

STATE OF IDAHO
 COUNTY OF KOOTENAI
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 CLERK, DISTRICT COURT
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JENNIFER WADMAN IVERSEN,)
)
 Plaintiff,)
 v.)
)
 NORTH IDAHO DAY SURGERY,)
 LLC, an Idaho limited liability)
 company, d/b/a)
 NORTHWEST SPECIALTY)
 HOSPITAL)
)
 Defendant,)
 and)
)
 ILLINOIS UNION INSURANCE)
 COMPANY, an Illinois corporation,)
)
 Defendant-Intervenor.)
 _____)

CASE NO. CV-2009-5180

**MEMORANDUM OPINION
 ON COURT TRIAL**

Plaintiff filed a Complaint for Medical Malpractice. Case proceeded to jury trial with the jury reaching a verdict. Prior to jury verdict being announced, parties entered into a high-low agreement on the record. Subsequent to entry of the verdict defendant disclaimed agreement. Action filed by plaintiff to enforce the terms of the high-low agreement.

Cynthia K.C. Meyer, Stephen J. Nemece, JAMES, VERNON & WEEKS, P.A. attorneys for Plaintiff.
 Michael E. Ramsden, RAMSDEN & LYONS, attorneys for Defendant North Idaho Day Surgery.
 Ausey H. Robinet, III, PAINE HAMBLEN, L.L.P. Thomas M. Jones, *Pro Hac Vice*, COZEN O'CONNOR, attorneys for Defendant-Intervenor ILLINOIS UNION INSURANCE COMPANY.

I. STATEMENT OF CASE AND PROCEDURE

On February 5, 2005, Plaintiff Jennifer Wadman underwent arthroscopic surgery to repair right shoulder tendonitis and impingement. Dr. Adam Olscamp performed the procedure at Northwest Specialty Hospital in Post Falls. During the surgery, a lethal dose of medication was negligently injected by Dr. Olscamp's assistant, Nat Biondi, into Ms. Wadman resulting in cardiac arrest and other severe injuries. On June 30, 2009, Plaintiff brought an action for medical malpractice against Dr. Olscamp and the hospital, seeking damages for personal injury.

Pursuant to a stipulation of the parties, Dr. Olscamp's medical group, Orthopedic Surgery and Sports Medicine Clinic LLC (OSSM), was substituted as defendant in place of Dr. Olscamp. Subsequently successful mediation resulted in settlement and dismissal of all claims between Plaintiff and OSSM.

On October 31, 2011, a jury trial commenced in District Court on the negligence claims against North Idaho Day Surgery (NIDS). Ms. Wadman was represented by Craig Vernon. The hospital was insured by Illinois Union and provided legal defense pursuant to its obligation under the terms of the policy. Joel Hazel and Brian Rekofke represented North Idaho Day Surgery at trial. After two weeks of trial, the case was submitted to the jury on Friday, November 11, 2011. On Monday, November 14, 2011, after an excess of five hours of deliberation, the jury reached a verdict, the bailiff advised the Court, and counsel was contacted. Before the verdict was received, the Court was

advised that the parties entered into some last-minute negotiations. Mr. Hazel stated the following:

“Okay, Your honor, my client, on behalf of its insurance adjustor, made an offer this morning of a high/low agreement, meaning that no judgment would be entered any higher than \$750,000 and no judgment would be entered any lower than \$500,000 or that’s what my client would agree to pay.

My client would require that no judgment be entered; that there be a dismissal regardless of the jury outcome, with an agreement to pay whatever amount is between \$500- and \$750,000; and each side bearing its own fees and cost; waiving any appeal; and that the parties would work out a more formal settlement agreement allocating certain amounts between certain categories of damages. And that’s my understanding of what the accepted agreement is.”

Mr. Vernon, counsel for the plaintiff, then responded:

“Yes. I will just and that I agree with everything Mr. Hazel said. The range from \$750,000 to \$500,000. If the jury verdict falls within that; this will be new money payment, so there’s not going to be any offsets. So in other word, we’re guaranteed to get at least a check from you for 500,000 up to 750,000.”

Mr. Hazel responded: *“In terms of any collateral sources.”*

Ms. Wadman assented to the agreement on the record. The Court asked if everyone was in agreement. Mr. Vernon said yes and Mr. Hazel stated: *“I am, at the request of my client’s insurance adjustor.”*

After the agreement was set forth on the record, the Court brought the jury in and received the verdict. A Special Verdict Form was given to the jury and the following special interrogatories were answered:

Question No. 1. Was the medical negligence of Orthopedic Surgery and Sports Medicine Clinic a proximate cause of Jennifer Wadman Iversen’s injuries? **Yes**;

Question No. 2. Was there medical negligence on the part of Northwest Specialty Hospital which violated the standard of care in Kootenai County? **Yes**;

Question No. 3. Was the medical negligence of Northwest Specialty Hospital a proximate cause of Jennifer Wadman Iversen's injuries?
Yes;

Question No. 4. What is the percentage of responsibility (if any) you assign to each of the following:
To Orthopedic Surgery and Sports Medicine Clinic 90 %
To Northwest Specialty Hospital 10 %

Question No. 5. What is the total amount of the damages sustained by the Plaintiff as a result of the injuries to Jennifer Wadman Iversen? \$760,000

The jury's verdict was for \$760,000, assigning 10 percent liability to the defendant. This resulted in liability of the defendant in the amount of \$76,000. However, because of the high-low agreement, the defendant was required to pay at least \$500,000.

Later, on the afternoon of November 14, 2011, the Court was contacted by Mr. Hazel with a request to put a matter on the record. Mr. Hazel addressed the Court as follows:

As you know the jury rendered its verdict today which net result was a \$76,000 verdict against Northwest Specialty Hospital.

