7-19-2012

Hall v. Rocky Mountain Emergency Physicians Respondent's Brief Dckt. 39473

IN THE SUPREME COURT OF IDAHO

HEATHER HALL,

Plaintiffs/Appellants,

vs.

ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C. and KURTIS HOLT, M.D., and RANDALL FOWLER, M.D. and JEFF JOHNSON,

Defendants/Respondents.

Docket No. 39473-2011

RESPONDENTS' BRIEF

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Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock

The Honorable David C. Nye, District Judge, Presiding

Allen H. Browning
BROWNING LAW
482 Constitution Way, Suite 111
Idaho Falls, Idaho 83402
Telephone (208) 542-2700
Facsimile (208) 542-2711
Attorneys for Plaintiffs/Appellants

Terrence S. Jones
Tracy L. Wright
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660
Attorneys for Defendants/Respondents

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Terrence S. Jones, ISB No. 5811
Tracy L. Wright, ISB No. 8060
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants/Respondents

IN THE SUPREME COURT OF THE STATE OF IDAHO

HEATHER HALL, Plaintiff/Appellant, vs. ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C. and KURTIS HOLT, M.D., and RANDALL FOWLER, M.D., and JEFF JOHNSON, Defendants/Respondents.	Docket No. 39473-2011 RESPONDENTS' BRIEF

I.
STATEMENT OF THE CASE

A. Nature Of The Case.

This is a medical malpractice case involving allegations asserted by Plaintiff/Appellant Heather Hall, hereinafter referred to as "Plaintiff" or the "patient." Plaintiff appeals the October 25, 2011 summary judgment decision of the Honorable David C. Nye wherein he granted the Defendants/Respondents' motion for summary judgment on all claims. Respondents contend the decision of the District Court should be affirmed in all

respects, because: 1) all of the patient's claims are subject to the requirements of Idaho Code §6-1012; 2) the affidavit of the patient's expert, Dr. David Bowman, lacks foundation and was therefore inadmissible pursuant to Rule 56(e) because Dr. Bowman failed to set forth in his affidavit that he had adequately familiarized himself with the standard of health care practice applicable to any of the Respondents practicing in the emergency room setting in Pocatello, Idaho in 2009; 3) the opinions expressed in Dr. Bowman's affidavit are conclusory and not based on personal knowledge as they are improperly based on unsupported allegations in the complaint; 4) Idaho Code § 54-1814 is inapplicable for use by an expert opposing summary judgment in a civil suit for damages; and 5) the patient failed to establish the existence of any statewide minimum standards regarding the proper way to auscultate a patient's heart beat while evaluating complaints of chest pain and migraine headache during an emergency room examination. Because the District Court properly concluded that Dr. Bowman's affidavit failed to meet the admissibility requirements of Rule 56(e) and Idaho Code §§ 6-1012 and 6-1013, the Court properly granted the Respondents' motion for summary judgment on all counts.

B. Course Of Proceedings.

Plaintiff filed her Complaint and Demand for Jury Trial on May 3, 2011, alleging claims for "Battery," "Intentional Infliction of Emotional Distress," "Invasion of Privacy," "Negligent Supervision" and "Respondeat Superior." (R. p. 4-6). The parties thereafter engaged in discovery after which the Defendants filed a motion for summary judgment. (R. p. 11–16). The defense motion was supported by the affidavits of Jeff Johnson, P.A., Dr. Holt and Dr. Fowler. In their affidavits, each of the Defendant health care providers set forth their actual knowledge of the local standard of health care practice

applicable to each of them for the time and place in question. (R. p. 19–47). The affidavits further state that the care and treatment of the Plaintiff by each of the Defendant health care providers complied in all respects with the applicable local community standard of health care practice for Pocatello, Idaho, in 2009. ***Id.***

Plaintiff opposed the defense motion with the Affidavit of Dr. David Bowman, an Idaho Falls, Idaho, physician of unknown specialty. (R. p. 71). Dr. Bowman claimed to have familiarized himself with the local standard of health care practice based on his experience, his review of the patient's medical records, his review of the complaint and consultation with anonymous physicians. (R. p. 72–73). Following oral argument on September 26, 2011, the District Court concluded that Dr. Bowman's affidavit lacked foundation and was therefore inadmissible, and thus the Plaintiff's showing was not adequate, and granted summary judgment in favor of the defense on all claims. (R. p. 101–108). As part of the District Court's ruling, it found that all of Plaintiff's claims should be treated together as a standard medical malpractice case. (R. p. 101).

Plaintiff did not seek reconsideration or submit a supplemental affidavit of Dr. Bowman correcting the deficiencies identified by the District Court. Instead, Plaintiff subsequently filed a Memorandum in Support of Motion to Alter or Amend Judgment Under Rule 59(a) on November 8, 2011; however, no motion was ever filed with the memorandum. (R. p. 111). Without any further court action, on December 8, 2011, Plaintiff filed her Notice of Appeal pursuant to I.A.R. 17. (R. p. 115). The defense opposed Plaintiff's procedurally improper Rule 59(a) submission. (R. p. 121-26). The court heard oral argument on December 19, 2011, after which the District Court affirmed summary

judgment for the Defendants.[1] Plaintiff thereafter filed an Amended Notice of Appeal pursuant to I.R.A. 17 on January 3, 2012. (R. p. 132).

C. Statement Of Facts.

1. Plaintiff presented to the Portneuf Medical Center emergency department on April 23, 2009, complaining of headache. (R. p. 34). She was treated in the emergency room by Defendant Jeff Johnson, P.A., who after evaluating the patient and initially trying non-narcotic medications agreed to the Plaintiff's request that she be provided with a limited amount of narcotic pain medication. Plaintiff was given the names of local primary care physicians and told to set up care with a local provider.

2. Plaintiff again presented to the Portneuf Medical Center emergency department on April 27, 2009, complaining of headache. (R. p. 34). At that time, the patient was seen by a different emergency room provider who documented that he was concerned the patient had presented to the emergency room exhibiting drug seeking behavior.

3. Plaintiff again presented to the Portneuf Medical Center emergency department on May 12, 2009, with another subjective pain complaint of suffering from a headache. (R. p. 25–28). She was seen and treated in the emergency room by Jeff Johnson, P.A. The patient again requested to be treated with narcotic pain medication. ***Id.*** Plaintiff had failed to establish care with a primary care provider as previously instructed

[1] This Court granted the defense/respondent motion to augment the record on appeal to include the District Court's February 27, 2012 decision denying Plaintiff's motion to alter or amend judgment under Rule 59(a). Counsel for Respondent is not clear how this document is being referred to on appeal as an augmented portion of the record. As a result, this decision is simply attached as **Exhibit A** to this response brief.

and was asked again to do so. ***Id.*** The patient was provided with a limited amount of narcotic pain medication and again instructed to establish care with a local provider rather than simply coming into the emergency room for such care. ***Id.*** at 27.

4. Dr. Randall Fowler was the supervising physician on duty in the Portneuf emergency room during Plaintiff's May 12, 2009 visit. He did not examine or treat Plaintiff at that time, but he agreed with Johnson's emergency medical treatment and recommendations to the Plaintiff. See Aff. Randall Fowler, M.D. (R. p. 38).

5. Plaintiff presented to the Portneuf Medical Center emergency department on June 5, 2009, with another subjective pain complaint that she was suffering from a headache. (R. p. 29–33). At that time, she also reported radiating pain, nausea, chills, night sweats, dizziness and light sensitivity. (R. p. 31). She was seen, evaluated and treated in the emergency room by Defendant Jeff Johnson, P.A. ***Id.*** Because of the range of symptoms described by the patient, P.A. Johnson performed the required ER physical exam which included, among other things, auscultating the patient's heart and lungs. (R. p. 30). The patient requested narcotic pain medication after alleging that the non-narcotic pain medication administered by Johnson had not been effective at relieving her subjective pain complaints. ***Id.*** Although inconsistent with a migraine headache, the patient reported pain relief after receiving an intravenous injection of the narcotic drug morphine. ***Id.*** The patient was again provided a limited prescription for narcotic pain medication and instructed to establish a physician patient relationship with a local provider. ***Id.***

6. Dr. Kurtis Holt was the supervising physician on duty in the Portneuf emergency room during Plaintiff's June 5, 2009 visit. He did not examine or treat Plaintiff

at that time, but he agreed with Johnson's emergency medical treatment and recommendations to the Plaintiff. (R. p. 44).

