STATE OF IDAHO)
County of KOOTENAI)ss
FILED 10/29/2020
AT 1:50 O'Clock P M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN C. BEEBE and CHERYL BEEBE, individually and as husband and wife,

Plaintiffs,

vs.

NORTH IDAHO DAY SURGERY, LLC, an Idaho Limited Liability Company, d/b/a Northwest Specialty Hospital; its owner, John Stackow, M.D. and unknown physicians, surgeons, medical assistants, nurses or employees as John or Jane Does I-X; and INCYTE PATHOLOGY, INC., a Washington State for-profit Corporation; and INCYTE PATHOLOGY PROFESSIONAL, P.S., a Washington State Professional Services corporation, or employees as John or Jane Does XI-XX; and MINIMALLY INVASIVE SURGERY NORTHWEST, PA, an Idaho Professional Service Corporation, and its owners, agents or employees,

Defendants.

Case No. **CV28-19-4048**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT NORTH IDAHO DAY SURGERY, LLC d/b/a NORTHWEST SPECIALTY HOSPITAL'S (NWSH) MOTION TO STRIKE THE DECLARATION OF RENAE DOUGAL, and GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT TO INCLUDE ADDITIONAL CLAIMS AND PUNITIVE DAMAGES

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The procedural history and factual background is more completely set forth in this Court's Memorandum Decision and Order Denying Defendant Incyte's Motion for Application of Washington Substantive Law, filed in this case on May 20, 2020.

This matter is before the Court on defendant Northwest Specialty Hospital's (NWSH) Motion to Strike the Declaration of Renae Dougal PHD, MSN, RN, CLNC,

CCRP in Support of Plaintiff's Motion to Amend Complaint (filed May 12, 2020), and plaintiff Beebes' Motion to Amend Complaint to Include Additional Claims and Punitive Damages (filed on May 15, 2020). Oral argument on both motions was held on June 23, 2020, at the conclusion of which the Court took those motions under advisement. Also at that hearing, the Court, on the record granted defendant NWSH's Motion for Qualified Protective Order, which was filed on May 12, 2020, and which was joined by defendant Incyte and opposed by plaintiffs.

This is a medical malpractice action. Second Am. Compl. 2, ¶ I; 8, ¶ 44-14, ¶93. Plaintiff's, John C. Beebe and Cheryl Beebe (the Beebes) filed their Original Complaint and Demand for Jury Trial on June 4, 2019. The facts of this case revolve around a sentinel lymph node biopsy performed upon John Beebe on June 6, 2018. *Id.* at 4, ¶ 16; 5, ¶ 19. On June 6, 2018, due to a malignant melanoma, John Beebe underwent partial amputation of his right foot at Defendant Northwest Specialty Hospital. (NWSH). *Id. at 4*, ¶¶ 16, 18. Concurrent with that amputation was a procedure to remove his sentinel lymph node from his right groin. *Id.* at 5, ¶ 19. Removal and study (biopsy) of the sentinel lymph node were to "constitute the basis of the medical science which a patient and his care team will use to plan and treat metastatic cancer." *Id.* ¶¶ 20, 21. Sentinel lymph node biopsy is a surgical procedure used to determine whether cancer has spread beyond a primary tumor into the lymphatic system. *Id.* at 7, ¶ 38. The sentinel lymph node specimen was removed (*Id.* at 5, ¶ 23) but was subsequently lost and Beebe "has never been given proper diagnosis or prognosis of his melanoma because the Defendants lost his lymph node specimen." *Id.* at 7, ¶ 37.

The Beebes claims raise nine causes of action: (1) medical malpractice of NWSH and its employees or agents; (2) negligence of NWSH's employees or agents;

(3) negligence of NWSH in its inadequate procedures; (4) negligence of NWSH to train or supervise its employees or agents; (5) negligence of NWSH in contracting with defendants Incyte Pathology and Incyte Pathology Professional; (6) negligence of Incyte Pathology and Incyte Pathology Professional; (7) loss of consortium; (8) lack of informed consent by defendants Minimally Invasive Surgery Northwest (Minimally Invasive Surgery) and Dr. Stackow; and (9) unnecessary surgery performed by Minimally Invasive Surgery and Dr. Stackow. Minimally Invasive Surgery and Dr. Stackow were dismissed by stipulation on December 11, 2019.

On May 15, 2020, the Beebes filed Plaintiffs' Motion to Amend Complaint to Include Additional Claims and Punitive Damages, as well as a Declaration of Renae L. Dougal, PHD, MSN, RN, CLNC, CCRP in Support of Plaintiff's Motion to Amend Complaint. On June 2, 2020, NWSH filed a Motion to Strike Declaration of Renae L. Dougal, and a Memorandum in Support of the Motion to Strike. The Beebes filed a Memorandum in Opposition to Defendant North Idaho Day Surgery, LLC's Motion to Strike Declaration of Renae L. Dougal, and Supplemental Declaration of Renae L. Dougal in Support of Plaintiff's Motion to Amend Complaint and in Opposition to Defendant North Idaho Day Surgery, LLC, D/B/A Northwest Specialty Hospital and Incyte Pathology's Motions for Summary Judgement on June 16, 2020. The Beebes filed a Second Supplemental Declaration of Renae L. Dougal In Support of Plaintiffs Motion to Amend Complaint on June 17, 2020. NWSH filed a Reply in Support of Motion to Strike Declaration of Renae L Dougal on June 19, 2020.

II. STANDARD OF REVIEW

The decision to grant or deny a motion to amend to add a prayer for punitive damages is reviewed under the abuse of discretion standard. *Rockefeller v. Grabow,* 136 Idaho 637, 647, 39 P.3d 577, 587 (2001); *Kuntz v. Lamar Corp.,* 385 F.3d 1177,

1187 (9th Cir. 2004) (Finding that the district court did not abuse its discretion in denying leave to amend on the grounds that Kuntz had not established a reasonable likelihood of proving the requisite "extremely harmful state of mind"). Appellate courts apply a four-prong standard for discretionary review: "whether the trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 867, 421 P.3d 187, 198 (2018). The evidence is reviewed to determine whether there was sufficient evidence for the jury to find that a defendant acted with aggressive, fraudulent, malicious, or outrageous conduct. *See* I.C. 6-1604. Punitive damages are not favored in the law and should only be used in the most unusual and compelling circumstances. *Manning v. Twin Falls Clinic & Hosp.*, 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992).

