5-21-2018

Eldridge v. West Appellant's Brief Dckt. 45214

IN THE SUPREME COURT OF THE STATE OF IDAHO

PHILLIP ELDRIDGE AND MARCIA ELDRIDGE, husband and wife, Plaintiffs/Appellants, v. GREGORY WEST, M.D., LANCE TURPIN, PA-C and SUMMIT ORTHOPAEDICS SPECIALISTS, PLLC, Defendants/Respondents.	Supreme Court Docket No. 45214 Bannock County Case No. CV-13-5486 (Consolidated with Case No. CV-2014-1936)

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Bonneville, Honorable Richard T. St. Clair, Senior District Judge, Presiding

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STATEMENT OF THE CASE

Nature of the Case

This is a medical malpractice case. Phillip and Marcia Eldridge ("Eldridge) sued Gregory West, M.D., Lance Turpin, PA-C and Summit Orthopaedics Specialists, PLLC ("Summit"), alleging that Mr. Eldridge became infected with Methicillin-Resistant Staphylococcus Aureus ("MRSA") and subsequently underwent multiple hip surgeries and lost his mobility due to Dr. West's, Mr. Turpin's and Summit's breach of the standard of care. For approximately six years Mr. Eldridge has been battling ongoing infection in his right hip. He has undergone numerous surgeries, and has spent much of the last six years in hospitals and rehabilitation facilities as a result of Dr. West's, Mr. Turpin's and Summit's failure to properly treat and diagnose infection in the his hip. Due to Dr. West's failure to properly diagnose and treat Mr. Eldridge, he was hospitalized for many months, endured several surgeries, and is now unable to walk. Marcia Eldridge endured this as well, and has a loss of consortium claim.

In this matter, the District Court has, erroneously, granted dismissal of Eldridges' claims for negligent and intentional infliction of emotional distress, gross negligence and reckless, willful and wanton conduct. The District Court further granted summary judgment to Lance Turpin, PA-C and partial summary judgment to Gregory West, M.D., erroneously relying upon the affidavits of Mr. Turpin and Dr. West, both of whom submitted conclusory affidavits and failed to set forth any applicable standard of care in their affidavits pursuant to I.R.C.P. 56(c)(4). The District Court then erred in limiting Plaintiffs' claim for damages to a small window of time from December, 2012 to

April, 2013. Finally, the District Court failed to follow precedent set forth in *Dyet v. McKinley,* 39 Idaho 526, 81 P.3d 1236 (2003) when it precluded Eldridge from submitting the total-billed expenses to the jury.

The Course of the Proceedings Below

On October 15, 2013, Mr. and Mrs. Eldridge filed their Complaint against Dr. West, Mr. Turpin and Summit.[1] From September 18, 2014, various motions for summary judgment and motions to dismiss were filed by Plaintiffs, Dr. West, Mr. Turpin and Summit, and the District Court ruled as follows: Defendants filed their first Motion for Summary Judgment on September 18, 2014. R., pp. 113-138. On May 1, 2015 Defendants filed a Second Motion for Summary Judgment. R., pp. 147-156. Plaintiffs filed their opposition on June 11, 2015. R., pp. 157-214. On June 11, 2014, Plaintiffs filed a Motion to Strike Affidavits of Defendant Medical Providers. R., pp. 215-259. On June 17, 2015, Defendants filed their response. R., pp. 263-288. The District Court issued its Memorandum Decision on July 13, 2015, wherein it denied Plaintiffs' motion to strike the affidavits of Dr. West and Mr. Turpin. R., pp. 299-315. Plaintiffs filed a Motion for Reconsideration on July 30, 2015. R., pp. 318-340. On August 20, 2015 the District Court denied Plaintiffs' Motion to Strike the Affidavits of Gregory West, M.D., and Lance Turpin, PA-C. R., pp. 383-393.

On August 3, 2015 Plaintiffs filed an amended Complaint to include a claim for lack of informed consent. R., pp. 353-372. On August 24, 2015, Plaintiffs filed a Motion for

[1]Plaintiffs settled with Eastern Idaho Regional Medical Center ("EIRMC") and the other Defendants named in the Complaint, and said Defendants were dismissed from the lawsuit.

Reconsideration of the Denial of the Plaintiffs' Motion to Strike the Affidavits of Dr. West and Mr. Turpin, with supporting Memorandum. Supp. R., pp. 10-20. On August 27, 2015, Defendants filed their response to the Motion for Reconsideration. R., pp. 425-430 and 441-452. On September 3, 2015 Plaintiffs filed a Reply Memorandum in Support of Plaintiffs' Motion for Reconsideration of Denial of Motion to Strike Affidavits Dr. West and Mr. Turpin (R., pp. 454-460), and Reply Memorandum in Support of Plaintiffs' Motion for Reconsideration. R., pp. 461-470. On September 11, 2015, the District Court entered a Memorandum Decision, denying Plaintiffs' Motions for Reconsideration; and granting Defendants' Motion for Summary Judgment as it pertained to Mr. Turpin, and denying it as it pertained to Dr. West and Summit. R., pp. 471-492. On October 19, 2015 the District Court entered a Memorandum Decision and Order granting entry of judgment and dismissing Plaintiffs' Complaint against Mr. Turpin. R., pp. 498-506.

On November 18, 2015, Plaintiffs filed a Notice of Appeal. R., pp. 509-533.

On April 20, 2016, Defendants filed their Third Motion for Summary Judgment and the Second Affidavit of Gregory G. West, M.D. Supp. R., pp. 41-138. On June 10, 2016, Defendants filed a Reply Memorandum in Support of Third Motion for Summary Judgment. Supp. R., pp. 232-337. Defendants also filed a Third Affidavit of Gregory G. West, M.D. R., pp. 534-548. On June 27, 2016, Plaintiffs filed an Objection to the Third Affidavit of Gregory G. West, M.D. R., pp. 549-562. Defendants filed an opposition to Plaintiffs' objection to Dr. West's affidavit on June 30, 2016. R., pp. 563-573. On April 20, 2016, Defendants filed a Motion in Limine for the Partial Exclusion of the Testimony of Mauro Giordani, M.D. Supp. R., pp. 139-157. On June 3, 2016, Defendants

filed a Motion to Strike the May 23, 2016 Declaration of Mauro Giordani, M.D. Supp. R., pp. 158-231. A Memorandum Decision was issued by the District Court on July 22, 2016 denying Plaintiffs' Motion to Strike the Second Affidavit of Dr. West; sustaining in part and overruling in part Plaintiffs' objection to the Third Affidavit of Dr. West; and granting in part and denying in part Defendants' Third Motion for Summary Judgment. R., pp. 581-598.

On November 29, 2016, Defendants filed a Fourth Motion for Summary Judgment. R., pp. 600-721. On January 20, 2017, Plaintiffs filed their opposition. R., pp. 940-984. An order was entered by the District Court on February 22, 2017 granting in part and denying in part Defendants' Fourth Motion for Summary Judgment. R., pp. 1114-1116. On December 13, 2016, Defendants filed a Motion in Limine to Limit Presentment of Certain Evidence of Damages (R., pp. 722-844), a Motion in Limine to Exclude Testimony of Life Care Planner (R., pp. 845-919), and a Motion in Limine to Exclude Causation Testimony by Treating Physicians. R., pp. 920-930. On January 26, 2017 Plaintiffs filed memoranda in opposition to Defendants Motions in Limine. R., pp. 992-1085. Defendants then filed reply memoranda supporting their Motions in Limine on February 10, 2017. R., pp. 1086-1098 and 1107-1113. On January 20, 2017 Plaintiffs filed their Second Motion for Reconsideration of the Denial of Plaintiffs' Motion to Strike the Affidavit of Lance Turpin. R., pp. 931-939. Defendants filed a Response to Plaintiffs' Second Motion for Reconsideration Re: Lance Turpin on January 25, 2017. R., pp. 985-991. On February 13, 2017, Plaintiffs filed a Reply Memorandum in Support of Plaintiffs' Second Motion for Reconsideration Re: Affidavit of Lance Turpin. R., pp. 1103-1106. A Minute Entry was entered on February 21, 2017 wherein the Court

denied Plaintiffs' Motion for Reconsideration Re: Affidavit of Lance Turpin and granted in part and denied in part Defendants' Fourth Motion for Summary Judgment. R., pp. 1117-1121. An order was entered by the District Court on February 22, 2017 denying Plaintiffs' Motion for Reconsideration Re: Affidavit of Lance Turpin. R., pp. 1114-1116.

