STATE OF IDAHO)
County of KOOTENAI) ss
FILED July 30, 2020
AT 4:12 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 GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT BROUGHT BY DEFENDANT NWSH AND DEFENDANT INCYTE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on two Motions for Summary Judgment, both filed on June 2, 2020. The first was filed by defendant Incyte Pathology, Inc. and Incyte Pathology Professional, P.S., (collectively "Incyte"), the second was filed by defendant North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital (NWSH).

This is a medical malpractice action. Third 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 [SLNB] 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 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 eleven causes of action: (1) medical malpractice of Northwest Specialty Hospital (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; (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; (10) intentional infliction of emotional harm; and (11) Negligent Infliction of emotional harm.

On June 2, 2020, Incyte filed its Motion for Summary Judgment, a Memorandum in Support of Defendants' Motion for Summary Judgment, as well as a Declaration of Jeffrey R. Galloway in Support of Defendants' Motion for Summary Judgment, and NWSH filed a Motion for Summary Judgment, a Memorandum in Support of Motion for Summary Judgment, an Affidavit of Counsel in Support of Motion for Summary Judgment, and an Affidavit of Denise Fowler in Supp. of NWSH's Motion for Summary Judgment. On June 16, 2020, the Beebes filed Plaintiff's Memorandum in Opposition to Defendant NWSH and Incyte's Motions for Summary Judgment. On June 23, 2020, Incyte filed a Reply Memorandum in Support of Defendants' Motion for Summary Judgemnt and NWHS filed a Reply in Support of Motion for Summary Judgment.

On June 29, 2020, this Court issued an order denying NWSH's Motion to Strike Renae L. Dougal's Declarations and Granting Plaintiff's Motion to Amend Complaint to Include Additional Claims and Punative Damages. Also on June 29, 2020, the Beebes filed their Third Amended Complaint and Demand for Jury Trial.

This Court heard oral arguments on both Motions for Summary Judgment on June 30, 2020. This Court allowed Incyte and NWSH seven days to file any response pertaining to *LaMadrid v. Hegstrom*, 599 F. Supp. 1450 (D. Or. 1984), a case raised by counsel for the Beebes for the first time in oral argument. On July 7, 2020, Incyte filed a Brief in Response to *LeMadrid v. Hegstrom* in Support of Summary Judgment. On July 7, 2020, this Court took the motions for summary judgment under advisement.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765,

769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

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III. ANALYSIS

A. Admissibility of Dr. Dougal's Declarations

Incyte argues that:

> Plaintiffs rely solely on the expert opinions of Dr. Dougal to support their case against Incyte. However, Dr. Dougal's report is completely devoid of any mention of how she is familiar with the standard of care applicable to Incyte, a pathology laboratory. Dr. Dougal also does not state what community standard of care is applicable to Incyte. Dr. Dougal simply recites regulations which she believes may be applicable. However, importantly, she does not determine whether these regulations are applicable to incite, or whether Incyte violated the regulations. Simply put, Dr. Dougal's report is insufficient to survive the instant motion.

Incyte's Mem. in Supp. of Defs' Mot for Summ. J. 5.

Similar to Incyte, NWSH argues that "Plaintiffs have failed to disclose any admissible expert testimony regarding actual knowledge of the applicable local standard of health care practice, the alleged breach, or proximate causation." NWSH's Mem. in Supp. of Mot. for Summ. J. 10.

Next, NWSH argues that:

> Based upon the evidentiary record before the Court, and Plaintiffs' lack of admissible expert evidence, Plaintiffs cannot rebut Ms. Fowler's actual knowledge of and opinions regarding local standard of healthcare practice, and therefore are unable to survive Summary Judgment.
>
> Without any admissible evidence to support their claims, Plaintiffs' allegations in the Complaint are speculative at best and are not rooted in any fact or evidence of record. Plaintiffs have not provided ***any*** admissible expert evidence that meets the qualifications set forth in Idaho Code §6-1012. As such, Plaintiffs are unable to make a showing sufficient to establish an essential element of their case, for which they bear the burden of proof, and that failure requires the entry of summary judgment. See *Clelotex, 477 U.S. at 323, 106 S. Ct. at 2553.*

Id. at 12-13 (emphasis in original).

The Beebes argue that:

> The Beebes have presented competent and admissible testimony regarding the standard of care and cited to facts establishing breaches of that conduct by the Defendants. Accordingly, the Beebes have met their

> burden to provide medical expert testimony in opposition to this motion for summary judgment.

Pls'. Mem. in Opp. to Defs'. Mot. For Summ. J. 9.

This Court finds that Dr. Dougal's Declarations are not only sufficient for the pleading stage, as suggested by NWSH (NWSH's Mem. in Supp. of Mot. for Summ. J. 9-17), but for the reasons described in this Court's June 29, 2020, Memorandum Decision and Order, Dr. Dougal's Declarations are sufficient to meet the requirements of summary judgment for an expert witness in a medical malpractice case. NWSH and Incyte make the same arguments addressed by this Court in the June 29, 2020, Memorandum Decision and Order, and this Court finds that Dr. Dougal's Declarations provide sufficient expert testimony as to the community standard of care for Post Falls Idaho at the time in question as required by I.C. §§ 6-1012, 6-1013 and applicable case law.

This Court's June 29, 2020, Memorandum Decision and Order applied to the Motion to Strike and the Motion to Amend, but its reasoning stands up to the requirements for a motion for summary judgment as well. The relevant portions of this Court's June 29, 2020, opinion are quoted below:

> 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 qualifiedproviders 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 thestandard 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.

Mem. Decision and Order Denying Def. NWSH's Mot. to Strike and Granting Pls' Motions 18-23.

For the reasons Described above, this Court finds that Dr. Dougals' Declarations are admissible regarding Incyte and NWSH's Motions for Summary Judgment.