The Idaho Supreme Court has made it clear that the trial court must first address the admissibility of expert testimony. *Suhadolnik v. Pressman*, 141 Idaho 110, 114, 254 P.3d 11, 15 (2011). The Supreme Court has also made it clear that the applicable standard of review is an abuse of discretion standard. *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221-22, 159 P.3d 856, 858-59 (2007).

III. ANALYSIS

First, NWSH argues that "[t]he court should use the literal or plain wording of the disclosed opinions within Dougal's Declaration and the Attached report[,]" and "the court should not give any inference to the testimony of Plaintiffs' expert." Mem. In Supp. of Mot. to Strike Decl. of Renae L. Dougal 4.

Second, NWSH argues that the Dougal Declaration should be struck because it fails to demonstrate knowledge of the applicable standard of care as required by Idaho for expert witnesses in a medical Malpractice case. *Id.* at 5-10. NWSH argues that:

> In this matter, Dougal has never practiced as a hospital administrator, and has never practiced in any capacity in Post Falls or Coeur d' Alene, Idaho. The Dougal Declaration fails to establish a valid basis, qualifications, or foundation for opinions as to the applicable standard of health care practice for Defendant Hospital or its nursing staff. Specifically, nothing in Dougal's background demonstrates qualifications to offer opinions as to Defendant Hospital's policies and procedures for specimen handling. Similarly, Dougal has not demonstrated adequate knowledge of the applicable standard of health care practice for Defendant Hospital's nursing staff. Nevertheless, Dougal offers the conclusory opinion that Defendant Hospital's policies and procedures for specimen handling not only failed to meet the standard of health care practice but were also reckless. The Dougal Declaration fails to set forth any sufficient qualification or basis of her opinions.
>
> Rather, Dougal's Declaration and the incorporated Report cites to IDAPA provisions, the State Nursing Practice Act (Title 54, Chapter 14 of the Idaho Code), Joint Commission Standards, position statements from the Associations of Peri-Operative Registered Nurses (AORN), Association of Surgical Technologist (AST) guidelines, and various other secondary guidelines. *Dougal Declaration,* Exhibit 1, pp. 1-2. These are insufficient to establish actual knowledge of the applicable standard of health care practice under IC§§ 6-1012 and 1013.

Id. at 7-8.

Third, NWSH argues that the court should strike the Dougal Declaration because it is impermissibly speculative, conclusory and unsubstantiated. *Id.* To this end, NWSH argues that:

> As a preliminary matter, there is no evidence as to where Plaintiffs lost sentinel node was lost; whether at Defendant Hospital Facility, at Co-Defendant InCyte's facility, or in transit. Therefore, the opinion that Defendant Hospital lost Plaintiffs specimen, is inherently speculative, conclusory, and unsubstantiated.
>
> Nevertheless, Dougal opines that, despite receiving Defendant Hospital's relevant procedures, requisition forms from Co-Defendant InCyte, and related requisition forms pertaining to Plaintiffs specimen, Dougal nevertheless concludes that there was an extreme deviation

from standard of care and reckless conduct based on speculating that there were no adequate policies and procedures in place. *Dougal Declaration,* ¶ 9. Further, Dougal concludes that if such policies and procedures were in place, then such policies and procedures must not have been followed and losing an irreplaceable tissue specimen is reckless. *Id.,* ¶ 10. These two statements demonstrate that Dougal's opinions are entirely outcome based, and are therefore speculative, conclusory, and unsubstantiated. Specifically, Dougal appears to offer the opinion that the loss of a specimen itself is reckless regardless of the protections in place to prevent that specific outcome.

However, Dougal fails to explain how Defendant Hospital's policies and procedures and/or Defendant Hospital's staff fail to meet the applicable standard of health care practice, let alone how Defendant Hospital's practices were an extreme deviation from that standard. While Defendant Hospital disputes Dougal's qualifications and foundation to offer such opinions as argued above, these opinions further fail because they are speculative, conclusory, and unsubstantiated.

Id. at 10-11.

Fourth, Defendant Hospital argues that the Dougal declaration should be stricken because:

> [T]he Report incorporated into the Dougal Declaration cites two Prelitigation Panel decisions that were issued by Panels appointed by the Idaho Board of Medicine pursuant to LC. §§ 6-1001 *et. seq. See Dougal Declaration,* Exhibit "1," p. 2. (Reports and Conclusion in Case Nos. 074-19 and 077-18). However, all documents, testimony, and findings of a Prelitigation Panel are confidential and exempt from disclosure by operation of I.C. §§ 6-1008 and 74-106(10) (formerly§ 9-340C(10)). As these records are maintained as confidential and no exception exists for their use in court proceedings, it was entirely improper for Plaintiffs to have provided the documents to Dougal to review in formulating her opinions. Significantly, the findings of the Prelitigation Panel are not the type of data that would be relied upon an expert in the field of nursing for any purpose. I.R.E. 703.
>
> As Dougal has been provided these confidential reports and can therefore no longer unsee them, the Dougal Declaration and her overall opinions in this matter are tainted by the improper disclosure. Therefore, Defendant Hospital hereby respectfully requests that the Court strike the Dougal Declaration and further exclude her testimony from this matter based on the improper disclosure of confidential proceedings.

Id. at 11-12.

Finally, Defendant Hospital argues that:

> The Dougal Declaration and Report further cites an unspecified Rule 408 Settlement Communication. While the report does not specify the settlement communication, it is believed that the only formal "Request for Settlement Rule 408 Communication" was authored by Plaintiff's counsel on or around August 28, 2018. The provision of such a settlement communication, particularly a posturing settlement communication from one of the Parties' attorneys is plainly an improper document for an expert to review and rely upon in formulating opinions.
>
> Rule 408(a) of the Idaho Rules of Evidence provides in pertinent part:
>
> > **Prohibited Uses.** Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
> > (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
> > (2) conduct or a statement made during compromise negotiations about the claim. Compromise negotiations encompass mediation.
>
> While Rule 408(b) provides an exception where such communications are admitted for a permissible purpose, it is impossible to conceive a circumstance where such a communication would be provided to a purported standard of care expert for any purpose other than to improperly bolster the validity of Plaintiffs claims, and possibly support the amount of Plaintiffs disputed claims.
>
> While admissibility of underling data or facts is not a strict necessity for the admissibility of expert opinions under I.R.E. 703, inadmissible facts or data may only be relied upon by an expert if it is the type of facts or data that is reasonably relied upon by experts in the relevant field. There is no reasonable basis for a nursing expert, who has been retained to purportedly offer opinions standard of health care practice opinions against Defendant Hospital and its nursing and other staff (as well as Co-Defendant Incyte Pathology), to have been provided and rely upon a settlement communication from Plaintiffs counsel. Therefore, the Dougal Declaration should be stricken and excluded from this matter as Dougal improperly relies upon inadmissible settlement communications in formulating her opinions.

