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Attorneys for Plaintiffs

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' BRIEF IN SUPPORT OF THEIR MOTION FOR A NEW TRIAL**

Plaintiffs submit this brief in support of their motion, pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, for a new trial.

A new trial is warranted on the following grounds: (1) the Court improperly permitted Peter Rosen to testify as an expert, (2) the Court improperly granted defendants' Rule 50(a) motion as to plaintiffs' battery claim, (3) the Court failed to properly instruct the jury on the elements needed, consistent with the United States Constitution, before defendants could be permitted to interfere with plaintiffs' rights of familial association without a hearing before a judge, (4) the jury's conclusion that St. Luke's Regional Medical Center, Ltd. ("St. Luke's") was not Dr. Macdonald's principal for purposes of tort liability (a conclusion necessary to its conclusion that St. Luke's was immune from state common law liability) was against the clear weight of evidence, and (5) the jury's conclusion that Macdonald acted in bad faith (and was thus not immune from the state common law claims) was inconsistent with its conclusion that he was not liable for filing a false report of medical neglect.

I. STANDARDS UNDER RULE 59(a)

Rule 59(a)(1)(A) states that "[t]he court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court."

Rule 59 does not identify or limit the grounds upon which a court may grant a motion for a new trial, and such motions are committed to the discretion of the trial court. *Murphy v. United States District Court for the Northern District of California, Southern Division*, 145 F.2d 1018, 1020 (9<sup>th</sup> Cir. 1944) ("The granting of a new trial is discretionary with the court and subject to no fixed rule, except a consideration of what is just"). Possible grounds for a new trial include a verdict against the weight of evidence, improper jury instructions, and erroneous evidentiary

rulings. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (“The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury”); *Murphy v. City of Long Beach*, 914 F.2d 183, 186 & n.5 (9<sup>th</sup> Cir. 1990) (affirming district court’s grant of a new trial to plaintiffs based on the verdict being contrary to the clear weight of evidence and improper jury instructions even though plaintiffs did not raise the improper instructions in their motion); *Murphy v. U.S. Dist. Ct.*, 145 F.2d at 1020 (upholding grant of a new trial in a condemnation case based upon, *inter alia*, speculative expert testimony).

With respect to inconsistent jury verdicts, the court’s discretion may be far more limited. *E.g.*, *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 175 (5<sup>th</sup> Cir. 1975) (affirming order granting a new trial where jury had assessed different damage awards against two different defendants despite the fact that each one’s liability was dependent upon the same actions of the same agent; “Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required.”); *Diasonics, Inc. v. Acuson Corp.*, 1993 WL 248654, \*9 (N.D. Cal. June 24, 1993) (“When faced with inconsistent verdicts, a trial court should attempt to bring them into harmony. Yet, when only cacophony reigns, the verdicts must be set aside.”) (*quoting Jarvis v. Commercial Union Assur. Cos.*, 823 F.2d 392, 395 (10<sup>th</sup> Cir. 1987)).

In the Ninth Circuit, any civil trial error is presumed prejudicial, and the burden shifts to the party aided by the error to show that it was not. *E.g.*, *Galdamez v. Potter*, 415 F.3d 1015,

1025 (9<sup>th</sup> Cir. 2005).

I. THE ADMISSION OF DR. PETER ROSEN'S TESTIMONY WAS  
ERRONEOUS AND PREJUDICIAL

Plaintiffs moved in limine to exclude the testimony of Dr. Macdonald's expert, Dr. Peter Rosen. Doc. No. 400. This Court granted that motion in part and denied it in part. Doc. No. 546. This Court adhered to that ruling upon reargument just prior to Dr. Rosen's initial testimony. Trial Transcript ("Tr.") 6/21/2010 at 28. After Dr. Rosen testified, this Court expressed some concern about the propriety of his testimony (*id.* at 160-65; Tr. 6/22/2010 at 12-14), but ultimately concluded that it would allow his testimony to stand and "take it up posttrial." Tr. 6/22/2010 at 36. Indeed, although Dr. Macdonald already had rested (*id.* at 5), this Court permitted him to reopen his case to allow Dr. Rosen to testify further, by telephone. *Id.* at 43 (apprising the jury that there were "exceptional circumstances" that permitted Dr. Rosen to testify remotely). *Cf.* Fed. R. Civ. P. 43(a) (requiring "good cause in compelling circumstances").