On May 3, 2017, the District Court filed a Minute Entry, wherein it granted Defendants' Motion in Limine to Exclude Testimony of Plaintiffs' Life Care Planner. R., pp. 1122-1126.On May 15, 2017, Plaintiffs filed a Motion for Rule 54(b) Certification. R., pp. 1127-1128 and 1132-1141. On May 26, 2017 the District Court denied Plaintiffs' Motion for Rule 54(b) Certification. R., pp. 1142-1147. On June 9, 2017, Plaintiffs filed a Motion for Permission to Appeal (R., pp. 1148-1162), which the District Court granted on July 7, 2017. R., pp. 1163-1166. Plaintiffs filed their Amended Notice of Appeal on October 5, 2017. R., pp. 1167-1183.

Statement of Facts

In 2009 Gregory West, M.D. performed a right hip replacement on Plaintiff Phillip Eldridge. R., p. 264**.** In October 2011, Plaintiff Phillip Eldridge injured his right hip, and in November 2011, Mr. Eldridge went to see Dr. Gregory West, at which time Dr. West did a steroid injection of Mr. Eldridge's right hip, which provided some relief, however, Mr. Eldridge's hip pain continued. Supp. R., p. 264. On October 11, 2012, Defendant Lance Turpin, PA-C at Dr. West's office injected the trochanteris bursa with Depo Medrol to relieve Mr. Eldridge's hip pain. This gave him temporary relief, however, the pain persisted. Supp. R., p. 264. On October 16, 2012, Mr. Eldridge requested that Dr. West have fluid extracted from his right hip to see if there was infection. A culture was

done, and nothing grew. However, Mr. Eldridge was still in considerable pain, so it was decided that another extraction would be done on October 22, 2012. Supp. R., p. 264. On October 19, 2012, Lance Turpin, PA-C informed Mr. Eldridge that they wanted to cancel the extraction procedure claiming it had already been done, and the results showed no infection. At Mr. Eldridge's request, the procedure was done on October 22, 2012. Afterwards, Mr. Eldridge's hip pain was temporarily better. The fluid was brown in color, however a culture test showed that nothing grew, and there was no sign of infection. Despite this, because the fluid did not look right, they placed Mr. Eldridge on antibiotics. However, Mr. Eldridge's right hip did not improve. Supp. R., p. 264.

Dr. West concluded that Mr. Eldridge needed to have surgery on his right hip, which was scheduled for October 29, 2012. At no time prior to the surgery did Dr. West inform Mr. Eldridge of the consequences of not conducting a full removal of the hip, versus a partial removal of the hip, nor did Dr. West discuss the success or failure rates of removal of half Mr. Eldridge's hip, versus removal of his full hip. On October 29, 2012 at Mountain View Hospital, Dr. West operated on Mr. Eldridge's right hip. However, despite Dr. West concluding that a full exchange, or full hip replacement, was necessary for Mr. Eldridge, Dr. West only performed a half exchange or half hip removal. Subsequent to the surgery, Dr. West informed Mr. Eldridge that there was no infection, but he did find torn ligaments and some dead tissue. Dr. West surmised that body fluid that was trying to heal the hip kept building up and was causing pressure which was why the extractions did provide Mr. Eldridge with some relief. Dr. West indicated that he did not have to replace Mr. Eldridge's right hip, but he did change the metal ball to a larger ceramic one. Supp. R., pp. 108,

109; 119 and 265.

On November 4, 2012, while getting out of the shower, Mr. Eldridge dislocated his right hip, and was taken by ambulance to the emergency room at EIRMC. They placed the right hip back in and sent Mr. Eldridge home. However, the next day, on November 5, 2012, while getting off the couch to go to bed, Mr. Eldridge again dislocated his right hip and took another ambulance ride to EIRMC. Supp. R., p. 265. On November 6th Mr. Eldridge went to Dr. West's office, and while standing in the reception area his right hip popped out again. He was then taken to Mountain View Hospital. Supp. R., p. 265. At that time, Dr. West told Mr. Eldridge that he made a judgment call, and that he was wrong, as he had chosen not to use the existing ball and had replaced it with a larger ceramic one, which was why Mr. Eldridge's hip was not staying in and kept dislocating. Dr. West then stated that he would have to do another surgery, and replace the ball with different kind. Dr. West apologized to Mr. Eldridge, stating that he had committed an error and was sorry, but he needed to fix the right hip. Supp. R., p. 265-266.

Thereafter, from November 7, 2012 to March 13, 2013Mr. Eldridge underwent nine different procedures, from having his hip put back in place to having surgeries on his hip. Supp. R., pp. 83-88 and 266-268. On March 13, 2013 Mr. Eldridge underwent another surgery at EIRMC, to take his right hip out, replace it with an antibiotic shell for six weeks to hopefully get rid of the MRSA, and if that worked, Dr. West would perform another surgery and replace the temporary hip with a permanent hip. Mr. Eldridge was informed by Dr. West, EIRMC's staff and other medical providers that the MRSA was in the metal, and they could not get rid of it because there is no blood supply

in the metal. The surgery took four hours. Dr. West said that it was complicated by the fact that it was "really in there" and they had to split the bone to take the hip out. Supp. R., pp. 88 and 268.

During this time, Mr. Eldridge was getting weaker, and on medication, such that his memory was being affected, especially his short term memory. He was not able to put words or sentences together, hallucinated and did not make sense, became agitated and angry with Plaintiff Marcia Eldridge and the staff. As a result of his condition, Mr. Eldridge was feeling very depressed and felt as if he wanted to give up on life. Supp. R. P. 268.

On April 8, 2013, Dr. West informed Mr. Eldridge that he still had a pocket of infection in his right hip. Aside from this pocket of infection, Dr. West told Mr. Eldridge that his hip looked good, and he believed he could replace the temporary hip with a permanent hip in two weeks, but with the infection still persisting they would have to wait and see. Supp. R., p. 269. On April 24, 2013, Mr. Eldridge was scheduled for surgery to take the temporary hip out and do a tissue biopsy to determine whether the permanent hip could be put in, or whether he would be left without a hip and have to walk with a walker the rest of his life. Dr. West informed Mrs. Eldridge that he was not hopeful, as they had been treating the infection for over 120 days and it had not resolved. Supp. R., pp. 92 and 269. An eighth hip surgery was performed at EIRMC on April 24, 2013. After the surgery, Dr. West informed Mr. Eldridge that there was so much pus and infection in the hip that they had to pull all the metal out, otherwise it would never heal, due to what Dr. West believed was a metal allergy. Dr. West informed Mr. Eldridge that he would be without a hip the rest of his life, but that he should be able to walk with a walker, cane or crutches, but he would not be able to stand

for very long periods. Thereafter, Mr. Eldridge still remained in EIRMC during May and June, 2013, and in June, Mr. Eldridge finally started feeling better. Supp. R., p. 269. June 11, 2013, Mr. Eldridge was moved to South Davis Community Hospital, and was there for approximately one month. R., p. 972.

On July 3, 2013, Mr. Eldridge was transferred to the University of Utah hospital because Medicare would no longer pay for his care at South Davis Community Hospital Rehab. R., p. 972.

At the University of Utah, Dr. Erickson followed Mr. Eldridge's treatment, and was concerned as to why Dr. West allowed Mr. Eldridge to have no weight bearing restriction on his leg. Dr. Erickson called Dr. West to discuss this with him. However, Dr. Erickson was not satisfied after speaking with Dr. West, and took over Mr. Eldridge's care from Dr. West. On July 22, 2013 Dr. Kubiak at University of Utah Health Care was called in for an orthopaedic consultation, and also took over Mr. Eldridge's care from Dr. West. On July 22, 2013 Dr. Kubiak performed surgery, and removed the screws that were left in Mr. Eldridge's hip by Dr. West, because the screws were preventing the wound from healing, leaving a tunnel effect in the hip. Dr. Kubiak also cleaned the wound, and they stitched Mr. Eldridge up again. On July 26, 2013, Mr. Eldridge was released from University of Utah Health Care due to the fact that he was now using his Medicare Lifetime Reserve days. R., p. 973.