Id. at 12-13.

The Beebes argue that:

> The Court should deny NWSH's motion to "Strike" Dr. Dougal's declaration, 1) because Dr. Dougal's expert report was sufficient to establish her knowledge of the standard of care, and 2) Dr. Dougal can certainly familiarize herself with the standard of care stated by Denise Fowler filed in support of NWSH's Motion for Summary Judgment, if in fact that standard of care is unique to the local area in Kootenai County.

Pls'. Mem. In Opp. To Def. Mot. to Strike 3

The Beebes argue that Dr. Dougal has met the burden of admissibility of expert disclosures and:

> Dr. Dougal has established, either in her initial report or in her subsequent Declarations that 1) she actually holds the opinions stated, 2) that her opinions are based on a reasonable degree of medical certainty, and 3) that she has the requisite professional knowledge and expertise "coupled with actual knowledge of the community standard." *Phillips,* p. 15. As the Beebes have met the standard for admissibility and consideration of their Expert's opinions, Dr. Dougal' s opinions are admissible.

Id. at 6.

In response to NWSH's assertion that Dr. Dougal's opinions are inherently speculative, conclusory, and unsubstantiated, the Beebes argue:

> More irony from SWSH. It argues Dr. Dougal's opinions are speculative because "there is no evidence as to where Plaintiff's lost sentinel node was lost, ..." However, as Dr. Dougal testifies in her Supplemental Declaration, NWSH has no procedures in writing to ensure the proper completion of the Incyte "Manifest," which results in the situation where neither NWSH nor Incyte can affirmatively and accurately state what was delivered nor received. No one knows where Mr. Beebe's lymph node ended up because of conduct that fell below the standard of care, and Dr. Dougal' s Supplemental Declaration certainly addresses all factual issues upon which she has based her opinions.

Id. at 6-8 (footnote omitted).

In response to NWSH's assertion that Dr. Dougal has based her opinions on confidential and inadmissible records the Beebes argue that "merely reviewing documents does not establish that the review influenced any opinion stated. NWSH

has failed to identify that any opinion stated by Dr. Dougal is based on 'Confidential and Inadmissible Records,' alone and not some other admissible source." *Id.* at 7.

In reply to the Beebes arguments, NWSH first argues that:

> While Dougal likely possesses the requisite professional knowledge and expertise for nursing care, albeit lacking actual knowledge of the community standard of health care practice, Dougal demonstrates zero knowledge or expertise in hospital and nursing administration. To assert that Dougal may offer the same opinions as Denise Fowler because they are both RNs is to ignore Ms. Fowlers extensive experience and education in health care and nursing administration. *See Aff. of D. Fowler in Supp. of Mot. for S.J.,* Exhibit "A."
>
> Based on the foregoing, the Original Declaration fails to establish any professional knowledge or expertise to opine on the adequacy of the policies and procedures utilized by Defendant Hospital.

Reply in Supp. of Mot. to Strike Decl. of Renae L. Dougal 5.

Second, NWSH argues:

> Dr. Dougal's citation to asserted national or statewide standards is unavailing because there is no foundation for asserting that such standard has replaced the local community standard. More importantly, Dougal fails to identify any provisions of the Nursing Practice Act or IDAPA that expressly provides a clear community standard of health care practice regarding the physical administration of health services. *See Navo v. Bingham Mem'l. Hosp,* 160 Idaho 363, 372, 373 P.3d 681, 690 (2016). In this regard, Dougal is required to identify a coherent standard, that the standard applied at this time and circumstance, and provided specific concrete guidance in the facts of this matter. None of the provisions cited by Dougal provide a coherent standard for the physical administration of health services at issue in this matter, namely handling storage and transfer of a specimen.

Reply in Supp. of Mot. to Strike Decl. of Renae L. Dougal 6.

Third, NWSH reasserts their claim that the Beebes' claim is impermissibly speculative, conclusory and unsubstantiated:

> this premise is based in part on the fact that it is unknown if the specimen went missing at Defendant Hospital's Facility, Co-Defendant InCyte's facility, or in transit with the third-party contracted courier. It is also based on Dougal' speculative, conclusory and unsubstantiated opinions regarding the forms utilized and exchanged between Defendant Hospital and Co-Defendant InCyte.

Id. 8-9. Specifically, NWHS argues Dougal only bases her opinion on the Manifest, and she has not requested or reviewed the documentation that was received by Co-Defendant Incyte with the specimens. *Id.* at 9. Therefore:

> [e]ven if Dougal had foundation for her opinions on the "form" of the laboratory documentation that accompanied the specimens sent to Co-Defendant InCyte, any such opinions that the "forms" were improperly documented would be conclusory, speculative, and unsubstantiated because Dougal has never seen the documentation received by Co-Defendant InCyte, with the exception of the Manifest "form" that was routinely returned to Defendant Hospital.

Id. at 9. Additionally, NWHS argues that:

> Dougal fails to explain how these allegedly deficient "forms" caused or contributed to the loss of the node specimen. The documentation is undisputed in this matter. Defendant Hospital documented sending two specimens, the only two specimens removed from Plaintiff John Beebe, to the Co-Defendant InCyte. That being the right amputated forefoot and the lymphnode. Co-Defendant documented receiving one specimen, that being the right forefoot. However, there is no explanation for how different documentation, or more documentation would have prevented the physical loss of the lymph node specimen. As this is the primary focus of Dougal's opinions, her opinions that this documentation caused the loss of lymph node specimen is conclusory, speculative, and unsubstantiated by law or fact.

Id. at 9-10.

Fourth, NWSH reasserts their claim that Dr. Dougall impermissibly relied on confidential and/ or inadmissible in forming her declaration. *Id.* at 10. NWSH argues that:

> As previously asserted, Dougal cannot unsee these materials. How does one remove from their basis of knowledge information that specifically identified on Dougal's expert report. Further, why would Dougal ever review these materials, since she makes no assertion these are the type of materials on which a nursing expert would rely. Therefore, there is a substantial likelihood that the above listed inadmissible information unfairly tainted or absolutely illegally prejudiced her opinions.