7. On each occasion that Plaintiff was treated by Defendant Johnson, the patient made repeated requests for narcotic pain medication despite the fact that such medication is not generally effective at relieving migraine headache pain. Following the June 5, 2009 visit, the patient was refused a narcotic pain medication refill by the Defendants. (R. p. 21, para. 9). This is because ER's do not provide prescription refills which is one of the reasons why the patient was repeatedly told to establish care with a local primary care physician.

8. Plaintiff subsequently presented to the Portneuf Medical Center emergency department on June 8, 2009; July 6, 2009; July 7, 2009; July 21, 2009; August 19, 2009; and September 10, 2009 all with continuing subjective complaints of a headache and requesting further narcotic pain medication. (R. p. 34). It is unknown whether Plaintiff ever sought treatment from any other medical providers during the above time period.

II.
ISSUES PRESENTED ON APPEAL

1. Did the District Court err in concluding that all of Plaintiff's claims arise out of the provision of medical care and are therefore exclusively governed by Idaho's Medical Malpractice Act, specifically including the expert witness requirements of Idaho Code §6-1012?

2. Did the District Court err in concluding that the affidavit of Dr. Bowman, in which he fails to identify his medical specialty, fails to identify the physicians with whom he claims to have consulted and fails to discuss the relevant time period in describing his efforts to familiarize himself with the applicable standard of health care practice, lacks foundation and is therefore inadmissible?

3. Does Idaho Code § 54-1814, which enumerates grounds for which a licensed physician or physicians' assistant may be subject to discipline by the Idaho State Board of Medicine, supercede Idaho's Medical Malpractice Act by creating a statewide standard of health care practice for all medical

providers, regardless of time, location or medical specialty whenever a claim for malpractice is alleged?

III.
ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Are Respondents entitled to attorney fees and costs on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41 because of Appellant's failure to identify any misapplication of the law and/or abuse of discretion by the District Court?

IV.
STANDARD OF REVIEW

In an appeal from an order granting summary judgment, the Appellate Court's standard of review is the same standard used by the District Court in ruling on a motion for summary judgment. ***See Edmunds v. Kraner***, 142 Idaho 867, 871, 136 P.3d 338, 342 (2006); ***see also U.S. Bank Nat. Ass'n v. Kuenzli***, 134 Idaho 222, 225, 999 P.2d 877, 880 (2000); ***see also First Sec. Bank v. Murphy***, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law summary judgment is proper." ***Id.***

Summary judgment is "not a disfavored procedural shortcut;" rather, it is the "principal tool . . . by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." ***Paugh v. Ottman***, 2008 U.S. Dist. LEXIS 52281, *9-10 (D. Idaho 2008) (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 377 (1986) (alterations in original)). In evaluating the sufficiency of the materials submitted in opposition to summary judgment, the Court must bear in mind the distinction between the requirements for admissibility of

expert opinion testimony under Rule 56(e) and the test for sufficiency of such testimony in order to oppose a motion for summary judgment. The "admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment." ***Edmunds*** at 871,136 P.3d 342. The Court must look at the affidavit or deposition testimony and determine whether it alleges facts, which taken as true, would render the testimony admissible. ***Id.*** (citing ***Dulaney v. St. Alphonsus Reg'l Med. Ctr.***, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002)).

In order to determine whether the trial court erred in the granting of summary judgment, it is first necessary to examine the trial court's evidentiary rulings. ***Edmunds***, 142 Idaho at 872, 136 P.3d 343. Furthermore, "when reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard." ***Id.*** "A district court's evidentiary rulings will not be disturbed by this Court, unless there has been a clear abuse of discretion." ***McDaniel v. Inland Northwest Renal Care Group - Idaho, LLC***, 144 Idaho 219, 222, 159 P.3d 856, 861 (2007). "To determine whether the trial court has abused its discretion, we consider whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its discretion by an exercise of reason." ***Shane v. Blair***, 139 Idaho 126, 128-129, 75 P.3d 180, 182-183 (2003) (citing ***Sun Valley Shopping Ctr. v. Idaho Power Co.***, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)). ***See also Lamar Corp. v. City of Twin Falls***, 133 Idaho 36, 40, 981 P.2d 1146, 1150 (1999)).

V.
ARGUMENT

A. The District Court Properly Concluded That Plaintiff's Claims Are Governed By Idaho's Medical Malpractice Act.

Although not clearly set forth in her opening brief, Plaintiff's repeated defamatory representation of Respondent Johnson's efforts to auscultate her heart and lungs during his examination appears aimed at pursuing both a battery claim and a malpractice theory.[2] Plaintiff cites to no authority to support a battery claim and Respondents contend that under the facts of this case no such claim is recognized against a health care provider under Idaho law. It is undisputed that the patient presented to the emergency department at Portneuf Regional Medical Center complaining of a range of symptoms, including headache, radiating pain, nausea, chills, night sweats, dizziness and light sensitivity. (R. p. 31). As part of the reasonable and necessary evaluation for this patient, Respondent Johnson conducted a physical examination which required him to auscultate the patient's heart and lungs with his stethoscope. This act, performed in the course and scope of providing medical care to evaluate the patient's condition, required Respondent Johnson to partially remove the patient's bra and place the stethoscope on the patient's chest in order to listen to her internal organs.

It is well settled that the requirements of Idaho Code §§ 6-1012 and 6-1013 apply to "any case, claim or action for damages due to injury . . . brought against any physician [,]. . . physicians' assistant . . . or any person vicariously liable for the negligence

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[2] It is worth noting that in the complaint Plaintiff describes the conduct at issue as follows: "Without consent, Johnson then completely lifted Plaintiffs's bra up and over, exposing her left breast, looked under her gown and brushed his hand over her left nipple, then continued with the stethoscope while resting his hand on her left breast for approximately 15-20 seconds, while claiming to check her heartbeat." (R. p. 4). Yet, hoping to invoke some passion, throughout her brief she falsely describes Respondent Johnson as having "remov[ed] a patient's bra against her will, grabbing her breast, staring at it and hanging onto it for 15-20 seconds . . ." (See i.e. Plaintiff's opening brief dated May 22, 2012 at p. 1, 5, 7, 8, 9, 12, 14).

of them . . . on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto. " ***See*** Idaho Code § 6-1012. Thus, any claim brought against a health care provider for claims involving the provision of health care must be pled or will be deemed to have been pled as a claim for medical malpractice. ***See Litz v. Robinson***, 131 Idaho 282, 284, 955 P.2d 113, 115 (Idaho App. 1997); ***Hough v. Fry***, 131 Idaho 230, 233, 953 P.2d 980, 983 (1998).

A plaintiff "cannot avoid the requirements of Idaho Code §§ 6-1012 and 6-1013 by claiming his action is based on an intentional tort rather than negligence." ***Litz v. Robinson***, 131 Idaho 282, 284, 955 P.2d 113, 115 (Ct. App. 1997). "The form of the action is not the decisive test in actions against physicians, surgeons and dentists for malpractice. The decisive test is the subject of the action." ***Id.*** at n.1. Accordingly, "to determine if I.C. § 6-1012 applies, courts need only look to see if the injury occurred on account of the provision of or failure to provide health care." ***Jones v. Crawforth***, 147 Idaho 11, 16, 205 P.3d 660, 665 (2009) (quoting ***Hough v. Fry***, 131 Idaho 230, 233, 953 P.2d 980, 983 (1998)) (emphasis in original).

