, Mr. Jones's duty to timely file the underlying medical malpractice complaint, sounds in tort and exists independent from a breach of contract claim.

In addition, the Dodds' damages in this case are for the medical expenses and other losses that Mrs. Dodd claims as a result of the hernia surgery and her postoperative care, not for purely economic damages resulting breach of the parties' contract. Stated another way, the Dodds are not seeking to recover economic damages for breach of contract because Mr. Jones failed to render legal services or failed to pay the Dodds as agreed in the Contingent Fee Agreement. Here, there is no dispute that Mr. Jones rendered legal services. However, in rendering those legal services, he failed to timely file the underlying medical malpractice complaint. In this lawsuit, Plaintiffs seek to be placed into the position they would have been in, but for Mr. Jones's failure to file the underlying medical malpractice action timely. Plaintiffs' breach of contract claim was not pled in the alternative. It is thus duplicative and Defendants' motion for summary judgment as to Plaintiffs' breach of contract claim, which asserts the same claim as the legal malpractice theory, is granted. Conversely, Plaintiff's motion for summary judgment on this claim is denied.

G. Defendants' motion for summary judgment as to Plaintiffs' fraudulent concealment claim is granted.

In their third cause of action for fraudulent concealment, Plaintiffs allege that Mr. Jones failed to inform the Dodds for more than six months that he had missed the filing deadline for the underlying medical malpractice action. (Am. Compl. at 14-15.) They further allege that but for this delay they, "would have been able to bring an action against Mr. Jones for professional malpractice much earlier than they otherwise would have, and thus been able to mitigate their mounting damages." (*Id.* ¶ 62(d).) They further allege that because of this concealment, they were unable to pursue claims against Dr. Fredline and St. Alphonsus. (*Id.* ¶ 64.) They also allege that their loss includes: "the value of Julene's damages caused by medical malpractice, mounting damages due to her inability to maintain employment since the medical malpractice occurred, and damages for William's loss of consortium." (*Id.*)

Fraud involves: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the other party and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the truth of the statement; (8) the hearer's right to rely on the statement; and (9) injury. *Saint Alphonsus Reg'l Med. Ctr., Inc. v. Krueger*, 124 Idaho 501, 507–08, 861 P.2d 71, 77–78 (Ct. App. 1992) (citation omitted). Failure to disclose a fact may constitute fraud if one party owes a duty to another to disclose the fact. *Id.* (citation omitted). A duty to disclose may arise when: (a) a party to a business transaction is in a fiduciary relationship with the other party; or (b) disclosure would be necessary to prevent a partial or ambiguous statement of fact from becoming misleading; or (c) subsequent information has been acquired which a party knows will make a previous representation untrue or misleading; or (d) a party

knows a false representation is about to be relied upon; or (e) a party knows the opposing party is about to enter into the transaction under a mistake of fact and because of the relationship between them or the customs of trade or other objective circumstances would reasonably expect a disclosure of the facts. *Id.* (citing RESTATEMENT, SECOND, *Torts* § 551(2)).

In this case, Plaintiffs offered no argument, authority, or response to Defendants' motion for summary judgment with respect to Plaintiffs' fraudulent concealment claim. (*See* Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J. filed Jan 30, 2023) There appears to be no dispute that Mr. Jones had a duty to inform the Dodds that he missed the December 4, 2019 deadline to file the underlying medical malpractice action. There is also no genuine issue of material fact that Mr. Jones complied with that duty when he informed Mrs. Dodds that he missed this deadline when he met with her on May 22, 2020. There is also no genuine issue of material fact that to the extent that the Dodds lost their ability to sue Dr. Fredline and St. Alphonsus, they did so because Mr. Jones missed the deadline to file the medical malpractice case—not because he failed to tell the Dodds about it months after the fact. Plaintiffs' cite no authority that would support their claim for fraudulent concealment, particularly when based upon a five to six month delay that did not prevent them from filing a timely legal malpractice against Mr. Jones. *Compare Walsh v. Swapp L., PLLC*, 166 Idaho 629, 641, 462 P.3d 607, 619 (2020). There is no genuine issue of material fact that Mr. Jones informed the Dodds that he missed the deadline to file the underlying medical malpractice action. Defendants' motion for summary judgment as to Plaintiffs' claim for fraudulent concealment is granted.

H. Plaintiffs' motion to amend their complaint to add a claim for punitive damages is denied.

A party filing a motion to add punitive damages under Idaho Code § 6–1604 is required to establish a reasonable likelihood of proving by a preponderance of the evidence that the opposing party acted oppressively, fraudulently, wantonly, maliciously or outrageously. *See Myers v. Workmen's Auto Ins. Co*., 140 Idaho 495, 501, 95 P.3d 977, 983 (2004) (citation omitted). The Idaho Supreme Court described the circumstances necessary to justify an award of punitive damages:

> An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that be termed "malice, oppression, fraud or gross negligence"; "malice, oppression, wantonness"; or simply "deliberate or willful."