Under the requirements of Federal Rule of Evidence 702, as set forth by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the trial court must undertake "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597, *quoted in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1313 (9<sup>th</sup> Cir. 1995). These guidelines apply to the testimony of a witness whose opinion rests on experience rather than scientific or technical knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). Dr. Macdonald has the burden of showing that these standards have been met. *Lust By and Through Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9<sup>th</sup> Cir. 1996) ("It is the proponent of the expert

who has the burden of proving admissibility”).

Dr. Rosen offered two crucial opinions: first, that when Dr. Macdonald told others that Taige Mueller had a 5% chance of death if not treated, that risk assessment was accurate, Tr. 6/21/2010 at 90-93; and, second that Taige probably had a serious bacterial infection and that Dr. Macdonald’s treatments probably saved her life, Tr. 6/21/2010 at 131, 86. For each opinion, Dr. Macdonald failed to meet his burden of showing that it was either reliable or relevant.

A. The Risk Estimate

Asked to explain why the first opinion was accurate, Dr. Rosen replied: “Because, based on everything I know about the incidents (sic), a serious bacterial illness in children this age, that was a pretty good guess at what the percentage of risk was.” Tr. 6/21/2010 at 93. But his only elaboration on this statement was this:

Well, what I mean is that we have estimates of the attack rate of infections by age, by presentation, and by disease. And those are based on the populations that are studied. No two populations are the same or identical.

*Id.* In short, giving his words the most charitable possible interpretation, Dr. Rosen claimed he based his opinion on what he knew about the incidence of serious bacterial infections in populations that have been studied. He did not elaborate further, and cited no specific studies. That alone is fatal. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (“[T]he proponent of expert scientific testimony may attempt to satisfy its burden through the testimony of its own experts. For such a showing to be sufficient, the experts must explain precisely how they went about reaching their conclusions and point to some objective source – a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like – to show that they have followed the

scientific method, as it is practiced by (at least) a recognized minority of scientists in their field.”); *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir.1994) (holding research must be described “in sufficient detail that the district court [can] determine if the research was scientifically valid”).

Further, Dr. Rosen’s explanation here does not even support his opinion. Dr. Rosen opined on an assertion that Taige Mueller had a 5% chance of *death*, but, in support of that opinion, referred only vaguely to studies about the incidence of serious bacterial infections. *Mueller v. Auker*, 2007 WL 627620, \*4 (D. Idaho Feb. 27, 2007) (noting the difference). Of course, Dr. Rosen might have cited specific studies (if they existed) showing that the incidence of serious bacterial infections in infants with Taige’s symptoms was some very high percentage, and showing further that of these, a certain percentage consisted of deadly infections that had a certain frequency of actually causing death if the infants who had them were taken home, and then demonstrated that when all of these percentages are taken into account, overall Taige had approximately a 5% risk of death if taken home. But he did nothing of the kind.

Instead, all he did was denigrate the usefulness of the very “studies” that purportedly supported his opinion:

And the problem with all of the population studies is that they don't tell you anything about the patient in front of you. All they do is give you a guesstimate as to what the risk is. But they don't tell you -- they can't tell you whether or not the patient in front of you whom you're worried about is infected or not. Only a workup will do that.

Tr. 6/21/2010 at 93.

Indeed, Dr. Macdonald’s counsel appeared to concede later that Dr. Rosen based his opinion here not on statistics and studies, but on his experience and “educational background.”

Tr. 6/22/2010 at 25-27. If so, Dr. Rosen provided no explanation whatsoever of how his experience or education convinced him that, based on what Dr. Macdonald knew when he made his risk assessment, that assessment was accurate. Such an explanation is as necessary when an expert's opinion is based on experience as when it is based on scientific knowledge; a mere claim that an expert's opinion is based on his experience, no less than a mere claim that it is based on "science," is insufficient. *E.g.*, *United States v. Frazier*, 387 F.3d 1244, 1261 (11<sup>th</sup> Cir. 2004) ("If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong [of *Daubert*] would be, for all practical purposes, subsumed by the qualification prong"); *Adams v. Teck Cominco Alaska, Inc.*, 399 F. Supp. 2d 1031, 1036 (D. Alaska 2005). *See generally* Advisory Committee Notes to the Federal Rule of Evidence 702 (2000 amendment):

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."

