STATE OF IDAHO)
County of KOOTENAI)ss
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AT 1:50 O'Clock P. M
CLERK OF DISTRICT COURT
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; JOHN L. PENNINGS, 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: 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

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This medical malpractice case arises out of the treatment and care of plaintiff Margaret Fisk (Margaret) at a facility operated by defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital (the Hospital). The matters currently before the Court are the Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure and Motion to Exclude Plaintiffs' Experts, the Hospital's Motion for Summary Judgment, and the Motion for Summary Judgment by defendant Jeffery D. McDonald, M.D. (Dr. McDonald). On August 22, 2017, a three-week jury trial was scheduled to begin on September 10, 2018.

A. Margaret's surgery and post-surgery care at the Hospital.

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. Fisks claim 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.[1] 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 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

[1] 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.

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 the Fisks' 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. Jeffrey 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.*

B. The Fisks' Complaint and the parties' stipulation to dismiss the claims against Dr. Pennings.

On March 1, 2017, Margaret and her husband, plaintiff David Fisk (the Fisks), filed a Complaint against Dr. McDonald, Dr. Pennings, and the Hospital. The Fisks generally allege that each defendant was negligent in the medical care and treatment they provided Margaret. Specifically, the Fisks allege that the medical care and treatment provided to Margaret fell below the standard of health care applicable to the local community as described in Idaho Code § 6-1012, and as a proximate and direct result of the defendants' failure to provide adequate care, Margaret was injured. The defendants subsequently filed separate Answers to the Fisks' Complaint. Each defendant generally denied liability.

On January 22, 2018, the parties stipulated to the dismissal of Dr. Pennings as a defendant in this case. Pursuant to that stipulation, on January 26, 2018, the Court issued an order dismissing the claims against Dr. Pennings. As a result, Dr. Pennings is

no longer a party to this case.

C. The Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts.

The Hospital received the Fisks' expert witness disclosure on January 16, 2018. The Fisks disclosed 13 non-retained experts and six retained experts. The disclosed non-retained experts are Dr. Scott Dunn, MD; Dr. Todd Hoopman, MD; Dr. Shimoli Shah, MD; Dr. Wichit Srikureja, MD; Dr. M. Shane McNevin, MD; Dr. Brian Samuels, MD; Dr. Edward MacInerny, MD; Dr. Thuy-Trang Ngo, MD; Dr. Sherwin S. Foster, MD; Dr. John L. Pennings, MD; Dr. Robert Martindale, MD; Dr. John Faggard, III, MD; and Brian Herndon, CRNA. The disclosed retained experts are Dr. Vernon Robert Kubiak, DNP; Timothy F. Hawkins, MBA; Dr. Robert Y. Uyeda, MD, JD; Suzanne Nebeker, FNP-BC; Robert H. Taylor, MA; and David M. Smith, CPA.

On April 3, 2018, the Hospital filed Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts. In support of its Motion, the Hospital submitted Defendant North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital's Memorandum in Support of Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts and an Affidavit of Counsel. The Hospital argues that the Court should strike the Fisks' expert witness disclosure and exclude all or some of the Fisks' retained experts because (1) the retained experts impermissibly rely on a statewide or national standard of care, (2) Dr. Vernon R. Kubiak's opinions are based on his admitted uncertainty as to the facts, (3) the retained experts rely upon standards prohibited by Idaho Code § 6-1014, (4) Timothy Hawkins is not qualified to testify about the standard of health care, (5) there is no basis or foundation for Dr. Robert Y. Uyeda's causation testimony, and (6) David M. Smith did not properly disclose his opinions. As for

non-retained experts, the Hospital contends that the Court should strike and exclude the Fisks' non-retained experts from testifying about the elements of proximate cause and damages because the Fisks' experts have failed to disclose any substantive opinions.

On May 16, 2018, the Fisks submitted Plaintiffs' Objection to Defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Motion to Strike and Exclude Plaintiffs' Expert Disclosures and Motion to Exclude Plaintiffs' Experts. The Fisks generally assert that the Hospital's Motion is premature because they are not required to establish foundation for their retained experts' opinions in their expert witness disclosure. They also take issue with the Hospital's understanding and application of Idaho Code § 6-1014 and reliance on *Schmechel v. Dille*, 148 Idaho 176, 219 P.3d 1192 (2009), as grounds to exclude their retained experts. Finally, with regard to non-retained experts, the Fisks explain that the non-retained experts are treating physicians and will be only be asked to testify as to their opinions related to Margaret's diagnosis and treatment.

D. The Hospital's Motion for Summary Judgment.

The Hospital also filed a Motion for Summary Judgment on April 3, 2018. In support of its summary judgment motion, the Hospital filed Defendant North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital's Memorandum in Support of Motion for Summary Judgment, Affidavit of Jeffrey Larson, M.D., Affidavit of Counsel, and Affidavit of Denise Fowler, R.N. In general, the Hospital argues that it is entitled to summary judgment on two grounds: (1) the Fisks are unable to establish an essential element of their claim because they have not disclosed or presented admissible evidence establishing the applicable standard of health care practice and/or that the Hospital negligently failed to meet that standard, and (2) the Fisks are unable to establish an essential element of their claim because they have not disclosed or presented admissible evidence related to causation, i.e., evidence showing the Hospital proximately caused

Margaret's injuries.

On May 9, 2018, the Fisks submitted Plaintiffs' Memorandum in Opposition to Defendant North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital's Motion for Summary Judgment. In support of their argument, the Fisks submitted the Affidavit of Counsel Dennis P. Wilkinson, Declaration of Suzanne Nebeker, Declaration of Dr. Vernon R. Kubiak, Declaration of Timothy F. Hawkins, and Declaration of Robert Y. Uyeda, M.D. The Fisks start by arguing that the local standard of care statutes do not apply to the expert witness disclosure and, as a result, the Hospital's argument that their expert witnesses should be excluded from testifying is without merit. Next, the Fisks contend that the Hospital is not entitled to summary judgment because it did not identify the applicable local standard of care and failed to meet their burden of proof related to the local standard of care. In the alternative, the Fisks argue that their experts' declarations establish the applicable local standard of care and further demonstrate a genuine issue of material fact exists as to whether the Hospital met the standard of care. The Fisks provided almost no argument in response to the Hospital's argument regarding causation.

On May 16, 2018, the Hospital filed Defendant North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospitals' Reply to Plaintiffs' Opposition to Motion for Summary Judgment. The Hospital also filed an additional affidavit of counsel.

On May 23, 2018, a hearing was held on the Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure and Motion to Exclude Plaintiffs' Experts, and the Hospital's Motion for Summary Judgment.

Just prior to that hearing, counsel for the Hospital filed an Affidavit of Nancy Garret. At the hearing, counsel for the Hospital provided the Court and counsel with a copy of that affidavit. No objection was made to this affidavit by counsel for the Fisks.

The affidavit of counsel has attached to it an Affidavit of Scott Dunn, M.D. In his

affidavit, Dunn claims he has practiced 25 years in Sandpoint, Idaho, has hospital privileges at Bonner General Health in Sandpoint, has never practiced in Post Falls, Idaho or Coeur d'Alene, Idaho, and does not have privileges in either area. Dunn states he does not know the standard of health care practice in Post Falls or Coeur d'Alene since he has never practiced medicine there. This is significant as Fisks' expert, Robert Y. Uyeda, M.D. stated in his affidavit that he consulted with "a local physician, Dr. Scott Dunn, who has been Margaret [Kelly] Fisk's physician, on issues concerning local standards of care." Uyeda Decl. 2, ¶ 3.

E. Dr. McDonald's Motion for Summary Judgment.

On April 24, 2018, Dr. McDonald filed a Motion for Summary Judgment. In support of his Motion, Dr. McDonald submitted Memorandum in Support of Jeffrey D. McDonald, M.D.'s Motion for Summary Judgment and the Declaration of Nathan S. Ohler. Dr. McDonald generally argues that he is entitled to summary judgment because the Fisks were required to disclose the opinions of and foundation for their retained experts as part of their expert witness disclosure. He also points out that the Fisks have failed to present any expert opinions critical of Dr. McDonald's treatment and care of Margaret. Because the Fisks have not disclosed this information, Dr. McDonald asserts that the Fisks' retained experts should be excluded from testifying in this matter. Without expert witnesses, Dr. McDonald contends that the Fisks are unable to establish that Dr. McDonald violated the local standard of care and, consequently, he is entitled to summary judgment.

On May 9, 2018, the Fisks submitted Plaintiffs' Memorandum in Opposition to Defendant Jeffrey D. McDonald's Motion for Summary Judgment. In support of their argument, the Fisks submitted the Affidavit of Counsel Dennis P. Wilkinson, Declaration of Suzanne Nebeker, Declaration of Dr. Vernon R. Kubiak, Declaration of Timothy F.

Hawkins, and Declaration of Robert Y. Uyeda, M.D. In general, the Fisks make four arguments in their Memorandum. First, they argue that the foundational requirements of Idaho Code §§ 6-1012 and 6-1013 do not apply to their expert witness disclosure and, as a result, there is no grounds for excluding their expert witnesses. Second, the Fisks assert that Dr. McDonald is not entitled to summary judgment because he did not identify the applicable local standard of care and failed to meet his burden of proof related to the local standard of care. Third, the Fisks contend that Dr. McDonald was NP Sholtz's employer and, as her employer, he is liable for her acts or omissions. Fourth, the Fisks argue that their retained experts' declarations establish the applicable local standard of care and further demonstrate a genuine issue of material fact as to whether NP Sholtz and, in turn, Dr. McDonald met the local standard of care.