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B. Incyte's Culpability in the Loss of the Lymph Node Specimen

This Court finds that a genuine issue of material fact exists related to Incyte's culpability in the loss of the lymph node Specimen.

Incyte argues that the Beebes "merely suggest that they have alleged a plain negligence claim against Incyte in an effort to circumvent Idaho Code and established case law." Incyte's Reply Mem.in Supp. of Defs. Mot. for Summ. J. 3. Additionally, Incyte argues that "[a] conclusory affidavit from the expert stating that the expert is familiar with the local standard of care is insufficient to withstand a motion for summary judgment." *Id.* (citing *Ramos v. Dixon,* 144 Idaho 32, 35, 156 P.3d 533 (2007)).

The Beebes argue that:

> While the pleadings are clear that the Beebe's claims against Incyte are based in negligence, not medical malpractice, Incyte argues it is entitled to summary judgment on some alleged medical malpractice claim against Incyte? The Beebe's claim against Incyte is based on negligence, so to prevail at summary judgment, Incyte would have to establish no genuine issue of material facts exists as to an element of a negligence cause of action. However, Incyte never mentions the elements or presents any facts to support summary judgment.
>
> This is even more incredible (baseless) as Incyte was not a party to the pre-litigation process against NWSH or has ever asserted that Incyte should have been a party. If Incyte received and lost Mr. Beebe's lymph node, then it was negligent.

Pls'. Mem. in Opp. to Defs'. Mot. For Summ. J. 7-8

This Court finds that the Beebes have presented admissible evidence that supports a negligence claim. Additionally, this Court finds that the Beebes have presented sufficient evidence for a medical malpractice claim (even though such a claim of medical malpractice claim is not lodged against Incyte).

In this case, the Beebes have not simply produced a conclusory affidavit that the expert (Dr. Dougal) is familiar with the local standard of care. Dr. Dougal 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. Dougal 2. Incyte has not offered evidence of a standard of care for a pathology laboratory, differs from the standard of care for handling medical specimens described by Dr. Dougal. Additionally, the Beebes have provided evidence that either Incyte or NWSH was negligent in losing the lymph node specimen. Dr. Dougal states that:

> Looking back at Incyte's Manifest, which was completed by circulating nurse "M. Clutter," it is ambiguous and unclear as to whether she deposited two tissues specimens or two specimen jars into the Incyte Lock Box. The data on this form is ambiguous and unclear because NWSH recklessly failed to provide even minimal instructions for properly completing the Incyte Manifest form.

Supplemental Decl. of Renae L. Dougal. ¶ 30.

Incyte argues that:

> The evidence is clear that Incyte never received Mr. Beebe's lymph node specimen.
>
> As shown by the Incyte manifest, only (1) specimen, that of Mr. Beebe's foot, was received by Incyte. (Decl. of Jeffrey R. Galloway in Support of Defendants' Motion for Summary Judgment at ¶ 2, Ex. 1.) The container was received by Incyte, the bag remained sealed, however, only the foot specimen was inside. (*Id.*) The sealed bag did not contain the lymph node specimen. (*Id.*)
>
> Consequently, Incyte never received Mr. Beebe's lymph node specimen. Any criticisms of Dr. Dougals [sic] are unwarranted as Incyte is not responsible for the lost Lymph node specimen.

Incyte's Mem. in Supp. of Defs' Mot. for Summ. J. 6-7.

The Beebes argue that:

> The Evidence is not "clear" that Incyte did not receive Mr. Beebe's lymph node. Incyte refers to its "Manifest" and argues that it only picked up "one (1) specimen," yet Incyte's own pathology report confirms that Incyte received two specimens. (Dougal Supp. Dec. para. 28, citing to the Pathology Report attached as Exhibit 7.) The undisputed facts are that Mr. Beebe's surgical procedures produced three specimens that should have been document[ed] [sic] separately. NWSH claims it delivered two specimens to Incyte, but NWSH has no documentation as to what those specimens were, and Incyte claims it only received on[e] [sic] specimens [sic] when its own documents confirm it actually received two.
>
> Based on these undisputed facts, genuine issues of material fact exist as to whether Incyte ever received the lymph node specimen. Nurse

> Fowler certainly claims NWSH delivered "two specimens" to Incyte. Fowler claims that the Incyte manifest shows delivery of "Plaintiff's foot and sentinel node specimens." (Fowler Aff, p. 10.) However, that is simply not true and not supported by NWSH'S documentation. What is clear is exhibit C, (Manifest form), shows a discrepancy, Which Incyte's driver ignored. Accordingly, the facts establish that NWSH has no idea whether it delivered three specimens or two, and Incyte has no idea which specimens it received. The Court must deny summary judgment to Incyte as it has failed to establish summary judgment is warranted under the circumstances.

Id. at 8-9

In this case, the only evidence offered by Incyte to prove that they received the lymph node specimen is the Incyte manifest. The Incyte manifest contains no description of what was received by Incyte and only contains the number "1" marked in the column labeled "TOTAL NUMBER IN SHIPMENT". It is altogether possible that the lymph node specimen was delivered to Incyte and the employee in charge of counting and marking receipt of the lymph node specimen on the Incyte manifest failed to account for it. Incyte has not provided an affidavit by the Incyte employee in charge of accounting for the contents of this shipment. Incyte's only evidence is the Incyte manifest.

Critically, the Incyte manifest is marked by NWSH with the number "2" under the column "TOTAL NUMBER IN SHIPMENT". This means that the very document in which Incyte is attempting to use to meet its burden, itself contains a genuine issue of material fact as to who lost the Lymph node specimen, NWSH or Incyte. "When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions." *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997). For the reasons described above, this Court finds that a genuine issue of material fact exists as to whether Incyte lost the lymph node specimen.

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C. NWSH's Culpability in the Loss of the Lymph Node Specimen

This Court finds that a genuine issue of material fact exists related to NWSH's culpability in the loss of the lymph node specimen.

