10-5-2015

Ballard v. Kerr Respondent's Brief Dckt. 42611

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES BALLARD, Plaintiff/Respondent, vs. BRIAN CALDER KERR, M.D., SILK TOUCH LASER, LLP, an Idaho limited liability partnership; and SILK TOUCH LASER, LLP, an Idaho limited liability partnership, dba SILK TOUCH MED SPA and/or SILK TOUCH MED SPA AND LASER CENTER, and/or SILK TOUCH MED SPA, LASER AND LIPO OF BOISE, Defendants/Appellants.	)	Supreme Court No. 42611 Ada County District Court Case No. CVOC 1204792

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DEBORAH A. BAIL
District Judge

Jeremiah A. Quane
Terrence S. Jones
Quane Jones McColl PLLC
P.O. Box 1576
Boise, ID 83701

Attorneys for Appellants

P. Gregory Haddad
Bailey & Glasser LLP
2855 Cranberry Square
Morgantown, WV 26508

Attorneys for Respondent

Scott McKay
Robyn Fyffe
Nevin, Benjamin, McKay & Bartlett LLP
P.O. Box 2772
Boise, ID 87301

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

Rules

II. STATEMENT OF THE CASE

A. Nature of the Case

Defendants-Appellants Brian Calder Kerr, M.D., and Silk Touch Laser, LLP, dba Silk Touch Med Spa, and/or Silk Touch Med Spa and Laser Center, and/or Silk Touch Med Spa, Laser and Lipo of Boise (hereinafter "Silk Touch" collectively) appeal from judgments entered in favor of Plaintiff-Respondent SSgt Charles Ballard (hereinafter "Charles") following a jury trial in a medical malpractice/wrongful death lawsuit. The initial trial ended in a mistrial after Silk Touch violated the district court's *limine* order. An Ada County jury found at a second trial that Silk Touch were negligent, reckless and caused the death of Charles' wife, SSgt Krystal Ballard (hereinafter "Krystal"). The district court entered judgment in the amount of $3,790,436 on the jury's verdict and entered a supplemental judgment in the amount of $143,696 on its award of costs.

B. Factual Summary and General Course of Proceedings

On July 26, 2010, twenty-seven year old Krystal died from an infection caused by bacteria that Dr. Kerr injected into her right buttocks during a cosmetic surgical procedure on July 21, 2010. Tr.[1] p. 552, ln. 10 - p. 553, ln. 3; p. 556, ln. 2 - p. 562, ln. 11; p. 594, ln. 17 - p. 595, ln. 7; R. 2661-62; Exh. 9 & 17. The bacteria that caused Krystal's death came from contaminated reusable medical equipment which Silk Touch failed to properly clean, disinfect and sterilize. Tr. p. 371, ln. 24 - 372, ln. 3; p. 372, ln. 17 - p. 376, ln. 19; p. 552, ln. 24 - p. 553, ln. 3.

---

[1] Three transcripts are included in the appellate record: the transcript of the 2014 jury trial and two subsequent proceedings is referred to herein as "Tr.," while the remaining two transcripts are referred to by the respective dates of the proceedings: "Tr. (11-5-2013)" and "Tr. (11-14-2013)."

At the time of her death, Krystal was an otherwise healthy Staff Sergeant in the United States Air Force. Exh. 5, p. 1-3; Tr. p. 403, ln. 2-9; p. 412, ln. 6-19; R. 2661-62. Charles and Krystal resided in Mountain Home where they were stationed. Tr. p. 1065, ln. 2 - p. 1066, ln. 22. Krystal earned numerous medals and accommodations during her military service including Airman of the Year in 2009. Exh. 32-34, 37, 39-42; Tr. p. 926, ln. 19 - p. 927, ln. 18. According to her Air Force supervisor, Krystal exemplified the top military standards and was one of the best airmen he had supervised in over two decades of military service. Tr. p. 901, ln. 3 - p. 927, ln. 18.

Dr. Kerr, an anesthesiologist who at the time of Krystal's procedure practiced and held himself out to be a cosmetic surgeon, performed the surgery. Tr. p. 772, ln. 19 - p. 773, ln. 15; p. 824, ln. 14-17. Dr. Kerr formed the cosmetic medical business, Silk Touch, with his wife Susan Kerr, a former elementary school teacher with no medical background. *Id.* at p. 773, ln. - p. 774, ln. 6; p. 1224, ln. 12 - p. 1225, ln. 15. As an anesthesiologist, Dr. Kerr completed neither a surgical residency nor surgical training and he initially performed limited cosmetic procedures working concurrently as an anesthesiologist and at Silk Touch. *Id.* at p. 773, ln. 2-15. Dr. Kerr expanded his practice to include surgical liposuction after attending a three day course in 2007. *Id.* at p. 774, ln. 2-11. In 2008, Dr. Kerr left his anesthetic practice and began practicing cosmetic medicine and surgery full time as owner and medical director at Silk Touch. *Id.* at p. 772, ln. 23 - p. 773, ln. 15.

Krystal first visited Silk Touch on July 13, 2010 where she met with employee Donna Berg who took Krystal's medical history and discussed the planned procedures. Tr. p. 1318, ln. 8 - p. 1319, ln. 22; Exh. 5. According to Dr. Kerr, Ms. Berg had different titles at Silk Touch and he

referred to her at different times as a "clinical advocate for the patient," "patient educator," "patient consultant" and "patient care coordinator." *Id.* at p. 1318, ln. 20-25; p. 2077, ln. 2-7; p. 2209, ln. 18 p. 2210, ln. 9. Prior to Silk Touch, Ms. Berg worked in sales, primarily in real estate, and had neither medical training nor health care experience. *Id.* at p. 2210, ln. 10 - p. 17.

Dr. Kerr examined Krystal on July 13, 2010 and determined she was an "excellent candidate" for the liposuction and fat transfer he performed on July 21, 2010. Tr. p. 1340, 1-20; Exh. 5. Surgical equipment used in this procedure includes disposable items[2] and "reusable medical equipment," which must be cleaned, disinfected and sterilized. Tr. p. 343, ln. 1-24; p. 12-19; p. 354, ln. 6-10. Dr. Kerr used different reusable medical equipment during Krystal's surgery, including a handpiece affixed with hollow tubes called cannulas. *Id.* at p. 1968, ln. 1 - p. 1969, ln. 24. Dr. Kerr harvested fat to inject into Krystal's buttocks by suctioning it from her flanks through a cannula and handpiece. *Id.* at p. 791, ln. 19 - p. 792, ln. 24; p. 1970, ln. 4-21; p. 1972, ln. 5-24. It was then deposited into a reusable canister for storage until injected. *Id.* at p. 1972, ln. 5 - p. 1973, ln. 17; 1984, ln. 4-12.

Dr. Kerr acknowledged that:

- reusable medical equipment is referred to as "critical" because it contacts material such as blood or lymphatic tissue and can transfer bacteria;
- the standard of health care practice applicable to him at the time of Krystal's surgery required that he use sterile, reusable medical equipment;
- failing to adhere to the applicable standard for cleaning, disinfecting and sterilizing reusable medical equipment could cause infection leading to sepsis and death;

---

[2] On appeal Silk Touch discuss only the pre-packaged sterile equipment they used in Krystal's surgery. App. Brief, pp. 3-4. They omit mention of the reusable, surgical equipment despite the fact that Silk Touch's practices for sterilizing such equipment was the focus at trial. Silk Touch also fail to discuss their sterilizing practices concerning such equipment - such as they were.

- his responsibility to minimize Krystal's risk of infection required him to appropriately clean, disinfect and sterilize the reusable medical equipment he used.

Tr. p. 783, ln. 17-24; p. 785, ln. 12 - p. 786, ln. 19; p. 789, ln. 2-14; 2246, ln. 25 - p. 2248, ln. 4.

Nevertheless, Silk Touch's cleaning, sterilization and disinfecting practices were wholly lacking. Dr. Kerr's daughter Briana, who had just turned twenty, served as the surgical assistant for Krystal's surgery and, at the time, father and daughter were the only two sterilizing Silk Touch's reusable medical equipment. Tr. p. 843, ln. 6-14; p. 1447, ln. 3 - p. 1448, ln. 8. Briana began working for her father at age nineteen and had neither medical certification nor medical training other than on the job training, primarily from her father. *Id.* at p. 1448, ln. 12 - p. 1450, ln. 24. Silk Touch had no written policies and procedures concerning the cleaning, disinfecting and sterilizing of reusable medical equipment. *Id.* at p. 792, ln. 25 - p. 793, ln. 5. At the time of Krystal's surgery, the sum of Briana's knowledge of sterile technique came from Dr. Kerr. *Id.* at p. 1450, ln. 23 - p. 1451, ln. 2.

Dr. Kerr could not recall reading the owner's manual for the machine used during Krystal's procedure and did not follow the recommendation that he soak the handpiece and cannulas in an enzymatic cleaner to remove material such as fat, blood and other body fluids from the reusable equipment. Exh. 48; Tr. p. 796, ln. 13-17; p. 800, ln. 1-18; p.1646, l. 5 - p. 1647, ln. 20; p. 1650, ln. 14-19. Instead of an an enzymatic cleaner, Silk Touch used a mixture of Hibiclens and water which is inadequate to sterilize reusable medical equipment.[3] *Id.* at p. 358, ln. 17-24; p. 362, ln. 8-15; p.

[3] Dr. Kerr claimed for the first time at trial that Silk Touch used a detergent with an enzymatic cleaner on the reusable medical equipment at issue. This new testimony was not credible and contradicted Dr. Kerr's sworn testimony both at deposition as the corporate representative of Silk Touch as well as in his verified answer to Charles' interrogatory. Tr. p. 365, ln. 9 - p. 366, ln.

359, ln. 7-23 p. 365, ln. 9 - p. 366, ln. 9. While Silk Touch used an autoclave – a machine using high pressure steam in the sterilization process – they neither performed routine maintenance or service checks, kept inspection logs nor used biological indicators. *Id.* at p. 370, ln. 18 - p. 371, ln. 23; p. 827, ln. 5-10; p. 1423, ln. 6; p. 2243, ln. 22 - p. 2244, ln. 2; p. 2286, ln. 12 - p. 2287, ln. 22. Dr. Kerr could not recall reviewing the autoclave manual. *Id.* at p. 820, ln. 2 - p. 821, ln. 10.

Dr. Dean Sorensen, a physician practicing cosmetic medicine and cosmetic surgery in Ada County for decades and in particular in July 2010, testified that Dr. Kerr's practices described above fell below the applicable standard of care. *See generally* Tr. p. 339, ln. 13 - p. 376, ln. 19. Further, the two cosmetic physicians testifying on Silk Touch's behalf testified that they employ the cleaning, disinfecting and sterilizing practices not employed by Silk Touch. *Id.* at p. 1609, ln. 23 - p. 1610, ln. 2; p. 1611, ln. 15-25; p. 1834, ln. 20 - p. 1835, ln. 17; 1842, ln. 20 - 1846, ln. 4. Drs. Geoffrey Stiller (Moscow) and John Lundeby (Spokane) testified, however, that they spoke by with a Dr. Kelly O'Neil in California whom they had neither met nor heard of and who purportedly described a lesser standard of practice for the Boise area.[4] *Id.* at p. 1523, ln. 13 - p. 1526, ln. 6; p. 1619, ln. 2 - p. 1620, ln. 16; p. 1786, ln. 2-24, p. 1790, ln. 8-23; *compare* p. 1835, ln. 4-17 and p. 1842, ln. 14 - p. 1847, ln. 13 to p. 1789, ln. 2-5, p. 1863 ln. 18 - p. 1863, ln. 22, p. 1638, ln, 6 - 21.

9; p. 358, ln. 17-24; p. 362, ln. 8-15. Further, Silk Touch's own standard of care expert testified that failing to use an enzymatic cleaner would breach the standard of care. *Id.* at p. 1614, ln. 10 - 14.

[4] Dr. O'Neil supposedly practiced in Boise during the time period at issue but never testified at trial. The district court precluded SSgt Ballard, in a *limine* ruling prior to the first trial, from offering any evidence of Dr. O'Neil's extensive history of professional misconduct and discipline in California and Idaho. *See* R 1258-65, 1299-1473.

After her surgery on July 21, 2010, Krystal began experiencing pain in her buttocks and her health rapidly declined. Krystal called Silk Touch and the Kerrs on several occasions following her surgical procedure. During a call on July 23, 2010 to Ms. Kerr, Krystal complained that the pain in her buttocks was nine on a scale to ten. Tr. p. 1213, ln. 12 - p. 1214, ln. 14; p. 1627, ln. 3 - 1633, ln. 12. Krystal visited Silk Touch that day and Dr. Kerr released her with an anti-inflammatory steroid and prophylactic antibiotic following his examination.[5] Exh. 5. Dr. Kerr did not see evidence of infection or that Krystal was not taking care of her wounds, including the injection site to her buttocks. Tr. p. 2263, ln. 5-20. The following evening on July 24, 2010, Krystal called Dr. Kerr to complain of continued pain in her buttocks. *Id.* at p. 1630, ln. 11-23. In the early morning hours of July 25, 2010, Krystal began experiencing trouble breathing and she and Charles called the paramedics who then transported her to Elmore Medical Center. Exh. 9; Tr. p. 1157, ln. 12 - p. 1158, ln. 23. Krystal was airlifted to Saint Alphonsus Hospital in Boise where she died shortly after midnight of July 26, 2010 - a little over four days after her surgery at Silk Touch. Exh. 7-9.

An autopsy revealed gram negative bacteria in the subcutaneous tissue in Krystal's right buttock at the surgical site where Dr. Kerr had injected fat in a horizontal fashion. Tr. p. 878, ln. 19 - p. 879, ln. 25; p. 552, ln. 18 - p. 553, ln. 3; Exh. 9. A tissue slide of this injection site in the right buttocks prepared in connection with this autopsy revealed:

evidence of a bacterial process that's associated with an inflammatory reaction in the

---

[5] Dr. Kerr charted in connection with the visit that "Krystal's major complaint is discomfort to buttocks." Exh. 5 (7/23/10 post-operative note). He testified that he had no idea whether this prophylactic antibiotic would have been effective against the gram negative bacteria that was discovered in her right buttock following her death. Tr. p. 2257, ln. 2 - p. 2258, ln. 3.

> subcutaneous tissues. It is horizontally placed parallel to the surface of the skin. It's composed of the types of white blood cells that show the infectious process has been ongoing for two to three days. And it does not show a direct path from the skin deep. It, rather, has been introduced parallel to the skin and deep to the skin into the fat.

Tr. p. 559, ln. 1-10.

The bacteria found at this injection site was gram negative bacteria and pathogenic – meaning it had initiated an inflammatory response in Krystal's body. Tr. p. 560, ln. 6 - 561, ln. 25. This bacteria did not enter from the surface of the skin but rather had been injected through an inoculation deep to the skin at a horizontal fashion – exactly as Dr. Kerr had injected it during the fat transfer. *Id.* at p. 560, ln. 6 - p. 562, 11; p. 1982, ln. 9-11. There was no bacteria or infection anywhere else in Krystal. *Id.* at p. 565, ln. 20 - 566, ln. 21. As succinctly stated by the district court:

> One of the most critical pieces of evidence was a slide made by the pathologist who performed Krystal's autopsy which showed the deadly infection inside a fat transfer injection site, with no tracing of bacteria from the surface of the skin to the infection point. If the infection had come from the surface, there would have been signs from the surface of infection. There was none. Krystal had nothing else medically wrong with her except the deadly bacteria injected during the procedure.

R. 2661-62.

The deadly bacteria Dr. Kerr injected into Krystal's right buttocks caused a toxic reaction and Krystal went into shock – her blood pressure declined and ultimately all her systems progressively failed leading to her death from sepsis. Tr. p. 566, ln. 22 - p. 568, ln. 14; p. 595, ln. n-8, p. 880, n.15-24; Exh. 8-9. Fat that Dr. Kerr injected in Krystal's right buttocks was contaminated with microscopic bacteria from non sterile reusable medical equipment used during Krystal's surgery. Tr. p. 340, ln. 4-17; p. 342, ln. 4-20; p. 376, ln. 11-19; p. 382, ln. 2 - p. 383, ln. 23; p. 595, ln. 1-8.

Charles initiated the instant lawsuit for medical malpractice and wrongful death against Silk

Touch on March 16, 2012. R. 13-20. The initial trial began on November 5, 2013. On November 14, 2013, during the presentation of Silk Touch's case, the district court declared a mistrial after Silk Touch violated a pre-trial *limine* ruling. Tr. (11-14-13) p. 108, ln. 24 - p. 110, ln. 24. As noted by the district court in its written "Order Re: Costs and Fees," the mistrial was triggered by Silk Touch:

> when their witness blatantly disregarded the Court's *in limine* order barring purported evidence of a lack of prior infections. The 'evidence' of a lack of prior infections came from a review performed by Dr. Kerr's wife, who had no medical training or background, of undisclosed records of Silk Touch. The records were never disclosed by the defense to the plaintiffs in spite of express requests and represented an inadmissible 'summary' which did not meet any of the requirements of IRE 1006.

R. 2661-62.

The district court spent "considerable time" addressing the issues associated with this "evidence." The district court noted Silk Touch had earlier violated another *limine* order pertaining to life insurance in questioning of Charles concerning insurance deductions on Krystal's Air Force paycheck but that violation "did not present the serious concerns caused by the grave misconduct" when the defense witness testified regarding a purported lack of other infections in violation of the *limine* order. *Id.* at 2662, 2666. A second trial scheduled to begin on April 8, 2014, was vacated after Silk Touch filed an "emergency" motion on March 28, 2014, requesting a reset of the impending trial date because Dr. Kerr was injured in a bicycle accident on March 19, 2014. R 2297-2301.

Ultimately, the retrial commenced on September 16, 2014 and concluded on October 2, 2014, when the jury returned a special verdict finding that Dr. Kerr and Silk Touch breached the applicable standard of health care in the treatment of Krystal and that this breach proximately caused Krystal's death. R. 2508-09. The jury further found that Silk Touch's actions were reckless and awarded

economic damages of $2,540,436 and non-economic damages in the amount of $1,250,000. *Id.* The district court entered judgment in the amount of $3,790,436 on October 14, 2014. R. 2510-11.

The district court thereafter considered the issue of costs and fees, including sanctions arising from the mistrial in November 2013. In a detailed written order, the district court explained it delayed ruling on the sanctions: (1) to fully assess the matter with the benefit of a compete record and "to assess, in colder light, what sanctions, beyond costs incurred, should be reasonably assessed"; (2) to craft sanctions in a manner which avoids unfairness to either side; and (3) "to preclude further delay in the retrial by defense interlocutory motions." R. 2664.

The district court characterized Silk Touch's misconduct in causing the mistrial as the kind which "discredits the entire system of justice" and their overall conduct as "so outrageous that this Court ha[d] simply not seen such a pattern of conduct in over three decades of trying complex cases." R. 2663-64. As discussed herein, the misconduct causing the mistrial was not isolated but permeated the first trial, continued during the second trial and even extended as far back as the very first hearing conducted in the case.[6] In fact, during the second trial, lead counsel for Silk Touch – Jeremiah Quane – called Charles' counsel a "goddamn liar" in the jury's presence. Tr. p. 1865, ln. 23 - p. 1868, ln. 6. Mr. Quane's only defense was that he did not intend the jury to hear the insult. *Id.* at p. 1866, ln. 22 - p. 1867, ln. 28. The district court admonished that Mr. Quane had been "very loud," "unprofessional," "uncivil" and "distasteful" and warned that if he "did it again," he would have to confer with co-counsel from another room during trial. Tr. 1868, ln. 24 - p. 1869, ln. 21.

---

[6] The district court assessed monetary sanctions against defense counsel at this hearing for their discovery abuse. *See* R. 202-203.