Whichever basis Dr. Macdonald claims for Dr. Rosen's opinion -- scientific studies or experience -- he cannot meet his burden of showing it was other than an *ipse dixit* assertion. *Daubert*, 43 F.3d at 1319 ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.").

Dr. Rosen's first opinion was inadmissible for two additional reasons. First, Dr. Rosen never stated his opinion that the 5% risk assessment was accurate, much less the data or other information he considered in forming it, in his report. He merely opined there that he regarded all of Dr. Macdonald's statements about risk that he (Dr. Rosen) reviewed as accurate, but he did

not state or clearly imply that he reviewed this statement. Doc. No. 400-3, Rosman Statement Ex. 1 (Dr. Rosen's report) at 11 (stating he reviewed "many of the tapes and recorded interviews with Mrs. Mueller, the policemen, and various others"). Thus, this opinion should have been excluded pursuant to Fed. R. Civ. P. 26(a)(2)(B) and (C) and 26(e). Second, he was permitted to avoid a relevancy problem by "clarifying" that this opinion was based solely on events before Dr. Macdonald gave his risk estimate because the Court granted Dr. Macdonald (over plaintiffs' objection) the extraordinary privilege of reopening his case after he rested so that Dr. Rosen could so testify by telephone -- on virtually no notice -- making adequate cross-examination difficult. Tr. 6/22/2010 at 43-45. Dr. Macdonald had every opportunity to clarify Dr. Rosen's testimony during his case, and any failure by him to do so did not constitute the "good cause in compelling circumstances" necessary to justify remote testimony under Fed. R. Civ. P. 43(a).

B. Taige Mueller's Alleged Serious Bacterial Infection And Dr. Macdonald's Alleged Saving Of Her Life

Dr. Rosen's opinion that Taige had a serious, indeed, life-threatening, bacterial infection that was effectively treated by Dr. Macdonald (his second opinion) was also inadmissible. To begin with, it was wholly irrelevant to "the task at hand," which was to determine whether Dr. Macdonald was liable because he exaggerated the risk, and whether the City was liable in part because Detective Rogers had no reason to believe that Taige was in imminent danger. At trial, it became clear that Dr. Rosen based this opinion on his belief that Taige Mueller exhibited certain symptoms after Detective Rogers seized her from her parents. (Again, just as with his opinion on risk, Dr. Rosen's report did not state that he based his second opinion on events that transpired after 1:40 a.m. Doc. No. 400-3, Rosman St. Ex. 1.) As he explained:

I base that [opinion] on the progression of signs that the child had



in the emergency department. I base that on my feeling that she had probably commenced with a viral infection, and the evidence for that was the somewhat elevated spinal fluid protein and the small cellular response within the spinal fluid that was predominantly of the cell type called lymphocyte.

My feeling about the bacteria infection superseding that was based on the fact that, after she began to improve from the intravenous fluids that were administered in the emergency department and she was looking somewhat better, she then suddenly began to look worse again. She spiked another temperature, and she became, again, somewhat less responsive to her environment.

That is classic behavior of somebody who has a bacterial infection. They can improve, and then they get another shower of bacteria throughout the body, and they start looking very sick again.

Tr. 6/21/2010 at 84-85. The Court subsequently stated that any opinion of Dr. Rosen's based on events that happened *after* Dr. Macdonald made his risk assessment was irrelevant, but decided not to try (probably futilely) to "unring the bell" with any curative instruction, but rather take the matter up after trial. Tr., 6/22/2010 at 13-15, 36-37.

Indeed, Dr. Rosen's second opinion, because it was based on symptoms that occurred outside Dr. Macdonald's knowledge when he made the risk assessment and after Detective Rogers had interfered with the Muellers' familial rights, was irrelevant to any issue in this trial. For example, on the crucial issue of whether Dr. Macdonald's 5% risk assessment was an exaggeration compared with what he had reason to believe was the true risk, given her symptoms at that time, Dr. Macdonald has no hope of showing that Dr. Rosen's opinion meets the relevance prong of *Daubert*.