Mr. Eldridge was required to have infusions of antibiotics every day, and physical therapy three times per week. R., p. 974, ¶ 9. Mr. Eldridge has had a long and trying struggle with the

infection in his hip. He ultimately had to have the hip replaced with a spacer to prevent atrophy. He is currently unable to walk, and he will likely be on antibiotics for the rest of his life. R., pp. 974-983.

ISSUES ON APPEAL

1. Whether the District Court erred in granting dismissal of Plaintiffs' claims for negligent and intentional infliction of emotional distress, gross negligence and reckless, willful and wanton conduct, for the reason that Plaintiff alleged medical negligence per Idaho Code §§ 6-1012 and 6-1013.

2. Whether the District Court erred in granting summary judgment to Lance Turpin, PA-C and partial summary judgment to Gregory West, M.D. where it relied upon the affidavits of Mr. Turpin and Dr. West, both of whom submitted conclusory affidavits and failed to set forth any applicable standard of care in their affidavits pursuant to I.R.C.P. 56(c)(4).

3. Whether the District Court erred in limiting Plaintiffs' claim for damages to a small window of time from December, 2012 to April, 2013.

4. Whether the District Court failed to follow precedent set forth in *Dyet v. McKinley,* 39 Idaho 526, 81 P.3d 1236 (2003) when it granted Defendants' Motion in Limine limiting Plaintiffs to presenting to a jury only the amount paid to their medical providers, versus the amount billed.

5. Whether Mr. and Mrs. Eldridge are entitled to attorney's fees and costs on appeal, pursuant to Idaho Code Section 12-121 and Idaho Appellate Rules 40 and 41.

ARGUMENT

A. NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, GROSS NEGLIGENCE AND RECKLESS, WILLFUL AND WANTON CONDUCT HAVE NOT BEEN SUBSUMED BY IDAHO CODE §§ 6-1012 AND 6-1013.

When deciding a motion filed pursuant to Rule 12(b)(6), all inferences are viewed in favor of the non-moving party. *Fuchs v. State of Idaho Dep't of Idaho State Police*, 152 Idaho 626, 628-29, 272 P.3d1257, 1259-60 (2012)(citation omitted). The issues are whether the non-movant has alleged sufficient facts, which if true, would entitle him to relief and whether the non-movant is entitled to offer evidence to support the claims. *Id.* Further, it must appear beyond doubt that the plaintiff/non-movant can prove no set of facts in support of his claim. *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 946, 821 P.2d 996, 1001 (Ct. App. 1991). Additionally, "Every reasonable intendment will be made to sustain a complaint against a motion to dismiss for failure to state a claim."*Idaho Comm'n on Human Rights v. Campbell,* 95 Idaho 215, 217, 506 P.2d 112, 114 (1973); *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992).

1. Section 6-1012 does not preclude negligent or intentional infliction of emotional distress, gross negligence, reckless, willful and wanton conduct claims in medical malpractice cases.

In its Memorandum Decision and Order regarding this issue, the District Court conceded that it was true that Idaho appellate courts have not specifically decided the issue of whether causes of action for negligent or intentional infliction of emotional distress are subsumed by Idaho Code § 6-1012. R., p. 102. None of the cases cited in support of the motion to dismiss below held that claims for negligent and intentional infliction of emotional distress, gross negligence, reckless,

willful and wanton conduct claims, in addition to medical negligence were subsumed by § 6-1012 and § 6-1013 and that the only claim a plaintiff can pursue is a claim for medical negligence. The District Court considered *Hough v. Fry,* 131 Idaho 230, 953 P.2d 980 (1998); *Hoover v. Hunter,* 150 Idaho 658, 249 P.3d 851 (2011); *Litz v. Robinson,* 131 Idaho 282, 955 P.2d 113 (Ct. App. 1997); and *Jones v. Crawforth*, 147 Idaho 11, 205 P.3d 660 (2009). Those cases show the Idaho appellate courts have never held that claims for negligent and intentional infliction of emotional distress or gross negligence, reckless, willful or wanton conduct were subsumed or obviated by Idaho Code § 6-1012.[2] In *Hough,* the issue in that case was whether the plaintiffs who had sued the medical provider for malpractice could pursue a separate claim for ordinary negligence. The Court there held that ordinary negligence was subsumed under § 6-1012. *Id.,* 131 Idaho at 231-32, 953 P.2d 982-83. The *Hough* case is, obviously, distinguishable from this case, in that in *Hough* the plaintiffs did not allege intentional or negligent infliction of emotional distress, gross negligence, reckless, willful or wanton conduct. Further, there is no language whatsoever from *Hough* concluding that only claims under § 6-1012 or §6-1013 can be asserted.

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[2]In *Schmechel v. Dill,* 148 Idaho 176, 219 P.3d 1192 (2009), the only claim that the court held was subsumed in a medical negligence claim under § 6-1012 was negligence per se. *Id.,* 148 Idaho at 183-84, 219 P.3d at 1199-200. Further, nowhere in *Schmechel* did the court preclude application of negligent or intentional infliction of emotional distress, reckless, willful and wanton conduct claims. In addition, the same is true for *Kolln v. St. Luke's Reg. Med. Ctr.,* 130 Idaho 323, 940 P.2d 1142 (1997), where the court did not address or speak to negligent or intentional infliction of emotional distress, reckless, willful or wanton conduct, but, rather, only held that res ipsa loquitur could not be asserted in addition to medical negligence. *Kolln.,* 130 Idaho at 334, 940 P.2d at 1153.

Next, in *Hoover*, which is also factually distinguishable from the instant case, the Court held that the plaintiffs there, who had asserted a fraud claim, which was merely a restatement of their medical malpractice claim, was precluded. *Id.,* 150 Idaho at 660, 249 P.3d at 853. In this case, Plaintiffs have not asserted any claim for fraud, and nowhere in *Hoover* does the Court issue any holding stating that a party cannot pursue claims of negligent or intentional infliction of emotional stress, gross negligence, reckless, willful and wanton conduct in addition to medical negligence under § 6-1012 or § 6-1013. Further, in *Litz v. Robinson,* 131 Idaho 282, 955 P.2d 113 (Ct. App. 1997), the plaintiff, appearing pro se, did not assert a claim for intentional infliction of emotional distress. The Court found fault with the form of the plaintiff's pleadings, which the court concluded were pled as negligence, as opposed to an intentional tort. *Id.,* 131 Idaho at 284, 955 P.2d at 115. Eldridge asserted intentional infliction of emotional distress claim. R., p. 49.

2. Idaho case law allows for Plaintiffs to assert claims for gross negligence, reckless, willful and wanton conduct.

Jones v. Crawforth, 147 Idaho 11, 205 P.3d 660 (2009) supports Plaintiffs' position. In *Jones*, the Court did not make any holding concluding that gross negligence, reckless, willful and wanton conduct were subsumed by §§ 6-1012 and 6-1013. The Court addressed the admission of expert testimony related to "level of negligence that [the experts] saw as reckless." *Jones,* 147 Idaho at 18, 205 P.3d at 666. The Court's allowance of testimony as to the medical provider's reckless conduct supports Plaintiffs' position that gross negligence and reckless, willful or wanton conduct are separate claims that may be asserted in addition to medical negligence under the statute. This comports with the Court's decision in *Carillo v. Boise Tire Co., Inc.,* 152 Idaho 741, 751, 274 P.3d

1256, 1266 (2012), where it looked to precedent in noting the difference in reckless conduct and negligence, stating,

> **[R]eckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent**. *State v. Papse*, 83 Idaho 358, 362-63, 362 P.2d 1083, 1086 (1961) (quoting Restatement (First) of Torts 500 cmt. g (1934)). Thus, 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 arisen to the degree of recklessness.

Carillo, supra, 152 Idaho at 751, 274 P.3d 1266 (emphasis supplied). Likewise, in *Schmechel, supra,* 148 Idaho 176, 187, 219 P.3d 1192, 1203 (2009), a medical malpractice case, this Court found it was not an abuse of discretion for a trial court to determine it would instruct a jury on recklessness when the jury returned a verdict with a damages award in excess of the non-economic damages cap. *Schmechel,* 148 Idaho at 187, 219 P.3d at 1203. Based on the foregoing, the District Court erred in concluding the only claims Eldridge could assert were sections 6-1012 and 6-1013.