Shortly before the verdict was rendered, both counsel and I put on the record a high/low plea agreement---or negotiated agreement---in which it was agreed that the high verdict amount to be paid would be \$750,000 and the low would be \$500,000. That matter was accepted on the record by Mr. Vernon and his client.

I have been instructed by my client's insurance company to inform the court that the high/low amount of \$750,000 as high, \$500,000 as low was offered by mistake; that I was not authorized to make such an offer; that the offer that they believe they authorized me to make was a \$75,000 low and a \$500,000 high offer.

As an officer of the Court, I feel compelled to tell you that a couple of the facts that I believe the insurance company is in error---well, they are accusing me of the error, obviously, but the following facts are relevant for the court's consideration.

The concept of a high/low offer was initiated at the request of Stephanie Milch, the adjustor in this case. It was not initiated at the request of the Plaintiffs.

I, at her request, solicited what plaintiffs might be willing to accept as a high/low offer, and I received an e-mail at 9:51 a.m. this morning from Craig Vernon indicating that he would accept a high of \$1.2 million and a low of \$600,000.

Shortly thereafter, and before I got notice of the jury's verdict, I received a phone call from Ms. Milch, and also on the phone was Robert Romeo, her supervisor, and they discussed a response to the high/low offer.

In that response---and I wrote it down---I wrote down \$750,000 as the high and the low of \$500,000. And literally as we were discussing that, I got a note from my assistant that the verdict was in, and I told them that I would attempt to convey that offer, but I wasn't sure there would be time to consummate such an agreement.

While you were conducting sentencing hearings this morning and before the jury was brought out to render its verdict, I discussed the high/low offer. The one I extended was \$750,000 for a high; \$500,000 for a low to Mr. Nemecek and Mr. Vernon.

They discussed that matter with their client. They came back to me indicating that they were probably willing to accept the high/low offer but they wanted some additional terms. The two terms they discussed were, one, they wanted a judgment rendered in whatever the amount of the high/low or whatever the ultimate result was based on the verdict coupled with the high/low agreement; and that, two, they wanted assurance that whatever amount to be paid would be paid within 30 days.

So I stepped outside in the hall within earshot of Mr. Vernon and I believe Mr. James, contacted my adjustor on cell phone, again, confirmed that I had authority to make a \$750,000 high offer, a \$500,000 low offer, and then discussed the two additional terms.

They did not agree to the additional terms that a judgment should be entered but did indicate that they would be able to pay whatever resulted from the verdict coupled with the high/low within 30 days. And shortly after that point we put the high/low on the record, the verdict came in.

Plaintiff's counsel made some additional comments on the record and the matter was concluded with the Court acknowledging that further proceedings on the issue would be anticipated.

On November 16, 2011, Plaintiff filed a Motion to Enforce Settlement Agreement. Illinois Union Insurance Company subsequently sought to intervene as the insurance carrier for North Idaho Day Surgery. A stipulation was submitted by the parties and the Court granted the motion to intervene. Illinois Union filed a Motion to Set Aside Alleged Settlement Agreement. The case was tried before the Court on November 13, 2012, over the course of four days. Written closing argument was submitted to the Court and the matter was taken under advisement on December 31, 2012.

II. FINDINGS OF FACT

This case presents a troubling factual dispute. In order to determine whether Mr. Hazel had the authority to bind his client to the terms of a settlement agreement placed on the record in open court, this Court must first resolve significantly divergent positions advanced by the parties. Each of the five witnesses to the terms of the contractual offer is a trained attorney bound by his or her professional oath to insure absolute candor to the court. Yet, this Court must determine the credibility of these witnesses and their exhibits. Such a determination may very well turn on an intentional falsehood rather than an innocent lapse of memory.

The insurer for North Idaho Day Surgery retained Mr. Hazel to represent them in this medical malpractice claim. During this representation Mr. Hazel had communications with two principle contacts acting on behalf of NIDS, Vaughn Ward and Ron Rock. While the case was pending, NIDS made it clear to Hazel that it wanted the case settled. Mr. Ward, NIDS's CEO, participated in

the mediation session resulting in a \$200,000 offer to Wadman. Hazel's client was concerned about a possible excess verdict, considered the case a distraction, and wanted resolution within the policy limits. Mr. Hazel proceeded to trial with this understanding and did not make any effort to communicate the terms of the settlement discussions that took place on November 14, 2011, with his client NIDS.

The insurance agreement includes language that specifically obligates the insurer to defend against any lawsuit seeking damages against NIDS. It provides further that the insurer has the discretion to settle the claim. Paragraph I subsection C of the Insuring Agreement contains the following language:

We will have the right and duty to defend the "insured" against any "suit" seeking those damages. However, we will have no duty to defend the "insured" against any "suit" seeking damages for injury to which this insurance does not apply. We may, at our discretion, investigate any "professional incident" and settle any "professional liability claim" or "suit" that may result.

There is no evidence before the Court indicating that Illinois Union or any of its claims representatives made any direct effort to communicate the terms of settlement discussions occurring on November 14, 2011, with their insured.

Illinois Union provided the insurance coverage to NIDS. Northwest Specialty Hospital, the parent company of NIDS, paid the premiums. Illinois Union is a subsidiary of ACE North American Claims. During the handling of the case, Mr. Hazel primarily communicated with Stefanie Milch, a claims director with the ACE's Medical Risk Department. Ms. Milch's direct supervisor was Assistant Vice President Steven Liu. Liu's supervisor was Vice President

Robert Romeo. During the settlement discussions of November 14, 2011, all three ACE employees had office space in the same building, only a few feet apart from each other.