Furthermore, Dr. Rosen's second opinion was also unreliable. He admitted that there was no way to prove (or disprove) his opinion scientifically; rather, it was based on his clinical experience. Tr. 6/21/2010 at 140. The closest Dr. Rosen ever came to explaining *how* his

second opinion was based on his clinical experience was his *ipse dixit* about “classic behavior” quoted above, and that simply is insufficient. Indeed, his opinion, without any lab results to support it, that Taige had a serious bacterial infection is at war with his testimony that “[o]nly a workup” (Tr. 6/21/2010 at 93) can show that condition. It is, to say the least, ironic that Dr. Macdonald would rely upon an expert claiming the ability to discern serious bacterial infections without *any* workup to support his position that the patient had to have a *complete* workup.

Similarly, while conceding that Taige’s worsening after improvement also was consistent with a viral infection, he asserted that it was “more suggestive” of a serious bacterial infection. But, again, he never said why. Tr. 6/21/2010 at 140-41. He never pointed out any symptoms Taige had that were more suggestive of a bacterial than a viral infection; nor did he claim that, in his experience, the majority of babies who worsen after recovering in the way Taige did had life-threatening bacterial infections whereas only a small minority had viral infections or non-life-threatening bacterial infections. From Rosen’s conclusory “explanations” (*e.g.*, “more suggestive” or “classic behavior”), there was no way for the Court to determine whether Dr. Rosen’s second opinion was based reliably on his experience; it had merely his say-so that it was.

Finally, his explanation for his opinion that Dr. Macdonald saved Taige’s life also fails the reliability prong because it relied upon yet another *ipse dixit*:

It's my opinion that, because of the aggressive treatment that Taige received and the early use of antibiotics and fluids, that it prevented her from developing a serious sepsis syndrome from which she could not have recovered, either causing her to die or leaving her permanently damaged. It's my opinion that this therapy saved her life.

Tr. 6/21/2010 at 86. Again, Dr. Rosen provides no support this, and it should have been excluded under Rule 702, for it is both unreliable and irrelevant to any issue in this case.

C. Prejudice

Defendants will be unable to meet their burden of showing that Dr Rosen's testimony was harmless. As the Court instructed the jury, the claims against Dr. Macdonald hinged on whether his risk assessment was an exaggeration. Tr. 6/23/2010 at 46-47. Plaintiffs' expert, Dr. Shapiro, testified based on specific studies that Dr. Macdonald's assessment wildly overstated the risk and could not have been believed by a doctor familiar with the literature. Tr. 6/15/2010 at 198-201. Thus, it is quite likely that had Dr. Rosen's first opinion been excluded, the jury would have concluded that Dr. Macdonald did exaggerate, and accordingly, following the Court's instructions, would have reached a different verdict. And that Dr. Rosen's second opinion most likely prejudiced the jury seems beyond any reasonable doubt. Given human nature, any 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. Equally, it would be hard-pressed to find a doctor liable because he used improper means, such as exaggerating the risk that a child faced, if they believed that by those very means he could have saved the life of that child. *See, e.g.*, Doc. No. 586, Instruction No. 15a (describing the affirmative defense of "good faith" exaggeration of risk). Dr. Rosen's irrelevant testimony likely caused this jury to believe that Dr. Macdonald and Detective Rogers saved Taige's life, and, thus, defendants cannot meet their burden of showing this error was harmless. The greater likelihood is that it fatally undermined the integrity of the trial.

II. THIS COURT ERRED IN DISMISSING PLAINTIFFS' BATTERY CLAIM

On June 23, 2010, this Court granted defendants' motion to dismiss the battery and false arrest claims. Tr. 6/23/2010 at 12-13. This was an erroneous legal ruling, and, accordingly,

plaintiffs should be granted a new trial on that claim.

The standard for a directed verdict is the same as for summary judgment: a court should not resolve disputed facts but merely determine whether there is a genuine issue of material fact. *In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1112-13 (9<sup>th</sup> Cir. 1989) (noting the similar standards).

In dismissing plaintiffs' claims, the Court stated that there "was a lack of a showing of intent" and that "the intentional tort would require an intent to accomplish a particular end . . . or to at least intentionally engage in acts which one would understand would result in that injury." Tr. 6/23/2010 at 13. This Court held that there was a "failure of proof on that." *Id.* (It deserves mention that defendants did not make this "intent" argument in either of their Rule 50(a) motions. Nor did they distinguish the battery claim from the other state common-law claims. *E.g.*, Tr. 6/18/2010 at 114-21, 122-33.)