The case of ***Litz v. Robinson*** is representative of the Idaho appellate courts' response to a plaintiff's attempt at circumventing Idaho Code §§ 6-1012 and 6-1013. In ***Litz***, the plaintiff argued Idaho Code §§ 6-1012 and 6-1013 did not apply to his claims because his cause of action was based on the intentional tort of intentional infliction of emotional distress. The Court of Appeals rejected that reasoning, noting that the "underlying nature of [the] claim . . . was inextricably intertwined with a claim of negligence." 955 P.2d at 115 (citing to ***Trimming v. Howard***, where this Court rejected a plaintiff's argument that his cause of action against a surgeon was grounded in contract,

reasoning that "the basic allegations of the complaint are directed solely to carelessness, negligence and misconduct as the proximate cause of the injury claimed to have been suffered." 52 Idaho 412, 415-16, 16 P.2d 661, 662 (1932)). Thus, the plaintiff was unable to avoid the statutory requirements applicable to a claim for medical negligence by "artfully labeling his cause of action as a claim for the intentional infliction of emotional distress." ***Id.***

Another decision addressing this issue can be found in the case of ***Hough v. Fry***. In ***Hough***, the plaintiff argued her cause of action was not governed by I.C. §§ 6-1012 and 6-1013, arguing instead that it was a claim for injuries resulting from the "ordinary negligence" of her therapist in failing to support her while she was on a balance board. ***Hough***, 131 Idaho at 233, 953 P.2d at 983. This Court rejected that argument, stating:

> "[t]here is nothing in the statute or its statement of purpose to indicate that the type of negligence, ordinary or professional, has anything to do with the application of *Section 6-1012*. Rather, **by its plain and unambiguous language, the statute applies when the damages complained of result from providing or failing to provide health care**." ***Id.*** (emphasis added).

As the District Court in this case correctly pointed out, the Plaintiff alleges that a battery "took place during and in connection with the provision of medical treatment–listening to a heartbeat with a stethoscope. Surely these alleged acts fall under the purview of 6-1012, especially in light of the language [in that statute] including 'any matter incidental or related to the provision of medical care.'" (Ex. A, p.7]). The District Court correctly noted that "the Idaho appellate courts disfavor allowing plaintiffs to escape the requirements of 6-1012 and 6-1013 by 'artfully' labeling their causes of action as

something other than medical malpractice when the alleged actions are connected to and intertwined with the provision of medical care." (Ex. A, p. 8). In the absence of any authority to the contrary, the District Court properly treated all her claims, including claims for intentional torts, as but one claim for medical malpractice.

B. The District Court Did Not Abuse Its Discretion When It Concluded Dr. Bowman's Affidavit Failed To Comply With The Admissibility Requirements Of Rule 56(e) And Idaho Code § 6-1013.

To be admissible, an affidavit opposing summary judgement must "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). The question of admissibility of affidavits under Rule 56(e) is a "threshold question to be analyzed before applying the liberal construction and reasonable inferences rules when reviewing motions for summary judgment." ***Rhodehouse v. Stutts***, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994).

"Admissibility of expert testimony requires personal knowledge." ***Shane v. Blair***, 139 Idaho 126, 129, 75 P.3d 180, 183 (2003). It is well settled that experts testifying as to the standard of practice in medical malpractice actions must show that they have familiarized themselves with the standard: 1) for the relevant community; 2) for the relevant time; and, 3) for a particular profession. ***Arregui v. Gallegos-Main***, Docket 38496 (Idaho May 4, 2012); ***Ramos v. Dixon***, 144 Idaho 32, 37, 156 P.3d 533, 538 (2007); ***Perry v. Magic Valley Reg'l Med. Ctr.***, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000); ***Kolln v. St. Luke's Reg'l Med. Ctr.***, 130 Idaho 323, 331, 940 P.2d 1142, 1150 (1997). Idaho Code § 6-1012 defines the relevant community and "is both site and time specific." 156 P.3d at 538 (quoting ***Gubler v. Boe***, 120 Idaho 294, 296, 815 P.2d 1034, 1036 (1991)). "[Idaho

Code] Section 6-1013 requires actual knowledge of the standard of care in the community where the alleged malpractice occurred." ***Morris v. Thomson***, 130 Idaho 138, 146, 937 P.2d 1212, 1220 (1997). "They must also state how they became familiar with the standard of care for the particular professional." ***Perry***, 134 at 51, 995 P.2d at 821 (citing ***Kolln v. St. Luke's Reg'l Med. Ctr.***, 130 Idaho 323, 331, 940 P.2d 1142, 1150 (1997)) (emphasis added). As outlined herein and as properly concluded by the District Court, the affidavit of Plaintiff's expert, Dr. Bowman, fails to comply with the foregoing requirements.

1. ***As an of-of-area physician, Dr. Bowman has not set forth facts showing he is familiar with the location and time specific requirements regarding the standard of health care practice applicable to each of the Defendant health care providers.***

Dr. Bowman is not a Pocatello physician, nor is there any evidence in his affidavit that he is an emergency room physician or an emergency room physicians' assistant. Thus, in order for Dr. Bowman's opinions against the Respondents to be admissible for purposes of opposing the defense motion for summary judgment, he was required to demonstrate–by setting forth "facts as would be admissible in evidence," that he had taken affirmative steps in order to acquire actual knowledge of the Pocatello standard of health care practice applicable to each of the Respondents. See Rule 56(e) and Idaho Code § 6-1013(1)(c).

In an attempt to comply with these requirements, Dr. Bowman states in his affidavit that he spoke with two secret consultant physicians from Pocatello regarding the allegations in the Complaint. (R. p. 73). Of these secret consultants, one purportedly had emergency room privileges in Pocatello in the past while the other purportedly had current emergency room privileges in Pocatello. (R. p. 72-3 at para 6(a) and (c). There is no reference to whether these unknown consultants ever had actual knowledge of the

applicable standard of practice for 2009 for each of the Defendants in order to be able to convey such information to Dr. Bowman. Throughout his affidavit, Dr. Bowman **never** states that the secret consultant doctor(s) ever told him they were familiar with the standard applicable to the Defendants for the 2009 time frame.

One of the anonymous doctors purportedly "had emergency room privileges in Pocatello," but there is no indication of **when** he purportedly had such privileges (perhaps many years *before* or since the relevant time period). (R. p. 72). Likewise, the other anonymous physician purportedly "has privileges to practice emergency medicine in Pocatello," but there is no indication of **when** he acquired such privileges (perhaps years *after* the relevant time period). (R. p. 73). Again, these deficiencies render Dr. Bowman's affidavit inadmissible due to a lack of foundation. Thus, Dr. Bowman's affidavit fails to create an issue of fact because it does not set forth any "facts as would be admissible in evidence."

This Court has previously ruled that no uniform standard of health care practice can be assumed within the state of Idaho. ***Ramos***, 144 Idaho at 38, 156 P.3d at 539. In fact, this Court has previously addressed the very question of whether the applicable standard of health care practice is the same for Pocatello and Idaho Falls, and found that it is not. *See* ***Gubler v. Boe***, 120 Idaho 294, 815 P.2d 1034, (1991) (upholding the trial court's decision to exclude plaintiff's expert witness testimony where the expert had not familiarized himself with the community standard of health care practice in Pocatello, as he had spoken only with a doctor practicing in Idaho Falls). Accordingly, Dr. Bowman was required to show how he became familiar with the relevant standard as it existed in Pocatello in 2009.

Plaintiff mis-states the relevant time period requirement of Idaho Code §6-1012 examined and explained by this Court in ***Dulaney v. St. Alphonsus Reg'l Med. Ctr.***, 137 Idaho 160, 45 P.3d 816 (2002). In ***Dulaney,*** the Court outlined remarkably similar foundational deficiencies which it held rendered a plaintiff's expert affidavit inadmissible for purposes of opposing a defense motion for summary judgment. There the Court noted:

> Even assuming that the use of an anonymous informant is an acceptable manner for adequately familiarizing an out-of-area physician of the local standard of care, Dr. Stump's affidavit does not allege specific facts showing that the anonymous professor was familiar with the standard of care for orthopedic surgeons in Boise in 1994. The professor stated that he had trained orthopedic physicians "that presently practice in Boise," but he did not state whether they were practicing in Boise in 1994. He stated that he has "maintained personal and professional relationships with physicians in Boise," but he did not state whether he did so during 1994. He likewise did not state that he had ever discussed with these orthopedic physicians the standard of care for an orthopedic physician practicing in Boise in 1994. He stated that he had taught and lectured in Boise, but did not state when he did so. Dr. Stump's affidavit does not allege any specific facts showing that the anonymous professor was familiar with the standard of care for orthopedic surgeons in Boise in August 1994. The professor's conclusory statement that he was familiar with the standard of care in Boise in 1994 is simply not sufficient.

Dulaney, 137 Idaho at 169, 45 P.3d at 825.

