

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' REPLY 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

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II.

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III.

INTRODUCTION

Idaho jurisprudence is littered with the skeletons of injured plaintiffs whose cases were improperly dismissed. Plaintiffs, who never get a direct answer from a defendant as to exactly what constitutes the local standard of care. Defendants who are rewarded for hiding the ball and are able to rely on conclusory affidavits. Plaintiffs, who are required to demonstrate a local standard of care by discussing the same with a medical community that won't talk to them. It's an unfair system resulting in an injustice to those that have been injured at the hands of medical professionals.

Nothing in the Respondents' Oppositions change the Appellants' right to the relief requested on appeal. The conclusory affidavits relied on to support their motions for summary judgment should never have been considered as they lacked factual and evidentiary support. This requirement is inherently necessary in all areas of practice in the State of Idaho, but in the context of medical malpractice claims, has been ignored.

The construct allowing medical malpractice defendants to shift the burden on summary judgment by filing conclusory affidavits creates an unfair playing field resulting in viable claims being dismissed. The same can be said for the summary dismissals resulting from a plaintiff's "inability" to demonstrate expert familiarity with the local standard of care. In this case that should not be an issue as the plaintiffs adequately and thoroughly presented evidence to the district court that their experts were familiar with the local standard of care.

The district court was critical that the plaintiffs did not request more time to respond to summary judgment—a fact picked up and argued by the respondents. There is a simple reason that more time was not requested. It was not needed. Voluminous information was provided by

the plaintiffs demonstrating expert knowledge of the standard of care. The district court laments the serious injuries caused by the respondents to Mrs. Fisk only to dismiss her case relying on an antiquated understanding as to the methods a plaintiff can rely on to demonstrate the local standard of care.

The respondents would have this Court believe that familiarity with the local standard of care can only be demonstrated through discussion with a local health care practitioner. The truth of the matter, and what is at the heart of this case, is that familiarity can be demonstrated through a number of different methods. The respondents' briefs highlight the inherent unfairness of a system geared toward stripping injured plaintiffs of their rights.

Please know that the plaintiffs do not solely rely on arguments that the system is inherently unfair. In this case, the plaintiffs complied with requirements dictated by Idaho law and presented the district court with ample evidence demonstrating a knowledge of and violation of the applicable standard of care.

IV.

ARGUMENT

A. Dr. McDonald has ignored – and therefore conceded – his responsibility for Jessica Sholtz by I.C. §30-1306.

There is a glaring absence of any discussion of I.C. §30-1306, in Dr. McDonald's Brief. That statute mandates responsibility of Dr. McDonald for any substandard care rendered by his employee, Jessica Sholtz. The statute says, in clear terms, that:

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.

To reiterate and re-emphasize facts already briefed by the Fisks, the McDonald/Sholtz relationship

had the following key aspects, as evidenced by a letter to Sholtz from McDonald:

- 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. The employment letter stated that Ms. Sholtz was to report directly to Dr. McDonald, just like Section 30-1306 envisions.
- A "salary" of \$100,000.00 was specified.
- A bonus program was offered.
- Health, life and dental insurance was provided.
- There would be eligibility for participation in a 401(k) plan.
- There were paid holidays and accrued personal time.
- The relationship was designated as an "at will" employment.
- McDonald's professional liability coverage also covered Jessica Sholtz (who had no separate coverage of her own.)

[Appellants' Brief, p. 46, with references.]

The list continues:

- In Ms. Sholtz's own words, about McDonald: "[h]e is my supervising physician and I look up to him as a father figure."
- Defendant McDonald hired Jessica Sholtz to be a mid-level provider in his practice.
- A mid-level provider was either a nurse practitioner or a physician's assistant.
- Defendant McDonald "never envisioned a mid-level provider as practicing independently in my practice."
- "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.
- McDonald signed off on all of Sholtz's orders because he was responsible for her actions. He signed all orders that came from Sholtz.

[R. 1996; Appellants' Brief, p. 47, with references.]

Dr. McDonald cannot escape his responsibility for the wrongs of Jessica Sholtz. He has stated he would have performed differently had he been informed of Ms. Fisk's condition. Dr. McDonald's ignorance of the events in his absence is no excuse from his responsibility for his

employee Jessica Sholtz, a “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.” 30-1306, *supra*.