On May 16, 2018, Dr. McDonald filed a Reply Memorandum in Support of Jeffrey D. McDonald, M.D.'s Motion for Summary Judgment. He simultaneously filed the Second Declaration of Nathan S. Ohler. In his Reply, Dr. McDonald reiterates that the Fisks were required to disclose opinions of and foundation for their retained experts as part of their expert witness disclosure. Dr. McDonald disagrees with the Fisks' argument regarding the burden of proof and asserts that to avoid summary judgment, the Fisks must present expert testimony related to the local standard of care and they failed to do so. With regard to the Fisks' assertion that he is vicariously liable for NP Sholtz's acts or omissions, Dr. McDonald points out that the Fisks did not plead that theory in their Complaint. He further asserts that he is not NP Sholtz's employer; rather, in March of 2015, NP Sholtz was an employee of the Hospital. As such, Dr. McDonald contends he cannot be held vicariously liable for NP Sholtz's alleged conduct. Lastly, Dr. McDonald asserts that the declarations submitted by the Fisks are inadmissible and, moreover, are not critical of his conduct.

On May 23, 2018, a hearing was held on McDonald's Motion for Summary Judgment.

II. STANDARD OF REVIEW.

A. Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts.

A district court's decision to impose discovery sanctions is discretionary and will be overturned only where the district court abused its discretion. *Lepper v. E. Idaho Health Servs., Inc.*, 160 Idaho 104, 109, 369 P.3d 882, 887 (2016) (citing *Edmunds v. Kraner*, 142 Idaho 867, 872–73, 136 P3d 338, 343–44 (2006)). The appellate court considers three factors to determine if a trial court abused its discretion: "(1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles, and (3) whether it reached its decision through an exercise of reason." *Id.*

B. Motions for Summary Judgment.

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)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). 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). "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*, 156 Idaho at 545, 328 P.3d at 525 (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. *Dunnick*, 126 Idaho at 311 n.1, 882 P.2d at 478 n.1. 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).

Heath v. Honker's Mini-Mart, Inc., 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

III. ANALYSIS.

A. The Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts.

The Hospital asks the Court to strike the Fisks' expert witness disclosure and to exclude all of their retained and non-retained experts because the Fisks failed to comply with the rules of discovery, the Court's pre-trial scheduling order, and/or Idaho statute. Under the Idaho Rules of Civil Procedure, a trial court may sanction a party for non-compliance with its pretrial orders and discovery violations. I.R.C.P. 16(e), 37(b)(2)(A), 37(c)(1). The sanctions may include those listed in Idaho Rule of Civil Procedure 37(b)(2)(A). I.R.C.P. 16(e), 37(c)(1); *see also Lepper*, 160 Idaho at 109, 369 P.3d at 887. As noted above, a trial court's decision to impose sanctions is

discretionary. *Lepper*, 160 Idaho at 109, 369 P.3d at 887 (citing *Edmunds*, 142 Idaho at 872–73, 136 P.3d at 343–44).

1. The Court grants the Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiff's Experts to the extent that it applies to retained expert David M. Smith, CPA; the Court denies the remainder of the Hospital's Motion.

The Hospital makes six arguments in support of its request to strike the Fisks' expert witness disclosure and exclude the Fisks' retained experts.

a. *The Fisks' retained experts do not need to demonstrate actual knowledge of the local standard of health care practice as part of their expert witness disclosure.*

First, the Hospital argues that the Court should strike Plaintiffs' Expert Witness Disclosure and exclude the Fisks' retained experts because the retained experts impermissibly rely on a statewide or national standard of care. Def. North Idaho Day Surgery d/b/a Northwest Specialty Hospital's Mem. Supp. Mot. Strike Pls.' Expert Witness Disclosures and Mot. Exclude Pls.' Experts (Def.'s Mem. Supp. Mot. Exclude Pls.' Experts) 4–13. More specifically, the Hospital argues that the retained experts have not disclosed certain foundational information required by Idaho Code §§ 6-1012 and 6-1013. *Id.* The Hospital asserts that, as part of the Fisks' expert witness disclosure, the Fisks' retained experts were required to demonstrate actual knowledge of the local standard of health care practice. *Id.* at 6–8. According to the Hospital, the Fisks failed to satisfy this foundational requirement in their expert witness disclosure and, as a result, the Fisks' expert witness disclosure does not comply with Idaho statute, Idaho Rule of Civil Procedure 26(b)(4)(A), and the Court's pre-trial scheduling order. *Id.* at 8–13. Consequently, the Hospital asks the Court to strike the Plaintiffs' Expert Witness Disclosure and exclude the Fisks' retained experts. *Id.* at 13.

The Fisks contend that the Hospital's Motion is premature because the foundational requirements in Idaho Code §§ 6-1012 and 6-1013 do not apply to their expert witness disclosure. Pls.' Obj. Def. North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital's Mot. Strike and Exclude Pls.'Expert Disclosures and Mot. Exclude Pls.' Experts (Pls.' Obj. to Def.'s Mot. Exclude Pls.' Experts) 6–10. Instead, the Fisks explain that a pre-trial scheduling order may require disclosure of foundational information concerning local standards of care. *Id.* However, if the pre-trial scheduling order does not expressly require that information, then the Fisks assert that a party is not required to make that disclosure. *Id.* (citing *Lepper*, 160 Idaho 104, 369 P.3d 882). The Fisks argue that in this case, the Court's pre-trial scheduling order, which incorporates Idaho Rule of Civil Procedure 26(b)(4)(A)(i), does not require the Fisks' expert witness disclosure to include the foundational requirements of Idaho Code §§ 6-1012 and 6-1013. *Id.* at 7–10.

To begin, the Idaho Supreme Court has held that Idaho Code §§ 6-1012 and 6-1013 do not apply to expert witness disclosures in the discovery stage of a case. *Lepper*, 160 Idaho at 109, 369 P.3d at 887; *Edmunds*, 142 Idaho at 875, 136 P.3d at 346. In reaching that decision, it explained:

> [t]here is a difference between the requirements for expert witness disclosures in the early discovery stages of a case, and the requirements for admissibility of expert witness testimony at trial or in summary judgment. Idaho Code sections 6-1012 and 6-1013 apply to the admissibility of expert witness testimony for trial, not disclosures in the discovery stages of a case.

Lepper, 160 Idaho at 109, 369 P.3d at 887. Accordingly, Idaho Code §§ 6-1012 and 6-1013 do not apply to the Fisks' expert witness disclosure and, in turn, those code sections do not require the Fisks' retained experts to demonstrate actual knowledge of the local standard of health care practice when making the disclosures required by the

discovery rules. Only when the Fisks try to admit testimony from their retained experts will they need to satisfy the foundational requirements of Idaho Code §§ 6-1012 and 6-1013.

Nevertheless, as recognized by the Fisks, a party may be required to satisfy the foundational requirements of Idaho Code §§ 6-1012 and 6-1013 if a district court's pre-trial scheduling order expressly requires such disclosure. *Edmunds*, 142 Idaho at 875, 136 P.3d at 346. In this case, the Court agrees with the Fisks and finds that its pre-trial scheduling order does not require the Fisks' retained experts to establish foundation for their opinions when making the disclosures required by Idaho Rule of Civil Procedure 26. This Court's pre-trial scheduling order required each party's expert witness disclosure to consist of at least the information required to be disclosed pursuant to Idaho Rule of Civil Procedure 26(B)(4)(A)(i).[2] Idaho Rule of Civil Procedure 26(b)(4)(A)(i) requires a party to disclose the following information for retained experts when answering an interrogatory or if required by court order:

> (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;

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[2] The Court's pre-trial scheduling order provides:

> 4. **EXPERT WITNESSES:** No later than **two hundred thirty (238) days (34 weeks) before trial**, plaintiff(s) shall disclose all experts to be called at trial. No later than **one hundred seventy-nine (179) days (26 weeks) before trial**, defendant(s) shall disclose all experts to be called at trial. Such disclosure shall consist of **at least** the information required to be disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i), Notice of all compliance of all disclosures shall be filed with the Clerk of Court. Absent good cause, an expert may not testify to matters not included in the disclosure. A party may comply with the disclosure by referencing expert witness depositions, without restating the deposition testimony in the disclosure report.

Scheduling Order, Notice of Trial Setting and Initial Pretrial Order 4 (emphasis in original).

- 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.

I.R.C.P. 26(b)(4)(A)(i). Notably, neither the Idaho Rules of Civil Procedure nor the Court's pre-trial scheduling order expressly reference the foundational requirements of Idaho Code §§ 6-1012 and 6-1013, and the Court declines to read those requirements into the discovery rules or its pre-trial scheduling order. *See Lepper*, 160 Idaho at 111, 369 P.3d at 888 (citing *Edmunds*, 142 Idaho at 875, 136 P.3d at 346). Therefore, the Court concludes the Fisks' retained experts did not need to demonstrate actual knowledge of the local standard of health care practice as part of the expert witness disclosure.

In summary, because the Fisks cannot be sanctioned for failing to do something Idaho statute, the Court's pre-trial scheduling order, and Idaho Rule of Civil Procedure 26(b)(4)(A)(i) did not require them to do, the Court denies the Hospital's request to sanction the Fisks on this basis.

b. The Fisks' retained expert Dr. Vernon R. Kubiak does not need to meet the foundational requirements of Idaho Code § 6-1013 as part of the expert witness disclosure.