Plaintiff reiterates that "Dr. Bowman repeats over and over, nine times, that the specific timeframe of conduct he refers to is May and June of 2009." Appellant's Brief p. 12. That argument misses the point. The deficiency that the District Court held

rendered Dr. Bowman's affidavit inadmissible did not turn on whether he had properly identified the time period of the alleged misconduct. The issue is whether his affidavit demonstrates an adequate foundation for the conclusion that he has actual knowledge of the applicable local standard of practice in 2009. The defense contends that Dr. Bowman's affidavit fails to do so and was properly ruled inadmissible by the District Court.[3]

2. *Dr. Bowman has not demonstrated that he is familiar with the standard of health care practice applicable to each of the Respondents' class of health care provider.*

While it is clear from his affidavit that Dr. Bowman is an out-of-area physician, it is equally unclear from his affidavit what sort of physician Dr. Bowman is. For example, it is unknown from the face of his affidavit if he is a podiatrist, dermatologist, oncologist, etc.[4] Presumably he is not an emergency room physician or else he would have simply stated such in his affidavit.[5] This creates additional foundational problems as it relates to the court's ability to address the sufficiency of Dr. Bowman's affidavit. (R. p. 71–75).

Idaho Code § 6-1012 "makes clear that a health care provider must be compared to a health care provider with similar training and in the same category or class, 'taking into account his or her training, experience, and fields of medical specialization.'"

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[3] As this Court pointed out in its recent medical malpractice decision in ***Arregui v. Gallegos-Main***, although the affidavit in ***Dulaney*** "provided much more detail and facts regarding the anonymous professor's knowledge and experience; nevertheless, the Court still found the affidavit lacked foundation because it did not relate the professor's experience to the time period in question." Docket No. 38496, slip op. at 27 (Idaho May 4, 2012). Dr. Bowman's affidavit suffers from each and every deficiency the ***Dulaney*** Court found in the Stump affidavit. Accordingly, the Bowman affidavit is equally inadmissible.

[4] According to the Idaho State Board of Medicine, Dr. Bowman is a doctor of osteopathy with a specialty in family medicine working at a skin clinic in Idaho Falls. There is no reference to him being in any way affiliated with emergency medicine. See https://isecure.bom.idaho.gov/BOMPublic/LicensePublicRecord.aspx?Board=BOM&LicenseType=O&LicenseNo=175. Last accessed on July 11, 2012.

[5] It arguably was the duty of Plaintiff's counsel to assist Dr. Bowman in avoiding these most basic errors. As this Court has stated, "[t]he attorney must be involved in advising the expert as to how to learn the applicable standard of care and determining whether the expert has done so." ***Ramos v. Dixon***, 144 Idaho 32, 37, 156 P.3d 533, 538 (2007).

Evans v. Griswold, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997) (quoting I.R.C.P. § 6-1012). This Court has clearly stated that it cannot be assumed that the standard of health care practice is the same for physicians of different specialties, even where the procedure at issue is relatively simple. *See* ***Suhadolnik v. Pressman***, 151 Idaho 110, 121, 254 P.3d 11, 22 (2011) (rejecting the plaintiff's argument that there is a "statewide mandate in every profession requiring an adequate patient history");[6] *see also* ***Dulaney v. St. Alphonsus Reg'l Med. Ctr.***, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002) (finding that an expert neurologist's testimony was properly excluded where there were no facts in the record showing the standards for a neurologist was the same as for the defendant emergency room physician or orthopedic surgeon).

Consistent with the requirements of Idaho Code §6-1012 and 6-1013 as set forth in ***Dulaney***, "[t]he witness must demonstrate a knowledge acquired from experience or study of the standards of the specialty of the defendant physician sufficient to enable him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards . . ." ***Id.*** at 824. Accordingly, Dr. Bowman was required to show how he became familiar with the standard of health care practice applicable to the Respondents' particular professions. As an out-of-town physician of an unknown specialty, Plaintiff was required to have Dr. Bowman explain in his affidavit how he is qualified to render opinions against each of the Defendants.

Turning to his affidavit, Dr. Bowman again relies totally on having: 1) "previously hired a doctor from Pocatello to work for me, and he had emergency room

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[6] Appellant misreads the facts of the ***Suhadolnik*** case which is one of defense counsel's cases. It did not concern the requirements for an expert to testify concerning the details of a cataract surgery; rather, it concerned, in part, the taking of an "adequate patient history." ***Suhadolnik v. Pressman***, 151 Idaho 110, 121, 254 P.3d 11, 22 (2011).

privileges in Pocatello" (R. p. 72); 2) "evaluated the emergency room at Portneuf Medical Center" (R. p. 73); and, 3) "personally spoke with another medical doctor in Pocatello who also has privileges to practice emergency medicine in Pocatello." (R. p. 73). The District Court properly concluded this showing was inadequate as nothing in the record demonstrates that Dr. Bowman would have "knowledge acquired from experience or study of the standards" applicable to a physicians' assistant or to a physician specializing in emergency medicine.

Dr. Bowman's affidavit does not identify the doctor whom he claims to have hired to work for him, nor does he identify that doctor's medical specialty. Similarly, Dr. Bowman fails to identify the other medical doctor in Pocatello with whom he spoke or how and when it is was that this secret consultant "has privileges to practice emergency medicine in Pocatello." (R. p. 73). As a result, the Court cannot glean from Dr. Bowman's vague references to anonymous physicians whether they have actual knowledge of the standard of health care practice applicable to the Respondents for the pertinent time period of May and June, 2009. As phrased by the ***Dulaney*** Court, "[t]here are no facts showing" the anonymous familiarizing physicians "had actual knowledge of the standard of care for those medical specialties."***Dulaney***, 137 Idaho at 168, 45 P.3d at 824. There is nothing in Dr. Bowman's affidavit that demonstrates he has any familiarity with the Respondents' particular professions, which again renders his affidavit lacking in foundation and therefore inadmissible.

3. Respondent Johnson can only be judged in comparison with the standard of health care practice applicable to a physician assistant.

Dr. Bowman's affidavit demonstrates that he does not recognize there is a distinction between the standards applicable to a physician versus those applicable to a

physicians' assistant. Dr. Bowman consistently lumps together the standards for physicians and physicians' assistants by stating: "I am familiar with the standard of care of physicians practicing in Pocatello, Idaho, and know first-hand the applicable standard of care for **physicians and physicians' assistants** . . ." (R. p. 72) (emphasis added); " . . . as such standard then and there existed with respect to **physicians and physicians' assistants** operating or functioning in Jeff Johnson's capacity" (R. p. 72) (emphasis added); " . . . it is my opinion that the treatment given by Jeff Johnson to Heather Hall, as described in paragraph 15 of her complaint, on June 5, 2009, failed to meet the standard of care of **physicians and physicians' assistants** . . . ." (R. p. 74) (emphasis added). As a physician and not a physicians' assistant, Dr. Bowman was required (even with the assistance of Plaintiff's counsel) to take affirmative steps to educate himself about the standards applicable to physicians' assistants working in the emergency room in Pocatello in 2009. There is nothing in Dr. Bowman's affidavit that demonstrates he has made any attempt to do so, which again renders his affidavit lacking in foundation and therefore inadmissible.

Plaintiff cannot overlook the fact there is a difference between a physician, i.e. Dr. Bowman, and a physicians' assistant, i.e. Respondent Johnson, which is expressly recognized by statute. For purposes of establishing a cause of action for malpractice in Idaho, the focus is not the type of medical procedure performed, but rather the type of health care provider performing it. Idaho Code §6-1012. The Plaintiff therefore cannot get around the foundational deficiencies in Dr. Bowman's affidavit by artfully arguing that "[t]he medical procedure in this case is so basic it is universally delegated to assistants." Appellant's Brief p. 12.

In ***Evans v. Griswold***, 129 Idaho 902, 935 P.2d 165 (1997), a plaintiff in a medical malpractice case argued that in the context of prescribing medication that an optometrist should be held to the same standard as an ophthalmologist since both are licensed to prescribe medication. ***Griswold***, 129 Idaho at 905, 935 P.2d at 168. This Court disagreed, noting that such an argument "ignores the requirements of I.C. Sections 6-1012 and 6-1013." ***Id.*** The Court went on to explain that "an ophthalmologist is a medical practitioner of a different class than an optometrist," meaning they cannot be held to the same standard. ***Id.*** As a result, summary judgment for the defendant health care provider was affirmed.