The district court ultimately determined that "in the cold light of further review, sanctions remain warranted." R. 2664. The district court entered a supplemental judgment in the amount of $143,696.21 on February 12, 2015 to reflect the district court's award of costs and fees including: (A) costs of right under I.R.C.P. 54(d)(1); (B) certain discretionary costs under I.R.C.P. 54(d)(1)(D) largely related to the first trial; and (C) certain attorney fees associated with the first trial under I.R.C.P. 47(u) and the declaration of a mistrial. R. 2661 -2674.

Silk Touch filed notices of appeal from the above judgments. R. 2512-18, 2684-87.

III. ISSUES PRESENTED ON APPEAL

Silk Touch identify the issues on appeal as:

A. Err of the Court ordering a mistrial and awarding expenses and attorney fees against the Defendants as a result of the mistrial.
B. The evidence of the Plaintiff on the proximate cause of the death of Krystal Ballard is insufficient as a matter of law to support the verdict of the jury, including the insufficiency of the testimony of Drs. Sorensen, Nichols and Groben.
C. Failure of the Court to instruct on elements of I.C. 6-1012 and 6-1013, refusal to give defense Instructions 11, 12 and 17 and err in giving Instruction 13 of the Court.
D. The testimony of Plaintiff's expert Dr. Sorensen did not establish the required standard of care to establish the liability of the Defendants and the Court erred in failing to give Defendants Instruction 13.
E. Err of the Court in ruling that Plaintiff's expert Dr. Sorensen did not have to familiarize himself with the community standard of practice.
F. Err of the Court in giving Instruction 5 as worded.
G. Err of the Court in failing to give an Instruction defining the standard of care that was stated in the Court's Instructions 8 and 9.
H. Err of the Court in giving Instruction 10.
I. Err of the Court to disallow the Defense to cross-examine Dr. Sorensen about his website and refusal to admit Defense Exhibits MM and NN.
J. Err of the Court in ruling who establishes the standard of health care practice.
K. Err of the Court refusing to admit Defense Exhibit H in evidence.
L. Err of the Court by refusing to admit evidence regarding the lack of infections of other patients and to admit Defense Exhibit AA.

M. Err of the Court in failing to give Defendants Instruction 28 and special verdict.
N. The Court erred by making improper comments on the evidence and by improperly questioning witnesses which unfairly prejudiced the Defense.
O. The Court erred in refusing to allow the Defense to challenge the foundation of Dr. Sorensen's causation opinions.
P. The Court erred in allowing Dr. Sorensen to render opinions as to alleged differences between Dr. Kerr's deposition and his discovery responses.
Q. Err of the Court by not allowing Dr. Stiller to rebut the opinions of Dr. Sorensen.
R. The jury verdict must be reversed as the cumulative effect of the errors by the Court precluded the Defendants from getting a fair trial.
S. The Court erred giving Instruction 18 and Question 3 of the Special Verdict.
T. The Court erroneously solicited over 90 juror questions and failed to ensure adequate safeguards to prevent unfair prejudice to the Defense.
U. The Court erred in allowing Plaintiff to utilize Dr. Kerr's answers to interrogatories which had not been disclosed pursuant to Rule 33(b)(2), I.R.C.P.

Charles rephrases the issues on appeal as:

A. Should this Court affirm the award of discretionary costs and attorney fees because Silk Touch fail to establish the district court abused its discretion in awarding costs and in finding the *limine* order violation deprived Charles of a fair trial and constituted deliberate misconduct?

B. Must the judgment entered on the jury's verdict be affirmed because there was sufficient evidence to support the jury's finding that Silk Touch was negligent, reckless and proximately caused Krystal's death? (Appellants' Issues B, D, E)[7]

C. Must the judgment be affirmed because Silk Touch fail to demonstrate error in the instructions to the jury or that any error requires reversal? (Appellants' Issues C, D, F, G, H, M, S)

D. Must the judgment be affirmed because Silk Touch fail to establish an abuse of discretion

---

[7]The Appellants' Brief lists twenty-one issues, many of which encompass more than one assignment of error while others involve the same legal issue as other issues. Thus, Charles lists the corresponding Appellants' issue(s) to the extent it may not be apparent from the issues' rephrasing.

in the district court's evidentiary rulings or that any error affected their substantial rights? (Appellants' Issues I, J, K, L, O, P, Q)

E. Must the judgment be affirmed because Silk Touch fail to establish a violation of any right to a fair trial or that alleged improper questioning by the district court effected the jury's verdict? (Appellants' Issue N)

F. Must the judgment be affirmed because Silk Touch fail to establish a violation of I.R.C.P. 33(b)(2) occurred in the use of Dr. Kerr's interrogatory answer at trial or that any purported violation constitutes a basis for reversal? (Appellants' Issue U)

G. Must the judgment be affirmed because Silk Touch fail to demonstrate an abuse of discretion in the district court's decision to allow the jurors to submit witness questions as permitted by the I.R.C.P. 47(q)? (Appellants' Issue T)

H. Must the judgment be affirmed because Silk Touch fail to demonstrate error by the district court and the doctrine of cumulative error is inapplicable? (Appellants' Issue R)

I. Should this Court award fees and costs under I.C. § 12-121 because Silk Touch's appeal is frivolous, unreasonable and without foundation?

IV. ARGUMENT

Silk Touch support their appeal with false and misleading summaries of the record. They disregard the standards of review and ask this Court to second guess the jury, re-weigh the evidence and find that the district court abused its discretion. In many instances, Silk Touch fail to support their arguments with authority and complain of purported errors despite making no objection in the district court. They fail to cogently argue or identify assignments of error. This appeal is a

continuation of Silk Touch's conduct in the district court, where they repeatedly disregarded court orders, presented baseless arguments and caused a mistrial. This Court should affirm the judgments and award Charles attorney fees and costs in defending this frivolous appeal.

A. The District Court Did Not Abuse its Discretion in Awarding Discretionary Costs and Awarding Fees for Silk Touch's Violation of the *Limine* Order

Following repeated violations of various pre-trial rulings and the district court's warnings that it would impose sanctions for further violations, Silk Touch's expert witness directly violated a pre-trial ruling prohibiting evidence of Silk Touch's alleged lack of prior infections. The district court declared a mistrial after finding that the violation deprived Charles of a fair trial. The district court further found that Silk Touch's misconduct was deliberate and ordered costs and fees associated with the mistrial pursuant to I.R.C.P. 47(u) and 54(d)(1)(D).

The court may declare a mistrial *sua sponte* or on the motion of any party if it "determines an occurrence at trial has prevented a fair trial." I.R.C.P. 47(u). Further, if the court determines that a party or attorney's deliberate misconduct caused the mistrial, the court may require that party or attorney to pay reasonable expenses including attorney fees incurred by the misconduct. I.R.C.P. 47(u); *Van Brunt v. Stoddard*, 136 Idaho 681, 686, 39 P.3d 621, 626 (2001).

The district court has discretion to award the prevailing party costs, that are either not enumerated in, or in an amount in excess of, costs allowed as a matter of right "upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." I.R.C.P. 54(d)(1)(D). The party opposing an award under Rule 54(d)(1)(D) bears the burden to demonstrate the district court abused its discretion and,

absent an abuse of discretion, this Court will uphold the district court's award. *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 186, 983 P.2d 834, 840 (1999); *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996).

This Court applies the following three factors to determine whether there has been an abuse of discretion: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *McKim v. Horner*, 143 Idaho 568, 571, 149 P.3d 843, 846 (2006); *City of McCall v. Seubert*, 142 Idaho 580, 586, 130 P.3d 1118, 1124 (2006).

Silk Touch here challenge the district court's finding that their violation of the *limine* order deprived Charles of a fair trial and constituted deliberate misconduct. Silk Touch fail to establish an abuse of discretion and this Court should affirm the award of discretionary costs and attorney fees.

1. The district court did not abuse its discretion in determining Silk Touch's violation of the *limine* order prevented Charles from receiving a fair trial

The district court's detailed written order explains that "[t]he defense triggered a mistrial the first time this case went to trial on the first day of the defense case, after eight days of testimony, when their witness blatantly disregarded the Court's *in limine* order barring purported evidence of a lack of prior infections." R. 2662. The district court noted that the parties had spent considerable time discussing the evidence's admissibility on the first day of trial and that it had been excluded on various grounds, including failure to disclose the underlying data and lack of foundation. *Id.*

On appeal, Silk Touch claim: "Incredibly, the district court did not even review the testimony

of the witness before granting the mistrial." App. Brief, p. 11. The record reflects the opposite. After Silk Touch violated the *limine* order, the district court excused the jury for the noon recess. Tr. (11-14-2013) p. 106, ln. 6-15. Before returning the jury to the courtroom following this recess, the district court advised that it had "reviewed extensively all of the orders and arguments *in limine* [from] the first day of the trial. And I *specifically reviewed the testimony relating to the absence of other infections*." *Id.* at p. 108, ln. 24 - p. 109, ln. 3. (emphasis added). Silk Touch's contention the district court did not review Dr. Stiller's testimony before declaring the mistrial is false.[8]

The district court determined that Charles was prejudiced when Silk Touch implied it had no history of infections because there was "no credible evidence that there was a prior lack of infection because no medically trained person ever reviewed the purported records." R. 2663. Also, the "underlying data was never disclosed. It is not clear which results from which procedures were reviewed." *Id.* Charles "was seriously prejudiced" by Silk Touch's implication to the jury "that there was any legitimate, credible evidence of a lack of prior infections for the same procedure." *Id.*

The district court made these findings after almost two weeks of trial. This Court evaluates whether the event which precipitated the mistrial motion represented reversible error in the context of the full record. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). With respect to the first trial, the appellate record only includes transcripts of the *limine* hearing on the first day of trial

---

[8]Although Silk Touch did not object to the grant of a mistrial, they later claimed that Dr. Stiller's testimony did not violate the *limine* order in proceedings involving sanctions, notwithstanding Dr. Stiller's apology to the Court in the wake of Charles' objection [Tr. (11-14-2013) p. 104, ln. 18] and defense counsel's statement that "to the extent it came out, I'll take responsibility for it; he's my witness" [*Id.* at 105, ln. 15-17]. *See* R. 2053-55. Silk Touch do not appear to renew this position in this appeal.

and Dr. Stiller's testimony followed by the mistrial declaration nine days later. Thus, this Court cannot review the prejudicial effect of Dr. Stiller's testimony in the context of the entire record.

As appellants, Silk Touch bear the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision. *See Gibson v. Ada Cnty.*, 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003). When a party appealing an issue presents an incomplete record, this Court presumes that the absent portion supports the findings of the district court. *Gibson*, 138 Idaho at 790, 69 P.3d at 1051; *Orthman v. Idaho Power*, 134 Idaho 598, 603, 7 P.3d 207, 212 (2000). This Court will not presume error from a silent record or from the lack of a record. *Gibson*, 138 Idaho at 790, 69 P.3d at 1051; *Brooks v. Brooks*, 119 Idaho 275, 280, 805 P.2d 481, 486 (Ct. App. 1990).

Accordingly, this Court must presume the trial proceedings prior to Dr. Stiller's testimony support the district court's decision. Silk Touch fail to establish error in the district court's finding that Dr. Stiller's testimony, which implied Silk Touch had no history of infections and thus did not cause Krystal to die from an infection, deprived Charles of a fair trial. Silk Touch did not object to the mistrial at trial nor do they now establish error in the district court's decision to declare a mistrial.

2. The district court did not abuse its discretion in determining Silk Touch engaged in deliberate misconduct

Silk Touch argue the district court erred in finding that they engaged in deliberate misconduct and, thus, that the award of fees and costs should not have been awarded under I.C.R.P. 47(u). Initially, the district court awarded costs associated with the first trial under I.R.C.P. 54(d)(l)(D) in addition to under Rule 47(u). R. 2665-67. Specifically, the district court awarded trial costs and expert fees for the first trial, less the costs awarded as a matter of right to the prevailing party, in the amount

of $48,121.51. R. 2666. The district court also exercised its discretion to award Charles' fees and costs for travel from his military duty station in Florida to attend the first trial, including lodging and meals, in the amount of $4,324.54 and for transcripts of the prior trial, in the amount of $1,664.75. *Id.* With each of these costs, the district court found that they were reasonable, necessary and exceptional and that justice required that they be borne by Silk Touch. *Id.* at 2666-67.

Discretionary costs under Rule 54(d)(1)(D) can include travel expenses along with other expenses and additional expert fees. *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 187, 983 P.2d 834, 841 (1999). Silk Touch offer no argument as to how the district court abused its discretion in concluding the costs and expert fees associated with the first trial could be awarded as necessary and exceptional costs under I.R.C.P. 54(d)(l)(D). Silk Touch has thus waived whether the district court erred in awarding these costs for failing to support the issue with argument and authority. *See Martin v. Smith*, 154 Idaho 161, 164, 296 P.3d 367, 370 (2013) (when issues on appeal are not supported by positions of law, authority, or argument, they will not be considered).

Nor did the district court abuse its discretion in finding that Silk Touch engaged in intentional misconduct. The first morning of the scheduled trial, the parties spent considerable time discussing Silk Touch's proffered evidence regarding an alleged lack of other infections. R. 2662. Despite the explicit *in limine* ruling, Dr. Stiller directly violated the order by responding to Silk Touch's question regarding the reason he opined that contaminated instruments did not cause Krystal's death: "Let alone the fact of that no pertinent or persistent infections in the office. There is no history of the fact that . . ." Tr. (11-14-2013) p. 105, ln. 5 - p. 106, ln. 8. Silk Touch made no attempt to interrupt or redirect their own witness and, instead, Charles was compelled to object at which point the district

court excused the jury. *Id.* at p. 106, ln. 9-12. The district court found:

> While the defense, Mr. Quane, engaged in questionable conduct during the trial in violating a different *in limine* order, this violation was such grave misconduct that the Court granted a mistrial and indicated that sanctions would be awarded to, as much as possible, alleviate the harm caused by the misconduct.

2663. The district court noted that it had intended to address the prior violation of an *in limine* order "by way of a cautionary instruction but to imply, without any solid basis, that there was absence of prior infections was a level of deliberate misconduct which necessitated a mistrial." R. 2668. Silk Touch has not provided a transcript of the entire first trial and this Court thus presumes that the absent portions support these findings. *See Gibson*, 138 Idaho at 790, 69 P.3d at 1051 (this Court presumes that absent portion of record supports the findings of the district court).

The district court also considered that:

> Mr. Quane is an extremely experienced counsel. He was well aware of the length of time spent addressing the motion *in limine*, its critical importance and the reasons for the court's ruling. He has handled expert witnesses for decades. He should have been well aware of the risk presented when an expert who has not testified in any previous trial has based previous opinions on evidence that has been declared inadmissible and that was fundamentally flawed. The triggering of the mistrial was grave misconduct which gave the defense a significant and unfair advantage. It is the kind of misconduct which discredits the entire system of justice. The foundational rule of the Idaho Rules of Civil Procedure is that the purpose of all of the rules is "to secure the just, speedy and inexpensive determination of every action and proceeding." I.R.C.P. 1(a). The defense misconduct violated every aspect of the Rule.

R. 2263-64.

In this appeal, Silk Touch claim the district court abused its discretion in finding deliberate misconduct because they presented Dr. Stiller's affidavit in which he claims he was instructed to not discuss other infections. App. Brief, p. 10, n.3. It falls within the province of the district court to

weigh conflicting evidence and the district court's finding of deliberate misconduct enjoys substantial support in the record. *See Beckstead v. Price*, 146 Idaho 57, 61, 190 P.3d 876, 880 (2008) (falls within district court's province to weigh conflicting evidence and this Court will not overturn findings of fact based on substantial and competent evidence even in the face of conflicting evidence).

It is worth noting that some twenty-eight years ago, this Court's own comments concerning Mr. Quane's misconduct bear a striking resemblance to those of the district court in this case: "Mr. Quane's intentional, inflammatory, and unfair tactic to violate the statute and confuse and unfairly prejudice the jury should not be tolerated." *Robertson v. Richards*, 115 Idaho 628, 643, 769 P.2d 505, 520 (1987). Consistent with this history, Silk Touch's misconduct in causing the mistrial was not an isolated incident and extended as far back as the first hearing conducted in the case. *See e.g.* R. p. 202 (order granting Charles' motion to compel discovery and awarding fees); R. 1742-1750 (Charles' response to Silk Touch's misrepresentation regarding mediation); R. 1811-1814,[9] 1820 (repeatedly stating the testimony sought to be elicited within the hearing of the jury when objections were sustained by the Court, despite prior ruling against speaking objections and admonishment during first trial); R. 1817 (Mr. Quane rotating his chair to turn his back on the district court as it explained the necessity for the mistrial); R. 1821; Tr. (11-14-2013) p. 107, ln. 21 - 108, ln. 1 (discussing prior violation of *in limine* order and district court's warning that another violation would result in sanctions); R. 2662 (district court finding that prior to the violation triggering the mistrial, defense

[9]Charles supported his motion for sanctions with a declaration of counsel swearing the description of events during the first trial set forth in the memorandum was accurate and consistent with his memory. R. 1812; Memorandum at R. 1815-1834.

had violated another order *in limine* barring reference to insurance when Mr. Quane engaged in extensive questioning of life insurance deductions on Krystal's paycheck); Tr. p. 319, ln. 2 - p. 320, ln. 17 (during second trial, district court's admonishment that further reference to inadmissible evidence, which Silk Touch referred to in opening, would result in sanctions); Tr. p. 464, ln. 22 - p. 470, ln. 14 (during second trial, attempting to elicit testimony barred by *in limine* ruling despite the fact the issue had been covered "pretty extensively"); R. 2409-2411 (order regarding defense's use of unauthorized transcript during second trial); Tr. p. 1866, ln. 2 - p. 1869, ln. 21 (Mr. Quane loudly referring to Charles' attorney as "a god damn liar" in presence of the jury and Mr. Quane indicating he only intended for his co-counsel to hear the comment). The record establishes that defense counsel's repeated disregard for the district court's pretrial rulings and persistent efforts to undermine the fairness of these proceedings ultimately caused a mistrial at great cost and prejudice to Charles.

Here, the district court delayed ruling on sanctions because "the kind of conduct engaged in by the defense in this case was so outrageous that this Court has simply not seen such a pattern of conduct in over three decades of trying complex cases." R. 2664. The district court thus determined that "a colder, more measured analysis would be prudent" yet "in the cold light of further review, sanctions remain warranted." R. 2664. In deciding to award the specific fees, the district court noted Silk Touch had a complete preview of Charles' entire case and "the defense can bill hourly and can recover its expenses regardless of outcome – not so the plaintiff, Krystal's husband, SSgt Ballard, had to come to Boise, obtain leave and stay here for two separate trials – a situation which should never have occurred." R. 2664.

The district court perceived its decision as discretionary, acted within the confines of

applicable legal principles and reached its decision through an exercise of reason. Silk Touch fail to establish an abuse of discretion in determining that its intentional misconduct deprived Charles of a fair trial and the award of fees and costs set forth in the supplemental judgment should be affirmed.[10]

B. Sufficient Evidence Was Presented For The Jury To Reasonably Conclude That Silk Touch's Negligent and Reckless Conduct Was the Proximate Cause of Krystal's Death

In a suit alleging medical malpractice, the plaintiff must prove that the defendant breached a duty and that this breach proximately caused the plaintiff's injuries. *Sheridan v. St. Luke's Reg'l Med. Ctr.*, 135 Idaho 775, 783, 25 P.3d 88, 96 (2001). Idaho Code §§ 6-1012 and 6-1013 require the applicable standard of care, and the failure to meet such standard be established "by direct expert testimony." On the other hand, the plaintiff can establish proximate cause through a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. *Sheridan*, 135 Idaho at 783, 25 P.3d at 96.