It is false ignorance for counsel for Dr. McDonald to assert a lack of awareness of the Fisk’s position that Dr. McDonald is responsible for what Jessica Sholtz did or didn’t do. Dr. McDonald’s counsel is top-notch, highly skilled and well versed in the law. It is disingenuous to assert surprise that the Fisks hold Dr. McDonald responsible for Sholtz. Coupled with this false ignorance by counsel, the Trial Court ignored the law – Section 30-1306, *supra*, in its failure to enforce Dr. McDonald’s legal responsibilities.

The negligence and substandard care by Jessica Sholtz is well documented in the filings in this matter. Dr. McDonald’s claims that the Fisks’ experts did not satisfy statutory requirements [McDonald Brief, pp. 18 – 21] are not convincing. The following section of this Reply notes the affirmative evidence of Sholtz’s negligence and the Fisk experts’ demonstration of familiarity with standards of care. It then highlights portions of Defendant Northwest Specialty Hospital’s filings evidencing Jessica Sholtz’s substandard care.

An insistence that the Fisk Plaintiffs needed to plead what is, effectively, a statutory rule related to who is responsible for negligence – not a statute which creates a separate cause of action, is ill-founded and “old” thinking. The following quotation, from *Clark v. Olsen*, 110 Idaho 323, 325, 715 P. 2d 993, 995, illustrates this view:

We begin our discussion by noting that technical rules of pleading have long been abandoned in this state. *Rauh v. Oliver*, 10 Idaho 3, 9, 77 P. 20, 21–22 (1904). The general policy behind the current rules of civil procedure is to provide every litigant with his or her day in court. *Sines v. Blaser*, 98 Idaho 435, 437, 566 P.2d 758, 760 (1977). The rules are to be construed to secure a just, speedy and inexpensive determination of every action or proceeding. I.R.C.P. 1(a). The purpose of a complaint is to inform the defendant of the material facts upon which the plaintiff bases his action. *Fox v. Cosgriff*, 64 Idaho 448, 454, 133 P.2d 930, 932–33 (1943).

A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief. I.R.C.P. 8(a)(1); *Stone v. Bradshaw*, 64 Idaho 152, 157, 128 P.2d 844, 846 (1942).

The Complaint adequately notified Dr. McDonald's skilled attorneys that he was responsible along with Jessica Sholtz. [See, e.g., Complaint, R. pp. 17 – 27, paragraphs 21, 25, 26, and 27]. Those allegations were that both Dr. McDonald and Jessica Sholtz were monitoring Ms. Fisk, that neither saw her personally, that both were aware of Ms. Fisk's condition at 2:15 a.m., and that Sholtz failed to follow a consultant's recommendation for transfer out of NWSH. A motion to amend to make it even more explicit [R. 1897 – 1911] was denied.

B. The Fisks presented abundant evidence that their experts who criticized Dr. McDonald's Nurse Practitioner Sholtz were familiar with the Local Standard of Care. Other defense experts, including Dr. McDonald, agreed.

1. Reiteration of Fisk's Opening Brief.

There are, pursuant to decisions of this Court cited by all parties, multiple mechanisms available to plaintiffs' experts to establish familiarity with the local standard of care. Short of having a local physician, nurse practitioner, or nurse say magic words such as "I practice in the locality, I know its standards of care, and the defendant's acts were substandard . . .", "the Fisks presented abundant, admissible evidence that their experts were familiar with local standards.

It would be redundant to reiterate all the evidence the Fisks have already presented to the Court in their Opening Brief. The evidence presented by professor/Doctor of Nursing Vernon Kubiak, nurse practitioner Suzanne Nebeker, and hospital administrator Timothy Hawkins has been discussed extensively and meticulously documented in the Opening Brief, specifically at pages 11 – 22 and 23 – 29. Suzanne Nebeker even satisfied a purported requirement of talking to local practitioners to confirm her understanding of the local standard as applied to nurses and nurse

practitioner Sholtz.

