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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

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ERIC MUELLER and CORISSA D. MUELLER, husband and wife, :
individually, and on behalf of TAIGE MUELLER,
a minor, and on behalf of themselves and those similarly situated, :

Plaintiffs, :

v. : Case No. CIV 04-399-S-BLW

APRIL K. AUKER, *et al.* :

Defendants. :

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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A NEW TRIAL

Plaintiffs submit this reply brief in further support of their motion for a new trial and in response to the opposition briefs of the City of Boise ("City Br."), St. Luke's Regional Medical Center Ltd. ("St. Luke's Br."), and Dr. Macdonald ("Macdonald Br.").

I. DEFENDANTS MISREPRESENT THE STANDARDS UNDER RULE 59(a)

Plaintiffs' initial brief ("Pls' Br.") set forth the correct standards under Rule 59. Pls' Br. 1-3. Defendants' contrary assertions misstate the law.

The City's primary argument in its opposition is that a Rule 59(a) motion cannot be based upon improper jury instructions, or, perhaps, that they only warrant a new trial if they meet some "miscarriage of justice" standard. City Br. 1-5. It does not bother to discuss (much less distinguish) the various Supreme Court and Ninth Circuit authorities plaintiffs cited. Pls' Br. 1-2. *See also, e.g.*, *United States Fidelity & Guaranty Co. v. Lee Investments LLC*, 551 F. Supp. 2d 1114, 1117 (E.D. Cal. 2008) ("'[E]rroneous jury instructions, as well as the failure to give adequate instructions, are . . . bases for a new trial.'") (*quoting Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990)); *Baufield v. Safelite Glass Corp.*, 831 F. Supp. 713, 718 (D. Minn. 1993) ("A new trial may be appropriate under Fed. R. Civ. P. 59 if the court erred in instructing the jury as to the applicable law."); *Kehm v. Proctor & Gamble Co.*, 580 F. Supp. 890, 896-97 (N.D. Iowa 1982), *aff'd*, 724 F.2d 613 (8th Cir. 1983). Instead, the City cites the separate opinion of Judge Smith (without identifying it as such) in *Tortu v. Las Vegas Metropolitan Police Dep't*, 556 F.3d 1075, 1087 (9th Cir. 2009) (Smith, J., concurring and dissenting). *Compare* City Br. 2 *with The Bluebook: A Uniform System Of Citation* 91 (Columbia Law Review Ass'n et al. Eds, 18th ed. 2005) (Rule 10.6.1). Of course, Judge Smith *dissented* in *Tortu* on the question of whether a motion for a new trial should have been granted, and even in that dissent, did not suggest that he identified an *exclusive* list of grounds that might

support a Rule 59(a) motion.

The City's claim that plaintiffs are really making a Rule 59(e) motion is obviously wrong. Plaintiffs are not seeking to *alter* or *amend* the final judgment (which would require a new final judgment to replace the current one) because of faulty jury instructions. Fed. R. Civ. P. 59(e).

The City also erroneously asserts that it is the Muellers' burden to show that errors in jury instructions were "more than harmless." City Br. 6. It is the City's burden to show that the error was harmless. Pls' Br. 2-3. *See also Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (an error in jury instructions is presumed prejudicial, and the burden shifts to the defendant to demonstrate otherwise); *Dang v. Cross*, 422 F.3d 800, 811 (9th Cir. 2005) (same).[1]

For its part, St. Luke's argues that a Rule 59(a) motion based upon a jury verdict contrary to the weight of the evidence must be denied if there is *any* substantial evidence to support the jury's verdict. St. Luke's Br. 2. This is plainly contrary to the cases interpreting Rule 59(a). *Murphy*, 914 F.2d at 187 ("It is clear that the district judge 'had the right, and indeed the duty, to weigh the evidence as he saw it, and to set aside the verdict of the jury, *even though supported by substantial evidence* where, in his conscientious opinion, the verdict is contrary to the clear weight of the evidence . . . .'") (*quoting Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir. 1957)) (emphasis added). St. Luke's cites *Wallace v. City of San Diego*, 479 F.3d 616 (9th Cir. 2007) for support, but it quotes the portions of that opinion discussing the