Second, the Hospital asks the Court to strike the Fisks' disclosed opinion for retained expert Dr. Vernon R. Kubiak (Kubiak) because his opinion is based on his admitted uncertainty as to the facts. Def.'s Mem. Supp. Mot. Exclude Pls.' Experts 13–15. The Hospital contends that that the foundational requirements of Idaho Code § 6-

1013 require Dr. Kubiak to offer his opinions to a "reasonable medical certainty." *Id.* at 14. The Hospital takes issue with Kubiak's "either/or opinions" and points out that Dr. Kubiak admits some uncertainty as to whether the nursing staff or on-call provider (i.e., NP Sholtz) are to blame for Margaret's injuries. *Id.* at 14–15. Because Dr. Kubiak offers "either/or opinions" and admits uncertainty, the Hospital asks the Court to strike his disclosed opinions for failing to comply with Idaho Code § 6-1013. *Id.*

In response, the Fisks argue that Dr. Kubiak's opinion does not need to meet the "reasonable degree of medical certainty requirement" at this stage of the case. Pls.' Obj. to Def.'s Mot. Exclude Pls.' Experts 13–14. They further assert that the Hospital has misconstrued Kubiak's opinion. *Id.* The Fisks explain that Dr. Kubiak's opinion is not uncertain. *Id.* Rather, according to the Fisks, the testimony from NP Sholtz and the Hospital's nursing staff is contradictory and resolving the contradictions in their testimonies would require Dr. Kubiak to make a credibility determination. *Id.* at 14. The Fisks contend that it would be inappropriate for their expert to "render an opinion on the credibility of particular witnesses." *Id.* Consequently, the Fisks state that Dr. Kubiak's "either/or" opinions take into account the possibility that either NP Sholtz's testimony or the Hospital's nursing staff's testimony is correct. *Id.*

First, this Court finds that an expert may offer more than one opinion. Opinions are always based on assumptions. Some of the assumptions are to facts. There is nothing inherently inconsistent about Kubiak rendering one opinion based on assumption of certain facts, and another, different opinion, based on assumption of other certain facts. Kubiak is not the finder of facts; the jury is the finder of facts. As an expert, Kubiak's job is to render an opinion based on certain facts which the jury might find. The jury might find the Hospital's nursing staff was negligent and the proximate

cause of Fisk's injuries, the jury might find NP Sholtz was negligent, or the jury could find both the nursing staff and NP Sholtz negligent.

Second, as discussed above, the Fisks' expert witness disclosure does not need to comply with the foundation requirements of Idaho Code § 6-1013. *Lepper*, 160 Idaho at 109, 369 P.3d at 887; *Edmunds*, 142 Idaho at 875, 136 P.3d at 346. The statute itself does not apply to the discovery stage of a case, and the Court's pre-trial scheduling order and Idaho Rule of Civil Procedure 26(b)(4)(A)(i) do not require the Fisks' to establish foundation for their expert witness's opinion. Therefore, even if Dr. Kubiak's disclosed opinion does not meet the requirements of Idaho Code § 6-1013 as the Hospital argues, such a failure does not provide grounds for imposing discovery sanctions because the Fisks were not required to disclose that information in their expert witness disclosure.

c. The admissibility requirements of Idaho Code § 6-1014 do not apply to the Fisks' expert witness disclosure.

Third, the Hospital asks the Court to strike all or part of the Fisks' expert witness disclosure because the Fisks' retained experts rely on impermissible standards as set forth in Idaho Code § 6-1014. Def.'s Mem. Supp. Mot. Exclude Pls.' Experts 15–19. The Hospital asserts that retained expert Timothy F. Hawkins (Hawkins) impermissibly and exclusively relies on the Joint Commission Standards and the CMS Conditions of Participation Standards to establish the local standard of health care practice. *Id.* at 17. The Hospital also asserts that the Fisks' retained experts, including Dr. Kubiak, Dr. Robert Y. Uyeda (Dr. Uyeda), and Suzanne Nebeker (Nebeker), impermissibly rely on the Joint Commission Standards and/or Medicare and Medicaid guidelines. *Id.* at 17–19.

The Fisks respond by arguing that the Hospital's position ignores the Idaho Supreme Court's holding in *Ballard v. Kerr*, 160 Idaho 674, 378 P.3d 464 (2016), which provides that Idaho Code § 6-1014 does not apply to guidelines established by the Center for Disease Control, the Idaho Department of Health and Welfare, or manufacturers of medical equipment. Pls.' Obj. to Def.'s Mot. Exclude Pls.' Experts 4–5. According to the Fisks, the "Ballard Court explains that *I.C. §6-1014* was intended to prevent quality metrics in the Affordable Care Act or by [sic] insurers to establish the standard of care for Idaho providers. None of the sources for Plaintiffs' Experts' local standards assessments is found in these categories." *Id.* at 5. The Fisks note that to the extent that the "CMS regulations might be considered within the ambit of *I.C. §6-1014*, the Idaho Department of Health and Welfare has confirmed to" Hawkins that "Idaho requires all CMS participants to abide by CMS rules – making CMS rules Idaho rules. The statute does not purport to apply to the State of Idaho rules." *Id.* at 5.

Because the Court has concluded that its pre-trial scheduling order does not require the Fisks to comply with the admissibility requirements of Idaho Code § 6-1012 and 6-1013 in their expert witness disclosure, it follows that the Fisks do not need to comply with § 6-1014. Therefore, the Court declines to decide whether one or more of the Fisks' retained experts relied on an impermissible standard and whether testimony from one or more of the Fisks' retained experts should be excluded or limited as a result. That issue is more appropriately addressed when the Fisks attempt to admit expert testimony, either at trial or at summary judgment.

d. The admissibility requirements of Idaho Code § 6-1012 do not apply to Hawkins' disclosed opinion.

Fourth, the Hospital asks the Court to strike the Fisks' disclosed opinion for retained expert Hawkins because he has no "medical expertise" qualifying him to testify

about the local standard of health care practice. Def.'s Mem. Supp. Mot. Exclude Pls.' Experts 19–21. The Hospital asserts that Hawkins is not a licensed healthcare provider and is therefore unqualified to render an opinion on the standard of health care. *Id.* at 19. To support its argument, the Hospital directs the Court to Idaho Code § 6-1012. *Id.* The Hospital acknowledges that Idaho law does not require an expert to "be of the same medical specialty as the defendant health care provider." *Id.* However, the Hospital asserts that Idaho law does require the expert to be a healthcare provider. *Id.* (citing *Hall v. Rocky Mountain Emergency Physicians, LLC*, 155 Idaho 322, 312 P.3d 313 (2013)).

In opposition, the Fisks explain that Hawkins is offered as an expert in hospital administration and safety and, as such, "his evaluation of the case comes from a perspective likely not covered by *I.C. §§6-1012* to *1014*." Pls.' Obj. to Def.'s Mot. Exclude Pls.' Experts 15. According to the Fisks, Hawkins' disclosed opinion is that the Hospital was negligent for failing to implement policies and procedures to guide the Hospital's nursing staff in making critical care decisions or, alternatively, if such policies and procedures were in place, the Hospital's nursing staff negligently failed to follow the Hospital's policies and procedures. *Id.* The Fisks further explain that Hawkins' opinion "does not address substandard medical care rendered[,]" but rather "the problems in the system which allowed the nurses' and nurse practitioners' actions to result in the harm to [Margaret]." *Id.*

As an initial matter, the Court disagrees with the Fisks' statement that Hawkins' opinion does not fall within the ambit of Idaho Code §§ 6-1012 to 6-1014. Idaho Code § 6-1012 clearly applies to hospitals and, as such, the Fisks must demonstrate that the Hospital negligently failed to meet the applicable standard of health care practice of the

community. Additionally, when admitting expert testimony related to the standard of health care practice applicable to the Hospital, the Fisks must comply with the requirements of Idaho Code §§ 6-1012, 6-1013, and 6-1014. Because the Fisks, in part, allege that the Hospital was negligent for failing to implement policies and procedures to guide the Hospital's nursing staff in making critical care decisions, the Fisks must establish the local standard of care related to implementing policies and procedures to guide critical care decisions. The Fisks must also demonstrate the local standard of care related to the administration of a hospital to the extent that they allege the Hospital violated the local standard of care in other ways.

Nevertheless, because the Hospital's argument is that the Fisks failed to satisfy the foundational requirements of Idaho Code § 6-1012, and because the Court has concluded that the Fisks are not required to establish foundation as part of their expert witness disclosure, the Court denies the Hospital's request to sanction the Fisks.

e. The expert witness disclosure for retained expert Dr. Robert Y. Uyeda meets the requirements of the Court's pre-trial scheduling order.

Fifth, the Hospital contends that the Fisks failed to sufficiently disclose the basis for Dr. Uyeda's medical proximate causation opinion. Def.'s Mem. Supp. Mot. Exclude Pls.' Experts 21–23. The Hospital analogizes Dr. Uyeda's causation opinion to the causation opinion excluded in *Swallow v. Emergency Medicine of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003), and argues that Dr. Uyeda's causation opinion should be excluded because it is conclusory, speculative, and lacking foundation. *Id.* at 21–22. The Hospital then proceeds to identify several ways in which Dr. Uyeda's disclosed opinion is inadmissible. *Id.* at 22–23.

The Fisks object to the Hospital's argument and assert that Dr. Uyeda's disclosed opinion is clear. Pls.' Obj. to Def.'s Mot. Exclude Pls.' Experts 15–16. According to the Fisks, Dr. Uyeda's causation opinion is that:

> the delay in care for [Margaret] resulted in substantially more loss [all but one foot] of her intestines. Dr. Uyeda explains that [Margaret] should have been evaluated at a much earlier time in the evening of her developing problems and offers the causation opinions that earlier intervention would have resulted in much less damage.

Id. at 16.