NWSH argues that "[t]his matter involves two specimens, which have been properly documented in this matter and which were documented in the records as having been sent to Co-Defendant." NWSH's Reply in Supp. of Mot. for Summ. J. 6.

The Beebes argue that:

> NWSH has no written policy or procedure for ensuring its employees properly complete the Incyte Manifest log, NWSH cannot tell what specimens it deposited in the Incyte Lock BOX, and NWSH has no policy or procedure to check the log post delivery to confirm accuracy.

Pls'. Mem. in Opp. to NWSH's and Incyte's Motions for Summ. J. 11.

NWSH argues that:

> Based on the foregoing, even if Dougal could establish actual knowledge of the community standard of care practice, she is still not qualified to offer opinions as to the Defendant Hospital. Therefore, the Court should grant summary judgment with respect to those claims arising out of Defendant Hospital's policies and procedures, as well as any other administration of Defendant Hospital.

NWSH's Reply in Supp. of Mot. for Summ. J. 6.

In this case, NWSH suffers the same problems as Incyte as it pertains to their reliance on the Incyte Manifest. NWSH, as the moving party has presented evidence, in the form of the Incyte Manifest, that they properly sent the lymph node specimen to Incyte. For the same reasons as described above, this Court finds that the Incyte Manifest relied upon by NWSH itself contains a genuine issue of material fact as to NWSH culpability in losing the lymph node specimen. No amount of figure pointing between NWSH and Incyte can alleviate the rational conclusion that either Incyte lost the lymph node specimen, or, NWSH lost it.

Additionally, the Beebes have presented evidence through Dr. Dougal's Declaration that:

> 8. NWSH has provided no proof, documentation, or testimony establishing any written policy or procedures were in place at NWSH for bagging, tagging, labeling, identification of specimens, completeing laboratory requisitions and placing specimens into laboratory bins/ boxes for storage until courier service picks up the specimens and takes them to the offsite laboratory for analysis.
> 9. It is an extreme deviation from reasonable standard of care and constitute reckless conduct for a hospital to remove human tissue without ensuring policies and procedures are in place and followed for bagging, tagging, labeling, identification of specimens, completing laboratory requisitions and placing specimens into laboratory bins/boxes for storage until courier service picks up the specimens and takes them to the offsite laboratory for analysis.
> 10. The fact that NWSH lost Mr. Beebe's irreplaceable sentinel lymph node, and to date, still has not located this specimen, proves that even if NWSH had written policies and procedures in place to ensure accurate handling of human tissues specimens, it did not follow those procedures in this case. Not only did NWSH nurses breach the standard of care, losing an irreplaceable tissue specimen under the circumstances is absolutely reckless.

Decl. of Renae L. Dougal In Supp. of Pls' Mot. to Amend Compl. 3.

This Court finds that it is proper for Dr. Dougal, as a qualified expert, to offer her opinions as to whether NWSH's procedures met the community standard of care. Dr. Dougal testifies that NWSH's procedures have not met the standard of care, and as a result they have lost the Lymph node specimen. *Id.*

For the reasons described above, this Court finds that a genuine issue of material fact exists related to NWSH's culpability in the loss of the lymph node specimen.

D. Causation and Damages

As a preliminary matter to the question of causation and damages, this Court finds that Dr. Stackow's testimony, as the surgeon who performed Mr. Beebe's Sentinel

Lymph Node Biopsy (SLNB), is admissible in its entirety, as it meets the requirements of a Non-Retained Expert witness under IRCP 26(b)(4).

NWSH argues that:

> Specifically, while Dr. Stackow may know the general purposes of the SLNB for cancer diagnosis, Dr. Stackow is not an oncologist and therefore does not have the requisite qualifications to offer opinions in the field of oncology. Further, the loss of the SLNB alone, without having either the knowledge, or the expertise to interpret the other medical evidence and tests that Dr. Bartels considered in developing a plan for Plaintiffs care, is insufficient for Dr. Stackow to have any basis for opinions on proximate cause. Significantly, Dr. Stackow does not demonstrate any knowledge [of] [sic] Dr. Bartels' actual treatment of Plaintiff, or how a negative or positive SLNB would have affected treatment based on the other medical evidence in Plaintiff's medical records.

NWSH's Reply in Supp. of Mot. for Summ. J. 18. Additionally, NWSH argues that:

> Dr. Stackow's opinions and knowledge of facts taking place after his surgery were necessary acquired for the purposes of preparation of trial. Further, the timing of Dr. Stackow's Affidavit in relation to his stipulated dismissal provides strong evidence that he was in fact retained as an expert in exchange for his dismissal. Based on these facts, Plaintiffs are attempting to introduce retained litigation opinions under the guise of a non-retained expert opinion. However this is clearly contrary to the requirements IRCP 26(b)(4).

Id. at 20

Idaho Rule of Civil Procedure 26(b)(4) states:

> (4) *Trial Preparation: Experts.*
> (A) Discovery of an Expert Expected to Testify. A party must disclose to the other parties by answer to interrogatory, or if required by court order, the identity of any witness it expects to ask to present evidence under Rule 702, 703 and 705, Idaho Rules of Evidence.
> (i) What Must be Disclosed: Retained Experts. For individuals retained or specially employed to provide expert testimony in the case or who are employees of the party:
> • a complete statement of all opinions to be expressed and the basis and reasons for the opinion must be disclosed;
> • the data or other information considered by the witness in forming the opinions;

> • any exhibits to be used as a summary of or support for the opinions;
> • any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
> • the compensation to be paid for the testimony; and
> • a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.
> (ii) What Must be Disclosed: Non-Retained Experts. For individuals with knowledge of relevant facts not acquired in preparation for trial and who have not been retained or specially employed to provide expert testimony in the case:
> • a statement of the subject matter on which the witness is expected to present evidence under Rule 702, 703 or 705, Idaho Rules of Evidence, and
> • a summary of the facts and opinions to which the witness is expected to testify.

