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IN THE SUPREME COURT OF THE STATE OF IDAHO

HEATHER HALL,

Plaintiff-Appellant,

v.

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

Defendants-Respondents.

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT FOR BANNOCK COUNTY IN CASE NO. CV-11-1740. APPEAL FROM THE JUDGMENT RENDERED AGAINST THE PLAINTIFF IN THIS CASE. HONORABLE DAVID C. NYE, DISTRICT JUDGE

APPELLANT'S REPLY BRIEF

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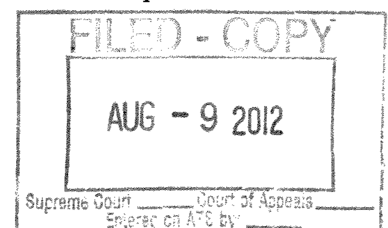

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Facts

There is no affidavit stating that the specific actions of the physician's assistant Jeffery Johnbson, as related by Appellant Heather Hall, were within any standard of care for taking a patient's pulse. Mr. Johnson, the physician's assistant, states in his affidavit, "I listened to her heartbeat with my stethoscope…." Affidavit of Jeffery Johnson, P.A., Clerk's Record, p. 21, para. 8. Heather Hall had a far more detailed version of what Mr. Johnson actually did when he was supposed to be taking her pulse, and there is no affidavit stating that her factual description of what happened to her in a Pocatello emergency room in 2009 was within any acceptable standard of care for taking a pulse in a Pocatello emergency room in 2009.

As Respondent does not want this case to be about the medical knowledge required to take a patient's pulse, and does not wish to address the sworn allegations of Heather Hall, counsel went outside the record of this case and re-characterized what it was that Jeffery Johnson was doing when he encountered Heather Hall:

> "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 patent's bra and place the stethoscope on the patient's chest in order to listen to her internal organs."

Respondent's Brief, p. 9. This explanation should be stricken, as it has no basis in the record whatsoever. It is mere argument of counsel unsupported by any fact in the record.

Appellant's Claims Are Governed by Idaho's Medical Malpractice Act

(Respondent's Brief, pp. 9-12)

Appellant is not urging that her claims are not governed by the Medical Malpractice Act. As stated by Appellant in her opening brief, she has complied with the requirements of that act, as demonstrated by the Affidavit of Dr. David Bowman.

The District Court Abused its Discretion When it Concluded Dr. Bowman's Affidavit Failed to Comply with the Admissibility Requirements of IRCP 56(e) and I.C. Section 6-1013

(Respondent's Brief, pp. 12-22)

Appellant addressed this in her opening brief, showing how Dr. Bowman's affidavit met the requirements of showing that Dr. Bowman was familiar with the standard of care for Pocatello emergency rooms in 2009, and showing how he was familiar.

Counsel was asked who the Pocatello doctor with emergency room privileges was who gave David Bowman the standard of care for an emergency room in Pocatello in 2009, and stated in court the doctor was Dr. David Wise of Pocatello. Tr., p. 17, l. 6, to p. 19, l. 1. It is not true that Dr. Wise was not disclosed to defense counsel. As Dr. Bowman was a physician qualified to practice in 2009 in emergency rooms down the road in Idaho Falls, it was not difficult for him to learn the standard of care for taking a pulse in an emergency room in Pocatello in 2009.

The fact that is missed by the defense, and frankly by Judge Nye at the urging of the defense, is that the defense raises potential cross examination questions for Dr. Bowman and speculates, that, had the defense taken his deposition, the defense might have found a flaw in Dr. Bowman's credentials. The defense never did take Dr. Bowman's deposition, they never asked

to do so, but preferred to pursue a summary judgment motion against this victim by misconstruing Dr. Bowman's affidavit and supposing that had they deposed or cross examined Dr. Bowman, he might be mistaken in his statements concerning his qualifications.

The plaintiff is not hiding anything. No matter how much information was contained in an affidavit by Dr. Wise, and Plaintiff submits more than sufficient foundation was submitted to the court that Dr. Wise did familiarize himself with the standard of care for taking a pulse in a Pocatello emergency room in 2009, defense counsel will claim it is not sufficient.

Counsel for plaintiff submits to the court that Plaintiff has met her burden of producing testimony from an expert that defeats summary judgment.

How many times in an affidavit is a doctor required to state the specific time period is 2009, and the specific place is Pocatello, Idaho? In every sentence? Does each sentence of an affidavit have to state the affiant is talking about Pocatello, Idaho? Does each sentence of an affidavit have to state the affiant is talking about 2009? That is what the defense is urging, and the point is absurd. The fair reading of the affidavit of Dr. Bowman is that he is talking about a standard of care in Pocatello in an emergency room in 2009.