It's unclear whether the Hospital is arguing that Dr. Uyeda's testimony should be excluded because the expert witness disclosure fails to comply with Idaho statute, the Idaho Rules of Evidence, the Idaho Rules of Civil Procedure, or the Court's pre-trial scheduling order. In any event, the only issue properly raised in the Hospital's Motion is whether the Fisks' disclosure complies with the Court's pre-trial scheduling order. After reviewing Dr. Uyeda's disclosed opinion, the Court finds that Dr. Uyeda's disclosed opinion contains sufficient details to meet the requirements of the pre-trial scheduling order. As noted by the Fisks, when Dr. Uyeda's disclosure is read in context, it is clear that his disclosed opinion is sufficiently detailed to withstand the Hospital's assertion that it is conclusory. Dr. Uyeda generally contends that the Hospital's medical providers were negligent in failing to recognize, diagnose, and treat Margaret's condition, and that negligence caused Margaret's injuries to be more extensive had the negligence not occurred. In rendering his causation opinion, Dr. Uyeda states that he relied on Margaret's medical records and deposition testimony from Margaret's medical providers. Altogether, the disclosure sufficiently describes Dr. Uyeda's anticipated testimony and, in turn, enables the Hospital to conduct adequate discovery of Dr. Uyeda's opinion.

In addition, as indicated above, the Hospital's effort to exclude Dr. Uyeda's testimony for failing to meet the foundational requirements of Idaho Code §§ 6-1012 and 6-1013 is premature. Similarly, the Hospital's reliance on the *Swallow* case is also premature. The issue presented in the *Swallow* case was the *admissibility* of expert testimony, and not whether a party's expert witness disclosure met the requirements of a district court's pre-trial scheduling order. In the motion before the Court, the Hospital is asking the Court to impose discovery sanctions for the Fisks' alleged failure to comply with this Court's pre-trial scheduling order, discovery rules, and/or Idaho statute. The Hospital is not asking and cannot ask the Court to exclude *evidence* because at the time the Hospital filed its Motion, the Fisks had not attempted to admit any evidence. If the Hospital wants to exclude evidence, the Hospital needs to file the appropriate motion at the appropriate time.

In conclusion, the Court denies the Hospital's Motion to strike and exclude Dr. Uyeda's causation testimony and finds that it meets the minimum requirements of the Court's pre-trial scheduling order. As such, the sanction of exclusion is not warranted.

f. The expert witness disclosure for retained expert David M. Smith, CPA does not meet the requirements of the Court's pre-trial scheduling order.

Sixth, the Hospital asks the Court to strike and exclude anticipated testimony from the Fisks' retained expert David M. Smith (Smith), CPA as the Fisks have not adequately disclosed his opinions. Def.'s Mem. Supp. Mot. Exclude Pls. Experts 25–26. The Fisks have not responded to the Hospital's argument.

The Court agrees with the Hospital that the disclosure from retained expert Smith fails to meet the requirements of the Court's pre-trial scheduling order. The Court's pre-trial scheduling order requires the Fisks to disclose all experts to be called at trial no later than 34 weeks before trial. The Fisks timely disclosed Smith as a retained expert.

However, as indicated above, when disclosing experts to be called at trial, the Fisks need to disclose at least the information required by Idaho Rule of Civil Procedure 26(b)(4)(A)(i). That Rule requires the Fisks to disclose a complete statement of all opinions to be expressed by Smith and the basis and reasons for his opinion. In their expert witness disclosure, the Fisks provide the following information related to Smith's anticipated testimony and opinion:

> **E. Subject Matter:** Mr. Smith will analyze the report and conclusions contained within Mr. Taylor's report[3] within the attached Exhibit E and provide a present value calculation. Mr. Smith will also look at all damages incurred to date and summarize the economic loss to the Plaintiffs.
>
> **F. Data and Other Information:** In forming his opinions, Mr. Smith will rely upon his training and experience; his education; and his familiarity with the current models and accounting methodologies associated with computing the present value of Mrs. Fisks' future expenses.
>
> **G. Substance of Facts Known and Opinions Held:** The substance of the facts known to Mr. Smith as well as the opinions held will be provided once he has the opportunity to review Mr. Taylor's report and conclusions. He reserves the right to alter and amend those opinions when and if relevant documents are obtained during discovery having some bearing on those conclusions.

Aff. Counsel, Ex. A, at 22–23. Clearly this disclosure does not satisfy the requirements of Idaho Rule of Civil Procedure 26(b)(4)(A)(i) and, consequently, it fails to comply with the Court's pre-trial scheduling order. There is no indication in the disclosure as to what Smith's opinion might be in this case. Instead, the Fisks admit that Smith still needs to review "Mr. Taylor's report and conclusions," and after he finishes that review, Smith will render his opinion. In addition to not timely disclosing Smith's opinion as required by the pre-trial scheduling order, the Fisks have not shown good cause as to why Smith was unable to review "Mr. Taylor's report and conclusions" before the disclosure deadline and, in turn, why Smith was unable to render a timely opinion. Similarly, the

Fisks have not argued or shown that they supplemented the expert witness disclosure, as it relates to Smith, at any time in the past four months.

Because the Fisks' disclosure for retained expert Smith does not comply with the pre-trial scheduling order and the Fisks have not shown good cause for that failure, the Court finds that sanctions are warranted and grants the Hospital's request to exclude Smith from testifying in this case.

2. The Court denies the Hospital's request to exclude the opinions of the Fisks' non-retained experts; however, the Court grants the Hospital's request to limit the testimony of the Fisks' non-retained experts.

The Hospital asks the Court to exclude or limit the opinions of the Fisks' non-retained medical experts because the Fisks "failed to identify the 'summary of opinions' required to be disclosed for non-retained experts." Def.'s Mem. Supp. Mot. Exclude Pls. Experts 24–25. Specifically, the Hospital points out that the Fisks disclosed that their "non-retained experts will testify about 'elements of proximate cause relevant in this case,' 'physical damage experienced by the plaintiff,' or 'medical knowledge of elements of proximate cause and damages in this case.'" *Id.* at 25. However, the Hospital asserts that the Fisks did not disclose their non-retained experts' opinions on these topics. *Id.* As a result, the Hospital asks the Court to strike the Fisks' non-retained experts' opinions on causation, proximate cause, and damages. *Id.*

In response, the Fisks explain that their non-retained experts are treating physicians. Pls.' Obj. to Def.'s Mot. Exclude Pls.' Experts 16. Accordingly, the Fisks state that "[t]hey are not designated to testify as to any opinions other than their own diagnoses and treatments of [Margaret]. They will not be asked to express any further opinions . . . ." *Id.*

[3] This is presumably a reference to Robert H. Taylor, a retained expert for the Fisks.

The Court notes that the Fisks' response appears to resolve the issues presented in the Hospital's argument. The Court also notes that the Fisks listed a total of 13 non-retained experts, eight of whom the Hospital also listed as non-retained experts.[4] Accordingly, given the Fisks' statement and the overlap in expert witnesses to be called by the parties, the Court grants the Hospital's request to limit the Fisks' non-retained experts' testimony—the Fisks non-retained experts may testify as to their own diagnoses, and treatments of Margaret. To the extent that the Hospital asks the Court to exclude the Fisks' non-retained experts from testifying in this case, the Court denies that request at this time.

B. The Hospital's Motion for Summary Judgment.

The Hospital's summary judgment motion and the Fisks' opposition present three issues. The first issue is whether the Fisks have produced admissible evidence showing that their expert witnesses have actual knowledge of the applicable standard of health care practice. The second issue is whether the Fisks have produced admissible evidence showing that the Hospital's conduct was the actual and proximate cause of all or part of Margaret's injuries. The third issue is the burden of proof applicable to the Hospital's summary judgment motion.

1. <u>The Fisks' have not produced admissible evidence showing that at least one of their expert witnesses has actual knowledge of the applicable standard of health care practice.</u>

In its memorandum, the Hospital generally argues that the Fisks failed to adequately disclose foundation for the opinions of retained experts Kubiak, Nebeker,

[4] The disclosed non-retained experts for the Fisks are: **Dr. Scott Dunn, MD**; **Dr. Todd Hoopman, MD**; **Dr. Shimoli Shah, MD**; Dr. Wichit Srikureja, MD; **Dr. M. Shane McNevin, MD**; **Dr. Brian Samuels, MD**; **Dr. Edward MacInerny, MD**; Dr. Thuy-Trang Ngo, MD; Dr. Sherwin S. Foster, MD; **Dr. John L. Pennings, MD**; Dr. Robert Martindale, MD; Dr. John Faggard, III, MD; and **Brian Herndon, CRNA**. The names is bold are the non-retained experts that the Hospital disclosed in its expert witness disclosure.

Hawkins, and Dr. Uyeda. Def.'s Mem. Supp. Mot. Summ. J. 10–13. Specifically, the Hospital asserts that the Fisks were required to disclose in their expert witness disclosure that their retained experts have actual knowledge of the local standard of health care practice. *Id.* Because the Fisks failed to do so, the Hospital contends that expert testimony from the Fisks' retained experts on the standard of care is inadmissible. *Id.* The Fisks responded by arguing that they are not required to meet the foundational requirements of Idaho Code §§ 6-1012 and 6-1013 as part of their expert witness disclosures. Pls.' Mem. Opp'n Def.'s Mot. Summ. J. 10–14. They further explain that the declarations of Kubiak, Nebeker, Hawkins, and Dr. Uyeda, which they submitted in support of their opposition to the Hospital's Motion, demonstrate that their expert witnesses have actual knowledge of the local standard of care. *Id.* at 16–21. In its Reply to the Fisks' opposition, the Hospital argues that the declarations from retained experts Kubiak, Nebeker, Hawkins, and Dr. Uyeda are inadmissible because each retained expert failed to show familiarity with the local standard of care as required by Idaho Code §§ 6-1012 and 6-1013. Def.'s Reply to Pls.' Opp'n 11–14. Because the Fisks' expert opinions related to the local standard of health care practice are inadmissible, the Hospital argues that the Fisks are unable to establish an essential element of their medical malpractice claim and, as a result, the Hospital asserts it is entitled to summary judgment. *Id.*

The Court above concluded that the Fisks are not required to meet the foundational requirements of Idaho Code § 6-1012 and § 6-1013 as part of their expert witness disclosure. As such, to the extent that the Hospital's summary judgment motion relies on that argument, the Court concludes that it is without merit. Nevertheless, the Hospital also argues that the declarations submitted by the Fisks in opposition to its summary judgment motion are inadmissible and, as such, the Hospital continues to

assert that it is still entitled to summary judgment because the Fisks have failed to produce admissible evidence on an essential element of their claim.