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[1] Although its relevance to this motion is unclear, the City also purports to state the standards that the Ninth Circuit applies in reviewing jury instructions. City Br. 6. The City gets this wrong, too. The standard of review that the Ninth Circuit uses for jury instructions depends upon the nature of the claimed error. When an appellant claims that an instruction or a failure to instruct misstates the law, as plaintiffs claim here, the review is *de novo*. *Medtronic, Inc. v. White*, 526 F.3d 487, 493 (9th Cir. 2008). *Cf. Hernando-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010) ("An error of law is an abuse of discretion").

standards under a Rule 50(b) motion for judgment as a matter of law, *not* a Rule 59(a) motion for a new trial. *Id.* at 624. It is well-settled that the standards for these two motions differ. *William Inglis & Sons Baking Co. v. ITT Continental Banking Co.*, 668 F.2d 1014, 1026-27 (9th Cir. 1982) (contrasting Rule 50 and Rule 59 motions); *Lucent Technologies v. Gateway, Inc.*, 509 F. Supp. 2d 912, 917-18 (S.D. Cal. 2007) (same).

II. DR. MACDONALD FAILS IN HIS EFFORTS TO SHOW THAT THE ADMISSION OF DR. PETER ROSEN'S TESTIMONY WAS PROPER OR NON-PREJUDICIAL

Plaintiffs' moving brief demonstrates that Dr. Rosen's testimony -- and specifically his two opinions concerning the accuracy of Dr. Macdonald's risk assessment and whether Taige Mueller was suffering from a serious bacterial infection – fails the relevance and reliability tests for expert testimony in federal court. Pls' Br. 3-10. Dr. Macdonald is the sole defendant to respond to this argument, and his argument is wanting.[2]

Dr. Macdonald argues that Dr. Rosen's first opinion -- that Dr. Macdonald's claim that Taige faced a 5% chance of death was accurate – was based on both population studies and his

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[2] The City asserts that only plaintiffs' third argument (concerning jury instructions) affects it, so it declines to address any other. City Br. 2-3 n.1. Plaintiffs' moving papers made clear that Dr. Rosen's testimony, and particularly his assertion that the treatment ordered by Dr. Macdonald saved Taige Mueller's life, infected plaintiffs' case against the City. Pls' Br. 10 ("[A]ny jury would find it more difficult to find a police officer violated the Constitution by making a certain decision, when with that decision he may have saved a baby's life."). The City's self-serving assertion as to which arguments affect it obviously does nothing to refute that demonstration. *Cf. Gasoline Products, Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931) (a court should hold a retrial of all issues unless the issues to be retried are "so distinct and separable from the others that a trial of it alone may be had without injustice."); *Williams v. Slade*, 431 F.2d 605, 608 (5th Cir. 1970) (reversing directed verdict in favor of driver of plaintiff's car and holding that case against driver of a second car, for whom the jury had reached a favorable verdict, would have to be retried as well; "a court may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict on those issues which will not be included in the new trial").

own experience. But Dr. Rosen never referred to a single specific study to support this opinion; indeed, he denigrated their usefulness. Macdonald Br. 10. Accordingly, Dr. Macdonald can only assert that Dr. Rosen's opinion was based on "the gamut of studies that he's been exposed to during his fifty years of medical practice." Macdonald Br. 6 n.1. He cites no case to suggest that such a vague appeal can meet the reliability prong of Fed. R. Evid. 702. Indeed, that Dr. Rosen could not cite any specific study to support his opinion, whereas Dr. Shapiro cited several (including a meta-analysis) to support his opinion without defendants identifying even one opposing study on cross-examination, strongly suggests that Dr. Rosen's opinion was contrary to the relevant medical literature, not supported by it. *See, e.g.*, *Hendricksen v. Conoco Phillips Co.*, 605 F. Supp. 2d 1142, 1166 (E.D. Wash. 2009) (holding that a toxicologist's opinion that any non-trivial exposure to benzene was a risk factor for plaintiff's condition was unreliable because it "fl[ew] in the face of the scientific literature . . . and other expert testimony").