Id. at 10-11.

Fifth, NWSH argues that Dr. Dougal's supplemental declaration filed on June 16 2020, was not filed timely for consideration of the Motion to Amend, or even the upcoming Motion for Summary Judgment, pursuant to Idaho Rule 7(b)(4)(A) because the Beebes were required to file declarations supporting the Motion to Amend 14 days prior to the hearing. *Id.* at 3. Additionally, NWSH argues that even if the supplemental Declaration was admissible in regards to the motion to amend, the supplemental Declaration is inadmissible because it lacks foundation. *Id.* NWSH's argument in this regard is quoted below in its entirety:

> **1. Dougal's Supplemental Declaration.**
>
> Notwithstanding Plaintiffs' attempts to argue that Dougal now has actual knowledge of the community standard of health care for Post Falls, Idaho in June 2018 based on the AORN guidelines and review of the Affidavit of Denise Fowler filed in Support of Defendant Hospital's Motion for Summary Judgment, neither of these asserted bases are sufficient for the actual knowledge of the community standard of health care practice for which Dougal must acquire.
>
> **a. AORN Guidelines**
>
> Plaintiffs rely heavily on the idea that because Defendant Hospital utilizes AORN Guidelines in the development of references the Defendant Hospital utilizes; i.e. policies and procedures. Plaintiffs assert that AORN Guidelines have replaced Idaho's local community standard of health care practice. As argued above, the cited AORN Guidelines are general principles that do not provide sufficient detail, a coherent standard of health care practice for each and every patient['s] [*sic*] factual situation in a specific geographical location at a certain date, the concrete nursing interventions to take, nor does the AORN cite or address what the nurse action should be under the circumstances of this case. Nothing in Dougal's Supplemental Declarations change this analysis. Knowledge of the AORN Guidelines is insufficient for actual knowledge of the applicable local community standard of health care practice on the basis and for the reasons that the text is sufficiently vague and cannot replace the statutorily required local community standard of health care practice.
>
> Fundamentally, Dougal assumes that relying on the AORN Guidelines, along with a variety of other texts from health care providers meets the requirements of the applicable statutes and the actual local practice. It should be readily apparent to the parties that general guidelines such as the AORN guidelines can be interpreted and applied differently statutorily identified in different communities. Further, the fact that Defendant Hospital utilizes AORN Guidelines to reference in their policies and procedures does not mean that the entirety of AORN Guidelines supplement the policies and procedures of Defendant

Hospital. Knowledge of the AORN Guidelines alone, or even the fact that Defendant Hospital references this text in policies and procedures, is insufficient for actual knowledge of the local community standard of health care practice.

b. Denise Fowler's Affidavit

Secondly, Plaintiffs assert that Dougal has actual knowledge of the applicable standard of healthcare practice by reviewing Denise Fowler's Affidavit (hereinafter "Fowler Affidavit"). This assertion is fundamentally false because Dougal's asserted opinions are strikingly divergent from those opinions set out in the Fowler Affidavit. Further, it is disingenuous to assert that Dougal's review of Denise Fowler's opinions , which are based in part by the Hospital's applicable policies and procedures, Hospital's surgical case records for John Beebe, and other documentation and then assert actual knowledge of a community standard of health care practice. An expert cannot argue significantly different from the Fowler Affidavit the actual knowledge gained from Fowler's opinion that Defendant Hospital met the standard of health care practice but disagrees with Fowler by stating that the opinions of Fowler are wrong.

For example, Plaintiffs' argue that based on review of Fowler's Affidavit, Dougal has foundation for her opinion that the community standard of health care practice requires written procedures to "properly handle, package, store, document, and transfer." Supplemental Declaration, ¶ 12. As a preliminary matter, this contradicts Fowler's Affidavit. While Fowler did provide a written policy and procedure for specimens in her Affidavit, and numerous others have also been provided in discovery, nothing in Fowler's Affidavit states that the local applicable standard of health care practice requires that every policy and procedure, or practice must be memorialized in writing, and certainly not to the extent suggested by Dougal. Further, Dougal addresses detailed policies and procedures that are not to be found in or supported by Fowler's Affidavit.

It stands to reason that if Dougal is relying on the Fowler Affidavit and opinions therein for actual knowledge of the community standard of health care practice, and it is Fowler's opinion that the nurses allowed the policies, procedures, and practice utilized by Defendant Hospital then the nurses met that standard of health care practice. The only foundation that Dougal has from reviewing Fowler's Affidavit is that Defendant Hospital met the applicable standard of health care practice. In order for Dougal to be able to opine that the Defendant Hospital did not comply with the standard of health care practice, there must be admissible evidence in Fowler's Affidavit that sets forth the standard of health care practice required by Dougal. Dougal has not provided any basis in Fowler's Affidavit on which to base her opinion that Defendant Hospital violated the applicable standard of health care practice. Rather, Dougal simply disagrees with Fowler's actual knowledge of the community standard of health care practice. *Supplemental Declaration*, ¶ 14. Dougal has no basis to foundation her opinions on the community standard of health care practice.

Dougal takes another tact and asserts that the applicable standard

of health care practice set out in Fowler's Affidavit is the same as any standard of care near an urban city and is a national standard of care. *Id.*, ¶ 10. Nothing in Fowler's Affidavit stands for the proposition that this statutory local community has the same standard of health care practice that is recognized as a national or statewide standard of health care practice. Further, Dougal's asserted standard to "properly handle, package, store, document, and transfer human tissue specimens post-surgical harvest" is simply a generic statement and cannot be considered a statutory standard of health care practice. For example, what is considered "proper" handling, packaging, storing, documenting, and transferring specimens can certainly be interpreted and practiced differently from community to community. There is nothing in Fowler's Affidavit that gives any basis that national or statewide standard of health care practice has supplemented the statutory local community standard of health care practice.

Based on the foregoing, Dougal's reliance on national or state standards, AORN Guidelines, and the Fowler Affidavit is insufficient for actual knowledge of the statutory local community standard of health care practice in this matter. Therefore, Dougal's Supplemental Declaration is not admissible and cannot provide support for either the Motion to Amend or in response to Defendant Hospital's Summary Judgment.