During May 2011 Hazel had discussions with Wadman's attorney, Craig Vernon, leading Hazel to believe that Wadman would not be willing to settle for less than \$500,000. Vernon advised Hazel he could not settle for any less because the Medicare set aside was over \$600,000 and there was an Idaho Worker's Compensation lien for medical expenses. This information was communicated to Milch from Hazel by email. Wadman submitted a Third Offer of Settlement to Hazel pursuant to Idaho Code section 12-301 in the amount of \$675,000 on August 9, 2011. Hazel made inquiries of Vernon about potentially settling the case for \$350,000. Vernon reiterated that Wadman would not settle for less than \$500,000.

In May 2011 Hazel prepared a Claim Evaluation-Litigation Plan for ACE and evaluated a reasonable settlement amount for NIDS's liability at \$200,000 to \$375,000. Just prior to trial Ms. Milch presented a Trial Report to Mr. Liu and Mr. Romeo, evaluating the case with a verdict value between \$500,000 and \$1.2 million globally with up to 25 percent liability assigned to the insured. The "plan of action" was to continue to consider settlement opportunities. When the trial commenced, the last offer by the defense was \$200,000. Plaintiff's demand was \$675,000 and defense counsel was confident the case could settle for \$500,000.

During the trial, Hazel provided daily progress reports to Ms. Milch. ACE retained an independent monitor to sit in on the trial. As the trial concluded, both Mr. Hazel and Mr. Vernon felt things went well. Mr. Hazel was “guardedly optimistic.” On Thursday, November 10, 2011, the case went to the jury. In Plaintiff’s argument to the jury, she sought damages of \$3.5 million with 75 percent liability assigned to the hospital. After deliberating for four hours, the jurors were excused for the three-day holiday weekend. Mr. Hazel felt that Ms. Milch was getting nervous about the deliberations when she contacted him the morning of November 14, 2011, seeking to solicit a high-low settlement offer from Wadman.

Hazel contacted Vernon, who then made a high offer of \$1.2 million and a low of \$600,000. Hazel called Milch back to relay the high-low offer from Wadman. During this call, Milch was on the phone, and her superiors, Mr. Liu and Mr. Romeo, participated in the conversation by speaker-phone. A discussion ensued concerning the jury deliberations as well as a discussion regarding potential appellate issues should there be an adverse defense verdict. Hazel was then told by the ACE representatives to offer a high of \$750,000 and low of \$500,000. Hazel wrote the numbers on a legal pad, thought the numbers were too generous, and made the statement, “guys, we can still get a defense verdict.” Mr. Romeo responded by saying to Hazel, “you are an optimist.” At this point Hazel was notified that the jury had reached a verdict and rushed off to court.

After the phone conversation with Hazel, Mr. Romeo sent an email to numerous individuals with the email domain "@acegroup.com" advising that the verdict was now in and that Illinois Union had countered Plaintiff's high-low offer with a low of \$75,000 and a high of \$500,000. This email was not copied to Mr. Hazel or to the insured.

At the courthouse, Mr. Hazel contacted Mr. Vernon, showed him the figures on the legal pad and conveyed the high-low offer. Vernon understood the offer to be a "take it or leave it deal," and there was no time to discuss a counteroffer. After consulting with Wadman, Vernon advised Hazel that Vernon's client would accept the offer, but wanted payment within thirty days and the amount reduced to a judgment. As he stood in the hall outside the courtroom, Hazel made a phone call to Ms. Milch. Tara Jalali, an attorney with Vernon's firm, was standing nearby when Hazel specifically stated that the Plaintiff accepted the high-low offer of \$750,000-\$500,000. Mr. Liu listened to this conversation by speaker phone. After the call, Ms. Milch sent an email to Mr. Romeo, with a copy to Liu, advising that the high-low of \$75,000-\$500,000 was accepted. Thereafter the parties placed upon the record the agreement that there would be payment within thirty days, that there was no need for a judgment, that each party would assume their own cost and fees, and that no appeal would be taken.

This Court makes a factual determination that the representatives of ACE advised Mr. Hazel to extend a high-low offer to Wadman on November 14, 2011, before the jury verdict was read. The amount of the offer was a \$750,000

high and \$500,000 low. The Court is mindful that Ms. Milch, Mr. Liu, and Mr. Romeo have all testified to the contrary, however, the Court finds the evidence offered by Wadman on this issue to be more credible for a variety of reasons.

Mr. Hazel is certain in his recollection of the terms discussed with the ACE representatives. He wrote the figures down and verbally confirmed them. He provided regular reports of the trial progress with an attention to detail. He felt the offer was too generous and expressed his feelings about being able to secure a defense verdict. Most importantly, Mr. Hazel does not have a clear motive to take a position contrary to the interest of his client's insurer. ACE pays the bills and may serve as an attractive client for the firm. His testimony appears motivated by his obligation to provide candor to the court and not any personal gain.

Likewise, Ms. Jalali heard confirmation of the numbers by Hazel during his phone conversation with Ms. Milch and Mr. Liu. There is nothing in the evidence to demonstrate any reason to doubt her credibility. There is no showing that she stands to profit in any way from a recovery by Wadman. She no longer works with Vernon's firm, is employed as a deputy prosecuting attorney, and simply has no dog in this fight.

The terms of the offer urged by Illinois Union make no sense. Milch, Liu, and Romeo testified that \$75,000 was the amount Illinois Union was willing to pay to make the case go away. That seems disingenuous to the Court. They already expressed an offer to pay \$200,000 and continued to explore settlement efforts. It seems illogical to believe that the insurer would expect

Wadman to be tempted by a "take it or leave it" offer \$75,000 low and \$500,000 high. Given the fact that the Plaintiff had already incurred considerable expenses, this offer was nothing more than a request to get the Plaintiff to accept a \$500,000 limit on liability. This was the amount Ms. Milch understood to be the minimum amount Wadman would accept. It makes no sense in light of the fact that the high-low discussion was instigated by the defense and the initial parameters were set by the plaintiff at \$600,000 low and \$1.2 million high.

