Electronically Filed
2/4/2020 3:52 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT FOR THE STATE OF IDAHO

DEBRA DLOUHY, individually, and as surviving spouse of Duane Dlouhy, DUSTIN DLOUHY, individually, and as Personal Representative of the Estate of Duane Dlouhy, DRUE HATFIELD, individually, and DEMI DLOUHY, individually, Plaintiffs/Appellants, vs. KOOTENAI HOSPITAL DISTRICT, doing business as KOOTENAI HEALTH KOOTENAI CLINIC, LLC, and UNKNOWN BUSINESS ENTITIES I through X, Defendant/Respondent.	Docket No. 47165 Kootenai County Case No. CV-17-4052

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County
Honorable Cynthia K.C. Meyer, District Judge Presiding

Kenneth L. Pedersen
Jarom A. Whitehead
Michael J. Hanby, II
PEDERSEN AND WHITEHEAD
161 5th Ave. S., Ste. 301
P. O. Box 2349
Twin Falls, ID 83303-2349

Attorneys for Appellants

Joel P. Hazel
WITHERSPOON KELLEY
The Spokesman-Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, ID 83814-2416

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES:

STATUTES:

I. ARGUMENT

A. The district court failed to act within the bounds of discretion by striking the opinions of the Dlouhys' experts.

1. *Samples* is controlling precedent and dispositive of the issues on appeal. Both Kootenai Heath and the district court misapplied the holding and the standards clearly articulated in that case.

In *Samples v. Hanson*, this Court plainly held that the standard of care for board-certified physicians is a national standard of care. 161 Idaho 179, 185, 384 P.3d 943, 949 (2016). Because this holding is fatal to Kootenai Health's position, it goes to great lengths to misconstrue that holding. Each of the arguments presented to distinguish the holding of *Samples* are flawed and each will be addressed in turn.

Kootenai Health's chief argument is that *Samples* is distinguishable because the expert in that case had actual knowledge of the standard of care because he was a local, rather than out-of-area expert. (Resp. Br., p.16 (stating: "In *Samples*, the Idaho Supreme Court recognized the unique facts of the case in which the expert was **actually familiar** with the local standard of care at issue, as he replaced the local provider in the local practice and had practiced locally in the role in question during the same time." (emphasis in original))). The district court parroted this faulty reasoning in its *Memorandum Decision and Order on Defendant Kootenai Hospital District's Motion for Summary Judgment*. (R. p. 777). This argument fails to acknowledge that the trial court in *Samples* found the expert to be an "out-of-area" expert which required him to familiarize himself with the local standard of heath care practice. This issue was specifically appealed by the patient. This Court explicitly stated that it was not going to address that issue on appeal as it had been rendered **moot**:

> The *Samples case* raised three issues on appeal. **The first is whether the district court erred in finding that Dr. Birkenhagen was an out-of-area expert**. The second is whether the district court erred in concluding that Dr. Birkenhagen failed to familiarize himself with the applicable community standard of health care

> practice. The third is whether the district court erred in denying the *Samples*' relief from the pretrial order. **We need address only the second issue, as the first issue has been rendered moot by our decision** and the second issue and the third issue can be sorted out on remand.

Samples, 161 Idaho at 182, 384 P.3d at 946 (emphasis added).

Given this articulation of the issues on appeal in *Samples*, and this Court's holding, the determination that the expert witness in that case was an out-of-area expert and was required to familiarize himself with the local standard of care was not disturbed on appeal. As a result, the language cited by Kootenai Health indicating that Dr. Birkenhagen had "actual knowledge" of the standard of care because he was a local expert is merely *dicta* and clearly not central to the holding in *Samples*.

It has long been recognized that "judicial opinions must be considered in the light of the rule that they are authoritative only on the facts on which they are founded." *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 586, 850 P.2d 724, 737 (1993) (*citing Bashore v. Adolf*, 41 Idaho 84, 88, 238 P. 534, 534 (1925)). Moreover, courts are not bound by such statements of *dicta*. *See*, *id*.

It is clear that this argument advocated by Kootenai Health was the sole basis of the district court's decision finding *Samples* distinguishable from this case. A review of the *Memorandum Decision and Order on Defendant Kootenai Hospital District's Motion for Summary Judgment* reveals that the entire basis for the court's decision rested on the faulty premise that this Court in *Samples* found the expert to be a "local" rather than "out-of-area" specialist.