Payne v. Wallace, 136 Idaho 303, 307, 32 P.3d 695, 699 (Ct. App. 2001) (citing *Cheney v. Palos Verdes Inv. Corp*., 104 Idaho 897, 905, 665 P.2d 661, 669 (1983)). "The issue revolves around whether the plaintiff is able to establish the requisite 'intersection of two factors: bad act and bad state of mind.'" *Meyers*, 140 Idaho at 503, 95 P.3d at 985.

In Idaho, "punitive damages are not favored in the law and should only be awarded in the most compelling and unusual circumstances and are to be awarded cautiously and within narrow limits." *Curtis v. Firth*, 123 Idaho 598, 604, 850 P.2d 749, 755 (1993) (citations omitted). "The policy behind such damages is deterrence rather than punishment." *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 610, 726 P.2d 706, 722 (1986) (citation omitted).

Here, the only remaining claim that is not dismissed by the Court is Plaintiffs' fourth cause of action for declaratory judgment. The Court is not convinced that such claim is viable,

since it is based upon other claims that have now been dismissed.[9] Nonetheless, Plaintiffs do not seek, and cite no authority that would allow them to obtain, punitive damages for their declaratory relief claim. Rather, under that claim, they seek "[a] judicial declaration"… "in order for the parties to determine their respective rights and remedies in this matter. (Am. Compl. at 16, ¶ 67.) They also seek, "a judicial declaration as to the duties owed by Mr. Jones to Plaintiffs with respect to the medical malpractice claim as alleged herein." (*Id.* at 17, ¶ 4.) Thus, the Court denies Plaintiffs request for punitive damages as to their claim for declaratory relief because such damages have not been sought for such claim. Moreover, because the remaining claims in Plaintiffs' Amended Complaint are dismissed, the Court denies Plaintiffs' motion to amend such complaint as moot.

IV. CONCLUSION

For the reasons set forth above:

1. Plaintiffs' Motion for Partial Summary Judgment, filed on October 4, 2022, is DENIED;

2. Defendants' Motion to Strike Declaration of Fred Simon, M.D., filed on November 17, 2022, is GRANTED;

3. Plaintiffs' Motion for Leave to Amend First Amended Complaint to Seek Punitive Damages against Defendants, filed on October 18, 2022, is DENIED;

[9] A declaratory action cannot stand, for example, where the underlying actions have already been dismissed, resulting in the Court having determined the particular underlying actions have not presented a justiciable controversy. *Sidorov v. Transamerica Life Ins. Co.*, 832 F. App'x 479, 483 (9th Cir. 2020) (claim for declaratory relief had to be dismissed, since that claim was based entirely on tort and contract claims that were appropriately dismissed); *Century Sur. Co. v. Belmont Seattle, LLC*, 691 F. App'x 427, 429 (9th Cir. 2017) (declaratory judgment action became moot after third parties settled insured's claims in separate action).

4. Defendants' Motion to Strike Declarations of Various Witnesses, filed on October 31, 2022, is GRANTED in part and DENIED in part, as set forth above;

5. Defendants' Motion for Summary Judgment, filed on December 12, 2022, is GRANTED, and Plaintiffs' first cause of action for professional malpractice is DISMISSED with prejudice, Plaintiffs' second cause of action for breach of contract is DISMISSED with prejudice, and Plaintiffs' third cause of action for fraudulent concealment is DISMISSED, with prejudice;

6. Defendants' Motion in Limine Re: Testimony of Rebecca E. Czarnik R.N., filed on December 23, 2022, is GRANTED;

7. Defendants' Motion to Strike the Amended Declaration of Fred Simon, M.D., filed on December 23, 2023, is GRANTED;

8. Plaintiffs' Motion for (1) Order Extending Expert Disclosure Deadlines, filed on January 3, 2023, is DENIED;

9. Defendants' Motion to Strike Second Supplemental Declaration of Fred Simon, M.D., filed on January 19, 2023, is GRANTED;

10. Plaintiffs' Motion for Summary Judgment as to Breach of Contract Claim, or in the Alternative, for Partial Summary Judgment, filed on January 20, 2023, is DENIED;

11. Defendants' Motion to Strike the Second Supplemental Expert Opinion Report of Fred Simon, M.D., filed on February 2, 2023, is GRANTED as set forth above; and

12. Plaintiffs' Motion for Relief From Case Scheduling Order, filed no March 2, 2023, is DENIED.

13. The jury trial in this case is VACATED and a status conference shall be set in this case.

IT IS SO ORDERED.

