

FILED June 14, 2021

AT 11:55 O'Clock a M  
CLERK OF DISTRICT COURT

James Clausen  
Deputy

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

**DAVID FISK and MARGARET FISK,**  
**husband and wife,**

*Plaintiffs,*

vs.

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

*Defendants.*

Case No. **CV 2017 1802**

**MEMORANDUM DECISION AND ORDER  
DENYING DEFENDANT NORTHWEST  
SPECIALTY HOSPITAL'S MOTION FOR  
RECONSIDERATION**

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This medical malpractice case arises out of the treatment and care of plaintiff Margaret Fisk (Margaret, collectively the Fisks) at a facility operated by defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital (the Hospital). The matter currently before the Court is the Hospital's Motion for Reconsideration. This follows an appeal by the Fisks on decisions by this Court granting defendants' motions for summary judgment and denying the Fisks motion for reconsideration, and reversal and remand per the decision by the Idaho Supreme Court in this lawsuit.

The following factual summary of the history of this case is from this Court's Memorandum Decision and Order Granting in Part and Denying in Part Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure; Granting Hospital's Motion for Summary Judgment; and Granting McDonald's Motion for Summary Judgment which was filed on May 31, 2018:

The Hospital is a specialty acute care hospital located in Post Falls, Idaho. Dr. McDonald is board certified in neurological surgery. In March of 2015, Dr. McDonald practiced medicine at the Hospital. He was also a member of Northwest Doctors, LLC, which was a member of North Idaho Day Surgery, LLC, and a member of North Idaho Neurosurgery & Spine, PLLC. Decl. Nathan S. Ohler (Ohler Decl.), at Ex. A, at 8.

On March 10, 2015, Dr. McDonald performed an out-patient cervical spinal fusion on Margaret at the Hospital's facility. The Hospital provided nursing care and treatment to Margaret before, during, and immediately after her surgery. Jessica Sholtz (NP Sholtz) was the nurse practitioner who assisted Dr. McDonald in caring for Margaret. Margaret claims NP Sholtz was employed by the hospital. Counsel for the Hospital at oral argument on May 23, 2018, claimed NP Sholtz was not an employee of the Hospital and has no supervising physician. Margaret's surgery was reportedly uneventful and without immediate complications.

The next day, March 11, 2015, the Hospital nursing staff prepared to discharge Margaret. At approximately 12:45 p.m., prior to her discharge, Margaret began experiencing abdominal discomfort and nausea. Decl. Suzanne Nebeker (Nebeker Decl.), at Ex. B.<sup>1</sup> The Hospital nursing staff prescribed Margaret a Dulcolax suppository for constipation. *Id.* At approximately 3:00 p.m., Margaret experienced a large emesis (vomiting). *Id.* The Hospital nursing staff reported this to NP Sholtz, which prompted NP Sholtz to postpone Margaret's discharge. *Id.* Margaret's symptoms continued to worsen throughout the day and into the evening. *Id.* Between approximately 7:45 p.m. and 9:00

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<sup>1</sup> In general, the Court used the timeline prepared by Suzanne Nebeker, an expert witness for the Fisks, to set forth this case's factual background. Suzanne Nebeker states that she used Margaret's medical records to prepare the timeline. The Court notes that the timeline appears to be mostly consistent with Margaret's medical records submitted as attachments to the Affidavit of Denise Fowler, R.N., an expert witness for the Hospital. See *generally* Aff. Denise Fowler (Fowler Aff.), at Ex. B.

p.m., the Hospital nursing staff's notes indicate that Margaret was experiencing nausea with intermittent retching emesis and severe abdominal pain. *Id.* The Hospital nursing staff periodically notified NP Sholtz about Margaret's condition, and NP Sholtz provided the Hospital nursing staff with additional orders as a result. *Id.*

Early the next morning, on March 12, 2015, at approximately 1:26 a.m., Margaret told the Hospital nursing staff that her stomach hurt and she felt like she was dying. *Id.* At around the same time, she vomited what was described as a coffee-ground emesis. *Id.* At 2:30 a.m., Margaret was still vomiting coffee-ground emesis. *Id.* Because of Margaret's condition, the Hospital nursing staff contacted NP Sholtz, and NP Sholtz ordered the Hospital nursing staff to consult with the on-call intensivist. *Id.* The on-call intensivist recommended that Margaret be transferred to Kootenai Medical Center for a gastrointestinal consult and a possible endoscopy. *Id.* The Hospital nursing staff related the intensivist's recommendation to NP Sholtz. *Id.* In response to the intensivist's recommendation, NP Sholtz reportedly told the Hospital nursing staff to keep Margaret at the Hospital's facility for a possible "scope" later that morning. *Id.*; Aff. Counsel Dennis P. Wilkinson (Wilkinson Aff.), Ex. A, Dep. Tr. 22:25–23:7. NP Sholtz disputes this, but, since the facts are construed in favor of the non-moving party, what is pertinent is what happened from Margaret's perspective. Over the next several hours, Margaret reported her abdominal pain as rating a ten-out-of-ten. Nebeker Decl., at Ex. B.

At 6:00 a.m., NP Sholtz reported to the Hospital facility "to round on" Margaret. *Id.* By 6:45 a.m., NP Sholtz was trying to coordinate a gastrointestinal consult. *Id.* At approximately 7:45 a.m., the Hospital nursing staff's notes indicate that Margaret's abdomen was distended and firm with no bowel sounds and her pain remained at a ten-out-of-ten. *Id.* The same notes also indicate that John L. Pennings, M.D. (Dr. Pennings),

arrived at the Hospital's facility to complete the gastrointestinal consult; Dr. McDonald appears to have been present for the consult. *Id.* Based on his examination, Dr. Pennings believed Margaret was in "terminal phase shock" and ordered the Hospital nursing staff to prepare Margaret for surgery. Aff. Counsel Def. N. Idaho Day Surgery Mot. Summ J. (Def. Counsel Aff.), Ex. A, Dep. Tr. 49:1–13. Shortly thereafter, Dr. Pennings performed an exploratory laparotomy. Nebeker Decl., at Exs. A, B. He discovered Margaret had developed mesenteric artery ischemia, i.e., a loss of blood supply to the small intestines leading to end-organ loss. *Id.* at Ex. B; Aff. Jeffery Larson (Larson Aff.) 5–6, ¶¶ 17–18. As a result, Dr. Pennings removed a significant amount of Margaret's small intestines. Nebeker Decl., at Ex. B; Larson Aff. 5–6, ¶¶ 17–18. Margaret's colon was also ischemic, so Dr. Pennings performed a total abdominal colectomy with an end ileostomy. Nebeker Decl., at Ex. B. After the surgery, at approximately 12:18 p.m., Margaret was transferred to the Intensive Care Unit at Kootenai Medical Center due to her critical condition. *Id.*

The Fisks filed their Complaint in this case on March 1, 2017. At the conclusion of the August 17, 2017, Scheduling Conference, this Court scheduled this case for a jury trial beginning September 10, 2018. As a result of that Scheduling Conference, on August 22, 2017, this Court issued its Scheduling Order. Under the terms of that Scheduling Order, plaintiffs' expert witness disclosure was due about January 15, 2018. On January 16, 2018, plaintiffs filed Plaintiffs' Notice of Compliance, notifying the Court that plaintiffs had provided Plaintiffs Expert Witness Disclosures to the defendants.

