Electronically Filed
6/19/2019 2:40 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID and MARGARET FISK,
Husband and Wife,

Plaintiffs-Appellants,

vs.

JEFFERY D. MCDONALD, M.D., an individual; and NORTH IDAHO DAY SURGERY, LLC., d/b/a NORTHWEST SPECIALTY HOSPITAL,

Defendants-Respondents,

And

JOHN L. PENNINGS, M.D., an individual

DOCKET NO. 46639-2018

APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR KOOTENAI COUNTY

HONORABLE JOHN T. MITCHELL
District Judge, presiding

Attorneys for Appellants

Dennis P. Wilkinson, Esq.
Smith Woolf Anderson
& Wilkinson, PLLC
3480 Merlin Drive
Idaho Falls, Idaho 83404

Gary L. Shockey, Esq.
Gary L. Shockey, P.C.
951 Werner Court, Suite 340
Casper, WY 82601

Deidre Bainbridge, Esq.
P.O. Box 747
Jackson, WY 83001

Attorneys for Respondent, Jeffery D. McDonald, M.D.

Michael E. Ramsden, Esq.
Nathan S. Ohler, Esq.
Ramsden, Marfice, Ealy & Harris, LLP
P.O. Box 1336
Coeur d'Alene, ID 83816

Attorneys for Respondent, Northwest Specialty Hospital

Nancy J. Garret, Esq.
Vala L. Metz, Esq.
Garrett Richardson, PLLC
P.O. Box 1362
Eagle, ID 83616

I.
TABLE OF CONTENTS

Page

II.

TABLE OF CASES AND AUTHORITIES

RULES Page

STATUTES

CASE LAW

III.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

"We all know how difficult it is to establish the standard of care. There is no doctor in the state that wants to talk to an out of state expert to acquaint himself with the standard of care so he can sue somebody that's practicing in the community where he's working. There's a code of silence. I don't think it's hard to see that its very, very challenging for a Plaintiff to bring a case in this state given what the legislature has said needs to be done."

--Justice John R. Stegner, Oral Argument, Eldridge v. West, Sup. Ct. Docket No. 45214, May 10, 2019.

A. Nature of the Case and Course of Proceedings Below.

This is a medical malpractice case, dismissed after the trial court ruled that the Plaintiffs/Appellants failed to produce admissible evidence showing that their expert witnesses had actual knowledge of the applicable standard of health care practice. R. 2172. Throughout the course of proceedings, the Appellants timely provided disclosures and laid ample foundation that their experts were familiar with the local standard. This issue is of paramount concern to plaintiffs in medical negligence cases as misapplication of Idaho case law has led to the dismissal of many deserving cases that should have been tried on the merits.

The Complaint and Demand for Jury Trial was filed on March 1, 2017. R. 17-27. Answers were filed shortly thereafter, and the parties commenced the discovery process. In April 2018, the

Defendants filed Motions to Strike the Plaintiffs' expert witnesses and Motions for Summary Judgment. R. 687-689; 843-845; 1452-1454. Plaintiffs responded, providing the trial court with declarations from multiple expert witnesses. R. 1540-1724. Argument was held on May 23, 2017, the trial court issued its decision granting summary judgement on May 31, 2018 and entering Judgment on June 7, 2018. R. 1829-1886; 1891-1893.

The Plaintiffs timely filed their Motion for Reconsideration on June 21, 2018. R. 1924-1926. Argument was held October 10, 2018. The trial court issued its decision denying the Plaintiffs' motion on November 13, 2018, and Judgment was entered on December 3, 2018. R. 2171-2192; 2193-2197. The Plaintiffs filed their Notice of Appeal on December 21, 2018. R. 2198-2207.

B. Statement of Facts.

1. Ms. Fisk's treatment at Northwest.

North Idaho Day Surgery ("Northwest") is a specialty acute care hospital in Post Falls, Idaho. R. 2172. Dr. Jeffrey D. McDonald ("McDonald") is board certified in neurological surgery. *Id*. On March 10, 2015, McDonald performed an out-patient cervical spinal fusion on Ms. Fisk at the Northwest facility. *Id*. Northwest provided the facility as well as the nursing care before, during and after the surgery. *Id*. Jessica Sholtz ("Sholtz"), a nurse practitioner and mid-level employee of McDonald, assisted him. *Id*.

On the morning of March 11, 2015, the process to discharge Ms. Fisk from the hospital was underway when she began experiencing tremendous abdominal pain that escalated to nausea, vomiting and bowel issues. R. 1541. In response, the hospital nursing staff prescribed a suppository for constipation. *Id*. At approximately 3:00 p.m., Ms. Fisk experienced a large emesis

(vomiting) that was reported to Sholtz. Ms. Fisk's condition continued to worsen throughout the day into the evening. *Id*.

As noted by the trial court relying on the Declaration of the Plaintiffs' expert Suzanne Nebeker, between 7:45 p.m. and 9:00 p.m., Ms. Fisk continued to experience nausea with intermittent retching emesis and severe abdominal pain. *Id.* At 1:26 a.m., on the morning of March 12, 2015, Ms. Fisk reported to staff that she felt like she was dying. She vomited what was described as a coffee-ground emesis, brown liquid. R. 1831. At 2:30 a.m., she again vomited a coffee-ground emesis. *Id*. The nursing staff at Northwest consulted with Sholtz, who recommended that they call the on-call intensivist. *Id*. The intensivist, a nephrologist, was called and recommended that Ms. Fisk be transferred immediately to Kootenai Medical Center for a gastrointestinal consult and a possible endoscopy. *Id*. This recommendation was relayed to Sholtz who instructed the nursing staff to keep Ms. Fisk at Northwest. *Id*. Over the next several hours her condition continued to deteriorate.

At this point—Ms. Fisk had severe abdominal pain reported at a level 10 for hours, nausea, vomiting and changes in her level of consciousness. She had not been seen by a physician or mid-level provider and the only physician contacted recommended transport to a higher level of care. That sole instruction was refused by Sholtz and not followed by the nursing staff at Northwest.

At 6:45 a.m. on the morning of the 12th, Sholtz was trying to coordinate a gastrointestinal consult. *Id*. At 7:45 a.m., the staff at Northwest noted that Ms. Fisk's abdomen was distended and firm with no audible bowel sounds and her pain remained at a 10 out of 10. *Id*. Around that same time Ms. Fisk was finally seen by physicians, McDonald and Dr. John L. Pennings. *Id*. Dr. Pennings believed that she was in shock and ordered the hospital nursing staff to prepare her for surgery. R. 1831 -1832.

When he performed an exploratory laparotomy, he discovered that Ms. Fisk had likely developed mesenteric artery ischemia a condition causing a loss of blood supply to the small intestines leading to end-organ loss. R. 1832. Dr. Pennings then removed a large amount of Ms. Fisk's small intestines as well as a total abdominal colectomy with an end ileostomy. *Id*. Ms. Fisk was then transferred emergently to the Intensive Care Unit at Kootenai Medical Center in critical condition. *Id*. Ms. Fisk remained on life support in the Intensive Care Unit for five (5) days. R. 22.

For more than twenty (20) hours Ms. Fisk agonized and declined in front of their eyes, no action was taken. R. 1548. Ms. Fisk was nearly dead when she was seen by a doctor on the morning of March 12, 2015, requiring immediate surgical intervention which was undertaken, and she lost all but a foot of her bowels. R. 1548. The Complaint alleged a claim for negligence against Defendant Northwest, Defendant McDonald and a third claim of negligence against the surgeon that treated Ms. Fisk on the morning of March 12, 2015, Dr. John Pennings. Dr. Pennings was dismissed from the litigation pursuant to Stipulation on January 26, 2018. R. 469-472.

2. Summary Judgment.

On April 3, 2018 Northwest filed *its* Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts as well as a Motion for Summary Judgment. R. 687-689; 843 - 845. The thrust of the argument presented by Northwest was that plaintiffs failed to produce any admissible expert testimony demonstrating that there was a violation of the standard of care. R. 847 - 848. The primary argument relied upon by Northwest was that plaintiffs failed to produce evidence that any of their experts had knowledge of the applicable standard of care in the community. R. 854.

McDonald filed his Motion for Summary Judgment on April 24, 2018 adopting many of the positions of Defendant Northwest. R. 1452 - 1454. The Plaintiffs responded to the defendants'

motions on May 9, 2018. R. 1540 - 1587. In support of the response, the Plaintiffs provided the Court with the Declaration of Suzanne Nebeker. R. 1619-1658; Declaration of Timothy F. Hawkins, FACHE, CHSP. R. 1659 - 1678; Declaration of Robert Y. Uyeda, M.D., R. 1679 - 1690; and Declaration of Dr. Vernon R. Kubiak, DNP, CNP, CNS, CNS-BC, PHHNP-BC, RN. R. 1691 - 1706.

The foundational support provided to the trial court demonstrating familiarity with the local standard of care was complete. Dr. Kubiak established familiarity with the local standard of care during the March, 2015, time frame in Post Falls, Idaho relying on the standard procedures adopted by Northwest wherein it adopted the standards set forth by the American Nurses Association, Idaho statutes applicable to nursing care in the State of Idaho, including Idaho Statues in *Idaho Code §18-1401*, et seq., as well as IDAPA regulations in effect in March of 2015. In laying foundation for his opinion, he also relied on deposition testimony and the medical record.

Ms. Nebeker provided the trial court with a declaration setting forth reliance on Northwest policy and procedure, the deposition excerpts of Scholtz and the standards referenced by Dr. Kubiak. In defining the standard of care, she elaborated on the applicable statewide standards, the Idaho State Board of Nursing administration rules and applicable IDAPA rules. Timothy Hawkins provided foundation that Northwest was a Joint Commission accredited facility and that national standards applied. He relied on Joint Commission standards, CMS standards and a discussion with a state Medicare official.