Dated: 4/14/2023 3:07:12 PM

CYNTHIA YEE-WALLACE
District Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on 4/14/2023, I caused a true and correct copy of the foregoing ORDER ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT AND PENDING MOTIONS to be forwarded with all requires charges prepaid, by the method(s) indicated below, to the following person(s):

Rosa PLLC Angelo L. Rosa Mary S. Amschel arosa@rosacommerce.com mamschel@rosacommerce.com *Attorney for Plaintiffs*	( ) U.S. Mail ( ) Certified Mail/Return Receipt ( ) Hand Delivered ( ) Facsimile (X) Email
Cooper & Larsen, Chartered Gary L. Cooper J.D. Oborn cooperobornfiling@cooper-larsen.com *Attorneys for Defendants*	( ) U.S. Mail ( ) Certified Mail/Return Receipt ( ) Hand Delivered ( ) Facsimile (X) Email

CLERK OF THE DISTRICT COURT FOURTH JUDICIAL DISTRICT ADA COUNTY, IDAHO

TRENT TRIPPLE
Clerk of the District Court

By _____
Deputy Clerk

4/14/2023 3:21:30 PM

Exhibit 1 to

Order on the Parties' Motions for Summary Judgment and Pending Motions

Electronically Filed
10/31/2022 10:28 AM
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Shantell Eaton, Deputy Clerk

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Attorneys for Plaintiffs
JULENE DODD and WILLIAM DODD

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF ADA

JULENE DODD, as an individual and member of a marital community under Idaho law, and WILLIAM DODD, as an individual and member of a marital community under Idaho law, Plaintiffs, v. RORY JONES, ESQ., an individual residing in the State of Idaho, and JONES WILLIAMS FUHRMAN GOURLEY, P.A., an Idaho professional service corporation, and DOES 1-50, inclusive, Defendants.	Case No. CV01-21-18926 **AMENDED DECLARATION OF JULENE DODD IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Julene Dodd, being first duly sworn upon her oath, deposes and states as follows:

1. I am over the age of eighteen (18) and reside in Canyon County, State of Idaho. I am one of the Plaintiffs in this matter.

2. The purposes of this Declaration are (a) to attest to the truthfulness of facts, and (b) to authenticate the documents referenced herein that support the Plaintiffs' Motion for Summary Judgment, filed concurrently herewith, and to verify that certain of the documents attached as exhibits to this Declaration and to the Declaration of Mary S. Amschel, Esq.—which I provided them prior to the filing of this lawsuit and/or were obtained during discovery in this matter—including my medical records. *The only revisions made in this Declaration are intended to clarify minor details resulting from a refreshing of my recollection during preparations for deposition and deposition questioning. These revisions do not change the substance of my sworn statements. For the sake of complete transparency, the revisions are inserted in italicized text.*

3. I have personal knowledge of the matters attested to herein, except for those statements expressly predicated on the basis of information and/or belief.

My Elective Hiatal Hernia Surgery and Consequent Ordeal

4. In June 2017, I was having difficulty breathing and consulted with my primary care healthcare provider, Dr. Cherise Tarter ("Dr. Tarter"). Dr. Tarter believed I was having allergies and prescribed an inhaler.

5. In July 2017, I returned to Dr. Tarter for breathing difficulties as the inhaler did not alleviate my symptoms. Dr. Tarter sent me for a chest computed tomography ("CT") scan at St. Alphonsus Hospital in Nampa. CT scan results showed a large hiatal hernia placing pressure on one of my lungs.

6. On August 2, 2017, Dr. Forrest Fredline ("Dr. Fredline") performed an endoscopy

that confirmed the CT scan results. Dr. Fredline indicated that hiatal hernia repair surgery was the proper course of treatment.

7. On August 16, 2017, I was admitted to St. Alphonsus Hospital in Nampa, Idaho for elective hiatal hernia repair surgery. Dr. Fredline was the operating physician. I was told that I would be discharged by the following day.

8. The same day, Dr. Fredline performed laparoscopic surgery intended to repair the hernia. After the surgery, Dr. Fredline told me that the operation was more difficult than he thought it would be, and that the hernia had caused roughly half of my stomach to come up into my chest and had been putting pressure on my lung. Post-operative records confirming these facts, which I provided to my counsel and which (I am informed) were produced in discovery in this case, are collectively attached to the Declaration of Mary S. Amschel as "Exhibit 38."

9. On August 17, 2017, Dr. Fredline ordered enemas to be administered to me because he wanted me to have a bowel movement before clearing me for discharge from the hospital.

10. After each enema, I told a nurse that I was having abdominal pain that (a) worsened/increased in severity after each enema and (b) was not located in the area of my surgical incisions. Despite my protestations, both the nurse and Dr. Fredline dismissed my concerns, insisting instead that the pain was from the surgical incisions.

11. On August 18, 2017, Dr. Fredline continued to order the administration of enemas to me. I experienced intense pain after each enema and felt my condition was getting worse after the surgery instead of better. I was visited by nurses occasionally and by a physician's assistant once in the early afternoon of August 18. When I again complained of the pain and also told them I was having more and more difficulty breathing. I was told (again) that the pain was from my surgical incisions and that I should not worry about the pain. Despite this advice, the pain both

persisted and increased. I felt increasingly unwell overnight and into the following morning.