On April 3, 2018, defendant Northwest Specialty Hospital filed a Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts, and a Motion for Summary Judgment. On April 24, 2018, defendant Jeffery McDonald, M.D., filed a Motion for Summary Judgment. Oral argument on these motions was held on

May 23, 2018. As mentioned above, on May 31, 2018, this Court filed its Memorandum Decision and Order Granting in Part and Denying in Part Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure; Granting Hospital's Motion for Summary Judgment; and Granting McDonald's Motion for Summary Judgment. Summarizing that decision, this Court found the Fisks, in their expert witness disclosure, did not need to demonstrate their experts had actual knowledge of the local standard of health care practice, and thus, the Fisks had not run afoul of the expert disclosure requirements (except as to witness David Smith, upon whom the Court found the Fisks had not met the expert disclosure requirements). However, what is required on summary judgment is different than what is required for expert witness disclosure. The Court found the Fisks had not produced admissible evidence showing that at least one of their expert witnesses has actual knowledge of the applicable standard of health care practice, and thus, the Court granted defendants' summary judgment motions.

Following that May 31, 2018, decision, the Fisks first filed a Motion to Amend on June 7, 2018, asking the Court to allow plaintiffs to amend their complaint to add a claim that Dr. McDonald be held personally responsible for the actions of Jessica Sholtz under I.C. § 30-1306. On September 27, 2018, defendant Northwest Specialty Hospital filed a Memorandum in Opposition to Motion to Amend, arguing a) the Fisks fail to state a valid claim, b) the statute of limitations bars such amendment, and c) the motion is untimely and does not relate back. On October 3, 2018, defendant Dr. McDonald filed an Opposition to Motion to Amend, making the same arguments made by Northwest Specialty Hospital, and adding that plaintiffs have not shown any "good cause" for the amendment and that such amendment would be an impermissible collateral attack.

The second motion the Fisks filed was their Motion for Reconsideration: Northwest Specialty Hospital, filed on June 21, 2018. The next day the Fisks filed their

Motion for Reconsideration: Defendant Jeffery D. McDonald, M.D. On August 15, 2018, defendant Dr. McDonald filed an Opposition to Plaintiffs' Motion for Reconsideration, arguing plaintiffs never sought relief under I.R.C.P. 56(d) throughout the summary judgment process, and that the Fisks have failed to show good cause for relief under I.R.C.P. 60(b). On August 16, 2018, defendant Northwest Specialty Hospital filed an Opposition to Plaintiffs' Motion for Reconsideration Re: Northwest Specialty Hospital.

Finally, on June 20, 2018, defendant Northwest Specialty Hospital filed its Motion for Attorney Fees and Costs, to which the Fisks filed an objection on July 5, 2018. On August 17, 2018, defendant Northwest Specialty Hospital filed its Reply to Plaintiffs' Objection to Motion for Costs and Fees. On June 22, 2018, defendant McDonald filed a Memorandum of Costs, to which plaintiffs filed an objection on July 5, 2018.

Oral argument on these matters was held on October 10, 2018. The entire time period for oral argument was consumed with the Fisks' motions for reconsideration. Counsel for the Fisks stated he would stand on his briefing for the plaintiffs' Motion to Amend and as to the Fisks' objections to costs and fees. At the conclusion of that hearing, the Court took all these matters under advisement.

On May 31, 2018, this Court filed its Memorandum Decision and Order Granting in Part and Denying in Part Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure; Granting Hospital's Motion for Summary Judgment; and Granting McDonald's Motion for Summary Judgment. The Court found the Fisks had not produced admissible evidence showing that at least one of their expert witnesses has actual knowledge of the applicable standard of health care practice, and thus, the Court granted defendants' summary judgment motions.

On June 21, 2018, Fisks filed Plaintiffs' Motion for Reconsideration: Northwest Specialty Hospital and a Memorandum in Support of Plaintiffs' Motion for

Reconsideration: Northwest Specialty Hospital. The next day, Fisks filed Plaintiffs' Motion for Reconsideration: Jeffrey D. McDonald, M.D. and a Memorandum in Support of Plaintiffs' Motion for Reconsideration: Northwest Specialty Hospital. On August 15, 2018, defendant McDonald filed Jeffrey D. McDonald, M.D.'s Opposition to Plaintiffs' Motion for Reconsideration. On August 16, 2018, Defendant Northwest Specialty Hospital filed Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Opposition to Plaintiffs' Motion for Reconsideration Re: Northwest Specialty Hospital. On October 10, 2018, this Court heard oral argument on plaintiffs' motions for reconsideration. On November 13, 2018, this Court filed its Memorandum Decision and Order: Denying Plaintiffs' Motion to Amend Complaint; Denying Plaintiffs' Motions for Reconsideration; and Order Regarding Fees and Costs. The portion of that decision pertaining to plaintiffs' motions for reconsideration is as follows:

**B. The Plaintiffs' Motions for Reconsideration are Denied.**

Fisks' motion to reconsider was filed after final judgment was entered in favor of the Hospital and Dr. McDonald. As a result, it is governed by I.R.C.P. 59(6) and 60(b). Idaho Rule of Civil Procedure 59(6) does not permit the introduction of new evidence. *Johnson v. Lambros*, 143 Idaho 468, 471, 147 P.3d 100, 103 (Ct.App. 2006). Since the pending motion seeks relief from the judgment to bring new claims against Dr. McDonald, it is also subject to Rule 60(b). Where . . . the motion for "reconsideration" raises new issues, or presents new information, not addressed to the court prior to the decision which resulted in the judgment, the proper analogy is to a motion for relief from judgment under Rule 60(b). *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982). That rule requires a showing of good cause and specifies particular grounds upon which relief may be afforded. *Hendrickson v. Sun Valley Corporation, Inc.*, 98 Idaho 133, 134, 559 P.2d 749, 750 (1977). In *Lowe*, the Idaho Court of Appeals affirmed the trial court's decision that buyers failed to show good cause for the submission of new information following award of summary judgment in favor of seller. 103 Idaho at 263-64, 646 P.2d at 1034-35.

Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977). Such proceedings must of

necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

*Id.*

Both forms of relief under I.R.C.P. 59 and 60 require a showing of good cause. This Court finds the Fisks have failed in this regard. Indeed, neither the Fisks' motion for reconsideration regarding Dr. McDonald, nor the Fisks' motion for reconsideration regarding Northwest Specialty Hospital, mentions one word about "good cause." Pls.' Mot. for Recons.: Def. Jeffery D. McDonald, M.D. 1; Pls.' Mot. for Recons.: Northwest Specialty Hospital, 1. In Fisks' briefing, the expression "good cause" is never mentioned. Mem. in Supp. of Pls.' Mot for Recons.: Def. Jeffery D. McDonald, 1-4; Mem. in Supp. of Pls.' Mot. for Recons.: Northwest Specialty Hospital, 1-6.

The entire focus by Fisk in their short memorandum regarding Dr. McDonald is "evidence" Fisk claims support their claim that Dr. McDonald was Sholtz's supervisor. Mem. in Supp. of Pls.' Mot for Recons.: Def. Jeffery D. McDonald, 1-4. But again, the "evidence" cited is Dr. McDonald's deposition testimony, and his deposition was taken on November 20, 2017. Since Fisks had that "evidence" on November 20, 2017, why is it they did not *immediately* move to amend their complaint to specifically add allegations that Dr. McDonald was responsible for the actions of Sholtz? Counsel for Fisks, at this motion for reconsideration juncture, completely ignore the fact that at no time prior to or at the May 23, 2018, hearing on the defendants' motions for summary judgment did the Fisks move for a continuance under I.R.C.P. 56(d) to allow them to clarify or strengthen that evidence as to NP Sholtz and make legal argument to defend their clients, the Fisks, from impending summary judgment against them. Counsel for Fisks, at this motion for reconsideration juncture, completely ignore the fact that at no time prior to or at the May 23, 2018, hearing on the defendants' motions for summary judgment, did the Fisks move to amend their complaint to allege a cause of action against Dr. McDonald for the acts of NP Sholtz.