2. Dougal's Second Supplemental Declaration.

Dougal's Second Supplemental Declaration appears to explain what Plaintiffs' perceive as a confusion over what her opinions are with respect to the allegation of recklessness. In the Second Supplemental Declaration, Dougal clarifies that when she stated "reckless" or "recklessness" in her opinions, she actually meant gross negligence.

This Second Supplemental Declaration suffers the same foundational issues with respect to gross negligence as her opinions on recklessness. An expert cannot testify to recklessness, gross negligence, or any negligence in a medical malpractice action Without reference to and knowledge of the applicable standard of heath care practice for the relevant community and time. *Ballard v. Kerr*, 160 Idaho 674, 710, 378 P.3d 464, 500 (2016). (Emphasis added).

However, this Second Supplemental Declaration is telling because it clearly identifies that Dougal is only offering opinions on gross negligence, and not recklessness. With this understanding in mind, notwithstanding Plaintiffs recitation of the prima facie elements on Intentional [infliction] [sic] of Emotional Distress ("IIED"), Plaintiffs now have proven that their expert is not intending to offer opinions on recklessness. As such, in addition to all the other arguments in opposition to Plaintiffs' IIED claim, Plaintiffs' Motion to Amend should be denied, or Defendant Hospital Motion for Summary Judgment should be granted specifically with respect to Plaintiffs' proposed IIED claim based on the evidence, as well as the fact that Plaintiffs do not have admissible or not admissible evidence of recklessness.

Id. at 11-15.

> ...while the subsequent Declarations (Supplemental and Second Supplemental Declarations) are untimely for the June 23 hearing on Plaintiffs' Motion to Amend, Plaintiffs' argued nearly exclusively on these supplemental declarations in response to this instant Motion to Strike. Therefore, should the Court entertain these two supplemental declarations based on the arguments, and for the reasons set forth herein, Defendant Hospital respectfully requests that the Court strike the Supplemental and Second Supplemental Declarations of Renae Dougal, PhD, MSN, RN, CLNC, CCRP in Support of Plaintiffs' Motion to Amend Complaint and in Response to Defendant North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital's Motion for Summary Judgment.

Id. at 16.

As a preliminary matter, this Court denies NWSH's Motion to Strike for reasons of untimeliness Dr. Dougal's two supplemental declarations filled on June 16, 2020, and June 17, 2020. At oral argument Beebes' counsel claimed the declaration filed June 16, 2020, was timely. To make that claim, Beebe's counsel inappropriately misapplies the time period of I.R.C.P. 7(b)(3)(B) (requiring affidavits be filed within seven days of hearing when one is **opposing** a motion) rather than the fourteen days required before hearing when a party is **making** the motion. I.R.C.P. 7(b)(3)(A). Since Beebe is **making** the motion to amend, the fourteen day limit applies to Beebes' declarations. Both declarations, the one filed June 16, 2020, and the one filed June 17, 2020, were filed late under the rule. At oral argument, the Court asked Beebes' counsel what "good cause" he could show for the late filing. He stated the declaration filed June 16, 2020, and June 17, 2020, were declarations filed in response to NWSH's expert Fowler, and there is no time limit under the rule for rebuttal declarations. Additionally, those two declarations were also filed for purposes of responding to the upcoming summary judgment motion, and for that motion they would be timely under I.R.C.P. 56. While the Beebes clearly violated the filing time requirements of I.R.C.P. 7(b)(3)(B), this Court finds Beebes have shown good cause (under I.R.C.P. 7(b)(3)(H)) to the time limit found in I.R.C.P. 7(b)(3)(B). And while these declarations were respectively filed seven days

and eight days late under I.R.C.P. 7(b)(3)(B), relative to the June 23, 2020, hearing, NWSH still had respectively seven and six days to address the supplemental declarations. NWSH has offered no argument in regards to prejudice they faced, due to that late filing; nor did NWSH make a motion to continue the June 23, 2020, hearing to allow it more time to address those declarations. NWSH was able to timely file a 17-page reply that addressed in detail their substantive issues with Dougal's Supplemental Declarations. No prejudice has been shown by NWSH. As addressed above, these kind of discovery sanctions are rightly taken under the Court's discretion, and this Court finds no reason to strike the Supplemental Declarations of Dougal for reasons of untimely filing.

In this case, this Court finds that NWSH's Motion to Strike Dougal's Declaration must be denied for two substantive reasons. First, at this motion to amend to allow claim for punitive damages juncture, the Beebes are not held to the same standard they would be held to at trial or even at summary judgment. Second, this Court finds the declarations of Dr. Dougal are adequate concerning her knowledge of the standard of care. The Court will discuss these two features in that order.

First, what is presently before the Court is Beebes' motion to amend to allow a punitive damages claim. That was what was heard by this Court on the June 23, 2020, hearing. The Motion to Strike Dr. Dougal's Declaration, which supports the Beebes' motion to amend, was also heard the same day. The standard at this point is whether the record contains substantial evidence to support a reasonable likelihood that the Beebes will be able to prove facts at trial to support an award of punitive damages. Idaho Code § 6-1604(2). One must keep in mind that all that is being sought to occur is to have this Court allow the Beebes to amend their complaint in accordance with that statute. This is a discretionary decision. *Manning v. Twin Falls Clinic & Hospital*, 122

Idaho 47, 52, 830 P.2d 1185, 1190 (1992). In reviewing the facts, this court views those facts and inferences in a light most favorable to the plaintiffs. *Clark v. Podesta*, 2016 U.S. Dist. LEXIS 103637, 21-22 (Dist. Idaho August 5, 2016).