12. The next day (August 19, 2017) I continued to tell the nursing staff that I was in extreme pain. At some point in the mid-afternoon on August 19 my body felt like it was giving up on me and *I am informed* it was around that time that my vitals ~~(which had been declining) crashed~~. ~~*I am informed that it* was then that I was finally examined. *I am informed that the* examination revealed that my blood pressure had dropped to 60/30 and my heart rate became erratic~~. *I later learned that* I collapsed when nurses attempted to assist me to get out of my hospital bed, *and that* Dr. Fredline finally ordered a CT scan, the results of which showed free fluid in my abdomen. *I am informed that* I was rushed into emergency surgery to determine the cause. I *also* later learned later that my abdominal cavity had been filling (and at the time of the operation, was full of) fecal matter. Little wonder I was feeling terrible!

13. I have reviewed the subpoena sent by the Defendants in this case to obtain my medical records covering the period discussed above (August 17 through August 19, 2017) and I have also reviewed the records themselves. ~~The medical records covering this time period—which I am informed were provided by St. Alphonsus Hospital in response to the subpoena—are true and correct copies of my medical records and are the only records provided by the hospital to me directly and again through the document requests, including the Defendants' subpoena~~. The Defendants' subpoena along with these records are collectively attached and incorporated to the Declaration of Mary S. Amschel as "Exhibit 51." ~~The records reflect the absence of attention and treatment on August 18-19, 2017 despite my pleading with the staff at St. Alphonsus Hospital~~ to ~~listen to me as I describe above. Even the physician's assistant notes documenting the previous day's examination (the notes were transcribed on August 19) did not lead to any action being taken to investigate my complaints until my vital statics had declined sharply~~.

14. Except for the last five (5) days I was there, I have no recollection of the remainder of my stay at St. Alphonsus Hospital after I was wheeled into surgery on August 19, 2017. ~~I am told that I was in an induced coma for weeks. I am informed and believe, and thereupon allege, that my husband, William Dodd ("Bill") and my daughter, Jennifer Robinson ("Jennifer") maintained a constant vigil at (and/or near) my bedside and observed my treatment until I was transferred to Vibra Hospital ("Vibra") on September 19, 2017.~~

15. At the time I was transferred to Vibra, I was unable to move my limbs on my own. I had a wound vacuum-assisted closure device placed on my abdomen; tracheotomy with speaking valve; a urinary catheter; and a nutritional catheter. I required observation and care on a twenty-four (24) hour basis. I was classified as a *participating* quadriplegic and had no strength in my arms and legs. I could speak with only a faint whisper and had difficulty swallowing. I had also developed a large pressure sore from being in my hospital bed for such a long time. True and correct copies of my medical records confirming these facts, which I provided to my counsel without alteration and which (I am informed) were produced in discovery in this case, are collectively attached to the Declaration of Mary S. Amschel as "Exhibit 57."

16. Despite being brought to the edge of death and fighting my way back ~~(due to the incompetence of Dr. Fredline and the staff of St. Alphonsus) I~~ tried to proactively direct my healing as soon as I was able. I requested aggressive physical therapy to get back to my original strength level and independence, but such strength and independence has still not returned.

17. On October 12, 2017, I had a neuropsychological examination at Vibra ~~because my doctors were concerned about depression.~~ I told Dr. Gage that, although at one point in my life I suffered from mild depression, at Vibra I was very depressed. I was also angry about my physical limitations, frustrated at what had been done to me, outraged that I had been ignored, and powerless

despite my desire to get better.

18. I was transferred from Vibra to the Sunny Ridge nursing facility on November 22, 2017: nearly one hundred (100) days after I was admitted to St. Alphonsus Hospital for elective hernia surgery. I still needed wound care, I had infections in my abdomen, could not move my limbs on my own, suffered from depression, required aggressive treatment for constipation, and was on a combination of thirty-three (33) different medications. True and correct copies of my medical records demonstrating these facts, which I provided to my counsel without alteration and which (I am informed) were produced in discovery in this case, are collectively attached to the Declaration of Mary S. Amschel as "Exhibit 56."

19. ~~In December 2017, both Jennifer (my daughter) and Dr. Tarter expressed concern about me due to behavioral issues and believed I may have suffered a stroke. I understand that Jennifer mentioned her concerns to Dr. Fredline, but he [Dr. Fredline] was unconcerned and unhelpful. Jennifer eventually persisted in demanding that a magnetic resonance imaging ("MRI") test be administered.~~

20. On December 14, 2017, I underwent a brain MRI. ~~Despite Dr. Fredline's lack of concern and performed after repeated insistence by Jennifer, the MRI revealed a brain bleed and infection~~. I was transferred from St. Alphonsus Hospital in Nampa, Idaho to St. Alphonsus Hospital in Boise, Idaho for treatment with a top neurologist. I was treated with antibiotics, then released from the hospital back to Sunny Ridge ten (10) days later, on December 21, 2017. True and correct copies of my medical records demonstrating these facts, which I provided to my counsel without alteration and which (I am informed) were produced in discovery in this case, are attached to the Declaration of Mary S. Amschel as "Exhibit 60."

21. I continued to convalesce at Sunny Ridge until March 2018, when I was released

to go home. I was still unable to walk and had to use a wheelchair to move around. I still needed twenty-four (24) hour nursing care for three (3) months after returning home because I could not get out of bed, walk, take a shower, or use the restroom without assistance.