This Court finds that Dr. Stackow's declaration falls within the scope of a "Non-Retained Expert" under I.R.C.P. 26(B)(4)(ii). NWSH recognizes that the Idaho Supreme Court has never ruled on the issue of retained vs. non-retained expert witnesses, but NWSH asks this court to consider out of State holdings on this issue because "Idaho case law recognizes that Idaho has adopted the federal Rules of Civil Procedure and often looks to federal courts in interpreting analogous rules." NWHS's Reply in Supp. of Mot. for Summ. J. 20. NWSH cites the following cases to argue that "I.R.C.P 26(b)(4)(A) now distinguishes between retained experts and non-retained treaters who do not develop opinions and testimony in anticipation on litigation," and therefore, "it does not follow that treating health care providers who offer opinions beyond their treatment and care are exempt from full disclosure" *(Id.* at 21): *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 825-26 (9th Cir. 2011); *Dixon v. Legacy Transprtation Sys., LLC*, No. 215CV01359JADPAL, 2017 WL 4004412, at 7 (D. Nev. Sept. 11, 2017); *Mears v. Safco Ins. Co. of Illinois*, 888 F. Supp. 2d 1048, 1055 (D. Mont. 2012), aff'd, 572 F. App'x 503 (9th Cir. 2014).

While not binding on this Court, *Goodman's* holding on this issue is illustrative for purposes of differentiating Dr. Stackow's testimony from the testimony found in *Goodman*:

> Today we join those circuits that have addressed the issue and hold that a treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment. Goodman specifically retained a number of her treating physicians to render expert testimony beyond the scope of the treatment rendered; indeed, to form their opinions, these doctors reviewed information provided by Goodman's attorney that they hadn't reviewed during the course of treatment. For these reasons, we agree with the district court that those doctors fell outside the scope of the "treating physician" exception insofar as their additional opinions are concerned. Therefore, Rule 26(a)(2)(B) required disclosure of written reports. By failing to provide these reports until long after the deadline for plaintiff's expert disclosures had passed, Goodman failed to comply with Rule 26's disclosure requirements.

Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 826 (9th Cir. 2011).

In the present case, Dr. Stackow's opinions found in his declaration were clearly formed during the course of his treatment of Mr. Beebe. Nowhere in Dr. Stackow's Declaration does it appear that Dr. Stackow reviewed information provided by the Beebes or their attorney. As shown below, all of the testimony provided by Dr. Stackow is clearly connected to his personal administration of the surgical SNLB procedure as well as his personal knowledge of the procedure and its relevance to pathological testing. While Dr. Stackow is not an Oncologist, it is perfectly reasonable that Dr. Stackow (a surgeon who performs lymph node biopsies) would have personal knowledge of the one-time nature of such a biopsy and its general purpose of providing pathological testing to determine treatment options for metastatic cancer. For these reasons, this Court finds that Dr. Stackow's Declaration is admissible expert testimony under I.R.C.P. 26(B)(4)(ii).

1. **Value of the lost lymph node specimen, and personal injury and pain and suffering.**

Incyte argues that the Beebes are not able to meet the burden of showing proximate cause in a medical malpractice case because "Plaintiffs are unable to identify how the alleged inability to locate Mr. Beebe's tissue specimen caused Plaintiffs' any damage." Incyte's Mem. in Supp. of Defs'. Mot for Summ. J. 6.

NWSH argues that summary judgment is appropriate because, "Plaintiff was required to disclose and present expert testimony as to how the loss of the sentinel lymph node required more extensive treatment or monitoring of Plaintiff's cancer without a sentinel node[,]" and the Beebes have not put forward admissible evidence doing so. NWSH's Mem. in Supp. of Mot. for Summ. J. 21.

NWSH argues that damages asserted as to the value of Mr. Beebe's lost sentinel lymph node "are inappropriate because Defendant Hospital did not cause Plaintiff to undergo a SLNB." *Id.* at 25. Additionally, NWSH argues that:

> Plaintiffs have failed to present any admissible evidence for how Defendant Hospital's alleged acts or omissions proximately caused any physical injury, pain, or suffering. Specifically, it is undisputed that Plaintiff's cancer was a preexisting condition that necessitated both the partial amputation of Plaintiff's right foot and the SLNB. Neither of these surgeries was proximately caused by Defendant Hospital.

Id. at 26.

The Beebes argue that they have provided expert testimony as to causation. Pls.' Mem. in Opp. to Defs Mot. for Summ. J. 10. Dr. Stackow has testified that "Because of the loss of the lymph node, not knowing whether the cancer had spread, denied Mr. Beebe knowledge of his status and treatment options." Stackow Decl. ¶ 19.

The Beebes state that:

> Dr. Stackow testified that Mr. Beebe's lymph node was 'indispensable and irreplaceable.' Notwithstanding Dr. Stackow's expert testimony, even a lay witness could conclude that the loss of the ability [to] [sic] further diagnose cancer results in direct harm to the patient.

Pls.' Mem. in Opp. to Defs Mot. for Summ. J. 10.

Additionally, the Beebes argue that NWSH and Incyte are responsible for Mr. Beebes resulting damages:

> NWSH conceded that lost body parts have value, but argues it is not responsible because "Defendant Hospital did not cause Plaintiff to undergo a SNLB." Like much of NWSH's brief, this argument is also baseless. NWSH took responsibility for processing the specimen and lost the specimen or was negligent in transferring it to Incyte without documentation. As NWSH breached the standard of care, and lost the lymph node, it is directly and proximately responsible for the resulting harm...including the value of an "irreplaceable" body part.
>
> ...Mr. Beebe underwent a painful procedure to remove a lymph node near Mr. Beebe's groin because his physician, Dr. Stackow said it was necessary. NWSH is incorrect that Mr. Beebe has not established a breach of the standard of care, so this argument fails.

Id.