This Court wishes the facts were different. There can be no doubt that the Fisks' lives have been permanently, significantly and irreparably damaged due to Margaret Fisk losing most of her intestines. There can be no doubt they have suffered damage. There can be no doubt that the longer emergency surgery was delayed, more of Margaret Fisk's intestines were irreparably damaged. Logic tells us that someone, or more than one person, *waited too long* to get Margaret Fisk into that emergency surgery. This Court has already found there is evidence of causation to allow the Fisks' case to survive summary judgment on that causation issue. Mem. Decision and Order Granting in Part and Den. in Part Hospital's Mot. to Strike Pl.s' Expert Witness Disclosure; Granting Hospital's Mot. for Sum. J.; and Granting McDonald's Motion for Summary Judgment, 57. The Fisks will not be able to hold anyone accountable because the Fisks lack evidence that their experts are knowledgeable about the local standard of care at the relevant time.

Just as someone *waited too long* to give Margaret Fisk the medical help she needed, the Fisks' attorneys *waited too long* to amend the Fisks' complaint, and the Fisks' attorneys *waited too long* to bring their experts up to speed on the standard of care in this community at the relevant time. This Court cannot help but believe that having their experts become familiar with the local standard of care at the relevant time was a task that could have been performed. Counsel for Fisks, for whatever reason, chose to never perform that task, not even at this motion for reconsideration stage. Counsel for Fisks completely failed to discuss the standard of care issue in their motion for reconsideration against Dr. McDonald. Pls.' Mot. for Recons.: Def. Jeffery D. McDonald, M.D. 1-4. In Fisks' motion for reconsideration against the Hospital, counsel for Fisks argue the standard of care has now been established through new affidavits of their experts: Nurse Practitioner expert Suzanne Nebeker, FNP-BC; Nursing Expert, Vernon Robert Kubiak, KNP, CNP, CNS-BC, PMHNP-BC, RN; and Hospital Expert Timothy Hopkins, FACJE, CHSP. Pls.' Mot. for Recons.: Northwest Specialty Hospital, 5-9. The Court has reviewed the new affidavits. The Court is persuaded for the same reasons set forth by the Hospital: these new affidavits and new arguments regarding those affidavits do not change this Court's decision on summary judgment...the Fisks failed to present admissible evidence reflecting actual knowledge of the applicable standard of health care practice as required by I.C. § 6-1012 and I.C. § 6-1013. Def. North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Opp'n to Pls.' Mot. for Recons. Re: Northwest Specialty Hospital, 3-27. The Court agrees with all arguments presented by the Hospital in that brief.

This Court finds, from a factual standpoint, the Fisks have presented no new evidence to support their motion to reconsider. This Court agrees with the Hospital's argument that Nebeker's new Declaration: does not provide the ANA guidelines for this Court to review to determine whether those guidelines provide some cognizable standard applicable to this case (*Id.* 3); does not provide any testimony by Nurse Miller (*Id.*); does not provide the contents of communications Nebeker had with Odom, Wagner and Moore (*Id.* 4-5); and provides no admissible evidence reflecting actual knowledge of the local standard of care through familiarizing sources (*Id.* 18-24). This Court agrees with the Hospital's argument that Kubiak's new Declaration fails to make a statement that the local standard of care was replaced by, or is the same as a statewide or national standard. (*Id.* 5). This Court agrees with the Hospital's argument that Kubiak's new Declaration provides no admissible evidence reflecting actual knowledge of the local standard of care through familiarizing sources (*Id.* 18-24). This Court agrees with the Hospital's argument that Hawkins new Declaration simply explains the origins of the Joint Commission guidelines previously considered by this Court, and does nothing to change this Court's prior finding that in *Navo v. Bingham Memorial Hospital*, 160 Idaho 363, 373, 373 P.3d 681, 691 (2016), the Idaho Supreme Court held that the Joint Commission Standards do not provide a coherent standard of care. Mem. Decision and Order Granting

in Part and Den. in Part Hospital's Mot. to Strike Pl.s' Expert Witness Disclosure; Granting Hospital's Mot. for Sum. J.; and Granting McDonald's Motion for Summary Judgment, 40-41.

This Court agrees with the Hospital that the "reasonable inference" standard does not apply with expert testimony. *Id.* 7-8. This Court agrees that the Fisks have not shown "good cause" to consider these new affidavits, and thus, should not be considered (*Id.* 10-13), but even had they established "good cause" for this late disclosure, what has now been disclosed is still insufficient to establish knowledge by the Fisks' experts as to the local standard of care at the relevant time. Accordingly, this Court finds no reason to address the Hospital's additional arguments of waiver by the Fisks (*Id.* 14-15) or that the new evidence was improperly obtained by Fisks' counsel. *Id.* 15-18.

The Court finds the Fisks' motions to reconsider must be denied.

Mem. Decision and Order: Den. Pls.' Mot. to Am. Compl.; Den. Pls.' Mot.s for Recons.; and Order Regarding Fees and Costs 13-17.

On December 21, 2018, Fisks filed a Notice of Appeal. On October 23, 2020, the Idaho Supreme Court filed its 31-page opinion in this case. The Idaho Supreme Court affirmed this Court's decision granting summary judgment in favor of the hospital, and held, "The district court did not err in concluding that none of the expert declarations supplied by the Fisks on summary judgment [Vernon R. Kubiak, Robert Y. Uyeda, Timothy F. Hawkins and Suzanne Nebeker], provided adequate foundation for any of their experts to testify as to the applicable community standard of care in the Post Falls/Coeur d'Alene area during March 2015. Because such testimony is required under Idaho Code sections 6-1012 and 6-1013 to establish the standard of care in a medical malpractice claim, the Fisks failed to establish an essential element of their case." October 23, 2020, Opinion 8-20; 167 Idaho 870, 880-90, 477 P.3d 924, 934-44. The Idaho Supreme Court affirmed this Court's decision that the burden was on the Fisks to establish the essential elements of their case on summary judgment. *Id.* at 20-24; 167 Idaho at 890-92, 477 P.3d at 944-46. The Idaho Supreme Court affirmed this Court's decision denying Fisks' motions for reconsideration as to Hawkins' second declaration

and Nebeker's second declaration because they failed to demonstrate that either expert had actual knowledge of the community standard of care. *Id.* at 24-28; 167 Idaho at 892-93, 477 P.3d at 946-47. But the Idaho Supreme Court held this Court erred in denying the Fisks' motions for reconsideration as to Kubiak's second declaration, writing "However, because Kubiak's second declaration demonstrated that he had actual knowledge of the community standard of care, the district court abused its discretion in concluding that Kubiak's testimony as to the standard of care was inadmissible at the motion for reconsideration stage. Therefore, the district court erred in denying the Fisks' motions for reconsideration." *Id.* at 28; 167 Idaho at 893-94, 477 P.3d at 947-48. The Idaho Supreme Court's analysis was as follows:

On the other hand [after finding that Nebeker's second declaration was insufficient for not spelling out a single standard of care], Kubiak's second declaration filled the void that was apparent in his first declaration by providing facts that, when taken as true, establish that the ANA standards of practice had been adopted as the community standard of care for nurses. Kubiak's second declaration provided significantly more detail explaining how he familiarized himself with the community standard of care. Like Nebeker's second declaration, Kubiak's second declaration explained that he reviewed the deposition of Nurse Miller who testified that her training incorporated the ANA standards, that the ANA standards "guide everything in nursing," that the Hospital had incorporated the ANA standards into its protocols, and that she understood that nurses were expected to act in accordance with the ANA standards. Kubiak further explained that he reviewed the depositions of Robin Hetzler, Pamela Carpenter, and nurse practitioner Jessica Sholtz, and that those depositions made clear that the nurses understood they were expected to comply with the ANA standards. Kubiak's second declaration also indicates that he reviewed the Hospital's protocols and determined that the Hospital had adopted the ANA standards.