Hiring Defendants for Legal Representation

22. I know Rory Jones ("Mr. Jones") because he has known my brother, Jeff Day ("Jeff") for many years, and had represented me in a relatively straightforward divorce approximately twenty years before my hernia surgery. I had not seen him since that time.

23. ~~I am informed that Mr. Jones came to see me in St. Alphonsus Hospital.~~ I do not remember seeing Mr. Jones at St. Alphonsus Hospital at all. ~~I am also informed that Mr. Jones had stated to Bill and Jennifer that there was a valuable lawsuit against the hospital and Dr. Fredline for their failure to competently treat me~~.

24. While I was at Vibra, ~~Bill told me that Mr. Jones and his firm, Jones Williams Fuhrman Gourley, had contacted him and told him they wanted to represent us in making claims over what Dr. Fredline and St. Alphonsus Hospital did to me. Bill informed me that Mr. Jones believed both Dr. Fredline and the Hospital had committed~~ medical malpractice on me. ~~I~~ remember meeting with Mr. Jones once at Vibra.

25. I remember seeing Mr. Jones again at Sunny Ridge. On November 3, 2017, he came to Sunny Ridge with a contingent fee agreement and told Bill and me that Dr. Fredline and St. Alphonsus Hospital knew they would have to pay for what they did to me and for Bill's loss of consortium. Bill and I signed a Contingent Fee Agreement. A true and correct copy of this Agreement, containing Bill's and my signatures, is attached and incorporated hereto as "Exhibit 01."

26. Over the next eighteen (18) months, I had little contact with Mr. Jones or any

representative of his firm. During this time, I would call in every two or three months to Mr. Jones's office, and he would tell me he was working on my case but would give few details. The only communications initiated by Mr. Jones or his firm were:

27. In or around March 2018, Mr. Jones e-mailed me releases of information to obtain my medical records from St. Alphonsus Hospital. I promptly printed, signed, and e-mailed back to him.

28. In spring 2019, Mr. Jones e-mailed me a statement of facts that described my medical ordeal, which I approved with few changes.

29. The only updates or documents Mr. Jones or his firm sent me were copies of documents supposedly filed with the Idaho State Board of Medicine ("the Board").

30. Beyond these interactions, neither Mr. Jones nor his firm communicated with me about my claims nor provided any updates on my case.

31. In approximately July 2018, I visited Mr. Jones in his office because I was finally able to walk with the assistance of a walker. He said the case was "huge," and he was seeking five million Dollars ($5MM) in damages. He said he was looking for an expert witness for my case.

Defendants Fail to Timely File Medical Malpractice Case

32. Mr. Jones filed a Pre-Litigation Application and Claim with the Board of Medicine on August 13, 2019. Why it took Mr. Jones eighteen months from his firm's engagement as our legal counsel to prepare and make this submission makes no sense to me. Mr. Jones represented me in a hearing before the Board on October 24, 2019, which I attended with him. Sometime around this date, Mr. Jones told me he was having difficulty finding an expert witness. However, neither he nor any of his colleagues ever communicated to Bill or to me that the case would not move forward.

33. ~~I am informed that, on November 8, 2019, the Board ruled on the motion Mr. Jones filed and issued an advisory opinion that found no medical malpractice by St. Alphonsus or Dr. Fredline.~~ Mr. Jones forwarded this to me by e-mail and represented that his firm would be moving forward with a claim and to "keep the faith." A true and correct copy of the correspondence I received from Mr. Jones is attached and incorporated hereto as "Exhibit 02."

34. I later learned that Mr. Jones did file a lawsuit for Bill and me on December 12, 2019. It was not until several months later that I discovered Mr. Jones had filed our lawsuit four (4) days after the legal deadline for doing so had passed.

35. Between January 1 and April 7, 2020, I had no communication with Mr. Jones and/or his firm. They did not contact me, and I assumed they were working on my case since he had been in contact with my friend, Karen Pachal's daughter, Khristen. Khristen is a medical malpractice defense *attorney* in the Miami, Florida, area. I asked Mr. Jones to consult with Khristen. ~~I am informed that he did so into 2020, despite the fact that (as I later learned) Mr. Jones had filed our lawsuit late!~~

36. I e-mailed Mr. Jones on April 7, 2020, to request a status update on my case. A true and correct copy of the correspondence I sent Mr. Jones is attached and incorporated hereto as "Exhibit 03." I never received a response to this e-mail from Mr. Jones or anyone at his firm.

37. A month later, in May 2020, I contacted Mr. Jones' firm again, and again requested a status update. Mr. Jones asked me to come to his office to discuss the case.

38. On *May 22*, 2020, I met Mr. Jones at his office. When I arrived, he asked me to go into his conference room. He closed the door and spoke to me alone. He then said that he felt badly because he had made a mistake by missing the filing deadline that applied to my lawsuit and that he had filed it four days late. Mr. Jones also told me that this was the first such mistake he had

made while practicing law.

39. Mr. Jones then told me he had spoken to another lawyer to determine if there was any way he could proceed with my lawsuit, and was informed there was not. He did not provide this other attorney's name. Mr. Jones stated that he had not yet told his partners about this mistake.