In this appeal, Silk Touch claim that Charles presented insufficient evidence to establish that Dr. Sorensen was familiar with the applicable standard of care, that Silk Touch failed to comply with that standard, and that their breach of the standard caused Krystal's death. However, issues of fact are questions for the jury, and the jury's verdict on such matters will not, in most instances, be disturbed on appeal. *McKim v. Horner*, 143 Idaho 568, 572, 149 P.3d 843, 847 (2006); *Garrett Freightlines, Inc. v. Bannock Paving Co., Inc.*, 112 Idaho 722, 726, 735 P.2d 1033, 1037 (1987). This Court construes the evidence adduced at trial in a light most favorable to the party who prevailed at trial.

---

[10]Awarding costs and fees under I.R.C.P. 37(e) (sanctions for failure to comply with an order) also would have been appropriate as Charles argued in the district court. R. 1825.

Hurtado v. Land O'Lakes, Inc., 153 Idaho 13, 19, 278 P.3d 415, 421 (2012); *Garrett Freightlines, Inc.*, 112 Idaho at 726, 735 P.2d at 1037. This Court will only disturb a jury verdict on appeal if it concludes the verdict is unsupported by substantial competent evidence or against the clear weight of the evidence, and that reasonable minds could not differ concerning the issues of negligence or causation. *Garrett Freightlines, Inc.*, 112 Idaho at 726, 735 P.2d at 1037. Conflicts in the evidence and conflicts in the conclusions to be reached from the evidence remain questions for the trier of facts. *Phillips v. Erhart*, 151 Idaho 100, 103, 254 P.3d 1, 4 (2011).

Despite these well-established standards, Silk Touch support their arguments by focusing on isolated evidence with no discussion of the evidence supporting the verdict. This Court should decline their invitation to re-weigh the evidence and affirm the judgment entered on the jury's verdict.

1. Dr. Sorensen established familiarity with the applicable standard of care

A plaintiff in a medical malpractice case must affirmatively prove the defendant negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided by direct expert testimony. I.C. § 6-1012. The applicable community standard is as it existed at the time and place of the alleged negligence, with respect to the class of health care provider which the defendant "belonged to and in which capacity he, she or it was functioning." *Id.* Such individual health care providers must be judged by comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and any fields of medical specialization. *Id.*

An expert testifying as to the standard of care in medical malpractice actions must establish the manner in which he became familiar with the standard for the particular health care professional

in the relevant community and at the relevant time. *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002); *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000). The obligation to demonstrate actual knowledge of the local standard of care is not an overly burdensome requirement. *Mattox v. Life Care Centers of Am., Inc.*, 157 Idaho 468, 474, 337 P.3d 627, 633 (2014); *Frank v. E. Shoshone Hosp.*, 114 Idaho 480, 482, 757 P.2d 1199, 1201 (1988). This Court "has recognized that 'governmental regulation, development of regional and national provider organizations, and greater access to the flow of medical information,' have provided 'various avenues by which a plaintiff may proceed to establish a standard of care....'" *Mattox*, 157 Idaho at 474, 337 P.3d at 633, *citing Suhadolnik v. Pressman*, 151 Idaho 110, 121, 254 P.3d 11, 22 (2011).

Here, Dr. Sorensen explained he became familiar with the standard of care for cleaning, disinfecting and sterilizing reusable medical equipment used for surgeries conducted in physician's offices during his role over the past eight years inspecting physicians' offices throughout Ada County, who elected to voluntarily undergo certification. Tr. p. 332, ln. 4 - p. 333, ln. 23; 334, ln. 1-5. p. 513, ln. 14-22. Additionally, over his twenty-five years practicing as a cosmetic surgeon in Ada County, Dr. Sorensen personally performed cosmetic surgery and worked alongside physicians from a number of specialities. *Id.* at 322, ln. 8 - p. 323, ln. 8; p.326, ln. 20 - 327, ln. 15; 331, ln. 23 - p. 332, ln. 3; p. 327, ln. 4-10. Dr. Sorensen personally observed his partner, Dr. Craig Bass, perform numerous fat transfers, including during 2010, and followed Dr. Bass' patients following the procedure. Tr. p. 344, ln. 1-16, p. 345, ln. 19-22. When working with other surgeons, Dr. Sorensen observed the sterilization procedures for cleaning, disinfecting and sterilizing reusable equipment. *Id.* at p. 334, ln. 6-12.

Silk Touch nonetheless claim on appeal that Dr. Sorensen did not establish he had "actual

knowledge" of "the care typically provided under similar circumstances" to "enable him to compare Dr. Kerr with similarly trained and qualified providers of the same class in the community, taking into account his training, experience and field of medical specialization required by I.C. 6-1012." App. Brief, p. 36. Silk Touch claim Dr. Sorensen's opinions were directed at what "should be done and the requirements imposed by others, like the [U.S. Center for Disease Control ("CDC")], Idaho Department of Health and Welfare and manufacturer of the equipment used by Dr. Kerr." *Id.* Silk Touch misrepresent the record and specifically, Dr. Sorensen's testimony.

Dr. Sorensen did not testify that a facility's certification that relied on standards set by the CDC, for example, was required but, rather, was voluntary and generally most Ada County physicians performing surgery in their offices chose to do this even though *not* required "because it's a safe thing to do." Tr. p. 513, ln. 14-22. Dr. Sorensen concluded that there is no difference in the standard of care with respect to accredited versus nonaccredited facilities in terms of the process for cleaning, disinfecting, and sterilizing their equipment. *Id.* at p. 335, ln. 18 - p. 336, ln. 21. Dr. Sorensen also opined that a physician or Med Spa, regardless of their certification status, should follow the guidelines published by their equipment's manufacturer and the Idaho Department of Health and Welfare, which are similar to the CDC Guidelines For Disinfection and Sterilization in Health Care Facilities. *Id.* at p. 340, ln. 18 - p. 341, ln. 3, ln. 10-22.

Standards of care are not "firmly rooted in past medical practices" and, instead, "are sensitive to evolving changes in the way health care services are delivered in the various communities of our

State." *Mattox*, 157 Idaho at 474, 337 P.3d at 633. While unexcused violations of pertinent rules[11] may not appropriately define the standard of care in a medical malpractice suit, they may still be relevant to whether providers were negligent. *Schmechel v. Dille*, 148 Idaho 176, 186, 219 P.3d 1192, 1202 (2009). Dr. Sorensen's detailed testimony regarding governmental standards, certification processes, inspection of facilities, and personal experience practicing as a cosmetic surgeon and practicing alongside physicians of a variety of specialties were recognized methods to establish he was sufficiently familiar with the relevant standard of care.

Silk Touch suggest that Dr. Sorensen's testimony was not sufficient "as a matter of law" because Dr. Sorensen was trained in plastic surgery whereas Dr. Kerr was an anesthesiologist practicing cosmetic surgery and Dr. Sorensen failed to establish knowledge that "Dr. Kerr failed to use reasonable care and diligence in the exercise of his skill and application of his learning." App. Brief p. 34-38 (emphasis in original). To the contrary, Dr. Sorensen familiarized himself with Silk Touch's practices by reviewing the depositions and discovery response of Dr. Kerr and the depositions of Dr. Kerr's wife and other Silk Touch employees as well as the pertinent medical

---

[11] Silk Touch also suggest that pursuant to I.C. § 6-1014, Dr. Sorensen's opinions on the standard of care have no legal efficacy or validity, do not establish a standard of care and cannot be relied upon to support the decision of the jury. App. Brief, p. 38-39. Section 6-1014 has no bearing on this case. The statute provides: "no criteria, guideline, standard or other metric established or imposed by the patient protection and affordable care act . . .or pursuant to any other law or regulation of the *United States* or any entity or agency thereof *and* used for the purpose of determining reimbursement or a rate of reimbursement for the care provided, or established or imposed by another state or by a third party payor, shall be used as a basis for establishing an applicable community standard of care." I.C. § 6-1014 (emphasis added). Dr. Sorensen discussed one federal entity, the CDC, whose guidelines are substantially similar to those of the Idaho Department of Health and Welfare and are for public safety, not reimbursement. Tr. p. 346, ln. 4-11.

records. Tr. p. 339, ln. 12 - p. 208-340-1233, ln. 14.

Moreover, it is unnecessary for an expert witness to be of the same specialty as the defendant so long as the expert establishes he possesses actual knowledge of the applicable standard of care. *Mattox*, 157 Idaho at 474, 337 P.3d at 633; *Newberry v. Martens*, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005). Dr. Sorensen inspected the sterilizing procedures in multiple physicians' medical facilities during the past eight years. Tr. p. 332, ln. 20 - p. 334, ln. 5. Dr. Sorensen performed various types of cosmetic surgeries during his career, including liposuction. *Id.* at p.326, ln. 20 - 327, ln. 15; 331, ln. 23 - p. 332, ln. 3. When working with other surgeons, Dr. Sorensen observed the sterilization procedures for cleaning, disinfecting and sterilizing reusable equipment. *Id.* at p. 334, ln. 6-12.

This evidence was more than sufficient for Dr. Sorensen to possess actual knowledge of the applicable standard of care for cleaning, disinfecting and sterilizing reusable equipment that applied to physicians, like Dr. Kerr, who performed cosmetic surgery in their offices. *See Newberry*, 142 Idaho at 292, 127 P.3d at 195 (holding that an ophthalmologist demonstrated actual knowledge of the applicable standard of care for family practice physicians by practicing alongside family practice physicians, by providing and obtaining referrals, and by discussing patient care with them, though the ophthalmologist never explicitly asked about the standard of care); *Grover v. Smith*, 137 Idaho 247, 253, 46 P.3d 1105, 1111 (2002) (holding that an out-of-area dentist demonstrated actual knowledge of the applicable standard of care by demonstrating familiarity with state licensing requirements governing the practice of dentistry).

The evidence at trial established Dr. Sorensen was intimately familiar with the standard of practice for cleaning, disinfecting and sterilizing reusable medical equipment that applied to

physicians performing surgery in their offices, including those performing cosmetic surgery, in Ada County. Silk Touch's contention that Dr. Sorensen's testimony was legally insufficient to establish the applicable standard of health care is entirely without merit.

2. Sufficient evidence was presented that Silk Touch failed to adhere to the community standard of care

Idaho Code § 6-1012 required Charles to prove that Silk Touch "negligently failed to meet the applicable standard of health care practice" of the relevant community "by a preponderance of all the competent evidence." A "preponderance of the evidence" is "evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth." *Harris v. Elec. Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004). Ample evidence was presented from which the jury could reasonably conclude Silk Touch negligently failed to meet the community standard of practice in cleaning, disinfecting and sterilizing reusable equipment.

Dr. Sorensen testified extensively regarding Silk Touch's failure to meet the applicable standard of care for cleaning, disinfecting and sterilizing the reusable medical equipment used on Krystal. *See generally* Tr. p. 339, ln. 13 - p. 376, ln. 19. Dr. Kerr knew that the applicable standard of care and his duty to minimize Krystal's risk of infection required that he use sterile, reusable medical equipment and that failing to do so could lead to an infection causing sepsis and death. *Id.* at p. 783, ln. 17-24; p. 785, ln. 12 - p. 786, ln. 1; p. 789, ln. 2-14; p. 2246, ln. 25 - p. 2248, ln. 4. Dr. Lundeby, a cosmetic surgeon retained by Silk Touch, similarly confirmed the standard of care applicable to Dr. Kerr in July 2010 required the delivery of sterile instruments to the place of the procedure. Tr. 1799, ln. 19-22.

Dr. Sorensen's testimony established that Silk Touch nevertheless breached the standard of care because they, among other matters:

- failed to use an enzymatic cleaner in the sterilization process;[12]
- failed to verify the autoclave's lethality with biological indicators;
- mixed clean and dirty areas;
- used a mixture of Hibiclens and water to clean, sterilize and disinfect reusable medical equipment which is inappropriate;
- neither performed routine maintenance or service checks on the autoclave nor kept inspection logs for the autoclave;
- had no written policies and procedures for cleaning, disinfecting and sterilizing reusable medical equipment;
- did not follow the sterilization recommendations discussed in the owner's manual for the reusable medical equipment associated with the machine used on Krystal.

Tr. p. 359, ln. 7 - p. 363, ln. 24; p. 365, ln. 17 - p. 368, ln. 19; p. 370, ln. 18 - p. 374, ln. 1; p. 792, ln. 25 - p. 793, ln. 5; p. 800, ln. 1-18; p. 820, ln. 2 - p. 821, ln. 10; p. 2243, ln. 22 - p. 2244, ln. 2.

Charles presented ample evidence for the jury to reasonably conclude Silk Touch breached the relevant standard of care for sterilizing reusable equipment.

3. Charles presented sufficient evidence that Silk Touch's failure to adhere to the community standard of care proximately caused Krystal's death

A plaintiff establishes proximate cause in a medical malpractice case by demonstrating that the provider's negligence was both the actual and proximate cause of his or her injury. *Coombs v.*

---

[12] Defense expert Dr. Stiller confirmed the standard of care requires use of an enzymatic cleaner. Tr. p. 1614, ln. 10 - 14.

Curnow, 148 Idaho 129, 139, 219 P.3d 453, 463 (2009). Actual cause is a factual question focusing on antecedent factors producing a particular consequence whereas proximate cause exists when it is reasonably foreseeable that such harm would flow from the negligent conduct. *Id.* at 139-40, 219 P.3d at 463-64. Proximate cause in medical malpractice cases may be proven by showing a "chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable." *Id.* at 140, 219 P.3d at 464. "The question of proximate cause is one of fact and almost always for the jury." *Cramer v. Slater*, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009).

In this appeal, Silk Touch isolate portions of the testimony of Drs. Sorensen and Nichols and then claim this testimony, considered individually, is conclusory and does not directly establish the bacteria's presence on the instruments used in Krystal's surgery or that Dr. Kerr injected that bacteria into her right buttock. Silk Touch thus claim Charles presented insufficient evidence to support the jury's conclusion that Silk Touch's breach of the community standards of care proximately caused Krystal's death Their argument is contrary to the weight of evidence and meritless.

a. Dr. Sorensen's and Dr. Nichols' opinions that Silk Touch caused Krystal's death have considerable factual support

Silk Touch claim that Dr. Sorensen's and Dr. Nichols' opinions that Dr. Kerr introduced the gram negative bacteria into Krystal's right buttock during the fat transfer were "net opinions" and too conclusory to assist the jury. App. Brief, p. 16-18, 23. Silk Touch, however, do not cite to a place in the record where they moved to exclude the experts' opinions. *See id.* Further, while Silk Touch cite to an isolated foundational objection to Dr. Sorensen's causation opinion, they ask this Court to reverse the verdict because they allege there was no chain of circumstances upon which the jury could

reasonably infer that fat, which Dr. Kerr injected into Krystal's right buttock, had been contaminated with gram negative bacteria after coming into contact with improperly sterilized reusable medical equipment. *See id.* p. 19-20, 25-26. Thus, the question in this appeal is not whether the doctors' opinions were admissible under I.R.E. 702 but, rather, whether the evidence Charles presented at trial is sufficient to allow a reasonable jury to conclude that Silk Touch's failure to adhere to the community standard proximately caused Krystal's death.[13]

Once an expert's opinion is admitted, it is up to the trier of fact to weigh the opinion against any conflicting testimony and the jury's weighing of conflicting, admitted opinions will not be second-guessed on appeal. *Coombs*, 148 Idaho at 137, 219 P.3d at 461; *City of McCall v. Seubert*, 142 Idaho 580-86, 585, 130 P.3d 1118, 1123-24 (2006). Instead of addressing the totality of the evidence heard by the jury, Silk Touch argue the evidence of causation was insufficient by isolating portions of testimony to support their contention that the opinions of Dr. Sorensen and Dr. Nichols are "net" and based on assumption. For instance, Silk Touch contend that Dr. Sorensen's answer to the following question on cross-examination "confirms" there is no factual evidence to support his conclusion that Dr. Kerr injected bacteria into Krystal's buttocks: "Isn't it true that there's no proof by any means of the fact that at the time of surgery these gram negative bacteria went into her body. Isn't that true?" App. Brief, p. 18. Dr. Sorensen's affirmative response to this broad and semi-

[13]In objecting to Dr. Sorensen's opinion, Silk Touch did not specify how the foundation was allegedly insufficient. *See* Tr. p. 342, ln. 15. Thus, even if Silk Touch had raised the issue on appeal, their objection was insufficiently specific to allow this Court's review. *See Hansen v. Roberts*, 154 Idaho 469, 473, 299 P.3d 781, 785 (2013) (an objection that no proper foundation has been laid not sufficiently specific when it fails to specify how the foundation for the opinion was insufficient).

intelligible question does not render his opinions, which were supported by extensive testimony discussed elsewhere in this brief, conclusory. *See also* App. Brief, p. 16-17; p. 492, ln. 9-24 (citing Dr. Sorensen agreeing with defense counsel that he assumes Silk Touch injected the bacteria into Krystal's right buttock and then claiming this isolated response establishes there "was no factual evidence that Krystal's death was the proximate result of or caused by" Silk Touch's failure to meet the standard of care); App. Brief p. 21-22, n.6 (claiming Dr. Groben's testimony that he was unaware how bacteria entered Krystal's buttocks "negated and voided" Dr. Nichols' thorough explanation of his opinion, which is misleading because Dr. Groben testified that the deadly bacteria was found exactly where Dr. Kerr injected the fat); App. Brief p. 22-23 (isolating Dr. Nichols' testimony that the only plausible way for gram negative bacteria to find itself deep into the buttock was the inoculation during the fat transfer and claiming the "balance of Dr. Nichols' testimony does not establish a factual basis for his conclusory causation opinion" without discussing content of that testimony or Dr. Groben's similar conclusion); App. Brief p. 23 (citing Dr. Nichols' comment prior to discussing the significance of blood cultures – "there is nothing apparent about how the bacteria was introduced into the buttocks" – out of context to claim that his opinion was conclusory).

Silk Touch neither address nor acknowledge the facts relevant in this appeal – those that support the verdict and must be viewed in Charles' favor. Silk Touch's argument that Drs. Sorensen's and Nichols' opinions are conclusory is misleading and contrary to the record.

b. Dr. Sorensen provided compelling evidence that Dr. Kerr used contaminated reusable equipment during Krystal's procedure

According to Silk Touch, Dr. Sorensen's testimony describing their violations of the standard

of care lacked "factual testimony or opinions expressed by Dr. Sorensen which establish that the violations [sic] failed to effectively clean, disinfect and sterilize the surgical equipment used by Dr. Kerr in this case." App. Brief, p. 16. Silk Touch thus claim "there was no testimony or proof by Dr. Sorensen that bacteria was on the equipment used by Dr. Kerr which he alleges was not properly cleaned, disinfected and sterilized." App. Brief, p. 16. However, direct evidence is not required to establish proximate cause and the medical malpractice plaintiff need only show a chain of circumstances that allows the jury to reasonably and naturally infer the ultimate fact. *Coombs*, 148 Idaho at 140, 219 P.3d at 464; *see also Sheridan*, 135 Idaho at 785, 25 P.3d at 98.

Dr. Sorensen testified in detail regarding the grave risk of contaminated instruments presented by Silk Touch's failure to utilize critical steps in the process dictated by the applicable community standard of care for cleaning, disinfecting and sterilizing reusable medical equipment. This testimony established a compelling chain of circumstances allowing the jury to reasonably conclude the reusable instruments used in Krystal's procedure were not sterile and that fat harvested for the transfer became contaminated with the gram negative bacteria when it came into contact those instruments.