Dr. Macdonald cites a Ninth Circuit case that stands for the proposition that an expert need not adduce specific studies when the type of event about which he testifies is so unusual that there are no studies about it. *Primiano v. Cook*, 2010 WL 1660303 at *6 (9th Cir. 2010). This holding is completely inapplicable here, however, because, unlike Dr. Rosen, the expert in *Primiano* made no claim that he relied on studies and, in fact, there are many studies on the risks faced by febrile infants. Tr. 6/15/2010 at 190, 200.

Nor, of course, did *Primiano* rescind the requirement that an expert who relies on experience must explain how his experience supports his opinion. *See Primiano*, 2010 WL 1660303 at *6 ("Dr. Weiss's background and experience, and his explanation of his opinion, leave room for only one conclusion regarding its admissibility."). Here, Dr. Macdonald asserts

that Dr. Rosen did give such an explanation, Macdonald Br. 10, but the part of the trial transcript he cites for this claim – pages 68 to 75 of the June 21 transcript – does not contain one. The first two pages feature only Dr. Rosen's *ipse dixit* that he relied upon a melange of general factors (including his experience and medical studies). In the remaining pages, Dr. Macdonald's risk assessment is never even mentioned. The testimony there does not begin to explain *how* Dr. Rosen's experience (or his education or medical studies or anything else) demonstrate that Taige's symptoms – that she had a fever, was lethargic, and had trouble feeding, Tr. 6/21/2010 at 70-73 – showed that Taige faced a 5% risk of dying or suffering severe brain damage. His appeal to his general experience and refusal to explain further is another red flag of unreliability.

In support of Dr. Rosen's second opinion – that Taige Mueller had a serious bacterial infection and Dr. Macdonald's intervention saved her life – Dr. Macdonald again claims that it is based on Dr. Rosen's extensive experience. Macdonald Br. 11-12. But Dr. Macdonald makes no effort to argue that Dr. Rosen ever explained how his opinion (which he admitted could not be proven or disproved scientifically, Tr. 6/21/2010 at 140) was based on his experience.[3]

The absence of an explanation here is especially troubling given that Dr. Rosen's hypothesis conflicted with the results of all the standard tests, including what Dr. Womack called the "gold standard" for determining bacterial infections, *viz.*, the cultures. Tr. 6/18/2010 at 55;

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[3] Dr. Macdonald argues only that this opinion is relevant because plaintiffs opened the door to evidence of events after Taige was seized by asking Dr. Macdonald whether Taige had bacterial meningitis. Macdonald Br. 11-12. But a question concerning an actual diagnosis made at the time of the patient's treatment does not open the door to opinion evidence from an expert. *Jerden v. Amstutz*, 430 F.3d 1231, 1239 n.9 (9th Cir. 2005). Further, this question could only have opened the door on whether Taige had meningitis, not whether she had some unspecified, life-threatening bacterial infection from which she would have developed a "serious sepsis syndrome," as Dr. Rosen claimed. *See, e.g.,* Tr. 6/21/2010 at 79-80, 86, 108.

JE 1, page 008 (all cultures were negative); Macdonald Br. 10 ("Only a workup" can determine if a patient is infected) (*quoting* Dr. Rosen's testimony). *Cf. Tamraz v. Lincoln Electric Co.*, 2010 WL 3489002, *3 (6th Cir. Sept. 8, 2010) (reversing judgment where treating doctor's testimony that manganese caused plaintiff's Parkinson's Disease "was at most a working hypothesis, not admissible scientific 'knowledge'"); *id.* at 11 (doctor was "intelligent and knowledgeable . . . [b]ut not everything a knowledgeable person say is 'knowledge' under Rule 702"). He also provided no explanation, based on his experience or anything else, for how the administration of antibiotics saved Taige's life despite the fact that she improved so rapidly from her serious infection that she had little fever or sign of illness by the time Dr. Womack examined her (before the antibiotics could take effect). JE 1, 011. Tr. 6/22/2010 at 63-65. Given the undisputed greater prevalence of viral infections, Macdonald Br. 12, these gaps are extraordinary. *Tamraz*, 2010 WL 3489002 at *9 (unknown causation "currently accounts for the vast majority of Parkinson's Disease cases, making it impossible to ignore and difficult to rule out").