To withstand summary judgment 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 demonstrating:

> (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). The applicable community standard of health care practice:

> is specific to 'the time and place of the alleged negligence' and 'the class of health care provider that such defendant then and there belonged to . . . .' The defendant's care is judged against 'similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization if any.'

Mattox, 157 Idaho at 473, 337 P.3d at 632 (citing I.C. § 6-1012). 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, the Fisks retained Kubiak, Nebeker, and Dr. Uyeda to testify as to the local standard of health care practice, i.e., the standard of care for nurse practitioners and/or nurses in the Post Falls, Idaho, area in March of 2015. The Fisks seem to have retained Hawkins to testify as to the local standard of care for the administration of a hospital, i.e., the standard of care for implementation of policies and procedures. As noted, the Fisks submitted declarations from each expert in support of its opposition to the Hospital's summary judgment motion. In turn, the Hospital has put the admissibility of each declaration at issue and, therefore, the Court reviews the declarations to determine whether one or more of the declarations satisfy the requirements of Idaho Code § 6-1013.

a. Dr. Uyeda failed to demonstrate actual knowledge of the local standard of care.

In his declaration, Dr. Uyeda testifies about the local standard of care for nurse practitioners and/or nursing staff in the Post Falls, Idaho, area. Uyeda Decl. 2, ¶ 3. To determine the local standard of care, Dr. Uyeda states the he consulted with a local physician, Dr. Scott Dunn, who is Margaret's primary care physician.[5] *Id.* Based on that consultation, Dr. Uyeda states that he believes his medical opinions are consistent with the local standards of care in the Post Falls, Idaho, area in March of 2015. *Id.*

To testify about the standard of care in a medical malpractice case, "the medical expert must show that he or she is familiar with the standard of health care practice for the relevant medical specialty, during the relevant timeframe, and in the community where the care was provided." *Bybee v. Gorman*, 157 Idaho 169, 174, 335 P.3d 14, 19

[5] Dr. Uyeda also states that reviewed several affidavits, expert witness disclosures, and a portion of Dr. Pennings' deposition. Uyeda Decl. 2, ¶ 5. However, he does not state that he relied on these documents to familiarize himself with the local standard of care.

(2014) (citing *Suhadolnik v. Pressman*, 151 Idaho 110, 116, 254 P.3d 11, 17 (2011); *Dulaney*, 137 Idaho at 164, 45 P.3d at 820). He or she "must also state *how* they became familiar with the standard of care for the particular health care professional." *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000) (citing *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 331, 940 P.2d 1142, 1150 (1997)).

A common way for an out-of-area expert to obtain knowledge of the local standard of care is by inquiring of a local specialist. *Id.* When an out-of-area expert consults with a local specialist, "the specialist need not have practiced in the same field as the defendant, so long as the consulting specialist is sufficiently familiar with the defendant's specialty." *Suhadolnik*, 151 Idaho at 116, 254 P.3d at 17. However, the out-of-area expert must show that "the local specialist interviewed has actual knowledge of the local standard of care." *Mattox v. Life Care Ctrs. Am., Inc.*, 157 Idaho 468, 476, 337 P.3d 627, 635 (2014) (citing *Dulaney*, 137 Idaho at 166–67, 45 P.3d at 822–23).

In *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002), the Idaho Supreme Court held that an out-of-area expert's affidavit lacked foundation because the affidavit did not set forth any facts demonstrating that the local specialist had actual knowledge of the type of care provided. *Id.* at 166, 45 P.3d at 822. In that case, the plaintiff asserted that an emergency room physician in Boise violated the applicable standard of health care practice by prematurely discharging her from the emergency room. *Id.* at 162–63, 45 P.3d at 818–19. The plaintiff retained an out-of-area emergency room physician to testify about the local standard of health care practice applicable to emergency room settings. *Id.* at 164–65, 45 P.3d at 820–21. To

familiarize himself with the local standard of care, the out-of-area expert consulted with a local physician in Boise who specialized in internal medicine. *Id.* at 165–66, 45 P.3d at 821–22. The Idaho Supreme Court affirmed the district court's holding that the out-of-area expert's resulting affidavit did not meet the foundational requirements of Idaho Code § 6-1013 because there were no facts in the affidavit demonstrating that the local specialist had knowledge of the standard of care for emergency room physicians in Boise. *Id.* at 166–67, 45 P.3d at 822–23.

Here, Dr. Uyeda is not qualified as an out-of-area expert because his affidavit fails to demonstrate that he adequately familiarized himself with the local standard of health care practice, i.e., the standard of care for nurse practitioners and/or nurses in the Post Falls, Idaho, area in March of 2015. Dr. Uyeda attempts to establish foundation for his standard of care opinion by consulting with Dr. Scott Dunn, Margaret's primary care physician. While he states he made contact with Dr. Scott Dunn, Dr. Uyeda provides no facts in his affidavit showing that Dr. Scott Dunn has actual knowledge of the standard of care for the relevant medical specialty (nursing care), in the relevant geographic area (Post Falls, Idaho), and at the relevant time (March 2015). Like the out-of-area expert's affidavit in the *Dulaney* case, Dr. Uyeda's declaration contains no facts showing where Dr. Scott Dunn practiced in March 2015 and what his medical practice consisted of in March 2015. The fact that Dr. Scott Dunn is currently Margaret's primary care physician does not resolve these issues because no facts have been disclosed related to Dr. Scott Dunn's care of Margaret. Because Dr. Uyeda's affidavit does not show that Dr. Scott Dunn has actual knowledge of the local standard of care, Dr. Uyeda's effort to familiarize himself with the local standard of care by consulting with a local specialist, Dr. Dunn, ultimately fails. The Court reaches this conclusion without regard to Dr. Dunn's affidavit attached to counsel for the

Hospital's affidavit, disclosed at the May 23, 2018, hearing. The affidavit of Dr. Dunn makes it clear that even if Dr. Uyeda *had* testified in his affidavit that Dr. Dunn has actual knowledge of the standard of care for the relevant medical specialty, in the relevant geographic area, at the relevant time, such a claim by Dr. Uyeda would not be true. Therefore, to the extent that Dr. Uyeda testifies in his declaration as to the local standard of care, the Court concludes that his testimony does not meet the foundational requirements of Idaho Code § 6-1013 and is inadmissible. Dr. Uyeda's affidavit is considered for purposes of summary judgment, thus, his affidavit is not stricken. However, Dr. Uyeda's failure to state *what* the local standard of care was in March 2015 for these nurses, and *how* he became familiar with that standard of care, is what causes Dr. Uyeda's opinions to be inadmissible on summary judgment due to a lack of requisite and very specific foundation.

b. Kubiak failed to demonstrate actual knowledge of the local standard of care.

In his declaration and report, Kubiak offers expert opinion related to the local standard of care for nursing care in Post Falls, Idaho, in March of 2015. Kubiak currently resides in Arco, Idaho. He works in Pocatello, Idaho, as a nurse practitioner at the Mental Wellness Center and as a clinical assistant professor at Idaho State University. His curriculum vitae reveals no ties to Post Falls, Idaho. Kubiak states that the local standard of care for nurses in the Post Falls area in March of 2015 has been replaced by a national standard—specifically, the American Nurses Association (ANA) Standards of Practice. He points out that a policy statement by the Hospital indicates that the Hospital uses the ANA Standards of Practice and, consequently, the ANA Standards of Practice set the local standard of care at issue in this case. The policy statement provides: "It is the policy of the hospital to utilize the American Nurses

Associations' standards of practice based on the nursing process." Kubiak Decl., at Ex. A. In addition to the ANA Standards of Practice, Kubiak indicates that he relied on the following sources to familiarize himself with the local standard of health care practice: the "State Nurse Practice Act," the "Joint Commission recommendations," and "authoritative nursing texts and journals . . . including the Lippincott Manual of Nursing Practice." *Id.*

"Where an expert demonstrates that a local standard of care has been replaced by a statewide or national standard of care, and further demonstrates that he or she is familiar with the statewide or national standard, the foundational requirements of I.C. § 6-1013 have been met." *Suhadolnik*, 151 Idaho at 116, 254 P.3d at 17 (footnotes omitted)). "Specifically, an out-of-area expert can demonstrate familiarity with a local standard by speaking to a local specialist and by reviewing deposition testimony that establishes the local standard is governed by a national standard." *Id.* (citing *Kozlowski v. Rush*, 121 Idaho 825, 828–29, 828 P.2d 854, 857–58 (1992)). In *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 995 P.2d 816 (2000), the plaintiff retained an out-of-area expert to testify regarding the standard of care for administering intramuscular injections in Twin Falls, Idaho. *Id.* at 51, 995 P.2d at 821. To determine whether the local standard differed from the national standard, the out-of-area expert reviewed depositions from three of the defendant hospital's nurses, reviewed a standard nursing text[6] identified by the defendant hospital's nurses as their standard for nursing procedures, talked to the executive director of the Idaho Board of Nursing, and talked with nursing faculty members at two Idaho nursing schools. *Id.* Based on this, the out-of-area expert ultimately concluded that the local standard did not differ from the statewide or national standard. *Id.* The trial court determined that the out-of-area

expert was qualified to testify about the local standard of care, and the Idaho Supreme Court affirmed that decision.[7] *Id.* at 51–52, 995 P.2d at 821–22.