2. Defense Experts Agreed Sholtz Acted Below the Standard.

Plaintiffs/Appellants' submissions were not the only evidence establishing local standards and that nurse practitioner Sholtz fell below those standards. Multiple submissions by Northwest Specialty Hospital, NWSH, demonstrated the local standard and Sholtz's violations. The following is a summary, not meant to be fully comprehensive:

- A. Rick Rasmussen, CEO, NWSH, stated in his designation of expert testimony, R. 657 – 661, stated that he was familiar with the local standards of care and that nurse practitioner Sholtz violated those standards by not contacting a critical care physician, failing to go personally to the hospital to treat Ms. Fisk, and not transferring Ms. Fisk to Kootenai Medical Center.
- B. Dr. Emery C. Douville, detailed in his expert designation [R. p. 536] that he had an unfavorable opinion of nurse practitioner Sholtz, that she was not physically present to examine Ms. Fisk, that she did not respond properly to information provided by NWSH nurses, and that she did not contact her supervising physician concerning Ms. Fisk.
- C. Annette Asper, Doctor of Nursing Practice, Post Falls, Idaho, concluded that nurse practitioner Sholtz fell below the local standard of care by failing to go to the hospital to personally assess Ms. Fisk, based on the failure of medications ordered by Sholtz to address Ms. Fisk's worsening symptoms, her coffee ground emesis, the severity of symptoms – and that Sholtz should have contacted Dr. McDonald. [R. pp. 539 – 540]
- D. Jennifer Orsua, nurse practitioner, Post Falls, Idaho, concluded that nurse

practitioner Sholtz should have been more thorough, asking more questions about symptoms, should have contacted Dr. McDonald, failing to inquire sufficiently for more information from nurses, and failure to notify Dr. McDonald that Ms. Fisk had not been discharged. [R. pp. 549 et seq.]

3. McDonald and His Experts Said Sholtz Fell Below the Standard.

Dr. McDonald himself was critical of Jessica Sholtz's decision not to transfer Ms. Fisk from NWSH to Kootenai. He testified in deposition that he would have transferred, based mainly on a consultant's recommendation to transfer, which Jessica Sholtz did not follow. [R. p. 1592]. There was no reason Jessica Sholtz couldn't have notified him, as he was "at home just having a normal night." [R. 1593] Dr. McDonald, in response to Interrogatories, [No. 28], would have seen Ms. Fisk and followed the recommendation to transfer. [R. p.1617]

One of Dr. McDonald's designated expert witnesses was also critical of Jessica Sholtz. In her designation, [R. p. 1609], nurse Rhonda Taylor, was critical of the Sholtz's actions in the early morning hours of March 12, 2015. Nurse Taylor's opinion was that Sholtz fell below the standard of care in her failure to follow a consultation recommendation to transfer Ms. Fisk to Kootenai.

4. Conclusion.

Jessica Sholtz provided substandard care under local standards. Dr. McDonald is statutorily responsible for that. He should be required to answer for Sholtz's substandard care at trial.

C. Significant Foundation was Presented Demonstrating Familiarity with the Common-Sense Standard of Care.

The standard of care applicable to the hospital is straight-forward and simple. The notion that the nursing staff had an obligation to observe, manage and treat Mrs. Fisk is universal. This standard is set forth in the policies adopted by the hospital, the Board of Nursing, State law and

the American Nurses Association (“ANA”) relied upon and followed by the nursing staff.

The failure to adequately care for Mrs. Fisk is recognized by the district court when it notes that, “There can be no doubt that they have suffered damage. There can be no doubt that the longer emergency surgery was delayed, more of Margaret Fisk’s intestines were irreparably damaged. Logic tells us that someone, or more than one person, waited too long to get Margaret Fisk into that emergency surgery.” R. 2185. That “someone” were the people responsible for her care. The district court found fault with those care providers and then denied the Fisks their opportunity to present their case to a jury.

This Court now has a clear choice: 1) give the Fisks the remedy they deserve, which is a trial; or 2) allow the defendants to escape liability based on a convoluted “how many angels can dance on the head of a pin” interpretation of the local standards statute. These standards must be applied in a common sense fashion allowing cases like this the opportunity to be weighed by the finder of fact.

As it relates to the Hospital, the district court ruled that the plaintiffs failed to produce admissible evidence that at least one of their expert witnesses had actual knowledge of the applicable standard of care. R. 1854. The court concluded that cases in Idaho tend to uniformly require that the (1) the out of area expert consult with a local expert that the local standard has been replaced by a national standard, or (2) the out of area expert to review deposition testimony from a local specialist that testifies that the local standard has been replaced by a national standard. R. 1863.