The \$500,000 low and \$750,000 high is more realistic under the circumstances. The defense valued the case as worth substantially less, yet there were indications that the insurer was getting nervous, and it was recognized and understood that juries are unpredictable. Ms. Wadman suffered significant injuries under circumstances of clear negligence. There was reason to be concerned about a substantial verdict. Illinois Union understood that Wadman would most likely accept in this range, which would protect them from the big verdict.

Illinois Union argues that their position is supported by the emails generated prior to anyone learning of the verdict. These emails appear to the court to be self-serving and unpersuasive. It is curious that emails reflecting the high-low figures would be dispersed among co-workers within a few feet of each other, but none sent to the attorney handling the case. It seems, likewise, suspect to rely on the emails while conveniently disavowing the "optimistic" statement by Hazel about still being able to secure a defense verdict and his

recitation of numbers during the second phone call. NIDS makes a noble effort, arguing how Hazel could have become confused during the discussions about the high-low figures. This Court finds that the confusion, if any, is more on the part of Illinois Union than its defense counsel.

III. DISCUSSION OF THE LAW

A. Alleged ethical violations

The issue before this Court is whether a high-low agreement that was entered into the Court minutes is enforceable. Before the trial, the defendants made motions *in limine* to exclude witnesses who overheard the allegedly confidential conversation regarding the settlement counteroffer. The defendants also objected to their former counsel's testimony concerning the same communication. The defendants essentially ask this Court to find the agreement unenforceable based on alleged violations of the Idaho Rules of Professional Conduct. The Court did not exclude witness testimony of the communication involving settlement numbers because Idaho case law permits such testimony. The Court cannot find a contract unenforceable based on an attorney's alleged ethical violations towards his client because Idaho case law does not recognize such relief.

This Court disagrees with the defendants' trial argument that a confidential communication includes relaying a settlement offer from attorney to client or confirming a settlement offer relayed from client to attorney. Idaho Rule of Professional Conduct 1.6 permits disclosure of certain information when "the disclosure is impliedly authorized in order to carry out the

representation....” In this case, the information relayed was the settlement offer and counteroffer. Relaying settlement figures to and from remote clients during negotiations falls under the purview of carrying out legal representation. Thus, the act of relaying these figures was an impliedly authorized disclosure, and this Court holds that it was not a confidential communication.

Even if this were a confidential communication, Idaho case law recognizes instances where disclosure of the communication is permissible. Although a court cannot compel an attorney to disclose statements made to him by his client, “if such statements are overheard by a third party, accidentally or otherwise, the latter may be made a witness and compelled to disclose the statements.” *Perry v. State*, 4 Idaho 224, 236-237, 38 P. 655, 659 (1894). See also *State v. Hoisington*, 104 Idaho 153, 159-60, 657 P.2d 17, 23-24 (1983). Here, witnesses overheard Mr. Hazel’s communication relaying the plaintiff’s offer and confirming the Illinois Union’s counteroffer. The testimony of these witnesses, regardless of confidentiality, was permissible.

Even an individual’s attorney may disclose an otherwise confidential communication when the client offers her own testimony to that specific communication. Generally, an attorney is statutorily prohibited from testifying in regards to communications with his client: “An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.” IDAHO CODE § 9-203(2) (2012). However, a client’s consent may be implied from the client’s own actions. *Skelton v. Spencer*, 98 Idaho 417, 419, 565 P.2d

1374, 1376 (1977). When a client testifies as to privileged communications, the client impliedly waives the privilege of confidentiality:

By testifying to privileged communications, and by making an issue of her defense the privileged matter of her relation with her former attorneys, [the client] waived the attorney-client privilege for all communications relevant to the settlement process and the conduct of her former attorneys. Her former attorneys were properly permitted to testify.”

Skelton, 98 Idaho at 421, 565 P.2d at 1378.

Here, Illinois Union has advanced its version of the communication that authorized the counteroffer since the day the communication occurred, the day that Mr. Hazel had called Ms. Milch with the jury verdict. Because Illinois Union has put into issue what it asserts as a privileged communication, it has impliedly waived the attorney-client privilege. Mr. Hazel’s testimony was proper.

This Court does not consider the defendants’ remaining arguments concerning alleged violations of the Rules of Professional Conduct as persuasive on any relevant issue for the Court. As far as determining the enforceability of a contract, the alleged ethical violations could have potentially affected the admissibility of witness testimony, but this Court has found that witness testimony admissible. Beyond its effect on the admissibility of testimony, ethical violations, even if true, cannot provide relief from a settlement agreement. Alleging an attorney’s violation of the Rules of Professional Conduct is a matter for the Board of Commissioners of the Idaho State Bar, who determine whether the rule has been violated, and the Supreme

Court of Idaho, who determines the sanction for a violation. IDAHO CODE §§ 3-401, 3-412 (2012); *see, e.g., Idaho State Bar v. Warrick*, 137 Idaho 86, 93, 44 P.3d 1141, 1148 (2002); *Dexter v. Idaho State Bar Bd. of Comm'rs*, 116 Idaho 790, 780 P.2d 112 (1989). Clients who are damaged from actions that they allege were violations of their attorney's duty to them do not have an affirmative defense in contract; rather, they have a malpractice claim in tort. *See, e.g., Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012); *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884 (2004). Thus, the defendants' ethical arguments are irrelevant to their defense on the breach of contract claim.