Here, Kubiak admits that he did not consult with a local specialist to determine if the local standard of care for nursing care in the Post Falls area in March of 2015 had been replaced by a national standard. While his report indicates that he reviewed deposition testimony from several of the Hospital's nurses, he does not link his review of those depositions to his understanding of the local standard of care.[8] Thus, unlike the out-of-area expert in *Perry*, Kubiak did not rely on any deposition testimony or interview anyone familiar with the local standard of care to show that the local standard of care had been replaced by a national standard. Instead, the only way Kubiak appears to have familiarized himself with the local standard of care is by reviewing a

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[6] The text was identified as the *Fundamentals of Nursing* by Kozier et al.

[7] In affirming the trial court, the Idaho Supreme Court explained:

> [The out-of-area expert] reviewed the depositions of three Hospital nurses and then reviewed the text upon which they relied. Marlys Massey, the Hospital's nursing director for the emergency department, helped formulate Hospital nursing policies and co-authored the Hospital emergency room's Nursing Policy and Procedure Manual. In her deposition, Massey testified that the standard for intramuscular injections at the Hospital was the same way that nursing curricula throughout the United States taught the technique. She agreed that the Kozier text provided the basic manner, applicable anywhere in the country, for giving intramuscular injections, and that the local standard was the same as the universal standard. Massey also testified that she would refer nurses specifically to the Kozier text for brush-up on intramuscular injection techniques. Janie Draney, the Hospital's nursing administrator, testified in her deposition that, if the Hospital did not have a written policy or guideline in effect for a particular procedure, she would advise a nurse to consult the most current best method in a core reference text such as the Kozier text. In her deposition, Teresa Phillips testified that the Hospital used the Kozier text, which she stated was "the nursing standard for injection . . . as far as selecting sites." [The out-of-area expert's] reading of the nurses' depositions, coupled with her subsequent review of the text identified by the nurses as providing the standard for intramuscular injections, gave her a sufficient foundation to testify to the local standard of care.

Id. at 52, 995 P.2d at 822.

[8] The Court also notes that the Fisks do not make this argument.

policy statement written by the Hospital and, based on that review, concluding that the local standard of care had been replaced by the ANA Standards of Practice.

The Court concludes that Kubiak's complete reliance on the Hospital's policy statement is misplaced. The Fisks, when arguing that Kubiak laid an adequate foundation, do not cite to any case law showing that an out-of-area expert can demonstrate that the local standard of care has been replaced with a national standard by relying on the defendant medical provider's internal policies. Similarly, in reviewing medical malpractice cases in Idaho, the Court has found no support for the Fisks' argument. Rather, the cases in Idaho tend to uniformly require (1) the out-of-area expert to consult with a local specialist who is familiar with the local standard of care and who informs the out-of-area expert that the local standard has been replaced by the national standard, or (2) the out-of-area expert to review deposition testimony from a local specialist who, in his or her deposition, testified that the local standard of care had been replaced by the national standard. *Compare Suhadolnik*, 151 Idaho at 118–19, 254 P.3d at 19–20, *with Perry*, 134 Idaho at 52, 995 P.2d at 822; *Kozlowski*, 121 Idaho at 828–29, 828 P.2d at 857–58. In this case, Kubiak did not consult with a local specialist or review deposition testimony from a local specialist. Therefore, the Court concludes that he has not demonstrated that the local standard of care for nursing care in the Post Falls, Idaho, area in March of 2015 was replaced with a national standard. Because Kubiak failed to demonstrate that the local standard was replaced by the national standard, his knowledge of the national standard is also insufficient.

For the reasons set forth above, the Court concludes that Kubiak has failed to lay an adequate foundation for his opinion as required by Idaho Code § 6-1013. Therefore, his declaration is inadmissible.

c. Nebeker failed to demonstrate actual knowledge of the local standard of care.

In her declaration, Nebeker testifies about the local standard of care for nurse practitioners and/or nursing staff in the Post Falls, Idaho, area in March of 2015. According to her curriculum vitae, Nebeker has been a nurse practitioner in Salmon, Idaho, from September of 1999 to present. Nebeker Decl., at Ex. A. She does not state and her curriculum vitae does not show that she has ever worked in the Post Falls, Idaho, area. As such, Nebeker is an out-of-area expert. As discussed above, an out-of-area expert may still testify about the local standard of health care practice if he or she familiarizes himself or herself with the local standard of care. *Mattox*, 157 Idaho at 476, 337 P.3d at 635 (citing I.C. § 6-1013). In her declaration and report, Nebeker indicates that she familiarized herself with the local standard of care by reviewing Kubiak's report, reviewing Idaho regulations, reviewing the Hospital's rules and regulations, and reviewing a variety of secondary resources.[9] *See* Nebeker Decl. 2, ¶¶ 5, 7, Ex. A. In doing so, she seems to state that the local standard of care has been replaced by a statewide standard of care. *Id.*

Like Kubiak, the issue presented is whether Nebeker has adequately shown that the local standard of care has been replaced by a statewide standard. First, because the Court concluded that Kubiak's opinion lacked foundation, Nebeker's reliance on Kubiak's report cannot be used by Nebeker to demonstrate that the local standard of care has been replaced by a statewide or national standard. Second, Nebeker's

[9] In her report, Nebeker refers to the "Acute care Nurse Practitioners Competencies, 2004, under Health promotion, Health Protection Disease Prevention, and Treatment 1A-1-3, 10." Nebeker Decl., at Ex. A, at 6. It is not clear what this resource is and how it informs the local standard of care. Additionally, in their memorandum, the Fisks indicate that Nebeker relied on Idaho statutes. Pls.' Mem. Opp'n Def.'s Mot. Summ. J. 18. However, the Fisks do not identify which statute(s) Nebeker relied on and, from the Court's review of Nebeker's declaration, it is not clear that she relied on a statute(s).

reliance on secondary resources may inform her understanding of the statewide and/or national standard of care, but it does not establish that the local standard of care has been replaced by a statewide or national standard of care. Third, in her declaration, Nebeker references the Hospital's rules and regulations. Nebeker Decl. 2, 4, ¶¶ 5, 11, Ex. A, at 6, ¶ 12. However, it is not clear how the rules and regulations referenced relate to the local standard of care. Fourth, while state regulations may replace the local standard of care, the regulations must "concern the 'physical administration of health care services.'" *Navo v. Bingham Mem'l Hosp.*, 160 Idaho 363, 372–73, 373 P.3d 681, 690–91 (2016) (quoting *Mattox*, 157 Idaho at 478, 337 P.3d at 637). Nebeker appears to have reviewed and relied on the following provisions of the Idaho Administrative Code: IDAPA 280.02(a), (b), (c), (e), (g),[10] 280.05,[11] 400.01,[12] 400.02.[13]

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[10] IDAPA 280.02 provides:

02. Core Standards for All Categories of Advanced Practice Professional Nursing. The advanced practice professional nurse shall practice in a manner consistent with the definition of advanced practice professional nursing and the standards set forth in these rules. The advanced practice professional nurse may provide client services for which the advanced practice professional nurse is educationally prepared and for which competence has been attained and maintained.

a. The advanced practice professional nurse shall consult and collaborate with other members of the health care team.

b. The advanced practice professional nurse shall recognize his limits of knowledge and experience and shall consult and collaborate with and refer to other health care professionals as appropriate.

c. The advanced practice professional nurse shall retain professional accountability for advanced practice professional nursing care according to the advanced practice professional nurse's scope of practice and IDAPA 23.01.01, "Rules of the Idaho Board of Nursing," Subsections 400.01 and 400.02.

d. The advanced practice professional nurse shall evaluate and apply current research findings relevant to the advanced nursing practice category.

e. The advanced practice professional nurse shall assess clients, identify problems or conditions, establish diagnoses, develop and implement treatment plans and evaluate patient outcomes.

f. The advanced practice professional nurse shall use advanced knowledge and skills in teaching and guiding clients and other health care team members.

g. The advanced practice professional nurse shall use critical thinking and independent decision-making, commensurate with the autonomy, authority and responsibility of the practice category.

h. The advanced practice professional nurse shall have knowledge of the statutes and rules governing advanced nursing practice, and function within the established boundaries of the appropriate advanced nursing practice category.

[11] IDAPA 280.05 provides:

05. Nurse Practitioner. In addition to the core standards, advanced practice professional nurses in the category of nurse practitioner shall practice in accord with standards established by the American Nurses Credentialing Center, the American Academy of Nurse Practitioners, the National Association of Pediatric Nurse Associates and Practitioners or the Association of Women's Health Obstetrics and Neonatal Nurses. Nurse practitioners who meet qualifying requirements and are licensed by the board may perform comprehensive health assessments, diagnosis, health promotion and the direct management of acute and chronic illness and disease as defined by the nurse practitioner's scope of practice. The scope of practice of an authorized nurse practitioner may include the prescribing and dispensing of pharmacologic and non-pharmacologic agents.

[12] IDAPA 400.01 provides:

01. Determining Scope of Practice. To evaluate whether a specific act is within the legal scope of nursing practice, a licensed nurse shall determine whether:

a. The act is expressly prohibited by the Nursing Practice Act or, the act is limited to the scope of practice of advanced practice professional nurses or to licensed professional nurses, or the act is prohibited by other laws; and

b. The act was taught as a part of the nurse's educational institution's required curriculum and the nurse possesses current clinical skills; and

c. The act does not exceed any existing policies and procedures established by the nurse's employer; and

d. The act is consistent with standards of practice published by a national specialty nursing organization or supported by recognized nursing literature or reputable published research and the nurse can document successful completion of additional education through an organized program of study including supervised clinical practice or equivalent demonstrated competency.

e. The employment setting/agency has established policies and procedures or job descriptions authorizing performance of the act; and

f. Performance of the act is within the accepted standard of care that would be provided in a similar situation by a reasonable and prudent nurse with similar education and experience and the nurse is prepared to accept the consequences of the act.