"A court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 249–50, 178 P.3d 606, 614–15 (2008) (citing I.C. § 6-1604). "Punitive damages are not favored in the law and should be awarded in only the most unusual and compelling circumstances." *Id.* (citing *Manning v. Twin Falls Clinic & Hosp.*, 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992)). Idaho Code § 6-1604(1) provides: "[i]n any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." I.C. § 6–1604. "The issue of punitive damages 'revolves around whether the plaintiff is able to establish the requisite intersection of two factors: a bad act and a bad state of mind.'" *Seiniger Law Office* at 250, 178 P.3d at 615 (quoting *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 503, 95 P.3d 977, 985 (2004)) (internal quotations omitted); *see also Linscott v. Rainier Natl. Life Ins. Co.*, 100 Idaho 854, 858, 606 P.2d 958, 962 (1980). "The action required to support an award of punitive damages is that the defendant 'acted in a manner that was an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.'" *Id.* (quoting *Myers* at 502, 95 P.3d at 984) (internal quotations omitted); *see also Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d

661, 669 (1983). "The mental state required to support an award of punitive damages is 'an extremely harmful state of mind, whether that be termed malice, oppression, fraud or gross negligence; malice, oppression, wantonness; or simply deliberate or willful.'" *Id.* (quoting *Myers* at 502, 95 P.3d at 984) (internal quotations omitted). This Court finds the Beebes have put forth evidence that show a reasonable likelihood that they will at trial be able to prove facts to support an award of punitive damages under Idaho Code § 6-1604(2). There can be no doubt Mr. Beebe's sentinel sample has been lost. Beebes have proven the importance of the missing sentinel sample. Dr. Stackow testified "I have personally referred to the sentinel lymph note as a 'golden egg,' meaning that its diagnostic value to the medical treatment of this patient was indispensable and irreplaceable." Decl. of John C. Stackow, MD, 2 ¶ 23. This is certainly evidence of gross negligence, wantoness, deliberate or willful conduct under Idaho Code § 6-1604(2). This Court agrees with Beebes' summation of their evidence and its import at this point:

> Because NWSH fails to review the Manifests for accuracy or discrepancies, the search for Mr. Beebe's lost specimen did not begin for three days. (See Fowler Aff. para. 19.)
>
> NWSH also has produced no written policy or procedure for the Incyte employee to inform NWSH if there is a discrepancy.
>
> Incyte's employee left NWSH without informing NWSH staff that there was a discrepancy.
>
> Because NWSH does not have a policy or procedure in place to review the Manifest post-pick-up, NWSH did not know of the error in the Manifest for three days, virtually ensuring any lost specimen would not be found.
>
> A reasonable juror could certainly find that the Defendants' conduct in processing what can be irreplaceable tissue samples is an extreme deviation from reasonable standards of conduct. NWSH has clear policies and procedures requiring the nurses to document *each* specimen and log those specimens in a surgical log book. NWSH was also to complete a "pathology request form," showing each specimen "numbered and listed individually." However, NWSH has not produced any such documentation in discovery, leading to the conclusion that NWSH did not follow its standards for documenting each of Mr. Beebes['] tissue specimens.

> Moreover, NWSH has no policy or procedure in place establishing how to accurately complete the Incyte Manifest, resulting in what Dr. Dougal refers to as an "ambiguous and unclear" medical document. (Dougal Supp. Dec. para. 30.) Then, not only is the Manifest unclear, NWSH has no review process post-pick up. Based on NWSH'S documents, this is how NWSH processes all of its tissue specimens, so NWSH's conduct is continually an extreme deviation from reasonable standards of conduct. NWSH tries to distinguish the *Vendelin v. Coscto* case because Costco had knowledge of prior instances. Here, NWSH plays *Russian Roulette* on a daily basis with patients' tissue specimens, and unfortunately, for John Beebe this time the hammer fell on a live round. The fact that NWSH may or may not have lost a specimen in the past is irrelevant as having no policies or procedures in place to ensure the accurate accounting for each specimen removed during surgery and for the transfer to a lab for analysis, clearly evidences a reckless disregard for the welfare of its patients. Based on the way NWSH and Incyte operate, the loss of a tissue sample was as inevitable as the sun coming up in the morning.
>
> The evidence cited in support of this Motion is largely undisputed; there were three specimens, but due to the disregard for NWSH'S own policies and procedures, NWSH only documented two specimens. Then NWSH cannot conclusively identify what specimens were ever deposited in the Incyte Lock Box, because NWSH has no policies or procedures to ensure its employees complete the Incyte Manifest in such a manner to ensure the identification of the specimens delivered to the lab. Accordingly, NWSH has no idea what specimens are deposited in the Incyte Lock Box. Then, NWSH has no policy or procedure to review the Manifest to ensure there were no discrepancies between what was deposited in the Incyte Lock Box and what Incyte received. Dr. Dougal's opinions are correct and based on undisputed evidence, and accordingly, the Beebe's have satisfied LC. § 6-1604.

Pls.' Reply Mem. in Supp. of Pls.' Mot. to Amend Complaint to Include Additional Claims of Punitive Damages 4-6.

Second, Dr. Dougal has met the requirements of setting forth her expert opinion of what the local community standard of care is at the applicable time. This is pertinent both to this Court's granting Beebes' motion to amend the complaint, and this Court's denying NWSH's motion to strike.

In a medical malpractice case, "the plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice." *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho

160, 164, 45 P.3d 816, 820 (2002); I.C. § 6-1012. In order to offer expert testimony on the local standard of health care practice, the plaintiff must lay a proper foundation as set forth in Idaho Code § 6-1013. The plaintiff lays a proper foundation for admission of his or her expert's testimony by establishing:

> (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed . . . .

I.C. § 6-1013 (emphasis added). This statutory requirement was discussed recently by the Idaho Supreme Court in *Phillips v. Eastern Idaho Health Services, Inc.*, Docket No. 45890, p. 15, 463 P.3d 365, 381 (March 11, 2020). The applicable community standard of health care practice:

> is specific to 'the time and place of the alleged negligence' and 'the class of health care provider that such defendant then and there belonged to..' The defendant's care is judged against '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.'

Mattox v. Lifecare Centers of America Inc., 157 Idaho at 473, 337 P.3d at 632 (citing I.C. § 6-1012). The Idaho Supreme Court has stated:

> 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.

Id. at 474, 337 P.3d at 633. .

In this Case, Dr. Dougal has met the three requirements of I.C. § 6-1013 for laying proper foundation for expert witness testimony regarding the local standard of care in a medical malpractice case. Dr. Dougal has fulfilled the requirement of I.C. § 6-

1013 that "such an opinion is actually held by the expert witness," when she states "I, RENAE L. DOUGAL, and upon personal knowledge of the facts and circumstances recited herein declares and states as follows[.]" May 15, 2020, Decl. of Renae L. Dougal 2. Dr. Dougal has also fulfilled the second requirement of I.C. § 6-1013 which requires "that the said opinion can be testified to with reasonable medical certainty," by her stating, "[t]he opinions and conclusions offered herein are made to a reasonable degree of nursing certainty and based upon my education, training, and experience." *Id.* at Ex. 1, p. 3. While not contested by NWSH, this Court still wishes to make clear its finding that using the phrase "nursing certainty" instead of "medical certainty" meets the requirements of I.C. § 6-1013. If anything, the phrase "nursing certainty" is more specific in this instance, because this medical malpractice claim centers on nursing standards.