Similarly, in ***Dulaney***, this Court determined a plaintiff's neurology expert was not competent to testify, because he had not familiarized himself with the standard of practice applicable to the defendants' medical specialties of emergency care and orthopedic surgery. The Court commented that "with respect to the care at issue, the local standard for a neurologist [might be] the same as that for an emergency room physician or orthopedic surgeon." ***Dulaney***, 137 Idaho at 168, 45 P.3d at 824. However, the Court found the expert failed to demonstrate such by showing he had "actual knowledge of the applicable standard of care for emergency room physicians or orthopedic surgeons." ***Id.*** Thus, the expert was not qualified to testify.[7]

As demonstrated by the optometrist and ophthalmologist at issue in ***Griswold***, it may be common for physicians of a different class, with different "training, experience, and fields of medical specialization," to perform the same procedure. Idaho Code § 6-1012. This does not mean, however, that they are to be held to the same

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[7] The expert in ***Dulaney*** was not disqualified simply because his was of a different medical specialty from the defendant health care provider, but rather because he had not familiarized himself with the standard applicable to the defendant's medical specialty.

standard of health care practice–in fact, doing so is forbidden by statute in Idaho. Plaintiff contends that because the malpractice at issue did not involve a "technical medical procedure requiring board certification," that "any licensed physician in Idaho" should be deemed qualified to testify against Respondent Johnson and his treatment of the patient. Appellant's Brief p. 11. Plaintiff cites to no case authority to support such a proposition, which is squarely in conflict with the express language of Idaho Code §6-1012. The ***Griswold*** and ***Dulaney*** cases outlined above solidify the conclusion that it is the defendant health care provider's medical specialty that determines the applicable standard, not the procedure in question. While it is true that physicians, physicians' assistants, registered nurses, and nurse practitioners are all capable of auscultating a patient's heart and lungs, they all, however, have different "training, experience, and fields of medical specialty" and therefore, under Idaho Code § 6-1012, are held to different standards.

Indeed, a simple example would be that of a cardiologist who specializes in heart medicine who would have vastly different training and experience in auscultation of a patient's heart and lungs than would a family physician or a dermatologist. It was precisely because of these differences that the statutory language was employed to insulate health care providers from being held to an unfair standard of practice. Without such statutory language, one could easily see scenarios wherein patients would seek to use health care providers with more specialized training to testify against lesser qualified or experienced providers.

Idaho Code § 6-1012 specifically lists "physicians' assistant" among the classes of health care providers to which the Act applies. As such, Respondent Johnson must be judged "in comparison with similarly trained and qualified providers **of the same class** in the same community." Idaho Code § 6-1012 (emphasis added). To comply with

this requirement and to establish an issue of fact, Plaintiff's affidavit from Dr. Bowmen was required to set forth how he acquired personal knowledge of the standard of practice applicable to a physicians' assistant like Respondent Johnson. Without such an explanation, his affidavit was properly excluded by the District Court based on a lack of foundation.[8]

In addition, the District Court's decision to grant summary judgment to all the Defendants, on all of the claims, was proper since "[t]he other claims in the complaint against Johnson's supervising physicians and Rocky Mountain Emergency Physicians, L.L.C. are derived from the claims against Johnson." (R. p. 107). Therefore, because Plaintiff provided no admissible expert opinion that Respondent Johnson had committed any malpractice, the derivative malpractice claims against the other Respondents (who had no direct contact with the patient) also fail.

C. The District Court Properly Concluded That Idaho Code § 54-1814 Does Not Establish A Statewide Standard of Practice Applicable To The Health Care At Issue In This Case.

Plaintiff argues that her allegations of "groping" required the Defendants to address in their affidavits this specific conduct and to address the alleged statewide standard established per Idaho Code § 54-1814. Appellant's Brief p. 12. This argument is without merit as it confuses the respective burdens placed on the moving and non-moving parties. It is well settled that at the summary judgment phase, the moving party is required only to point out the "absence of evidence" to support the non-moving party's case. ***Foster v. Traul***, 141 Idaho 890, 893, 120 P.3d 278, 281 (2005). At that point it is

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[8] The District Court found that "all these deficiencies, collectively and individually, render Dr. Bowman's affidavit inadmissible under I.R.C.P. 56(e) and I.C. §§ 6-1012 and 1013." (R. p. 107) (emphasis added).

the non-moving party's burden to "come forward with evidence, and to 'set forth specific facts showing that there is a genuine issue for trial.'" ***Id.*** (quoting I.R.C.P. 56(e) (internal cites omitted). The non-moving party "may not rest upon the mere allegations or denials of that party's pleadings." I.R.C.P. 56(e).

The Defendant health care providers did, to the extent required of them, address the specific conduct at issue, because that "conduct" was the provision of medical care. Jeff Johnson, P.A., Dr. Holt and Dr. Fowler each filed Affidavits which set forth their actual knowledge of the local standard of health care practice applicable to emergency medical providers in Pocatello, Idaho in 2009. (R. p. 19–47). Those affidavits further stated that the care and treatment they provided complied in all respects with the applicable local community standard of health care practice for Pocatello, Idaho, in 2009. ***Id.*** Accordingly, said Affidavits established the elements required by Idaho Code §§ 6-1012 and 1013, as well as Rule 56(e) and were sufficient to shift the burden of proof to the Plaintiff to respond.

Thus, the burden was shifted "to the non-moving party to produce evidence sufficient to support a jury verdict in her favor." ***Foster***, 120 P.3d at 281. The Plaintiff "may not rest upon the mere allegations or denials of [her] pleadings." I.R.C.P. 56(e). If the evidence put forth by the non-moving party is in the form of an affidavit, the affidavit "must show affirmatively that the affiant is competent to testify to the matters stated therein" and "shall be made on personal knowledge." ***Id.*** The question of admissibility of affidavits under Rule 56(e) is a "threshold question to be analyzed before applying the liberal construction and reasonable inferences rules when reviewing motions for summary judgment." ***Rhodehouse v. Stutts***, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994).

With the above principles in mind, it is clear that Dr. Bowman's affidavit does not rise to the task of creating a genuine issue of material fact, because his "opinions" are

nothing more than a restatement of the allegations in the pleadings, and are not based on the affiant's personal knowledge. Dr. Bowman's affidavit states that his opinions are based on the medical records and the Complaint filed in this case. (R. p. 74). With respect to the allegations in the Complaint, Dr. Bowman states that "the treatment given by Jeff Johnson to Heather Hall, as described in paragraph 15 of her complaint" violated "the standard of care expected of any health care provider in Pocatello, whether in an emergency room or otherwise." ***Id.*** (emphasis added). Such a statement fails to satisfy the requirements of Rule 56(e).

To the extent Dr. Bowman wants to base his opinions on the allegations in the Complaint, the allegations are simply that, allegations; they are not facts in evidence. It is well settled in the summary judgment setting that a Plaintiff may not rely merely upon the allegations in her complaint, but rather she must set forth such facts as would be admissible in evidence in order to create an issue of fact. Rule 56(e): ***Suhadolnik v. Pressman***, 151 Idaho 110, 254 P.3d 11 (2011). That requirement is not satisfied when the Plaintiff simply re-states her allegations by proxy, as she has done here through Dr. Bowman's affidavit. Dr. Bowman has done nothing to affirmatively show he has personal knowledge of the allegations in the complaint, such that he would be competent to testify with regard to those allegations.

For example, there is no evidence that Dr. Bowman ever read the Affidavit of Heather Hall, that he ever spoke to Heather Hall or that he ever even read the defense affidavits. Rather, his opinions are consistently qualified by phrases such as "as described in paragraph 15 of her complaint" and "if Heather Hall's report of what occurred on June 5, 2009, is accurate." (R. pp. 74, 75). Such phrases demonstrate that Dr. Bowman has no personal knowledge regarding whether the allegations are true, or not. Therefore, his

opinions necessarily are conclusory, speculative and not based on personal knowledge of the affiant. As such, they are inadmissible under I.R.C.P. 56(e).

Likewise, Dr. Bowman's statement that his opinions are based in any way on his review of the medical records is of no support. The medical records of Heather Hall do not address, nor do they in any way support the allegations set forth in her Complaint (*see* R. pp. 25-35). The medical records describe the encounters Respondent Johnson had with the patient on the dates in question. ***Id.*** In his affidavit, Dr. Bowman does not point to anything in the medical records that supports his opinions or his conclusions that there were any failures or violations of the standards of practice by any of the Respondents. Dr. Bowman was required to state with particularity what each Respondent did that amounted to a violation of the applicable standard of practice. His failure to do so renders his affidavit insufficient to establish an issue of fact.