B. MR. TURPIN'S AND DR. WEST'S AFFIDAVITS VIOLATE I.R.C.P. 56(C)(4).

Rule 56(c)(4) states that affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Thus, Rule 56(c)(4) requires an adequate foundation be laid for the testimony provided in an affidavit. *Pearson v. Parsons*, 114 Idaho 334, 340, 757 P.2d 197, 203 (1988). "An adequate foundation is **not** laid, however, by the mere inclusion of conclusory statements." *Id.*

[Emphasis in original]. A conclusory affidavit fails to show the absence of a genuine issue of material fact. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 508, 600 P.2d 1387, 1390 (1979). Conclusory or speculative statements do not satisfy admissibility or competency requirements under Rule 56(c)(4). *Kolln v. St. Luke's Regional Medical Ctr.,*130 Idaho 323, 940 P.2d 1142 (1997).

1. Dr. West's and Mr. Turpin's affidavits do not comply with Rule 56(c)(4).

Paragraphs 3, 4, 5 and 6 of both Dr. West's and Mr. Turpin's affidavits (R., pp. 130-131 and 135-136) lacked foundation and contain conclusory statements. Dr. West and Mr. Turpin failed to identify what the local community standard of care was from 2009 through 2013. Dr. West averred that he is familiar with the local community standard of care, and in paragraph 4 of his affidavit he states: "The care and treatment for Mr. Eldridge's right hip from 2009 through 2013 complied with the local community standard of care applicable to an orthopedic physician practicing in Idaho Falls, Idaho." R., p. 135. In the next paragraph Dr. West states, "there is nothing I did or allegedly failed to do that caused the damages alleged in the Eldridges' Complaint." R., p. 136. Nowhere does Dr. West explain what treatment he provided to Mr. Eldridge, what the local community standard of care is, or how he complied with that standard of care in treating Mr. Eldridge.

Likewise, Lance Turpin, PA-C issued conclusory statements. In paragraph 4 of his affidavit he states: "The care and treatment I provided Mr. Eldridge in 2011 and 2012 complied with the local community standard of care applicable to a physicians assistant practicing in Idaho Falls, Idaho." R., p. 131. Mr. Turin went on to aver, "there is nothing I did or allegedly failed to do that caused the damages alleged in the Eldridges' Complaint." R., p. 131. Nowhere within Mr. Turpin's

affidavit does he attempt to explain what treatment he provided to Mr. Eldridge, what the local community standard of care is, or how he complied with that standard of care in treating Mr. Eldridge.

2. The Court should follow *Mattox* and overrule *Foster v. Traul.*

In *Mattox v. Life Care Centers of America, Inc.,*157 Idaho 468, 337 P.3d 627 (2014), this Court held that an affidavit, from a defendant in a medical malpractice action, must allege "facts which, taken as true, show that the proposed expert has actual knowledge of the applicable standard of care." *Mattox, supra.,* 157 Idaho at 474, 337 P.3d at 633. In addition, at footnote 1 in the *Mattox* decision, the Court noted that,

> We do, however, observe that whether an affidavit is submitted in support of, or in opposition to, a motion for summary judgment, it must contain admissible evidence. **In a malpractice case that would include at a minimum the identification of the standard(s) of care at issue in the case.**

*Mattox, supra.,*157 Idaho at 480, note 1, 337 P.3d at 639, note 1. Further, this Court stated:

> The guiding question is simply **whether the affidavit alleges facts** which, if taken as true, **show the proposed expert has actual knowledge of the applicable standard of care.** In addressing that question, courts must look to the standard of care issue, the proposed expert's grounds for claiming knowledge of that standard, and determine – employing a measure of common sense – whether those grounds would likely give rise to knowledge of that standard.
> ***
> **[W]hether an affidavit is submitted in support of, or in opposition to, a motion for summary judgment, it must contain admissible evidence. In a malpractice case that would include at a minimum the identification of the standard(s) of care at issue in the case.**

Mattox, supra., 157 Idaho at 474, 480, note 1, 337 P.3d 633, 639, note 1. [Emphasis supplied].

While the Court in *Mattox* did not expressly overrule its decision in *Foster v. Traul*, 141 Idaho 890, 120 P.3d 278 (2005), where the Court did not require a defendant medical provider to state the applicable standard of care, the Court should follow its rationale from *Mattox* and overrule *Foster.* The *Mattox* rationale comports with Rule 56(c)(4); *Foster* does not. Moreover, defendant medical providers must be held to the same standard as plaintiffs. Rule 56(c)(4) must be applied equally to all parties in a medical malpractice, and defendant medical providers must not be allowed an exception to that rule.

3. Dr. West and Mr. Turpin were given an improper inference that their affidavits complied with Rule 56(c)(4), which is not proper on summary judgment.

It is well settled on summary judgment, that the non-moving party is to be given every inference, and the moving party is not entitled to any inference from the record. As this Court has stated:

> As we have reiterated in our recent cases, upon a motion for summary judgment, all disputed facts are liberally construed in favor of the non-moving party. **The burden of proving the absence of a material fact rests at all times upon the moving party. This burden is onerous because even "[c]ircumstantial evidence can create a genuine issue of material fact." Moreover, reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion.** If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, **a summary judgment must be denied because all doubts are to be resolved against the moving party. The requirement that all reasonable inferences be construed in the light most favorable to the non-moving party is a strict one.** Nevertheless, when a party moves for summary judgment the opposing party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. Notwithstanding the utility of a summary judgment, **a motion for summary judgment should be granted with caution.**

McCoy v. Lyons, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991)[Internal citations omitted][Emphasis supplied]. The District Court, at page 13 (R., p. 311) gave the inference that Dr. West "would know" the standard of care for hip surgery and that Mr. Turpin "would know" an orthopedic Physician Assistant's standard of care. Those are inferences that are based upon non-existent statements of what those respective affiants failed to provide in their affidavits as to what the local community standard of care was. This is in direct contravention to the well settled summary judgment maxim that inference is only to be made in favor of the party resisting the motion, and is not to be given to the moving party.

C. THE DISTRICT COURT ERRED IN LIMITING PLAINTIFFS' DAMAGES.

On November 29, 2016, Dr. West and Summit submitted a Fourth Motion for Summary Judgment. R., pp. 600-601. In their motion, Dr. West and Summit argued that they were entitled to summary judgment with regard to any damages other than the surgeries Mr. Eldridge underwent between December 21, 2012 and March 13, 2013, as they claimed Plaintiffs failed to offer any expert opinion that other damages were caused by delaying the explant of Mr. Eldridge's hip. On February 15, 2017, at the hearing on Defendants' Fourth Motion for Summary Judgment, the District Court erroneously concluded that there was insufficient expert testimony as to causation of damages after April 24, 2013. R., pp. 168-169.

This is not a complex case. In simple terms, Dr. West's medical negligence in treating the MRSA infection caused the damages suffered by Mr. Eldridge. Dr. Giordani has opined that once Dr. West made a diagnosis that Mr. Eldridge had MRSA, the standard of care was for Dr. West to

remove Mr. Eldridge's hip, and that had Dr. West not committed medical negligence, Mr. Eldridge would not have needed the subsequent surgeries and treatment. R., p. 710. Likewise, Dr. Giordani's opinions have sufficient foundation, he has disclosed his conclusions as to Dr. West's apparent negligence, and that had Dr. West not committed medical negligence in treating Mr. Eldridge's MRSA infection, Mr. Eldridge would not have needed the treatment he received thereafter. R., p. 710.

There is no dispute that Mr. Eldridge contracted MRSA. In his second affidavit, Dr. West averred that on January 30, 2013, Dr. West noted Mr. Eldridge's sedimentation rate and CRP rate "started to bump up again" and that "given the worsening labs, I wanted to make sure that there was not a new abscess that had been untreated." *Dr. West Aff.,* ¶ *45.* Supp. R., p. 87. On February 9, 2013, Dr. West did "another VAC change" with "a new string of beads . . .placed." *Dr. West Aff.,* ¶ *47.* Supp. R., p. 88. It was not until March 2, 2013 that Dr. West decided he would recommend explanation. *Dr. West Aff.,* ¶ *49.* Supp. R., p. 88.