Specifically, Dr. Sorensen testified that disinfecting cannulas with an enzymatic cleaner – which Silk Touch failed to do – is critical because the enzymatic cleaner dissolves debris that feeds microorganisms sticking to the sides of the hollow tubes even after soaking and scrubbing with brushes. Tr. p. 352, ln. 1-13. Dr. Sorensen explained that an enzymatic cleaner is the "key thing" in cleaning liposuction cannulas because the solvent proteinaceous debris can insulate bacteria inside the cannula allowing it to survive notwithstanding processing through an autoclave. *Id.* at p. 351, ln. 3-13, p. 353, ln. 5-13. Even Dr. Kerr's own expert acknowledged that the standard of care required

use of an enzymatic cleaner. *Id.* at p. 1658, ln. 7 - p. 1659, ln. 9

Dr. Sorensen explained that verifying an autoclave's temperature is not enough because temperature alone can be insufficient to achieve complete sterilization. Tr. p. 370, ln. 15-22. Instead, the community standard of care requires physicians to use biological indicators (spore counts) which contain bacteria that is processed through the autoclave. *Id.* at p. 370, ln. 23 - p. 371, ln. 5. The survival of this bacteria reflects the autoclave is not functioning properly. *Id.* at p. 371, ln. 5-9. Biological indicators are the only process that directly monitors the autoclave's lethality and, because Dr. Kerr did not use them, he had no assurance his autoclave effectively killed all micro-organisms such as the deadly bacteria found in Krystal's right buttock. *See id.* at p. 370, ln. 15-22; p. 371, ln. 5-15. Dr. Sorensen also analogized Silk Touch's practice of mixing dirty and clean areas to cutting uncooked chicken on a counter and then making a sandwich on that counter. *Id.* at p. 376, ln. 5-10.

The nature of the fat transfer procedure established that Silk Touch's breach presented a grave risk of injecting contaminated fat into a patient. During liposuction, Dr. Kerr suctioned fat out of the body, through the hollow cannula and handpiece, through tubing and into a reusable cannister. Tr. p. 511, ln. 4-16; p. 791, ln. 19 - p. 792, ln. 24; p. 1970, ln. 4-21; p. 1972, ln. 5-24; p. 1972, ln. 5 - p. 1973, ln. 17; p. 1984, ln. 4-12. From that cannister, Dr. Kerr drew the fat into syringes and used a long needle to inject the fat into the buttocks "through the skin and then fanning in a horizontal fashion, if you will, between the layer of the skin and the muscle." Tr. p. 511, ln. 4-11; p. 1982, ln. 9-11. The autopsy report, which Dr. Sorensen reviewed, indicates the gram negative bacteria that killed Krystal was found deep within her buttock, where Dr. Kerr had injected fat only days earlier. Exh. 9.

The most probable conclusion the jury could reach is that as a result of Silk Touch's failure

to adhere to the community standard of care, the reusable equipment Dr. Kerr used in Krystal's procedure became contaminated with deadly gram negative bacteria. The contaminated portion of fat was then drawn into a syringe and injected horizontal to the skin and deep into Krystal's right buttock. Silk Touch contend that Dr. Sorensen "did not identify any factual evidence that the patient was ever contaminated by any act or omission by Defendants" as Dr. Sorensen does not "clean or sterilize his own equipment and just assumes other people have done it properly." This assertion misstates the evidence. Dr. Sorensen also testified that when working with other surgeons, he observed the sterilization procedures for cleaning, disinfecting and sterilizing reusable equipment. Tr. p. 334, ln. 6-12. Dr. Sorensen has also observed the sterilization procedures in many medical facilities and operating rooms in Ada County in his role inspecting medical facilities for accreditation, which he has done since approximately 2006. *Id.* at p. 332, ln. 4 - p. 333, ln. 23; 334, ln. 1-5. Dr. Sorensen has walked through the St. Luke's Hospital Surgery Center facility in addition to the main hospital, "step by step to see how they proceed with caring for their dirty instruments, clean through to the process of packaging and utilization" including in 2010. *Id.* at p. 336, ln. 22 - p. 337, ln. 16.

There is considerable factual support for Dr. Sorensen's opinion that Silk Touch's sterilization processes directly led to inappropriate sterilization, which resulted in an infection, sepsis and death. Silk Touch's argument that the evidence was insufficient is meritless.

c. Charles presented substantial proof that Dr. Kerr infected Krystal

As discussed above, Silk Touch appear to suggest Charles was required to prove proximate cause through direct expert evidence. However, "nothing in Idaho Code sections 6-1012 or 6-1013 requires that proximate cause be proved by expert testimony – those statutes only address the

applicable standard of care and breach of that standard." *Coombs*, 148 Idaho at 140, 219 P.3d at 464; *see also Sheridan*, 135 Idaho at 785, 25 P.3d at 98. Charles was only required to establish a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. *Sheridan*, 135 Idaho at 786, 25 P.3d at 99.

In addition to Dr. Sorensen's testimony outlined above, one of the most compelling pieces of evidence that Dr. Kerr injected contaminated fat was Slide B (admitted as Exhibit 21), which was a tissue slide from Krystal's right buttock created by the pathologist who performed Krystal's autopsy. *See* Tr. p. 553, ln. 4-20. Slide B illustrated an infectious process caused by gram negative bacteria that was horizontal and deep in the subcutaneous tissues of Krystal's right buttock that had been ongoing for two to three days. *Id.* at p. 555, ln. 25 - p. 556, ln. 4; p. 556, ln. 22 - p. 557, l. 3; p. 557, ln. 21-24; p. 559, ln. 1-15. Dr. Nichols explained that if the bacteria had entered Krystal's body from her skin following the surgery, the slide would have illustrated evidence of infection traveling in a vertical line from the skin's surface to deep in the fat, instead of the horizontal line deep within the fat and parallel to the skin as illustrated by Slide B. *Id.* at p. 559, ln. 5-10; p. 561, ln. 2 - p. 562, ln. 11; p. 694, ln. 1-7. Dr. Nichols thus concluded that the deadly bacteria had been injected deep into the skin in a horizontal fashion. *Id.* at p. 560, ln. 6-9.

In this appeal, Silk Touch grossly misstate the significance of Dr. Nichols' testimony arguing: "If Dr. Kerr contaminated the patient with bacteria as alleged, common sense dictates there should have been an identifiable infection tract from the outside going in where the fat was injected." App. Brief, p. 25; *see also id.* at p. 24, n. 9 (claiming that the "totality of Dr. Nichols' testimony supports the proposition that Dr. Kerr never injected any bacteria into the buttock because there is no testimony

by Dr. Nichols of an entry point on the buttock for the injection of fat in the first place by Dr. Kerr").

Rather than support Silk Touch's position, Dr. Nichols' testimony *directly refutes* their suggestion that bacteria entered "buttocks through incision sites of bacteria [sic] that came from the colon of Krystal." App. Brief, p. 25. As Dr. Nichols explained, bacteria cannot swim and, thus, are either injected into tissue or move from one place to another by replicating. Tr. p. 673, ln. 9 - p. 674, ln. 5. Dr. Nichols specifically testified that the slide would have illustrated evidence of infection traveling in a vertical line from the skin's surface to deep in the fat if the bacteria had entered Krystal's body from her skin following the surgery. *Id.* at p. 559, ln. 5-10; p. 560, ln. 6-9; p. 561, ln. 2 - p. 562, ln. 11; p. 694, ln. 1-7. Dr. Sorensen explained that he would not expect to see a visible entry point with the deep needle sticks to inject the fat. *Id.* at p. 398, ln. 9-22. Dr. Groben, who performed the autopsy, testified that the bacteria was located where the fat had been injected in Krystal's right buttocks. Tr. 878, ln. 3-8. That the bacteria was found deep within the fat and parallel to the skin's surface – right where Dr. Kerr injected fat – rules out Silk Touch's claim that bacteria somehow entered Krystal through a needle injection site following the surgery.

Silk Touch's discussion of the prepackaged instruments used in the procedure – scalpels, syringes and needles – and the absence of bacteria on Krystal's left buttock is similarly misleading. Charles never suggested that Dr. Kerr infected Krystal with pre-packaged equipment. Instead, Silk Touch breached the standard of care regarding cleaning, disinfecting and sterilizing the reusable equipment used in Krystal's procedure. Moreover, the location of the infection in a horizontal line deep within the fat and parallel to the skin illustrates that the fat suctioned through improperly sterilized reusable (critical) equipment was itself contaminated, not the pre-packaged equipment. Tr.

p. 559, ln. 5-10; p. 561, ln. 2 - p. 562, ln. 11; p. 694, ln. 1-7. The angle of infection matched the angle at which Dr. Kerr testified he injected the fat. *Id.* at p. 1982, 9-11.

Silk Touch further attempt to misdirect the Court by suggesting the bacteria's location in Krystal's right buttock and not her left supports their position. App. Brief p. 17 (no evidence to "explain or establish why bacteria were found only in the right buttock of Krystal at autopsy and not in any other operative site made by Dr. Kerr, even though the right buttock of Krystal was the last operative site made by Dr. Kerr"). Dr. Kerr did not indicate the fat used for the transfer was mixed or homogeneous and to the contrary testified that he does not "break apart the fat because we want that to be pristine as possible because we are going to transplant it." Tr (2014) p. 1380, ln. 13-16. Only that fat which contacted the microscopic bacteria was contaminated and the bacteria's location deep beneath and parallel to the skin surface – exactly where Dr. Kerr injected it – is evidence that contaminated reusable equipment infected part of the fat Dr. Kerr injected into Krystal's right buttock.

Silk Touch breached the standard of care for cleaning, disinfecting and sterilizing the reusable equipment used to harvest fat from Krystal's body to use in the fat transfer. As a result, fat which was injected deep into Krystal's right buttock was contaminated with deadly gram negative bacteria. Silk Touch's misleading arguments on appeal are without merit.

d. while not required, Charles presented substantial testimony ruling out other causes of Krystal's death

According to Silk Touch, Charles presented insufficient evidence to support the jury's verdict because Drs. Sorensen and Nichols did not sufficiently rule out alternate causes of Krystal's infection and they claim their causation opinions are based on a "mere temporal connection" between the

breach of the standards of care and Krystal's death. App. Brief, p. 17, 25. Initially, Charles was not required to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury. *Sheridan.*, 135 Idaho at 785-86, 25 P.3d at 98-99.

Nor was Dr. Sorensen's opinion based solely on the grave risk of contamination presented by the multiple breaches of the applicable standard of care. Dr. Sorensen reviewed Dr. Groben's report, which discussed findings that ruled out causes of death other than sepsis and which revealed the deadly gram negative bacteria at the surgical site in the right buttocks.

Similarly, Dr. Groben, who conducted the autopsy, concluded that neither fat embolism syndrome nor a urinary tract infection caused Krystal's death. Tr. 858, ln. 24 - 859, l. 6; 862, ln. 16-20. Dr. Nichols also testified extensively regarding his opinion that Krystal died from sepsis caused by the bacteria in her buttock as opposed to other causes, including the differential diagnosis of fat emboli that Dr. Groben ruled out. Tr. p. 574, ln. 14 - p. 575, ln. 6; p. 577, ln. 4 - p. 579, ln. 25; p. 583, ln. 1-12; p. 657, ln. 16-21; p. 687, ln. 8-11. Dr. Nichols concurred with Dr. Groben that the results of neither urinalysis supported the diagnosis of a bladder infection. *Id.* at p. 584, ln. 16 - p. 589, ln. 7; p. 589, ln. 13 - p. 590, ln. 12. p. 591, ln. 2-20. While Silk Touch initially suggested Krystal could have died from a urinary infection or fat embolism syndrome during trial, they apparently abandoned this theory as evidenced by their decision to forgo presenting their retained pathologist as a witness and to omit mention of these as potential causes in closing argument. *See e.g. id.* at p. 301, ln. 23 - p. 304, ln. 25 (opening); p.400, ln. 3 - p. 401, ln. 19 (cross of Sorensen regarding fat embolism syndrome); p. 462, ln. 5 - p. 464, ln. 5 (cross regarding urinary infection).

In addition to testimony setting forth a compelling chain of circumstantial evidence from

which the jury could reasonably conclude that Silk Touch caused Krystal's death, the jury heard substantial evidence ruling out other potential causes of her death. Silk Touch's claim that there was insufficient evidence to support the verdict is entirely without merit.

C. Silk Touch Fail to Demonstrate Error or Error Requiring Reversal in Jury Instructions

Silk Touch raise several challenges to the jury instructions given in this case, including arguing the district court erred in rejecting their medical malpractice instructions; erred in its instructions regarding circumstantial evidence, negligence and expert testimony; and erred in instructing the jury on the definition of recklessness. Again, Silk Touch's arguments are misleading, incorrect and contrary to both the record and the applicable standard of review.

On appeal, the review of jury instructions is generally limited to a determination of whether the instructions considered as a whole – and not individually – fairly and adequately present the issues and state the applicable law. *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 724, 291 P.3d 399, 407 (2012); *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 176, 45 P.3d 829, 832 (2002). This Court will not reverse based on an erroneous instruction so long as the instructions taken as a whole neither mislead nor prejudice a party. *Lakeland True Value Hardware, LLC,* 153 Idaho at 724, 291 P.3d at 407; *Robinson*, 137 Idaho at 176, 45 P.3d at 832. A requested jury instruction need not be given if it is either an erroneous statement of the law, adequately covered by other instructions, or not supported by the facts of the case. *Puckett v. Verska*, 144 Idaho 161, 167, 158 P.3d 937, 943 (2007); *Craig Johnson, LLC v. Floyd Town Architects, P.A.*, 142 Idaho 797, 800, 134 P.3d 648, 651 (2006).

The jury was fairly and adequately instructed and the district court did not err in declining Silk Touch's proposed instructions. Silk Touch fail to establish a basis to reverse the judgment.

1. The District Court correctly instructed the jury regarding medical malpractice

Silk Touch claim that the district court committed reversible error in declining to give their proposed instructions regarding the standards applicable in medical malpractice (Defense Proposed Instructions 11,12, 13 and 17) and in giving other instructions they claim were inconsistent with I.C. § 6-1012. App. Brief, p. 26-38. However, the district court instructed the jury regarding the elements of medical negligence and the community standard by utilizing the Idaho Jury Instructions (IDJI). The jury instructions, taken as a whole, fairly and adequately stated the law. Silk Touch fail to establish either error or prejudice.

a. the district court's instructions patterned after IDJI 2.10.1 and 2.10.3 adequately and correctly instructed the jury

Directly patterned after the IDJI instruction titled "charging elements of medical negligence," the district court's Instructions 8 and 9 informed the jury:

> On his claim of medical negligence against Dr. Brian Calder Kerr [and Silk Touch Laser, LLP] for failure to meet the standard of care, the plaintiff has the burden of proof on each of the following propositions:
>
> 1. That Dr. Kerr [and an agent of Silk Touch Laser, LLP,] failed to meet the applicable standard of care as defined in these instructions;
> 2. That the acts of Dr. Kerr [and the agent], which failed to meet the applicable standard of care, were a proximate cause of the death of Krystal Ballard;
> 3. That the plaintiff was injured by the death of Krystal Ballard; and
> 4. The elements of damage and the amount thereof.

R 2491-92 (compare with IDJI 2.10.3). Similarly, Instruction 11 was directly taken from the IDJI instruction defining the standard of care in medical malpractice cases:

> A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers who are trained and qualified in the same or a similar field of care who practice in the same community. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.
>
> Dr. Brian Kerr and the defendants are health care providers within the meaning of this instruction.

R 2494 (compare with IDJI 2.10.1). The district court also instructed the jury following a discussion on the scope of Dr. Kerr's testimony during the trial that:

> The standard of care is the applicable standard of health care practice of the community in which such care allegedly was or should have been provided as such standard existed at the time and place of the alleged negligence and of such physician, keeping in mind that individual providers in health care are judged in comparison with similarly-trained and qualified providers/of the same class in the same community taking into account his or her training experience, and
> fields of medical specialization.

Tr. p. 2050, ln. 22 - p. 2051, ln. 8.

Silk Touch do not claim that these instructions incorrectly state the law yet nonetheless argue the jury was not correctly instructed pursuant to I.C. § 6-1012 because the district court refused their proposed instructions. App. Brief, p. 26-41. However, I.R.C.P. 51(a)(2) recommends that trial judges used the IDJI instructions "whenever the latest edition . . . contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject" unless "the judge finds that a different instruction would more adequately, accurately or clearly state the law." Silk Touch support their argument with several cases that pre-date IDJI 2.10.1 and 2.10.3 and that found no error in instructing the jury on the requirements set forth I.C. § 6-1012 instead of using pattern, general, instructions. App. Brief, p. 27-30. Silk Touch do not identify any cases finding error in the district

court's decision to utilize the pattern instructions for medical malpractice cases.

Moreover, read as a whole, Defense Proposed Instructions 11, 12, 13 and 17 only include two concepts not addressed in the Court's instructions – that the standard of care must be proven "by direct expert testimony" and that the term "community" refers to the geographical area ordinarily served by the licensed general hospital where the medical care was provided. R. 2235-37, 2241. In deciding not to include this information in the pattern instructions, the Civil Jury Instructions Committee recognized that juries do not require that information in most medical malpractice cases.

Despite Silk Touch's appellate claim that the district court "did not instruct the jury on the definition of the standard of care" [App. Brief p. 37], the district court instructed the jury regarding the requirements of I.C. § 6-1012[14] by using the IDJI instructions. Given the evidence, additional information was unnecessary. Accordingly, Silk touch fail to establish the district court erred in declining to give their proposed instructions.

b. No reasonable view of the facts supports the theory that the evidence was insufficient to establish the applicable community standard

Silk Touch claim the absence of an instruction defining the community's geographic scope may have caused "speculation and uncertainty . . . and [was] misleading, because the jury is otherwise allowed to conjure up any definition of community it chooses." App. Brief, p. 31, n.13. Silk Touch claim prejudice since "Dr. Kerr testified he treated Krystal at his office in 2010 in Eagle at which time

---

[14] Silk Touch's discussion of alleged error in the jury instructions cite to I.C. § 6-1013 and cases discussing that statute's foundational requirements for expert testimony regarding the standard of care. App. Brief p. 35-37. The admissibility of Dr. Sorensen's and Dr. Nichols' opinions is not at issue in this appeal or relevant to whether the jury was correctly instructed. Therefore, no detailed response to these arguments is required.

there was a hospital in Eagle – St. Alphonsus – which would be the closest hospital to the location where he treated Krystal. Tr. 2048, L. 9 - p. 2248, L. 11." *Id.* Silk Touch's assertion is without merit.

Idaho Code § 6-1012 defines the term "community" as "that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided." Of course, "hospitals in nearby towns can certainly be in competition with each other" and because people residing at one location may commonly use the services provided by more than one hospital, communities may overlap one another. *Bybee v. Gorman*, 157 Idaho 169, 176, 335 P.3d 14, 21 (2014), c*iting Ramos v. Dixon*, 144 Idaho 32, 35, 156 P.3d 533, 536 (2007).

Silk Touch suggest Eagle is a separate medical community from Boise and Meridian because Saint Alphonsus has a satellite hospital in Eagle. However, a hospital in Eagle does not preclude Eagle from being within the geographic area served by other licensed hospitals such as St. Luke's. *See Ramos,* 144 Idaho at 35, 156 P.3d at 536 (the existence of a licensed general hospital in Idaho Falls would not preclude Idaho Falls from being within the geographical area ordinarily served by licensed hospital in Blackfoot).

Even if reasonable to argue that the Eagle Saint Alphonsus rendered Eagle a distinct medical community from Boise, Silk Touch presented no evidence that the standard of care in Eagle differed from the rest of Ada County. Indeed, Dr. Stiller (Silk Touch's Moscow-based standard of care expert) spoke with Dr. O'Neil, "a family physician that practiced cosmetic surgery in the *Boise* area," to gain actual knowledge of the standard of care applicable to Boise in 2010. *Id.* at p. 1523, ln. 13 - p. 1526,

ln. 6 (emphasis added).[15] Similarly, Dr. Lundeby practiced in Spokane, Washington but he familiarized himself with the standard of practice in "Boise in 2010" during a conversation with Dr. O'Neil. *Id.* at p. 1786, ln. 2-24. Dr. Kerr acknowledged advertising to the Treasure Valley to include Boise, Nampa, Caldwell, and surrounding areas. *Id.* at p. 2248, ln. 11 - p. 2249, ln. 22.

Silk Touch instead argue that they were prejudiced by the absence of a jury instruction defining the community's geographic scope because "Dr. Sorensen . . . gave no testimony or opinions on the care typically provided under similar circumstances by the relevant type of health care provider in the community at the time and place of the events in question." App. Brief, p. 36. Dr. Sorensen's testimony does not support this argument.