> Plaintiffs' reliance on *Samples* is mistaken. A close reading of *Samples* reveals that Dr. Birkenhagen, the challenged medical expert, had actual knowledge of the local standard of care. *Samples v. Hanson*, 161 Idaho 179, 185, 384 P.3d 943, 949 (2016). **The *Samples* court noted "this case does not present a situation where an out-of-area doctor is required to become familiar with the local standard of care**

> **by consulting with a local physician."** *Id.* The *Samples* court explained that "[t]here can be no doubt that Dr. Birkenhagen became aware of the standard of care in the vicinity of BMH in April or May 2011. In his affidavit, Dr. Birkenhagen states that he was employed by BMH to replace Dr. Hanson as a general surgeon in August 2011." *Id.* "Dr. Birkenhagen replaced Dr. Hanson as general surgeon at BMH a mere 22 months after the incident at issue," and "practiced in that role at BMH for 25 months until he signed his affidavit." …
> To the extent that the *Samples* court engaged in a discussion regarding the standard for board certified physicians, it does not appear to be the basis for the Idaho Supreme Court's determination that Dr. Birkenhagen was qualified as an expert under Idaho Code §§ 6-1012 and 6-103.

(R., p. 777.) (emphasis added).

The district court's *Order* ignored that the trial court in *Samples* determined that Dr. Birkenhagen was not a local expert and that that decision was left undisturbed by the Idaho Supreme Court and specifically found to be "moot." In essence, the district court in this case erroneously found the language regarding board certification to be *dicta*. That was the faulty basis for the determination that it was not required to follow the reasoning of the *Samples* Court. This is completely backwards and demonstrates that the district court misapplied the law and failed to act within the bounds of its discretion.

Similarly, Kootenai Health's argument that *Buck v. St. Claire* is inapplicable as it has been disavowed by this Court holds no water. This faulty argument relies on outdated language from *Grimes v. Green*, 11 Idaho 519, 746 P.2d 978 (1987) and simply ignores this Court's more recent approval of *Buck* found in *Samples*. In fact, *Grimes* predates *Samples* by nearly thirty years. By relying on the language from *Buck*, the *Samples* Court affirmed that those standards are still good law in this state.

It is also false to argue that finding an out-of-area expert to testify based on board certification is contrary to Idaho Code § 6-1012. In fact, that statute explicitly states that physicians "shall be judged in such cases in comparison with **similarly trained and qualified**

providers of the same class in the same community, taking into account his or her **training, experience, and fields of medical specialization**, if any." IDAHO CODE ANN. § 6-1012 (emphasis added). Board certification on its face is compelling evidence of training, skill, and specialization. Utilizing a measure of common sense, this Court in *Samples* re-affirmed that a nationally board-certified physician is held to a national standard of care because of their high degree of training, the fact that they must pass a nationally accredited examination, and the fact that they are products of a nationally designed education program. This reasoning is perfectly aligned with requirements set forth in Idaho Code § 6-1012.

In short, each of Kootenai Health's arguments as to why *Samples* does not control the outcome of the issues on appeal fall flat. By misapplying the holding of the case and by relying on outdated case law such as *Grimes*, the district court abused its discretion in determining on summary judgment that the Dlouhys' experts lacked the appropriate foundation to render their opinions.

2. Kootenai Health advocates for a foundational burden that inconsistent with this Court's jurisprudence.

In its Respondent's Brief, Kootenai Health contends that Dr. Hammerman was required to have a "phone consultation with a local specialist" or review "a deposition in which a local specialist testified to the local standard of care"[1] in order to claim foundation to testify to the standard of care. (Resp. Br., p. 14 n. 3.) This position places a higher burden on plaintiffs than is required under Idaho law.

Contrary to Kootenai Health's argument, this Court has recognized several ways in which an expert can demonstrate foundation. In *Newberry v. Martens,* it was recognized that an

[1] As discussed *supra*, the Dlouhys' expert did review the depositions of local specialists as part of the foundation for their opinions.

ophthalmologist demonstrated actual knowledge of the standard of care for a family practice physician simply by practicing alongside family practice physicians, by providing and obtaining referrals, and by discussing patient care with such providers. 142 Idaho 284, 292, 127 P.3d 187, 195 (2005). In *Grover v. Smith*, it was recognized that basic familiarity with state licensing requirements governing the practice of dentistry was sufficient foundation for an out-of-area provider. 137 Idaho 247, 253, 46 P.3d 1105, 1111 (2002). Additionally, sharing a national board certification with the defendant provider is sufficient foundation, as discussed at length above. *Samples v. Hanson*, 161 Idaho 179, 384 P.3d 943 (2016). In *Suhadolnik v. Pressman*, this Court found 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." 151 Idaho 110, 121, 254 P.3d 11, 22 (2011). Thus, any contention that an out-of-area provider make a phone call has been flatly rejected by this Court on several occasions.