[13] IDAPA 400.02 provides:

02. Deciding to Delegate. When delegating nursing care, the licensed nurse retains accountability for the delegated acts and the consequences of delegation. Before delegating any task the nurse shall: (5-3-03)

a. Determine that the acts to be delegated are not expressly prohibited by the Nursing Practice Act or Board Rules and that the activities are consistent with job descriptions or policies of the practice setting; and

b. Assess the client's status and health care needs prior to delegation, taking into consideration the complexity of assessments, monitoring required and the

Nebeker Decl., at Ex. A, at 5–6. However, none of these provisions govern the actual administration of care. 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).

IDAPA 280.02 and 280.05 set forth broad standards of practice (or competencies) applicable to all advanced practice professional nurses. Similarly, IDAPA 400.01 and 400.02 merely set forth the process a nurse should use to determine whether a specific act is consistent with the legal scope of nursing practice and whether the nurse may delegate a specific act. These IDAPA regulations certainly do not provide actual concrete guidance with respect to the activities (or inactivities) that were visited upon Fisk. The only IDAPA requirement that comes close is 280.02(e), and the statement, "The advanced practice professional nurse shall assess clients, identify problems or conditions, establish diagnoses, develop and implement treatment plans and evaluate patient outcomes" provides nothing concrete as pertains to the alleged facts of this case.

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degree of physiological or psychological instability; and

c. Exercise professional judgment to determine the safety of the delegated activities, to whom the acts may be delegated, and the potential for harm; and

d. Consider the nature of the act, the complexity of the care needed, the degree of critical thinking required and the predictability of the outcome of the act to be performed; and

e. Consider the impact of timeliness of care, continuity of care, and the level of interaction required with the patient and family; and

f. Consider the type of technology employed in providing care and the knowledge and skills required to effectively use the technology, including relevant infection control and safety issues; and

g. Determine that the person to whom the act is being delegated has documented education or training to perform the activity and is currently competent to perform the act; and

h. Provide appropriate instruction for performance of the act.

In summary, the Court concludes that Nebeker has failed to show that she is familiar with the local standard of care. As a result, she is not qualified to testify about the local standard of care.

d. Hawkins failed to demonstrate actual knowledge of the local standard of care.

Hawkins offers expert opinion on the local standard of care for the administration of a hospital. Hawkins resides in Cape Coral, Florida. Hawkins Decl., at Ex. A. He holds several certifications and has over 30 years of experience in hospital administration. *Id.* Currently, Hawkins works as a part-time consultant and as the Living Hope Haiti Surgical Team coordinator, field technician, and director of field engineering. In his report, Hawkins states that the Hospital holds itself out as a facility accredited by the Joint Commission and that the Hospital has violated various standards set by the Joint Commission. Hawkins Decl., at Ex. A, 3–9. He further states in his declaration that he consulted with Dennis Kelly with the Idaho Department of Health and Welfare. *Id.* at 2, ¶ 4. According to Hawkins, Dennis Kelly confirmed with him that the Hospital is a "CMS" facility and subject to all "CMS" standards and guidelines. *Id.* As a result of that consultation, Hawkins "concludes that [his] opinions in [his] report applicable to the locality of the [Hospital] in this matter and provide minimum standards for that locality." *Id.*

As an initial matter, from reviewing Hawkins' declaration and report, it appears that the Joint Commission standards and CMS standards are different sets of standards. However, it appears that in his report Hawkins only relies on the Joint Commission standards. With that in mind, the Court concludes that Hawkins has failed to show that the Joint Commission standards have replaced the local standard of care.

In *Navo v. Bingham Memorial Hospital*, 160 Idaho 363, 373 P.3d 681 (2016), the Idaho Supreme Court considered whether Joint Commission Standards LD.1.10, LD.1.30, LD.2.20, and LD.3.50 established a standard of care. *Id.* at 373, 373 P.3d at 691. In concluding those Standards did not establish a standard of care, it stated:

> On review, it is clear that these Joint Commission Standards do not provide a coherent standard of care that a hospital could look to for guidance in the administration of anesthesia services. 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.

Id. The Idaho Supreme Court found the Joint Commission Standards cited by Hawkins are general requirements lacking specificity. As such, the Court concluded the Standards relied on by Hawkins did not provide a standard of care. Consequently, there was foundation for Hawkins' opinion related to the standard of care.

2. The Fisks have submitted admissible testimony on the element of causation.

The Hospital argues that the Fisks have not presented admissible evidence from a qualified expert on the element of causation. Def.'s Mem. Supp. Mot. Summ. J. 13–16. Without such evidence, the Hospital asserts that it is entitled to summary judgment because the Fisks cannot meet their burden of proof on an essential element of their claim. *Id.* The Fisks provide almost no argument in response to the Hospital's assertions. However, the Fisks have submitted a declaration from Dr. Uyeda and they do state that Dr. Uyeda's declaration shows causation. Pls.' Mem. Opp'n Def.'s Mot. Summ. J. 9, 19–20. Therefore, the issues presented appear to be whether Dr. Uyeda is qualified to testify as an expert on the issue of causation and whether his declaration is admissible to prove causation.

a. Dr. Uyeda is qualified to testify as an expert.

The Hospital generally asserts that Dr. Uyeda is not qualified to offer an opinion on causation. Def.'s Mem. Supp. Mot. Summ. J. 15. "[T]he admission of testimony to prove proximate cause in medical malpractice cases is governed solely by the Idaho Rules of Evidence." *Combs v. Cunrow*, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009). While not required, expert testimony is often necessary to establish causation in a medical malpractice case. *Id.* "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)). Idaho Rule of Evidence 702 provides the test for determining whether a witness is qualified as an expert. *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 837, 153 P.3d 1180, 1183 (2007). "A qualified witness is one who possesses 'knowledge, skill, experience, training, or education[]'" in the relevant field. *Id.* (citing I.R.E. 702). "The proponent of the testimony must lay foundational evidence showing that the individual is qualified as an expert on the topic of his or her testimony." *Id.* (citations omitted).

In this case, Dr. Uyeda states that he is a general surgeon, and his testimony is based on his professional training and experiences. Uyeda Decl. 2, ¶ 5. In the report attached to his declaration, Dr. Uyeda indicates that he trained in surgery at Cedars-Sinai Medical Center in Los Angeles, California. *Id.* at Ex. A. He further indicates he is a board certified surgeon with active licenses to practice in California and Nevada, and that he has actively practiced general surgery, including surgery of the abdomen and gastrointestinal tract, from 1982 to 2017. *Id.* Given Dr. Uyeda's education,

certifications, training, and more than thirty years of experience, the Court finds that Dr. Uyeda is qualified as an expert to testify on the issue of causation.

b. Dr. Uyeda's causation testimony is admissible.

To establish proximate cause, the Fisks must show that the Hospital's negligence was the actual cause and the legal cause of Margaret's injuries. *See Combs*, 148 Idaho at 139, 219 P.3d at 463. "Actual cause 'is a factual question focusing on the antecedent factors producing a particular consequence[,]" while the legal cause "exists when 'it [is] reasonably foreseeable that such harm would flow from the negligent conduct.'" *Id.* at 139–40, 219 P.3d at 463–64 (quoting *Cramer v. Slater*, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009)). "The question of proximate cause is one of fact and almost always for the jury." *Id.* at 140, 219 P.3d at 464 (quoting *Cramer*, 146 Idaho at 875, 204 P.3d at 515).

As noted above, "the admission of testimony to prove proximate cause in medical malpractice cases is governed solely by the Idaho Rules of Evidence." *Id.* Idaho Rule of Evidence 702 governs the admissibility of expert testimony; it provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702. Therefore, "[a] qualified expert may testify in opinion form where his or her scientific or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *Nield v. Pocatello Health Servs., Inc.*, 156 Idaho 802, 816, 332 P.3d 714, 728 (2014).

"[E]xpert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is

inadmissible." *Combs*, 148 Idaho at 140, 219 P.3d at 464 (quoting *Ryan v. Beisner*, 123 Idaho 42, 46–47, 844 P.2d 24, 28–29 (Ct. App. 1992)).

> Testimony is speculative when it "theoriz[es] about a matter as to which evidence is not sufficient for certain knowledge." Conversely, expert testimony will assist the trier of fact when the reasoning or methodology underlying the opinion is scientifically sound and "based upon a 'reasonable degree of medical probability'"—mere possibility is insufficient.

Id. (citations omitted).

Turning to Dr. Uyeda's testimony, his opinion is that Margaret's symptomology necessitated medical attention and intervention at a much earlier point in time and that NP Sholtz and the Hospital's nursing staff breached the local standard of care when they failed to timely provide Margaret with the medical attention and intervention she needed. Specifically, Dr. Uyeda states that Margaret's symptomology[14] in the early afternoon and evening of March 11, 2015, necessitated NP Sholtz personally examining Margaret, NP Sholtz and/or the Hospital's nursing staff involving a medical doctor in Margaret's care, conducting a CT scan, and transferring Margaret to a higher level of care. Uyeda Decl. 2, 4, ¶¶ 3, 11. Each task was eventually accomplished, albeit in an untimely manner in Dr. Uyeda's opinion. *Id.* From these conclusions, Dr. Uyeda opines that if NP Sholtz and/or the Hospital nursing staff had provided Margaret with the medical attention and intervention (as he describes) six hours earlier, a larger portion of Margaret's intestines could have been salvaged. *Id.* at 3, ¶ 9. Similarly, he opines that if intervention had occurred eight hours earlier, an even larger portion of Margaret's intestines could have been salvaged. *Id.* And if intervention had occurred more than eight hours earlier, fifty-percent of Margaret's intestines could have been salvaged. *Id.* If medical intervention had occurred six hours, eight hours, or more than eight hours

[14] He points to Margaret's unexplained acute onset of severe abdominal pain along with

earlier, Dr. Uyeda states that it is probable Margaret could have returned to normal or near normal functionality. *Id.* In summary, Dr. Uyeda's causation testimony is that NP Sholtz and/or the Hospital nursing staff's negligent failure to timely provide Margaret with the medical attention and intervention she needed proximately caused an increase in her injuries, i.e., an earlier diagnosis would have resulted in a better outcome for her.