Based on that logic the district court concluded that the plaintiffs’ experts failed to lay an adequate foundation for their opinion as required by *Idaho Code §6-1013*. The plaintiffs do not quibble with the requirement that they must demonstrate that their experts have familiarity with

the local standard of care. The standard of care is simply the care typically provided under the circumstances by the relevant type of health care provider at the time and place of the negligent act. *Shane v. Blair*, 139 Idaho 126, 130, 75 P.3d 180, 184 (2003). Reviewing depositions and the like is an accepted means to acquire knowledge of the local standard. *Id.* at 184

This Court in *Samples v. Hanson*, 161 Idaho 179, 384 P.3d 943, 947 (2016), held that experts are not held to some formulaic process for familiarizing themselves with the standard of care. The question the court must ask is whether the proposed expert's grounds for claiming knowledge of that standard would likely give rise to knowledge of the standard. *Id.* at 949. The standard of care in *Samples* was "largely a matter of common sense" and "not complicated." *Id.* at 949-50.

In opposition to the hospital's Motion for Summary Judgment the plaintiffs provided the Declarations of Dr. Kubiak, Suzanne Nebeker, Timothy F. Hawkins and Robert Uyeda, M.D. The substance of what was provided is largely covered on pages 11-22 of the Appellants' Brief. The variety of information relied on by the experts must be viewed comprehensively. Medical professionals in a community cannot adopt standards that are inferior to statewide standards. *Suhadolnik v. Pressman*, 151 Idaho 110, 117-18, 254 P.3d 11, 18-19 (2011). It was recognized by the *Suhadolnik* Court that the increase in communication, government regulation, development of regional and national provider organizations, and the wide availability of medical information has resulted in local standards not frequently varying from national standards.

In coming to their opinions the plaintiffs' experts relied on a number of things in familiarizing themselves with the local standard of care. Among those items reviewed were:

- The standards of nursing care present in Idaho during the March 2015 timeframe.
- The standard procedures adopted by the hospital to include the standards put forth by the ANA.

- Idaho Statutes and IDAPA.
- The Medical Record.
- Jt. Commission Standards (Requirements associated with hospital accreditation.
- Depositions.
- Expert reports and declarations submitted by the defendants.

The requirements and policies set forth by the ANA and adopted by the hospital define the standard of care. These standards were adopted by policy and according to the depositions of nursing staff were required to be followed in the Post Falls area in March of 2015. Similarly, compliance with the Idaho Board of nursing is required. The standard of care as it relates to the hospital is the standard that was adopted through its own policy.

Mattox simply requires a showing that the expert is familiar with the standard of care and a demonstration as to how they became familiar with it. Each of the items reviewed above are completely acceptable in familiarizing an expert with the local standard of care. Nothing in the language of §6-1012-13 precludes an expert, when forming their opinion, from relying on a statewide standard of care that has been adopted by that profession's governing board. *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105 (2002).

The plaintiffs' experts educated themselves with evidence and information that has been recognized by this court to be acceptable. First and foremost the hospital adopted a national nursing standard of care. Those policies, procedures and rules define the standard of care for the hospital. The Idaho Board of Nursing is governing board establishing state wide policies that must be followed by the hospital. The information gleaned from depositions completes this comprehensive picture of what the standard of care was at that time and place.

Let us not forget that we are not dealing with a complicated standard of care. As noted in *Samples*, sometimes the standard is largely a matter of common sense. The hospital failed to react

to Mrs. Fisk's changing condition. As she languished in pain the nursing staff failed to treat her and ultimately failed to move her to a higher level of care as recommended by a physician.

As noted by the plaintiffs' experts the applicable standard of care in March of 2015 would have required the nursing staff to act quickly to treat Mrs. Fisk's condition. To adopt the hospital's position, we must ignore the existence of Idaho statutes on nursing, national standards of the ANA, the national standards created by the Joint Commission and CMS, the analysis of a distinguished Idaho nurse and professor—Dr. Kubiak, the obviously brilliant nurse practitioner—Suzanne Nebeker, and cast all this aside because we couldn't produce a local health care provider to say the obvious, that the hospital must comply with the guidelines of the profession.