It is also clear that no "magic language" is required to demonstrate familiarity with the standard of care and that "this Court does not require that an affidavit include particular phrases or state that an expert acquainted himself or herself with the standard of care **in some formulistic manner in order to establish adequate foundation under Section 6-1013**." *Samples v. Hanson*, 161 Idaho 179, 183, 384 P.3d 943, 947 (2016) (*citing Mattox v. Life Care Ctrs. of Am., Inc.*, 157 Idaho 468, 473-74, 337 P.3d 627, 632-33 (2014)) (emphasis added). Instead, the testimony proffered by the expert must only meet the minimum requirements of Idaho Code § 6-1012. Importantly, courts are required to view the proposed expert's foundation with a measure of common sense. *Mattox*, 157 Idaho at 474, 337 P.3d at 633 (*citing Frank v. E. Shoshone Hosp.*, 114 Idaho 480, 482, 757 P.2d 1199, 1201 (1988)).

Kootenai Health's position simply attempts to place a higher burden on plaintiffs than is required. The Court has held that the "obligation to demonstrate actual knowledge of the local standard of care **is not intended to be an overly burdensome requirement**." *Id.* Kootenai Health's position, however, attempts to place an impossible burden on medical malpractice plaintiffs in this state. When the foundation claimed by the Dlouhys' experts is reviewed through the proper standards, it is abundantly clear that their proffered testimony not only meets but far exceeds the minimal requirements set forth by Idaho law.

3. The Dlouhys' experts' reliance on specific deposition testimony, policies, and procedures provide adequate foundation under Idaho law to opine as to the standard of care.

While Kootenai Health acknowledges that out-of-area experts may gain the necessary foundation to testify as to the standard of care through the review of depositions, it ignores the substance of those depositions as well as the policies, procedures and regulations that further add to that foundation. (*See* Resp. Br., p. 14.) Rather than contradicting the testimony of the local providers directly or on a substantive level, Kootenai Health argues that the materials relied upon are insufficient to establish the requisite foundation. These arguments are conclusory, overly general, and contrary to this Court's jurisprudence. Essentially, Kootenai Health seeks to require "magic words" and an impossibly high burden for expert testimony foundation. When properly viewed using a measure of common sense, it is clear that the depositions relied upon provide adequate foundation as to the standards of care as outlined by the experts.

Here, each of the expert opinions offered by Dr. Hammerman and Schmidt were supported with ample foundation from a variety of sources. As was the case in *Samples*, the standards at issue are basic universal standards of care. Both Drs. Hammerman and Schmidt state that the standard of care in this case is basic, universal, and a matter of common sense for all

medical professionals. (R., pp. 232-49; pp. 266-89.) The opinions that the standards at issue are universal and basic remain unchallenged as there is no testimony in the record from Kootenai Health's experts disputing this contention.

The opinion that the practice of medicine for board-certified providers such as Dr. James is supported by the testimony of Dr. James himself:

Q. And you were board certified in 2014?
A. Yes.
Q. And '15?
A. Yes.
Q. Is there anything different about the practice of gastroenterology in – with Kootenai or in Coeur d'Alene that is different than the way you practiced when you were doing your fellowship in San Francisco?
A. I get to wear what I want.
Q. Other than dress.
A. Other than the blue – the blue shirt and blue coat, yeah.
Q. The dress isn't military standard; is that –
A. Right.
Q. -- what you're saying? Okay.
A. **Otherwise, no**.

(*Id.*, p. 625, Deposition of Dr. James, p. 19, ll. 11-25; p. 20, l. 1.) (emphasis added).

This statement may seem simple on its face but it could not be any clearer. There can be little doubt that a national standard of care applies to providers in San Francisco as it is one of the most technologically advanced metropolitan areas in the country. When asked if the practice of gastroenterology was in any way different in Coeur d'Alene, Idaho, Dr. James specifically acknowledged that it was not. That is an important fact in this case because the district court is required to employ a measure of common sense when examining the foundation that is claimed by an expert. The mandate from this Court is that if the manner in which the expert claims foundation is "taken as true" and "show[s] the proposed expert has actual knowledge of the standard of care," there can be no basis to prohibit the proffered testimony. *Mattox v. Life Care Centers of America, Inc.*, 157 Idaho 468, 474, 337 P.3d 627, 633 (2014). This testimony supports

the contention of the Dlouhys' expert that a national, rather than local, standard of care applies.