Unlike Nebeker, Kubiak's first declaration contained numerous statements of the applicable standards of care. Generally, Kubiak explained that the standard of care for nurses is "typically defined as what a reasonable and prudent nurse would do when caring for a same or similar patient in the same or similar circumstances." Kubiak also included specific standards of care relevant to Mrs. Fisk's treatment. For example, he explained that "adequate pain management is a compelling and universal requirement," and that "[w]hen a patient states that he or she believes he or she is dying, it is reasonable for the registered nurse to assume that something significant is happening and immediate care is needed."

Furthermore, Kubiak explained that registered nurses are trained to understand that “coffee ground emesis can be a sign of abdominal bleeding and requires immediate intervention.” With respect to documentation, Kubiak explained that “[c]lear, accurate, and accessible nursing documentation is an essential element of safe, quality, effective, and evidence based nursing according to the American Nurses Association.” To that end, Kubiak explained that “all nursing care must be well documented.”

Kubiak’s first and second declaration, taken together, demonstrate that he reviewed the depositions of four local healthcare providers, along with the Hospital’s internal policy statements to familiarize himself with the community standard of care. Specifically, his second declaration contains sufficient facts from the sources he reviewed to demonstrate that the ANA standards of practice, which he was familiar with, had been adopted as community standards of care. Because of his familiarity with the ANA standards, Kubiak was able to elucidate several standards of care that were applicable to nurses within the community. Therefore, Kubiak’s second declaration provided sufficient additional information, such that, his two declarations, taken together, demonstrated his familiarity with the applicable community standards of care for nurses in the Post Falls/Coeur d’Alene area.

*Id.* at 26-27; 167 Idaho at 893, 477 P.3d at 947.

On January 7, 2021, the Clerk of the Courts for the Idaho Supreme Court filed the Remittitur in this case. On that same day the Clerk of the Courts for the Idaho Supreme Court filed its Order Denying Petition for Rehearing filed by McDonald, and its Order Denying Petition for Rehearing filed by the Hospital. That placed this case back in the hands of this Court.

On April 19, 2021, the Hospital filed Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital’s Motion for Reconsideration, Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital’s Memorandum in Support of Motion for Reconsideration, an Affidavit of Denise Fowler in Support of Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital’s Motion for Reconsideration, and Affidavit of Counsel (Garrett) In Support of Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital’s Motion for Reconsideration. The Hospital’s motion for reconsideration stated:

This Motion is brought based on Defendant NWSH's interpretation of the Supreme Court's opinion, that this Court erred in finding Vernon Kubiak's declarations to be inadmissible and denying Plaintiff's previous Motion for Reconsideration, should be treated as the procedural equivalent of this Court making those decisions itself for the purposes of IRCP 11(b). In other words, Defendant NWSH interprets the Supreme Court Opinion as the procedurally the same as if this Court had granted Plaintiff's Motion for Reconsideration based on Kubiak's testimony.

It is with this understanding that Defendant NWSH requests this Court's reconsideration of Kubiak's opinions based on the evidence and arguments presented herein. It is Defendant NWSH's assertion that those asserted sources identified by the Supreme Court as providing foundation for Kubiak's purported knowledge of local standard of care. Rather the Supreme Court appears to decide that this Court was required to rely on Kubiak's declaration, without providing any of the source materials themselves for the Court to consider. Defendant NWSH hereby seeks to provide those materials for the Court's consideration and demonstrate why they are insufficient to replace or serve as the entire community standard of care in Post Falls, Idaho.

Defendant NWSH acknowledges that there is not in fact an order of this Court, and it is therefore uncertain if Rule 11(b) applies. However, in the absence of an order from this Court, then proceedings on Plaintiff's original Motion for Reconsideration would appear to remain open, subject to the Supreme Court's opinion and reasoning. Therefore, this Motion could in the alternative be viewed as a request by Defendant NWSH to reopen arguments and presentation of evidence on Plaintiff's 2018 Motion for Reconsideration.

Whether treated by the Court as Defendant NWSH's new Motion for Reconsideration, or a continuation of Plaintiff's Motion for Reconsideration, Defendant NWSH respectfully submits that the asserted familiarizing sources relied upon by Kubiak are inadequate to establish actual knowledge of local standard of health care practice. Based on the arguments herein, and the actual submission of those familiarizing sources into the record in this matter, Defendant NWSH respectfully requests that the Court reconsider the inadmissibility of Kubiak's declarations, grant the instant Motion and dismiss this Defendant NWSH with prejudice as a matter of law.

Def. North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Mot. for Recons.

2-3.

On April 26, 2021, Fisks filed a Memorandum in Support of Plaintiff's Objection to Northwest Specialty Hospital's Motion for Reconsideration, a Declaration of Suzanne Nebeker Re: Affidavit of Denise Fowler, R.N., and a Declaration of Counsel (Wilkinson) in Support of memorandum in Support of Plaintiff's Objection to Northwest Specialty

Hospital's Motion for Reconsideration. The thrust of Fisk's objection to the hospital's motion for reconsideration is that this Court lacks the authority to reconsider the determination of the Idaho Supreme Court. Mem. in Spp. Of Pls.' Obj. to NWSH's Mot for Recons. 1-9. Due to that focus, Fisks only discussed the merits of the Hospital's motion to reconsider in a superficial manner. *Id.* at 9-12.

On April 29, 2021, the Hospital filed Defendant North Idaho Day Suregery, LLC, d/b/a Northwest Specialty Hospital's Reply in Support of Motion for Reconsideration.

On May 3, 2021, Fisks filed Plaintiffs' Motion to Strike Defendant Northwest Specialty Hospital's Reply Re: Reconsideration, or, Alternatively, for Additional Time to Respond. The claim made by Fisks in that document were that the hospital in its motion to reconsider sought to reconsider the Idaho Supreme Court's ruling, and that when such was pointed out in the Fisks' objection, the hospital filed a reply on April 29, 2021, and "the bulk of the Reply consist of arguments that are 'new' to the issues presented and argued in the initial Motion and supporting materials." Pls.' Mot. to Strike Def. NWSH's Reply Re: Recons., or Alternatively, for Additional Time to Respond 2.

On May 3, 2021, this Court heard oral argument on the Hospital's motion for reconsideration. At that hearing, the Court told counsel for all parties that it was not going to address Fisks' motion to strike as it was only filed earlier that day. The Court told counsel for all parties that it did not consider that the Hospital's motion for reconsideration was asking this Court to reconsider the Idaho Supreme Court's decision. The Court pointed out that because counsel for the Fisks was so focused on the claim that the hospital was asking this court to reconsider the Idaho Supreme Court's decision, that counsel for Fisks perhaps had not adequately addressed the substance of the hospital's motion for reconsideration, which was whether Fisks have set forth in their experts' affidavits and declarations, knowledge of the local standard of care. The court

rescheduled oral argument on the hospital's motion for reconsideration for May 20, 2021, and gave counsel for Fisks until May 10, 2021, to respond to the merits of the hospital's motion for reconsideration, and gave the hospital until May 17, 2021, to respond. On May 10, 2021, Fisks filed Plaintiffs' Supplemental Memorandum in Support of Objection to Northwest Specialty Hospital's Motion for Reconsideration, an Affidavit of Counsel (Wilkerson) in Support of Plaintiffs' Supplemental Memorandum in Support of Objection to Northwest Specialty Hospital's Motion for Reconsideration, a Fourth Declaration of Suzanne Nebeker and a Third Declaration of Vernon Kubiak. On May 17, 2021, the hospital filed Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Supplemental Reply in Support of Motion for Reconsideration. At the conclusion of oral argument, the Court took the Hospital's motion for reconsideration under advisement.