Dr. Macdonald also argues that when plaintiffs cross-examined Dr. Rosen on this opinion, he admitted that Dr. Womack disagreed with it, and also that Dr. Shapiro disputed it in his rebuttal testimony, and that, thus, there was a range of medical opinions for the jury to weigh. Macdonald Br. 12-13. But these are simply further indicia of the unreliability of Dr. Rosen's opinion, and an expert's opinion under Rule 702 is not made admissible because the jury heard differing opinions. Were it otherwise, all expert opinions, however unreliable, would be admissible if opposed by reliable expert opinions. Dr. Macdonald also argues that these conflicting opinions demonstrate that there was no prejudice from either of Dr. Rosen's opinions.

Macdonald Br. 14.[4] But the strength of Dr. Shapiro's testimony only makes the prejudice here more certain; the jury may have considered the "totality of the evidence" (Macdonald Br. 14), but that "totality" would have been far more favorable to plaintiffs without Dr. Rosen's testimony. The impact of a well-credentialed expert who claims, and is the only expert to claim, that defendants saved a child's life cannot be dismissed as trivial.

III. DEFENDANTS FAIL TO JUSTIFY THIS COURT'S DECISION TO TAKE THE BATTERY CLAIM FROM THE JURY

Plaintiffs' moving papers demonstrate that this Court erred in dismissing the battery claim. Pls' Br. 10-13. Dr. Macdonald and St. Luke's ignore the relevant factual issue.

Those defendants fail to defend this Court's stated reason for dismissing the claim: an absence of intent. Both suggest that the rationale applied only to the claim for false imprisonment and/or that what this Court meant was an absence of an "intentional, unpermitted contact." St. Luke's Br. 8; *cf.* Macdonald Br. 16 ("plaintiffs failed to show that there was . . . intent . . . to provide medical treatment . . . without the consent of her legal guardian."). Both try to transform the "intent" ruling into a ruling that plaintiffs failed to prove the absence of consent.

Both also ignore *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994). *Neal* demonstrates that a battery claim is not defeated merely because a defendant believes he has valid consent.

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[4] Dr. Macdonald asserts that plaintiffs bear the burden of showing that permitting Dr. Rosen's testimony was prejudicial. Macdonald Br. 13-14 (*citing Elsayed Mukhtar v. California State University, Hayward*, 299 F.3d 1053 (9th Cir. 2002)). There is an apparent conflict in the Ninth Circuit between cases like *Elsayed Mukhtar*, which hold that the party harmed by an evidentiary error bears the burden of showing prejudice, and cases like *Clem v. Lomeli*, 566 F.3d at 1182 (error in jury instructions) and *Jerden v. Amstutz*, 430 F.3d at 1240 (errors in striking and admitting testimony), which hold that prejudice is presumed for *all* civil trial errors, with the party benefitting from the error bearing the burden to prove otherwise. Given the "more probably than not" standard, a finding of prejudice is proper here even if plaintiffs were to bear the burden.

The husband in *Neal* surely *believed* that he had valid consent (as did the lower courts), his omissions about his extramarital affair notwithstanding. Nor do defendants try to dispute the fact that a jury *could* reasonably have found that Dr. Macdonald made misrepresentations and/or omissions that vitiated any consent that April Auker gave. (Indeed, Dr. Macdonald's agnosticism on what "bad faith" acts the jury may have found would preclude any such dispute. Macdonald Br. 19.) The battery claim should not have been dismissed.

IV. THE CITY FAILS TO JUSTIFY THE OMISSIONS AND ERRORS IN THIS COURT'S JURY INSTRUCTIONS

Having spent so much effort wrongly arguing that errors in jury instructions cannot be the basis for a Rule 59(a) motion for a new trial, the City makes only short and ineffective arguments to try to refute plaintiffs' demonstration (Pls' Br. 13-16) that those instructions were incorrect.

The City argues that the Court need not have instructed the jury concerning the presumption accorded parents by the Due Process Clause when they make medical decisions for their children because the Ninth Circuit did not mention it as the "central issue" of the case. City Br. 7. The Ninth Circuit did not mention the presumption because it was not relevant to the "notice" claims before it. This Court (and the Supreme Court) already has held that there is such a presumption, Pls' Br. 13, and the Ninth Circuit said nothing to the contrary.