Again, this case is not about brain surgery. It is about taking a pulse. And we have a medical doctor licensed in Idaho discussing whether facts contained in Heather Hall's affidavit describing a physician's assistant's actions when he is supposed to be taking a pulse. To the extent Respondent's brief addresses cases concerning medical specializations, those cases are irrelevant. There is no authority in common sense or in facts or even opinions cited in this case that any degree of specialization is required to properly obtain a pulse.

Further, as to Respondent's arguments in pages 20-21 of his brief, there is nothing in the record indicating there is any different standard applied when a physician's assistant takes a

pulse compared to when the physician himself takes a pulse. At page 21 of Respondent's brief, he states "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." There is no unfair standard urged by Appellant in this case. This case is about whether or not the PA groped Heather Hall. He either did or did not.

A Statewide Standard Holds Physician Assistants Shall Not Abuse or Exploit Patients in Their Care.

(Respondent's Brief, pp. 22-30)

Since there is a state statute prohibiting abusing or exploiting patients, I.C. Section 54-1814, and that statute explicitly applies to physicians as well as physician assistants, that statute expressly sets forth a statewide standard applicable to every physician and every physician assistant in Idaho, whether the person practices in Boise, Pocatello or Glens Ferry. This is not a matter of whether an MRI is warranted in a small community which can't afford the same equipment as Boise; it is a statewide standard that the physician's assistant shall not abuse or exploit a patient. Not in any Idaho city. This standard has nothing to do with whether one community can afford state-of-the-art equipment while the neighboring community cannot.

This standard is about using your position as a doctor or P.A. to abuse or exploit a patient in your care. It is not allowed at all in Idaho.

There is nothing wrong and everything right about holding a physician assistant to this standard in an Idaho medical malpractice suit. There is no authority in Idaho holding this cannot be done.

> Where an expert demonstrates that a local standard of care has been replaced by a statewide or national standard of care, and further demonstrates that he or she is familiar with the statewide or national standard, the foundational requirements of I.C. Section 6-1013 have been met.

Suhadolnik v. Pressman, 151 Idaho 110, 116, 254 P.3d 11, 17 (2011).

At page 23, counsel says Respondent addressed the conduct at issue. That is not true. This is a summary judgment motion. The conduct to be addressed is the conduct described by the Plaintiff, not the conduct described by the Defendant. No affidavit supplied by the defense addresses the propriety of the conduct described by Heather Hall.

At pages 23-24, Respondent confuses the requirements for an affidavit of a fact witness with that required of an expert. Dr. Bowman signed his affidavit prior to Heather Hall signing hers, so Dr. Bowman was rendering an opinion on based on the allegations of Heather Hall in her complaint; these allegations were repeated in her affidavit filed with the court. There is nothing improper about that.

Respondent's comments regarding Dr. Bowman not pointing out an irregularity in the medical records are likewise irrelevant. (Respondent's Brief, p.25). When a physician's assistant gropes a patient is it expected that the PA will have documented his sexual misconduct in the medical records? There is no requirement that a doctor giving the standard of care point to documentation of sexual misconduct in the record before a case may proceed beyond a motion for summary judgment.

Defendant cited several cases in this section of the brief which are inapplicable to the issues of this case.

Strode v. Lenzi, 116 Idaho 214 (1989), cited by the Respondent, is inapplicable. Strode holds that being a board-certified orthopedic surgeon in Chicago, in itself, does not allow that

physician to testify as to the standard of care of a board-certified orthopedic surgeon in Boise, Idaho. There was no statewide standard of care cited, and no specific rule, as opposed to this case.

Dekker v. Magic Valley Regional Medical Center, 115 Idaho 332 (1988), cited by Respondent, did not involve any evidence of a statewide standard of care, as in this case.

Kunz v. Miciak, 118 Idaho 130 (Ct. App. 1990), merely rejected the idea there is a national standard of care for board-certified specialists. There was no statewide standard of care based upon conduct which violated a specific rule in place in Idaho, as in this case.

Dulaney v. St. Alphonsus Regional Medical Center, 137 Idaho 160, 164 (2002), cited by Appellant in Appellant's opening brief, sets forth a standard for what is required in an affidavit of an expert in a medical malpractice case. Appellant's affidavit complied with the requirements set forth in Dulaney, as discussed in Appellant's opening brief. It does not address an Idaho doctor testifying as to a statewide standard of care regarding conduct as set forth in this case.

Foster v. Traul, 141 Idaho 890 (2005), cited by Defendant in his brief was a hybrid medical malpractice/informed consent case. The case may have been cited by Respondent by mistake, as Appellant can see no relevance to an Idaho doctor testifying as to a statewide standard of care regarding conduct as set forth in this case.