Further, in Dr. Giordani's review of the records, and his discussions with Dr. Selznick, he stated that he reviewed Dr. West's deposition, Dr. West's second affidavit, as well as the medical records identified in his prior affidavit and declaration, as well as those attached to his declaration in opposition to Dr. West's and Summit's third motion for summary judgment. He testified to this at page 55, lines 13-19, page 58, line 22 to page 59, line 20, page 74, lines 4-7 of his deposition, that once Dr. West found that Mr. Eldridge had MRSA, which he averred, at paragraph 42 of his affidavit, Mr. Eldridge acquired after the December 3, 2012 procedure, Dr. West breached the

standard of care for definitive treatment of an MRSA infected total hip arthroplasty by failing to perform a full explant or complete removal of Mr. Eldridge's hip. R., pp. 635-638. Dr. West treated the MRSA, inappropriately, initially with antibiotics and then antibiotic beads on December 18 and 21, 2012 and January 6, February 9 and February 19, 2013 as he averred at paragraphs 38 and 43-48 in his affidavit. Supp. R., pp. 85-88.

1. Mr. Eldridge presented expert testimony establishing causation of damages after April 24, 2013.

Dr. Giordani's affidavit, declarations and his report all establish that Dr. West was negligent in his treatment of Mr. Eldridge. Further, Dr. Giordani's opinions establish that Dr. West's negligence was the cause of Mr. and Mrs. Eldridge's damages.

a. The District Court previously denied summary judgment to Defendants Dr. West and Summit based on its conclusion that Dr. Giordani's opinion that Dr. West breached the standard of care in not removing Mr. Eldridge's hip after he diagnosed him with MRSA was a jury question.

The District Court had already concluded that it was a jury question as to whether Dr. West was negligent in treating Mr. Eldridge's MRSA infection. *Memorandum Decision, p.18.* R., p. 488. Dr. West's and Summit's position that there is no foundation for Dr. Giordani's opinion, is belied by not only the District Court's prior decision, but the record. Dr. Giordani's opinions have been that but for Dr. West's negligence, Mr. Eldridge would not have needed the subsequent surgeries and then potential re-implantation of a new hip. It must be remembered, as stated by this Court in *Sheridan v. St. Luke's Reg. Med. Ctr.*, 135 Idaho 775, 25 P.3d 88 (2001):

> Unlike the elements of duty and breach of duty, **there is no statutory requirement explicitly stating proximate cause in medical malpractice cases must be shown by direct expert testimony.** Therefore, testimony admissible to show proximate cause in a medical malpractice case, like any other case, is governed by the rules of evidence regarding opinion testimony by lay witnesses and experts under Idaho Rules of Evidence 701 and 702.

Id., 135 Idaho at 785, 25 P.3d at 98 [emphasis added]. Further, the Court held:

> Furthermore, according to our precedent, **proximate cause can be shown from a "chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.**
> * * *
> [A plaintiff] was not required to prove his case beyond a reasonable doubt, nor by direct and positive evidence. **It was only necessary that he show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. "If the rule of law is as contended for by defendant and appellant, and it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science**. [Internal citations omitted].

Id., 135 Idaho at 785-86, 25 P.3d at 98-99. Eldridge needs only to establish proximate cause, through a chain of circumstances, that Dr. West's actions and omissions were a substantial factor in bringing about his injuries. *Coombs v. Curnow*, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009) [emphasis added]; *Weeks v. EIRMC*, 143 Idaho 834, 839, 153 P.3d 1180, 1185 (2007). Proximate cause "**can be shown by a 'chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.'"** *Weeks, supra,* 143 Idaho at 839, 153 P.3d 1185, *citing, Sheridan, supra,* 135 Idaho at 785, 25 P.3d at 98 [emphasis added].

Additionally, expert testimony is admissible pursuant to the requirements of Idaho Rules of

Evidence 702 and 703. Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 provides, in pertinent part, as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Expert testimony in medical malpractice cases is admissible when:

> '[T]he expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect.'

Coombs, supra, 148 Idaho at 140, 219 P.3d at 464 (*quoting, Ryan v. Beisner*, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct. App. 1992)). Admissibility of an expert's opinion "depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion." *Id.* Moreover, where an expert's reasoning or methodology is scientifically sound and "based upon a 'reasonable degree of medical probability'" and not a mere possibility, such testimony will assist the trier of fact. *See, Bloching v. Albertson's, Inc.,* 129 Idaho 844, 846-47, 934 P.2d 17, 19-20 (1997) (*quoting,*

Roberts v. Kit Mfg. Co., 124 Idaho 946, 948, 866 P.2d 969, 971 (1993)).[3]

In *Weeks, supra*, the Idaho Supreme Court held that a district court erred in granting summary judgment, when the district court excluded expert testimony. The Court reasoned that where the expert based his opinions on his experience and research, and made inferences from facts known to him, it was reversible error to grant summary judgment. *Weeks, supra,* 143 Idaho at 839-40, 153 P.3d at 1185-86. Also in *Weeks*, the Court followed the well-settled principle that to survive summary judgment, the plaintiff does not need to rule out all factors, but only needs to establish proximate cause by showing, through a chain of circumstances, the defendant's actions and omissions were a substantial factor in bringing about the injuries. *Id.,* 143 Idaho 834, 839, 153 P.3d 1180, 1185 (2007).

b. Dr. Giordani's opinions as to causation and damages are admissible.

The record shows Dr. Giordani's opinions are admissible under *Coombs* and *Weeks,* such that Eldridge met the substantial factor test. First, Dr. Giordani relied upon facts that other experts rely upon; that is, he reviewed Mr. Eldridge's medical records, including, not only records from Dr. West and EIRMC from December, 2012 through April, 2013, but also records from South Davis Community Hospital, University of Utah and Dr. Aaron Altenburg. R., pp. 181, 329 and 704. Based on his experience and research, like the expert witness in *Weeks*, Dr. Giordani properly concluded Dr. West did not properly treat the MRSA infection and Mr. Eldridge was then required

[3]In *Bloching*, this Court disallowed a physician's testimony that was "possible" and not based upon a "reasonable degree of medical probability." *Id.,* 129 Idaho at 846, 934 P.2d at 19. Dr. Giordani's opinions are based on a reasonable degree of medical certainty. R., p. 709.

to have subsequent treatment as a result of that negligence. Again, Mr. Eldridge only has to establish that only that Dr. West's conduct was a substantial factor in causing his injuries. Dr. Giordani's opinions establish Mr. Eldridge met that test, and, at the very least, raised genuine issues of material fact.

Moreover, Dr. Giordani identified the records he's reviewed, the opinions he has reached and the basis for his opinions. Dr. Giordani's opinions were based on his review of the records, set forth in his prior deposition testimony, declaration, affidavit and report. Dr. Giordani has consistently opined that once Dr. West diagnosed Mr. Eldridge with MRSA, which the records show occurred on December 21, 2012 the standard of care was to remove the hip, which Dr. West did not do. Dr. Giordani testified to this in his deposition. *See Declaration of Javier L. Gabiola in Opposition to Fourth Motion for Summary Judgment, Exhibit A (Dr. Giordani Deposition), p. 53, ll. 17-24; p. 55., ll.13-19; p. 58, l.22-p.59, l.1;p. 71, ll. 11-19; p. 74, ll.4-6.* R., pp. 965-971. While Dr. West concludes that MRSA was present already, and there was nothing he could have done to alter the outcome, that is belied by Dr. Giordani. Dr. West admitted that he treated with antibiotics from December 18, 2012, and did not recommend removing the hip until March 13, 2013. *Dr. West Aff.,* ¶¶ *38-44, 47-48.* Supp. R., pp. 85-88. Again, once Dr. West diagnosed MRSA, total removal of the hip was the only way to properly treat that infection. Dr. West did not do the removal on December 21, 2012, rather, he waited until March 13, 2013 before he even considered doing a total removal of the hip prosthesis. Further, **Dr. Giordani opined that it was more probable than not that Mr. Eldridge would not have needed the subsequent surgeries he had.** R., p. 709. Based on this

record, a genuine issue of material fact exists as to Dr. West's medical negligence, and the damages suffered by Mr. Eldridge by way of the subsequent treatment he was required to have due to Dr. West's negligence.

c. Dr. Giordani's opinions are not limited to the time period of December 20, 2012 to April 24, 2013.