40. Finally, Mr. Jones told me that Bill and I would be able to sue him and his firm to recover my damages from the medical malpractice. Mr. Jones encouraged me to do so and said his malpractice insurance would cover him and that he was getting ready to retire.

Continuing Medical Issues and Financial Consequences of Ordeal

41. My health has continued to deteriorate since ~~the medical malpractice~~ I suffered at the hands of Dr. Fredline and St. Alphonsus Hospital.

42. In late summer 2020, a physician's assistant in Dr. Tarter's office discovered I had gallstones and referred me to a surgeon for a consultation. The surgeon told me that he would not perform surgery because it would be too risky due to the volume of scar tissue in my abdomen. I had no scar tissue in my abdomen prior to my ordeal caused by Dr. Fredline in August of 2017.

43. Since February 2018, Dr. Tarter performed annual wellness checks on me, which include laboratory tests.

44. On October 2021, I felt weak and dizzy and had difficulty walking and breathing. I went to the emergency room at St. Alphonsus and was admitted to the hospital with kidney failure. I underwent two rounds of dialysis and a blood transfusion in the first two days I was there. My kidneys were functioning at five percent (5%) of capacity, and I was diagnosed with end-stage renal failure. I was released on Tuesday, October 26, 2021. I now need dialysis three (3) times per week just to survive.

45. ~~Laboratory test results from Dr. Tarter show I had no kidney issues before Dr.~~

Fredline's surgery, but worsening kidney issues after his surgery and the resulting sepsis. True and correct copies of my medical records demonstrating these facts, which I provided to my counsel without alteration and which (I am informed) were produced in discovery in this case, are attached to the Declaration of Mary S. Amschel as "Exhibit 65."

46. Before Dr. Fredline's surgery I was a sixty-five (65) year old woman in good health. I had been working full-time as a commercial insurance agent with much additional education and licensing for about seventeen (17) years at the time of the surgery. I was taking interviews for work at a new company just before the surgery. After the surgery, I intended to renew my license and to continue working as an insurance agent. However, renewing my license would require forty (40) hours of education, and I discovered that the ordeal I went through with Dr. Fredline's surgery made it physically impossible to sit for the study time. The ordeal also affected my memory, and I discovered that I was unable to remember the information necessary to renew my license.

47. The ordeal—which began with Dr. Fredline's incompetently-performed surgery followed by the development of sepsis resulting from post-operative enemas, and St. Alphonsus' refusal to take corrective actions until the sepsis brought me to the edge of death—rendered me unable to work due to exhaustion, the inability to mentally focus, and the inability to sit or stand for any length of time.

Consequences of Surgical Ordeal on My Marriage

48. Bill and I enjoyed a happy and active marriage before the ordeal described above. We regularly traveled together to rodeos and to visit family members. We took road trips together and genuinely enjoyed our life together. *Our traveling opportunities are severely limited* because I undergo dialysis three (3) times a week *just to survive and* to manage the damage caused by the sepsis on my kidneys. *If I travel out of the Treasure Valley, I must arrange treatment for dialysis*

at a center while I am away.

49. Bill and I also had a close and satisfying sex life before the ordeal, but we have not been sexually intimate since the surgery. We have tried to, but it causes me pain. This has badly affected our relationship because we both miss our intimacy and I know he struggles with watching what has happened to his loving, energetic life partner. Whether our marriage will survive this remains to be seen.

Consequences of Surgical Ordeal on My Daily Life

50. Bill and I live on two (2) acres of land with a garden, miniature horses, and donkeys. William is long-haul trucker, and before my ordeal I regularly took care of our land and animals, mowed the lawns, sprayed weeds, irrigated the pastures, and generally handled the upkeep of our property. Before the ordeal I could easily handle eighty (80) pound hay bales and fifty (50) pound feed bags. Now, I have a medical restriction that prohibits me from lifting more than fifteen (15) pounds and I cannot stand long enough to cook a meal or clean my own home. I tire easily and sleep for long hours, yet still need to take naps during the day. I am extremely depressed, angry at the string of incompetent conduct resulting from trusting first my healthcare providers and then the attorneys who pursued us to offer help in remedying failed surgery. At times, I have considered giving up on life.

51. Before the ordeal I also used to travel, including making long trips by car to visit family. In October 2018, after the ordeal, due to constant pain and need for medical care, I was unable even to fly to visit my sister, who was in hospice care. She passed away without my being able to say "goodbye" to her in person.

52. I have never returned to my normal level of functioning or activity. I have not felt healthy or even remotely normal since the morning of August 17, 2017. In short, my condition has

robbed me of my zest for living and it seems terribly unfair that I should suffer due to ~~incompetent medical care~~ and then lose any chance of remedying that injury because of the ~~incompetence of a law firm who pursued me as a client~~.

I declare, under penalty of perjury under the laws of the State of Idaho, that the foregoing is true and correct.