## **II. STANDARD OF REVIEW.**

In deciding a motion for reconsideration, the district court must apply the same standard of review required for the order that is being reconsidered; and the "[t]he district court evaluates a motion to reconsider an order granting summary judgment by employing the summary judgment standard . . ." *Franklin Bldg. Supply Co. v. Hymas*, 157 Idaho 632, 636, 339 P.3d 357, 361 (2014); *Pandrea*, 160 Idaho at 171, 396 P.3d at 949. As with Rule 59(e) proceedings, the right to grant, or deny, relief under the provisions of Rule 60(b) is a discretionary one with the trial court. *Johnston v. Pascoe*, 100 Idaho 414, 420, 599 P.2d 985, 991 (1979). "A trial court's disposition of a . . . Rule 60(b) motion will be upheld unless the court has manifestly abused the wide discretion vested in it." *Alderson v. Bonner*, 142 Idaho 733, 743, 123 P.3d 1261, 1271 (Ct.App. 2006). The same standard applies for decisions made pursuant to I.R.C.P 59(e).

*Pandrea*, 160 Idaho at 171, 369 P.3d at 949.

### III. ANALYSIS.

The focus of the Hospital's argument is on the following portion of the Idaho Supreme Court's decision, which was quoted immediately above: "On the other hand [after finding that Nebeker's second declaration was insufficient for not spelling out a single standard of care], Kubiak's second declaration filled the void that was apparent in his first declaration by providing facts that, **when taken as true**, establish that the ANA standards of practice had been adopted as the community standard of care for nurses. *Id.* at 26; 167 Idaho at 893, 477 P.3d at 947. (bold added). In the Hospital's motion for reconsideration, the Hospital's argument is that the Idaho Supreme Court did not have the evidence which formed the basis for Kubiak's second declaration, and that if the Idaho Supreme Court had such evidence, the Idaho Supreme Court would have discovered that Kubiak's opinion that the ANA standards of practice had been adopted as the community standard of care for nurses, was not true. The Hospital argues:

This Motion addresses this Court's decision as to Defendant NWSH, Summary Judgment and Plaintiffs' subsequent Motion for Reconsideration.

The Supreme Court affirmed the Summary Judgment on nearly every ground, save the admissibility of the opinions of Plaintiffs' expert, Vernon Kubiak on Plaintiffs' 2018 Motion for Reconsideration. Specifically, in the absence of the actual deposition testimony on which Kubiak relied, the Supreme Court held that the Trial Court abused its discretion on Plaintiffs' Motion for Reconsideration in failing to accept, as true, Kubiak's summary the actual testimony of Registered of Nurse Miller. Specifically, Kubiak represented that Miller testified that ANA standards "guide everything in nursing" as meaning that ANA standards have been adopted as this community's standard of health care practice. Further, the Supreme Court erroneously assumed that three other witnesses testified that ANA standards governed local standard of care. This Memorandum, and the actual depositions at issue, will show the Supreme Court misinterpreted Kubiak's declarations.

Similarly, the record did not provide the ANA standards for the Court to review. The Supreme Court appears to opine that the Trial Court was to simply assume that all of Kubiak's stated opinions on standard of care came directly from ANA standards. From these two relatively limited Supreme Court findings, based solely on Kubiak's brief representation of

the asserted familiarizing sources, the Supreme Court assumed all of Kubiak's declarations to be true. Against all prior precedent as well as the statutory requirements, the Supreme Court reversed the Trial Court as to Kubiak.

This Memorandum will demonstrate that the Supreme Court exercised liberties with the mere representations from Kubiak and did not recognize the significant gaps and insufficiency between the asserted familiarizing sources and Kubiak's ultimate opinions. In this respect, the Supreme Court decision is a marked departure of review, that being abuse of discretion. It is Defendant NWSH's position that the Supreme Court simply accepted Kubiak's representation without the foundational basis required.

This Memorandum will demonstrate that Nurse Miller's deposition testimony cannot serve as foundation for Kubiak's opinion that ANA standards have replaced or are the same as the community standard of health care practice. First, Miller's deposition testimony was heavily qualified in that her full statement was that ANA standards only provide a general outline of what is expected of nurses. Second, Plaintiffs' questioning focused on the one specific ANA standard in Defendant NWSH's policies and procedures. That one policy only utilized a portion of a specific publication by the ANA, the Standards of Practice and Scopes Manual. More importantly, the Supreme Court already found the relevant single policy did not replace the local standard of health care practice. Similarly, even if the ANA standards were utilized throughout the community, which the testimony and policies referenced above are insufficient to establish, this Memorandum and the evidence will demonstrate that the ANA standards of practice themselves are not concrete to serve as the community standard of health care practice. As testified by Registered Nurse Miller, ANA standards provide only an outline of general expectations for nursing care. They do not provide a sufficiently coherent standard of care or the concrete guidance as to Mrs. Fisk health issues, or Defendant NWSH's nursing care in this matter.

While the Supreme Court accepted, as true, Kubiak's standard of care opinions as reflecting the ANA standards of practice, that finding was not based on the any evidence contained in ANA standards themselves. Based on the evidence contained herein, the ANA standards of practice are set out as general goal and are not sufficiently detailed to reference, guide, or provide a coherent standard of care in this or any other matter.

Def. North Idaho Day Surgery, LLC Mem. in Supp. of Mot. for Recons. 2-4. There is some merit in the Hospital's argument. It is true that the Idaho Supreme Court did not have all the evidence upon which Kubiak expressed his opinion found in his second declaration. It is also true that at the time this Court denied Fisks' motion for reconsideration on November 13, 2018, this Court was not presented with all the

evidence upon which Kubiak expressed his opinion found in his second declaration.

The Hospital has done a good job making the argument that once that underlying evidence is reviewed, Kubiak's opinion in his second declaration is suspect. The

Hospital argues:

The Supreme Court accepted as true Kubiak's opinions as statements of ANA standards without determining whether the ANA actually supported such opinions. A review of Defendant NWSH's Policy makes clear that ANA standards of practice do not establish a coherent local standard of health care practice for this matter. It does not establish or any specific patient care necessary to meet the applicable standard of health care practice. The single NWSH policy cited by Kubiak does not support his statements identifying the applicable standard of health care practice. Significantly, Kubiak's declarations and report do not even indicate that he has reviewed the "ANA Scope and Standards of Practice (2<sup>nd</sup> ed. 2010), which was the current version in March 2015. See 2<sup>nd</sup> Decl. V. Kubiak, passm, attached as Exhibit "C" to Pl. Memo in Supp. of Mot for Reconsideration: NWSH, filed June 21, 2018.

While the Supreme Court properly opined that Defendant NWSH's policies do not establish community standard of health care practice, the above ANA Policy further establishes that the ANA standards of practice, relied upon by Kubiak, do not provide a coherent standard of health care practice or concrete guidance required to serve as a community standard of health care practice. Nevertheless, as will be addressed below, the testimony relied upon by Kubiak was insufficient to establish that the ANA standards of practice have been adopted or that they had replaced the community standard of health care practice or that the ANA had any particular expectations that their standards apply or define the standard of care applicable to the facts of this case.

*Id.* at 12.

However, as this sworn testimony, now placed on the record by Defendant NWSH, the new evidence in this matter makes clear, NP Sholtz is not of the same practice and could not provide foundation for the hospital nurses. More importantly, neither N.P. Sholtz nor Registered Nurse Carpenter referenced ANA standards in any portion of her testimony, nor were either asked any questions about ANA. Aff. Counsel, Exhibits "C" and "D." Further, Registered Nurse Hetzler's questioning and testimony was strictly limited to whether she was familiar with the ANA standards, and whether she was aware they had been utilized in a single NWSH policy. This testimony does nothing more than confirm the existence of the NWSH ANA Policy.