With respect to the battery claim, this Court plainly erred. Idaho law is clear. The only "intent" for purposes of a battery is the intent to do the act complained of. *White v. University of Idaho*, 118 Idaho 400, 402-03, 797 P.2d 108, 110-11 (1990) (holding that an unconsented touching, although not intended to be offensive or cause harm, was a battery; "the intent requirement for battery . . . [does] not require an intent to injure or harm, but merely an intent to do the act complained of"). There was plenty of proof – indeed, it can hardly be disputed – that Dr. Macdonald intended to have steroids and antibiotics administered to Taige Mueller and intended to perform a lumbar puncture. He recommended those very procedures to Corissa Mueller, and ordered them through the hospital's computer system. Employees of St. Luke's administered the steroids and antibiotics and Dr. Macdonald performed the lumbar puncture.

Contrary to this Court's analysis, there was no "intent" issue related to the battery claim. Rather, the only issue was whether there was proper consent. *E.g.*, Tr. 6/18/2010 at 124. And, here, Idaho law is also crystal clear. Consent that is obtained through any improper or deceptive means is invalid. In *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994), the Idaho Supreme Court reversed a lower court's summary judgment dismissing a battery claim by a wife against her husband, based upon their sexual relations, where the husband had not disclosed an affair that he had been having. The wife claimed that "although she consented to sexual intercourse with her husband during the time of his affair, had she known of his sexual involvement with another woman, she would not have consented" and that the husband's "failure to disclose the fact of the affair rendered her consent ineffective." *Id.*, 125 Idaho at 622, 873 P.2d at 876. The Idaho Supreme Court held that her affidavit raised a genuine issue of material fact. *Id.*, 125 Idaho at 624, 873 P.2d at 877.

*Neal's* importance here is twofold. First, *Neal* demonstrates that Idaho law has a broad concept of the kind of deceptive conduct that will vitiate consent. Second, it demonstrates that liability is not precluded simply because the defendant in a battery case did not understand the *legal consequences* of his deceptive conduct. After all, even the district court and court of appeals in *Neal* did not correctly understand the legal consequences of the husband's omissions.

Here, whether Dr. Macdonald engaged in deceptive conduct to obtain Department employees' consent to the procedures was a question for the jury. Indeed, this Court allowed the much *narrower* question of whether he had made a bad faith report of medical neglect go to the jury. As *Neal* demonstrates, a jury could have found that the consent was invalid if Dr. Macdonald simply had omitted important facts – for example, the blood and urinalysis test

results that demonstrated a reduced risk of a serious bacterial infection – in communicating with April Aufer. This Court erred in dismissing the battery claim as a matter of law.

III. THE COURT’S INSTRUCTIONS ON WHEN STATE OFFICIALS MAY INTERFERE WITH FAMILIAL RIGHTS WITHOUT A HEARING WERE ERRONEOUS AND SUBSTANTIALLY INCOMPLETE

This Court’s instructions on the circumstances in which state officials can interfere with familial rights were set forth in its Instruction No. 12. Plaintiffs objected to that instruction, and identified a series of their proposed instructions that better set forth those requirements, and the standards under which they should be considered. Tr. 6/23/2010 at 15-16. This Court overruled those objections. *Id.* at 22. For at least the following reasons, Instruction No. 12 was inadequate, and should have been replaced by plaintiffs’ proposed instructions.

First, Instruction No. 12 failed to apprise the jury that state officials must give a presumption that parents are acting in the best interests of children. *Troxel v. Granville*, 530 U.S. 57, 69 (2000) ("The problem here is not that the [state] Superior Court intervened, but that when it did so, it gave no special weight at all to [mother's] determination of her daughter's best interest"); *Mueller v. Aufer*, 2007 WL 627620, \*9 (D. Idaho Feb. 26, 2007) (“when fit parents decline medical treatment for their minor child, the Due Process Clause clothes them with a presumption that they are acting reasonably.”). In close cases, presumptions can be vitally important, and, here, this Court failed to instruct the jury about the presumption that the Due Process Clause affords parents making medical decisions for their children.