In their Reply Brief, NWSH again asserts that "Dr. Stackow's opinions do not establish proximate causation for any damages because Dr. Stackow has not, and cannot say with any certainty or probability that the care Plaintiff has in fact received was changed or adversely affected by the loss of SLNB." NWSH's Reply in Supp. of Mot. for Summ. J. 22.

As to the value of the lost lymph node, NWSH argues that:

> From the moment the lymph node was removed from Plaintiff's body, its permanent disposal was a forgone conclusion. Dr. Stackow was not going to place the lymph node back in the Plaintiff once a negative SLNB came back. As set forth in Defendant Hospital's initial Memorandum, Plaintiff expressly consented to its disposal following pathology. Because Defendant Hospital did not cause the "loss" of the lymph node from Plaintiff's body, it cannot be claimed as an element of damages.
>
> As previously argued, what Plaintiff lost was the chance at pathological examination before the SLNB was disposed. However, Defendant Hospital is unaware of any Idaho cases, and Plaintiffs have certainly not pointed to any, that a lost diagnosis without more is a legally recognized injury or element of damages.

Id. at 24. Additionally, NWSH argues that:

> Plaintiffs simply assert that Defendant Hospital "is incorrect that Mr. Beebe has not established a breach of the standard of care." Pl. Memo. In Opp. to Def N. Idaho Day Surg. LLC d/b/a NW Spec. Hosp.'s and Incyte Pathology's Mots. for S. J., p. 10. While this contention is wholeheartedly disputed as set forth above, it further does not explain how the alleged breach caused the personal injury or pain and suffering in this matter. It is undisputed that the asserted breach by Defendant Hospital occurred after the asserted painful procedure.

Id. at 25.

Finally, Incyte argues that *LaMadrid* (which was cited by the Beebes in oral arguments) does not apply to this case, and:

> Plaintiff's lymph node was properly removed from his body, a fact which is undisputed. Once removed, it would not be replaced. The lymph node was never going to be replaced in his body. Therefore, it is not proper to compensate the Plaintiff for the "actual loss of a body part or function" because that loss was going to occur irrespective of anything Defendant Hospital did or did not do.
>
> Lost information is not a compensable element of damages. Rather, Plaintiffs are required to explain how that lost information proximately caused them injury or damages, which Defendant Hospital contends that they failed to do.

Brief Resp. to *LaMadrid v. Hegstron* in Supp. of Summ. J. 3. This Court has read *LaMadrid*. NWSH's is correct in its quotation that LaMadrid held that, "Compensation for injury to, or loss of a body part involves not only the replacement expense of <u>making the person whole</u> by <u>compensating for the actual loss of a body part or function</u> but making the person whole while attempting to teach the person new functional and vocational skills." Id. at 2, citing *LaMadrid*, 599 F.Supp. at 1457. This Court finds that NWSH is correct that Mr. Beebe's lymph node was properly removed and was not going to be replaced. However, the removal and subsequent loss produces damage, not the loss of a hand damage that occurred in *LaMadrid*, but the damage resultant from the loss of Mr. Beebe's lymph node. *LaMadrid* held, "While no amount of money can actually replace a lost body part, the concept of damages has always been viewed

as a way to make the injured party whole." *LaMadrid*, 599 F.Supp at 1456. LaMadrid does nothing to support NWSH's argument that, "Lost information is not a compensable element of damages." Brief Resp. to *LaMadrid v. Hegstron* in Supp. of Summ. J. 3. Under the present facts, lost information due to loss of Mr. Beebe's lymph node may well result in damages that are compensable by a monetary award. Mr. Beebe has an opportunity to prove damages, to prove to the trier of fact how he can be "made whole."

This Court finds Dr. Stackow's Declaration admissible expert testimony under I.R.C.P. 26(B)(4)(ii), and Dr. Stackow has presented testimony that the lymph node biopsy has an effect on options for treatment (the very purpose of the lymph node biopsy). Dr. Stackow asserts that:

> In my opinion, if Mr. Beebe's biopsy had been negative, the course of treatment would have been to monitor and observe; if the biopsy had been positive, Mr. Beebe and his oncologist would know the cancer had spread and would be able to discuss all the different treatment options. Because the loss of the lymph node, not knowing whether the cancer had spread, denied Mr. Beebe knowledge of his status and treatment options.

Decl. of John C. Stackow ¶ 19. Additionally, Dr. Stackow has testified that "Mr. Beebe's diagnosis, staging and treatment options depended on the outcome of the sentinel lymph node biopsy." *Id.* at ¶ 24.

This Court finds that Dr. Stackow's testimony is sufficient to show a genuine issue of material fact exists relating to damages suffered by the Beebes as to the value of the lost lymph node specimen, personal injury and pain and suffering, as well as the proximate cause of these damages due to the defendants' alleged loss off the lymph node specimen.

This Court finds Incyte and NWSH's argument, that the Beebes cannot prove that treatment would have been different if the Lymph node specimen was not lost, to be absurd. The Beebes cannot show what treatment options have been lost to them

because of the very fact that the lymph node specimen has been lost. As testified by Dr. Stackow, "[a] sentinel lymph node dissection and pathological study is a one-time opportunity to conclusively diagnose and stage a metastatic cancer like Mr. Beebe's." *Id.* at ¶ 22. Critically, Dr. Stackow also testifies that "[i]n the absence of the valuable diagnostic information from the lost lymph node, Mr. Beebe will likely require more vigilance in the future, whenever he reveals suspicious symptomology that could suggest metastatic cancer." *Id.* at ¶ 26. That is evidence of damage to Mr. Beebe. The possibility of a late diagnosis due to the loss of the sentinel lymph node would also be evidence of damage to Mr. Beebe.