Executed on October 28, 2022 at Nampa, Idaho:

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~~29~~ October 2022 | 4:52:40 PM EI
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Julene Dodd

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10/4/2022 6:58 PM
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Gena Foley, Deputy Clerk

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Attorneys for Plaintiffs
JULENE DODD and WILLIAM DODD

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF ADA

JULENE DODD, as an individual and member of a marital community under Idaho law, and WILLIAM DODD, as an individual and member of a marital community under Idaho law, Plaintiffs, v. RORY JONES, ESQ., an individual residing in the State of Idaho, and JONES WILLIAMS FUHRMAN GOURLEY, P.A., an Idaho professional service corporation, and DOES 1-50, inclusive, Defendants.	Case No. CV01-21-18926 **DECLARATION OF WILLIAM DODD**

William O. Dodd, Jr., being first duly sworn upon his oath, deposes and says:

1. I am over the age of eighteen (18) and reside in Canyon County, State of Idaho.

2. I am the husband of Julene Dodd, a co-Plaintiff in this matter and a co-Plaintiff in the underlying medical malpractice case in which Julene and I were represented by the Defendants.

3. The purpose of this Declaration is to attest to certain facts and authenticate certain documents attached here as exhibits in support the Plaintiffs' present Motion for Partial Summary Judgment, filed herewith. I have personal knowledge of the matters attested to herein, except for those statements expressly predicated on the basis of information and/or belief.

Julene's Medical Ordeal

4. On August 16, 2017, my wife, Julene Dodd, was admitted to St. Alphonsus Hospital in Nampa for an elective hiatal hernia repair surgery. Before the surgery Julene was told (in front of me) that she would be discharged no later than the day after the surgery. Instead, Julene was in the Intensive Care Unit ("ICU") at St. Alphonsus Hospital for thirty-eight (38) days and did not come home for over six (6) months.

5. The day after her surgery, on August 17, 2022, Julene told her post-surgical nurses and her doctor, Dr. Forrest Fredline ("Dr. Fredline") that she was having abdominal pain. Dr. Fredline had ordered enemas be administered to her, and her abdominal pain became worse after each enema. The nurses and Dr. Fredline told her that the pain was from her surgical incisions even though she informed them that the pain was not in the area of her incisions. This pain increased over the next two days, but neither the nurses nor Dr. Fredline took her pain seriously.

6. On August 19, 2017, Julene collapsed while getting out of her hospital bed even though she had assistance from nurses. The same day, Dr. Fredline took Julene in for second surgery.

7. After this surgery, Julene's daughter, Jennifer, Lisa Westfall, and I saw Dr. Fredline in a hallway in the hospital. Dr. Fredline said about Julene's situation, "This is all my fault." He also stated that he had broken off a small needle tip in Julene's abdomen but that it was too small to search for and he did not believe it would pose a danger.

8. I was shocked, but I was so concerned about Julene that I did not confront Dr. Fredline. Also, right at the time he made that statement, I had to leave Julene's hospital room so she could be connected to a ventilator, and I was unable to discuss with him further his statement that he was responsible for Julene's condition.

9. Later that day I saw Dr. Fredline again when I was exiting the elevator. He stated to me a second time that he was responsible for Julene's condition. I was emotionally distraught and did not know how to respond, so I did not.

10. In or about the second week of September, 2017, while Julene was still in the ICU at St. Alphonsus Hospital, Dr. Fredline told me that a social worker who had come to speak to Julene about being discharged should not have visited with Julene because Julene was nowhere near ready to be discharged, and this only brought a false hope to me and Julene that she would return home soon. Dr. Fredline seemed angry and told me that Julene was his patient, so he would decide when she would be discharged.

11. Julene suffered numerous injuries and medical issues from the surgery. She required high-level nursing care after her stay in the ICU, and an extended stay in a rehabilitation center as well. Ultimately, Julene could not return home until March 8, 2018: one-hundred ninety-one (191) days of being in hospitals and a nursing home. She required three (3) months of in-home healthcare after she was released.

My Interactions with Rory Jones

12. I am familiar with the name Rory Jones ("Mr. Jones") from Julene. ~~Upon information and belief, Mr. Jones handled Julene's previous divorce and drafted a will for her~~. I was also aware that Mr. Jones was a friend of Julene's brother, Jeff Day ("Jeff").

13. One day while I was at the hospital and while Julene was in the ICU in an induced coma, Jeff came to visit Julene. He told me Mr. Jones was there with him and asked if I would speak with him. I was not considering a lawsuit at the time. I was solely concerned with Julene's survival.

14. Mr. Jones met me in a visitor lounge across the hall from Julene's hospital room. ~~Upon information and belief, he had been to Julene's room and viewed her condition. I believe this because of what he said to me.~~ He introduced himself and told me words to the effect of "this is a huge deal, and they [St. Alphonsus Hospital and Dr. Fredline] know that they will have to settle with you."

15. Mr. Jones stated that I would be able to recover money damages for what Dr. Fredline did to Julene. He said that I would not be able to recover as much as Julene would, but that I had a claim for loss of consortium. He explained to me that a claim for loss of consortium was for the loss of companionship and the marriage relationship with my wife.