4. There was substantial foundation presented to support the Dlouhys' experts' opinions regarding inadequate follow-up and discharge.

In addition to opining that the standard of care is a national one, the Dlouhys' expert opined that the providers failed to order and complete a repeat colonoscopy immediately due to inadequate preparation and the inability to view the rectum. (R., p. 233.) This basis standard of care relates to improper follow-up and discharge after the colonoscopy performed by Dr. James. (*Id.*) Not only is this a basic, universal standard of care, it was further confirmed by the testimony of Dr. James:

Q. And if you can't see, what do you need to do?
A. **Well, the best thing is to – we see him in follow up and recommend they get another colonoscopy**.
Q. And why would you do that?
A. To get a better prep, get a better look.
Q. You don't think you had a good look on this one?
A. No. And that's what I stated.
Q. What about the prep wasn't good?
A. It didn't clean him out completely.

(*Id.*, p. 635, Deposition of Dr. James, p. 57, ll. 3-12.) (emphasis added).

It was an admitted fact that Dr. James did not order, recommend, or perform a follow-up colonoscopy at any time. (*Id.*, p. 635, Deposition of Dr. James, p. 57, ll. 23-25; *see also*, R., pp. 500-01; p. 503.) Consistent with *Perry v. Magic Valley Reg. Med. Cnt.,* 134 Idaho 46, 995 P.2d 816 (2000) and *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (Idaho 1994), this is specific testimony providing adequate foundation as to the standard of care.

This standard of care requiring the providers to provide adequate follow-up was also supported by the policies and procedures of Kootenai Health. Dr. James specifically acknowledged that the standard of care is to follow the polices, procedures and rules in place at Kootenai Health. (R., pp. 637, Deposition of Dr. James, p. 66, ll. 18-25, p. 67, ll. 1-6.) With

respect to adequate follow-up and discharge, the Hospital Wide Discharge policy confirms and supports the opinions of the Dlouhys' experts. (*Id.*, pp. 658-70.) That policy states that the "attending physician is ultimately responsible for the assessment, medication reconciliation, **and plan of care**." (*Id.*, p. 659.) (emphasis added). That policy also requires that the physician complete "the discharge order in the EMR" and to indicate "the type of services needed post hospitalization." (*Id.*) Further, the Patient Transfer/Release of Medical Information Policy recognizes that the standard of care is to provide "continuity of care among settings" as well as "consistent patient care" and "service coordination." (*Id.*, pp. 709-26.)

Finally, Dr. James, by virtue of his contract, was required to comply with federal law and the standards set forth by Medicare in his treatment of patients. (*Id.*, p. 237.) This includes the requirement that patients be properly transferred or referred for follow-up care. 42 CFR 482.43(d).

While there may be factual issues regarding the care provided, there is extensive support for what the standard of care for proper follow-up and discharge required. The foundation for these opinions goes well beyond the minimal requirements set forth by Idaho. When viewed together with a measure of common sense, it is abundantly clear that the opinions expressed regarding follow-up and discharge are sufficiently supported by the applicable depositions, policies, and regulations.

5. There was substantial foundation presented to support the Dlouhys' experts' opinions regarding the requirement that providers to inform patients of critical findings, test results, and the need for follow-up.

After the inadequate colonoscopy was performed, the Dlouhys were **not** informed that the physicians had not ruled out cancer or a neoplasm. They were not informed that another colonoscopy was needed because of the inadequate preparation. In fact, they were assured that

the opposite was true:

> Q. And what did he tell you about your husband's condition and whether or not you could go home, anything else?
>
> A. **He told us that everything looked good, that they had done all the tests, that he was clear of any of the scary – clears [sic] of cancers, CT scan looked good, his heart looked good, his EKG was good**, that the concern would be the – a future bleed, that we needed to add more fiber to his diet, that they drew even things up on the board to kind of show it to us. We asked so many questions, what we could do in the future if something like this was to happen. And told us that the red – and I apologize for not knowing the exact terminology of it – that the red test was what – if we ever happen – we walk into the emergency room and ask for that very first, **not a colonoscopy**, that that test is what would show the indication of where the bleeding was coming from.

(*Id.*, p. 461, Deposition of Debra Dlouhy, p. 52, l. 8-25.) (emphasis added).

This is confirmed by the discharge instructions provided to the Dlouhys after the colonoscopy was performed:

> ASSESSMENT AND PLAN: Lower gastrointestinal bleed, probably diverticular. Probably okay to go home later today. He was told to come back to the hospital if he has any recurrent signs of bleeding. Discussed high fiber diet and/or Metamucil at home with his diverticulosis. If he does have rebleeding, would recommend repeating stat tagged packed red blood cells scan with angiogram if positive. This was discussed with him and his wife.