There are two issues raised by the defendants that affect whether this agreement is enforceable. First, the defendants claim that their former counsel had no authority to enter into a high-low agreement of \$750,000-\$500,000. Second, the defendants claim that the high-low agreement entered into the record was not a meeting of the minds as to material terms and that those terms were missing. The Court addresses these arguments here.

B. Authority to enter into a high-low agreement of \$750,000-\$500,000

The defendants have asserted that their former defense counsel, Mr. Hazel, had no authority to enter into the high-low agreement that he did. Illinois Union argued that it authorized Mr. Hazel to counteroffer an amount of \$75,000 low and \$500,000 high. North Idaho Day Surgery argued that Mr. Hazel did not have authority from NIDS because Mr. Hazel did not consult with NIDS before entering into the settlement. The Court addresses each defendant's argument individually.

1. Actual authority from Illinois Union to enter into the settlement agreement

The attorney-client relationship is an agency relationship where the attorney is the agent and the client is the principal. **Caballero v. Wikse**, 140 Idaho 329, 332, 92 P.3d 1076, 1079 (2004). The practical application of this relationship permits an attorney to enter a binding settlement agreement on behalf of his client only when the attorney has actual authority to do so. *Id.* Actual authority must be established by more than the sole statement or claim of the attorney. *Id.* at 333, 92 P.3d at 1080. Illinois Union argued that the only evidence of actual authority to support the plaintiff's claim was Mr. Hazel's representation of that authority, and **Caballero** prohibits the reliance this sole representation. Thus, Illinois Union argued, the plaintiff was unable to prove that Mr. Hazel had authority to enter into a \$750,000-\$500,000 settlement. Although this Court has made a factual finding that Illinois Union made a counteroffer of \$750,000 high and \$500,000 low, this Court additionally holds that there were several pieces of evidence that tended to prove that Joel Hazel had actual authority to counteroffer and enter into the agreement that he did.

"[A]n agent needs actual authority, express or implied actual authority, to compromise a principal's claim." **Caballero**, 140 Idaho at 332, 92 P.3d 1076, 1080. "Implied authority refers to that authority which is necessary, usual, and proper to accomplish or perform the express authority delegated to the agent by the principal." **Bailey v. Ness**, 109 Idaho 495, 497, 708 P.2d 900, 903 (1985) (internal citations omitted). As to proving that actual authority existed, "The declarations of an alleged agent, standing alone, are insufficient

to prove that the principal has conferred such authority. However, the authority of the agent to act for and on behalf of his principal does not have to be established by direct or positive proof, but may be inferred from dealings, circumstances, acts and conduct.” **Caballero**, 140 Idaho at 333, 92 P.3d at 1080 (citing **Muniz v. Schrader**, 115 Idaho 497, 500, 767 P.2d 1272, 1275 (Ct. App. 1989)). The question of whether an agent had authority is for the trier of fact to determine. *Id.*

Mr. Hazel’s authority to enter into a \$750,000-\$500,000 high-low settlement is evidenced by various testimony as well as other factual circumstances. This Court has found Mr. Hazel’s testimony on his authority credible. Although Mr. Hazel’s testimony cannot stand alone as proof, it is certainly corroborated by other evidence. First, Mr. Hazel repeated the numbers over the phone, and this was overheard by Ms. Jalali, who testified that Mr. Hazel confirmed his authority to offer a high of \$750,000 and a low of \$500,000 counteroffer. Second, as explained earlier, a \$750,000-\$500,000 high-low agreement is more logical than a \$500,000-\$75,000 high-low agreement. In addition to factual findings, this case has a significantly distinguishable circumstance from **Caballero**. The situation in **Caballero** involved an out-of-court-settlement agreement. Here, Illinois Union authorized its counsel to memorialize the agreement in the Court minutes. Although the high-low amount that Illinois Union authorized is at issue, Illinois Union did affirmatively authorize Mr. Hazel to make a settlement offer on the record.

The judiciary has a long-standing recognition of an attorney's courtroom authority in the duration of his representation: "There is a presumption that an attorney-at-law, as an officer of the court is, in general, duly authorized to act for a client whom he professes to represent. Unless the contrary is shown, an attorney who brings an action and signs the papers as attorney for the party he represents has authority to do so. Hence the act of the attorney was the act of the principal or client." **Stout v. McNary**, 75 Idaho 99, 104, 267 P.2d 625, 628 (1954) (citations omitted). See also IDAHO CODE § 3-202 (stating that an attorney has authority to bind that attorney's client by agreement that is entered into the court minutes). For this reason, stipulations made on the record are generally considered to be binding. **Savage Lateral Ditch Water Users Ass'n v. Pulley**, 125 Idaho 237, 245, 869 P.2d 554, 562 (1993); see also **Singleton v. Pichon**, 102 Idaho 588, 589, 635 P.2d 254, 255 (1981).

Although stipulations on the record are generally binding, a court has discretionary power to relieve a party from a stipulation if there is a good cause for doing so and it is in the interest of justice. **Thompson v. Turner**, 98 Idaho 110, 112, 558 P.2d 1071, 1073 (1977) (setting aside parties' stipulation of venue change and ordering back to original venue so case could be consolidated and would be more cost-efficient and convenient for witnesses); **Loughrey v. Weitzel**, 94 Idaho 833, 835, 498 P.2d 1306, 1308 (1972) (upholding trial court's refusal to set aside a stipulation between the plaintiff's attorney and the defendant in the judge's chambers and later stated in court). See also **Singleton v. Pichon**, 102 Idaho 588, 589, 635 P.2d 254, 255 (1981);

Idaho R. Civ. P. 60(b). One basis to relieve a party from a stipulation is when an attorney did not have authority to act as he or she did; the presumption of an attorney's authority is rebuttable. **Howell v. Reimann**, 77 Idaho 84, 88, 288 P.2d 649, 651 (1955). See also **Muncey v. Children's Home Finding and Aid Soc. of Lewiston**, 84 Idaho 147, 153, 369 P.2d 586, 589 (1962) ("While it is recognized that generally an attorney is presumed to be duly authorized to act for a client, when a question of his authority is raised, as in this instant case, his actual authority must be established....").