Second, Instruction No. 12 placed the burden of proving the absence of imminent danger or necessity for interference on plaintiffs. The most analogous cases to the instant one are Section 1983 cases alleging illegal searches. *Mueller v. Aufer*, 2007 WL 627620, \*10 (D. Idaho

Feb. 26, 2007) (“*Wallis* drew the ‘imminent danger’ standard from Fourth Amendment cases that recognized the need for a ‘very limited exception’ to the rule that a judge be involved”). Those cases demonstrate that the burden of exigent circumstances should be placed on defendants. *Murdock v. Stout*, 54 F.3d 1437, 1440 (9th Cir. 1995) (holding that, in Section 1983 action alleging Fourth Amendment violations, “[b]ecause a warrantless search is presumed to be unreasonable, [defendant police] bear the burden of establishing the applicability of any exception”), *abrogation of “mild exigency” rule acknowledged in, Lalonde v. County of Riverside*, 204 F.3d 947, 957-58 (9th Cir. 2000). *See also, e.g., Curiel v. County of Contra Costa*, 2010 WL 236270, \*2 (9th Cir. Jan. 21, 2010) (rejecting district court’s finding on a Section 1983 claim that search had been justified by an exigency as a matter of law; “Because the government failed to meet its ‘heavy burden’ to show ‘specific and articulable facts [justifying] the finding of exigent circumstances’ that would support departing from the usual procedure of obtaining a warrant . . . a jury could reasonably find that Appellants’ Fourth Amendment rights were violated”); *Bates v. Harvey*, 518 F.3d 1233, 1245 (11th Cir. 2008) (concluding that police had violated Fourth Amendment in searching Section 1983 plaintiff’s home to effect a civil commitment order for a person not residing there; “The police thus bear a heavy burden of proving that the exigent circumstances exception validates a warrantless entry or search of a third party’s home to look for a non-resident”); *Hardesty v. Hamburg*, 461 F.3d 646, 655 (6th Cir. 2006) (holding that, in Section 1983 action for Fourth Amendment violation, where police relied upon sight of unresponsive person lying on couch for warrantless entry, “[t]he government bears the burden of proving that exigent circumstances such as a medical emergency existed to justify a warrantless search.”); *Shannar v. Felsing*, 128 F.3d 810, 820 (3d Cir. 1997) (reversing district

court's dismissal of Section 1983 claims, based upon constructive arrests within the home; "The government bears the burden of proving that exigent circumstances existed").<sup>1</sup>

Third, Instruction No. 12 makes no mention of the state's obligation to make a reasonable investigation. *Compare* Doc. No. 398 at 31-32. Instead, Instruction No. 12 states only that plaintiff had to prove that "Detective Rogers did not have reasonable cause to believe" and then explained that this only required the jury to investigate "whether a reasonable person, *knowing what Detective Rogers knew*, would have made the same decision regarding the danger to Taige Mueller and the need for immediate medical care." Doc. No. 586 at 19 (emphasis added). This is wrong for a variety of reasons. Most importantly, the standard is *not* what a reasonable person who knew what Detective Rogers knew would have done, but rather what a reasonable person would have known, after a reasonable investigation, and *then* would have done. *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) (state officials must pursue reasonable avenues of investigation). This Court's instructions ignored the "reasonable investigation" requirement.

Fourth, Instruction No. 12 included "whether there is time to contact a judge" only as a factor that a reasonable person would have evaluated. This is wrong because the inability to obtain court authorization is a required element that *must* be met before a state official can interfere with familial rights. *Rogers v. County of San Joaquin*, 487 F.3d at 1294 (9<sup>th</sup> Cir. 2007) ("Officials . . . who remove a child from its home without a warrant *must* have reasonable cause

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<sup>1</sup> This Court's reliance on Section 1983 cases where the defendants claimed consent was misplaced. Doc. No. 551. Consent is an element where the plaintiff is usually in a very good position to provide evidence on its perceived presence or absence. Accordingly, for example, in battery claims the absence of consent is part of plaintiffs' burden. Furthermore, even in Section 1983 cases where the burden is placed on plaintiffs to show the absence of an exception, defendants still have the burden of production. *E.g., Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991). Here, of course, Instruction No. 12 placed all burdens on the plaintiffs.