(*Id.*, p. 503.)

There is nothing in what was told to the patient or contained in the written discharge plan that would indicate that the potential neoplasm identified on the CT scan still needed to be worked up. As opined by the Dlouhys' experts, the standard of care was to adequately disclose to Mr. Dlouhy that the CT scan report noted focal wall thickening and that a neoplasm could not be excluded. (*Id.*, p. 237-38.) This lack of disclosure impacted the ability of the patient to make informed decisions regarding his care; (*Id.*)

Again, this is a basic standard of care that applies nationally, especially when dealing

with board-certified physicians. The foundation for this opinion was also supported by the deposition testimony of local providers. NP Hildebrandt testified:

Q. And with respect to those functions, diagnosing, writing prescriptions, making recommendations, is it fair to say that part of that responsibility would be make sure you communicate with the patient all of the relevant clinical information?
A. Yes.
Q. Put another way, a patient would have to have all the right information in order to make the most intelligent decision about their care, right?
A. Sure.
Q. If there's something significant about a finding or diagnostic study, those are things that a patient needs to be told in order for them to take your recommendation, correct?
A. Sure.
Q. And it would be beneath the standard of care not to provide that information and expect a patient to make the decision in that vacuum, correct?
A. Beneath the standard of care?
Q. Yeah.
A. Sure.

(*Id.*, pp. 547-48, Deposition of NP Hildebrandt, p. 28, ll. 9-25; p. 29, ll. 1-4.)

Dr. Bartels, a board-certified oncologist who treated Mr. Dlouhy testified:

Q. And shifting away from statistics or prognosis or probabilities, I want to focus more on an underlying, a concerning finding, because you would agree with me that there might be different treatment options depending on what the finding is.
A. True.
Q. And a patient has a right to make decisions about how to treat a certain disease based on that finding?
A. Yes.
Q. And in order to do that, the patient needs the complete and accurate information about the underlying diagnosis to do that?
A. Yes.
Q. And it's the standard of care to give them that information –
A. Uh-huh.
Q. As soon as you know it?

MR. HAZEL: Object to the form. Go ahead and answer.

A. Yes.

BY MR. HANBY:

Q. And that's not dependent on a medical specialty or geographic location, that's just a basic patient fundamental right.
A. Uh-huh.
Q. Is that true?

MR. HAZEL: I'm going to object to the form. Dr. Bartels, I just have to get objections on the record. I'm not trying to break this up, but I just need to put it on the record. So sorry if I'm interrupting your train of thought.

Q. You would agree that that's true?
A. Yes.

(*Id.*, pp. 28-9, Deposition of Dr. David Bartels, p. 28, ll. 3-25; p. 29, ll. 1-13.)

The standard of care requiring providers to inform patients of critical findings, test results, and the need for follow-up is further found in the policies and procedures of Kootenai Health.

Patient Rights & Responsibilities
At Kootenai Health our primary concern is to provide professional care at the highest standard in collaboration with the families we serve. Our patients may exercise these rights without regard to race, sex, culture, economic, educational, religious backgrounds, gender identity, sexual orientation, disability or their source of payment for their care.
Patient Rights
As a patient, you are entitled to:
…
Receive sufficient information to give consent prior to treatment except in life threatening situations.
--Be informed concerning your diagnosis, treatment, and prognosis as well as the names of those responsible for your care. (The primary physician responsible for coordination of your care and relationships of other professionals involved in your care.)
--Participate in decisions about your care, treatment and services provided to you.

(R., pp. 685-704.) (emphasis added).

Consistent with the depositions and policies, federal regulation states that patients are entitled to this critical information:

42 CFR 482.13—Condition of Participation: Patient's Rights.

(b) *Standard: Exercise of rights.*

(1) The patient has the right to participate in the development and implementation of his or her plan of care.

(2) The patient or his or her representative (as allowed under State law) has the right to make informed decisions regarding his or her care. **The patient's rights include being informed of his or her health status, being involved in care planning and treatment, and being able to request or refuse treatment**. This right must not be construed as a mechanism to demand the provision of treatment or services deemed medically unnecessary or inappropriate.

…

(emphasis added).