Robert Uyeda MD, provided the trial court with a declaration which detailed his review of the medical records and medical provider depositions including that of Dr. Pennings. He also spoke with the primary care physician of Ms. Fisk and concluded that his assessment of the standard of care comported with the local standard of care in the Post Falls/Coeur d'Alene medical community.

All Plaintiffs' experts went far beyond these brief summaries to display their familiarity with local standards. Detailed discussions of this appear later in this brief.

i. Defendants' productions at summary judgment.

In support of its *Motion for Summary Judgment* Northwest submitted the Affidavit of Jeffrey Larson M.D., and the Affidavit of Denise Fowler, R.N. R. 863 - 1380. Neither submission described what the local standard of care was. These deficiencies are described in detail later in this brief. In sum, Defendants failed in their burden of proof obligations to provide a description of the standard of care.

McDonald did not offer any affidavits or evidence of compliance with the local standard of care. He argued instead that the plaintiffs failed to provide evidence critical of his care.

ii. Evidence submitted by Appellants at summary judgment.

Absent the ability to talk with local care providers, [though Suzanne Nebeker and Robert Uyeda did so] Appellants' experts established their familiarity with the local standard through other mechanisms. In response to the defendants' motions for summary judgment, the plaintiffs provided the trial court with substantial evidence including:

1. Deposition excerpts from McDonald and Scholtz as well as page 15 of McDonald's Answer to discovery (R. 1588-1618);
2. Declaration of Dr. Vernon R. Kubiak (R. 1691-1706);
3. Declaration of Robert Y. Uyeda (R. 1679-1690);
4. Declaration of Timothy F. Hawkins (R. 1659-1678); and
5. Declaration of Susanne Nebeker (R.1619-1658).

A careful review of the attached information yields significant information and evidence on all elements required to survive summary judgment.

a. Declaration of Dr. Vernon R. Kubiak.

Dr. Kubiak initiated his Declaration with discussion of the Affidavits of Denise Fowler and Jeffery Larson, M.D. R. 1692. In paragraph 5 of his declaration he was critical of the Affidavit of Denise Fowler, disagreeing that the standard of care is established by reference to the medical record. R. 1692 at paragraph 5. Exhibit A to his Declaration was Kubiak's Report that was submitted as part of the plaintiffs' expert witness designation. R. 1694 - 1706. He did an extremely thorough review of the medical record, though not agreeing that its entries established a standard of care.

Dr. Kubiak was retained to opine regarding the nursing care rendered to Ms. Fisk while a patient. He concluded that the nursing care provided to Ms. Fisk was not consistent with and did not comply with the standard of health care practice applicable to nurses and that the on-call provider assigned to care for Ms. Fisk (Scholtz) did not respond appropriately to critical information. R. 1694.

As foundation for his opinion Dr. Kubiak established that:

- He reviewed the standards of nursing care present in Idaho during the March 2015 timeframe.
- The standard procedures adopted by Northwest specifically state that the facility follows the American Nurses Association standards.
- He reviewed Idaho Statute §54-1401 and IDAPA 23 versions effective during March 2015 timeframe which establish a state wide standard.
- He reviewed the medical record. R. 1694.

He then discussed the standard of health care practice applicable to the nursing care provided in this case. R. 1695. In defining the standard of care he declared it to be established by the American Nursing Association, ANA, (which was specifically adopted by the facility), the State Nurse Practice Act (which sets forth the standard applicable to all nurses in the State of Idaho), the Joint

Commission recommendation for accredited facilities (Northwest is so accredited), and applicable hospital policies and procedures which he enumerated. R. 1695 - 1696.

Relying on the above references, with specific references to hospital adopted policies and procedures, Dr. Kubiak discussed the standard of care specific to nursing care plans, pain management, comfort and documentation. R. 1697 - 1698. He described the standards as applied to the care of Ms. Fisk.

His ultimate opinion, based on the records provided and comparing that information to the defined standard of care was that Ms. Fisk did not receive appropriate nursing care from March 11, 2015, through the morning of March 12, 2015, and that the Scholtz failed to recognize the deteriorating condition of Ms. Fisk and take appropriate action. R. 1704. Dr. Kubiak discussed the time frame in which he believed that Ms. Fisk reached a point where the nursing staff was unable to adequately care for her. He concluded that by 0229 on March 12, 2015, Northwest nurses should have realized that their efforts to reduce her pain level had failed completely. R. 1705.

Dr. Kubiak explained that there was a failure of the nurses to adequately inform Scholtz, or that Scholtz failed to take appropriate action, or both. R. 1705. He reached this conclusion based on the review of the record. The hospital staff claim to have informed Scholtz, while she claims they did not. R. 1705. He continued to conclude that the nursing staff should have recognized that Ms. Fisk was becoming hemodynamically compromised based on her vitals. R. 1705. In a candid opinion, Dr. Kubiak noted that discrepancies exist that prevent an exact placement of blame as between Hospital staff and Jessica Sholtz. R. 1705.

Dr. Kubiak is a distinguished nurse, nurse practitioner, and educator in Pocatello. In his first Declaration, he established that he knew the local standard of care with several references. R.

1691 – 1706, especially 1694 – 1696. He reviewed pertinent Northwest rules and procedures. R. 1694. He found that the Hospital's rules required compliance with American Nursing Association [ANA] standards. Id. He therefore concluded that one measure of the local standard of care, based on Northwest Specialty Hospital's own rules, were the standards expressed by the ANA. He evaluated the care provided accordingly.

Dr. Kubiak also relied on the guidelines of the Joint Commission, the primary accreditation entity in the country. R. 1696. The interrelatedness of Joint Commission guidelines and standards of care is highlighted in the filings of Appellants' hospital procedures and safety expert, Timothy Hawkins, below.

Dr. Kubiak also relied on Idaho Statutes and Regulations as defining the local standard. R. 1694 – 1695. Specifically, he stated that *Idaho Code §54-1401, et seq*., and IDAPA 23, were requirements that must be followed in Idaho. There has been no rebuttal to the notion that a state law or regulation dictates a standard of care for Idaho hospitals, and Kubiak's reliance on both hospital regulations and state law falls within guidelines established in *Suhadolnik v. Pressman*, 151 Idaho 110, 254 P3d 11 (2011): "where an expert demonstrates that a local standard of care has been replaced by a statewide or national standard of care, and further demonstrates that he or she is familiar with the statewide or national standard, the foundational requirements of *Idaho Code § 6-1013* have been met."

b. Declaration of Suzanne Nebeker.

In her declaration Ms. Nebeker sets forth that she reviewed the affidavits of Denise Fowler and Jeffrey Larson and the expert designation of Rhonda Taylor. R. 1620. She also sets forth that she reviewed the deposition of Jessica Scholtz and that the standards referenced in her report and

that of Dr. Kubiak are standards that apply statewide in Idaho and specifically to Scholtz and Northwest. R. 1620 at paragraph 5.

She opined that the nursing care of Ms. Fisk was not consistent with and did not comply with the national and local standards of health care practice applicable to nurses in the local community of Post Falls, Idaho. R. 1628. In discussing the standard of care applicable to Scholtz, Ms. Nebeker cited the Idaho State Board of Nursing administrative rules which apply to all such nurses in the State of Idaho. R. 1631. Scholtz was a nurse practitioner licensed by the State of Idaho in March of 2015. R. 1631.

Scholtz was under the supervision of McDonald and was required to follow the state licensing requirements and the policies and procedures of the hospital. R. 1631. Each of her opinions related to the standard of care were in reference to State of Idaho standards setting forth required standards in the state or to the American Nurses Association which was specifically adopted by the hospital as the standard of care. R. 1627-1636. Additionally, she also cited IDAPA provisions which are also applicable to the standard of care for Idaho nurses.

Suzanne Nebeker is a highly respected nurse practitioner who works in Salmon, Idaho, and plays a prominent role in its local hospital. In her first declaration, incorporating a report she had prepared, she addressed the issue of her knowledge of the local standard of care for nurses and nurse practitioners in several manners. R. 1619 – 1658.

The foundations for Suzanne Nebeker's knowledge of the local standard of care included agreement with Vernon Kubiak's (above) assessment of Northwest Specialty Hospital rules, the ANA, State law, and National Standards. Ms. Nebeker is an expert on the Nursing Standards of Practice as outlined by the American Nurses Association, [ANA], R. 1627, and the Nursing Scope of Practices for the State of Idaho. R. 1627.

To inform herself of the local standards, Suzanne Nebeker reviewed the designations of McDonald's expert witnesses, Denise Fowler, Jeffrey Larson, and Rhonda Taylor, nurses and physicians. She also reviewed the deposition of Jessica Sholtz, Mc Donald's employee and nurse practitioner. R. 1620. In her initial Declaration, Suzanne Nebeker made it clear that the State and national standards were the standards for Defendants: "I reiterate that all standards, which in my opinion apply to nurses and nurse practitioners, referenced in my initial report and that of Vernon Kubiak, are standards that apply statewide for the State of Idaho, to Sholtz, and to Northwest and its staff."

Suzanne Nebeker reviewed the By-Laws of Northwest. She reviewed medical records in detail, R. 1620, and prepared a time-line of events, R. 1647 – 1656, which was adopted by the trial court, R. 1830. She also reviewed the Rules and Regulations of the Medical Staff of Northwest. R. 1622. She reviewed Idaho's Nursing Practice Act and the Idaho Administrative Rules of the Board of Nursing. R. 1657.