to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.”) (emphasis added). Moreover, the time element (like the risk element) is a comparative one. The question is not *just* whether there is time to obtain court authorization before the injury threatened by the alleged imminent danger would occur, although that is a minimum, but whether it was reasonably necessary to interfere with the Muellers’ rights without judicial involvement or a hearing. This would be true only if Rogers had reason to believe that his actions would result in treatment for Taige Mueller in *less* time than judicial involvement might (*see* Doc. No. 398 at 35), and there was evidence that he had no idea how treatment of Taige Mueller might be effected, much less how much time it would take, when he interfered with the Muellers’ rights. *E.g.*, Pls’ Ex. No. 1067, RTA No. 6 (City of Boise denies that it contends that the Department of Health and Welfare had authority to order medical treatment because “[o]nce the custody of Taige Mueller was surrendered to the Department . . . , Boise City police officers were not responsible for determining who had authority to order medical treatment for Taige Mueller.”).

Fifth, this Court should have instructed – as it held in its February 2007 memorandum opinion and order – that the police had the ability to use the Emergency Medical Treatment statute with a doctor’s assistance. *E.g.*, Doc. No. 398 at 33 & n.48 (*citing Mueller v. Aufer*, 2007 WL 627620, \*13 (D. Idaho Feb. 26, 2007)). The City was thus able to argue that the circuitous and time-consuming route that it had itself set up for utilizing the statute (whereby, apparently, it would have had to first call an on-call prosecutor and file a written affidavit) somehow rendered Detective Rogers unable to use the statute in the time efficient manner that the statute itself contemplates and that state courts had set up. *E.g.*, Tr. 6/17/2010 at 37-40.

IV. THE JURY'S CONCLUSION THAT ST. LUKE'S WAS NOT MACDONALD'S PRINCIPAL WAS AGAINST THE CLEAR WEIGHT OF EVIDENCE

The jury concluded that Macdonald had acted in bad faith, and was not immune from state law liability, but that St. Luke's was immune. Accordingly, it presumably concluded that St. Luke's was not liable for Macdonald's actions under either an apparent agency or actual agency theory. That conclusion was against the clear weight of evidence.

A Rule 59 motion asserting that a jury's conclusion was against the weight of the evidence requires the Court to review the evidence itself, not under the strict standard of a Rule 50(b) judgment as a matter of law motion, but a more lenient one. While a court must give the jury's verdict respect, and cannot grant the motion solely because it would have arrived at a different conclusion, it may grant a new trial motion even if there is "substantial evidence" to support the jury's conclusion. *E.g., Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9<sup>th</sup> Cir. 1987) ("The judge [on a Rule 59 motion] can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party."); *William Inglis & Sons Baking Co. v. ITT Continental Banking Co.*, 668 F.2d 1014, 1026-27 (9<sup>th</sup> Cir. 1982) (contrasting Rule 50 and Rule 59 motions); *Manley v. Ambase Corp.*, 337 F.3d 237, 245-45 (2<sup>d</sup> Cir. 2003) (noting that Rule 59(a) "has a less stringent standard than Rule 50 in two significant respect," *viz.*, that a new trial may be granted even if there is substantial evidence supporting the verdict and that the district court is free to weigh the evidence itself and need not view it in the light most favorable to the verdict winner); *Lucent Technologies v. Gateway, Inc.*, 509 F. Supp. 2d 912, 917-18 (S.D. Cal. 2007).

A person is an apparent agent of another if the other held the person out as an agent and a reasonable person would have concluded that the person was an agent. *Jones v. Healthsouth*

*Treasure Valley Hospital*, 147 Idaho 109, 116-17, 206 P.3d 473, 480-81 (2009). With respect to hospital emergency rooms, the law is well-settled that a hospital holds a doctor out as an agent if it permits him to work in an emergency room and, in the absence of any specific indications to the contrary, a patient is reasonable in believing that such doctors are agents of the hospital. *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 152 (Ind. 1999) (“a hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital”); *Estate of Cordero v. Christ Hospital*, 403 N.J. Super. 306, 318, 958 A.2d 101, 108 (App. Div. 2008) (“when a hospital patient accepts a doctor’s care under such circumstances [where a reasonable patient would believe the service is rendered in behalf of the hospital], the patient’s acceptance in the reasonable belief that the doctor is rendering treatment in behalf of the hospital may be presumed unless rebutted”); *Mejia v. Community Hospital of San Bernardino*, 99 Cal. App. 4th 1448, 1454, 122 Cal. Rptr. 2d 233, 237 (Ct. App. 4th Dist. 2002) (“a hospital is generally deemed to have held itself out as the provider of care, unless it gave the patient contrary notice” and “many courts presume reliance [on the part of the patient], absent evidence that the plaintiff knew or should have known the physician was not an agent of the hospital”).