Furthermore, the legislative intent, language and requirements of Idaho Code § 54-1801 et seq. are not compatible with the requirements for maintaining a medical malpractice action as set forth in Idaho Code §§ 6-1012 and 6-1013. "It is well established that statutes should be interpreted to mean what the legislature intended them to mean." ***Walker v. Nationwide Fin. Corp. of Idaho***, 102 Idaho 266, 268, 629 P.2d 662, 664 (1981). The stated purpose of Idaho's "Medical Practice Act" (I.C. § 54-1801 et seq) is "to assure the public health, safety and welfare in the state by the licensure and regulation of physicians, and the exclusion of unlicensed persons from the practice of medicine." Idaho Code § 54-1801 (emphasis added). To further the purpose of that Act, § 54-1814 provides "Grounds for Medical Discipline," whereby those licensed to practice medicine in Idaho may be "subject to discipline by the board pursuant to the procedures set forth in [Chapter

18] and the rules promulgated pursuant thereto." Idaho Code § 54-1814 (emphasis added).

Plaintiff provides no authority to support the proposition that the provisions of Idaho's Medical Practice Act have any application in the context of a civil action seeking damages based on allegations of medical malpractice. Defendants contend this is because no such authority exists as the Idaho legislature never intended the Medical Practice Act to apply in civil actions like the case at bar. Rather, the legislature enacted Idaho Code § 6-1001 et seq, Idaho's Medical Malpractice Act, to apply in "any case, claim or action for damages" brought against a health care provider in Idaho. Idaho Code § 6-1012.

Unlike the requirements set forth under Idaho Code § 54-1814, Idaho Code § 6-1012 requires "direct expert testimony" that the defendant physician failed to meet the applicable standard of health care practice of the local community. ***Strode v. Lenzi***, 116 Idaho 214, 775 P.2d 106 (1989); ***Dekker v. Magic Valley Regional Medical Center***, 115 Idaho 332, 766 P.2d 1213 (1988); ***Kunz v. Miciak***, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990); ***Dulaney v. St. Alphonsus Regional Medical Center***, 137 Idaho 160, 164, 45 P.3d 816 (2002); ***Foster v. Traul,*** 141 Idaho 890, 120 P.3d 278 (2005) ; ***Ramos v. Dixon***, 144 Idaho 32, 156 P.3d 533 (2007) see also ***McDaniel v. Inland Northwest Renal Care***, 144 Idaho 219, 159 P.3d 856 (2007). "[T]o allow plaintiffs in medical malpractice suits to establish that a provider has breached the standard of care indirectly by showing that he or she breached a statute or rule flies in the face of the legislature's intent that plaintiff's prove that the provider breached the standard of care through direct testimony." ***Schmechel v. Dille***, 148 Idaho 176, 183, 219 P.3d 1192, 1199 (2009).

As discussed in Section A, above, Idaho's Medical Malpractice Act, by its very terms, applies to "any case, claim or action for damages" brought against a health care provider in Idaho. Idaho Code § 6-1012. Whereas, Idaho Code § 54-1814, by **its** very terms, applies to "discipline by the board." It is worth noting that Idaho Code § 54-1814(7) contains language "similar to the well-accepted definition of medical malpractice," yet, one statute provides a rubric under which medical malpractice claims for damages are considered, and the other provides that the Idaho State Board of Medicine may initiate disciplinary procedures when it determines that malpractice has occurred. ***Haw v. Idaho St. Bd. Of Med.***, 140 Idaho 152, 158, 90 P.3d 902, 908 (2004). The two statutes do not overlap in their application, because the statutes have different purposes and different requirements.

Some of the problems associated with plaintiffs' intermingling of rules and statutes were highlighted in the case of ***Schmechel v. Dille***, 148 Idaho 176, 183, 219 P.3d 1192, 1199 (2009). There, the appellants argued that the District Court abused its discretion in not permitting their undisclosed expert witness to testify that the defendants' failure to abide by the terms of a Delegation of Services (DOS) Agreement (as required by IDAPA § 22.01.03.030.04) constituted a breach of the standard of care in their medical malpractice claim. In upholding the District Court's decision to exclude the expert testimony, the Idaho Supreme Court noted that the testimony would not have saved the appellants' case even if it had been allowed. The Court pointed out that the specificity required by Idaho Code § 6-1012 regarding the applicable local standard of health care practice was in contrast to the generality of DOS agreements. The Court also noted that Idaho Code § 6-1013 requires a plaintiff's expert to testify to a reasonable degree of medical certainty that a breach of the standard of practice occurred, not that a breach of

a DOS agreement occurred. As such, to permit a plaintiff to establish a breach of the standard of practice via testimony regarding breach of a DOS agreement would "fl[y] in the face of the legislature's intent." ***Schmechel***, 148 Idaho at 183, 219 P.3d at 1199.

Appellant has not produced any medical evidence suggesting that Respondent Johnson had no medical purpose associated with his actions in touching the patient or being in proximity to her breast. The fact the patient contends after her examination that subjectively she felt the touching was offensive or unnecessary is irrelevant. Indeed, many medical examinations and procedures can be extremely offensive or even demeaning to the average lay person, al la mammograms, prostate exams or colonoscopy exams. This does not mean the subjective beliefs of the patient rule the day in a malpractice case.

Rather, the issue is whether the procedure was medically necessary and whether the manner in which it was performed was consistent with the applicable standards of practice for the health care provider at issue.[9] Touching one's "private parts" as part of rendering required emergency medical care in an emergency room in Idaho does not equate to "conduct which constitutes an abuse or exploitation of a patient" under Idaho Code § 54-1814(22). To even establish such a ground in disciplinary proceeding, the Idaho Board of Medicine would still be required to present qualified expert testimony that such conduct did, if fact, meet the elements of the statute.

Simply stating a patient's subjective belief that she was improperly touched and then referring to a statute that provides for discipline for health care providers who

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[9] It should be noted that Plaintiff has not pled a claim based on lack of informed consent for any of the care at issue. Lack of informed consent is an entirely separate and distinct claim from a medical malpractice claim. See Idaho Code § 39-4506, et seq.

engage in abuse or exploitation of a patient does not create a statewide minimum standard of practice for auscultating one's heart and lungs. In order to overcome a defense motion for summary judgment a patient is still required per Idaho Code § 6-1012 to present expert testimony demonstrating that the conduct in question violated the local standard of health care practice in the absence of an unequivocal minimum statewide standard which has not been demonstrated in this case. Since no such minimum standard exists in this case, nor was one ever advocated by Plaintiff's expert Dr. Bowman, it does not serve to create an issue of fact sufficient to avoid summary judgment.[10] This was part and parcel of the District Court's decision which should be affirmed in all respects.

Plaintiff's argument that § 54-1814(22) creates a statewide standard for performing a medical examination is analogous to the argument rejected by this Court in ***McDaniel v. Inland Northwest Renal Care Group-Idaho***. 144 Idaho 219, 159 P.3d 856 (2007). There, the appellant argued that 42 C.F.R. § 405 Subpart U (which "prescribe[s] the role which End-Stage Renal Disease (ESRD) networks have in the ESRD program. . . and describe the health and safety requirements that facilities furnishing ESRD care to beneficiaries must meet") created a "minimum national standard of care with respect to services provided by ESRD dialysis facilities." ***Id.*** 144 Idaho 222-23, 159 P.3d at 859-60.

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[10] Respondents agree with Plaintiff that ***Perry v. Magic Valley Reg'l Med. Ctr.***, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000), "stands for the rule that if the expert testifies a national standard applies, **and can demonstrate that**, it is not even necessary to consult a local physician." Appellant's Brief p. 10 (emphasis added). However, ***Perry*** concerned only the narrow question of whether it is possible to demonstrate that a national standard applies by reviewing the deposition of a local practitioner, rather than consulting with a local practitioner. This Court found that it is possible to make such a demonstration where the expert is familiar with the national standard and reviews the deposition of one familiar with both the national and local standard, whose deposition testimony also states that the two are not different. The reasoning in ***Perry*** has no bearing here, however, where Dr. Bowman did not review any deposition testimony. In fact, there is no deposition testimony to review, as no party has taken any depositions.