Additionally, in oral arguments, the Beebes pointed to a cancer assessment undergone by Mr. Beebe that reads:

> **Assessment**
> John presents today due to a newly diagnosed T4b melanoma of the right foot.
> PET/CT reviewed and shows no evidence for metastatic disease.
> Unfortunately the SLN biopsy was lost by the pathology department preventing appropriate staging for Johns case.
> Today he presents Past surgical resection of his melanoma. I have recommended aggressive in close surveillance due to inadequate staging of his disease. The patient understands and agrees with the plan.
> **Plan**
> F/U in 3 months with repeat CT imaging and labs.

Aff. Of Counsel Nancy J. Garrett in Support of Mot. for Summ. J. Ex. B, page 4.

This Court finds that based on evidence on the record, a reasonable jury could conclude that the Beebes suffered damages due to a painful medical procedure that was undergone for the purpose of learning more about Mr. Beebes life threatening cancer, and Mr. Beebe suffered this pain and loss of his lymph node without gaining the benefit of discovering present and future treatment options, thus frustrating the entire purpose of undergoing such an procedure, and necessitating (or causing) present and future close surveillance of his cancer that would not have been necessary if the Lymph

node specimen had not been lost. For these reasons, this Court finds that that a genuine issue off material fact exist as to the damages suffered by the Beebes in regards to the value of the lost lymph node specimen, personal injury and pain and suffering.

In regards to causation, this Court finds that Dr. Stackow's Declaration establishes a genuine issue of material fact as to the loss of the lymph node specimen being an actual and proximate cause of damages relating to the value of the lost lymph node specimen, personal injury and pain and suffering.

The Idaho Supreme Court has found that:

> In a medical malpractice case, a "plaintiff has the burden of proving not only that a defendant failed to use ordinary care, but also that the defendant's failure to use ordinary care was the proximate cause of damage to the plaintiff." *Pearson v. Parsons,* 114 Idaho 334, 339, 757 P.2d 197, 202 (1988) (citation and internal quotation marks omitted). "To establish proximate cause, a plaintiff must demonstrate that the provider's negligence was both the actual and legal (proximate) cause of his or her injury." *Coombs v. Curnow,* 148 Idaho 129, 139, 219 P.3d 453, 463 (2009). Actual cause "is a factual question focusing on the antecedent factors producing a particular consequence." *Id.* at 139–40, 219 P.3d at 463–64. Legal cause exists when "it is reasonably foreseeable that such harm would flow from the negligent conduct." *Id.* at 140, 219 P.3d at 464 (citation and internal quotation marks omitted).
>
> "Proximate cause in medical malpractice cases involving more than one possible cause of injury will be established if it is shown that the defendant's conduct was a substantial factor in bringing about the injury suffered by the plaintiff." *Id.* (citation and internal quotation marks omitted). Whether negligent conduct was a substantial factor in bringing about the plaintiff's injuries "may be proven by direct evidence or by showing a 'chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.' " *Id.* (quoting *Weeks v. E. Idaho Health Servs.,* 143 Idaho 834, 839, 153 P.3d 1180, 1185 (2007)). "The question of proximate cause is one of fact and almost always for the jury." *Id.* (internal quotation marks omitted).
>
> Idaho Code sections 6–1012 and 6–1013 require that, in medical malpractice cases, the applicable standard of care and breach of that standard be proved by expert testimony. *Id.* There is no such provision requiring expert testimony to prove proximate cause. Rather, the

> admission of testimony to prove proximate cause in medical malpractice case is governed solely by the Idaho Rules of Evidence. *Sheridan v. St. Luke's Reg'l Med. Ctr.*, 135 Idaho 775, 785, 25 P.3d 88, 98 (2001). Although expert testimony is not expressly required to establish causation in medical malpractice cases, "such testimony is often necessary given the nature of the cases." *Coombs,* 148 Idaho at 140, 219 P.3d at 464. "Expert testimony is generally required because 'the causative factors are not ordinarily within the knowledge or experience of laymen composing the jury.' " *Id.* (quoting *Flowerdew v. Warner,* 90 Idaho 164, 170, 409 P.2d 110, 113 (1965)).

Easterling v. Kendall, 159 Idaho 902, 914, 367 P.3d 1214, 1226 (2016).

In the present case, actual cause is apparent. The antecedent factors that led up to the inability to perform pathological testing on the lymph node specimen was the casual chain of the lymph node being removed from Mr. Beebe by Dr. Stackow, and the subsequent loss of the lymph node by the defendants before it could be utilized for pathological testing. The defendants' loss of the lymph node specimen was clearly an actual cause of the damages.

This Court also finds that Dr. Stackow's testimony shows proximate cause sufficient to survive summary judgment. Dr. Stackow's testimony shows it was reasonably foreseeable that the loss of the lymph node specimen by defendants would extinguish any possibility for pathological testing on the lymph node specimen, and the lack of this pathological testing would irrevocably deny Mr. Beebe knowledge pertaining to his present and future treatment options.

Dr. Stackow testifies as to the medical importance of a lymph node biopsy by stating "[t]he sentinel lymph node biopsy is the single most important prognostic indicator of metastatic melanoma and is the standard of care." Decl. of John C. Stackow ¶ 18. Dr. Stackow establishes the irrevocable harm that would result from a loss of the Lymph node specimen by stating "[a] sentinel lymph node dissection and pathological study is a one-time opportunity to conclusively diagnose and stage a

metastatic cancer like Mr. Beebe's." *Id.* at ¶ 22. Dr. Stackow also establishes that knowledge of present and future treatment options depends on the pathological analysis of the lymph node specimen by stating "Mr. Beebe's diagnosis, staging and treatment options depended on the outcome of the sentinel lymph node biopsy[,]" and "[i]n the absence of the valuable diagnostic information from the lost lymph node, Mr. Beebe will likely require more vigilance in the future, whenever he reveals suspicious symptomology that could suggest metastatic cancer." *Id.* at ¶¶ 24, 26.