Comparing the acts/omissions of Mc Donald's employee nurse practitioner, Jessica Sholtz, to the standards in the hospital rules, state laws and national standards, Ms. Nebeker's assessment was "the actions and omissions of Jessica Sholtz were, in a word, 'indefensible.'" R. 1625.

Though lengthy, it is instructive to note the detail with which Suzanne Nebeker explained portions of the Idaho Board of Nursing rules, applicable to all nurse practitioners in Idaho, R. 1631 – 1632:

> Advance Practice Professional Nursing in the state of Idaho is defined by the State the Idaho Board of Nursing through administrative rules governing the APRN. The purpose of the rules is to promote, preserve, and protect public health, safety, and welfare of the patient. The advanced practice nurse professional nurse is a professional nurse licensed in the state who has gained additional specialized study and is authorized to perform advanced nursing practice which may include acts of diagnosing and treatment, and the prescribing, administering, and dispensing of therapeutic pharmacologic and non-pharmacologic agents. A nurse practitioner is

considered an Advance Practice Professional Nurse. The nurse practitioner shall be currently licensed to practice as a professional nurse in Idaho, successfully completed a nurse practitioner program which is accredited by a national organization recognized by the Board of Nursing in Idaho, pass a certification examination administered by an organization recognized by the board, hold current national certification from an organization recognized by the board The nurse practitioner when functioning within their recognized scope of practice, assume primary responsibility for the care of their patients. This practice incorporates the use of professional judgment in the assessment and management of wellness and conditions appropriate to the advance practice professional nurse's area of specialization. Standards for the advanced practice professional nurse are established for the safe practice, to serve as a guide for evaluation of the APRN practice to determine if it is safe and effective. The advance practice professional nurse shall practice in a manner consistent with the definition of advance practice professional nursing and the standards set forth in the rules. 280- 02: The APRN may provide services for which they are educationally prepared and for which competence has been attained and maintained. 280-02-a: The APRN shall consult and collaborate with other members of the health care team. 280-02-b The APRN shall recognize her limits of knowledge and experience and shall consult and collaborate with and refer to other health care professionals as appropriate.280-02-c The APRN shall retain professional accountability for advance practice professional nursing care according to the APRN scope of practice and the IDAPA 23.01.01 "Rules of the Board of Nursing" subsections 400.01 and 400.02. 280-02-e The APRN shall assess clients, identify problems or conditions, establish diagnosis, develop and implement plans and evaluate patient outcomes. 280-02-g The APRN shall use critical thinking and independent decision making, commensurate with the autonomy, authority, and responsibility of the practice category. 280-05 The nurse practitioner shall practice in accord with the standards established by the American Nurses Credentialing Center, and the American Academy of Nurse Practitioners. Nurse practitioners who meet qualifying requirements and are licensed by the board may perform comprehensive health assessments, diagnosis, health promotion and direct management of acute and chronic illnesses and disease as defined by the nurse practitioner's scope of practice. The nurse practitioner shall practice with supervision and provide for appropriate medical consultation, collaborative management, and referral.

Suzanne Nebeker provided an extensive and detailed description of laws and guidelines which apply universally and uniformly – including at the Northwest Specialty Hospital in Coeur d'Alene, Mc Donald and his employee nurse practitioner Sholtz. This, however, was not convincing to a trial court bound to the notion that a conversation with some local provider must be included in the process.

c. Declaration of Timothy F. Hawkins.

Mr. Hawkins is a hospital administration expert. He is an expert on the Joint Commission and CMS Conditions of Participation Standards for hospitals and Outpatient facilities. R. 1662. He notes that Northwest holds itself out in the community as accredited by the Joint Commission and that the Joint Commission as well as the CMS Conditions of Participation are national standards to be adhered to by all hospitals receiving Medicare funding. R. 1664.

Mr. Hawkins established that the Joint Commission standards applied to Northwest and detailed the various standards that specifically apply to the care and treatment of Ms. Fisk. R. 1665. He identified concrete requirements established by the Joint Commission and identified non-compliance on the part of the hospital. The compliance issues centered on the failure of the hospital to have written policy and procedure for recognizing and responding to a patient's worsening condition. R. 1665. This is a concrete requirement with clear ramifications as applied to the care of Ms. Fisk.

Hawkins identified this lack of policy and direction as a facility breakdown where the nursing staff did not have clear guidance on what to do given Ms. Fisk's changing and deteriorating condition. R. 1666. He then identified another facility breakdown involving the failure of the chief nursing officer to be elevate the care of Ms. Fisk as required by the cited Joint Commission rule. R. 1667-1668.

The third standard identified by Hawkins involved providing consistent services. R. 1668. He discussed the failure of the facility to conduct diagnostic intervention thorough the use of the available CAT scan. R. 1669. His ultimate opinions are set forth on pages 1669 - 1670 of the record identifying facility non-compliance with the Joint Commission standards.

As noted, Timothy Hawkins is an expert in hospital administration, regulations and safety. He was presented by Plaintiffs to testify concerning shortcomings in Northwest Specialty

Hospital's policies and protocols, as well as the interrelationships between the Hospital's administration, nursing at the Hospital and Mc Donald and his employee nurse practitioner, Jessica Sholtz.

There are obviously no local hospital administrators available to establish a standard of care. Northwest and Kootenai are the only two, and their activities and medical staffs are inextricably interwoven. Therefore, as above, Appellants were not able to establish the local standards "from the ground up," through consultation with "locals." The establishment of the local standard of care necessarily involved evaluating Northwest Specialty Hospital's policies, procedures, and the actions/inactions of its staff from the perspective of national standards adopted locally.

In his first declaration, R. 1659 – 1678, Timothy Hawkins explained that Northwest represents itself to be accredited by the Joint Commission, the largest healthcare accreditation organization in America. R. 1664. The Hospital was also under contract with CMS and Medicare. Mr. Hawkins demonstrated his familiarity with the facts of this case through review of Hospital discovery responses, depositions of doctors and nurses involved in the care of Margaret Fisk, Northwest standards and policies, Hospital By-Laws, nursing notes and other care records for Margaret Fisk, hospital rules and regulations, and Joint Commission documents. R. 1677.

Mr. Hawkins confirmed, through contact with Mr. Dennis Kelly of the Idaho Department of Health and Welfare, that Northwest was a CMS facility and "subject all CMS standards and guidelines (CMS Conditions of Participation)." R. 1660. Mr. Hawkins' Declaration noted that "I am informed that in Idaho, all such facilities are required to comply with CMS requirements and that their geographic location does not alter that requirement." R. 1660.

Succinctly stated, the national standards were the local standards for every CMS facility in

Idaho, regardless of location. Those standards were expressed through the Joint Commission.

CMS requires that its participants have appropriate policies, procedures and protocols in place for the safety and care of its participants. Hospitals satisfy this national standards requirement through accreditation by the Joint Commission and adoption of policies in compliance with the Joint Commission standards and guidelines. R. 1664. By virtue of its relationships with CMS, Medicare, and the Joint Commission, the national standards of these entities were the mandated local standards for Northwest Specialty Hospital.

The balance of Mr. Hawkins' First Declaration outlined pertinent Joint Commission standards, their relationship to the case, and how Northwest Specialty Hospital fell short of the standards. Among the shortcomings described were the absence of appropriate procedures for recognizing patient deterioration, failures to react promptly and sufficiently to Margaret Fisk's rapidly deteriorating condition, deficiencies in the nursing "chain of command" policies, as well as failures by the nursing staff to react promptly, and discrepancies in policies.

At the initial summary judgment hearing, and in its opinion, the Court expressed ignorance of the exact nature of Mr. Hawkins' testimony. "The Fisks seem to have retained Hawkins to testify as to the local standard of care for the administration of a hospital . . ." R. 1857, emphasis added. And the trial court dismissed consideration of Mr. Hawkins' opinion at least partly on the misunderstanding that CMS and Joint Commission standards are different, but that Mr. Hawkins relied only on the Joint Commission. R. 1868. For that and other reasons, Appellants supplemented Mr. Hawkins' testimony with a Second Declaration.

d. Declaration of Robert Y. Uyeda, M.D.

Robert Y. Uyeda, M.D., J.D., F.A.C.S., is a physician and surgeon with medical licenses to practice in the states of California and Nevada, and inactive license in state of Washington; he

was certified by the American Board of Surgery and a current Fellow of American College of Surgeons. He trained in surgery residency at Cedars-Sinai Medical Center, Los Angeles, CA, Dept. of Surgery; and has an active practice in General Surgery, including surgery of abdomen and gastrointestinal tract from 1982 to 2017 in County of Los Angeles. He was presented by Plaintiffs to testify concerning his familiarity with the standard of care, general medical knowledge, and knowledge in his specialty in surgery, applicable to providers in care of hospitalized patients who suffer from acute onset of unexplained severe abdominal pain out of proportion to physical findings. Though primarily a causation expert, Dr. Uyeda tried to learn local standards of care.

Dr. Uyeda in his Declaration stated his opinions with a reasonable medical probability and that he consulted with a local physician, Dr. Scott Dunn, who is Margaret Fisk's physician on issues concerning local standards of care. Based upon that contact he believed that the medical opinions he expressed comport with the local standards of practice in the Post Falls/Coeur d'Alene area, particularly with reference to the need for Dr. McDonald's nurse practitioner Sholtz to have personally examined Mrs. Fisk in the evening March 11, 2015, and the need to involve a medical doctor in the care and assessment much earlier than the engagement of the interventionist in the early morning hours, of March 12, 2015.