An Idaho court will not set aside a civil judgment, however, for mistakes made by an attorney within the scope of his or her existing authority. "[L]itigants freely choose their attorneys and cannot avoid the consequences of the attorney's actions." **Devault v. Steven L. Herndon, A Professional Ass'n**, 107 Idaho 1, 2, 684 P.2d 978, 980 (1984). "It is a well-settled rule in Idaho that the negligence, mistakes, or unskillfulness of counsel do not provide a basis for setting aside a civil judgment." **Danti v. Danti**, 146 Idaho 929, 942, 204 P.3d 1140, 1153 (2009) (citing **Donovan v. Miller**, 12 Idaho 600, 88 P. 82 (1906)). As a result, "[t]he fault in [ineffective representation] cases is attributed to the party himself." **Danti**, 146 Idaho at 942, 204 P.3d at 1153 (citing **Donovan**, 12 Idaho at 606, 88 P. at 83). See also **Goodman v. Lothrop**, 143 Idaho 622, 627, 151 P.3d 818, 823 (2007); **State Dept. of Health and Welfare ex rel. State of Or. v. Conley**, 132 Idaho 266, 271, 971 P.2d 332, 337 (Ct. App. 1999). The Supreme Court of Idaho has recently discouraged vacating a judgment as a manner of addressing ineffective representation:

“Individuals are generally bound by their attorneys' actions and when that representation falls below professional standards, the usual course of action is not to vacate the judgment under I.R.C.P. 60(b), but to allow a malpractice suit against the attorney.” **Eby v. State**, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010). The **Eby** Court acknowledged and cited the Supreme Court of the United States in the rationale for not vacating judgments because of the actions of a party’s attorney:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

Eby v. State, 148 Idaho 731, 736-37, 228 P.3d 998, 1003-04 (2010) (citing **Link v. Wabash R. Co.**, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390 (1962)).

Although the Court notes that the agreement between Wadman and Illinois Union was not a judgment, the Court finds that, generally, stipulations on the Court record should remain equally undisturbed. The Court reiterates its earlier finding of fact that Joel Hazel had actual authority to enter into a high-low agreement of \$750,000-\$500,000. But, even if the Court had found that \$75,000-\$500,000 had been the real scope of authority, the proper relief for exceeding that scope of authority would have been a malpractice claim in

tort law rather than asking this Court to invalidate the agreement under contract law.

2. Authority from NIDS to enter into a settlement agreement

NIDS argues that Mr. Hazel did not have authority to bind NIDS to a settlement agreement because Mr. Hazel did not consult with NIDS about any settlement offer. “While the general rule is that an agent of the insurer is not the agent of the insured, statutory or contractual provisions may alter that relationship.” **Sysco Intermountain Food Service v. City of Twin Falls**, 109 Idaho 88, 91, 705 P.2d 548, 551 (Ct. App. 1985) (citing 43 Am.Jur.2d, Insurance, § 110 (1982)). This relationship may vary because “rights and remedies of parties to an insurance contract are determined by the terms contained in the insurance policy....” **State v. Continental Cas. Co.**, 121 Idaho 938, 939, 829 P.2d 528, 529 (1992).

In this case, Illinois Union assumed control over NIDS’s defense in the medical malpractice action. When the insurer assumes full control over a defense of an action against its insured, the insurer also assumes implied duties towards the insured. For example, insurers with full control over defending a claim have a duty, if reasonable, to settle within policy limits. **Goddard ex rel. Estate of Goddard v. Farmers Inc. Co. of Oregon**, 22 P.3d 1224, 1227 (Or. App. 2001). Additionally, while in settlement negotiations, it is the insurer’s duty to “keep[] the insured timely and adequately informed of any offers of settlement received from the claimant and of the progress of any settlement negotiations.” **Baker v. Northwestern Nat. Cas. Co.**, 125 N.W. 2d

370, 373 (1963). Failing in these implied duties is an issue to be resolved between the insurer and the insured.

Mr. Hazel may very well have not engaged in best ethical practice by not communicating with NIDS's representatives during the high-low settlement discussions. He did, however, have a clear understanding of NIDS' position regarding the parameters of an appropriate settlement and acted within those parameters. More important, the discretion to settle was vested in the insurer under the contract terms of the policy. Hazel acted in accordance with the authority conferred by the insurer, which in turn extended authority from NIDS.

C. A meeting of the minds on the material terms of the high-low settlement agreement

Settlement agreements are governed by the rules and principles of contract law. *Vanderford Co., Inc. v. Knudson*, 150 Idaho 664, 672, 249 P.3d 857, 865 (2011). "Generally, oral settlement agreements do not have to be reduced to writing to be enforceable." *Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (2009). An oral agreement that is entered on the court record is binding so long as the parties have assented to the agreement. *Id.* at 898, 204 P.3d at 538 (citing *Kohring v. Robertson*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002)). "The burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and once those facts are established, the defendant has burden of pleading and proving affirmative defenses, which legally excuse performance." *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, __, 280 P.3d 685, 689 (2012) (citing *Idaho Power Co. v.*

Cogeneration, Inc., 134 Idaho 738, 747, 9 P.3d 1204, 1213 (2000)). A contract must be reasonably certain in order to be enforceable. Also, the parties must have intended to enter into a binding contract. The defendants argue that the \$750,000-\$500,000 agreement was unenforceable because it was missing material terms, and the defendants had considered it simply an agreement to agree. This Court holds that the high-low agreement is reasonably certain and that the parties intended for it to be binding. Therefore, the \$750,000-\$500,000 high-low agreement is enforceable.