16. Neither Mr. Jones nor anyone from his office interviewed me to obtain information to support the claim they told me they were filing on my behalf. I was not asked for information. At no time did Mr. Jones or anyone from his office tell me they needed evidence or information to support this (or any other) claim. I was never provided with any affidavits or other written statements to review and sign relating to my case. I am not an attorney, so I assumed that Mr. Jones knew what he was doing and would contact me if I was needed. I do not understand how an

attorney could file a claim on my behalf without asking me for facts to support it.

17. I have a clear recollection of events described in this declaration because of the emotional torment and fear of losing my wife that I was experiencing, which I still associate with those events. However, although those events are recounted accurately, I cannot recall the specific date of every event that occurred during Julene's hospitalization. Both at the time and in looking back, days sometimes felt like they blended together. My focus was on helping Julene with whatever means were in my control rather than watching the calendar. Regardless, I will supplement this declaration if I should recall or be able to extrapolate more accurate dates.

18. Based upon the facts that Julene was in the ICU at St. Alphonsus Hospital and the discussion took place after her three (3) surgeries, the conversation with Mr. Jones when he came to the hospital occurred on or after August 23, 2017 and before September 19, 2017 when Julene was discharged to Vibra Hospital.

19. I did not see Mr. Jones again until November 3, 2017, when he came to visit Julene at Sunny Ridge Rehabilitation Center while I was there. He had with him a contingency fee agreement for Julene and me to sign. I did not arrange with Mr. Jones to meet us there. I assumed that Jeff told him we were both at Sunny Ridge at that time.

20. I was in a meeting with Julene and Mr. Jones in Mr. Jones' office after Julene returned home on March 8, 2018. Although I cannot recall the exact date, I believe this meeting took place in May 2018. I was not in any other meetings with Mr. Jones.

21. Between the time Julene was released on March 8, 2018 and June 23, 2020, when Mr. Jones informed Julene that he had lost our case, I did not have contact with Mr. Jones or anyone at his firm, nor did Mr. Jones or anyone at his firm attempt to contact me

22. ~~During this time Mr. Jones also had little contact with Julene. I know that such~~

contact was infrequent because Julene would tell me each time she spoke to Mr. Jones. I have neither seen nor communicated with Mr. Jones since our meeting in or about May 2018.

23. Julene met with Mr. Jones in his office on June 23, 2020. When she came home from that meeting, she informed me that Mr. Jones had lost our case because he filed the lawsuit too late.

Inaccuracies in Mr. Jones' Testimony

24. Mr. Jones made statements in his deposition testimony that are inaccurate as follows:

25. He stated that he visited Julene in St. Alphonsus Hospital once a week, and that I was not at the hospital with my wife. This is false. I was at the hospital every day from approximately seven o'clock (7:00) a.m. until nine o'clock (9:00) p.m. I was in Julene's hospital room at nearly all times during these hours. Other than the first time I met Mr. Jones – when he came to St. Alphonsus Hospital to talk to me about a possible medical malpractice lawsuit with a claim for loss of consortium – I never saw Mr. Jones at the hospital.

26. He stated that he never discussed the case with me until I signed the contingent fee agreement on November 3, 2017. This is false. As stated in paragraphs 13, 14, and 15, *supra*, he met with me at St. Alphonsus Hospital and discussed a medical malpractice case with a claim for loss of consortium.

My Injuries

27. I was at the hospital with Julene every day until she was discharged. The ordeal took a physical and emotional toll on me as well as Julene.

28. I lost nine (9) weeks of pay due to Dr. Fredline's medical malpractice. I am self-employed so had to work extremely hard to make up for the money lost during that time.

29. I have additional home labor responsibilities on our farm ~~since the medical malpractice~~. Before the surgery Julene cared for our horses, mowed the yard, and moved firewood and haybales. Since the medical malpractice, these tasks are my responsibility even though I am often away from home on the road in my job as a long-haul truck driver. However, when I come home, I must also take care of all farm responsibilities because since her surgery, Julene cannot.

30. In December 2017, I developed a shingles and Bell's palsy while Julene was in the hospital for a brain bleed. I believe these health problems were caused by the stress I underwent as a result of Dr. Fredline's medical malpractice – not knowing whether Julene would live or die, and having to work long hours to make up for the income I lost while at Julene's bedside.

31. My relationship with my wife has not been the same ~~since the medical malpractice~~. Julene is not the same person, and we lack the same kind of companionship we used to enjoy. We used to take road trips together, but Julene has been unable to do so since she was released from Sunny Ridge due to continuing health issues and exhaustion. Before her hernia surgery on August 16, 2017, we were sexually intimate at least once per week. We have not been sexually intimate since the weekend before that date because Julene cannot engage in sexual relations with me because of the pain caused by the course of events that unfolded from August 2017 onward.

I declare, under penalty of perjury under the laws of the State of Idaho, that the foregoing is true and correct.

Executed on August 5, 2022 at Nampa, Idaho:

DocuSigned by:
William O. Dodd
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William O. Dodd, Jr.