In rejecting that argument, this Court noted "a marked difference between regulations that govern the physical administration of health care services and those that govern other aspects of a health care provider's practice." ***Id.*** 144 Idaho at 223, 159 P.3d at 860. This Court went on to state that "[w]here the promulgated regulations do not concern the administration of health care services . . . Idaho Code § 6-1012 dictates that the applicable standard of health care is that practiced in 'the community in which such care allegedly was or should have been provided.'" ***Id.*** Thus, the local community standard applied.[11]

D. Respondents Are Entitled To Attorney Fees On Appeal Pursuant To Idaho Code § 12-121 And I.A.R. 41(a).

Idaho Rule of Civil Procedure 54(e)(1) governs the award of attorney fees. It states:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

"Idaho Rule of Civil Procedure 54(e)(1) 'creates no substantive right to attorney fees, but merely establishes a framework for applying I.C. § 12-121.'" ***Newberry v. Martens***, 142

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[11] Plaintiff would do just as well to cite the Idaho Criminal Code, which provides a "statewide standard" prohibiting battery. Neither "standard" supercedes the local community standard of proof required in Idaho Code § 6-1012 in a malpractice claim seeking money damages.

Idaho 284, 292, 127 P.2d 187,195 (2005) (citing ***Huff v. Uhl***, 103 Idaho 274, 277 n.1, 647 P.2d 730, 733 n.1 (1982)).

According to the Idaho Supreme Court:

> Attorney fees on appeal are appropriate under that statute [Idaho Code § 12-121] only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. **Where an appeal turns on the question of law, an award of attorney fees under this section is proper if the law is well settled and the appellant has made no substantial showing that the district court misapplied the law.**

Wait v. Leavell Cattle, Inc., 136 Idaho 792, 799, 41 P.3d 220, 227 (2001). (emphasis added) (citation omitted).

Respondents contend that the case authority interpreting Rule 56(e) and Idaho Code §§ 6-1012 and 6-1013 specifically discuss the steps an out-of-area expert must take in order to sufficiently familiarize himself or herself with the local standard of practice. The actions of Dr. Bowman, relying solely on anonymous physicians in order to familiarize himself without reference to medical specialty or time frame, resulted in a foundationally defective affidavit despite the presence of well-established Idaho case authorities regarding summary judgment in medical malpractice cases. Respondents further contend that Idaho Code §§ 6-1012 and 6-1013 and interpreting case authority firmly establish that Plaintiff's claims, and the applicable standard of health care practice, are governed exclusively by Idaho's Medical Malpractice Act.

Based on the record before the Court, Respondents contend Appellant has unreasonably pursued this appeal and has failed to establish a credible misapplication of the law by the District Court. In light of the substantial expenses incurred as a result of this

undertaking, Respondents respectfully request that they be awarded attorney fees on appeal pursuant to Idaho Code § 12-121 and I.A.R. 41(a).

VI.
CONCLUSION

The District Court properly concluded that Dr. Bowman's affidavit failed to comply with the threshold foundational requirements set forth under Rule 56(e). Dr. Bowman is an out-of-area physician. His affidavit states he relied upon anonymous physicians to learn about the local standard of practice. There is no evidence the anonymous physicians were familiar with the standard of health care practice for the relevant time period, which the District Court properly concluded prevented Dr. Bowman's affidavit from being admissible. The District Court therefore did not abuse its discretion and properly granted the Respondents' motion for summary judgment. The Respondents therefore respectfully request this Court affirm the District Court's decision in all respects and that the Respondents be awarded costs and attorney fees for defending against this appeal.

DATED this 19th day of July, 2012.

CAREY PERKINS LLP

/S/

By_____
Terrence S. Jones, Of the Firm
Attorneys for Defendants/Respondents

/S/

By_____
Tracy L. Wright, Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2012, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen Browning
BROWNING LAW
482 Constitution Way, Suite 111
Idaho Falls, Idaho 83402
Telephone (208) 542-2700
Attorneys for Plaintiff/Appellant

[X] U.S. Mail, postage prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile (208) 542-2711

/s/

Tracy L. Wright

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT,

STATE OF IDAHO, BANNOCK COUNTY

HEATHER HALL, **Plaintiff,** **v.** **ROCKY MOUNTAIN EMERGENCY PHYSICIANS, L.L.C., and KURTIS HOLT, M.D., and RANDALL FOWLER, M.D., and JEFF JOHNSON,** **Defendants.**	**Case No.: CV-2011-1740-PI** **DECISION ON PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(a) (MOTION TO RECONSIDER)** **Hon. David C. Nye**

This matter came before the Court for a hearing on Plaintiff Heather Hall's Motion on January 23, 2012. Allen Browning appeared on behalf of Plaintiff Heather Hall, and Tracy Wright appeared in behalf of all Defendants. At the hearing, the Court took Hall's motion under advisement, and now issues its decision, **denying** the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of Hall's visits to the Portneuf Medical Center ("PMC") emergency room in Pocatello to receive treatment for headaches. She alleges that on one occasion, a physician's assistant, Jeff Johnson, in the course of a medical examination, touched her breast

Exhibit A

inappropriately while listening to her heartbeat with a stethoscope. She brought claims against Johnson for battery, intentional infliction of emotional distress, and invasion of privacy. She also asserted claims against Drs. Kurtis Holt and Randall Fowler for negligent supervision of Johnson. Additionally, Hall asserted a claim against Rocky Mountain Emergency Physicians, L.L.C., under the theory of *respondeat superior*. Defendants did not submit an answer to Hall's complaint, but moved for summary judgment in August 2011. On October 25, 2011, the Court granted summary judgment to Defendants on all of Hall's claims against them, and entered judgment on November 1, 2011.

On November 10, 2011, Hall filed a document entitled "Memorandum in Support of Motion to Alter or Amend Judgment Under Rule 59(a)." Hall's Memorandum in Support was filed alone—unaccompanied by a separate document containing an actual motion. At the January hearing, Hall requested that the Court consider her Memorandum as a motion as well. The basic substance of Hall's Memorandum is a request that the Court reconsider its summary judgment decision. However, the Court noted at the January hearing that Rule 59(a) of the Idaho Rules of Civil Procedure pertains only to a motion for a new trial, so Hall also requested at the hearing that the Court consider her Memorandum a motion to reconsider brought under Rule 11(a)(2)(B). Defendants object to the substance of Hall's Memorandum, as well as both requests Hall made at the hearing.

II. ANALYSIS

The Court denies Hall's "motion" on three alternative grounds: no motion was filed with the Memorandum, Rule 59(a) is not the proper rule for a motion to reconsider, and summary judgment to Defendants was proper.

A. No motion filed with Memorandum

Under IRCP 7(b)(1), "[a]n application to the court for an order shall be *by motion* which, unless made during a hearing or trial, shall be made in writing . . . ."[1] Additionally, Rule 7(b)(3)(C) provides:

> It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the face of the motion whether the party desires to present oral argument or file a brief within fourteen (14) days with the court in support of the motion.

Nothing in Rule 7 provides that a brief or memorandum in support of a motion may be considered the actual motion itself. The beginning portion of Rule 7(b)(3) does contain the phrase "[u]nless otherwise ordered by the court," suggesting that the trial court has the discretion whether to allow a memorandum in support to be considered as a motion also.

The Court hereby exercises its discretion by denying Hall's request to treat her Memorandum as a motion also. Rule 7(b)(1) plainly indicates that when a party makes an application to the court for an order, it *shall* be by *motion*. The Rule does not provide that such an application can be made by simply a memorandum in support. The Court therefore finds Hall's Memorandum in Support procedurally improper because no motion was properly filed in accordance with IRCP 7(b)(1).

[1] (emphasis added).

Any oral motion made at the hearing on January 23, 2012, was untimely and cannot be considered a proper motion under Rule 7.

B. Rule 59(a) not proper for a motion to reconsider

The Court also finds, alternatively, that Hall's Memorandum was not brought under the correct rule. IRCP 7(b)(1) provides that a motion to the court "shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought." In this case, Hall's Memorandum cites IRCP 59(a), which provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons . . . ." Nothing in Rule 59(a) provides for a motion to reconsider when, as in this case, there has been no trial.

