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Suhadolnik v. Pressman Appellant's Reply Brief Dckt. 37526

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRANZ **SUHADOLNIK** and BETTY SUHADOLNIK, individually and as husband and wife, Plaintiffs/Appellants, vs. SCOTT H. **PRESSMAN**, M.D., SCOTT H. PRESSMAN, M.D., a Limited Liability Company, THE EYE ASSOCIATES, P.A., an Idaho Corporation, and BUSINESS ENTITIES I through X, and JOHN DOE and JANE DOE, husband and wife, I through X, Defendants/Respondents.	Docket No. **37526-2010**

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth
Judicial District for Ada County

Honorable Patrick H. Owen, District Judge, presiding

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A. SUMMARY OF ARGUMENTS.

The Defendant responds to this appeal by insisting that the Plaintiffs' expert did not have knowledge of the standard of care for ophthalmologists as it existed in Boise, Idaho, in 2006 despite Dr. Pressman's admissions of the standard in his deposition. Defendant's arguments go well beyond the intent of Idaho Code §§ 6-1012 and 6-1013, and if adopted, would support tolerance of negligence in our medical community. The Plaintiffs' expert, Dr. Hofbauer, did familiarize himself with the standard of care and his testimony should not have been excluded at summary judgment. Therefore, Plaintiffs present this reply to the Defendant's arguments.

B. PLAINTIFFS PROPERLY PRESENTED ALL ISSUES ON APPEAL BEFORE THIS COURT.

The Defendant asserts that the Plaintiffs waived their claims because they allegedly did not address the issue of informed consent. To make this argument, the Defendant has to turn a blind eye to the issues of this case. The central issue on appeal is whether the District Court erred in finding that Dr. Hofbauer did not properly familiarize himself with the standard of care applicable to this case. The District Court erroneously found that Dr. Hofbauer had failed to meet the standard required for expert testimony in this case. Based on that finding, the court dismissed both counts of the Plaintiffs' complaint.

The District Court recognized that the issue of familiarity with the standard of care was the same in both counts. It stated:

Because Idaho Code § 39-4506 requires a plaintiff to prove a violation under a

> community based standard, the Suhadolniks must present evidence of a violation of this standard in order to create a genuine issue of material fact and survive summary judgment. Here, the Suhadolniks have not presented evidence of a violation of the community based standard. ***For the reasons discussed above***, the testimony of the Suhadolniks' expert, Dr. Hofbauer, does not show that he had actual knowledge of the local standard.

R. p. 194 (emphasis added). Clearly, the court understood the issue of the Defendant's motion to be the expert's familiarity with the local standard of care. The court applied its reasoning across both counts when granting summary judgment. As a result, Plaintiffs appealed and presented this Court with the issue of Dr. Hofbauer's testimony regarding the standard of care. However, because Dr. Hofbauer properly familiarized himself with the applicable standard of care, his testimony presents genuine issues of material fact on both counts. As a result, summary judgment was inappropriate.

The Defendant relies on *Bach v. Bagley*, and its predecessors to support his argument that Plaintiffs waived claims on appeal. 142 Idaho ___, 229 P.3d 1146 (2010). However, the court in that case only considered issues to be waived when the briefing totally failed to cite to the record or supporting authority. *Id*,. 229. P.3d at 1153. The court did consider issues that appeared in the briefing even as vaguely as "recurring themes." *Id.*

> The issues we are considering on appeal are those listed in Part II, most of which ***serve as recurring themes throughout his briefing***. That does not necessarily mean that the arguments we address were presented in a cogent manner but merely that they were asserted to the extent that the Court deemed them to have been marginally raised. The remainder of the issues, which we have not addressed, ***were so lacking in coherence, citations to the record, citations of applicable authority, or comprehensible argument that we simply will not consider them.***

Id. (emphases added).

The issues presented before this Court are whether the district court erred in finding that Dr. Hofbauer had familiarized himself with the local standard of care and whether the court erred in fact-finding when making that decision. These issues span across both of the Plaintiffs' claims and the district court granted summary judgment on all counts based on its decision based on the court's decision on the issues at hand. As a result, the Plaintiffs, in bringing these issues before this Court, have not waived any claims.

C. DR. HOFBAUER'S AFFIDAVIT IS ADMISSIBLE BECAUSE HE PROPERLY FAMILIARIZED HIMSELF WITH THE REQUISITE STANDARD OF CARE IN THIS CASE

The Defendant responds to the Plaintiffs' arguments by attempting to narrow the ways in which an out-of-state expert can familiarize himself with the local standard of care. He argues that familiarity must come from contacting a local expert, reviewing an "appropriate" deposition, or evidence that the local standard does not differ from the national standard of which the expert has knowledge. (Respondent's Br. pp. 12-16). However, this Court has never held that there is any one way an expert can obtain knowledge of the local standard of care. *See Newberry v. Martens*, 142 Idaho 284, 127 P.3d 187 (2005). An expert can review the Defendant's deposition and use that for the necessary foundation when that deposition contains admissions of the applicable standard of care. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51-52, 995 P.2d 816, 821-22 (2000); *Kozlowski v. Rush*, 121 Idaho 825, 8282-29, 828 P.2d 854, 857-58 (1992)

The Defendant attempts to distance himself from his admission that failing to take an adequate history is the basic standard in this case. He argues that *Grover v. Smith* is factually different from this case. 137 Idaho 247, 46 P.3d 1105 (2002). *Grover* was a malpractice case in which the doctor did not take an adequate history and his treatment led to significant injuries. *Id.* 137 Idaho at 248, 46 P.3d at 1006. The Defendant alleges that that case is different because the defendant did not take any history. (Respondent's Br. p. 16). That is simply not true. The doctor in that case was well aware of the patient's history.