The only witness who testified as to the use of the ANA policy was Registered Nurse Miller, and she only testified that she understood that

she was expected to comply with the ANA standards that had been adopted into the one policy called herein, NWSH's ANA Policy.

Based on the following arguments, and consistent with Idaho caselaw, Registered Nurse Miller's testimony alone is insufficient to establish that the applicable local standard of health care practice had been replaced in total by the national ANA standards.

*Id.* at 24. After accurately and appropriately discussing previous Idaho Supreme Court cases *Phillips v. E. Idaho Health Servs., Inc.*, 166 Idaho 731, 463 P.3d 365 (2020) and *Suhadolnik v. Pressman*, 151 Idaho 110, 254 P.3d 11 (2011), (Def. North Idaho Day Surgery, LLC Mem. in Supp. of Mot. for Recons. at 24-28), counsel for the Hospital writes:

Significantly, the only conceivable basis for the Supreme Court reaching an opposite conclusion in this matter from its decision in *Phillips* is that it did not have Registered Nurse Miller's actual testimony on record. Instead, the Supreme Court relied exclusively on Kubiak's description and characterization of Registered Nurse Miller's testimony. However, now that Defendant NWSH has placed on the record Registered Nurse Miller (as well as Registered Nurse Hetzler's) testimony, it now is available for the District Court to review, the governing standards of *Phillips* (as well as *Suhadolnik*) clearly apply.

Neither Hetzler nor Miller testify to the standard of health care practice and also do not testify that the community standard of health care practice applicable to this matter is identical to national standards. Neither witness identifies concrete particular provisions or expectations of the ANA that govern the standard of health care practice specific to this matter. Most significantly, Registered Nurse Miller only testified as to her subjective belief that she, personally thought she was expected to follow ANA standards, and no witness was ever asked, nor did they testify to the applicable community standard of health care practice.

*Id.* at 29.

The facts and testimony of this case, and the assumptions made by the Supreme Court in its Opinion, based solely on Kubiak's representations, demonstrate why actual testimony should be of record for the Trial Court. Based on the fact that now the oral deposition testimony from Registered Nurse Miller, Registered Nurse Hetzler, Registered Nurse Campbell, and N.P. Sholtz are all now of record, it is clear that the testimony from any of the witnesses cited by Kubiak is void of facts that would provide actual knowledge as to the applicable local standard of health care practice.

Defendant respectfully requests that the District Court find that Kubiak's opinions that community standard of care has been replaced by national standards of care are not supported by the depositions he reviewed and that he lacks actual knowledge of the local standard of health care practice, such that his opinions lack the required foundation. Based on the inadmissibility of Kubiak's opinions, Defendant NWSH respectfully requests that the Court reinstate its prior Summary Judgment decision and dismiss Plaintiffs' claims as to Defendant NWSH.

*Id.* at 30. This Court finds that nothing in this argument by the Hospital is false or unsubstantiated. However, the Hospital does want the evidence frozen as it was back in 2018, when this Court granted summary judgment in favor of the Hospital and denied the Fisks' motion for reconsideration. Counsel for the Hospital writes:

Therefore, this Memorandum will demonstrate that this is **not** a Motion to Reconsider a Supreme Court Opinion. While Defendant NWSH is certainly critical of the Supreme Court's Opinion, particularly its superfluous factual inferences and assumptions that seem inconsistent with abuse of discretion review, this Motion for Reconsideration is to revisit the admissibility of Kubiak's opinions based on new evidence, specifically the actual materials relied upon to familiarize Kubiak with local standard of care. Therefore, what is really being reconsidered by this Court is its 2018 Order Denying Plaintiffs' Motion for Reconsideration which was vacated by the Supreme Court, or alternatively the Court's Order Granting Summary Judgment in favor of Defendant NWSH. While the Supreme Court vacated this Court's decisions on the narrowest of grounds, nothing precludes further evaluation of the facts based on the presentation of new evidence not considered by the Supreme Court.

Def. North Idaho Day Surgery, LLC Reply in Supp. of Mot. for Recons. 3 (bold and underlining in original).

Based on the foregoing, Defendant NWSH's Motion for Reconsideration of the admissibility of Kubiak's testimony is proper and not barred by the Supreme Court's Opinion. Moreover, it is invited by the denial of Defendant NWSH's Petition for Rehearing. Specifically, while the Supreme Court accepted Kubiak's description of what he relied upon to determine he had established foundation for actual knowledge of local standard of care, it did so without the ability to review the actual grounds for such knowledge. Nothing in the Supreme Court's Opinion prevents this Court from actually reviewing the familiarizing sources to determine whether they comply with Idaho caselaw for providing foundation on community standard of health care practice. Based on the evidence submitted by Defendant NWSH, as well as Plaintiffs' own arguments and

testimony from Suzanne Nebeker, Defendant Respectfully requests that the Court find that neither the testimony relied upon by Kubiak nor the ANA standards of practice provide a coherent standard of health care practice or concrete guidance to Defendant NWSH nursing staff. In the absence of a coherent standard of health care practice in the materials reviewed by Kubiak, Kubiak's review is legally insufficient to establish actual knowledge of the community standard of health care practice.

*Id.* at 6.

In this matter, this Court's Order and Decision on Reconsideration was reversed on the limited ground that Kubiak's characterization of the testimony that he relied upon, and his asserted knowledge of ANA standards, **without the ability of either Court to review those materials**, was sufficient to establish actual knowledge of local standard of health care practice. This Motion is not seeking to revisit whether Kubiak's own characterization of his familiarizing sources should be sufficient. Rather, the sole question presented by this Motion for Reconsideration is, now that those familiarizing sources have been presented to this Court to review, could Kubiak have actually familiarized himself with local standard of care from reviewing those familiarizing sources. Defendant NWSH maintains that the asserted familiarizing sources are insufficiently coherent or concrete to serve as foundation for opinions on community standard of health care practice. Plaintiffs' arguments present nothing to the contrary.

*Id.* at 9 (bold and underlining in original).

Submitted at the eleventh hour, Fisks filed on May 10, 2021 (ten days before oral argument on the Hospital's motion for reconsideration and less than four months before the jury trial currently set to commence on September 13, 2021), the Fourth Declaration of Suzanne Nebeker and the Third Declaration of Vernon Kubiak. Incredibly, at oral argument on May 20, 2021, counsel for Fisks stated that Suzanne Nebeker is still making a comparison between the ANA materials and the Hospital's policies. Counsel for Fisks stated: "Now, as part of the submissions from Suzanne Nebeker, she relates to the court that she has done and is – she's actually still in progress of doing a comparison of the ANA standards and NWSH policies, and she finds them to be very congruent, and one – one statement that she makes in her declaration that bears a reading just one sentence, she says there's nothing contrary to the ANA standards that

can be extracted from the NWSH standards of care, NWSH policies and procedures, and depositions from nurses.” Rough transcript 9:9-18. Indeed, Nebeker’s fourth declaration states:

4. In my previous Declaration concerning the Affidavit of Nurse Fowler, I attached a partial compilation/comparison of the provisions of the ANA, NWSH Policies, and IDAPA provisions. I have continued in that process. My additional work in that discloses further and specific congruencies between and among ANA, NWSH, and IDAPA provisions. I am familiar with the evaluation of ANA and NWSH provisions referenced in the Report of Vernon Kubiak, primarily at pp. 2 – 5, and state that my ongoing evaluation is consistent with Vernon Kubiak’s Report.

Fourth Decl. of Suzanne Nebeker 2, ¶14. After losing at summary judgment on the issue of the local standard of care issue and familiarity of such, after losing on a motion for reconsideration, and after prevailing before the Idaho Supreme Court on the slimmest of margins, it is troubling that this additional detail on the local standard of care and familiarity of such is provided ten days before oral argument on its motion for reconsideration. And apparently the detail on the local standard of care will continue to evolve between now and trial only a few months away. Nevertheless, the Fisks after over three years have been able to better explain familiarity with the local standard of care.