To come to the conclusion that the Dlouhys' experts lacked foundation to testify that the standard of care required the providers to inform the patient that the colonoscopy needed repeated because the rectum could not be visualized, that the patient had poor preparation, and to inform the patient that tests and procedures were unable to exclude the potential neoplasm, and then to discharge the patient home without any information regarding proper follow up requires one to ignore the basic nature of the standard of care, to ignore the training and background of the providers and experts, to ignore the deposition testimony of multiple local providers, to ignore the policies of Kootenai Health, and to ignore the regulations of federal law.

6. <u>There was substantial foundation presented to support the Dlouhys' experts' opinions regarding the need to supervise mid-level providers and to properly coordinate the patient's care among providers</u>.

Dr. Hammerman's disclosure states that the standard of care required Dr. James to adequately supervise mid-level providers and to ensure proper coordination of care and communication amount the providers. (R., pp. 244-45.) Likewise, Dr. Schmidt's disclosure identifies that these standards of care were breached. (*Id.*, pp. 286-87.)

On the issues of coordination of care and supervision of mid-level providers, Dr. James testified as follows:

Q. Okay. What goes into your supervisory role with respect to the P.A. or the N.P.?
A. Well, we – at the hospital we just review the patients in the hospital.
Q. All of them or just –
A. All of them.
…
Q. With respect – and I – let me finish. With respect to Duane Dlouhy's chart?
A. Yes, I did.
Q. You did?
A. Right.
Q So when they had an interaction with Mr. Dlouhy, you then reviewed that?
A. Yes.
Q. So the follow-up appointments he had, you reviewed that?
A. The note.
Q. The note.
A. Yes.
Q. As part of your supervisory role?
A. At that time we were reviewing notes. We don't anymore. The policy changed. But at that time they would see a patient, dictate a note. They would give it to us to read. That's what we did.
Q. Okay. And did you – do you ever recall taking any corrective steps or suggesting any additional treatment or intervention with respect to their seeing Mr. Dlouhy?
A. No, I don't.

(R., pp. 636-37, Deposition of Dr. James, p. 64, ll. 1-6; p. 65, ll. 1-23.)

Contrary to the general and conclusory arguments asserted by Kootenai Health in its brief, this is a clear and definite statement of what the standard of care required of physicians supervising mid-level providers after the care of a patient like Duane Dlouhy.

These standards also find support in the polices and procedures of Kootenai Health. The standard of care required set forth in the Clinical Communication Using ISBARD policy adopted by Kootenai Health requires physicians transferring responsibility of a patient to the care of another to provide pertinent patient information to ensure continuity of care. (*Id.*, pp. 706-07.) This policy provides adequate foundation for the Dlouhys' experts to testify as to the standard of care. Finally, the Patient Transfer/Release of Medical Information Policy recognizes that the

standard of care is to provide "continuity of care among settings" as well as "consistent patient care" and "service coordination." (*Id.*, pp. 709-26.)

The Dlouhys' experts have demonstrated substantial foundation to testify as to these standards of care. What remains is a factual determination as to whether these standards were met by the Defendant providers.

7. Kootenai Health does not cite to any evidence that would contradict the standard of care as articulated by the Dlouhys' experts.

This case came to the district court under a somewhat unique procedural posture. Rather than provide affidavits containing the testimony and opinions of Kootenai Health's proposed experts or the treating providers, Kootenai Health moved for summary judgment based solely on the reasoning that the experts retained by the Dlouhys lacked sufficient foundation to testify at trial. The only supporting affidavit relied upon was that of its counsel.

This is important because the opinions rendered by the Dlouhys' experts stand unopposed. The record as reviewed and considered by the district court contains absolutely no evidence that would contradict the factual basis on which the expert foundation is based. In considering whether the district court abused its discretion in refusing to consider the opinions of those experts, it is important to emphasis that when the Dlouhys' experts state that the standards of care at issue are basic and universal—there is no contrary evidence in the record. In other words, there is no issue of material fact by which the district court could conclude otherwise. The same is true as the Dlouhys' experts' statements that the standard of care is a national standard of care. There is simply no contrary evidence for which the district court could conclude otherwise.

The procedural posture of this case is also noteworthy in light of this Court's recent ruling in *Eldridge v. West*, Docket 45214 (2019). In that case, the district court refused to strike the opinions of the defendant's experts despite the conclusory nature of their affidavits. *Id.*

Instead, it relied on those affidavits to grant summary judgment. *Id.* This Court found that to be error noting that such affidavits should have been stricken and that had the district court done so, "summary judgment would have been appropriately denied." *Id.*

While not an issue on appeal directly as *Eldridge* had not yet been decided, it is questionable whether Kootenai Health's *Motion for Summary Judgment* was sufficient to shift the burden to the Dlouhys in the first instance. More importantly, it is apparent that the statements regarding the national standard of care by the Dlouhys' expert were sufficient to establish that the standard of care at issue was a national standard of care. If Kootenai Health truly sought to oppose that contention, the burden had been shifted to it to provide expert testimony as to how or why the standard of care was not national. For example, if Kootenai Health lacked certain resources or access to certain information, it was incumbent upon it to come forth with that evidence. It failed to do so. As a result, the district court lacked any basis to conclude that the Dlouhys' experts were incorrect in asserting that the standard of care was, in fact, a national standard of care.