The District Court inaccurately concluded that Dr. Giordano's opinions are limited to December 20, 2012 to April 24, 2013. However, there is no case law to support that position. Mr. Eldridge need only prove that Dr. West's medical negligence was a substantial factor in causing his injuries. *See Combs,* 148 Idaho at 140, 219 P.3d at 464 (2009); *Weeks,* 143 Idaho at 839, 153 P.3d at 1185 (2007). In addition, Dr. Giordani has made in abundantly clear, as the District Court cited to its prior decision on July 23, 2016, that but for Dr. West's medical negligence, Mr. Eldridge would not have required subsequent surgeries including re-implantation. Mr. Eldridge need only establish those two things, nothing more. In addition, Dr. West and Summit have been provided copies of the records that establish Mr. Eldridge did receive subsequent treatment beyond the explant on March 13, 2013. As indicated in the Declaration of Phillip Eldridge filed on January 20, 2017, from June 2013, to December 2016, Mr. Eldridge endured several surgeries and medical procedures to eradicate the MRSA and finally have a new hip implanted. *See Declaration of Philip Eldridge,* ¶¶*2-63.* R., pp. 972-984.

d. Dr. Giordani has provided sufficient foundation to testify that the only way to treat a MRSA infection is to do a full explant, and because Dr. West did not do that, Mr. Eldridge suffered damages in being required to have subsequent medical procedures and treatment.

As this Court stated in *Coombs* and *Weeks,* all Mr. Eldridge has to establish is that Dr. West's actions were a substantial factor in bringing about his injuries. *Coombs, supra and Weeks, supra.* Dr. Giordani's opinions, which the District Court previously found were based upon sufficient foundation for a jury to decide the issue, are, again, based upon his review of the records, as well as his experience, which lead him to conclude that, again, but for Dr. West's medical negligence, Mr. Eldridge would not have required subsequent surgeries or the potential for re-implantation. Once again, Dr. Giordani testified, regarding the MRSA as follows:

> And then afterwards, he ends up with a draining wound that eventually grows MRSA, and then the MRSA is not treated with an explant of the prostheses, but it's treated with antibiotic beads, that are not going to treat the MRSA.
>
> **So I don't understand why you have a MRSA-positive wound that goes down to a hip joint, and why wouldn't you just do an explant?**

Dr. Giordani's Deposition Transcript, Page 53 line 17-24 [emphasis supplied]. R., p. 966. Dr. Giordani further testified:

> Yeah. And even those – I didn't go into that for this reason. But I have a problem with the way the antibiotic spacers were placed in a MRSA wound with a total hip underneath that. **That MRSA-positive draining wound from a total hip replacement requires an explant. There is no way to treat that. We don't have a magic bullet for that yet.**

Dr. Giordani's Deposition Transcript Page 55 lines 13-19 [emphasis supplied]. R., p. 967. Further, Dr. Giordani's testimony was as follows:

> Q. And then it sounds like you have a problem with the treatment of when the MRSA was diagnosed and how Dr. West treated that?
>
> A. Correct.

Dr. Giordani's Deposition Transcript page 56 lines 14-17. R., p. 967. Dr. Giordani further explained:

> Well, you can say that to the patient, but you also tell them that if they decide not to have an explant, that they may get sick and die, because their infection is that serious. And the only chance they have of possible cure, and not, like I told you, 80 to 90 percent at best, **is by explantation**."
> ***
> **If it's a MRSA bacteria, I would say, you need an explant. There is no way to take care of this except for explantation.** That is your best chance of getting a cure, antibiotics based or IV antibiotics."

Dr. Giordani's Deposition Transcript Page 59 lines 15-20; page 74 lines 4-7 [emphasis supplied]. R., pp. 968 and 970.

In the recent decision in *Samples v. Hanson,* 161 Idaho 179, 384 P.3d 943 (2016), this Court reversed a district court's decision granting summary judgment and striking the plaintiff's medical expert's opinion. This Court in *Samples* noted the following as it pertains to providing adequate foundation under Idaho Code § 6-1013;

> As we recently stated , "(t)his Court does not require that an affidavit include particular phrases or state that the expert acquainted himself or herself with the applicable standard of care in some formula like manner in order to establish adequate foundation under Section 6-1013." *Mattox,* 157 Idaho at 473-74, 337 P.3d 632-33."

Samples, at 183. The Court then went on to provide the rational for reversing the district court's decision striking the plaintiffs expert's affidavit, noting that where the defendant doctor was a member of the American College of Surgeons, which is held to a national board certification process, and the plaintiff's medical expert was also certified as a member of that national entity, it

was sufficient for the plaintiff's expert to lay foundation as to the famarility of the local standard of care. See *Samples*, at 184. The Court then reasoned that where the defendant provider was a member of the national board that certified physicians or doctors and the plaintiff's expert being a member of that board, the standard of care would be the same as practiced by either provider. In that regard the Court held as follows:

> Additionally, the standard of care Dr. Birkenhagen attributes to surgeons who are members of the American College of Surgeons and have been board certified is largely a matter of common sense. He states:
>
> Among other things, this standard of care requires that the surgeon stay with his patient post-surgery and attend to, examine, and follow closely certain indications of infection or complication that will lead to patient sepsis. Those indicators include conducting and reviewing tests including blood work for changes in white blood count and "bands" revealed in the blood work indicative of infection. The standard of a board certified surgeon and a member of the American College of Surgeons also dictates the use of a full spectrum anaerobic antibiotic during post-surgery recovery of the patient to combat or prevent infection. When these factors and others indicate post-surgical complications and/or infection, a surgeon, especially one that is board certified and a member of the American College of Surgeons, would be expected to examine and/or reopen the patient's surgical site to rule out infection and/or sepsis. This is especially true in a patient such as David Samples where Dr. Hanson tore the transverse colon while performing a laparoscopic cholecystectomy and, therefore, was aware that stool and other contaminants had been allowed into Mr. Samples' belly. This standard of care was not met by Dr. Hanson in his treatment of David Samples in 2009. **This standard of care is universal of any surgeon**, but especially of a board certified surgeon and member of the American College of Surgeons. It also was the standard of care that was in effect in Blackfoot, Idaho upon my arrival in 2011.
> ***
> **This is not a complicated standard of care**. It merely calls for basic post-operative care to ensure that the patient does not suffer infection or

> complications. It is not a standard of care that requires detailed specialization, intricate treatments, expensive equipment, or detailed knowledge of drug interactions. **One would hope that any surgeon, regardless of whether operating in the backwoods or a metropolitan hospital, would monitor the patient post-operatively to ensure a decent recovery without infection or complications. That didn't happen with Mr. Samples, as outlined by Dr. Birkenhagen. We hold that Dr. Birkenhagen's affidavit sufficiently showed that he had actual knowledge of the applicable standard of care and, therefore, the district court abused its discretion in concluding that the Samples had not laid an adequate foundation for his testimony.**

Samples, at 9-10 [emphasis supplied].