Certainly the facts of this case present unusual and interesting issues as to causation and damages. That fact creates no problem at this summary judgment juncture, nor does it create an issue at trial. The mere fact that it is difficult to arrive at the exact amount of damages does not prevent the award of damages; where damages are shown to have resulted, fixing the amount is for the trier of fact. *Smith v. Daniels*, 93 Idaho 716, 718, 471 P.2d 571, 573 (1970); *Conley v. Amalgamated Sugar Co.*, 74 Idaho 416, 423-24, 263 P.2d 705 712-13 (1953). So long as the underlying cause of action is established, uncertainty as to the amount of damages will not bar recovery. *Bartlett v. Peak*, 107 Idaho 284, 285-86, 688 P.2d 1189, 1190-91 (1984).

This Court finds that a reasonable jury could conclude that due to the nature of the work Incyte and NWSH perform, they certainly should be familiar with the importance and relevant issues described by Dr. Stackow surrounding a lymph node biopsy and its testing. Therefore, it would be reasonably foreseeable that the loss of Mr. Beebes lymph node specimen would result in damages stemming from the loss of knowledge regarding Mr. Beebes present and future treatment options. For the reasons described above, this court finds that a genuine issue of material fact exists as

it pertains to actual and proximate cause for the Beebes' damages relating to the value of the lost lymph node specimen, personal injury and pain and suffering.

2. Intentional Infliction of Emotional Distress Claim

NWSH argues that summary judgment on the Beebes' Intentional infliction of Emotional Distress claim (IIED) is appropriate "because the alleged conduct at issue in this matter (as distinguished from Plaintiff's conclusory characterizations regarding said conduct) does not rise to the level of outrageousness required for an IIED claim." NWSH's Mem. in Supp. of Mot. for Summ. J. 22. Further, "Plaintiffs have not demonstrated severe emotional distress which is also required for an IIED claim." *Id.*

The Beebes argue that:

> Contrary to NWSH's baseless arguments, the Beebe's have established reckless and outrageous conduct. NWSH has no policy or procedure to check the log post delivery to confirm accuracy. When processing human tissue, some of which is "indispensable and irreplaceable," it [sic] a reasonable juror could certainly conclude that NWSH's conduct was reckless or outrageous.

Pls' Mem. in Opp to Def. NWSH and Incyte's Mot. for Summ. J. 11.

In the Beebes' third Amended Complaint they argue that as it pertains to their IIED claim:

> 113. Such conduct by a trained nursing staff was negligent, reckless and outrageous and an extreme deviation from reasonable standards of conduct.
> 114. Such conduct by a medical laboratory was negligent, reckless and outrageous and an extreme deviation from reasonable standards of conduct.
> 115. Defendant NWSH is directly and vicariously liable for the conduct 0f its employees or agents.
> 116. Defendant NWSH is directly and vicariously liable for the conduct of its employees or agents.
> 117. Defendants Incyte Pathology, Inc. and Incyte Pathology Professional, P.S. are directly and vicariously liable for the conduct of its employees or agents.
> 118. As a direct and proximate result of the Defendants' negligence, recklessness and outrageous conduct, Mr. Beebe has suffered severe and likely permanent emotional injury, and medical costs for treatment of

> this injury, the reasonable compensation for which will be decided by a jury.

Third Amended Compl. 17.

The Idaho Supreme Court has described the requirements of an IIED claim:

> In Idaho, four elements are necessary to establish a claim of intentional infliction of emotional distress: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. *Curtis v. Firth,* 123 Idaho 598, 601, 850 P.2d 749, 751 (1993).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 179, 75 P.3d 733, 740 (2003).

In this case, this Court grants defendants' motions for summary judgment on the Beebes' IIED claims because the Beebes have not presented evidence of emotional distress suffered by Mr. Beebe.

Dr. Dougals' Declarations and Dr. Stackow's Declarations present evidence that negligent conduct by the defendants, through the loss of the lymph node specimen, rise to the level of extreme recklessness, but the Beebes have not presented any evidence that Mr. Beebe did in fact suffer emotional distress causally connected to the defendants recklessness as required by the third element of an IIED claim. Additionally, the Beebes have presented no evidence that the emotional distress suffered by Mr. Beebe rose to the level of severity required by the fourth element of an IIED claim. The Beebes only assert in their Third Amended complaint that, "[a]s a direct and proximate result of the Defendants' negligence, recklessness and outrageous conduct, Mr. Beebe has suffered severe and likely permanent emotional injury, and medical costs for treatment of this injury, the reasonable compensation for which will be decided by a jury." Third Amended Compl. 17.

The Beebes cannot rest on that bald assertion from their Third Amended Complaint. The Beebes have not present any evidence via further depositions,

discovery responses or affidavits, that there is indeed a genuine issue for trial, and they have not offered a valid justification for the failure to do so under [I.R.C.P. 56(d)]. (see *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994)). The only justification offered by the Beebes for their failure to offer such evidence is their assertion that "NWSH wastes the Court's time arguing summary judgment on claims that have not yet been approved by the Court." Pls' Mem. in Opp. to Mot. for Summ. J. 11. This assertion holds no water. The defendants' Motions for Summary Judgment pertaining to all of the Beebe's claims are rightfully before this Court. Furthermore, The Beebes' Motion to Amend their Complaint to Include Additional Damages was filed on May 15, 2020, and NWSH/Incyte's Motions for Summary Judgment were filed on June 2, 2020. Oral arguments on the Motions for Summary Judgment were held on June 30, 2020. Finally, the Beebes' initial Complaint was filed just over one year ago on June 4, 2019. The Beebes have clearly had plenty of time to contemplate and put forward a defense of their additional damages claims in the context of the present Motions for Summary Judgment.

For the reasons described above, This court Grants NWSH and Incyte's Motions for Summary Judgment regarding the Beebes' claim of Intentional Infliction of Emotional Distress, due to no evidence being presented as to permanent emotional injury of Mr. Beebe.