This Court has closely re-read the second declaration of Vernon Kubiak and the newly filed Third Declaration of Vernon Kubiak. The second declaration bears the caption, “Declaration of Dr. Vernon R. Kubiak, DNP, CNP, CNS, CNS-BC, PMHNP-BC, RN”, is dated June 21, 2018, and is not separately filed, but is attached as Exhibit C to the Memorandum in Support of Plaintiffs’ Motion for Reconsideration: Northwest Specialty Hospital, filed June 21, 2018. This Court has also closely re-read the Second Declaration of Suzanne Nebeker which is dated June 21, 2018, and is attached as Exhibit B to that same memorandum, and the Third Declaration and Response of

Suzanne Nebeker filed on October 9, 2018, and compared those two declarations to the newly filed Fourth Declaration of Suzanne Nebeker.

Kubiak's third declaration does provide more detail, more depth and more explanation about the basis for his opinion on the standard of care, as compared to his second declaration. It provides more explanation as to the interconnectedness of the ANA standards and the Hospital's procedures, as compared to what Kubiak included in his second declaration. The pertinent portion of Kubiak's third declaration are as follows:

4. All my analysis and opinions expressed in my filings have been pertinent to, and apply to, the time frame of March, 2015, the time frame in which Margaret Fisk was a patient at Northwest Specialty Hospital. In my analysis of nursing standards of care, I have focused on, but have not meant to be exclusive, IDAPA, ANA, and NWSH materials which, in my opinion, have pertinence to the issues of the care rendered to Margaret Fisk.

5. In my Report, pp. 2 – 5, I evaluated sources from which nursing standards of care for NWSH are derived. It may be helpful to consider a very basic outline of those sources. I also note that in the field of nursing, the terms standards of practice and standards of care have specific meanings in some contexts. They are also sometimes generally used with less specificity.

6. Nursing Standards of Practice are derived in Idaho from the laws, statutes, and regulations of the State of Idaho, sometimes referenced as IDAPA. I have, in prior submissions, outlined the provisions from these sources which I deemed germane to Ms. Fisk's treatment at NWSH.

7. Nursing Standards of Care are derived from various sources. In the case of the treatment of Ms. Fisk, the standards of care are to be derived primarily by reference to the American Nurses' Association [ANA] materials AND hospital policies, such as the policies of NWSH.

8. The Education of nurses is another component which should be considered in deriving the standard of care for nurses at a facility such as NWSH.

9. Standards of Practice, Standards of Care from the ANA and hospital policies, and a nurse's education, do not exist in a vacuum. They form a symbiotic basis to determine the standard of patient care which should be provided to patients everywhere, in Idaho, and specifically at the NWSH facilities in Post Falls. My process to determine the standard of care owed to Ms. Fisk, as illustrated by my Report and Declarations, was not limited to a single focal point, and was not limited to the

deposition testimony of a single nurse [Miller] that the ANA set the standard for NWSH.

10. I am informed the Idaho Supreme Court did find that my reliance on nurse Miller's testimony and the ANA was sufficient to demonstrate a knowledge of the standard of care for Ms. Fisk. I agree, but emphasize that my analysis, as demonstrated in pp. 2 – 5 of my Report, was far more comprehensive. That analysis, as well as the balance of this Declaration, provides a much broader basis for the conclusion that I am aware of the standard of care pertinent to this case.

11. In the big picture, the ANA is a national professional association. Individual state laws, rules, and regulations govern the practice of nursing, where the ANA standards guide nurses in the application of their professional knowledge, skills, and responsibilities. Individual hospital policies, such as those from NWSH which I have evaluated, provide detail to how the standard of care is to be met. Hospital policies must be consistent with the ANA in this matter, because NWSH policy adopts the ANA. Hospital policies may be more detailed than the ANA, as the NWSH policies which my submissions have considered. When the ANA, hospital policies, and a nurse's education are considered together, I am able to say, with a reasonable degree of certainty, that I understand and have familiarized myself with standards of care for NWSH. I am also able to say that I am therefore familiarized with "hands on" methods and procedures which are, and should be, the standards of care at NWSH.

12. With a focus on nursing education - most nursing educational programs are accredited by one of two national accrediting agencies – most BSN programs are accredited by the Commission on Collegiate Nursing Education (CCNE); most ADRN programs are accredited by the Accreditation Commission for Education in Nursing (ACEN).

13. In the CCNE standards, Standard 1, Program Quality: Mission and Governance, Key Element I-B, states "The mission, goals, and expected program outcomes are consistent with relevant professional nursing standards and guidelines for the preparation of nursing professionals."

14. In the ACEN standards, Standard 4, Curriculum, Standard 4.1 states "Consistent with contemporary practice, the curriculum incorporates established professional nursing standards, guidelines, and competencies and has clearly articulated end-of-program student learning outcomes."

15. In either case, all nursing educational programs are expected to teach the standards of the profession. Some programs may have specific courses, such as Professional Nursing, which specifically addresses the professional standards, like the ANA standards, and some may include portions of the ANA standards in the individual courses – for example, those ANA standards that relate to Medical Surgical Nursing will be taught (in general) in the Medial Surgical Nursing course.

16. Often, textbooks reference the ANA in the textbook itself. For example, "Medical Surgical Nursing: Assessment and Management of Clinical Problems," by Lewis, Bucher, Heitkemper, and Harding, is a common textbook for Medical Surgical Nursing. Chapter 1, Professional

Nursing Practice, states in part “The American Nurses Association is the primary professional nursing organization. There are numerous professional specialty organizations, such as the American Association of Critical-Care Nurses (AACN), Association of periOperative Registered Nurses (AORN), and Oncology Nursing Society (ONS). Professional organizations have numerous roles in promoting quality patient care and professional nursing practice. These roles include developing standards of practice and codes of ethics, supporting research, and lobbying for legislation and regulations. Major nursing organizations promote research into the causes of errors, develop strategies to prevent future errors, and address nursing issues that affect the nurse's ability to deliver patient care safely.”

17. A nurses' competency to practice, at the end of the formal educational process, is determined, in part, by very comprehensive testing. The NCLEX, the required test for all nurses in the United States, does not specifically test to the ANA standards. However, it tests to the standards of practice, which includes the ANA standards. For example, in the Physiological Integrity section of the NCLEX test plan, the NCLEX states it will test on “Assess client for pain and intervene as appropriate.” This directly flows down from the ANA Position Statement on The Ethical Responsibility to Manage Pain and the Suffering it Causes.

18. In summary, NWSH states it implements the ANA standards in its own procedures. Many of those procedures [NWSH] are more specific than the ANA standards to provide more specific direction to the nurse on the floor; these procedures must and generally do implement the ANA standards. This is detailed in my original Report. In sum: 1) The nurses have been educated and tested; 2) IDAPA and state rules provide Standards of Practice; 3) the ANA provides standards of care; and 4) NWSH policies adopt/implement the ANA and provide some further guidance/requirements for actual hands-on patient care.

Third Decl. of Vernon Kubiak 2-5, ¶¶ 4-18.