> Sharon Grover (Grover) was a patient of Dr. David G. Smith (Dr. Smith), a general dentist practicing in Fruitland, Idaho. In addition to knowing him as her dentist, Grover also knew Dr. Smith through the leadership position he held in their church. Grover had chronic problems with her upper left teeth, particularly in 1995 and 1996. In the fall of 1996, Grover began complaining of pain on the upper right side of her head, above her temple.

Id. Dr. Grover was familiar with the patient's history and this Court held that local standards cannot fall below the most basic elements of providing healthcare. *Id.* 137 Idaho at 252, 46 P.3d at 1110.

This case centers on whether Dr. Pressman took an adequate history of Franz Suhadolnik prior to the surgery. Dr. Pressman admitted that it was the applicable standard of care, among other things, to take an adequate history of the patient prior to cataract surgery, to do a preoperative exam, to be familiar with the drugs being used, and to be familiar with the medical literature in the field and FDA recommendation. (R. p. 155). Dr. Hofbauer used that deposition and the admissions contained therein to become familiar with the applicable standard of care. With that knowledge, Dr. Hofbauer offered his opinions of the breaches of the standard that

occurred – namely, failure to adjust for positive Flomax usage and other pre-existing conditions. Further, Dr. Pressman's inadequate patient history caused him to be unable to obtain an appropriate informed consent because he could not inform the patient of the salient risks. Dr. Hofbauer's testimony satisfies all elements required in Idaho Code §6-1013 and Idaho Rule of Civil Procedure 56(e) to be admissible and to create a genuine issue of material fact to prevent summary judgment. In fact, the Defendant even admits that had Dr. Hofbauer's affidavit been admitted, summary judgment would have been inappropriate. (Respondent's Br. p. 23). What constitutes an adequate history will always depend on the factual issues of the case, which should be left to the jury. However, the standard of taking an adequate history is admitted in this case and Dr. Hofbauer properly based his opinions on that standard. As a result, the District Court erred in determining Dr. Hofbauer did not have adequate knowledge of the local standard of care. Thus, summary judgment was inappropriate on all counts.

D. THE DISTRICT COURT ERRED IN GRANTING INFERENCES IN DR. PRESSMAN'S FAVOR WHEN HIS TESTIMONY CHANGED THROUGHOUT THE RECORD.

Plaintiffs maintain that the District Court erred in granting inferences in the Defendant's favor at summary judgment. The court, when faced with contradictory testimony from Dr. Pressman, opted to accept the testimony that most benefitted the Defendant. Further, the court placed the burden of establishing how doctors in the community were practicing on the Plaintiffs. Such a burden is contrary to the summary judgment standard that requires the moving party to demonstrate that no issue of material fact exists. I.R.C.P. 56(c).

The District Court cannot engage in weighing competing evidence at summary judgment. *Watts v. Lynn*, 125 Idaho 341, 344, 870 P.2d 1300, 1303 (1994). When deciding a motion for summary judgment, it is improper for the court to "erroneously involve itself in weighing competing evidence." *Id.* Here, the court weighed the competing evidence before it, and granted the inferences in the Defendant's favor. The finding was improper and contradictory to the rules of summary judgment. As a result the court erred in granting summary judgment based on these factual findings.

E. THE DEFENDANT IS NOT ENTITLED TO ATTORNEY FEES.

Idaho Rule of Civil Procedure 54(e) allows for an award of attorney fees only when the case is pursued frivolously or without merit. The Defendant correctly cites to law that demonstrates that an award of fees should only be awarded when there has been no showing that the district court misapplied the law. *Wait v. Leavell Cattle, Inc.*, 136 729, 799, 41 P.3d 220, 227 (2001).

Here, it is well settled that an out-of-state expert can become familiar with the local standard of care by reviewing the Defendant's deposition. *See e.g. Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000); *Kozlowski v. Rush*, 121 Idaho 825, 828 P.2d 854 (1992). The District Court went beyond that law and applied the facts of the case to narrowly construe the standard that would only apply to this particular case. That is not the law or intent of the medical malpractice statutes and the Plaintiffs brought this appeal to correct the District Court's error. Therefore, the Defendant is wrong in asserting that this appeal has been pursued

unreasonably. The District Court erred in granting summary judgment, thus this appeal was necessary. As a result, the Defendant is not entitled to an award of attorney fees.

II. CONCLUSION

Dr. Hofbauer is appropriately familiar with the applicable standard of care in this case. He offered his expert opinions based on his knowledge of the standard as it was admitted in Dr. Pressman's deposition. The District Court erred in finding that Dr. Hofbauer did not have the requisite knowledge of the local standard of care and by granting inferences in the Defendant's favor. As a result, the Defendant's motion for summary judgment should have been denied. Therefore, Plaintiffs respectfully request that this Court reverse the decision of the District Court.

DATED this 5th day of November, 2010.

PEDERSEN and WHITEHEAD

By_____
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Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

BRIAN J. HILVERDA, a resident attorney, hereby certifies that on the 5th day of November, 2010, he caused a true and correct copy of the within and foregoing APPELLANTS' REPLY BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

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X First Class Mail
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