8. Kootenai Health failed to address the policy reasoning underpinning Idaho Code Sections 6-1012 and 6-1013.

At the very heart of the Idaho legislature's intent in requiring medical experts to have actual knowledge of the standard of care of a particular community was the resources and training available in that community. It was pointed out that Kootenai Health maintains a formal collaboration with the Mayo Clinic and has since 2011. (R., pp. 234-35.) Through this national network, Kootenai Health and Dr. James have access to additional resources such as: AskMayoExpert, eConsults, eBoards, Patient Education Materials, and Mayo Clinic Grand Rounds. (*Id.*) The relationship with the Mayo Clinic provides Kootenai Health with "access to the Mayo Clinic's knowledge and expertise." (*Id.*)

Like the opinions of the Dlouhys' experts, Kootenai Health points to no facts to contradict these contentions. Instead, it is argued in a single terse footnote that citing to this evidence is "an attempt to obscure Dr. Hammerman's clear lack of effort to familiarize himself with the local standards of care" and that these national resources "do not relate to the local standard of care." (Resp. Br., p. 16 n. 4.)

The review of the resources available to Kootenai Health at the time of the alleged negligence was but one thing that the experts did to familiarize themselves with the standard of care at issue. To argue that citing to and acknowledging the **actual resources** of the health care institution whose care is at issue in this case is insufficient, nonsensical and strains credibility.

The fact that the Mayo Clinic is a world-renowned medical institution is devastating to Kootenai Health's position. Its formal collaboration with the Mayo Clinic gives Kootenai Health access to national providers, information, and, resources. These facts further underscore the basis for the Dlouhys' experts to state the standard of care at issue is a national one.

Rather than dispute these facts, Kootenai Health attempts to dismiss its collaboration with the Mayo Clinic as having nothing to do with the standard of care. Such an argument ignores cases like *McDaniel* where this Court stated: "Understandably, the practice of medicine in Idaho has historically involved a good number of doctors practicing in small communities **with limited resources, limited access to the flow of information, and limited support from like providers**. Such doctors, if held to the same standard of practice as urban communities, would face inequities stemming from the geographic location of their practice." *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 159 P.3d 856 (2007) (*citing Buck v. St. Clair*, 108 Idaho 743, 746, 702 P.2d 781, 784 (1985)) (emphasis added).

Despite the arguments to the contrary, Kootenai Health's collaboration with the Mayo

Clinic and the resources associated with that collaboration further support the contention that a national, rather than local, standard of care applies.

9. The Dlouhys demonstrated that Dr. Schmidt was qualified and had the requisite foundation to testify as to the standard of care.

In addition to Dr. Hammerman, the Dlouhys timely disclosed Dr. Jude Schmidt as an expert witness. (R., pp. 266-92.) In her report, Dr. Schmidt opined that the failure to timely identify and treat the cancer was a substantial contributing factor in the death of Mr. Dlouhy. (*Id.*) This opinion was supported by medical literature, her training, and the statistical survival rate of patients with similar cancers. (*Id.*)

Dr. Schmidt is highly trained and holds three national board certifications in oncology, internal medicine, and hematology. (*Id.*) Dr. Schmidt has extensive experience treating patients, including patients with cancer. (*Id.*) She states that "[a]s a Fellow in Medical Oncology, I was exposed to a plethora of benign and malignant tumor diagnosis, workup, and management issues as I worked along with many world experts in Hematology, Radiation and Medical Oncology, Surgical Oncology, Radiology, and Pathology." (*Id.*, p. 267.) It is well understood that "*it is unnecessary for an expert witness to be of the same specialty as the defendant*, so long as the expert establishes he possesses actual knowledge of the standard of care to be applied." *Mattox v. Life Care Ctrs. of Am., Inc.*, 157 Idaho 484, 337 P.3d 627 (2014) (*citing Newberry v. Martens*, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005) (emphasis added)). As part of her practice, she regularly "recommends screening and surveillance colonoscopies for" her patients. (R., p. 268.) Like in *Newberry*, Dr. Schmidt's own training and experience as well as her interactions with other medical professionals in these relevant fields qualifies her to render the opinions contained in her report.