He affirmed his medical opinion that in almost any setting, a person presenting symptomatology like Mrs. Fisk, especially at an abdominal pain level of 10 with accompanying symptoms, could be properly assessed with a CT scan procedure. The CT procedure would in medical probability, likely establish intestinal deterioration. The CT procedure would eliminate many, if not all, alternative explanations other than ischemic bowel, in a differential diagnosis process. It is my opinion that the failure to perform the CT scan in the late afternoon to evening hours of March 11, 2015, was substandard care. Based on my inquiries concerning standard of

care the CT scan should have been done at Northwest Specialty hospital, or perhaps more appropriately, Mrs. Fisk should have been transferred at the time of the reports of these symptoms and would have obtained a CT scan upon transfer.

He stated that in his medical opinion an ischemic bowel is a common enough medical problem that it should always be part of a differential diagnosis and should always be a matter that must be ruled out with appropriate medical assessment and testing which was not done in the case of Mrs. Fisk.

iii. The District Court's Memorandum Decision and Order on Summary Judgment.

In the submitted declarations and reports the Plaintiffs' experts detailed the foundation for their opinions to include their familiarity with the local standard of care. The trial court recognized six (6) arguments made by Northwest in its Motion to Strike the plaintiffs retained experts. R. 1841. The Court declined to grant Northwest's Motions to Strike the plaintiffs' various healthcare experts because expert designations were not required to comply with *Idaho Code §6-1012, 6-1013 and 6-1014*. R. 1840-1853.

With respect to Northwest's Motion for Summary Judgment the court considered three issues: 1) Whether the plaintiffs produced admissible evidence that their expert witnesses had actual knowledge of the applicable standard of care; 2) Whether the plaintiffs produced admissible evidence that Northwest's conduct was the actual and proximate cause of Ms. Fisk's injury; and 3) The burden of proof applicable to Northwest's motion. R. 1854. The court reviewed the plaintiffs' submissions from Dr. Uyeda, Dr. Kubiak, Suzanne Nebeker, and Timothy Hawkins and determined that each was unfamiliar with the local standard of care. R. 1854-1868.

The court went on to hold that the plaintiffs submitted admissible evidence on the element of causation through Dr. Uyeda. R. 1869.

The court also granted Defendant McDonald's Motion for Summary Judgment ruling that the plaintiffs failed to plead that McDonald was vicariously liable for the acts and omissions of his nurse practitioner and that they failed to demonstrate actual knowledge of the local standard of care for a nurse practitioner. R. 1880-1884.

In its *Memorandum Decision and Order* the court concluded with a miscellaneous observation acknowledging that Ms. Fisk sustained serious injury and damage and that there was enough evidence on the issue of causation that would have allowed her claims to survive summary judgment. R. 1885. The dismissal of her claims, as set forth by the court, was due to insufficient evidence presented at the summary judgment juncture regarding the local standard of care. R. 1885.

iv. Plaintiffs' Motion for Reconsideration.

On June 21, 2018, the plaintiffs filed their Motion for Reconsideration. R. 1924-1926. The plaintiffs took no position on the Court's analysis associated with the Motion to Strike and ultimately argued that the plaintiffs' experts demonstrated adequate familiarity with the local standard of care contrary to the trial court's determination at summary judgment. R. 1930.

In support of the Motion for Reconsideration, the plaintiffs provided additional declarations from Dr. Kubiak and Ms. Nebeker.

a. Second Declaration of Dr. Kubiak.

To assist the trial court's understanding of the issues, Vernon Kubiak provided a Second Declaration to clarify how he had familiarized himself with local standards. R. 1953 – 1969. He clarified his comments on the ANA Standards with references to depositions he reviewed. R.

1954. He explained, again, that a hospital's own rules and procedures are statements of its standard of care. "The rules and regulations of Northwest Specialty Hospital are a definite statement of that facility's guidelines for practice, applied locally." R. 1954. He emphasized that the nurses' depositions he reviewed demonstrated that nurses knew that their standard of care was defined [in part] by the ANA guidelines. R. 1954.

Vernon Kubiak then went into greater detail, itemizing hospital rules and the ANA and how they defined a local standard of care, R. 1955:

> 7. As illustrations of my assessment of the local standard of care, I am providing examples, not meant to be fully exhaustive, of information I obtained pertinent to the local standard of care from the sources listed above:
>
> a. Hospital protocol 1015-00-001 provides that the ANA is the standard that applied to NWSH.
>
> b. Nurse Hetzler testified in her deposition, at page 15, that the ANA guidelines for practice were known to her and that the ANA guidelines were incorporated into the NWSH protocols. [Hetzler p. 15.]
>
> c. Nurse Miller testified in her deposition that her training included the ANA guidelines, that they used them to "guide everything in nursing," and that she understood that NWSH incorporated the ANA guidelines into its protocols and nurses were expected to act in accordance with those guidelines. [Miller pp. 29, 30.]
>
> d. As stated, I accepted the Hospital's own protocols, and rules and regulations as statements of the local standard of care.
>
> e. I considered the testimony of nurse Miller, at pages 82 through 87 of her deposition

regarding NWSH protocols, or their absence, as further indicators of the local standards of care for NWSH. This discussion was pertinent because it also shed light on the nurses' perceptions of their ability to counter an order from nurse practitioner Sholtz concerning transfer of Ms. Fisk.

f. I also considered further deposition testimony of nurse Miller concerning other NWSH protocols as indicative of local standards of practice, for example administration of medications, [Miller deposition p. 91] nursing assessments, [p. 104-5] pain management, [p. 107] and charting, [p. 109].

g. Nurse Miller's deposition also provided information about practices at NWSH. As an example, nurse Miller explained her understanding of circumstances in which a nurse would communicate with a physician or nurse practitioner. [Miller deposition pp. 20 – 27.]

Taken as a whole, Vernon Kubiak's Declaration demonstrated that he adequately informed himself of the local standards of practice for the case. Dr. Kubiak's extremely detailed analysis of the substandard and non-compliant actions/inactions of Northwest Specialty personnel and McDonald's nurse practitioner, Sholtz, will not be detailed as the essential issue on appeal is the standard of care matter, not how those standards were violated.

b. Supplemental Declarations from Suzanne Nebeker.

To address concerns expressed by the trial court, Suzanne Nebeker performed additional analysis and gathered additional information. This is reflected in her Second Declaration, R. 1941 – 1952.

In her second Declaration, Ms. Nebeker elaborated on her approach to the local standard matter, referencing prior filings on the issue and stating, R. 1942:

> I explained and wrote extensively about the American Nurses' Association [ANA] and that organization's guidelines and standards. I also noted that I had read and reviewed the depositions of nurses Robin Hetzler, Coleen Miller, nurse practitioner Jessica Sholtz, and Dr. Jeffrey McDonald. I also detailed that I had considered Northwest Specialty Hospital Rules and Regulations. I believed that those references, taken cumulatively, adequately informed me of the standards of care and practice applicable to this case. The rules and regulations of Northwest Specialty Hospital are a definite statement of that facility's guidelines for practice, applied locally. The depositions informed with respect to the nurses' understandings that they were expected to comply with the ANA, interpreted by me as another aspect of statements of the local standard of care for the treatment of Ms. Fisk.

She also referenced, as examples, the same materials as Vernon Kubiak, above, R. 1943 – 1944.

Suzanne Nebeker also expanded on her descriptions of how Idaho Nursing Regulations assisted her in determining the local standard of care. R. 1944 – 1948. Summarized, these regulations cover a broad scope of rules to be followed in any Idaho facility. The trial court's disregard of IDAPA regulations on the grounds that they don't prescribe how health care is to be provided by the caretakers, e.g., R. 1864 - 1868, is grossly mistaken. A scan of those cited by Ms. Nebeker shows that they do guide actual patient care, not just administrative matters. For example, requirements that nurses know the rules, adequate training of nurses, safeguarding patients from incompetent practices, observation and reporting of signs and symptoms of a patient, collaboration with other providers, and record keeping.

Suzanne Nebeker also satisfied the trial court's "gold standard," conversing with local providers. Her Second Declaration detailed conversations she had with Susan K. Odom, Idaho Board of Nursing, Jackie Wagner, and Holly Moore, R. 1950 – 1951:

> I have, since my Report and Declaration, communicated with other nurse practitioners within the geographic area of NWSH. I have communicated with Susan K. Odom PhD, RN, FRE, CCRN-K, Associate Executive Director, Practice and Education, Idaho Board of Nursing , Jackie Wagner, FNP from Coeur d Alene, Idaho, who is affiliated with Kootenai Hospital, and Holly Moore , FNP-BC from Coeur d Alene, Idaho in a neurosurgical practice, who had hospital privileges at NWSH during 2015; and discussed my perceptions of the standard of care for

> NWSH, Kootenai, and the geographic area and medical community surrounding them. Specifically, I have communicated with these individuals on the local standards of care with respect to the guidelines outlined by the BON in State of Idaho, national standards of care developed by ANA, education and certification of FNP designation as providing a foundation for the standards of care, the reliance on hospital protocols and rules and regulations, hospital privileging as defining the standard of care, and, specific guidelines, evidence based medicine, protocols for the care of the patient at NWSH and Kootenai and specifically for the patient undergoing anterior cervical neck surgery, post –operative care, including common and uncommon risks and outcomes, and the standard of care for the patient who develops acute abdominal pain at NWSH. Based on those communications, I believe I have confirmed that my assessment of Ms. Fisk's care and treatment has been done in accordance with the prevailing standards of care existing at the time.