Ramos v. Dixon, 144 Idaho 32 (2007), cited by Defendant in his brief at p. 26, is a case in which the plaintiff was not claiming a uniform statewide standard of care as to any matter, and counsel for appellant in that case admitted such in his oral argument. Ramos concerned whether Idaho Falls and Blackfoot can be considered part of the same medical community.

McDaniel v. Inland Northwest Renal Care, 144 Idaho 219 (2007), cited by Respondent in his brief at page 26, held that an out-of-state expert was not able to testify that End Stage Renal

Disease treatment was subject to a nationwide standard of care. This was not an Idaho physician addressing an Idaho standard of care based upon an Idaho statute.

Haw v. Idaho St. Bd. Of Med, 140 Idaho 152, 158 (2004), cited by Respondent in his brief at page 27, was not a medical malpractice case at all. It was an appeal from an administrative decision by the Idaho State Board of Medicine sanctioning a doctor's license.

Schmechel v. Dille, 148 Idaho 176, 183 (2009), cited by Respondent in his brief at page 27, concerned whether a delegation of services agreement, a contract between a physician and a physician assistant, could be used to establish a standard of care in a medical malpractice case. The Court stated it could not. A delegation of services agreement is not for the protection of patients, it is merely an agreement setting forth what services a PA will carry out for the doctor who employs him. That is in stark contrast to I.C. Section 54-1814, which is designed to protect all patients in Idaho from physicians and physician assistants who abuse or exploit them in the course of providing care.

McDaniel v. Inland Northwest Renal Care Group-Idaho, 144 Idaho 219 (2007), cited by Respondent in his brief at p. 29, is another case concerning an out-of-state physician testifying there is a national standard of care for treating a complex disease, End-Stage Renal Disease (ESRD). *McDaniel* expressly states that an out-of-state expert may testify concerning appropriate regulations setting forth a national standard of care in medical malpractice cases. In *McDaniel*, though, the specific regulation cited was a Social Security regulation more concerned with organization of a facility and prerequisites for Social Security reimbursement.

> The McDaniels argue that the regulations found in 42 C.F.R. § 405 Subpart U create a minimum national standard of care with respect to services provided by ESRD dialysis facilities. They further argue the district court's finding, that Dr. Wish's testimony regarding the national standard of care was inadmissible, is inconsistent with this Court's holding in *Hayward v. Jack's Pharmacy Inc., 141*

> Idaho 622, 115 P.3d 713 (2005). **In Hayward, this Court found that an out-of-state medical expert could testify as to the standard of care applicable to the prescription of pharmaceuticals in nursing homes because certain relevant federal regulations created a national standard of care governing pharmaceutical use in nursing homes.** *Id.* at 628, 115 P.3d at 719. However, unlike the plaintiffs in Hayward, who were able to cite to a specific federal regulation that dealt with the administration of pharmaceuticals in the nursing home setting, the McDaniels have failed to cite to any federal regulation that even generally deals with the actual physical administration of ESRD dialysis services.[2]
>
> **There is a marked difference between regulations that govern the physical administration of health care services to patients and those that govern other aspects of a health care provider's practice, such as organizational, personnel, and utilization requirements**. *Hayward* does not stand for the proposition that a national standard of care is automatically implicated simply because the federal government has created some general regulatory scheme for a given area of medicine. Where the promulgated regulations do not concern the administration of health care services, the principles delineated by this Court in *Hayward* are inapplicable. In such circumstances, 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."

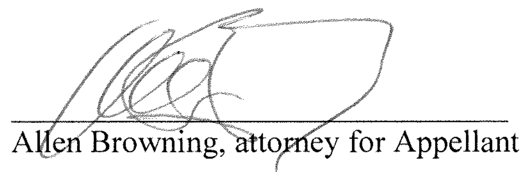
Id. at 223.

McDaniel supports Appellant's position in this case: I.C. Section 54-1814 addresses not administrative duties or organizational duties (which were also addressed by the delegation of services agreement in *Schmechel v. Dille*, *supra*.); it addresses the physical administration of health care services to patients: it prohibits exploitation and abuse of patients by P.A.s who are treating them. That is the standard in Idaho and it applies statewide to physicians and physician assistants alike.

The Award of Attorney Fees is Not Appropriate In This Case

This appeal was not pursued frivolously. Appellants request an award of costs.

Dated this 8th day of August, 2012.



Allen Browning, attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2012, a true and correct copy of the foregoing was delivered to the following attorney of record by placing same for overnight deliver via Federal Express.

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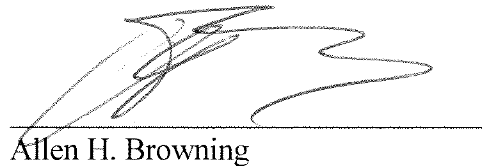

Allen H. Browning