The third and final requirement of I.C. § 6-1013, "that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed", is also met by Dr. Dougal's Declaration. Dr. Dougal has adequately laid out her professional qualifications for assessing the standard of care in this case by providing her academic education in nursing, which includes a PHD, MSN, RN, and ASN in nursing. Dr. Dougal has also listed her extensive employment history and qualifications in the field of nursing. June 16, 2016, Supplemental Decl. Of Renae L. Dougal Ex. 1, p. 1-12. Dr. Dougal has also shown that that her professional knowledge and expertise is coupled with actual knowledge of the applicable said community standard in this case. Dr. Dougal testifies to a list of material she has reviewed relevant to the standard of care including IDAPA Rules of the Idaho Board of Nursing, Idaho and federal statutes, guidelines and regulations from a wide array of nursing organizations,

Court documents relating to this Case, and documents related to NWSA's. May 15, 2020, Decl. of Renae L. Dougal Ex. 1 page 1-15. In Dr. Dougal's Supplemental Declaration, she states:

> Since filing my initial declaration, I have now reviewed Defendant North Idaho Day Surgery, d/b/a Northwest Specially Hospital 's Third Responses And Objections To Plaintiffs ' Request To Supplement Discovery Responses, and provided documents.
>
> I have also reviewed the Affidavit of Denise Fowler, R.N. filed in Support of Defendant North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital's Motion for Summary Judgment.
>
> Nurse Fowler testifies to her knowledge of the "local standard of health care practice applicable to registered nurses and surgical hospital facilities in Kootenai County, Idaho."
>
> I am not an "out-of-state" expert witness. Like Fowler, I am licensed by the State of Idaho Board of Nursing.
>
> Fowler testifies that the local standard of care is to properly handle, package, store, document, and transfer human tissue specimens post—surgical harvest. (Fowler, Aff. para. 13.)
>
> Based on Fowler's testimony, I have actual knowledge of the standard of care NWSH asserts existed in Post Falls, Idaho in 2018.
>
> In my initial report attached as Exhibit 1 to my Declaration filed in Support of Plaintiffs Motion to Amend Complaint, I base my opinions in part on my knowledge and familiarity with policies, procedures and standards of practice of the Association of Operating Room Nurses, "AORN." In NWSH's "standard procedure" titled "SCOPE OF SERVICES OF THE SURGICAL refers to AORN as a source of "references used in the formulation and review of policies, procedures and standards of practice in the Surgical Services." AORN is a national organization and its policies, procedures and standards of practice address national, not regional, standards of care.
>
> Based on my education and experience, NWSH's standard of care is not unique nor specific to the community in which NWSH is located, but is the standard of care in hospitals and for nursing staffs in all urban Idaho communities, and nationally. The standard of care is to "properly handle, package, store, document, and transfer human tissue specimens post-surgical harvest."

June 16, 2020, Supp. Decl. of Renae L. Dougal 2-3, ¶¶ 3-10.

As referenced above, the Idaho Supreme Court has stated that the applicable community standard of health care practice:

> ...is specific to 'the time and place of the alleged negligence' and 'the class of health care provider that such defendant then and there belonged to..' The defendant's care is judged against '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.'

Mattox, 157 Idaho at 473, 337 P.3d at 632 (citing I.C. § 6-1012). *Mattox* also states 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. 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.

Id. at 474, 337 P.3d at 633. This was reiterated in the recent Idaho Supreme Court decision in *Phillips*.

> There is no "'magic language' ...required to demonstrate the requisite familiarity with the applicable standard of health care practice, [but] the testimony of the proffered expert must meet minimum requirements as a prerequisite to admission of that expert's opinion." *Samples*, 161 Idaho [179] at 183, 384 P.3d [943] at 947 [(2016)].
>
> > 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.

Phillips, 463 P.3d at 381, citing *Mattox*, 157 Idaho at 474, 337 P.3d at 633.

In this case, Dr. Dougal's Declarations clearly comply with the requirements of *Mattox* and *Phillips*. Dr. Dougal's Declarations assert that the applicable standard of care for which NWSH's care is judged against is a nationwide standard. Dr. Dougal states that she has reviewed Fowler's Affidavit, and "Fowler testifies that the local standard of care is to properly handle, package, store, document, and transfer human tissue specimens post-surgical harvest." Suppl. Decl. of Renae L. Fowler 2. Dr. Dougal states that "[b]ased on Fowler's testimony, I have actual knowledge of the

standard of care NWSH asserts existed in Post Falls, Idaho 2018." *Id.* Furthermore Dr. Dougal asserts that "Based on my education and experience, NWSH's standard of care is not unique nor specific to the community in which NWSH is located, but is the standard of care in hospitals and for nursing staffs in all urban Idaho communities, and nationally." *Id.* at 3.

The Idaho Supreme Court has held:

> For a federal or statewide regulation to replace a local standard of care, that regulation must provide actual concrete guidance with respect to the activities it purports to govern. Generalities requiring "compliance with the law," "effective leadership," and that services be provided "safely" and "effectively" are, as a practical matter, not sufficient to replace a local standard of care.

Navo v. Bingham Memorial Hospital, 160 Idaho 363, 373, 373 P.3d 681, 691 (2016).

In this Case, Dr. Dougal has reviewed and attained actual knowledge of the community standard of care as described by Fowler. Dr. Dougal has compared the information she has familiarized herself with, to her own knowledge of Idaho's statewide standards of care and the national standards of care. Dr. Dougal does not seek to assert that a federal or statewide regulation replaces the local standard of care; instead, Dr. Dougal has found the local standard of care to be identical to the national standard of care, and she has sufficient expertise to testify about both. NWSH argues that "[t]here is nothing in Fowler's Affidavit that gives any basis that national or statewide standard of health care practice has supplemented the statutory local community standard of health care practice." Reply in Supp. of Mot. to Strike 14. But NWSH offers nothing on the record showing what this supposedly unique local standard of care is or how it differs from the statewide and national standard of care. For the reasons stated above, this Court finds Dr. Dougal has demonstrated actual knowledge of the local standard of care to meet the statutory requirements of I.C. § 6-1013.