Here, it is undisputed that Dr. Macdonald was chosen for Mrs. Mueller, and he did not tell Mrs. Mueller about his alleged status as an employee of Emergency Medicine of Idaho, Inc. Tr. 6/10/2010 at 16-17; Tr. 6/14/2010 at 156-57. Her belief that he was an employee of St. Luke’s (Tr. 6/10/2010 at 17) was perfectly reasonable. Indeed, in responding to plaintiffs’ Rule 50(a) motion at trial, St. Luke’s could only point to two pieces of evidence that purportedly gave

Mrs. Mueller notice that Dr. Macdonald was not an employee of St. Luke's: Mrs. Mueller signed paperwork that discussed independent contractors at St. Luke's and Mrs. Mueller testified that she knew that Karen Erickson did not have "privileges" at St. Luke's. Doc. No. 552 at 5.

The registration form to which St. Luke's alluded in its papers asked Mrs. Mueller to "consent to care by St. Luke's, its employees and contractors, encompassing but not limited to, routine x-rays, laboratory and other diagnostic procedures, medical treatment, and other medical services." JE 1, 005. The financial agreement stated that "St. Luke's and its independent contracting physicians" would bill her. JE 1, 006. Neither suggested that every doctor at St. Luke's (much less *anyone* in the emergency room) was an independent contractor. Assuming such forms are adequate to give notice at all (*cf. Cooper v. Binion*, 266 Ga. App. 709, 714, 598 S.E.2d 6, 11 (Ga. Ct. App. 2004)), they only gave notice, at best, that *someone* in the hospital was an independent contractor. They did not show that *Dr. Macdonald* was, and, contrary to the argument put forth by St. Luke's (Doc. No. 552 at 5), the cases do not create any "duty of inquiry" on the part of the patient. As to Karen Erickson's status, it is entirely unclear why the fact that Karen Erickson did not have "privileges" would reveal anything at all about Dr. Macdonald's status. The clear weight of evidence demonstrates that St. Luke's must be held responsible for Dr. Macdonald's acts.

V. THE JURY'S CONCLUSIONS AS TO DR. MACDONALD WERE INCONSISTENT

The jury concluded that Dr. Macdonald acted in bad faith and was not immune from state common-law liability. That conclusion is irreconcilable with its conclusion that he did not make a report of medical neglect in bad faith or knowing that it is false.

Idaho law provides for immunity "from any liability, civil or criminal" for anyone "who

has reason to believe that a child has been abused, abandoned, or neglected and, acting upon that belief, makes a report of abuse, abandonment, or neglect.” I.C. § 16-1606. “Any person who reports in bad faith or with malice shall not be protected by this section.” *Id.* At the same time, Idaho law also provides that “[a]ny person who makes a report or allegation of child abuse, abandonment or neglect knowing the same to be false or who reports or alleges the same in bad faith or with malice shall be liable to the party or parties against whom the report was made . . . .” I.C. § 16-1607. (Plaintiffs did not allege malice against Dr. Macdonald.)

Thus, Idaho law does not have a middle ground whereby a report of neglect can be made with bad faith sufficient to strip immunity but insufficient to impose liability. To the contrary, it is exactly the *same* “bad faith” that both strips immunity (under I.C. § 16-1606) and imposes liability (under I.C. § 16-1607). The jury’s conclusions cannot be reconciled with Idaho law, and must therefore be rejected. Since we do not know precisely what the jury intended by these inconsistent findings, this Court must grant plaintiffs a new trial against Dr. Macdonald.

#### Conclusion

This Court should grant plaintiffs’ motion for a new trial.

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Certificate of Service

I hereby certify that on August 13, 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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