“A contract must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty.” **Vanderford Co., Inc. v. Knudson**, 150 Idaho 664, 672, 249 P.3d 857, 865 (2011) (citing **Giacobbi Square v. PEK Corp.**, 105 Idaho 346, 348, 670 P.2d 51, 53 (1983)). See also **Kohring v. Robertson**, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002); **Lawrence**, 146 Idaho at 898, 204 P.3d at 538. “To meet this standard the contract must embody a distinct understanding of the parties, showing a meeting of the minds as to all necessary terms of the contract.” **Dursteler v. Dursteler**, 108 Idaho 230, 234, 697 P.2d 1244, 1248 (Ct. App. 1985). See also **Lawrence** at 898, 204 P.3d at 538 (“There must be a meeting of the minds on the essential terms of the agreement.”). “No enforceable contract comes into being when parties leave a material term for future negotiations, creating a mere agreement to agree.” **Maroun v. Wyreless Systems, Inc.**, 141 Idaho 604, 614, 114 P.3d 974, 984 (2005); see also **Spokane Structures, Inc. v. Equitable Investment, LLC**, 148 Idaho 616, 621,

226 P.3d 1263, 1268 (2010). But, every contractual detail is not necessary. **Barnes v. Huck**, 97 Idaho 173, 178, 540 P.2d 1352, 1357 (1975). “Rather only reasonable certainty is necessary before a contract will be given legal effect.” *Id.*

The defense contends the high-low agreement did not include all the material elements and therefore is not enforceable. The Court does not agree. It is apparent that not every detail of the settlement was set forth on the record. It should be noted that if the case simply went to verdict there would still be remaining terms to resolve. The jury was asked to answer five special interrogatories. These five questions were simply designed to make a single determination: how much money, if any, did NIDS owe Wadman for professional negligence? That inquiry was resolved by an agreement between the parties. That single determination was the focus of two weeks of trial by jury. It was the fundamental material term of the case and one that the parties decided to resolve by agreement.

Payment of the determined amount was to be paid within thirty days, there would be no appeal, and cost and fees would be assumed by the respective parties. This would resolve the dispute, placed in the hands of the jury, with finality. Failure to include contingency terms, such as addressing the failure to timely pay, is not material to enforcement.

In addition to finding reasonable certainty of the contract, parties must have intended to enter into a binding, oral high-low settlement when they entered it into the Court minutes. “A prerequisite to the valid formation of a

contract is a meeting of the minds as evidenced by a manifestation of mutual intent to contract.” **Bajrektarevic v. Lighthouse Home Loans, Inc.**, 143 Idaho 890, 892, 155 P.3d 691, 693 (2007). “Whether the parties to an oral agreement or stipulation become bound prior to the drafting and execution of a contemplated formal writing is largely a question of intent.” **Kohring**, 137 Idaho at 99, 44 P.3d at 1154 (citing **Conley v. Whittlesey**, 126 Idaho 630, 634, 888 P.2d 804, 808); see also **Lawrence**, 146 Idaho at 898, 204 P.3d at 538. “Generally, the determination of the existence of a sufficient meeting of the minds to form a contract is a question of fact to be determined by the trier of facts.” **Vanderford Co., Inc. v. Knudson**, 150 Idaho 664, 672, 249 P.3d 857 (2011) (citing **Shields & Co. v. Green**, 100 Idaho 879, 882 606 P.2d 983, 986 (1980)). Whether the parties in this case intended to be bound by the high-low agreement entered on the Court record is a question of fact for this Court to decide.

There should be no question that the parties intended to be bound by the high-low settlement. Illinois Union testified that it has used high-low agreements in the past. Typically these agreements would be entered after the case was submitted to the jury. There was no indication Illinois Union had contested the validity of such agreements in the past. When Mr. Hazel advised Ms. Milch of the verdict, her reaction indicated an expectation that the agreement was binding. In fact, Illinois Union has consistently argued in this case that the terms of the high-low agreement, as Illinois Union understood them, were enforceable.

It appears to this Court that such high-low agreements entered between the parties in open court should be honored. Otherwise, legal chaos and an abuse of the interest of justice would rule the day. A losing party would challenge the agreement, asserting it only meant to be bound if they won. A party aggrieved by the outcome should not be allowed relief by claiming they neglected to formalize every detail of a last-minute agreement. A trial after a trial would be encouraged, and the party in the superior financial position would control the process. Idaho has a long history of recognizing the right to enter into a contract. That right should be recognized here; otherwise, judges in this state would be well advised to reject any proposed high-low agreements. Such a result should not be tolerated. Wadman shall be entitled to a judgment in the amount of \$500,000.

IV. PUNITIVE DAMAGES

Plaintiff sought to amend her complaint to include several claims as well as a claim for punitive damages. At hearing on April 4, 2012, the Court determined that the case would proceed only on breach of contract as to NIDS and Illinois Union. A Second Amended Complaint was subsequently filed, upon which trial proceeded. At the hearing on the Motion to Amend, the Court did not feel that a sufficient showing was made to support a claim for punitive damages, however, the Court allowed the issue to be revisited as the facts at trial were developed. Wadman urges the Court to make such an award.