NWSH asserts that Dr. Dougal's Declaration and opinions should be stricken because, "the report incorporated into the Dougal Declaration cites two Prelitigation Panel decisions that were issued by panels appointed by the Idaho Board of Medicine..." Mem. in Supp. of Mot. to Strike 11. Other than Dr. Dougal citing the documents in a list of documents she has reviewed; Dr. Dougal has made no other mention of these documents or the contents of these documents in her declarations. For these reasons this Court declines to strike the entirety of Dr. Dougal's declarations under the grounds of possible improper disclosure to Dr. Dougal under I.C. § 6-1008 and I.C. § 74-106(10).

As set forth above, the standard on appeal of this decision is the abuse of discretion standard. This is now referred to as a four-part standard by the Idaho Supreme Court: "Whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life, Inc.*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018). Certainly, this Court perceives the Motion to Strike Dougal's declaration and supplemental declarations as matter committed to its discretion. This Court feels it is acting within the boundaries of that discretion, is acting within the legal standards of the applicable statutes and case law, and reached its decision in an exercise of reason. For the reasons described above, NWSH's Motion to Strike the May 15, 2020, declaration of Renae L. Dougal, the June 16, 2020, Supplemental Declaration of Renae L. Dougal, and the June 17, 2020, Second Supplemental Declaration of Renae L. Dougal are denied.

Finally, this Court grants the Beebes motion to amend their complaint to add the additional claims of negligent infliction of emotional distress and intentional infliction of

emotional distress. The standard of review regarding amending complaints to add additional claims is outlined in *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*:

> Under I.R.C.P. 15(a) "a party may amend his pleading once as a matter of course at any time before a responsive pleading is served...." However, where, as here, an answer and counterclaim have been filed, I.R.C.P. 15(a) provides that "a party may amend his pleading only by leave of court ... and leave shall be freely given when justice so requires...." The grant or denial of leave to amend after a responsive pleading has been filed is a matter that is within the discretion of the trial court and is subject to reversal on appeal only for an abuse of that discretion. 6 Wright & Miller, Fed. Practice & Procedure ¶ 1484. *Ada County Highway District v. Acarrequi,* 105 Idaho 873, 874–875, 673 P.2d 1067, 1068 (1983) ("The allowance of amendment to pleadings is a matter not to be disturbed absent a showing of clear error.... A court may, in its discretion, allow such amendment, unless to do so would deprive the complaining party of some substantial right."); *Jones v. Watson,* 98 Idaho 606, 610, 570 P.2d 284, 289 (1977).

119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

In this case, this Court does not find prejudice to Incyte in regards to their proposed difficulty in readying additional witnesses for the October 5, 2020, trial date. Resp. to Plfs' Mot. to Amend Compl. to Include Additional Claims and Punitive Damages 3-6. If three months is not enough time for Incyte or NWSH to ready additional witnesses for trial or complete discovery they are free to ask for a continuance of the trial date.

NWSH argues that the proposed amendment to add a negligent infliction of emotional distress claim should be denied because it is duplicative of the medical malpractice claims. Def. Northwest Specialty Hospital's Resp. to Plf.'s Mot. to Am. Compl. 5-6. The Idaho Supreme Court recently found that:

> Based on our case law and the plain language of the statute, the Medical Malpractice Act does not categorically supplant all common law causes of action. Instead, the analysis should be whether the cause of action alleges damages that arise out of the "account of the provision of or

> failure to provide health care." *See id.* If so, the plaintiff must comply with the expert testimony requirements stated in Idaho Code sections 6-1012 and 6-1013. To the extent that this Court's prior decisions suggest that the Medical Malpractice supplants a claim categorically, we disavow them. Accordingly, the district court erred when it dismissed the Eldridges' common law claims for negligent infliction of emotional distress, gross negligence, reckless, and willful and wanton conduct on the basis that the claims were supplanted by the Medical Malpractice Act.

Eldridge v. West, 166 Idaho 303, 310-11, 458 P.3d 172, 179–80 (2020). As described below, the Beebes have complied with the expert testimony requirements stated in Idaho code sections 6-1012 and 6-1013, and therefore this court cannot strike the Beebes negligent infliction of emotional distress claim for being duplicative of the medical malpractice act.

NWSH also argues that the Beebes have not pled facts supporting an intentional Infliction of emotional distress claim. Def. Northwest Specialty Hospital's Resp. to Pls.' Mot.to Am. Compl. 6-10. The sufficiency of the facts supporting the pleadings is rightly left for summary judgement, and "in proposed Count Ten, the Beebes have pled each element of this claim." Plfs' Mot. to Am. Compl. to Include Additional Claims and Punitive Damages 5. For the reasons described above, this Court grants the Beebes motion to amend their complaint to add the additional claims of negligent infliction of emotional distress and intentional infliction of emotional distress.

IV. CONCLUSION AND ORDER

Based on the above, Beebes' motion to amend complaint is granted, and NWSH's Motion to Strike Renae L. Dougal's May 15, 2020, Declaration, Renae L. Dougal's June 16, 2020, Supplemental Declaration, and Renae L. Dougal's June 17, 2020, Second Supplemental Declaration are denied.

IT IS HEREBY ORDERED the Defendant NWSH's Motion to Strike Renae L. Dougal's May 15, 2020, Declaration, is DENIED. Additionally, NWSH's Motion to Strike

Renae L. Dougal's June 16, 2020, Supplemental Declaration and NWSH's Motion to Strike Renae L. Dougal's June 17, 2020, Second Supplemental Declaration, are DENIED.

IT IS FURTHER ORDERED the plaintiffs' Motion to Amend Complaint to Include Additional Claims and Punitive Damages is GRANTED.

Entered this 29th day of June, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 29th day of June, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

William Mitchell
P. O. Box 140694
Garden City, ID 83714
williamgmitchell@yahoo.com

Eric Clark
P. O. Box 2504
Eagle, ID 83616
eclark@ericrclarkattorney.com

Stephen Lamberson
618 W. Riverside Ave., Ste 210
Spokane, WA 99201
lambo74@ettermcmahon.com

Nancy Jo Garrett
P. O. Box 1362
Eagle, ID 83616
nancy@garrettrichardson.com

By Jeanne Clausen, Secretary