While counsel for Northwest has made filings challenging Ms. Nebeker's accounts of her conversations, Appellants assert that any attack on Ms. Nebeker's professionalism and knowledge, as well as the integrity which she brings to the table in this matter, is at best very ill-founded. Nevertheless, Ms. Nebeker filed a Third Declaration, R. 2153–2166. In that Declaration, she provided even further explanations of her approach to defining the local standard. She also clarified and rebutted the filing by Northwest's counsel as follows, R. 2162–2164:

> In my second declaration, I reported that I had direct telephone communication with other nurse practitioners within the geographic area of NWSH; Jackie Wagner, FNP from Coeur d Alene, Idaho, who is affiliated with Kootenai Hospital, and Holly Moore, FNP-BC from Coeur d Alene, Idaho in a neurosurgical practice, who had hospital privileges at NWSH during 2015. I spoke with Jackie Wagner, FNP from Coeur d Alene, Idaho by telephone on or about June 13, 2015. I did identify myself as legal consultant working on an area case. I did not identify the specifics of the case, i.e. patient name, date, or any identifying information due to compliance with HIPPA laws. In my communication with Ms. Wagner learn the following: She is a family nurse practitioner who works in a clinic setting, she does not practice hospital medicine but does have an affiliation with Kootenai Hospital and could practice if she were so inclined. She was not and had not been affiliated with NWSH but was aware of its existence. She does not practice in the specialty of neuro-surgery but is and was familiar with the treatment of abdominal pain as a family nurse practitioner in the year of 2015. She was familiar with standard of care and practice guidelines outlined by her education and experience for the care of a patient with acute abdominal pain. We discussed the care that such a patient should ordinarily receive, including the necessity for evaluation and physical assessment, developing differential diagnosis, ordering appropriate laboratory tests to include at very least CBC and CMP. We also discussed the necessity of ordering a CT scan

of the abdomen/pelvis to help determine the cause of the abdominal pain. We discussed the necessity for ordering consultation of GI specialist in a timely manner. Ms. Wagner was definite in her explanation that this would be the standard practiced by her at that time, in the Coeur d Alene and Post Falls area, given her education and credentialing, and the national standards of care outlined by the ANA.

On or about June 18, 2018, I spoke with Holly Moore, FNP by telephone. I found her information on the internet through Google search. Her professional information was listed on Health Care for People. The site lists that she has an affiliation with NWSH and that she "cooperates with other doctors and specialists without joining any medical groups." Her phone number is listed. At no time, was I aware that she worked with or for Dr. Larsen. She did not at any time during the conversation identify herself as an employee of Dr. Larsen. I did identify myself as legal consultant working on an area case. I did not identify the specifics of the case, i.e. patient name, date, or any identifying information due to compliance with HIPPA laws. I discussed we discussed her educational background as an FNP-BC, and that she worked at NWSH and had clinical privileges there in February 2015. We discussed the process for obtaining those privileges and that she had copies of those. We also discussed the fact that she worked in the specialty of neurosurgery at NWSH. At no time, was there a discussion that she was associated with Dr. Larson. We discussed a hypothetical case whereby a patient had had cervical surgery and developed acute abdominal pain. She discussed that it was unusual for a cervical patient to develop acute abdominal symptoms as a result of surgical intervention. We discussed the course of care that would be the minimum standard. She agreed that at a minimum, the patient should have received an early physical examination and evaluation by the nurse practitioner, and that laboratory tests should have been ordered, CBC, CMP included, and CT of the abdomen/pelvis should have been ordered at the onset. She also agreed that early specialty consultation would be in order. The ANA standards of care were discussed, and it was agreed that they are the national standards and that they apply at the local level.

On or about June 13, 2018, I communicated with Susan K. Odom PhD, RN, FRE, CCRN-K, Associate Executive Director, Practice and Education, Idaho Board of Nursing. I identified myself and that I was seeking guidance from the BON on "local standard of care." Specifically, I asked if the BON had any documentation on what was considered the "local standard of care." Ms. Odom directed me to the specific areas of IDAPA 23 section 400 and 401. She also shared with me the BON nursing philosophy. She was unable to identify any documentation that defined "local standard" but did identify that RN's and APRN's in the state of Idaho were expected to abide by "nationally accepted standards and guidelines, as well as nursing specialty standards and guidelines." She emailed me the nursing philosophy on the same day. She extended an offer to help if I needed further assistance. The Affidavit by Nancy J. Garrett relating the conversation with Ms. Odom was shocking. It was flagrantly incomplete, biased, incorrect, and misleading.

c. Second Declaration from Timothy Hawkins.

To clarify matters, Timothy Hawkins submitted a Second Declaration. R. 1971 – 1990. Mr. Hawkins clarified the issue of the relationship among CMS, the Joint Commission, Idaho Health Department and Northwest Specialty Hospital as follows, R. 1972:

> It is my understanding that the Court viewed my Declaration as pertaining to Joint Commission guidelines only, while the description in my Declaration of my confirmation communication with Mr. Dennis Kelly concerned CMS standards. To clarify, as a CMS participant, Northwest Specialty Hospital [NWSH] is required by Federal Law to formulate and implement standards for its facility. CMS does not specify or create the standards. One way for a hospital such as Northwest Specialty Hospital to demonstrate compliance with the CMS requirement is to adopt, implement and accept inspections by the Joint Commission. Therefore, Mr. Kelly's confirmation that NWSH was a CMS facility also means that NWSH can comply with that by its participation with the Joint Commission. It is for that reason that I conclude that the CMS requirement creates a statewide standard of care applicable to all hospitals, including NWSH. It is for that reason that I conclude that Joint Commission guidelines create the local standard of care for NWSH. With this understanding, my Report and its descriptions/documentation of substandard acts/omissions/policies at NWSH is grounded in the local standard of care. Another way of saying this might be to say that Joint Commission standards are local standards of care for NWSH by virtue of the Idaho Department of Health. Viewed in this light, my Report does reflect my knowledge of the local standard of care for NWSH, how those standards were not met, and the impact on the care of Margaret Fisk.

Sadly, the trial court essentially chose, in an asserted abuse of discretion and violation of case law, to disregard this and much of Appellants' supplemental information provided in their Motions for Reconsideration. Those failures by the trial court are addressed in subsequent sections of this Brief.

v. Court's Decision on the Motion for Reconsideration.

The trial court issued its *Memorandum Decision and Order: Denying Plaintiffs' Motions for Reconsideration* on November 13, 2018. R. 2171-2192. It found that because the motion to reconsider was filed after final judgment was entered it was governed by I.R.C.P. 59(6) and 60(b)—ruling that new evidence is not permitted unless there is a showing of good cause. R. 2183.

The court found that there was no good cause to consider new evidence. R. 2183-2187. The court in so ruling ignored the supplemental declarations of Dr. Kubiak, Ms. Nebeker, and Mr. Hawkins which set forth additional information related to their familiarity with the local standard of care.

The court also considered the defendants' Motions for Costs and Fees and ultimately awarded McDonald costs as a matter of right in the amount of $2,972.58 and to Northwest in the amount of $4,729.34. R. 2188-2189. The Court refused to grant discretionary costs to either party and also denied Northwest's claim for attorney fees under *Idaho Code §12-121*. R. 2189.

The court refused to consider any of the declarations filed in support of the Motion for Reconsideration ruling that a motion for reconsideration filed after a final judgment is governed by *I.R.C.P. 59(e)* and/or *60(b)*. The plaintiffs respectfully identify this ruling as error as will be explained below.

IV.

ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred in granting summary judgment to McDonald and Northwest where it relied upon conclusory affidavits failing to set forth any applicable standard of care.

2. Whether the Trial Court erred in dismissing the plaintiffs' claims on summary judgment for failure to demonstrate expert witness familiarity with the local standard of care pursuant to *Idaho Code §6-1012*.

3. Whether the Trial Court erred in failing to consider the plaintiffs' supplemental filings in support of their Motion for Reconsideration.

4. Whether Defendant McDonald is responsible for the acts and omissions of his

employee nurse practitioner Jessica Scholtz.

5. Whether the Court erred in granting the Defendants their costs as a matter of right,

6. Whether Appellant is entitled to an award of attorney fees and costs on appeal.

V.

STANDARD OF REVIEW

A. Summary Judgment.

Under Idaho law, summary judgment is proper "if pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *I.R.C.P. 56(c);* see also *Smith v. Meridian Joint School Dist. No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). In applying this standard, the trial court is to liberally construe all disputed facts in favor of the non-moving party and should draw all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *McKay v. Owens*, 130 Idaho 148, 152, 937 P. 2d 1222, 1226 (1997).

If the adverse party set forth facts sufficient to establish that there is a genuine issue of material fact, then the moving party is not entitled to summary judgment. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). The summary judgment rule (*I.R.C.P. 56(b)*) provides:

> A party against whom a claim, counterclaim, or cross-claim is asserted, or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any party thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.

The Court is thus duty-bound to liberally construe the record in favor of the party opposing the motion and must draw all reasonable inferences and conclusions from the evidence in favor of

the party opposing summary judgment. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994).

In the context of a medical malpractice claim, the liberal granting of summary judgment in favor of physicians has been specifically denounced. In *Clarke v. Prenger*, 114 Idaho 766 (1988), the Court stated the following:

> We take this occasion to express our disapproval of what appears to be a growing practice among the trial courts of this State dismissing medical-negligence cases at the Summary Judgment point on the basis that the plaintiff's experts are not sufficiently familiar with the standard of care to be expected from the defendant physicians....on the other hand, it appears that some of our trial judges failed to recognize their obligation to construe not only evidence before the court but all reasonable inferences that flow therefrom most favorable to the non-moving party.

As will be demonstrated, ample evidence was presented by the plaintiffs to survive summary judgment and the trial court erred in granting the defendants' motions.

VI.