Punitive damages are awarded in certain cases in addition to actual damages in order to deter or punish blameworthy conduct. Idaho Code section

6-1604 limits recovery where the claimant proves by clear and convincing evidence, oppressive, fraudulent, malicious, or outrageous conduct. “[P]unitive damages are not favored in the law and should be awarded in only the most unusual and compelling circumstances.” *Manning v. Twin Falls Clinic & Hosp.* 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992). Plaintiff must prove that Defendants’ actions “constituted an extreme deviation from standards of reasonable conduct, which was done with knowledge of the likely consequences and an extremely harmful state of mind.” *Seiniger v. North Pacific Ins.* 145 Idaho 241, 250, 178 P.3d 606, 615 (2007). Punitive damages are generally not available in a breach of contract action, however the Idaho Supreme Court has recognized that numerous situations arise where the breaking of a promise may be an extreme deviation from the standards of reasonable conduct, and, when done with knowledge of its likely effects, may be grounds for an award of punitive damages. *Linscott v. Rainier Nat’l Life Ins. Co.*, 100 Idaho 854, 606 P.2d 958 (1980).

A. Punitive Damages against NIDS are not supported by the facts of the case

As noted, punitive damages are intended to punish or deter wrongful conduct. They are not intended to compensate an aggrieved party for its loss. The issue revolves around whether the plaintiff is able to establish a bad act and a bad state of mind on the part of the defendant. *Myers v. Workmen’s Auto Ins. Co.*, 140 Idaho 495, 503, 95 P.3d 977, 985 (2004). Neither can be established against NIDS. As discussed above, the terms of the high-low agreement were controlled by Illinois Union acting through its counsel, Mr.

Hazel. The Court has determined that NIDS had contracted the right to settle the claims against the hospital to its insurer. Furthermore, NIDS was not even privy to the negotiations during the high-low settlement. While NIDS can be contractually bound by the acts of its agents, such acts do not impute either a bad act or bad state of mind. The public policy consideration of punitive damages includes deterrence of wrongful conduct. Punishment of NIDS for conduct it had no control over would not serve the policy.

B. Punitive damages against Illinois Union are not supported by clear and convincing evidence

The plaintiff has also asserted punitive damages against Illinois Union. Under Idaho law, to successfully recover punitive damages, “the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.” IDAHO CODE § 6-1604(1) (2012). The plaintiff must prove “a bad act and a bad state of mind.” *Myers*, 140 Idaho at 503, 95 P.3d at 985 (citing *Linscott*, 100 Idaho at 858, 606 P.2d at 962). Not only must the conduct deviate from a reasonable standard, but the defendant must act with “an extremely harmful state of mind, whether that be termed ‘malice, oppression, fraud or gross negligence;’ ‘malice, oppression, wantonness;’ or simply ‘deliberate and willful.’” *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983) (internal citations omitted). See also *Gunter v. Murphy’s Lounge, LLC*, 141 Idaho at 29, 105 P.3d at 689 (2004); *General Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 853, 979 P.2d 1207, 1211 (1999); *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211,

220, 923 P.2d 456, 465 (1996); **Taylor v. Browning**, 129 Idaho 483, 494, 927 P.2d 873, 884 (1996);

Here, the mental state necessary to recover punitive damages for the breach of contract action has not been clearly and convincingly proved. Testimony and evidence offered by Wadman were more persuasive to find that a binding contract existed and that Joel Hazel, as an agent of Illinois Union, had authority to offer the high-low amount of \$750,000 high and \$500,000 low. The Court simply found the plaintiff's witnesses to be more credible than the defendant's witnesses. While the Court's findings of facts allude to suspicious conduct on the part of Illinois Union, facts that allude to suspicious conduct do not constitute clear and convincing proof of deliberate behavior. Ultimately, the evidence presented does not convince this Court that Illinois Union orchestrated a plan ensuring an emergency exit from the high-low agreement in the event of a highly-favorable jury verdict for Illinois Union.

In Wadman's rebuttal closing argument, Wadman also asserted that punitive damages should be allowed on the claim that Illinois Union deliberately concealed the excess insurance policy during the course of the initial litigation and settlement negotiations. However, the plaintiff's argument under this theory cannot be considered for punitive damages. The only issue before the Court at trial was a breach of contract claim. Concealing an excess insurance policy before the agreement was formed is not conduct that is probative or relevant as to whether Illinois Union authorized Mr. Hazel to enter into a high-low settlement agreement or whether the agreement included

sufficient material terms. Concealing an excess insurance policy is also not conduct that is relevant or probative as to whether the parties intended the agreement to be binding. For these reasons, punitive damages are denied.

V. CONCLUSION

For the above reasons, this Court holds the following:

1. Joel Hazel had actual authority, as directed by Illinois Union on behalf of its insured, to enter into a \$750,000 - \$500,000 high-low agreement on the Court record.
2. Wadman is entitled to \$500,000 pursuant to that high-low agreement.
3. Punitive damages against Illinois Union and North Idaho Day Surgery are denied.

It is also hereby ORDERED that counsel for the plaintiff shall prepare a judgment consistent with the foregoing opinion.

DATED this 4th day of March, 2013.



John Patrick Luster
District Judge

I hereby certify that on the 2/21 day of March, 2013, a true and correct copy of the foregoing was sent via FAX to:

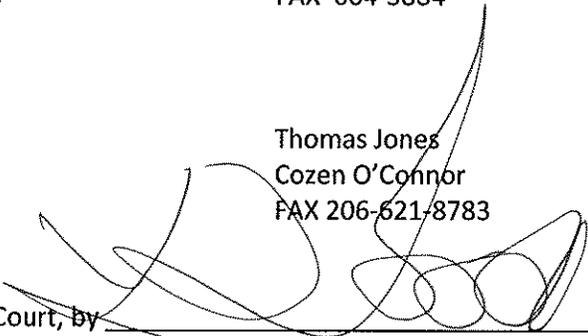
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CLIFFORD T. HAYES, Clerk of the Court, by


Deputy Clerk