Over the past twenty-five years, Dr. Sorensen performed most of his cosmetic surgeries at the St. Luke's in downtown Boise but also practiced "all the time" at the St. Luke's in Meridian, where a " huge percentage" of the patients are from the city of Eagle. Tr. p. 336, ln. 22 - 337, ln. 1; p. 436, ln. 2-8; p. 481, ln. 22-25; p. 493, ln. 24 - p. 494, ln. 3. Dr. Sorensen directly observed the sterilization processes in physicians' facilities in and around Eagle during comprehensive, day-long inspections he had been performing for the past eight years. *Id.* at p. 332, ln. 20 - p. 333, ln. 25; p. 336, ln. 12 - p. 338, ln. 2 Dr. Sorensen testified that there is no difference in the community standard of care between Eagle and Boise in terms of sterility practices. *Id.* at p. 337, ln. 17 - p. 338, ln. 2; p. 493, ln.

---

[15]Dr. Stiller spoke with Dr. O'Neil to gain an understanding of the standard of care applicable to cosmetic physicians in the Boise area. Tr. p. 1619, ln. 7 - p. 1620, ln. 4. Nonetheless, Dr. Stiller did not inquire whether Dr. O'Neil completed a surgical residency, the type of liposuction machine used in his office, whether he personally sterilized equipment, whether he used an autoclave, whether he used spore counts and whether he has written materials describing the procedure for cleaning, disinfecting and sterilizing reusable medical equipment. *Id.* at p. 162, ln. 3 - p. 1625, ln. 15.

19 - p. 493, ln. 20; p. 498, ln. 13-19.

Dr. Sorensen's testimony undisputedly established that he was familiar with the standard of care for physicians conducting surgeries in their offices throughout Ada County for cleaning, disinfecting and sterilizing reusable medical equipment. Because the jury only heard evidence of one community, the additional language in Silk Touch's requested instruction defining the community was unnecessary under the facts of the case. The district court did not err in using the pattern instructions to instruct the jury on medical malpractice.

c. Silk Touch fail to establish the district committed reversible error in instructing the jury regarding expert testimony

Silk Touch claim it was harmed because the district court's instructions did not provide that Charles had to "affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence" that Dr. Kerr breached the relevant community standard. App. Brief, p. 27. As discussed above, that the pattern instructions do not include this language suggests the committee recognized the language would not always be required. In the instant case, the only evidence received regarding Dr. Kerr's breach of the community standard was by direct expert testimony and, thus, no instruction was required to assist the jury in deciding the issues before it.

Further, Silk Touch acknowledge in this appeal that the district court indicated that the community standard must be established by direct expert testimony in the jury's presence. App. Brief, p. 27. Specifically, Silk Touch objected that Dr. Sorensen's testimony regarding Saint Alphonsus's sterility standards was irrelevant and the district court ruled that it was relevant to respond to Silk Touch's implication that because Dr. Sorensen did not practice at Saint Alphonsus

in Eagle, he was unfamiliar with the standard of care that applied to Dr. Kerr. In the jury's presence, the district court then indicated that there "must be expert testimony by a knowledgeable, competent expert witness, that the witness possesses" professional knowledge and expertise, coupled with actual knowledge of the applicable community standard to which the opinion is addressed. Tr. p. 497, ln. 18 - p. 498, ln. 4. Silk Touch nonetheless argue that the district court committed reversible error in not also including this information in the written instructions.

Silk Touch further claims they were harmed by omission of the words "direct expert testimony" in the pattern instructions because the district court instructed the jury:

> A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

App. Brief, p. 27; R. 2496. This instruction is identical to the former IDJI 124 and the current Idaho Criminal Jury Instruction 345. Silk Touch imply that the instruction's removal from the current edition of the pattern instructions signifies it was disproved. App. Brief, p. 32. However, the introduction to these instructions published on the Supreme Court website explains that a number of instructions included in the first edition of IDJI were eliminated "as too specialized, too particularized, or too remote for inclusion in a set of pattern instructions." *See* IDJI Introduction. An instruction's removal does not mean it has been disproved and, instead, "means only that the topic is such that a manuscript instruction drafted expressly to cover the particular topic is more appropriate than an attempt to offer a pattern instruction." *Id.*

Without citing to authority disproving the language, Silk Touch nonetheless claim the

instruction was a "complete misstatement of the law" because it informed the jury it was not bound by any particular expert's opinion and the jury should instead determine the amount of weight to assign expert testimony. App. Brief, p. 29-30. Silk Touch assert the instruction is "absolutely contrary to I.C. § 6-1012" because it "tells the jury they are not bound by the opinions of any expert" and "allowed the jury to decide the question of whether or not Defendants compiled [sic] with the standard of health care practice based on whatever the jury wanted." App. Brief, p. 31-33.

Initially, there is nothing inconsistent with the propositions that the standard of care must be proven by direct expert testimony and that the jury should decide whether to be bound by a particular expert's opinion, which may conflict with an opposing expert's opinion. Moreover, the jury was instructed that "individual providers in health care are judged in comparison with similarly-trained and qualified providers of the same class in the same community taking into account his or her training experience, and fields of medical specialization." Tr. p. 2050, ln. 22 - p. 2051, ln. 8. The only evidence presented on the sterilization practices of providers with training similar to Dr. Kerr's was that of the respective experts of the parties. Thus, it was unnecessary to inform the jury that the standard of care must be established through expert testimony even if the jury instruction could be interpreted as urged by Silk Touch.

Silk Touch claim that instructing the jury that it was not bound by the testimony of a particular expert "devastated the Defendants and deprived them of a fair trial" because the jury had the right under the instruction "not to be bound by the opinions of defense experts Drs. Kerr, Lundeby,

Coffman and Stiller." App. Brief, p. 31, 33.[16] Silk Touch's position that I.C. § 6-1012 requires the jury to believe their experts' testimony is unsupportable and the district court did not err by instructing the jury regarding that factors it could consider in determining the weight to assign the testimony of the respective experts in order to determine which of those experts, if any, to believe. Indeed, Silk Touch asked the district court to instruct the jury that a witness with special knowledge may give an opinion and that the jury should consider the qualifications and credibility in determining the weight to assign the testimony. R 2231. Determining the weight to assign a particular expert's testimony, which may conflict with an opposing expert's opinion, is a necessary function of a jury.

The district court correctly instructed the jury using the pattern instruction and did not err in informing the jury it could decide which experts to believe.

2. The jury instruction defining circumstantial evidence was not erroneous

During the jury instruction conference, Charles indicated that an instruction defining direct and circumstantial evidence would assist the jury in interpreting the evidence since, for example, there was no opportunity to test the medical instruments used in Krystal's procedure.[17] Tr. p. 2321, ln. 21 - p. 2322, ln. 9. The district court noted that jurors generally "are not philosophy majors" and that it

---

[16] Silk Touch also claim the expert opinion instruction allowed the jury "to ignore, discount, or otherwise elect not to be bound by" Dr. Sorensen's testimony regarding causation. App. Brief, p. 32. The basis of Silk Touch's alleged prejudice is unclear. In any event, I.C. § 6-1012 only requires direct expert testimony to establish breach of the relevant standard of care and not proximate cause. *Sheridan*, 135 Idaho at 786, 25 P.3d at 99.

[17] Dr. Groben, who performed Krystal's autopsy, testified that by the time his testing revealed an infection in the fat transfer site in the right buttocks, too much time had passed to test the Silk Touch instruments used on Krystal. Tr. p. 878, ln. 22 - p. 879, ln. 1.

would include an example of circumstantial evidence in an instruction that it had frequently given in the past. Tr. p. 2322, ln. 6 - p. 23, ln. 22. Specifically, the district court instructed the jury:

> Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred. For example, if you see it snowing, you have direct evidence that it has snowed. If you don't see it snowing but wake up and find the ground is covered in snow, then you have circumstantial evidence that it snowed.
>
> The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

R. 2488.

Silk Touch contend the district court committed reversible error by including the snowfall illustration, which is not included in the pattern instruction. According to Silk Touch, the illustration unfairly prejudices them because telling the jury there is no distinction between direct and circumstantial evidence allowed Charles "to establish the fact in issue without supporting expert testimony." App. Brief, p. 42.

The instruction was pertinent to the issue of proximate cause, which requires neither direct nor expert evidence and which Charles could establish through a chain of circumstances from which the jury could reasonably and naturally infer the ultimate fact. *See Sheridan*, 135 Idaho at 785-86, 25 P.3d at 98-99. Moreover, while there does not appear to be an Idaho appellate case discussing similar language involving snow, other states have concluded the illustration was helpful in cases involving circumstantial evidence. *See Thomas v. State*, 350 S.E.2d 253, 254 (1986) (trial court's snow analogy in circumstantial evidence instruction could aid the jury in distinguishing direct from circumstantial

evidence); *State v. Kaszas*, No. 72546, 1998 WL 598530, at *18 (Ohio Ct. App. Sept. 10, 1998) (court did not abuse its discretion in using snowing example in instructing the jury and the import of the instruction was clear); *State v. Cipriano,* 21 A.3d 408, 425 (R.I. 2011) (holding that snowing example provided a clear example of proof by inference).

According to Silk Touch, "just because there is snow on the ground doesn't mean it snowed unless there are facts that show it did not get there for some reason or than it even snowed." App. Brief, p. 43. Silk Touch thus urge that including the snow example was tantamount to instructing the jury to hold them liable based on the doctrine of *res ipsa loquitur*. App. Brief, p. 44. Silk Touch appear to confuse the concept of circumstantial evidence with conclusive evidence.

Evidence, whether direct or circumstantial, is entitled to varying weights. Indeed, the instruction, taken from the pattern instruction, concludes by advising the jury that "each is accepted as a reasonable method of proof and each is respected for such convincing force as it *may* carry." R. 2488 (emphasis added). The district court's instruction provided the parties with a common sense illustration through which they could discuss the inferences the jury "may" draw from the evidence.

Further, Charles did not argue that the jury should hold Silk Touch liable on a claim of *res ipsa loquitar*. Charles presented substantial direct expert evidence that Silk Touch breached the community standard of care for sterilizing reusable medical equipment and he provided compelling circumstantial evidence that Silk Touch's breach of the community standard resulted in contamination of the reusable medical equipment used on Krystal, which caused her death.

The district court's common sense illustration of circumstantial evidence presented no risk of the jury concluding that just because Krystal died, Dr. Kerr must have violated the standard of care

and caused her death. Silk Touch fail to establish any error, let alone reversible error.

3. The district court did not err by giving the pattern negligence jury instruction

Silk Touch contend the district court erred in giving the pattern instruction defining negligence arguing the definition is inconsistent with the pattern instruction defining a medical provider's duty in a medical negligence action. App. Brief, p. 45-47; R. 2493. The district court used this instruction noting the IDJI instructions for medical malpractice that it had adapted for wrongful death use the phrase "medical negligence' in the preface and, thus, the term should be defined for the jury using the pattern instruction. Tr. p. 2349, ln. 9-23. The district court did not err.

There are only two specific pattern malpractice instructions – the elements instruction, IDJI 2.10.3 and two variations of the community standard of care instruction IDJI 2.10.1 and 2.10.2 – and those instructions are not meant to include all jury instructions given in a medical malpractice case. The pattern definition of negligence in IDJI 2.20 suggests that it is meant to be used in conjunction with specialized instructions such as IDJI 2.10.1 and 2.10.2. In addition to the definition of negligence included in the instruction given in this case, the pattern instruction includes the following, optional, bracketed language: "The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide." IDJI 2.20. The comment then explains: "The bracketed words may be omitted when specific instructions defining standard of care, such as statutory duties, are included." The standard defined in I.C. § 6-1012 provides exactly such a circumstance.

Rather than being inconsistent with the general definition of negligence, the instruction defining the standard of care provides the additional information regarding the statutory definition of reasonable conduct contemplated by IDJI 2.20. Silk Touch's argument that the district court erred

in including the pattern negligence instruction is without merit.

4. the district court did not err by submitting the issue of recklessness to the jury

The limitation of noneconomic damages in personal injury cases does not apply to "causes of action arising out of willful or reckless misconduct." I.C. § 6-1603(4)(a). Because the evidence introduced at trial could support a finding of recklessness, the district court instructed the jury:

> Willful or reckless misconduct, when used in these instructions and when applied to the allegations in this case, means more than ordinary negligence. Willful or reckless misconduct means intentional or reckless actions, taken under circumstances where the actor knew or should have known not only that his actions created an unreasonable risk of harm to another, but also that his actions involved a high degree of probability that such harm would actually result.

R p. 2501; Tr. p. 2351, ln. 5-7. The special verdict instructed the jury to first determine whether Charles met his burden to prove that Dr. Kerr and Silk Touch negligently breached the applicable standard of health care and that their conduct was the proximate cause of Krystal's death. Then, if the jury found in the affirmative, it was instructed to determine "were the actions of the defendant(s) which breached the standard of care and were the proximate cause of Krystal Ballard's death, reckless." R p. 2508. The jury concluded that Silk Touch's conduct in breaching the standard of care and causing Krystal's death was reckless. *Id.*

In this appeal, Silk Touch claim the district court erred by instructing the jury regarding recklessness because Charles' experts did not specifically opine their conduct was "reckless" citing *Jones v. Crawforth*, 147 Idaho 11, 17, 205 P.3d 660, 666 (2009). App. Brief, p. 64-68. In *Jones,* this Court found no abuse of discretion in allowing two experts to opine that the conduct at issue reached a level of negligence they saw as reckless although the district court did not allow the experts to

present their opinions of the legal definition of recklessness, only that they viewed the negligence as reaching a level they saw as reckless. *Id.* at 17, 205 P.3d at 666.

The trial court's exercise of discretion found appropriate in *Jones* fails to support Silk Touch's argument in this appeal that an expert must always opine on the degree of negligence before the issue may be submitted to the jury. In *Jones,* this Court noted that courts may appropriately exercise their discretion in precluding an expert from testifying that conduct constituted a reckless disregard in situations where the expert is no more qualified than the average juror to conclude from the evidence what any of the defendants had actually perceived or understood. *Jones,* 147 Idaho at 17, 205 P.3d at 666, *discussing Athay v. Stacey*, 142 Idaho 360, 366, 128 P.3d 897, 903 (2005). Here, the jury was qualified to weigh the testimony of all the witnesses and determine whether Silk Touch's breach of the community standard involved a reckless disregard of Krystal's safety.

Silk Touch also rely on *Coombs* to support their assertion that the district court erred by instructing regarding recklessness even though that case did not discuss jury instructions defining recklessness. Instead, the *Coombs* Court noted: "Although the Idaho Rules of Evidence do not require expert testimony to establish causation in medical malpractice cases, such testimony is often necessary . . . 'because the causative factors are not ordinarily within the knowledge or experience of laymen composing the jury'" *Coombs*, 148 Idaho at 140, 219 P.3d at 464, *citing Flowerdew v. Warner*, 90 Idaho 164, 170, 409 P.2d 110, 113 (1965). Thus, *Coombs* only supports the use of expert testimony to establish causation and does not support Silk Touch's argument that the expert must specifically opine whether the degree of negligence constitutes recklessness as that expert understands this term.

Here, Dr. Sorensen provided extensive expert testimony regarding the precise conduct underlying Silk Touch's breach of the standard of care and the combined specialized testimony of Drs. Sorensen, Groben and Nichols addressed how Silk Touch's breach caused Krystal's death. The jury was qualified to weigh that testimony with that of other witnesses including Dr. Kerr himself to determine whether the breach described by the testimony was reckless.

The other cases Silk Touch rely on in this appeal are similarly inapplicable to the issue at bar. *See* App. Brief p. 65-66 *citing Carrillo v. Boise Tire Co.*, 152 Idaho 741, 751, 274 P.3d 1256, 1266 (2012) (where liability is disputed, an allegation of negligence is sufficient to put a defendant on notice that its liability will not be statutorily capped if its conduct is found to have risen to the degree of recklessness) *and Schmechel v. Dille*, 148 Idaho 176, 187, 219 P.3d 1192, 1203 (2009) (unable to conclude that the failure to instruct the jury as to recklessness deprived the jury of the opportunity to evaluate expert's testimony or that the absence of an instruction otherwise prejudiced plaintiff given the jury's finding defendants were not negligent).

Finally, contrary to Silk Touch's contention in this appeal, the recklessness instruction could not have confused the jury as to who bears the burden of proof. The jury was instructed Charles had the burden to prove Silk Touch failed to meet the applicable standard of care and his breach caused Krystal's death. R 2491-92. The jury only considered whether Silk Touch was reckless after the jury concluded Charles met his burden to prove breach of the standard of care and causation. The jury instructions, taken as a whole, do not suggest Silk Touch had to prove their conduct was not reckless.

Silk Touch fail to establish the district court erred in instructing the jury on recklessness.

D. Silk Touch Fail to Establish Reversible Error in the District Court Evidentiary Rulings

This Court will not disturb a district court's evidentiary rulings absent a clear abuse of discretion. *Mattox*, 157 Idaho at 473, 337 P.3d at 632; *McDaniel v. Inland Nw. Renal Care Grp.-Idaho, LLC*, 144 Idaho 219, 222, 159 P.3d 856, 859 (2007). To determine whether a trial court has abused its discretion, this Court considers 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 decision by an exercise of reason. *Perry*, 134 Idaho at 50-51, 995 P.2d at 820-21. This Court disregards errors made on evidentiary rulings unless the rulings were a manifest abuse of the trial court's discretion and affected the party's substantial rights. *H.F.L.P., LLC v. City of Twin Falls*, 157 Idaho 672, 686, 339 P.3d 557, 571 (2014); *Perry*, 134 Idaho at 51, 995 P.2d at 821.

1. the district court did not err by permitting Silk Touch to question Dr. Sorensen regarding the standard of care

In this appeal, Silk Touch complain of the district court's comments during a discussion on the relevance of Dr. Sorensen's conversations with physicians in 2006 and 2007. Initially, Silk Touch claim the district court's comments prevented them from challenging Dr. Sorensen's testimony without identifying a specific adverse ruling. App. Brief, p. 39-41. Instead, they broadly allege: "The case Plaintiff presented at trial was foundationally deficient per the requirements of I.C. 6-1012 and 6-1013 and the verdict should be reversed." App. Brief, p. 41.

"'It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." *Patterson v. State, Dep't of*

Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011), *citing Krempasky v. Nez Perce County Planning & Zoning*, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010). Rather than reveal an *adverse* ruling, Silk Touch cite to a portion of the transcript revealing that the district court made the complained of comments in the course of *overruling* Charles' objection and *allowing* Silk Touch to continue questioning Dr. Sorensen about conversations that occurred before July 2010. On cross-examination, Dr. Sorensen indicated his review of the circumstances leading to Krystal's death did not specifically include speaking with physicians in Boise, Meridian or Eagle about cosmetic procedures in July 2010. Tr. p. 473, ln. 3-7. Silk Touch then inquired whether Dr. Sorensen spoke to physicians in 2006 about the standard in Boise for cosmetic surgeons. Tr. p. 474, ln. 10 - p. 475, ln. 2. Charles objected arguing that questions regarding the standard of care in 2006 and 2007 were irrelevant to the standard of care in July 2010. Tr. p. 475, ln. 5-6.

Silk Touch argued such evidence was relevant because Dr. Sorensen did not interview physicians regarding the standard of practice in July 2010 as part of his review of this case and the: "law is clear. The information you base an opinion on has to be the date of the procedure." Tr. p. 475, ln. 13-21. The district court responded that Dr. Sorensen practiced in the relevant community and did not need to gain knowledge of the standard of practice during a given time frame by interviewing local practitioners in the same manner as an out-of-state expert. Tr. p. 475, ln. 22 - p. 476, ln. 1. The following exchange then occurred:

Mr. Quane:	He doesn't know what the standard of practice is for a non-plastic surgeon who does cosmetic surgery. He has to learn it from someone else.
Court:	Not really.
Mr. Quane:	Well, he does.
Court:	He already testified -- well, *anyway, you are certainly entitled to explore the*

basis for his opinion that Dr. Kerr didn't perform in July 2010 in accordance with the standard of care as it existed at that time. That's relevant. But I am unaware of any requirement that a person who practices in the local area and is familiar with the standards of care in the local area has to . . . consult with in state people in the way that an out-of-state expert does.