Dr. Giordani is a member of the American Board of Orthopaedic Surgery. *See Declaration of Julian E. Gabiola in Support of Defendants Gregory West, M.D.'s and Summit Orthopaedics Specialists, LLC's Fourth Motion for Summary Judgment, Exh. D.* R., p. 714. Dr. West is also a member of that national medical entity. Dr. West testified that he has been a member since July 10, 1992 and re-certified his membership. *See Gabiola Declaration, Exhibit B (Dr. West's Deposition), page 11 line 14 to page 15 line 14.* R., p. 963. In fact, Dr. West also testified that in order to practice at Eastern Idaho Regional Medical Center, he had to be both board eligible and certified within a certain period of time. *Dr. West's deposition, page 14 line 17 to page 15 line 5*. R., p. 964. Dr. West then further testified that the American Board of Orthopaedic Surgeons is not limited to surgeons or physicians in Idaho, that other physicians or surgeons from other states, such as California, are also certified with that entity through the same process he went through in obtaining his certification. *Dr. West's deposition, page 15 line 6 through page 17 line 20*. R., p. 964. Thus, for Dr. West to claim that he is qualified to render opinions in this matter, and Dr. Giordani is not,

is in direct contravention in the holding in *Samples*. The Court has made it very clear that Dr. West's and Summit's hyper-technical arguments have no place in a motion for summary judgment in medical malpractice cases. Refreshingly, the Court has stated that these cases must be decided, not with "magic words" but with basic facts and inferences. For the District Court to discount Dr. Giordani's credentials violates the Court's decision in *Samples.*

Moreover, below, Dr. West and Summit submitted improper law as it pertains to the admissibility of expert testimony, when they conclude that Dr. Giordani is not an expert in MRSA infection. Again, the Court's decision in *Samples*, belies this position. Dr. West was trained and certified with the American Board of Orthopaedic Surgery, as was Dr. Giordani, as it pertains to the treatment of MRSA infections. Dr. Giordani is trained the same as Dr. West, and as Dr. West admitted, Dr. Giordani treats patients with MRSA. Mr. Eldridge has met the applicable standard, which is that Dr. West's negligence was a substantial factor in causing Mr. Eldridge's injuries, subsequent medical treatment and damages.

e. Dr. Giordani's opinions are admissible, as they are based upon his review of the records and his experience.

As Mr. Eldridge's history provides, Mr. Eldridge was not free of MRSA after Dr. West did the explant, but continued to suffer from MRSA and endured a long and painful treatment process to eradicate it. *See Philip Eldridge Dec,* ¶¶*2-63.* R., pp. 972-984. Dr. Giordani's opinions are that the only way to treat a MRSA infection once it has been diagnosed is to do a full explant - that is, to remove all of the hardware so as to get rid of the infection entirely, and had Dr. West initially done that, Mr. Eldridge would not have needed the subsequent treatment he received.

Again, Mr. Eldridge only needs to establish that Dr. West's conduct was a substantial factor, not the only factor, in bringing about his injuries. *See Coombs,* 148 Idaho at 140, 219 P.3d at 464; *Weeks,* 143 Idaho at 839, 153 P.3d at 1185 (2007). The Court reaffirmed this in *Nield v. Pocatello Health Services, Inc*., 156 Idaho 802, 332 P.3d 714 (2014). In *Nield,*, the Court held to the long-standing rule that proximate cause can be shown from a "chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable." *Nield*, 156 Idaho at 812, 332 P.3d at 724. Ultimately, Dr. Giordani's opinions are admissible. Dr. Giordani was trained the same as Dr. West, both being certified by the American Board of Orthopaedic Surgery. Further, Dr. Giordani has reviewed the records, and based on the national board standard, reached the conclusion that the only way to treat a MRSA infection as was in Mr. Eldridge's case, was to do a full explant.

D. AS *DYET V. MCKINLEY* IS STILL GOOD LAW, THE DISTRICT COURT ERRED IN PRECLUDING ELDRIDGE FROM SUBMITTING THE TOTAL BILLED MEDICAL EXPENSES.

The District Court did not follow Stare Decisis and ignored the rule of law announced in *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003). Under *Dyet*, jurors are to be shown the invoiced amount of medical expenses, not "write-offs." Only in post trial proceedings may a trial court consider the write-offs and potentially reduce a jury verdict. *Dyet*, 139 Idaho at 528-29 81 P.3d at 1238-39.

Dyet is still good law. Stare Decisis dictated that the District Court follow *Dyet* and allow Eldridge to submit the invoiced or total billed expenses, not what was actually paid. Ultimately, the

District Court bought into public policy and used that as a reason to ignore *Dyet.* This Court recently held: "In Idaho 'the rule of stare decisis dictates that we follow [controlling precedent] unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principals of law and remedy continued injustice.'" *Farm Bureau Mut. Ins. v. Cook,* Dkt. 44897 at Page 6, citing *Houghland Farms, Inc., v. Johnson,* 119 Idaho 72, 77, 803 P.2d 978, 983 (1990). The following portions of this brief will illustrate the history related to the collateral source rule, statutory revision to the historic rule, the significance of this Court's decision in *Dyet* and its underlying reasoning, and why *Dyet* is still good law. And the practical litigation concerns and good public policy reasons why the court should continue to follow its decision in *Dyet.*

1. The collateral source rule and its legislative modification.

Before 1990, Idaho adhered to the common law collateral source rule. *See Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 352, 766 P.2d 1277, 1234 (1988), overruled on other grounds by *Greenough v. Farm Bureau Mutual Insurance Co. of Idaho,* 142 Idaho 589, 592-93, 130 P.3d 1127, 1130-31 (2001)). It applied to prevent tortfeasors from receiving a credit reducing a verdict against it when an injured party received payments from a third party that were also intended to compensate the harm caused by the tortfeasors. *See Carrillo, supra,* 152 Idaho at 753, 274 P.3d at 1268. Further, under the rule, the Plaintiff was allowed to make a full recovery against a tortfeasor even where a plaintiff received a double recovery. *Brinkman* 115 Idaho at 352, 766 P.2d at 1233.

The common law rule was modified in 1990. Idaho Code § 6-1606 was enacted to "modify

the collateral source rule of evidence in certain circumstances to prevent people from being paid twice for the same damages." 1990 Idaho Sess. Laws Ch. 131, House bill No. 745, Statement of Purpose. I.C.§ 6-1606 "mandates that a tortfeasor is liable only for the damages that remain after most forms of collateral source payments are considered." *Carrillo,* 152 Idaho at 753, 274 P.3d at 1268. § 6-1606 provides, in part:

> Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent that the award includes compensation for damages which have been compensated independently from collateral sources.

Thus, evidence as to enumerated collateral source payments is not admissible at trial but only considered by the judge after jury has rendered an award. The statute's purpose is to prevent a double recovery. *Carrillo*, 152 Idaho at 753, 274 P.3d at 1268, citing *Dyet* 139 Idaho at 529, 81 P.3d at 1239. The statute also provides that collateral sources "shall not include benefits paid under federal programs which by law must seek subrogation, death benefits, paid under life insurance contracts and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract." Thus, payments made by Medicare are not collateral sources under the statute as they are "federal programs which by law must seek subrogation."

2. The *Dyet* decision.

In *Dyet* this Court considered "whether or not Medicare write-offs are a collateral source under § 6-1606 or, if not, whether the write-offs should be treated the same as a collateral source. *Id* at 529, 81 P.3d at 39. This Court held:

> By treating a Medicare write-off **as a collateral source** the danger of prejudice contemplated I.R.E. 403 is avoided, and the jury will not be influenced by the existence of Medicare. At the same time, the ploy of I.C. § 6-1606 contained in both the statute and the legislative history to prevent a double payment for the damages is preserved. Although the write-off is not technically a collateral source, it is the type of wind fall that I.C. § 6-1606 was designed to prevent."

Id. [Emphasis applied]. Thus, while the Idaho Legislature never provided any statutory directives for handling evidence of insurance adjustments, this Court determined that had the legislature done so, it would have looked just liked the way the legislature handled collateral sources under § 6-1606.

It is recognized that the amount of reasonable medical expenses is a relevant and important factor which influences juries in their assessment of general damages. See *Mascarenas v. Gonzalez,* 497 P.2d 751 (N.M. Ct. App. 1972); *Malaver v. Garis,* 138 S.E. 2d 435 (Ga. Ct. App. 1964); *Stanley v. Walker* 906 N.E. 2d 852, 860 (Ind. 2009) (Dickson, J. Dissenting). When a plaintiff's medical expenses increase or decrease, the corresponding effect on the award of general damages is often observed. *Stanley,* 906 N.E. 2d at 860. The issue as to the influence of medical expenses on a jury's determination of general damages was considered by this court in *Dyet*. *Id.,*139 Idaho at 529, 81 P.3d at 1239. Only allowing the jury to see the post-adjustment amount, as opposed to the full market amount, paid toward medical expenses artificially and arbitrally depresses general damages awards.