D. The District Court Applied an Incorrect Standard to the Motion for Reconsideration.

As noted in the Appellants' Brief, the district court erred by applying the good cause standard of I.R.C.P. 59 and 60 to the Motion for Reconsideration. This error is not addressed by the hospital. The hospital does not defend the district court's application of those rules. Instead, it argues that I.R.C.P. 11.2 does "not preclude" the use of a good cause standard when considering evidence submitted with a motion for reconsideration. The rule doesn't preclude a number of different standards, but the rule as written does not impose such a standard.

The hospital provided no authority supporting the use of a "good cause" standard for the consideration of new evidence. Instead, the hospital argues that this Court should create a new standard to deter litigants from taking advantage of the system by seeking a second shot. The rule and the case law suggest that seeking this relief is not about a second shot, rather it is about ensuring that the district court has all the information it needs to make the correct decision. This policy, with an aim toward ensuring a fair opportunity to be heard should be embraced by this Court.

The Appellants stand by their firm conviction that adequate foundation was provided to the district court at the initial summary judgment. After review of the court's decision, additional foundation was sought—clarification provided—and a more complete foundational record was created so that, in the interest of justice the district court would have everything it needed to make its decision.

1. The Motion for Reconsideration Should have been Granted.

Contrary to the findings of the district court, the information and evidence presented in those affidavits was fundamentally important in demonstrating familiarity with the local standard of care. The district court chastised the Appellants for failing to address the I.R.CP 59 and 60 standard of good cause and then indicated that the new affidavits fail to present admissible evidence reflecting knowledge of the standard of care. R. 2184, 2186.

In support of the Motion for Reconsideration the Appellants provided ample additional information to the district court. The Declaration of Vernon Kubiak went into great deal setting forth hospital rules and the ANA providing detailed examples as to how they define the local standard of care. R. 1955. Within those examples he also provided specific deposition testimony from hospital nurses further relied on in establishing the local standard of care.

In her second Declaration, Ms. Nebeker provided a great deal of additional information. R. 1941-1952. Not only does exhaustively set forth the information she relied on in educating herself as to the local standard of care, she spoke to a local nurse about the prevailing standards in existence at the time. (Please see Appellants' Brief at 25-28). The Declaration of Timothy Hawkins addressed his opinion further providing information to the court as to the relationship between CMS, the Joint Commission, the state of Idaho and Norwest Specialty Hospital. R. 1972. The Third Declaration and Response of Suzanne Nebeker provides additional information on the

applicable standard of care. R. 2153-2166.

The district court's decision is mixed. The Court found that the Appellants presented no new evidence to support their motion to reconsider. It found that Nebeker's new Declaration:

- Did not provide the ANA guidelines for the Court to review to determine whether those guidelines provide some cognizable standard applicable to this case.
- Did not provide any testimony by Nurse Miller.
- Did not provide the contents of communications she he had with Odom, Wagner and Moore.
- Provides no admissible evidence reflecting actual knowledge of the standard of care. R. 2186

Similar analysis was applied to the new Declaration of Kubiak. The caselaw does require that the Appellants demonstrate knowledge of the standard of care. The submitted declarations provided the court with that information. In addition to the experts setting forth their knowledge of the standard of care and how they became familiar with it the district court-imposed requirements found nowhere in Idaho jurisprudence.

In providing the laundry list referenced above the court is now requiring more than just testimony in a declaration. Nebeker cannot say that she is familiar with the standards set forth by the ANA—according to the district court she now has to physically provide those standards to the court for review. She cannot simply reference the testimony of Nurse Miller—she has to provide the actual testimony for review. Though she summarized her communications with Odom, Wagner and Moore—it was not enough for the Court. Throughout each of her Declarations she continually provided an evidentiary basis reflecting knowledge of the standard of care. As it relates to each and every Declaration submitted by the Appellants the court found unnecessary fault applying a stringent standard of admissibility not in keeping with the applicable rules or the spirit of the requirements under §6-1012-13.

VII.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 18th day of September 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 September 18, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served on those listed below using the delivery method(s) indicated:



DENNIS R. 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: mramsd@rmehlaw.com
nohler@rmehlaw.com