Mr. Quane: Well, just because -- let me say this. Just because you practice in Boise doesn't mean you know the standard of practice.

Court: Okay. *Well, I will certainly let you go ahead and explore the basis for his opinion that Dr. Kerr's performance did not meet the standard of care as it existed in Boise at the time the care was rendered, so I will give you some leeway to explore that.*

Tr. p. 476, ln. 22 - p. 477, ln. 2 (emphasis added). Silk Touch then elicited testimony from Dr. Sorensen indicating he spoke with two local physicians in 2007 and 2011 in connection with his inspection of their facilities. *Id.* at p. 478, ln. 9 - p. 480, ln. 23.

Accordingly, the record establishes that the district court *permitted* Silk Touch to continue their line of questioning and, contrary to their assertion in this appeal, in no way refused to "allow the defense to challenge whether Dr. Sorensen had the requisite actual knowledge of the local standard applicable to Dr. Kerr." App. Brief, p. 41. Silk Touch fail to identify an adverse ruling that forms the basis for an assignment of error.

Nor did the district court incorrectly state the law during its ruling. An expert testifying as to the standard of care must state how he or she became familiar with that standard of care. *Newberry*, 142 Idaho at 292, 127 P.3d at 195; *Dulaney,* 137 Idaho at 164, 45 P.3d at 820. An out-of-area expert can meet the foundational requirement of personal knowledge regarding the local standard of care by inquiring of a local specialist regarding the standard of care. *Dulaney,* 137 Idaho at 164, 45 P.3d at 820; *Perry*, 134 Idaho at 51, 995 P.2d at 821. An expert witness need not be of the same specialty as the defendant so long as the expert establishes he or she possesses actual knowledge of the applicable

standard of care. *Newberry*, 142 Idaho at 292, 127 P.3d at 195; *Dulaney*, 137 Idaho at 164, 45 P.3d at 820. Accordingly, the district court correctly stated the law in indicating local practitioners are not required to interview other local practitioners to obtain actual knowledge of the applicable standard of care.

Indeed, the very case relied on by Silk Touch in this appeal, *Newberry,* undercuts its position. *See* App. Brief, p. 41. In *Newberry*, this Court rejected the defendant's argument that the actual knowledge requirement "dictate[d] that such actual knowledge must in all cases be obtained by explicitly asking a specialist in the relevant field to explain the local standard of care." 142 Idaho at 292, 127 P.3d at 195. Instead, inquiring with a local specialist is one method an expert witness may obtain such knowledge, "but it is not the only method." *Id.* In *Newberry*, the plaintiff's expert was an ophthalmologist who practiced in the same community where the defendant was a family practice physician. The ophthalmologist's professional interactions with family practice physicians in the relevant area at the relevant time, including practicing alongside family practice physicians, providing and obtaining referrals, and discussing patient care with them, provided the expert with the requisite actual knowledge of the applicable standard of care. *Id.* at 292, 127 P.3d at 195.

Here, if Dr. Sorensen were considered of a different specialty than Dr. Kerr,[18] even though

---

[18] Silk Touch claim there were "vast differences" in the training of plastic surgeons and physicians practicing cosmetic surgery without a background in plastic surgery like Dr. Kerr. App. Brief, p. 40. The vast differences testified to at trial dealt with the number of cosmetic procedures that the surgeon must complete before being allowed to sit for boards. *See* Tr. p. 1507, ln. 22 - p. 1510, ln. 8; p. 1766, ln. 23 - p. 1768, ln. 8. Silk Touch did not present evidence that the training or standards for sterilizing reusable medical equipment was "vastly" different for physicians practicing cosmetic surgery versus those trained as plastic surgeons.

both are cosmetic surgeons, Dr. Sorensen established extensive familiarity with the standard of care for physicians from various backgrounds conducting surgery in their offices in Ada County including the surgery performed by Dr. Kerr. Specifically, Dr. Sorensen practiced and interacted with numerous physicians including cosmetic surgeons during his twenty five years practicing cosmetic surgery and eight years inspecting physicians' facilities in Ada County. Tr. p. 334, ln. 1-12. p. 336, ln. 12-21.

Finally, even if the district court's comment was incorrect, it was made during the course of an evidentiary ruling rather than as an instruction to the jury. The jury was specifically instructed that the district court's evidentiary rulings were not intended as an opinion concerning the evidence. R. 2482. This Court presumes that the jury followed the jury instructions in arriving at their verdict. *Phillips*, 151 Idaho at 109, 254 P.3d at 10; *Weinstein v. Prudential Property and Casualty Ins. Co.*, 149 Idaho 299, 335, 233 P.3d 1221, 1257 (2010).

The district court correctly stated the law during the course of overruling Charles' objection and permitting Silk Touch to continue asking Dr. Sorensen about conversations he had with other providers. Silk Touch fail to establish a basis for reversing the verdict.

2. the district court did not err in ruling Dr. Kerr could opine regarding the standard of care and the legal definition would be in a jury instruction

Defense counsel inquired of Dr. Kerr at trial: "In your opinion, Doctor, who establishes the standard of health care practice." Tr. p. 2049, ln. 25 - p. 2050, ln. 3. The district court sustained an objection that the question called for a legal conclusion and then clarified that Dr. Kerr could "say factually what goes into the standard of care, but the standard of care in Idaho is the standard of care applicable for a local community, which was a legal issue addressed in the instructions to the jury."

Id. at p. 2050, ln. 6-13. Defense counsel indicated "the important part of that is who establishes that standard" and the district court instructed counsel to rephrase the question." *Id.* at p. 2050, ln. 16-21. The district court then instructed the jury:

> The standard of care is the applicable standard of health care practice of the community in which such care allegedly was or should have been provided as such standard existed at the time and place of the alleged negligence and of such physician, keeping in mind that individual providers in health care are judged in comparison with similarly-trained and qualified providers of the same class in the same community taking into account his or her training experience, and fields of medical specialization.

Id. at p. 2050, ln. 22 - p. 2051, ln. 9.

On appeal, Silk Touch argue this was "an erroneous and irrelevant reason for her ruling because the question asked who established the standard of health care practice." App. Brief, p. 49-50. Without specifying the aspects of the district court's comments that were allegedly erroneous, Silk Touch cite I.C. § 6-1012 and *Bybee v. Gorman*, 157 Idaho 169, 335 P.3d 14 (2014) for the well-established proposition that the standard of health care must be established by direct expert testimony. In *Bybee*, which addressed the foundation required for the admission of expert testimony under I.C. § 6-1013 for purposes of summary judgment, the Court concluded the district court erred in finding that whether Pocatello was within the geographical area ordinarily served by Idaho Falls was a legal, rather than factual, determination. *Bybee*, 157 Idaho at 176, 335 P.3d at 21. The district court's ruling that Dr. Kerr could testify as to the underlying facts regarding the community standard but that the legal definition would be addressed in the jury instructions was consistent with *Bybee*.

Nor was the district court's ruling inconsistent with I.C.§ 6-1012. The district court's comments in directing Silk Touch to rephrase the question described the community standard with

language substantively identical to the statute. Dr. Kerr then testified that neither Sound Surgical Technologies's Vaser system manual, the CDC, the State of Idaho, nor medical literature establish the standard of care, which was intended to rebut Dr. Sorensen's testimony that these resources help define the community standard. Tr. p. 2051, ln. 10 - p. 2052, ln. 1.

Silk Touch contend the evidence excluded by the district court's ruling was "apparent from the context" and they were not required to lay a further record. However, it is unclear what Dr. Kerr would have offered to rebut Dr. Sorensen beyond discussing the facts underlying his opinion regarding the community standard, including his apparent opinion that manuals for equipment he used, government health care standards and medical literature are not relevant to the community standard for cleaning, disinfecting and sterilizing reusable equipment.

The district court did not abuse its discretion in ruling that Dr. Kerr could testify as to the underlying facts regarding the community standard but that the legal definition would be addressed in the jury instructions. Silk Touch's arguments are without merit.

3. the district court did not abuse its discretion by ruling that certain evidence from Dr. Sorensen's website was extrinsic and inadmissible

In their opening statement, Silk Touch quoted extensively from a section of Dr. Sorensen's website cautioning the public against allowing non plastic surgeons to perform liposuction. On direct and cross examination, Dr. Sorensen admitted the website's contents and explained his underlying motivation in cautioning against non plastic surgeons performing liposuction. The district court declined Silk Touch's request to admit photographs of the website because Dr. Sorensen admitted their contents and extrinsic evidence was not permitted under rule I.R.E. 613 and cumulative. Tr. p.

429, ln. 11 - p. 430, ln. 9, p. 523, ln. 18-24.

Rule 613(b) provides that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Silk Touch do not cite legal authority supporting the admissibility of photographs from Dr. Sorensen's website and do not even cite to IRE 613. This Court will not consider claims on appeal that are not supported with relevant argument and authority. *Hopper v. Swinnerton*, 155 Idaho 801, 806, 317 P.3d 698, 703 (2013).

Rather than challenge the district court's legal conclusion, Silk Touch contend the "interpretation by the District Court of the direct testimony of Dr. Sorensen is not factually accurate in that the court erroneously concluded the direct testimony of Dr. Sorensen related only to plastic surgeons doing liposuction and no other physicians which is not accurate." App. Brief, p. 48. The precise meaning of this is unclear and Silk Touch support their position with a misleading recitation of the relevant procedural history. Silk Touch argue "it was Plaintiff's attorney who brought up" Dr. Sorensen's website while failing to inform this Court that Charles elicited the testimony to respond to their opening statement. *See* App. Brief, p. 48.

Specifically, Silk Touch told the jury during opening:

> We will show you an interesting web page [Dr. Sorensen] puts out that was in effect last year. You will get a kick out of this.
>
> . . .
>
> Here is what he says on his web page. This Dr. Sorensen.
>
> > Unfortunately, there are a number of procedures being performed by physicians who are not trained in plastic surgery. These non-plastic

> surgeons often utilize technologies that have catchy names and are expensive but in clinical trials have not shown any significant improvements over the standard tumescent liposuction techniques.
>
> Patients are advised to select a procedure that is safe and effective based on scientific results performed by board-certified plastic surgeons and to ignore the marketing hype so common today.

> He is broadcasting to the public, don't have this liposuction done by anyone but a plastic surgeon, and Dr. Kerr ain't a plastic surgeon. And this is the -- and he authored these words that I will prove. And this is the doctor they claim is going to prove that Dr. Kerr violated this standard of practice and he knows all about this stuff, even though he doesn't want anyone to go get liposuction from someone who isn't a plastic surgeon, and he says so right here. And if that ain't bias, I don't know what it is.

Tr. p. 307, ln.21-24; p. 308, ln. 24 - p. 309, ln. 24.

Dr. Sorensen responded on direct examination that he was familiar with the website and explained that when "Smart Liposuction came out" six or seven years ago "somebody of any speciality" would begin providing the service after attending "a meeting and then take a weekend training course." Tr. p. 330, ln. 20 - p. 331, ln. 18. After Dr. Sorensen observed undesirable results following such procedures, he warned the public via his website to ensure that a provider is qualified to perform. *Id.* at p. 331, ln. 10-18. Dr. Sorensen denied any bias towards cosmetic surgeons not trained in plastic surgery. *Id.* at p. 331, ln. 18-22. On cross-examination, Dr. Sorensen acknowledged adding the warning to the liposuction section of his website six and seven years ago and that he continued to represent himself as a plastic surgeon on his website. *Id.* at p. 425, ln. 2 - p. 426, ln. 18.

At that point, Silk Touch moved to admit and publish the photographs from the website and the district court ruled it was unnecessary extrinsic evidence because Dr. Sorensen agreed with the content, "the point's already been made" and the website itself would be unduly cumulative. Tr. p.

428, ln. 17 - p. 430, ln. 9. The district court also found that Dr. Sorensen testified that he added information to his website because he believed that liposuction should be done by plastic surgeons and that there are problems with non plastic surgeons doing the procedure. *Id.* at p. 523, ln. 12-17. The district court ruled the Idaho Rules of Evidence do not permit extrinsic evidence of a consistent statement, that extrinsic evidence is admissible under I.R.E. 613 to address *inconsistent* statements, and the evidence was cumulative. *Id.* at p. 429, ln. 11 - p. 430, ln. 9; p. 523, ln. 18-24.

The district court's ruling was correct and Silk Touch's argument is misleading and meritless.

4. Silk Touch fail to establish reversible error in the district court's ruling permitting redactions to Krystal's Silk Touch Medical Chart

Krystal's Silk Touch medical chart was redacted in accordance with the district court's *in limine* rulings and admitted during the prior trial. Tr. p. 317, ln. 4-10, Exh. 5. On appeal, Silk Touch claim the district court permitted redactions to certain portions of the chart on relevance grounds and then argues the ruling was error. App. Brief, p. 68-69. However, the transcript reveals no objection to this Exhibit – Exhibit 5. Tr. p. 316, ln. 24 - p. 319, ln. 1.

Instead, Silk Touch support their appellate argument by citing arguments they made several days after the exhibit was introduced. *Compare* App. Brief, p. 69 *citing* Tr. p. 1392, ln. 2 – p. 1394, ln. 22 *with* Tr. p. 1388, ln. 3-13; p. 1389 - p. 1394, ln. 22; p. 1403, ln. 7-13. Specifically, on the seventh day of trial outside the jury's presence, Silk Touch indicated they wanted to discuss potential testimony to ensure they did not run afoul of the district court's prior *in limine* rulings. Tr. p. 1388, ln. 3-13. Silk Touch argued that Exhibit 5 – admitted without objection on the first day of trial – should not have been redacted and that they anticipated testimony that Krystal was instructed to have

someone available to assist her for twenty-four to forty-eight hours after the surgery. *Id.* at p. 1389, ln. 13- p. 1391, ln. 17. Silk Touch told the district court: "That's the issue I want to make sure that I'm not running afoul of everything, because it was redacted, and I want to be able to present that testimony, and we believe it should be included in Exhibit 5." *Id.* at p. 1391, ln. 20-24.

After further discussion, Silk Touch indicated their point with Exhibit 5 was "whether or not that was a proper redaction, and whether or not [Dr. Kerr's daughter] can talk about how" Krystal was instructed to have someone available to assist her during the first twenty-four to forty-eight hours. Tr. p. 1403, ln. 7-13. Charles' counsel noted that Exhibit 5 had been introduced during the last trial and Silk Touch should not be allowed to re-visit the ruling at that time. *Id.* at p. 1403, ln. - p. 1404, ln. 1. The district court indicated evidence of Krystal's self-care following the procedure was potentially relevant if it related to causation. *Id.* at p. 1392, ln. 22 - p. 1393, ln. 5. The district court also ruled that Dr. Kerr's daughter could testify regarding the instructions she provided Krystal following the procedure but that if they intended to have a witness "leapfrog" from that information, they would need to address whether the opinion was previously disclosed. *Id.* at p. 1405, ln. 15 - p. 1406, ln. 20.

Later in the trial, Silk Touch offered an unredacted version of the Silk Touch chart. Tr. p. 2103, ln. 13 - 2105, ln. 3. Rather than find the information irrelevant, the district court indicated that the jury had already heard evidence concerning almost all of the information reflected in the unredacted chart. The "only narrow portion of Exhibit 5 that I excluded were some speculations and explanations" regarding Dr. Kerr's concerns that Krystal had not told her husband about the procedure. *Id.* at p. 2105, ln. - p. 2106, ln. 2. The district court noted that the jury was already aware that Charles was not home in the immediate post-surgery period and further evidence would be

speculative. *Id.* at p. 2106, ln. 3-13. The district court did not abuse its discretion in concluding that introducing a duplicate of Exhibit 5 was unnecessary given the jury was already aware of most the information redacted from that exhibit.

Silk Touch do not appear to argue to the contrary and, instead, primarily complain of the initial redactions and sufficiency of the district court's findings in allowing the redacted exhibit. App. Brief p. 70-73. However, Silk Touch did not object at the time this exhibit was offered at trial and have waived any such objection. Moreover, Silk Touch did not include the district court's initial ruling in the appellate record. The party appealing a decision of the district court bears the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision. *Gibson*, 138 Idaho at 790, 69 P.3d at 1051. When a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court. *Id.* This Court will not presume error from a silent record or from the lack of a record. *Id.*

Because the record does not include the district court's ruling admitting Exhibit 5 in the first trial, this Court presumes its evidentiary ruling was correct. Silk Touch fail to establish any abuse of discretion in the district court's decision in the second trial to not admit a second version of the medical record, where the jury had been informed of most of the information therein through the testimony of witness. Silk Touch fail to establish reversible error.

5. The district court did not abuse its discretion by precluding Silk Touch's purported evidence of a lack of infection in other patients

Silk Touch claim the judgment entered on the jury's verdict should be reversed because the district court excluded a spreadsheet, which purported to list other Silk Touch patients who allegedly

did not experience infections following various procedures. App. Brief, p. 86-93. However, Silk Touch only challenge one of the grounds underlying the district court's ruling – that it would be irrelevant – and do not even mention the district court's exclusion of the evidence for failing to disclose the underlying data despite Charles' explicit request. Silk Touch fail to establish an abuse of discretion and the judgment should be affirmed.

a. procedural history related to "evidence" of absence of other infections

Silk Touch's "evidence" of a lack of other infections was based on a review of undisclosed Silk Touch records performed by Dr. Kerr's wife who had no medical training or background. R. 2662. As set forth in his *limine* motion on this evidence, Charles served Silk Touch with discovery requests in June 2012, including requesting production of documents referred to in interrogatory responses. R. 885, 984-1002. During his deposition, Dr. Kerr initially testified that he believed that bacteria had been introduced into Krystal's body after she left Silk Touch, "Because I've never had another infection of that nature." R. 886, 925-948 (Dep. 82:11-25). Dr. Kerr clarified that a limited number of his post-lipolysis patients had experienced infections, and he admitted that he never formally tracked the number of post-surgical patients who experienced infections. *Id.*

Seven months later, at the deposition of defense expert Dr. Coffman, Silk Touch first provided Charles with the summary at issue, which purported to list the first names of Silk Touch patients, their dates of treatment, and a brief description of the procedures performed. R. 886, 979-983 (Coffman Dep. 40:19 - 41:4, Aug. 20, 2013). Dr. Coffman reviewed no other information pertaining to these patients. *Id.* at 41:11-16.

On September 16, 2013 – which was over a month after written discovery had closed, ten days after the deposition deadline had passed and less than two months prior to trial – Silk Touch served a supplemental interrogatory response disclosing, in part, that Susan Kerr's "expected testimony" would relate to Silk Touch records and "records and data she compiled of Silk Touch for infections." R 1027-1034. By letter dated September 20, 2013, Charles noted the vagueness of Silk Touch's supplemental interrogatory response, requested immediate production of the records and data compiled by Ms. Kerr, and sought a date upon which she could be re-deposed in light of the newly disclosed information. R. 1035-1037. On September 26, 2013, Silk Touch responded with a letter indicating that they were not required to provide the requested data and that Charles' request to re-depose Ms. Kerr was untimely. R. 1038-1040. On September 27, 2013, Charles noticed the reconvened deposition of Ms. Kerr and requested that she bring all records and data underlying her testimony, as disclosed by Silk Touch's supplemental response to the interrogatory. R. 1041-1045. Silk Touch refused to produce Ms. Kerr to be re-deposed, and failed to further supplement their discovery responses to include any data or documentary support for the proposed trial exhibit. R. 888.