ARGUMENT

A. McDonald and Northwest submitted conclusory, not evidentiary, affidavits to support their motions for summary judgment. The trial court overlooked this failure. Summary Judgment should never have been considered due to the inadequate filings by the defendants.

The Summary Judgment Motions of both Defendants, Dr. McDonald and Northwest Specialty Hospital, were not supported with sufficient affidavits or other admissible evidence to meet their initial burdens of proof for summary judgment.

1. Dr. McDonald provided no factual or evidentiary support for his Motion for Summary Judgment related to the local standard of care.

For his Motion for Summary Judgment, McDonald provided absolutely no facts or evidence that: 1) described the local standard of care for his profession, or 2) described how McDonald purportedly complied with the local standard.

The Declaration of Nathan S. Ohler in support of McDonald's Motion for Summary Judgment is devoid of an affidavit or any other evidence from McDonald establishing the standard of care for his profession. R. 1475–1539. A thorough reading of McDonald's Memorandum in Support of Motion for Summary Judgment discloses no attempt to define the local standard of care or how McDonald complied with the standard. R. 1457 – 1474. McDonald's memorandum does not provide any facts, evidence, or even argument that established the standard of care. The closest McDonald's memorandum approached the issue was to admit that "It is undisputable that Fisk's medical records, in and of themselves, do not provide the basis for actual knowledge of the standard of care," citing *Rhodehouse v. Stutts*, 125 Idaho 208, 201, 868 P.2d. 1224, 1228 (1994). By noting this, McDonald negates his reliance on the filings of Northwest, which McDonald purported to incorporate, to the extent the Hospital's filings attempted to establish the local standard by reference to medical records.

2. Northwest provided no factual or evidentiary support for its Motion for Summary Judgment related to the local standard of care.

Northwest made a vague attempt at providing competent factual support for its Motion for Summary Judgment. The Hospital provided an affidavit from Dr. Jeffrey Larson, a Coeur d'Alene neurosurgeon. R. 863 – 880. While Dr. Larson described a good deal of his own experience in the area, he provided no facts or evidence of what standard of care was at the time of Margaret Fisk's injuries. Dr. Larson provided a detailed description of how his experience would familiarize himself with the local standard – but he never said what that local standard was. His closest approach was reference to an affidavit of nurse Denise Fowler, who, as we shall see, stated the local standard for nurses was what could be seen in the medical records. As noted above, even McDonald admitted that the contents of medical records do not establish the standard of care.

Dr. Larson's affidavit describes, in some detail, the care rendered to Ms. Fisk. That does

not establish what the standard of care was for any profession. Dr. Larson's affidavit could be considered as a first-order assessment of negligence - or its absence – but it does not describe the standard of care.

The affidavit of Denise Fowler does not establish what the standard of care was, despite its length and incorporation much of Ms. Fisk's hospital file. R. 889-1380. The only direct statement about the standard of care from nurse Fowler was "[t]he standard of health care to which I and other nurses are held is set forth in the attached medical records identified as Exhibit "B," of which I have personally reviewed." R. 892. Risking redundancy, this is insufficient according to *Rhodehouse, supra*, and McDonald's filings.

3. Appellants raised this issue in their initial memoranda opposing summary judgment.

In their initial Memoranda opposing Summary Judgment by both Defendants, Plaintiffs brought the issue to the court's attention. [See, e.g., Record, pp. 1540 – 1564, 1565 – 1587.] Exemplary excerpts from Plaintiffs' filings demonstrate the inadequacy of Defendants' filings:

> A motion for summary judgment on the local standard of care must define the applicable standard. *Suhadolnik v. Pressman*, 151 Idaho 110, 254 P3d 11, (2011), provides guidance as to the burden of proof for a summary judgment motion premised on the local standard of care. Dr. Pressman was an ophthalmologist. At issue was whether he failed to learn about Plaintiff Suhadolnik's use of the drug Flomax.

Dr. Pressman was deposed, and he also filed an affidavit in support of his motion for summary judgment. The court acknowledged that an affidavit to support motion for summary judgment must provide "a description of the standard and alleged compliance with that standard." *Suhadolnik, supra*, at 254 P.3d 24, fn. 4. [Emphasis added.]

The court did not provide the Pressman affidavit in its opinion. It acknowledged its requirement in other comments, noting that Pressman's affidavit did describe what the local

standard was. Id. With a compliant affidavit, the burden of proof on the local standard of care for summary judgment purposes is shifted to the Plaintiff. *Suhadolnik, supra,* at 254 P.3d 16. Absent the movant's affidavit that describes specifically what the local standard of care is, that burden does not shift, and Appellants should not be required to provide conflicting evidence on the subject.

The Affidavits filed by Defendant Northwest do NOT specify what the local standard of care is. The affidavit of Denise Fowler, provided by Northwest, states only that the standard of care is "set forth in the attached medical records identified as Exhibit "B," which I have personally reviewed. R. 892. A thorough review of the medical records cited reveals absolutely no description of any medical standard of care, whether for a hospital, doctor, nurse practitioner, nurses, or any other category of care giver.

McDonald's own filings acknowledge that what is contained in the medical records does not establish the standard of care. "It is indisputable that Fisk's records, in and of themselves, do not provide the basis for actual knowledge of the applicable standard of care. See *Rhodehouse v. Stutts*, 125 Idaho 208, 212, 868 P.2d 1224, 1228, (1994)." R. 1470.

Northwest cannot legitimately say that the records set the local standard of care. If this were the case, then the local standard of care for any case would be whatever treatment was provided. This view is affirmed by the Vernon Kubiak, above, in which he noted that the Fowler affidavit does not describe a standard of care

The Affidavit of Dr. Jeffrey Larson does not provide a description of the local standard of care. It simply incorporates what nurse Fowler states – that the contents of medical records establish the standard of care. "With specific reference to the Plaintiff, Margaret Fisk, the standard of health care practice to which registered nurses are held is set forth in the medical records identified as Exhibit "B," to the Affidavit of Denise Fowler, R.N., which I have personally

reviewed." Dr. Larson's affidavit is otherwise devoid of any description of what is/was the local standard of care.

It is instructive to pause and consider the state of Defendants' assertions at this point:

1) No description of the standard of care for a hospital is provided.

2) A registered nurse's statement that the medical records themselves describes the standard of care is all that is provided.

3) No description of the standard of care for a physician such as McDonald is provided.

4) No description of the standard of care for a nurse practitioner like McDonald's nurse practitioner, Jessica Sholtz, is provided.

Discussing whether a review of deposition testimony might be sufficient to learn and describe the standard of care, the *Suhadolnik, supra,* court made the following observations:

> [w]hile it may be acceptable for an expert to demonstrate knowledge of a local standard of care by reviewing deposition testimony, that testimony must clearly articulate the local standard for the particular time, place and specialty at issue in order to meet the foundational requirements of I.C. Section 6-1013.

Under these circumstances, Northwest failed to provide a description of the standard of care. And the burden of proof to establish the local standard of care is not shifted to Plaintiffs. R. 1574 – 1580.

4. This issue is currently before the Court though in a somewhat different context.

In *Eldridge v. West,* et al., Sup.Ct. Docket No. 45214, the issue of the sufficiency of the movant's affidavits was evaluated in light of *Rule 56(c)(4),* IRCP, which requires that affidavits be made on personal knowledge and "set out facts that would be admissible in evidence." The rule does not allow for conclusory statements such as the standard of care is reflected in the medical records.

Plaintiffs' counsel in Eldridge acknowledged the decision in *Foster v. Traul*, 141 Idaho 890, 120 P.3d 278 (2005), which has been the basis of assertions that conclusory, non-factual

statements might be sufficient to establish the local standard of care to satisfy a movant's duties under *Rule 56(c)(4).* Plaintiffs' counsel in Eldridge has urged the Court to overrule Foster, explicitly, based on *Mattox v. Life Care Centers of America, Inc*., 157 Idaho 468, 337 P.3d 627 (2014).

The Appellants agree with counsel's arguments in *Eldridge* that *Mattox* implicitly nullifies *Foster*, which should be explicitly overruled. In summary, the Eldridge argument notes that Mattox requires affidavits, for either side, "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*.

The *Mattox* court noted, at 337 P.3d 627, 633, that "the guiding question is simply whether the affidavit alleges facts which, taken as true, show the proposed expert has actual knowledge of the applicable standard of care." This is another way to state Rule 56 in our context.

Plaintiffs agree with the arguments in *Eldridge* that concepts in *Maddox* should control. Weighed against these guidelines, the affidavits of Northwest and McDonald should have been interpreted as insufficient to ripen the summary judgment inquiry. The burdens placed on Appellants to demonstrate knowledge of the local standard, and how they were violated, were far greater than those imposed on Northwest and McDonald. If the burdens were applied equally, the Fisks' experts would have merely needed to say they knew the local standards without providing any factual basis for what the standards were and how they were violated. Despite this grotesque inequity imposed by statute and court decision, the following section of this brief will demonstrate how completely Appellants' experts satisfied that task.

B. The trial court misapplied the analysis for the local standard of care in ignoring the voluminous evidence produced by the Appellants' experts demonstrating actual knowledge.

The volume of facts and evidence offered by Appellants to establish knowledge of the local standard of care occupies considerable space in the Record on Appeal. In general, Appellants' experts explained how NATIONAL STANDARDS, STATE STANDARDS, and HOSPITAL RULES must be the standards of care applicable to Northwest and Mc Donald.

