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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

SUMMER STRICKER, Personal Representative of the Estate of ALLEN J. LONGSOLDIER JR., Plaintiff, vs. BLAINE COUNTY and HILL COUNTY, Defendants.	Cause No.: DDV-12-0937 DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGEMENT

Defendants Hill and Blaine County, through their counsel of record, submit herein their Response to Plaintiff's Motion to Alter or Amend the Judgment. This

Court should deny Plaintiff's request to alter or amend the judgment because their motion is mischaracterized as a motion to alter or amend because no manifest error of law occurred.

ARGUMENT

Mont. R. Civ. P. 59(e) governs a motion to alter or amend. Rule 59 relief is available, in the discretion of the court, only in *extraordinary* circumstances. *Folsom v. Mont. Pub. Emps. Ass'n*, 2017 MT 204, ¶ 59, 388 Mont. 307, 400 P.3d 706. Rule 59 relief is available under the following grounds: (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or (4) to bring to the court's attention an intervening change in controlling law. *Nelson v. Driscoll*, 285 Mont. 355, 360, 948 P.2d 256, 259 (1997) (citing 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (1995)).

The Montana Supreme Court held that a Rule 59 motion "may not be used to relitigate old matters, present the case under new theories, raise arguments which could have been raised prior to judgment, or give a litigant 'a second bite at the apple.'" *In re Marriage of Johnson*, 2011 MT 255, ¶ 16, 362 Mont. 236, 262 P.3d 1105 (quoting *Hi-Tech Motors, Inc. v. Bombardier Motor Corp. of Am.*, 2005 MT 187, ¶ 34, 328 Mont. 66 117 P.3d 159). A motion to alter or amend should not present

arguments which the court has already considered and rejected. *Nelson*, 285 Mont at 360, 948 P.2d at 259. If a motion substantively seeks to accomplish one of the matters referred to in this paragraph, the Court should consider it a motion for reconsideration, which is not provided for nor authorized under the Montana Rules of Civil Procedure. *See, Nelson*, 285 Mont. at 360, 948 P.2d at 259; *ABC Collectors, Inc. v. Birnel*, 2006 MT 148, ¶ 14, 332 Mont. 410, 1338 P.3d 802. A motion for reconsideration has no effect unless the court equates it to another type of motion which is allowed under the Rules. *ABC Collectors, Inc.* at ¶ 14.

Plaintiff alleges that the motion to alter or amend is to correct a manifest error of law upon which the judgment was based. No manifest error of law exists unless an "obvious, apparent, and glaring" error exists. *In re Marriage of Edwards*, 2015 MT 9, ¶ 19, 378 Mont. 45, 340 P.3d 1237. A "manifest" error of law, "is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Anderson v. Suburban Teamsters of N. Ill. Pension Fund Bd. of Trs.*, 2007 WL 9723951 at *2 (D. Ariz. 2007) (internal quotations and citations omitted). When a motion to alter or amend merely regurgitates arguments already presented to and rejected by the Court, it has not met the requirements of Rule 59(e). *Edwards*, at ¶ 19.

Consideration of Dr. Bulger's testimony was not a manifest error of law because this Court did not disregard, misapply, or fail to recognize controlling precedent. A statute's plain language controls its interpretation. *Sturchio v. Wausau*

Underwriters Ins. Co., 2007 MT 311, ¶ 10, 340 Mont. 141, 172 P.3d 1260. This Court should refuse to insert what has been omitted or omit what has been inserted. Mont. Code Ann. § 1-2-101. The plain language of Section 26-2-601(1)(a) provides that a person may not testify as an expert witness on issues relating to the standard of care and negligence unless her, *inter alia*:

> is licensed as a health care provider in at least one state and routinely treats or has routinely treated **within the previous 5 years <u>the diagnosis or condition</u>** or provides the type of treatment that is the subject matter of the malpractice claim or is or was within the previous 5 years an instructor of students in an accredited health professional school or accredited residency or clinical research program relating to the diagnosis or condition or the type of treatment that is the subject matter of the malpractice claim . . .

(Emphasis added.) Plaintiff's interpretation of the statute omits the language that the 5-year limit relates to the diagnosis or condition. The statute also makes no reference to trial or the date of testimony, and no language should be inserted to assume the same. The plain language of the statute provides that Dr. Bulger must have been practicing within the previous 5 years of Longsoldier's misdiagnosis at Northern Montana Hospital.

Plaintiff further does not cite to any controlling precedent on § 26-2-601 in its motion to alter or amend. Defendants hereby incorporate their Response Brief to Plaintiff's Motion to Exclude Dr. Bulger's Testimony to support the conclusion that this Court did not fail to consider any precedent. (Doc. 273.) What's more, the Plaintiff mischaracterized the two cases cited in her Reply Brief to support her

contention that the Montana Supreme Court has set clear precedent that the 5-year rule applies from the date of testimony.

In *Griffin v. Lewis*, 2019 MT 92N, ¶ 14, 396 Mont. 546, 439 P.3d 386, the issue was that the plaintiff failed to demonstrate that her proposed expert provided the type of treatment at issue in the case: the recommendation of a colonoscopy for a patient with no history of cancer presenting with abdominal pain. As evidence that the proposed expert provided different types of treatment, the Court noted that she had not examined or performed a work-up of abdominal pain on a patient with no history of cancer for more than five years before her deposition. *Id.* at ¶ 13. However, the Court was not ruling on the timing of the five-year requirement but rather if the proposed expert's practice and the defendants' practices were substantially similar. *Id.* at ¶ 15.

In *McColl v. Lang*, 2016 MT 255, ¶ 18, 385 Mont. 150, 381 P.3d 574, the proposed expert was required to be licensed by at least one state, routinely treat the type of condition at issue, facial lesions, and have the education and experience to be familiar with the standards of care and practice as they related to the defendant's treatment of the plaintiff. The Court held that the proposed expert was qualified as a naturopathic physician that routinely treated facial lesions in his patients. Although he did not consider himself an expert in the use of the specific treatment at issue, that

did not disqualify him from testifying regarding the standard of care. *Id.* The Court did not even discuss when the five-year limitation period began to run.

Other jurisdictions with similar statutes have held, as did this Court during trial, that the five-year period is based upon the time of the alleged malpractice and not the time of trial which, as in this case, was years later. Otherwise, irrelevant standard of care developed years later would be the focus and ". . . the most up to date information and the most current medicine are irrelevant to a determination of whether the defendant physician has breached the applicable standard of care." *Spotts v. Small*, 2003 WL 22212060 at *239 (Pa. Com. Pl. 2003); *see also Petrou v. S. Coast Emergency Grp.*, 119 Cal. App. 4th 1090 (2004).

Plaintiff has not cited any precedent that she alleges the Court failed to adhere to. The precedent that Plaintiff does cite does not support her argument. Thus, the motion to alter or amend is misidentified and is instead merely a motion to reconsider the arguments raised in her Motion to Exclude Dr. Bulger's Testimony, which is not provided for or authorized in the Montana Rules of Civil Procedure. (Doc. 272.)

CONCLUSION

Because Plaintiff's Motion is substantively an impermissible motion for reconsideration, Defendants move to strike it from the record. Should this Court consider the Motion, it should be denied for the foregoing reasons.

DATED this 14th day of January 2025.

COUNTY LITIGATION GROUP

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CERTIFICATE OF SERVICE

I, Molenda Lee McCarty, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 01-15-2025:

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