Prior to the first trial, Charles moved *in limine* to preclude testimony concerning the alleged lack of other infections because Silk Touch failed to timely disclose the summary and refused to provide the information on which that summary was purportedly based. R. 874-911. The district court ruled that "as a general rule, one doesn't get into the absence of other accidents in establishing whether there was or was not negligence on a particular occasion." Tr. (11-5-2013) p. 21, ln. 5-8. The district court ordered that the issue could be re-addressed outside the jury's presence "but the lack of disclosure of data underlying the summary presents a separate and considerably more serious

problem." *Id.* at p. 23, ln. 23 - p. 24, ln. 6; *see also* Tr. (11-14-2013) p. 109, ln. 15-21 (failure to provide the data, which would support the conclusion, played directly into district court's decision to grant the order *in limine* with respect to the absence of other infection).

Silk Touch then triggered the mistrial by intentionally eliciting testimony regarding the lack of other infections without first addressing the issue outside the jury's presence. Tr. (11-14-2013) p. 106, ln. 6-14; p. 108, ln. 6-16.

During the second trial, the parties sought clarification regarding the *limine* order prior to Dr. Kerr's testimony. Tr. p. 526, ln. 1-14. The district court clarified that Dr. Kerr could testify about the number of procedures he completed to illustrate his experience. *Id.* at p. 526, ln. 15 - p. 527, ln. 1. However, the district court reiterated that it continued to view evidence implying an absence of infections as irrelevant to whether Silk Touch was responsible for Krystal's infection. *Id.* at p. 527, ln. 1-23. Charles responded that his objection went beyond relevance and that he has "never been provided the materials to verify whether there has been or has not been prior infections." *Id.* at p. 528, ln. 8-18. The district court responded:

> Absolutely, which is one of the other bases for the ruling I made on the *in limine* motion, is that not only that, but you were never given the opportunity, which is fundamental when somebody offers a summary it's fundamental that the other side is given the opportunity to examine thoroughly the supporting data that goes into a summary. And so on so many grounds, as I previously said, this testimony is completely inadmissible. I have granted an *in limine* [motion], and I will take every conceivable action to make sure that that inference is not made.

Id. at p. 528, ln. 19 - p. 529, ln. 6. The district court clarified Silk Touch was "absolutely prohibited" from presenting the absence of other infections to prove no negligence but that Dr. Kerr discussing his experience during similar procedures did not implicate the *in limine* ruling. *Id.* at p. 528, ln. 1-8

Silk Touch informed the district court they dispute Charles' assertion the information was not provided and inquired whether the district court would allow them to provide a response. Tr. p. 535 - p. 536, ln. 6. The district court noted that Silk Touch had ample opportunity to present new information and argument since the first trial and declined to reconsider its previous ruling. *Id.* at p. 535, ln. 9 - p. 536, ln. 15. Eleven days later, Silk Touch presented an affidavit reflecting the date on which they initially provided the alleged summary to Charles in an effort to rebut their failure to timely disclose the information. R. 2417-2421. However, this information reinforced that the data underlying the summary had never been provided to Charles. *See id.* The district court indicated that the affidavit included "misstatements" about the prior ruling and that the issue had already been "dealt with . . . extensively." Tr. p. 2106, ln. 14-18.

The district court declined to reconsider the issue and noted that while the lack of disclosure continued to be an important ground to deny the evidence, it was one of several grounds. Tr. p. 2106, ln. 19-24. The district court found that Silk Touch had failed to establish that the procedures listed in the summary were sufficiently similar to the one at issue for the evidence to be relevant. The district court also noted that the evidence could also consume undue time disputing collateral matters such as whether the prior patients actually did not become infected following the procedure and whether the procedures were sufficiently similar. *Id.* at p. 2106, ln 25 - p. 2108, ln. 22.

b. the district court correctly found the chart was governed by I.R.E. 1006

The district court correctly determined the chart was a summary governed by I.R.E. 1006, which allows the contents of voluminous documents which cannot conveniently be examined in court to be presented in the form of a summary. *See* Tr. p. 2107, ln. 23 - p. 2108, ln. 2; R. 2662. Before a

summary can be admitted under Rule 1006, "the originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place." Silk Touch neither challenge the district court's ruling the summary was governed by Rule 1006 nor do they contend they provided Charles with the records underlying that summary[19]

c. the district court appropriately exercised its discretion by excluding the evidence based on Silk Touch's failure to disclose the underlying data

The conclusion that other Silk Touch patients had purportedly not been infected was based on Dr. Kerr's wife's review of medical charts, which was not disclosed to Charles despite express requests. This lack of disclosure was a key aspect of the district court's ruling.

The district court has the discretion to exclude testimony based on late disclosure as a sanction under I.R.C.P. 37(b). *McKim v. Horner*, 143 Idaho 568, 571, 149 P.3d 843, 846 (2006); *Bramwell v. S. Rigby Canal Co.*, 136 Idaho 648, 651, 39 P.3d 588, 591 (2001). The decision whether to exclude undisclosed expert testimony pursuant to I.R.C.P. 26(e)(4) is also committed to the sound discretion of the trial court. *Schmechel*, 148 Idaho at 180-81, 219 P.3d at 1196-97; *Viehweg v. Thompson*, 103 Idaho 265, 271, 647 P.2d 311, 317 (Ct. App. 1982). This Court applies the following three factors to determine whether there has been an abuse of discretion: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *McKim*, 143 Idaho at 571, 149 P.3d at 846.

---

[19] The summary refers to procedures before and after Krystal's surgery. R. 2428-2429.

In this appeal, Silk Touch do not argue that the district court abused its discretion by excluding the summary because they failed to disclose its underlying data. They have thus waived the issue for purposes of appellate review. Moreover, the district court correctly exercised its discretion in excluding the evidence based on lack of disclosure. Without the underlying records, the reliability of the purported evidence was highly suspect as there was no method to evaluate the similarity of the procedures or their circumstances. *See* Tr. p. 2107, ln. 2-6; p. 2108, ln. 1-6. The district court noted that a patient experiencing an adverse reaction would not necessarily return to Silk Touch and, thus, the absence of a note in the chart regarding an infection does not necessarily equate to the absence of an infection. *Id.* at p. 2108, ln. 7-11.

Silk Touch do not claim they ever provided Charles with the underlying data. Their claim that this Court should vacate the judgment entered on the jury's verdict based on the exclusion of the summary is entirely without merit.

d. Silk Touch fail to establish the summary's admissibility

In this appeal, Silk Touch only assign error to the district court's exclusion of the summary on relevance grounds. However, the district court did not broadly rule that the absence of other infections would never be relevant. Instead, the district court ruled that to be relevant, a party must show the procedures and circumstances were sufficiently similar. Tr. p. 2106, ln. 24 - p. 2107, ln. 6. Such evidence tends to be "collateral and cumulative" and of little importance in most negligence cases." *Id.* at p. 2107, ln. 7-17. The district court ruled that Silk Touch failed to lay sufficient foundation and that the circumstances had not changed sufficiently to warrant the introduction of "very scantily vetted assertions." *Id.* at 2108, ln. 19-22.

Silk Touch fail to establish that the district court abused its discretion by determining they did not establish the relevance of the summary reflecting an alleged lack of other infections.

6. The district court did not abuse its discretion by ruling that questioning Dr. Sorensen about the types of gram negative bacteria exceeds the scope of direct and is a topic that may be addressed through a different witness

In this appeal, Silk Touch asserts that the district court ruled their questions regarding gram negative rods, including E. coli, were irrelevant and that they were prevented from questioning Dr. Sorensen about E. Coli. App. Brief, p. 59. Silk Touch again misrepresent the record.

On cross-examination, defense counsel asked Dr. Sorensen if there is one particular type of microorganism or bacteria that is most common within the definition of gram negative rod and Dr. Sorensen responded that he was unsure. Tr. p. 454, ln. 23 - p. 455, ln. 6. Defense counsel then asked Dr. Sorensen if he had knowledge where on the human body E. Coli flourish, inhabit and thrive and Dr. Sorensen responded in the colon. *Id.* at p. 455, ln. 7-10. Charles objected that the question was outside the scope of Dr. Sorensen's direct testimony. *Id.* at p. 455, ln. 10-12. The district court ruled that while such evidence might become relevant, Dr. Sorensen was not offered as a microbiologist and it would be more appropriate to address the topic with other witnesses. *Id.* at p. 456, ln. 17-21; *see also id.* at p. 457, ln. 4-7 (not the correct witness to address topic). Accordingly, contrary to Silk Touch's contention, the district court did not sustain the objection based on relevance.

Silk Touch claim the district court's ruling prevented them from challenging Dr. Sorensen's opinion that the gram negative bacteria found in Krystal's right buttock was the result of Silk Touch's breach of the community standard with respect to sterilizing reusable medical equipment. However, the record reflects the district court's ruling did not prevent Silk Touch from challenging Dr.

Sorensen's causation opinion. For instance, before the ruling at issue, Dr. Sorensen admitted he was not a microbiologist. Tr. p. 453, ln. 19-22. After the district court's ruling, Silk Touch continued to question Dr. Sorensen about E. coli in general, including testimony that it is pathogenic when it enters sterile tissue, that a gram negative rod can thrive and live in the colon and escape the colon in stool. *Id.* at p. 457, ln. 19-25; p. 461, ln. 3-22.

The district court did not abuse its discretion in ruling the question regarding E. coli was outside the scope of Dr. Sorensen's direct and the ruling did not prevent Silk Touch from challenging Dr. Sorensen's opinion concerning the cause of Krystal's death. Silk Touch's claim is without merit.

7. The district court did not err in allowing Dr. Sorensen to discuss the sterilization steps described in Dr. Kerr's sworn testimony

In contradiction to Dr. Kerr's prior sworn interrogatory answer and deposition testimony, defense counsel told the jury in opening statement that Dr. Kerr "uses a detergent that has a compound in it called enzymatic fluid that kills and sterilizes equipment. He uses that like he always has." *Compare* Tr. p. 295, ln. 11-14 *with* p. 365, ln. 9 - p. 366, ln. 9. p. 358, ln. 17-24; p. 362, ln. 8-15. In this appeal, Silk Touch claim the district court committed reversible error by allowing Dr. Sorensen to draw on his expertise in the sterilization process to comment on whether Dr. Kerr's prior testimony was consistent with the use of an enzymatic cleaner. App. Brief, p. 60-61. Silk Touch fail to establish an abuse of discretion.

Charles asked Dr. Kerr by interrogatory to identify and describe each procedure, policy and/or protocol for sterilization of each individual and/or piece of equipment which participated in or was used during the procedure on Krystal Ballard. Tr. p. 365, ln. 9-16. Dr. Kerr responded:

> Sterilization of all equipment, including handpieces and cannulas. Hand piece and hand piece cord wiped down with bacteriostatic wipe. All other equipment rinsed of fluids and debris, washed in hot water and Hibiclens and rinsed in hot clean water. Hollow instruments and cannulas cleaned with brushes and flushed with Hibiclens solution. Instruments evenly spaced and placed in autoclave cassette. New thermal sterilization placed on outside of cassette. Instruments autoclaved in Statim autoclave. Individual instruments not placed in cassette are place in autoclave pouches and run separately. Before use, sterilization markers are checked before opening cassette or opening autoclave packages.

Id. at p. 365, ln. 17 - p. 366, ln. 9.

At deposition, Dr. Kerr testified that Silk Touch soaked reusable equipment in Hibiclens mixed with hot water and that he cleaned the handpiece with aseptic wipes. Tr. p. 358, ln. 11-24. After the Hibiclens, Silk Touch used a brush to scrub additional debris from hollow instruments such as cannulas, rinsed the instruments with tap water and placed them in the autoclave. *Id.* at p. 361, ln. 11-22. Dr. Kerr denied using "any type of other cleaner that is used in that process" before placing the reusable equipment in the autoclave and denied the "use any type of enzymatic cleaner in the process." *Id.* at p. 358, ln. 17-24; p. 362, ln. 7-15. Dr. Kerr did not mention a detergent or enzymatic cleaner in that deposition. *Id.* at p. 363, ln. 15-24, p. 362, ln. 7-15.

In response to Silk Touch's claim at trial that Dr. Kerr used an enzymatic cleaner, Charles asked Dr. Sorensen to comment on whether Dr. Kerr's sworn interrogatory answer was consistent with his deposition testimony regarding how he cleans, disinfects, and sterilizes reusable equipment. Tr. p. 366, ln. 10-14. Silk Touch objected, asserting the question called "for a conclusion," the jury interprets the consistency of prior statements. *Id.* at p. 366, ln. 17-20, ln. 21-25. The district court overruled the objection stating it is "fair to ask an expert witness to comment on things relevant to the standard of care." *Id.* at p. 366, ln. 17-20; p. 367, ln. 1. Dr. Sorensen then testified that Dr. Kerr

described the same method of cleaning, disinfecting and sterilizing the equipment at deposition and in his interrogatory answer. *Id.* at p. 367, ln. 5-13. Silk Touch again objected asserting it was "a conclusion not for an expert witness." *Id.* at p. 367, ln. 14-15. The district court overruled the objection but instructed the jury "it's always up to the jury to decide if something is consistent or not." *Id.* at p. 367, ln. 16-24. Dr. Sorensen testified he did not see a reference to enzymatic cleaner or detergent being used in the interrogatory answer. *Id.* at p. 368, ln. 9-19.

Charles was entitled to rebut Dr. Kerr's claim that his sworn interrogatory answer and deposition testimony were consistent with use of an enzymatic cleaner. Moreover, because the interrogatory and deposition utilize terms outside the scope of the average juror's experience, it was appropriate to have an expert explain the reasons those responses were inconsistent with the use of an enzymatic cleaner. Silk Touch fail to establish an abuse of discretion in the district court's ruling.

8. The district court did not abuse its discretion in determining that additional testimony from Dr. Stiller regarding Krystal's death would be redundant

Silk Touch claim the district court erred by not allowing Dr. Stiller to rebut Dr. Sorensen's testimony. App. Brief, p. 61. The record establishes Dr. Stiller offered extensive testimony intended to rebut Dr. Sorensen's opinion and that in the ruling cited by Silk Touch, the district court determined further testimony would be redundant. Silk Touch fail to establish an abuse of discretion.

Specifically, Silk Touch cite to their question near the end of Dr. Stiller's examination asking if he had "an opinion as to whether or not if Dr. Kerr had done everything the way Dr. Sorensen says he should have done whether Krystal Ballard would be alive today?" Tr. p. 1605, ln. 16-20. Charles objected the testimony would be speculative. *Id.* at p. 1605, ln. 21 - p. 1606, ln. 2. The district court

agreed the testimony would be speculative and also found Dr. Stiller's earlier testimony covered the same ground in several different ways. *Id.* at p. 1606, ln. 3-13. The district court thus sustained the objection because the question had been "addressed, asked and answered." *Id.*

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of needless presentation of cumulative evidence. I.R.E. 403; *Reed v. Reed*, 137 Idaho 53, 58, 44 P.3d 1108, 1113 (2002). Dr. Stiller testified extensively regarding his opinion that Silk Touch's failure to follow the standard of care would not have impacted the sterilization of the equipment. Silk Touch fail to establish an abuse of discretion.

E. Silk Touch Fail to Establish a Violation of Any Right to a Fair Trial or Alleged Improper Questioning by the District Court Effected the Jury's Verdict

Silk Touch claim the judgment entered on the jury's verdict should be vacated because the court made "improper comments in front of the jury and advanced partisan opinions on key issues which unfairly prejudiced the defense." App. Brief, p. 51. Silk Touch support this contention with strained interpretations and misrepresentations of the record. Further, while Silk Touch mention "plain error," they cite no authority to support their contention that a series of alleged errors to which no objection was made provides a basis for reversing the judgment in a medical negligence action.

To the contrary, this Court has held that where an appellant fails to assert assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Hopper*, 155 Idaho at 806, 317 P.3d at 703; *Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010). A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is

insufficient to preserve an issue. *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). An assignment of error not argued and supported in compliance with the Idaho Appellate Rules is deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Application of this standard to Silk Touch's arguments on appeal and the facts set forth in the record reveal that the claim is without merit.

1. The district court did not rule the community standard required compliance with certain guidelines

Silk Touch cite an isolated comment out of context to support their contention on appeal that the district court stated there were certain CDC guidelines that were "absolutely required and mandatory to be followed." App. Brief, p. 51. Silk Touch focus on a single sentence of the transcript indicating the district court stated: "Well, obviously the jury is well aware of the fact that there were particular statutory and regulatory standards that were absolutely required for the sterilization of reusable instruments in cosmetic surgery." Tr. p. 1921, ln. 9 - p. 1922, ln. 23. The entirety of the district court's remarks and indeed the very next two sentences of the transcript, however, establish the district court intended to state exactly the opposite and that the omission of the word "not" before "particular statutory and regulatory standards" was either a reporting error or an obvious misstatement, which the district court immediately corrected. While not mentioned by Silk Touch, the district court's very next statement indicated: "Of course, that doesn't mean that they weren't supposed to be sterile – they weren't supposed to be sterile. It just means that there *weren't* any particular guidelines that were mandatory." Tr. p. 1922, ln. 1-5 (emphasis added).

No witness for either party testified that any particular statutory and regulatory standard was

mandatory. That Silk Touch did not object to the district court's remark further reinforces that they understood the district court indicated there are no mandatory guidelines. Even if the district court actually misspoke by omitting the word "not," and the jury could have somehow understood that compliance with any guideline was required notwithstanding the district court's subsequent and immediate remarks indicating there "weren't" any mandatory guidelines, Silk Touch failed to preserve the issue for appellate review.

2. The district court did not improperly comment on Dr. Kerr's credibility

Silk Touch claim the district court improperly commented on Dr. Kerr's credibility during their attempt to convince the jury that he used an enzymatic cleaner notwithstanding his sworn deposition testimony and interrogatory answer reflecting otherwise. According to Silk Touch, the district court cut off defense counsel and took over the questioning. App. Brief, p. 53. Silk Touch did not object to this supposed misconduct at trial and cite no authority for the proposition that this Court should review such claims for the first time on appeal in a medical negligence action.

Moreover, the transcript itself reveals that the so-called interruptions were in fact rulings in response to objections to the questions at issue. In the section at issue, Dr. Kerr testified that he interpreted the deposition question regarding the use of an enzymatic cleaner to refer to a very specific product labeled as enzymatic cleaner. Tr. p. 2061, ln. 23 - p. 2062, ln. 3. The district court sustained an objection that the following question was leading: "Okay and was that because of your interpretation of that question? Is that why you gave that answer." *Id.* at p. 2062, ln. 4-8. The district court rephrased the question and inquired "why did you say you used an enzymatic cleaner when you hadn't said it before?" *Id.* at p. 2062, ln. 9-10. Dr. Kerr responded that while he had said he did not

use an enzymatic cleaner in his deposition, he had clarified during the prior trial that he used a detergent that contained an enzymatic cleaner. *Id.* at p. 2062, ln. 11-17. Defense counsel then asked Dr. Kerr regarding the number of pages in the deposition transcript and why he did not make changes upon review of the transcript. As the district judge overruled an objection to the question, defense counsel interrupted. *Id.* at p. 2063, ln. 4-12. The judge instructed counsel not to interrupt and asked Dr. Kerr the same question posed by counsel: why he did not read and change his deposition answers. *Id.* at p. 2063, ln. 12-16. Dr. Kerr testified he overlooked the correction in light of the length of the documents. *Id.* at p. 2063, ln. 17-19.

On appeal, Silk Touch claim the district court's re-phrasing of the question changed the issue from whether Plaintiff's counsel had even asked about an enzymatic cleaner during the deposition to the court implying the issue had been squarely asked in the deposition." App. Brief, p. 53. This argument is not borne out by the record. The excerpts of Dr. Kerr's deposition published to the jury during trial reveal that Dr. Kerr was asked the following:

Counsel:	As far as the Hibiclens and water, is there any type of other cleaner that is used in that process before [reusable equipment including cannulas] get into the autoclave?
Dr. Kerr:	No
Counsel:	All right. Do you use any type of enzymatic cleaner in the process?
Dr. Kerr:	No

Tr. p. 358, ln. 17-24; p. 362, ln. 8-15. In light of this testimony, Silk Touch cannot credibly complain if the district court's question "implied" Dr. Kerr had been directly asked whether he used an "enzymatic cleaner."