The Fourth Declaration of Suzanne Nebeker also provides more detail, more depth and more explanation about the basis for her opinion on the standard of care, as compared to her third and second declarations. It especially provides more explanation about the ANA standards themselves, and more explanation as to the interconnectedness of the ANA standards and the Hospital's procedures, as compared to what she included in her third and second declarations. It is fair to say that Nebeker's fourth declaration builds upon her third and second declaration. This Court will not reiterate much of what is stated in Nebeker's fourth declaration, primarily

because it was Kubiak's declaration which was the focus of the Idaho Supreme Court. However, the Court finds the following portions helpful toward understanding the ANA standards, the importance of those standards and the interconnectedness of those standards with the Hospital's policies:

4. In my previous Declaration concerning the Affidavit of Nurse Fowler, I attached a partial compilation/comparison of the provisions of the ANA, NWSH Policies, and IDAPA provisions. I have continued in that process. My additional work in that discloses further and specific congruencies between and among ANA, NWSH, and IDAPA provisions. I am familiar with the evaluation of ANA and NWSH provisions referenced in the Report of Vernon Kubiak, primarily at pp. 2 – 5, and state that my ongoing evaluation is consistent with Vernon Kubiak's Report.

5. It is my understanding that NWSH asserts that the ANA [and perhaps NWSH policies and IDAPA provisions] cannot constitute an expression of the local standards of care for the NWSH facility because it does not explicitly detail hands-on, "concrete guidance" about how a nurse is to perform specific functions. From the standpoint of a practicing health care provider, this is an incorrect way to interpret ANA or other provisions.

6. Application of legal terms to provisions in the ANA may lead to incorrect conclusions, such as the assertion that the ANA does not provide a coherent standard of health care practice or concrete guidance to a working nurse.

7. To an educated and trained nurse, ANA provisions do provide coherent standards of health care practice and/or concrete guidance for working nurses. The American Nurses Association is the premier organization representing the interests of over 3.6 million of the nation's registered nurses. ANA is at the helm of leadership and addresses safety and quality in the clinical, administrative, educational, policy-making, and research domains of the nursing profession. It is akin to the American Medical Association for physicians. The ANA nursing scope and standards of practice are authoritative statements of the duties every registered nurse is expected to perform competently, regardless of role, population, or specialty.

8. While a lawyer might review an ANA standard and believe it doesn't provide hands on direction to a nurse, every graduate RN will easily interpret the standard as providing mechanisms for care delivery.

9. It is important to note that each ANA standard does not stand alone and is accompanied by competency actions. As an example, there are ANA provisions and NWSH provisions concerning assessment and patient history. During a routine assessment of the patient, the RN or NP takes a health history, a clinical skill which the professional nurse is taught during her/his education. Those points of history which are important to NWSH are outlined in the NWSH procedure and include name, other demographics, a list of medications, health history, surgical history, etc. It

also includes a review of systems, including cardiac, abdominal, etc. There are specifics noted in the NWSH procedure. During assessment, the procedure specifically defines that the RN is to make a hands on physical examination of body system, including auscultation and percussion. Consideration of the ANA provisions and related NWSH provisions together demonstrate a standard of care for NWSH nurses in a "hands on" context. Consideration of the congruent ANA and NWSH provisions results in defining a local standard of care that is both coherent and amounts to concrete guidance to the NWSH nursing staff.

10. I have given further consideration to the interaction of education, training, the ANA, NWSH policies, and IDAPA. RN licensure in the State of Idaho requires graduation from an accredited school of nursing and successful completion of the national examination for licensure. There is no one source that specifies exactly how every nursing function is to be performed, although the ANA provides a great deal of uniformity in this regard.

\* \* \*

19. The standards of care provide a road map for the nursing process. Through reference to ANA standards, hospital policies, state laws, education, and training, a reasonable nurse in any environment should be able to perform the necessary skills to complete the process of patient care. For example, as an RN in the state of Idaho, I would be able to practice at Steele Memorial Hospital in Salmon, Idaho or NWSH, or at St. Luke's Hospital in Boise, Idaho as a medical-surgical nurse with no further "specialized local" training, although I would be familiarized with the particular job description, policies, and procedures at each hospital during orientation. The clinical skills I employed would be similar in each hospital and would be based on my education and experience. The only limitation on the practice of nursing by location would be access to resources, and those limitations are addressed in the policy and procedures of each hospital.

20. I have demonstrated how the ANA, NWSH, and IDAPA standards all have the same foundation for the nursing process. They all contain the same language and intent as demonstrated in the comparison chart. NWSH procedure 1015-01-0001 specifically states that specific acts are to be carried out by the RN. My work in progress correlates NWSH Standards with clinical guideline skills.

21. I am very familiar with the standards of care and clinical skills required for RN's caring for the post-surgical patient. In my position as a nurse practitioner hospitalist, I work closely with medical-surgical nurses from multiple facilities around the state. I have extensive experience in the care of the post -surgical patient in the hospital setting. Despite the venue, the expectation of professional clinical skills, critical decision-making, and care provided by the RN is the same in any location.

22. My interactions with patients, providers, and nursing staff across the state confirm to me that the standards of care for nursing in Salmon, Idaho and other locations within the state are generally the same as those in the Post Falls, Idaho area and grounded in national standards, such as those from ANA. There is nothing notably contrary to those

standards that can be extracted from the NWSH standards of care, NWSH policy and procedures, and depositions from RN's that have been reviewed (Miller, Hertzler, etc).

23. From the perspective of an expert, professional registered nurse and advanced practice nurse, I believe that the professional education, practical clinical experience, national certification, licensure, ANA standards of practice, and local hospital policies and procedures, taken together, define and constitute a local standard of care for a nurse at NWSH.

Fourth Decl. of Suzanne Nebeker 2-7, ¶¶ 4-10. 19-23.

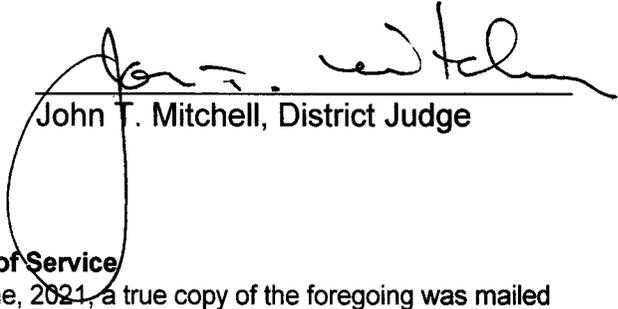
Additionally, the Hospital argues that, "Significantly, Kubiak does not specifically address the ANA standards of practice in Defendant NWSH's ANA Policy, or otherwise explain how they apply to the nursing activities required for Mrs. Fisk's care." Def. North Idaho Day Surgery, LLC Suppl. Reply in Supp. of Mot. for Recons. 8. The Court finds that to be somewhat true. However, that sort of specificity is appropriate for exploration on examination of Kubiak at trial, or may be tested in additional motion practice between now and trial. This lack of specificity was not the subject of this Court's May 31, 2018, Memorandum Decision and Order: Granting in Part and Denying in Part Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure; Granting Hospital's Motion for Summary Judgment; and Granting McDonald's Motion for Summary Judgment (see pages 26-56). That is the Order which has led to the Fisks' motion for reconsideration which led to the appeal to the Idaho Supreme Court which led to the Hospital's present motion for reconsideration. It would be inappropriate for this Court to essentially grant summary judgment on this new issue without the parties actually going through the process outlined in I.R.C.P. 56.

#### **IV. CONCLUSION AND ORDER.**

Based on the above reasons, the Hospital's motion for reconsideration is denied.

IT IS HEREBY ORDERED that the Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Motion for Reconsideration is DENIED.

Entered this 14<sup>th</sup> day of June, 2021.

  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the 14<sup>th</sup> day of June, 2021, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>email</u>	<u>Lawyer</u>	<u>email</u>
Dennis P. Wilkinson	dennis@eastidaholaw.net ✓	Nancy J. Garrett	nancy@garrettrichardson.com ✓
Gary L. Shockey	<u>gary@garyshockeylaw.com</u> ✓	Michael Ramsden	mramsden@rmehlaw.com ✓

  
Jeanne Clausen, Deputy Clerk