The Court denies Hall's request to treat her Memorandum as a motion for reconsideration brought under Rule 11(a)(2)(B). The Court finds that Hall's Memorandum, even if the Court considered it an actual motion under Rule 7(b)(1), was not procedurally proper because it failed to cite the appropriate Rule, thereby failing to give Defendants notice of the precise grounds for her request.

C. Summary judgment to Defendants was proper

Alternatively, even if the Court agreed to treat Hall's Memorandum as a motion for reconsideration properly brought under Rule 11(a)(2)(B), the Court would still deny Hall's motion on its merits because summary judgment to Defendants was proper in the first place.[2]

[2] The well-known standard of review on summary judgment was set forth in the Court's prior decision. It is hereby incorporated by reference.

When Defendants moved for summary judgment, they produced several affidavits. In the affidavit of Johnson, he described how he has actual, personal knowledge of the applicable standard of care for Pocatello and PMC, and he stated that he did not violate the standard of care in his treatment of Hall. The affidavits of Drs. Kurtis Holt and Randall Fowler also described how they have actual, personal knowledge of the standard of care for physicians supervising physician's assistants in Pocatello and PMC, and they stated that they did not violate that standard of care in their supervision of Johnson. Hall did not challenge the admissibility of those affidavit opinions. Hall's response in opposition was based solely on the affidavit of Dr. David Bowman.

Assuming that Hall's claims are properly treated as medical malpractice claims—which is addressed below—the Defendants' affidavits successfully shifted the burden in summary judgment to Hall to produce a qualified expert opinion in accordance with Idaho Code § 6-1012. Hall had to provide at least some evidence that Defendants violated the applicable standard of care in her case in order to survive summary judgment. Hall responded by submitting the affidavit of Dr. Bowman, but the Court found it inadmissible in its entirety for lack of foundation. As a consequence, Hall had no other admissible evidence that Defendants violated the standard of care. Therefore, Hall failed to demonstrate that there was a genuine issue of material fact necessitating a trial on the medical malpractice claims. Accordingly, the Court held that Defendants were entitled to summary judgment.

In her current motion, Hall does not challenge the Court's ruling that Dr. Bowman's affidavit was inadmissible. She argues that the Court should have denied summary judgment

because Defendants did not acknowledge or admit Hall's allegations that Johnson inappropriately groped her. She also argues that Defendants never claimed that the alleged groping would not violate the standard of care. Hall also argues that Defendants never contradicted Dr. Bowman's statement that the alleged groping violated the statewide ethical standards for physician's assistants.

Hall's argument concerning Dr. Bowman's statement fails because the Court previously found Dr. Bowman's affidavit inadmissible, and Hall has not challenged that ruling. Hall's other arguments primarily depend on whether her intentional tort claims were properly treated as medical malpractice claims.

In its summary judgment decision, the Court noted that although Hall brought intentional tort claims, her entire case would be treated as a standard medical malpractice case rather than an ordinary tort case. The Court acknowledges that some additional explanation is necessary to clarify that particular ruling, but the overall outcome remains the same.

Idaho Code § 6-1012, which governs medical malpractice cases, contains the following provision concerning cases which fall under its purview:

> [A]ny case, claim or action for damages due to injury to or death of any person, brought against any [health care provider] . . . on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto . . . .

Such cases falling under this definition must comply with the other provisions of 6-1012, which requires the opinion of an expert witness to prove a violation of the applicable standard of healthcare.

Obviously, not every conceivable lawsuit against a health care provider would require compliance with 6-1012. In *Hough v. Fry*, the plaintiff fell and was injured while using a balance board as part of her supervised physical therapy treatment.[3] The plaintiff attempted to sue her physical therapist under a theory of ordinary negligence rather than medical malpractice, but the Idaho Supreme Court stated:

> Hough argues that § 6-1012 should not be read to require expert testimony every time a provider of medical care is sued for negligence. We agree. We can conceive of circumstances where the alleged act of negligence is so far removed or unrelated to the provision of medical care that § 6-1012 would not apply. This, however, is not one of those cases. The act complained of was so directly related to providing Hough with physical therapy that it cannot be reasonably argued that § 6-1012 does not apply.[4]

Thus, the plaintiff in *Hough* still had to comply with the requirements of 6-1012 in order to survive summary judgment.

Similarly, this Court recognizes that there are conceivable circumstances where the healthcare provider's alleged act of intentional tort is so far removed from or unrelated to the provision of medical care that 6-1012 should not apply. However, Hall's case is not one of those circumstances. The intentional torts allegedly took place during and in connection with the provision of medical treatment—listening to a heartbeat with a stethoscope. Surely these alleged acts fall under the purview of 6-1012, especially in light of the language including "any matter incidental or related" to the provision of medical care. Other than the Idaho Supreme Court's statement in *Hough*, no Idaho case has addressed precisely how a court should determine if a

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[3] 131 Idaho 230, 231-32, 953 P.2d 980, 981-82 (1998).
[4] *Id.* at 233, 953 P.2d at 983.

claim against a healthcare provider is *related enough* to the provision of healthcare such that the claims should be required to comply with the expert witness provisions of 6-1012. However, this Court finds that due to the proximity and connection between the alleged acts of intentional tort and the provision of medical care, Hall's claims should be required to comply with 6-1012. This Court's holding is bolstered by the Idaho Court of Appeals' decision in *Litz v. Robinson*, where the Court stated:

> [W]e conclude that Litz was required to comply with I.C. §§ 6–1012 and 6–1013. Litz's later attempt to escape the requirements of I.C. §§ 6–1012 and 6–1013 by artfully labeling his cause of action as a claim for the intentional infliction of emotional distress is not persuasive in consideration that the underlying nature of Litz's claim, as pled in his complaint and in further documentation submitted to the district court, was inextricably intertwined with a claim of negligence.[5]

Thus, it is apparent that the Idaho appellate courts disfavor allowing plaintiffs to escape the requirements of 6-1012 and 6-1013 by "artfully" labeling their causes of action as something other than medical malpractice when the alleged actions are connected to and intertwined with the provision of medical care.

Obviously, in an ordinary intentional tort claim, a defendant could not be granted summary judgment without submitting at least some evidence refuting the plaintiff's allegations of what events took place. In this case, if Hall's intentional tort claims were treated as such instead of medical malpractice claims, Defendants could not be granted summary judgment without at least first denying that inappropriate touching took place. However, when the case is treated as a medical malpractice case, Hall's own specific allegations of what took place are not

[5] 131 Idaho 282, 284, 955 P.2d 113, 115 (Ct. App. 1997).

as important as an expert's opinion that such conduct violated the standard of care. Even though Johnson's own affidavit did not directly deny that he groped Hall, his qualified opinion that he did not violate the standard of care is enough to shift the burden of production to Hall in summary judgment, because that is how medical malpractice cases proceed under Idaho law. Furthermore, the doctors' opinions that they did not violate the standard of care in supervising their physician's assistant were enough the shift the burden of production in summary judgment to Hall. Since the only expert opinion produced by Hall in response was found inadmissible, the Defendants' affidavits stood unopposed. Thus, summary judgment was proper. Therefore, even if the Court treated Hall's Memorandum as a procedurally proper motion, the motion is denied.

III. CONCLUSION

Hall's Memorandum was procedurally improper because there was no motion filed with the Memorandum. Alternatively, Hall's Memorandum was procedurally improper because it failed to cite an appropriate rule as grounds for the request. The Court denies Hall's requests to treat her Memorandum as a proper motion for reconsideration brought under IRCP 11(a)(2)(B). Additionally and alternatively, even if the Court treated Hall's Memorandum as a proper motion for reconsideration, the motion fails on its merits because summary judgment was proper.

IT IS SO ORDERED.

DATED February 27, 2012.

DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of February, 2012, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Allen Browning
BROWNING LAW
482 Constitution Way, Ste. 111
Idaho Falls, ID 83402

- [x] U.S. Mail
- [ ] Overnight Delivery
- [ ] Hand Deliver
- [ ] Fax: (208)542-2711
- [ ] Email:

Terrence S. Jones
Tracy L. Wright
CAREY PERKINS, LLP
P.O. Box 519
Boise, ID 83701

- [x] U.S. Mail
- [ ] Overnight Delivery
- [ ] Hand Deliver
- [ ] Fax: (208)345-8660
- [ ] Email:

Amy J. Beers
Deputy Clerk