In support of her opinions regarding the standard of care, she reviewed and relied on the same documents as Dr. Hammerman. (R., p. 270.) Importantly, Dr. Schmidt came to the same conclusions as to the requirements imposed by the standard of care and the multiple breaches by the providers. (R., pp. 266-92.) It would defy common sense to hold on the one hand that Dr. Hammerman correctly articulated the standard of care and can render his opinions and on the other hand find that Dr. Schmidt articulated the standard of care in the exact same manner and yet lacks foundation to testify.

The disclosure of Dr. Schmidt demonstrates that she is qualified to render opinions in this case and is familiar with the standard of care as it existed in Coeur d' Alene, Idaho at all times in question. By failing to consider her opinions, the district court abused its discretion.

B. The district court's granting of summary judgment should be reversed and the case remanded for a trial on the merits.

"On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion." *Samples v. Hanson*, 161 Idaho 179, 181-82, 384 P. 3d 943, 945-46 (2016) (*citing Arregui v. Gallegos-Main*, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012)). "Summary judgment is proper if the 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 a judgment as a matter of law." *Id.* (internal quotation omitted). "When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences, in favor of the nonmoving party." *Id.* (*citing Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002)).

As stated above, not only do the Dlouhys' experts have ample foundation to testify as to

their opinions—those opinions stood unopposed on the *Motion*. When viewing those opinions in a light most favorable to the Dlouhys as required, there were genuine issues of material fact that precluded summary judgment. The opinions of the experts were disregarded improperly by the district court requiring the judgment to be vacated, and the matter remanded for further proceedings.

In addition to the expert witness testimony, the factual testimony from law witnesses further preclude summary judgment. For example, Debra Dlouhy testified that they were not told about potential neoplasm, that they were not advised to have a repeat colonoscopy, and that they were not informed that the colonoscopy did not rule out cancer. (R. p. 461.) This testimony is further supported by the actual medical records in this case. (*Id.*, p. 503.) When combined with the expert testimony, these facts raise genuine issues of material fact and the Dlouhys are entitled to a jury trial on these issues.

C. Kootenai Health is not entitled to attorney fees on appeal.

Kootenai Health requests attorney fees on appeal pursuant to Idaho Code § 12-121. (Resp. Br., p. 27.) Under that rule, attorney fees are only allowed where the case "brought, pursued or defended frivolously, unreasonably or without foundation." *See Sweet v. Foreman*, 159 Idaho 761, 367 P.3d 156 (2016). "Attorney fees will not be awarded for arguments that are based on a good faith legal argument." *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014).

In its argument, Kootenai Health asserts that the Dlouhys are asking this Court to simply reach a different conclusion than the district court rather than attacking the process utilized by the district court. (Resp. Br., p. 27.) That is clearly not the case. In fact, one of the primary arguments raised is that Kootenai Health and the district court misconstrued and then misapplied the standards for foundation as articulated in *Samples*. It is further argued that the district court

ignored relevant testimony without reason. Stating differently, the district court misapplied the law in rendering summary judgment. In short, the Dlouhys are not merely asking this Court to second guess the district court. Therefore, there is no basis to award attorney fees in this case.

II. CONCLUSION

In providing foundation for their opinions, the Dlouhys' experts took a multifaceted approach by relying on their national training, national board certifications, the depositions of several local providers, the policies and procedures of Kootenai Health, as well as government laws and regulation. Each of these approaches on their own satisfy the minimal foundational requirements of Idaho law. When viewed cumulatively, the evidence that the Dlouhys' experts had proper foundation is overwhelming. By misapplying Idaho law and improperly disregarding this evidence, the district court abused its discretion.

Based on the foregoing, it is respectfully requested that the judgment entered by the district court be vacated, and the case remanded for a trial on the merits.

DATED this 4th day of February, 2020.

PEDERSEN and WHITEHEAD

By /s/ Michael J. Hanby II
Michael J. Hanby II, ISB #7997
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2020, a true and correct copy of the foregoing was served on the following by the manner indicated:

Joel P. Hazel
Witherspoon Kelly
608 Northwest Blvd., Ste. 300
Coeur D' Alene, ID 83814
jph@witherspoonkelley.com

☐ First Class Mail
☐ Hand Delivered
☐ Facsimile
☒ Electronic Filing

__/s/ Michael J. Hanby II_____
Michael J. Hanby II