While Dr. Kerr was entitled to explain his prior sworn testimony, he cannot pretend there is

an issue whether he was "even asked about an enzymatic cleaner during the deposition." Contrary to Silk Touch's claim that the district court expressed an opinion that Dr. Kerr had changed his testimony, the district court simply rephrased counsel's question asking Dr. Kerr to explain the obvious difference between the two varying accounts. Silk Touch fail to establish the district court commented on Dr. Kerr's credibility.

3. The district court neither improperly questioned witnesses nor commented on the weight of the evidence

Silk Touch claim the judgment should be reversed because the district court took over questioning Dr. Kerr and "prejudiced the defense" by "repeatedly" commenting on the degree of relevance of Charles' evidence. App. Brief, p. 54. Silk Touch objected to none of these purported instances of misconduct in the district court and their claims are unsupported by the record.

Silk Touch claim the district court "needlessly took over the questioning" based on the district court's comments while ruling on an objection. During Dr. Kerr's cross-examination, Charles impeached his testimony that he did not pay attention when answering the interrogatory by asking whether he was aware at the time that a primary issue in the case was whether he appropriately cleaned, disinfected and sterilized the equipment. Tr. p. 2213, ln. 21 - p. 2214, ln. 11. Defense counsel objected simultaneously with Dr. Kerr's response that "he did not know it was the main criticism." *Id.* at p. 2214, ln. 12-17. The district court overruled the objection. *Id.* at p. 2214, ln. 18. Because the testimony had been difficult to follow with repeated objections, the district court indicated "let's back up" and asked whether Dr. Kerr's answer had been that he "knew that it was important at the time of the interrogatories what the process of sterilization was that was used at the

time you had the interrogatory?" *Id.* at p. 2214, ln. 18-23. Dr. Kerr indicated that he did not believe the question posed by the district court was the same question presented to him. *Id.* at p. 2214, ln. 24-25. The district court directed the court reporter to read the question and answer again because it had been difficult to hear. *Id.* at p. 2215, ln. 1-7.

Thus, the transcript reflects that the district court was uncertain of Dr. Kerr's answer because he and his attorney spoke over one another during the course of an objection. Silk Touch's claim that the district court needlessly interfered and "dramatically" had the court reporter read back the question is not supported by the record.

Silk Touch also claim that the district court further "prejudiced the defense" by "repeatedly" commenting on the degree of relevance of Charles' evidence because in overruling three objections, the district court indicated the question called for "highly" or "very" relevant evidence. App. Brief, p. 54. Silk Touch did not object to the district court's characterization in the trial court and, in any event, the record reveals that the district court's conduct did not prejudice Silk Touch.

On direct examination, Charles asked Dr. Kerr whether he was confused regarding the appropriate process for sterilizing reusable medical equipment as it pertained to his responsibility to follow the standard of practice. Tr. p. 779, ln. 22 - p. 780, ln. 2. Silk Touch objected, indicating that the "standard of health care practice is what controls" and the question was "irrelevant." *Id.* at p. 780, ln. 3-6. The district court ruled that the question was "not irrelevant" and was "highly relevant." *Id.* at p. 780, ln. 7-10. Dr. Kerr responded that he was not confused but he was unclear of how counsel defined "appropriate." *Id.* at p. 780, ln. 12-21.

Similarly, Dr. Kerr testified that he was familiar with the CDC guidelines because he had

been present during Dr. Sorensen's testimony regarding those guidelines. Charles inquired how far in advance of the trial he had reviewed those guidelines and Silk Touch objected that the evidence was irrelevant. The district court overruled the objection finding the evidence "very relevant." *Id.* at p. 1858, ln. 21 - p. 1859, ln. 5; *see also Id.* at p. 2215, ln. 16-25 (finding whether Dr. Kerr understood that the criticism was that Krystal died of an infection because of unsterile instruments "highly" relevant in overruling relevance objection).

Silk Touch supports its appellate argument with criminal cases holding that a judge's remark will be deemed prejudicial if it constitutes a comment on the weight of the evidence or indicates an opinion of the court as to the defendant's guilt or innocence. *See* App. Brief, p. 55-57, citing *State v. White*, 97 Idaho 708, 712, 551 P.2d 1344, 1348 (1976); *State v. Johnson*, 138 Idaho 103, 106, 57 P.3d 814, 817 (Ct. App. 2002).

Whether evidence is relevant is a question of law and a comment on the degree of relevance is not a comment on the *weight* the jury should assign the response. Accordingly, the district court's comment that evidence would be highly or very relevant on three occasions over the course of the multi-week trial in no way prejudiced Silk Touch. *See also United States v. Middlebrooks*, 618 F.2d 273, 277 (5th Cir.) *opinion modified on reh'g*, 624 F.2d 36 (5th Cir. 1980) (isolated incidents in a four-day trial in which there was ample evidence upon which to convict the defendant for his part in the marijuana conspiracy did not deprive him of a fair trial).

Even if the district court's comments could be construed as a comment on the evidence, the district court instructed the jury that: "the production of evidence in court is governed by the rule of law. Except as explained in this instruction, none of my rulings were intended by me to indicate any

opinion concerning the evidence in this case." R. 2482. The jury was also instructed that the: "key part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all." R. 2486. This Court presumes that the jury followed these instructions. *See Phillips*, 151 Idaho at 109, 254 P.3d at 10.

The district court neither interfered with the question of witnesses nor commented on the weight of Silk Touch's evidence. Silk Touch fail to establish any error, let alone any error that could be reviewed in the absence of an objection.

F. Silk Touch Fail to Establish a Violation of I.R.C.P. 33(b)(2) or The Use of Dr. Kerr's Interrogatory Answer at Trial is a Basis for Reversal

Silk Touch claim the judgment entered on the jury's verdict should be reversed because Charles did not "disclose" Dr. Kerr's sworn interrogatory answer prior to trial. According to Silk Touch, "Rule 33(b)(2) specifically requires interrogatory answers to be identified in advance of the trial so opposing counsel can prepare for the very attack made by the Plaintiff in this case." App. Brief, p. 86. Silk Touch misconstrue the rule's meaning and purpose and, in any event, cannot credibly claim surprise or that they were unprepared to be confronted with Dr. Kerr's own sworn testimony made during the course of discovery in this case.

As previously noted, defense counsel told the jury in opening statement that Dr. Kerr "uses a detergent that has a compound in it called enzymatic fluid that kills and sterilizes equipment. He uses that like he always has." Tr. 295, ln. 11-14. Charles responded to that position by publishing

Dr. Kerr's prior deposition testimony and interrogatory answer, verified by him under oath indicating otherwise, during the examination of various witnesses, including Dr. Sorensen. Silk Touch initially objected, asserting Charles had not disclosed Dr. Kerr's interrogatory response prior to trial "[u]nder Idaho Rule of Procedure [sic] regarding the disclosure of any interrogatory use at a trial." Tr. p. 364, ln. 8-10. The district court overruled the objection. *Id.* at p. 364, ln. 11-14.

Rule 33(b)(2), now cited by Silk Touch on appeal, provides that if interrogatory responses are to be used at trial, "only those portions to be used shall be submitted to the court at the outset of the trial . . . insofar as their use can be reasonably anticipated by the party seeking to introduce such evidence." The rule limits the interrogatory or response presented to the trial court to the interrogatory at issue, without inclusion of the surrounding interrogatories or responses. *See also* I.R.C.P. 30(f)(4)(B); *Brown v. Mathews Mortuary, Inc.*, 118 Idaho 830, 833, 801 P.2d 37, 40 (1990) (noting depositions are no longer physically filed with the clerk and on summary judgment only those portions of the deposition applicable to the existence of material facts need be submitted to the court).

Even if the purpose of the rule is notice as urged by Silk Touch, they compelled the use of Dr. Kerr's prior sworn answer to the interrogatory by telling the jury in opening statement that Silk Touch used a detergent and enzymatic cleaner in the sterilization process used in Krystal's case, which directly contradicted Dr. Kerr's prior sworn testimony. This permitted the use of the prior inconsistent statements even if the rule could be interpreted as Silk Touch claim.

Rule 33(b)(2) does not require a party to produce to an opposing party in advance of trial that very party's own interrogatory answer to refute the subsequent, inconsistent testimony and arguments

of that party. Silk Touch's claim to the contrary is without merit.

G. The District Court Did Not Abuse its Discretion by Allowing the Jurors to Submit Questions as Permitted by I.R.C.P. 47(q)

After re-direct examination of each witness, the district allowed the jurors to submit written questions pursuant to I.R.C.P. 47(q), which provides:

> In the discretion of the court, jurors may be instructed that they are individually permitted to submit to the court a written question directed to any witness. If questions are submitted, the parties or counsel shall be given the opportunity to object to such questions outside the presence of the jury. If the questions are not objectionable, the court shall read the question to the witness. The parties or counsel may then be given the opportunity to ask follow-up questions as necessary.

Silk Touch's challenge on appeal to this jury questioning appears to be three-fold: (1) claiming the district court violated the rule by not allowing the parties to object to the questions; (2) listing multiple admissibility challenges to individual questions that were not made during trial; and (3) challenging the practice in allowing jury questions. App. Brief, p. 74-84. However, the record establishes the parties had the opportunity to object and Silk Touch failed to preserve individual objections to the juror questions. Further, Idaho trial courts are afforded by rule the discretion to allow juror questions and the policy considerations underlying the decision of other states to disallow such questioning does not provide a basis for reversing the judgment in this case.

In deciding to allow juror questions, the district court found the process had been beneficial in a recent trial. Tr. p. 75, ln. 9-12. The district court noted that the jury in the prior trial appeared more engaged and focused when allowed to ask questions and that it seemed to heighten their ability to listen and digest information. *Id.* at p. 75, ln. 19-25. The district court indicated it would allow the jurors to write questions at the end of the re-direct testimony of each witness. *Id.* at p. 77, ln. 3-11.

The district court and counsel approached the bench to review the questions and the court indicated it would red-line questions it found inappropriate. Counsel would approach the bench, initial the question if acceptable and indicate "object" when there is an objection. *Id.* at p. 77, ln.11 - p. 78, ln. 15. The district court thus perceived the issue as discretionary, acted within the bounds of that discretion and exercised reason in making the decision to allow questions.

Silk Touch nonetheless claim the district court abused its discretion because they contend they were only permitted to note "objection" on each juror question and there was never an opportunity for an open discussion regarding the nature of the questions. App. Brief p. 74. These assertions are belied by the record. In response to Silk Touch's inquiry, the district court indicated that it would rephrase questions where there were problems with form "but *objections as to relevance, hearsay, meritorious objections can always be made*" and the party can object if the witness veers off from the question. *Id.* at p. 79, ln. 18 - p. 80, ln. 2 (emphasis added). After re-direct examination of each witness, the district court allowed the jurors to submit written questions. *Id.* at p. 509, ln. 24 - p. 510, ln. 7. The district court showed the questions to counsel and then discussed the questions at the bench. *Id.* at p. 510, ln. 14-20. Notwithstanding the district court's invitation for parties to object to juror questions on various grounds, Silk Touch elected to note only "object" on every juror question without stating the legal basis for their objection.[20]

---

[20]Silk Touch list more than ten assignments of error regarding the juror questions to witnesses, which were not specifically objected to at trial. App. Brief p. 76-79. Even if this Court concluded that these alleged errors could be reviewed for the first time on appeal and that the district court erred in some respect, this Court disregards errors made on evidentiary rulings unless the rulings were a manifest abuse of the trial court's discretion and affected the party's substantial rights.

Silk Touch's suggestion that the they were provided insufficient opportunity to lay a record during the bench conference is similarly contradicted by the record. After the first witness, Dr. Sorensen, testified the jury was excused and the district court provided additional comments regarding the juror questions and invited Silk Touch to make an offer of proof. Silk Touch addressed several issues without specifically addressing the questions submitted by the jury. Tr. p. 518 - p. 524, ln. 13. Additionally, the district court required the parties to appear every morning before trial to allow them to address any issues that could be taken up outside the jury's presence. *Id.* at p. 532, ln. 14-23. Beyond their global objection to allowing juror questions, Silk Touch did not state any specific objection to any juror question despite the district court's invitation that meritorious objections such as relevance or hearsay could "always" be made.

Silk Touch complain the district court erred in various respects in allowing approximately ten questions. However, Silk Touch failed to make these objections in the trial court and they cannot be considered for the first time in this appeal. For an objection to be preserved for appellate review, either the specific ground for the objection must be clearly stated, or the basis of the objection must be apparent from the context. I.R.E. 103(a)(1); *Hansen v. Roberts*, 154 Idaho 469, 473, 299 P.3d 781, 785 (2013); *Slack v. Kelleher*, 140 Idaho 916, 921, 104 P.3d 958, 963 (2004). Objection to the admission of evidence on one basis does not preserve a separate and different basis to exclude the evidence. *State v. Sheahan*, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003). This limitation on

---

H.F.L.P., LLC v. City of Twin Falls, 157 Idaho 672, 686, 339 P.3d 557, 571 (2014); *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000). Given the considerable evidence in support of the jury's verdict detailed herein, any error in the questions submitted by jurors could not have effected Silk Touch's substantial rights.

appellate authority serves to induce the timely raising of claims and objections, which gives the trial court the opportunity to utilize its first hand knowledge to consider and resolve the issue, and prevents the litigant from sandbagging the court by remaining silent about an objection and belatedly raising the error only if the case does not conclude in his favor. *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010).

Here, Silk Touch failed to raise any of their multiple, specific objections to the district court and, instead, simply raised a generic objection to every juror question. *See* Sealed Clerk's Record. According, they have waived any objection to those questions for purposes of this appeal.[21]

Finally, Silk Touch include a discussion of extra-jurisdictional authorities limiting or prohibiting the practice of juror questions. App. Brief p. 80-84. However, Rule 47(q) expressly permits the procedure followed by the district court and includes the safeguards discussed above.

Silk Touch fail to establish an abuse of discretion in allowing juror questions and waived objections to specific questions. The judgment entered on the jury's verdict should be affirmed.

H. Silk Touch Fail to Demonstrate any Error by the District Court that Effected Their Substantial Rights and the Doctrine of Cumulative Error Is Inapplicable

Citing criminal precedent, Silk Touch claim that the judgment entered on the jury's verdict

---

[21]Ironically, Silk Touch even now complain that the district court did *not* ask certain juror questions to which they generally objected. *See* App. Brief, p. 78 (complaining district court elected not to read certain juror questions of Drs. Coffman and Stiller). As for other objections made for the first time on appeal, Silk Touch largely now complain of appropriate questions regarding sterilization procedures, causation issues, or which were rephrased, and cannot credibly claim any such question affected their substantial rights. Silk Touch was entitled to state a specific objection to any such question and follow up on any issue raised by a juror question in further questioning of the witness.

should be reversed under the doctrine of cumulative error. App. Brief, p. 62-64. The cumulative error doctrine arises out of a criminal defendant's constitutional right to a fair trial and requires reversal of a conviction when there is an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial, in contravention of the defendant's constitutional right to due process. *State v. Field*, 144 Idaho 559, 572-73, 165 P.3d 273, 286-87 (2007); *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). Silk Touch present neither argument nor authority establishing the above constitutional protections and the doctrine of cumulative error apply to a civil lawsuit.

Instead, Silk Touch simply list a series of complaints regarding various evidentiary rulings, which Silk Touch neither objected to nor presented as issues on appeal. App. Brief p. 62-64. A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). To the extent that an assignment of error is not argued and supported in compliance with the Idaho Appellate Rules, it is deemed to be waived. *Bach*, 148 Idaho at 790, 229 P.3d at 1152; *Suitts*, 141 Idaho at 708, 117 P.3d at 122.

Even if Silk Touch could establish the applicability of the cumulative error doctrine in this civil case, they fail to establish a basis for reversal. A necessary predicate to the application of the doctrine is a finding of more than one error. *State v. Adamcik*, 152 Idaho 445, 483, 272 P.3d 417, 455 (2012); *Perry*, 150 Idaho at 230, 245 P.3d at 982. Silk Touch have not established any error and the doctrine is thus, necessarily, inapplicable.

Moreover, this Court disregards errors made on evidentiary rulings unless the rulings were

a manifest abuse of the trial court's discretion and affected the party's substantial rights. H.F.L.P., 157 Idaho at 686, 339 P.3d at 571; *Perry*, 134 Idaho at 51, 995 P.2d at 821. Similarly, an erroneous jury instruction does not constitute reversible error where the instruction taken as whole neither misleads nor prejudices a party. *Lakeland True Value Hardware, LLC,* 153 Idaho at 724, 291 P.3d at 407; *Robinson*, 137 Idaho at 176, 45 P.3d at 832. As discussed *supra*, Charles presented compelling evidence that Silk Touch breached the community standard of care for sterilizing reusable surgical equipment and this breach led to the tragic death of twenty-seven year old Krystal.

Therefore, even this Court finds that the district court erred in some respect and the cumulative error doctrine could be applied to this civil case, any error (individually or cumulatively) could not be said to have effected Silk Touch's substantial rights and would not require reversal of the judgment entered on the jury's verdict.

I. This Court Should Award Fees and Costs Under I.C. § 12-121 Because Silk Touch's Appeal is Frivolous, Unreasonable and Without Foundation

Idaho Code § 12-121 permits this Court to award "reasonable attorney's fees to the prevailing party." The Court will award fees if it determines "the action was brought or pursued frivolously, unreasonably or without foundation." *Turner v. Turner*, 155 Idaho 819, 827, 317 P.3d 716, 724 (2013); *Baker v. Sullivan*, 132 Idaho 746, 751, 979 P.2d 619, 624 (1999). When an appellant fails to present a cogent argument as to why he should prevail, an award to his opponent is appropriate. *Turner*, 155 Idaho at 827, 317 P.3d at 724; *Chicoine v. Bignall*, 127 Idaho 225, 228, 899 P.2d 438, 441 (1995). Likewise, an award of attorney fees under this statute is appropriate if the appeal simply invites this Court "to second-guess the trial court on conflicting evidence." *Turner*, 155 Idaho at 827,

317 P.3d at 724; *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d, 1087, 1097 (2006).

In this appeal, Silk Touch ask this Court to re-weigh the evidence, repeatedly misrepresent the record, misrepresent the import of legal precedent, fail to cogently argue their assertions of error, and present multiple issues not preserved for appellate review with no argument or authority supporting review of such errors. Silk Touch's conduct in this regard also should be viewed in the context of their conduct in the district court, which includes, but certainly is not limited to, causing a mistrial, and the delays associated with their repeated and baseless requests that the district court include various documents in the appellate record. The combined effect of Silk Touch's conduct has forced Charles to expend significant resources including now responding to the multitude of issues raised by Silk Touch in defense of this appeal – which further delays this case's ultimate resolution.

Silk Touch's conduct in this appeal, particularly when viewed in light of their conduct below and as found by the district court: "discredits the entire system of justice." Accordingly, this Court should conclude that the appeal was brought and pursued frivolously, unreasonably and without foundation and award Charles his attorney's fees in this appeal.

V. CONCLUSION

Charles respectfully asks that this Court affirm the judgments entered in this case and award attorney's fees and costs in defending this appeal.

Respectfully submitted this 29th day of September, 2015.

NEVIN, BENJAMIN, McKAY & BARTLETT, LLP

By _____
Scott McKay
Attorneys for Plaintiff-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2015, I served two true and correct copies of the foregoing Respondent's Brief by hand delivery to the following:

Jeremiah A. Quane
Terrence S. Jones
QUANE, JONES, McCOLL, PLLC
16th Floor, U.S. Bank Plaza
101 S. Capitol Boulevard, Suite 1601
Boise, Idaho 83702

_____
Scott McKay