1. Legal Discussion.

In the years since the imposition of *Idaho Code §6-1012 and 1013* in Idaho, this Court has been presented with a multitude of appeals concerning how, in the absence of a local care provider's testimony, plaintiffs' experts can establish familiarity with the local standard of care. Knowledge of the local standard of care can be established by several different methods. The most pertinent decisions in this regard include *Mattox v. Life Care Centers of America, Inc.*, 157 Idaho 468, 474, 337 P.3d 627, 633, (2014), cited above, and *Suhadolnik v. Pressman*, 151 Idaho 110, 254 P3d 11, (2011), also cited above.

In sum, according to these cases, mechanisms for demonstrating knowledge of the local standard of care include direct testimony, consultation with a local professional, who need not be of the same specialty. *Newberry v. Martens*, 142 Idaho 284, 127 P.3d 187 (2005), reliance on deposition testimony that describes local standards or practices. *Suhadolnik, supra.*, government regulations, such as Idaho laws and regulations, national governmental requirements, such as CMS requirements, and guidelines of national organizations, *Mattox, supra*, and *Suhadolnik, supra*. and board certifications, guidelines associated with national board certifications. Id.

Mattox, supra, provided the following guidance:

> This 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 formulaic manner in order to establish adequate foundation under Section 6–1013. See, e.g., Bybee v. Gorman, 157 Idaho 169, 178–79, 335 P.3d 14, 23–24 (2014) (holding that a district court erred in excluding an expert affidavit simply because the out-of-area expert claimed to have learned the applicable standard of care by

> consulting with an anonymous local expert); Newberry v. Martens, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005) (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 guiding question is simply whether the affidavit alleges facts which, 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 at 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. The obligation to demonstrate actual knowledge of the local standard of care is not intended to be "an overly burdensome requirement...." Frank v. E. Shoshone Hosp., 114 Idaho 480, 482, 757 P.2d 1199, 1201 (1988). Nor is the standard static and firmly rooted in past medical practices. Standards of care are sensitive to evolving changes in the way health care services are delivered in the various communities of our State. Indeed, the 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...." Suhadolnik v. Pressman, 151 Idaho 110, 121, 254 P.3d 11, 22 (2011).

These *Mattox* guidelines have not been changed or altered since it was decided. Two primary cases have referenced *Mattox* in the local standards context, *Samples v. Hanson*, 161 Idaho 179, 384 P.3d 943 (2015) and *Navo v. Bingham Memorial Hosp.*, 160 Idaho 363, 373 P.3d 681 (2016). Neither case changed the *Mattox* guidelines in any respect.

This court is presented with the opportunity to dispel the myths perpetrated by the local standards statutes and case law. The myth is that a hospital like Northwest operates at less than State or national standards of care. It is a myth to suggest that a hospital which qualifies itself as a Medicare provider by contracting to abide by Joint Commission guidelines has a lesser standard of care. It is a myth to say that Northwest was not obliged to act in accord with Idaho State Statutes and Regulations. All this is true for a physician like McDonald and his employee nurse practitioner

Sholtz. It is a myth that the contents of a set of medical records can establish the local standard. It is a myth that an expert can say he/she looked at the care given, and it complied with a standard of care which was never described. Minimal summary judgment requirements mandate a description of what the standard is – not the self-defining conclusion that whatever the providers did established the standard.

2. Conundrums.

The trial court's view was "tunnel vision" in the sense that Judge Mitchell stubbornly held to a position that someone "local" to Coeur d'Alene or Post Falls was required to say, for example, "yes, there are Idaho State Statutes and Regulations, and they provide the local standard of care for Northwest Specialty Hospital, Dr. McDonald, and his employee."

While Judge Mitchell paid lip service to the notion that plaintiffs have great difficulty getting local experts, and that there are exceptions to the requirement of an actual local expert witness, he rigidly insisted that Appellants produce an affidavit, declaration, or evidence of consultation with a local practitioner to prove Appellants' experts were familiar with the local standard. The conundrum – it is impossible to get local witnesses to cooperate, but the Court requires cooperation in some form by a local witness. That is not the intent of the cited Supreme Court decisions.

A second conundrum is the notion that the existence of a local standard of care must be established "from the bottom up," meaning, in the eyes of the Court and Respondents, that someone from the local medical community must testify that State or National standards have been adopted locally. For example, Respondents and the trial court would assert that a local professional would need to testify that the Respondents adopted State laws. Appellants assert that the impact of a State Law or Regulation on the local standard of care doesn't need further

explaining – it is the law and Appellants should not be saddled with the impossible burden of finding a local provider to say the hospital, doctor, or nurse practitioner are required to abide by state law.

Yet another conundrum was the trial court's repeated view that some local testimony was necessary to establish that existing local standards were replaced by State or National Standards. It is both ironic and a conundrum that the trial court did not require Defendants to describe, either generally or in detail, exactly what the local standards in place were. What were the local standards? None were established by the Defendants. Therefore, to require Appellants to produce information about replacement of a non-disclosed standard was a specious requirement. In fact, the local standards were expressed, not replaced, in the Hospital's own policies and through national accreditation and guidelines such as those from the ANA.

C. The court should have considered the Appellants' supplemental declarations filed in support of the Motion for Reconsideration.

Idaho Rule of Civil Procedure 11.2(b)(1) provides:

> A motion to reconsider any order of the trial court entered before final Judgment, may be made at any time prior to or within 14 days after entry of a final judgment. A motion to reconsider an order entered after the entry of final judgment must be made within 14 days after entry of the order.

The rule allows a motion to reconsider after entry of final judgment and case law allows the presentation of new or additional evidence as well. On a motion to reconsider additional facts may be considered. *Coeur d'Alene Mining Co., v. First National Bank*, 118 Idaho 812, 800 P.2d 1026 (1990). A party is allowed to present new facts on a motion for reconsideration. *Johnson v. Lambros*, 143 Idaho 468, 147 P. 3d 100 (Ct. App. 2006).

The court must consider new evidence bearing on the correctness of a summary judgment order if the motion to reconsider is filed within fourteen (14) days after a final judgment issue.

Agrrisource, Inc. v. Johnson, 156 Idaho 903 (2014). A review of the district court's denial of a motion for reconsideration is de novo. *Bremer, LLC., v. E. Greenacres Irrigation Dist*., 155 Idaho 736, 744, 316 P.ed 652, 660 (2013).

With respect to the Appellants' *Motion to Reconsider*, Appellants assert this right pursuant to *Rule 11.2(b)(1)* and its predecessor *Rule 11(a)(2)(B).* While no substantive interpretations of *Rule 11.2(b)(1)* have been issued by the Supreme Court since the Rule's amendment in 2016, Appellants assert that the issue of whether new evidence may/should be considered in a motion for reconsideration should be the same for each version of the Rule. The rule allows the presentation of new or additional evidence. Additional facts may be considered. *Coeur d'Alene Mining Co., v. First National Bank*, 118 Idaho 812, 800 P.2d 1026 (1990). A party is allowed to present new facts. *Johnson v. Lambros*, 143 Idaho 468, 147 P. 3d 100 (Ct. App. 2006). This applies to medical malpractice cases.

Appellants submitted new information, both evidentiary and explanatory, in their Motions for Reconsideration. R. 1924 – 1990; 1991 – 2034. *Ramos v. Dixon*, 144 Idaho 32, 37, 156 P.3d 533 (2007). The Court should have considered the additional information. Effectively, it did not. It should also be noted that *Rule 11.2(b)(1)* makes no distinction, explicitly or implicitly, in the standard of review for motions filed either before or after final judgment.

Wickel v. Chamberlain, 159 Idaho 532, 363 P.3d 854 (2015) is very instructive in this context. *Wickel* stood for the proposition that materials submitted in support of a motion to reconsider a summary judgment are to be considered by the trial court in the same manner as materials submitted previously. In other words, new evidence or new information/arguments should be considered as if they had been submitted in the initial oppositions to Summary Judgment. Appellants contend that the supplemental Declarations submitted should have been considered in

the same light and given the same weight as if they had been submitted in Appellants' original oppositions.

The trial court did not consider the additional information submitted in the reconsideration motions in this light. The trial court mistakenly applied evaluative tests grounded in Rules 59 and 60 requiring, for example, a showing of good cause. The trial court effectively disregarded Appellants' additional evidence and assessment for their purported failure to show good cause and other factors mandated in Rule 59 and Rule 60 proceedings.

Neither version of the rules on reconsideration incorporate Rule 50 or 60 mandates. To the contrary, both versions of the reconsideration rule explicitly exclude the reconsideration route in the context of Rules 59 and 60. "No motion to reconsider an order of the trial court entered on any motion filed under Rules . . . 50(a), 59 (e), 59.1, 60(a) or 60(b) may be made." *Rule 11.2(b)(2*). By its very terms, the reconsideration rule says it may not be utilized in Rule 59 or 60 proceedings. It follows that standards and tests under those rules do not apply to Motion for Reconsideration.

The court erroneously relied on the decision in *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (2006), as mandating application of Rule 59 or 60 criteria for a *Rule 11.2(b)(1)* motion for reconsideration. R. 2183. A thorough review of that case reveals no dicta nor holding to that effect. Interpreting the prior *Rule 11(a)(2)B),* the *Lambros* Court first observed that while submission of new evidence was allowed under the rule, it was not required. The sole "holding" of *Lambros* was "we hold that the absence of new evidence accompanying Johnson's motion for reconsideration did not, standing alone, require that the motion be denied." *Lambros, supra*, at 473, 105. Similarly, neither *Lowe v. Lym*, 103 Idaho 259, 646 P. 2d 1030 (1982), nor *Hendrickson v. Sun Valley Corporation, Inc.*, 98 Idaho 133, 559 P.2d 749 (1977), cited by the court, R. 2183, support the proposition that a *Rule 11.2(b)(1)* motion be decided on Rule 59 or 60 criteria. *Lym*

considered a *Rule 59(e)* motion only, not a motion under an earlier version of *Rule 11*. *Hendrickson* involved a *Rule 60(b)* motion and was disposed on issues related to the timing of the motion, not substantive considerations for either *Rule 60(b)* or *Rule 11.2(b)(1).*

Since the trial court mistakenly applied the wrong standards of review to Appellants' motions for reconsideration under *Rule 11.2(b)(2),* the findings and reasoning are plainly wrong. The test the court should have applied, as above described, was to analyze the new evidence and information exactly that same as in the original motions for summary judgment.