In their moving papers, plaintiffs demonstrate that defendants have always had the burden of showing exigent circumstances in Section 1983 cases involving Fourth Amendment violations where defendants contend those circumstances excuse the absence of a warrant, and that Fourth Amendment "consent" cases are far less analogous. Pls' Br. 13-15. *See also, e.g.*, *Johnson v. City of Memphis*, 2010 WL 3305264, *2 (6th Cir. Aug. 24, 2010); *Lundstrom v. Romero*, 2010 WL 3222048, *10 (10th Cir. Aug. 10, 2010). The City ignores both propositions, and simply

recites a Section 1983 case involving consent. City Br. 7.

The City claims that *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 1999) did not require that state officials interfering with family relations conduct a "reasonable investigation" under the circumstances. City Br. 8. This is not a plausible interpretation of that court's opinion on page 1138, and whether circumstances precluded any significant investigation was for the jury to determine. Equally implausible is the City's claim that the jury did consider whether Rogers conducted a reasonable investigation. There is a difference between whether someone's actions are reasonable given what they *did know* and whether those actions were reasonable given what they *should have known*. (An attorney who makes an assertion that is reasonable given his knowledge, but who failed to conduct a reasonable inquiry, has still violated Fed. R. Civ. P. 11.) Instruction No. 12 erroneously required the jury to assess the former instead of the latter.

The City's interpretation of *Rogers v. County of San Jacinto*, 487 F.3d 1288 (9th Cir. 2007) ignores the word "must" and its common meaning in English. City Br. 9-10. It further ignores plaintiffs' argument (Pls' Br. 16) that the Court failed adequately to instruct the jury that Rogers violated the Muellers' rights unless he reasonably believed that avoiding a hearing would be more likely to result in the removal of any so-called "imminent danger" more expeditiously.

Finally, the City simply ignores plaintiffs' argument regarding the Emergency Medical Treatment statute, which was not (as the City would have it) that the police "are required to utilize [it]" (City Br. 10), but rather that they can and may use it. Pls' Br. 16.

V. DEFENDANTS' OTHER ARGUMENTS ARE MERITLESS

The argument St. Luke's makes to support the jury's conclusion that Dr. Macdonald was not its "apparent agent," and why that conclusion does not warrant a new trial, is marred by the

erroneous standard of law it presents from *Wallace*, discussed in Part I. Further, its discussion of Dr. Macdonald's and Dr. Womack's testimony concerning their *actual* relationships with St. Luke's (St. Luke's Br. 4-5) is irrelevant to the question of "apparent agency." Finally, the two documents it relies upon (St. Luke's Br. 6-7) were discussed at length in plaintiffs' moving papers (Pls' Br. 19). Even assuming that the cryptic phrase "independent contracting physicians" were adequate to give a layperson notice that such individuals were not agents, St. Luke's does nothing to refute the obvious fact that neither document says that *every* doctor (or *any* doctor in the Emergency Room) was an independent contractor. (To the contrary, they indicate that at least some medical professionals would be employees.) St. Luke's provides no case law that documents so vague are sufficient to rebut the presumption that hospitals hold out the doctors that work in their emergency rooms as agents. *See* Pls' Br. 18. When analyzed under the proper standard for Rule 59(a) motions, the jury's conclusion that St. Luke's was not Dr. Macdonald's principal under a theory of apparent agency was against the clear weight of evidence.

Finally, Dr. Macdonald does not dispute (Macdonald Br. 17-19) that the "bad faith" required to remove immunity for reports of neglect in Idaho's Child Protection Act statute is the same "bad faith" required to impose liability for making such a report. Pls' Br. 19-20. Nonetheless, he asserts the jury's finding of "bad faith" must have been based on "something [else] other than Dr. Macdonald's report of child medical neglect," Macdonald Br. 18, although he refuses to say what that something else could be (*id.* at 19). Dr. Macdonald correctly asserts that the court should try to reconcile the jury's verdicts if at all possible, but the fact that even he cannot hypothesize the bad faith acts that would do so is telling.

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Certificate of Service

I hereby certify that on September 24, 2010, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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