Dyet established, as an evidentiary matter, billed amounts are admissible evidence, not what was actually paid. To assert that the adjusted rate or paid amount as the reasonable value of medical service is to say that the billed amount is unreasonable. On this issue, the Supreme Court of Tennessee stated a well-articulated position in support of its decision to continue to follow the

collateral source rule, and rejecting the "actual amount paid" approach. *Dedmon v. Steelman*, 535 S.W. 3d 431 (Tenn.2017). The Tennessee Supreme Court reasoned:

> We do not pretend to fully understand medical economics or the pricing of medical services in today's environment. Even without a full understanding, however, it is evident that medical expenses cannot be valued in the same way one would value a house or a car, pegging the "reasonable value" at the fair market value, that is, the amount a buyer is willing to pay. Healthcare services are highly regulated and rates are skewed by countless factors, only one of which is insurance. **Under the circumstance, equating the value of medical services to the amount the medical provider accepts from an insurance company is simplistic at best and misleading at worst."**

Dedmon, 535 S.W. 3d at 461 [Emphasis supplied].

3. *Dyet* has not been overruled.

Again, *Dyet* is still good law. One year after *Dyet* was issued, this Court decided *Slack v. Kelleher*, 140 Idaho 916, 104 P.3d 958 (2004). *In Slack,* the Court upheld and reinforced *Dyet* while rejecting the request that it overrule *Dyet's* holding that insurance adjustments be treated like a collateral source. *Slack* at 925, 104 P.3d at 967. Despite this, below Dr. West and Mr. Turpin asserted that *Verska v. St. Alphonsus Reg'l Medical Ctr.,* 151 Idaho 889, 265 P.3d 502 (2011), overturned *Dyet.* However, *Verska* had nothing to do with § 6-1606, collateral sources or the admissibility of insurance adjustments at trial. See *Verska,* 151 Idaho at 891, 265 P.3d at 504. *Verska* pertained to a dispute between a physician who had lost staff privileges at a hospital. When Dr. Verska sought contents of a peer review, the hospital refused to disclose it in the discovery pursuant to the peer review statute. *Id,* at 891-92, 265 P.3d at 504-05. Dr. Verska then argued that interpreting the peer review statute in such a way created an "absurd result" from the reading of the plain language of the statute. This Court acknowledged that it had previously recited an "absurd

results" rule existed, but announced that the law was a misstatement of the law. *Verska.,* at 894-95, 265 P.3d at 507-08. This Court then offered a string cite to about 50 cases in which the "absurd results" rule was mentioned, including *Dyet. Id.,* at 895-96, 265 P.3d at 508-09. That was the only time *Dyet* was mentioned in *Verska.*

Had this Court, in *Verska,* truly overturned *Dyet,* then its decision in *Slack* is no longer good law as it relates to adjustments. However, there is nothing to suggest that *Slack* has been overturned. Conversely, if *Slack* is still good law, then *Dyet* is also still good law. Six months after this Court's *Verska* decision, it issued its decision in *Carrillo*, *supra*. There, this Court cited to *Dyet* several times in several places without any indication overruling *Dyet. Carrillo*, 152 Idaho at 753, 756, n.5, 274 P.3d at 1268, 1271, n.5. Likewise, stare decisis mandates that the Court follows its decision in *Slack*, where this court held that it was "not persuaded that *Dyet* was incorrect." *Id,* at 925, 104 P.3d at 967. This court in *Slack* further unequivocally ruled that "the District Court erred in denying [defendant's] Motion to treat the write-downs as a collateral source". *Id.* This court in *Slack* further described its earlier ruling in *Dyet* in mandatory language stating that in *Dyet* "we held that such write downs are to be treated as collateral source." *Id.*

4. *Dyet* is good public policy.

There are several good public policy reasons as to why the court should continue to adhere to its decision in *Dyet.* The first is that *Dyet* is an objective standard. IDJI 9.01 provides that the reasonable value of medical services is the measure of damages related to medical expenses. Medical providers testify the invoiced amounts are reasonable as opposed to fluctuating amounts

based upon whether there is an insurance program that provides any contractual basis for an adjustment. The testimony of a medical provider stating that the value of the medical services represents the objective actual market value is what the jury should hear, as opposed to what an insurance company has agreed to pay by way of an adjustment.

Dyet is consistent with Idaho Code § 6-1603, the limitation on non-economic damages. Under that statute, the jury hears the entirety of the evidence and evaluates a plaintiff's non-economic loss. It is only after the jury provides the total award that the trial court adjusts the damages to fit within that statute. Similarly, under § 6-1606, a jury is to consider the actual loss, but the court determines the legal limit on the recovery after the jury issues its award.

Additionally, only allowing the adjusted costs means the jury does not have an accurate picture of what a plaintiff experienced. This creates confusion for a jury to try to reconcile the severity of injuries with a paucity of payments. The end result minimizes and falsifies what a an indigent plaintiff has endured, i.e. the rehabilitation hassles he lived through and the inconvenience of his life.

Also, if the jury is allowed to consider only the adjusted medical costs, that situation can give the jury an artificial view of the cost of future medical treatment. A plaintiff may not have the same insurance coverage and may not receive the same adjustment. Further, there is certainly the probability that a plaintiff may not have insurance in the future, and, thus, having no adjustments. If a jury were to award medical expenses in the future based on the assumption that a plaintiff will have the same insurance coverage, it is indeed speculative. In addition, having a jury seeing one

amount for adjusted past medical expenses and a different amount for unadjusted future medical expenses will confuse it and create unwarranted skepticism towards medical providers as not being honest or accurate about the costs for treatment.

Further, *Dyet*, provides equal protection under the law. Restricting evidence at trial to an adjusted amount would result in a jury verdict punishing those who are poor or elderly, both of which are either Medicaid (the poor) or Medicare recipients (the elderly). Also, an anti-*Dyet* approach rewards people who chose to go without health insurance. Consider the situation where you have three individuals of similar age, gender, and health, who get hit in a cross walk by a driver texting while driving. All three suffer similar injuries and receive the same medical treatment. The only difference is that one individual has Medicaid, another has private insurance coverage and the third individual has no insurance. If adjusted amounts are presented to the jury, then the uninsured individual gets to put before the jury the market value of the medical expenses, i.e., the full invoiced amounts. However, the Medicaid recipient and injured person with private insurance coverage will see a lower number for the same services, as they will have a far smaller number to present to the jury. As this Court recognized in *Dyet,* a jury will likely reward the smallest general damages to the plaintiff will the smallest amount of medical expenses and award the largest general damages to the plaintiff with the largest amount of medical expenses. The uninsured person is rewarded while the poor plaintiff with Medicaid and the plaintiff with private insurance are punished. This creates the potential situation for an incentive to have people decide not to be insured and penalize those who are responsible and obtain insurance. The public policy in the state of Idaho is to encourage people

to obtain insurance and rewarding the uninsured with a larger verdict by way of overturning *Dyet* would go against that public policy.

Also, keeping *Dyet* would avoid an accounting nightmare. Allowing a jury to consider adjusted amounts forces it to decide what costs and benefits are applicable to the adjusted costs. In that scenario, the Defendant receives a windfall, which is incongruent with § 6-1606. Moreover, submitting adjusted amounts invites juror error. If a jury is shown the adjusted amounts as evidence of the reasonable value of services, and is instructed not to consider insurance, then the fact that the adjustment arose based on the insurance is kept from them. A juror is instructed to bring the experience and background of his life into the courtroom and render a decision based on that. It would be impossible to envision a juror who is unaware that medical bills are adjusted by insurers. This could lead to a jury reducing the bills a second time. For these reasons, the Court must hold that *Dyet* is still good law, and reverse the District Court.

E. ELDRIDGE IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Eldridge is entitled to attorney's fees and costs under Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41. Section 12-121 and I.A.R. 41 allow for attorney fees and costs in a civil action where a matter was defended frivolously, unreasonably and without foundation. I.A.R. 40 allows for the award of costs to the prevailing party on appeal. The District Court improperly limited the claims to sections 6-1012 and 6-1013; failed to strike Dr. West's and Mr. Turpin's affidavits; wrongfully limited Eldridge's damages; and failed to follow the precedent set forth in *Dyet.* For these reasons, Eldridge is entitled to attorney fees and costs on appeal.

CONCLUSION

Mr. and Mrs. Eldridge request that the Court reverse and remand the case for further proceedings.

DATED this 21st day of May, 2018.

COOPER & LARSEN, CHARTERED

By /s/ Javier L. Gabiola
JAVIER L. GABIOLA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2018, I served two (2) copies of the above and foregoing document to the following person(s) as follows:

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