3. Negligent Infliction of Emotional Distress Claim

In regards to the Beebes' Negligent Infliction of Emotional Distress claim (NIED), NWSH argues that "Plaintiffs have neither pled nor established the requisite physical injury or manifestations for an emotional distress claim." NWSH's Mem. in Supp. of Mot. for Summ. J. 27. Additionally, NWSH asserts that "[d]espite nearly two years having passed since loss of Plaintiff's sentinel lymph node, Plaintiffs failed to plead any

physical manifestations of their alleged emotional distress and therefore summary judgment should be granted on that bases alone." *Id.* at 29.

The Beebes argue that, "for the negligent infliction claim, the Beebe's have pled the requisite physical manifestations. Not only is this not the proper time to argue summary judgment for claims not yet filed, the arguments are baseless in the first place." Pls' Mem. in Opp. to NWSH and incyte's Mot. for Summ. J. 11.

The Beebes state in their Third Amended Complaint that:

> 120. As a direct and proximate result of the Defendants' negligence, recklessness and outrageous conduct, Mr. Beebe has suffered severe and likely permanent emotional injury, manifesting as depression, anxiety, sleep disorders, reduction of libido, fatigue, and general or overall deterioration of general wellbeing.
>
> 121. As a direct and proximate result of the Defendants' negligence, recklessness and outrageous conduct, Mr. Beebe has suffered severe and likely permanent emotional injury, and medical costs for treatment of this injury, the reasonable compensation for which will be decided by a jury.

Third Amended Compl. 18.

The Idaho Supreme Court has found that:

> Due to the risk of fraudulent claims, the difficulty of proving causation, and the belief that some degree of emotional distress is a foreseeable fact of everyday life, courts have long conditioned recovery for emotional distress on plaintiffs' ability to offer tangible proof of emotional distress. *See Hatfield v. Max Rouse & Sons NW,* 100 Idaho 840, 851, 606 P.2d 944, 955 (1980) (overruled on other grounds by *Brown v. Fritz,* 108 Idaho 357, 359–60, 699 P.2d 1371, 1373–74 (1985)); *Gates v. Richardson,* 719 P.2d 193, 196 (Wyo.1986). Thus, this Court held over forty years ago that a plaintiff who alleges emotional trauma as the result of another's negligence must demonstrate that she has physically manifested the distress. *Summers v. W. Idaho Potato Processing Co.,* 94 Idaho 1, 2, 479 P.2d 292, 293 (1970). Our previous decisions recognize that there may be circumstances in which proof of a negligently inflicted physical impact is sufficient to support an award for resulting emotional distress. *Hatfield,* 100 Idaho at 851, 606 P.2d at 955) (characterizing *Summers* as holding that there is no right of recovery "for emotional distress in the absence of *physical causes or* manifestations ....") (emphasis added).

Carrillo v. Boise Tire Co., 152 Idaho 741, 750, 274 P.3d 1256, 1265 (2012).

In this case, the Beebes have plead manifestations of emotional distress in the form of "depression, anxiety, sleep disorders, reduction of libido, fatigue, and general or overall deterioration of general wellbeing". Third Amended Compl. 18. Outside of these pleadings, the Beebes have not pointed to any *evidence* on the record that Mr. Beebe has suffered emotional distress as a result of the defendants' negligence, nor have the Beebes pointed to any evidence on the record related to physical manifestations of their emotional distress. As with the Beebes IIED claim, this Court finds that their NIED claim is properly before this Court. Since the Beebes have not pointed to any evidence on the record to support their NIED claim, this Court grants NWSH and Incyte's motions for summary judgment on the Beebes claim of Negligent Infliction of Emotional Distress. There is no evidence of physical manifestation of emotional distress.

4. Loss of Consortium Claim

In regards to the Beebes loss of consortium claim, NWSH argues that:

> Under Idaho law, a consortium claim is derived and therefore entirely dependent on the tort claims of the spouse. Zaleha v. Roholt, Robertson & tucker, Chtd., 131 Idaho 254, 256 953 P.2d 1363, 1365 (1998). Therefore, to the extent that the Plaintiffs' other tort claims fail as argued above, Mrs. Beebe's claim must also fail.
>
> Further even if Plaintiffs' medical malpractice claims survive, the loss of consortium claim should still fail because Plaintiff has not suffered a physical injury.

NWSH's Mem. is Supp. of Mot. for Summ. J. 31.

The Beebes have offered no argument, nor have they pointed to any evidence on the record to support their loss of consortium claim. For these reasons, NWSH and Incyte's motions for summary judgment regarding the Beebes Loss of Consortium Claim is granted.

5. Informed Consent Claim

NWSH argues, as it pertains to the Beebes informed consent claim, that "despite the absence of the SLNB, and based on Plaintiff's other imaging, pathology results, and clinical assessments, he is ultimately receiving the same treatment and observation he otherwise would have received for his cancer." *Id.* at 18. Additionally, NWSH argues that they did not need to obtain informed consent because NWSH did not perform the procedure (*Id.*), and nevertheless, informed consent was satisfied by Mr. Beebe signing an informed consent form regarding the procedure. *Id.* NWSH also argues that failure to obtain informed consent has not been established because no expert witness has disclosed opinions as to the informed consent claim, and the Beebes have not put forward an expert witness that would be qualified as to the community standard of care. *Id.* at 19.

The Beebes have offered no argument, nor have they pointed to any evidence in the record to support their informed consent claim. Thus, NWSH and Incyte's motions for summary judgment regarding the Beebes informed consent claim is granted.

IV. CONCLUSION AND ORDER

IT IS HEREBY ORDERED the defendants NWSH and Incyte's Motions for Summary Judgment regarding the Beebes claims of Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Loss of Consortium, and Informed Consent is GRANTED.

IT IS FURTHER ORDERED the defendants NWSH and Incyte's Motions for Summary Judgment regarding all the Beebes' other existing claims is DENIED.

DATED this 30th day of July, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 30th day of July, 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:

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By _____
Jeanne Clausen, Secretary