D. McDonald is responsible for the acts and omissions of his employee nurse practitioner Jessica Sholtz.

Another myth perpetuated by the Respondents and the court is that Mc Donald is not responsible for the acts and omissions of his employee nurse practitioner Sholtz. To sustain this myth, the Respondents and the court ignored the following provision in Idaho law, *Idaho Code §30-1306*:

> Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered.

This is not an uncommon legal concept when professionals like doctors or lawyers choose to do business as corporations or limited liability entities. The supervising professional remains personally responsible for his/her own actions. This statute also makes the professional responsible for all those under "his direct supervision and control." The Respondents feign ignorance that Appellants were holding Mc Donald responsible for Sholtz. There were numerous discovery approaches to the subject.

Initially, multiple medical references to Sholtz by Northwest personnel were to McDonald's physician's assistant. This was reflected in Appellants' Complaint. R. 20, paragraphs

21 and 26, R. 21, paragraphs 27 and 29. While Appellants do not present this as a dispositive fact, it is evidence that the Hospital viewed Sholtz as representing McDonald.

The court apparently relied solely on the notion that a Complaint must specifically allege a matter such as Mc Donald's responsibility for Sholtz. This reliance on the Complaint only was ill-founded.

If the inquiry is to be limited to the pleadings only, Appellants satisfied their requirements for a concise statement of facts under *Idaho Rule of Civil Procedure 8*. As noted above, Appellants pled that Scholtz was the physician's assistant for Mc Donald. This alone is sufficiently puts McDonald on notice that he was allegedly responsible for Sholtz. But what did Mc Donald plead? He pled an absence of sufficient information to admit or deny that Sholtz was his responsibility. R. 141, paragraphs 20 and 21. (If Mc Donald didn't have enough information to admit or deny that Sholtz was his physician's assistant, then how could the court expect Appellants to have that information to include in their Complaint?) McDonald failed in his responsibility to plead defenses as required by *Rule 8(c)*, which requires all matters of defense, not just those explicitly stated in the rule, to "affirmatively state any avoidance or affirmative defense."

If this issue was subject to determination simply by reference to the rules of pleading, we can see that Mc Donald's defenses were deficient. The court's criticism of delays in raising the issue is equally applicable to both parties. As noted above, Appellants' counsel made it abundantly clear through the entire course of the case that they were seeking information on the exact nature of the relationship between McDonald and Sholtz, which McDonald had represented in pleadings that he didn't have enough information to admit or deny. Appellants' efforts in this regard were documented in their Memorandum Opposing Mc Donald's Summary Judgment Motion. R. 1555 – 1558.

Neither the Motion nor the Memorandum in Support for McDonald's Summary Judgment Motion stated a defense that Mc Donald was not responsible for Sholtz. At best, in a mistaken recitation of undisputed facts, Mc Donald mentioned that the Complaint did not explicitly claim an agency relationship, that Sholtz was a nurse practitioner, not a physician's assistant, and that Mc Donald had a business entity called North Idaho Neurosurgery & Spine. R. 1458. Nothing in Mc Donald's motion or memorandum suggested that he was entitled to immunity from responsibility for Sholtz.

Understanding the intent of Mc Donald's summary judgment motion as challenging the existence of an agency relationship between him and Sholtz, Appellants stressed several factors establishing the employer-employee relationship evidenced by an employment agreement between Mc Donald and Sholtz, R. 1557 – 1558. Those factors were:

1) Sholtz was to carry out the duties in a job description. That job description has not yet been found or produced. In any event, it shows McDonald had control over the details of Ms. Sholtz's job duties.
2) A "salary" of $100,000.00 was specified.
3) A bonus program was offered.
4) Health, life and dental insurance was provided.
5) There would be eligibility for participation in a 401(k) plan.
6) There were paid holidays and accrued personal time.
7) The relationship was designated as an "at will" employment.
8) McDonald's professional liability coverage also covered Jessica Sholtz.

Evidence of these factors was provided to the court in Appellants' Opposition, R. 1557, footnotes 13 and 14, referencing Mc Donald's deposition testimony. Detailed information about the McDonald and Sholtz relationship was requested in Appellant's Second and Third Requests for Production.

Further evidence (not new evidence) of the relationship between McDonald and Sholtz was

detailed to the court in Appellants' Motion and Memorandum in Support of Plaintiffs' Motion for Reconsideration, R. 1991 – 2034. The following summarized those factors, R. 1996, with references to Sholtz and Mc Donald Depositions:

1. In Ms. Sholtz's own words, about McDonald: "[h]e is my supervising physician and I look up to him as a father figure."
2. Defendant McDonald hired Jessica Sholtz to be a mid-level provider in his practice.
3. A mid-level provider was either a nurse practitioner or a physician's assistant.
4. Defendant McDonald "never envisioned a mid-level provider as practicing independently in my practice."
5. "For the most part, the mid-level provider and myself work side by side, physically in each other's presence . . . . So we are in clinic together." McDonald goes on to explain other aspects of the close relationship with Jessica Sholtz.
6. McDonald signed off on all of Sholtz's orders because he was responsible for her actions. He signed all orders that came from Sholtz.

All factors, and all evidence, conclusively established that Mc Donald was the supervisor of Sholtz. Regardless of whether he was the employer, or whether the employer was North Idaho Spine, Mc Donald was Sholtz's supervisor and responsible for her actions by virtue of the provisions of *Idaho Code § 30-1306*, above.

Appellants supplemented this argument with comments concerning their Motion to Amend, R. 1897. That Motion, and the accompanying proposed amended pleading, R. 1901, did not attempt to add a party nor a cause of action. It simply clarified Appellants' position and pled the specifics of the statute. The court's assessment of the amendment issue was therefore misguided with references to amendment to add parties or causes of action. The proposed amendment simply designated the statutory mandate that McDonald is responsible for Sholtz.

The Appellants stress that their failure to plead agency or the above statute was not fatal to their claims against McDonald. They are aware of no requirement, for example, that a Complaint alleging injuries due to a defendant running a red light require citation of the statute creating the

obligation to stop be pled. Likewise, they are aware of no requirement that a pleading against an employer or supervisor specify that the employee was the agent of the employer.

Appellants pled that the "treatment provided" by Mc Donald was negligent – and that treatment included providing Sholtz's services. Appellants pled that Sholtz's care was deficient. All these factors, taken together, established Mc Donald's responsibilities for Sholtz.

It is instructive to contemplate if this this case were tried to a jury with only Northwest as a Defendant. The verdict form would certainly include a space for the assignment of fault to Sholtz. Assuming the jury assigned fault to her, the quoted statute requires that McDonald be responsible for that negligence.

E. The Respondents should not have been awarded costs as a matter of right.

The court granted the respondents costs as a matter of right determining that they were the prevailing party. In order to grant costs as a matter of right such a determination must be made. Given the clear errors made in the court below the Appellants request that the Judgment allowing costs as a matter of right be vacated.

F. Appellants are entitled to attorney's fees and costs on appeal.

The Appellants are 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 granted summary judgment without the defendants making a proper foundation, disregarded the Appellants voluminous evidence demonstrating knowledge of the standard of care and ignored additional evidence submitted by the Appellants on their request for reconsideration. For these reasons, the Appellants are entitled to attorney fees and costs on appeal.

VII.

CONCLUSION

The Appellants respectfully request that the Court reverse and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 19th day of June, 2019.

By: _____

DENNIS P. WILKINSON, ESQ.
Smith Woolf Anderson & Wilkinson, PLLC
3480 Merlin Drive
Idaho Falls, Idaho 83404
Telephone: (208) 525-8792
Facsimile: (208) 525-5266
dennis@eastidaholaw.net

GARY L. SHOCKEY, ESQ.
Gary L. Shockey, P.C.
Pro hac vice
480 South Cache
P.O. Box 10773
Jackson, Wyoming 83002-0073
Telephone: (307) 733.5974
Facsimile: (866) 567.8950
gary@garyshockeylaw.com

DEIDRE BAINBRIDGE, ESQ.
Pro hac vice
P.O. Box 747
Jackson, Wyoming 83001
Telephone: (307) 739-0748
Facsimile: (307) 733-1508
deidre@tennbain.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served on those listed below using the delivery method(s) indicated:

DENNIS P. WILKINSON

Nancy J. Garrett, Esq. □ Odyssey eFile and Serve
Vala L. Metz, Esq.
Bradley S. Richardson, Esq.
GARRETT RICHARDSON, PLLC
738 S. Bridgeway Place, Suite 100
P.O. Box 1362
Eagle, ID 83616
Facsimile: (208) 938-2277
Court eService Email: nancy@garrettrichardson.com
Vala@garrettrichardson.com
brad@garrettrichardson.com

Michael E. Ramsden, Esq. □ Odyssey eFile and Serve
Nathan S. Ohler, Esq.
RAMSDEN, MARFICE,
EALY & HARRIS, LLP
P.O. Box 1336
Coeur d'Alene, ID 83816-1336
Facsimile: (208) 664-5884
Court eService Email: mramsden@rmehlaw.com
nohler@rmehlaw.com