Dr. Uyeda's testimony, as summarized above, is based on his medical knowledge and experience as a general surgeon and his review of Margaret's medical records, portions of Dr. Pennings' deposition, the Affidavits of Jeffrey Larson, M.D. and Denise Fowler, R.N, and several of the Hospital's expert witness disclosures. *Id.* at 2, ¶ 5, Ex. A. He states that his training and experience includes the evaluation and treatment of patients with sudden onset of severe abdominal pain. *Id.* at Ex. A. Relying on his training and experience, he explains that the development of mesenteric artery ischemia is an "evolutionary process" that is gradual and occurs over the course of several hours. *Id.* at 2–3, ¶ 7. Because it is an "evolutionary process," Dr. Uyeda states that the condition can and should be treated with medical intervention. *Id.* at 3, ¶ 8. Based on his understanding of how mesenteric artery ischemia presents and develops in a patient, Dr. Uyeda has rendered the opinion that earlier intervention would have resulted in a better outcome for Margaret. *Id.* at 3, ¶ 9. Given these facts, Dr. Uyeda's opinion that NP Sholtz and/or the Hospital nursing staff's negligent failure to timely provide Margaret with the medical attention and intervention she needed proximately caused an increase in Margaret's injuries is scientifically reliable. While Dr. Uyeda has not supported his testimony with peer-reviewed articles or scientific, medical, or other studies, such support is not always necessary to find scientific reliability. *See Combs*, 148 Idaho at 143, 219 P.3d at 467.

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vomiting as indicative of mesenteric artery ischemic. Uyeda Decl., at Ex. A.

3. The Hospital has correctly stated the burden proof.

The Hospital asserts that because the Fisks failed to produce evidence on an essential element of their claim, it is entitled to summary judgment. The Court agrees. As indicated above, the Hospital may meet the genuine issue of material fact burden by establishing the absence of evidence on an element that the Fisks will be required to prove at trial. *See Dunnick*, 126 Idaho at 311, 882 P.2d at 478. Such an absence of evidence may be established either by an affirmative showing with the Hospital's own evidence or by a review of all the Fisks' evidence and the contention that such proof of an element is lacking. *See id.* Here, the Hospital has reviewed all the Fisks' evidence and asserted that the Fisks are unable to prove two essential elements of their claim: (1) the local standard of care and a breach thereof, and (2) the Hospital's conduct actually and proximately caused Margaret's injuries. Because the Court concluded that the declarations submitted by the Fisks to establish the local standard of care are inadmissible, the Fisks have failed to present admissible evidence on an essential element of their claim. Because the Fisks failed to present admissible evidence on an essential element of their claim, the Court concludes that the Hospital is entitled to summary judgment. *See Dulaney*, 137 Idaho at 164, 45 P.3d at 820.

C. Dr. McDonald's Motion for Summary Judgment.

1. Dr. McDonald's arguments regarding Fisks' experts.

Dr. McDonald makes arguments similar to those made by the Hospital regarding the deficiencies in Fisks' expert witness disclosure, discovery responses and testimony. Dr..McDonald points out that in Fisks' expert witness disclosure, the Fisks identify four retained experts who will testify to the local standard of health care practice: Dr. Uyeda, Kubiak, Nebeker), and Hawkins. Dr. McDonald asks the Court to exclude these four experts from submitting testimony in response to his summary judgment motion on the

ground that each retained expert failed to lay a proper foundation for his or her opinion in the expert witness disclosure. Mem. Supp. Jeffrey D. McDonald, M.D.'s Mot. Summ. J. (Mem. Supp. McDonald's Mot. Summ. J.) 6–18. Dr. McDonald explains that the Court's pre-trial scheduling order required the Fisks to disclose expert witnesses in conformity with Idaho Rule of Civil Procedure 26(b)(4). *Id.* at 6–9. To meet Rule 26(b)(4)'s requirements, Dr. McDonald argues that the Fisks needed to "disclose the bases upon which their experts were qualified to meet the foundational mandates of [Idaho Code] §§ 6-1012 and 6-1013." *Id.* at 9–12. Dr. McDonald asserts that the four listed experts did not disclose the foundational basis for their opinions and, consequently, are "not qualified to opine on the standard of care applicable to an on call neurosurgeon as that standard existed in the area served by [the Hospital] in March of 2015." *Id.* at 12. Dr. McDonald further points out that none of the Fisks retained experts disclose opinions critical of him. *Id.* at 9, 12.

In response, the Fisks contend that Dr. McDonald's argument is premature. Pls.' Mem. Opp'n Def. Jeffrey D. McDonald's Mot. Summ. J. (Pls.' Mem. Opp'n Def.'s Mot. Summ. J.) 9–14. They cite to *Lepper v. Eastern Idaho Health Services, Inc.*, 160 Idaho 104, 369 P.3d 882 (2016), and argue that Idaho Code §§ 6-1012 and 6-1013 set forth the requirements for admission of an expert's opinion in a medical malpractice case, and not pre-trial disclosure requirements. *Id.* at 10. The Fisks further argue that the Court's pre-trial scheduling order does not require them to disclose foundation for their experts' standard of care opinions. *Id.* at 10–14. While they recognize that a court's pre-trial scheduling order may require such a disclosure, the Fisks assert that the pre-trial scheduling order must expressly request foundational information. *Id.* In this case, the Fisks contend that the Court's pre-trial scheduling order, which incorporates Rule

26(b)(4)(A)(i), did not require foundation for their experts' standard of care opinions. *Id.*

At the outset, the Court notes that Dr. McDonald is asking the Court to sanction the Fisks for failing to comply with the Court's pre-trial scheduling order. Idaho law allows a district court to sanction a party for failing to comply with its pretrial orders. *Lepper*, 160 Idaho at 109, 369 P.3d at 887. The sanctions may include those listed in Idaho Rule of Civil Procedure 37(b)(2)(A). I.R.C.P. 16(e); *see also Lepper*, 160 Idaho at 109, 369 P.3d at 887. A district court's decision to impose discovery sanctions is discretionary and will be overturned only where the district court abused its discretion. *Lepper*, 160 Idaho at 109, 369 P.3d at 887 (citing *Edmunds v. Kraner*, 142 Idaho 867, 872–73, 136 P3d 338, 343–44 (2006)). To determine whether a district court abused its discretion, Idaho appellate courts consider three factors: "(1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles, and (3) whether it reached its decision through an exercise of reason." *Id.*

For the same reasons noted above in this Court's analysis of the Hospital's motion to strike, this Court is not persuaded that its pre-trial scheduling order required the Fisks to meet the foundational requirements of Idaho Code §§ 6-1012 and 6-1013 as part of their expert witness disclosures. To the extent that Dr. McDonald argues that such a conclusion is inconsistent with the Idaho Supreme Court's holding in *Lepper*, the Court disagrees. The *Lepper* opinion seems to primarily stand for the proposition that a district court may sanction a party for failing to comply with a pre-trial scheduling order only where the party had notice of what the district court expected for expert witness disclosures. *Lepper*, 160 Idaho at 110–11, 369 P.3d at 888–89. In making that point, the Idaho Supreme Court compared the expert witness disclosure before it to the expert

witness disclosures at issue in *Edmunds* and in *Easterling v. Kendall*, 159 Idaho 90, 367 P.3d 1214 (2016). *Id.* It is the *Lepper* Court's discussion of the *Easterling* opinion that Dr. McDonald uses to support his position and, arguably, portions of that discussion do support Dr. McDonald's argument. As noted by Dr. McDonald, the *Lepper* Court states that "[i]f a trial court in its discretion wishes to have an appropriate pretrial order containing names, opinions, conclusions and foundational requirements, an example of such an order is illustrated in" the *Easterling* decision. *Id.* at 111, 369 P.3d at 889 (emphasis added). The *Lepper* Court then explains that the district court's scheduling order in *Easterling* "required the parties identify each expert and provide the subject matter each witness was expected to testify to and all the information required under [Rule] 26(b)(4)." *Id.* (citing *Easterling*, 159 Idaho at __, 367 P.3d at 1222). Taken together, one might infer from these two statements that when a trial court's pre-trial order incorporates the requirements of Rule 26(b)(4), the trial court is notifying the parties that they are required to provide foundation for admission of their expert's opinion as part of his or her expert witness disclosure. However, this Court declines to make such an inference in this case primarily because the *Easterling* opinion does not appear to support that inference. In *Easterling*, the Idaho Supreme Court held that a district court did not abuse its discretion by excluding opinion testimony from the plaintiff's causation expert. *Easterling*, 159 Idaho at __, 367 P.3d at 1223. It explained that the "district found that [the plaintiff] had violated the court's scheduling order by disclosing what was in essence a new expert witness after the deadline for [plaintiff's] initial disclosures." *Id.* at __, 367 P.3d at 1222. In upholding the district court's decision, the Idaho Supreme Court summarized the relevant facts as follows:

> [The plaintiff] timely disclosed that [Bruce] Wapen [(Wapen)] would offer opinion testimony as to the appropriate standard of care and [the

> defendant's] breach thereof on October 11, 2013. However, there was no indication in the initial disclosure that Wapen would testify as to causation. [The plaintiff] first learned that Wapen would offer opinion testimony on causation during Wapen's deposition on November 21, 2013, over a month after [the Plaintiff's] initial disclosures were due. Two weeks later, [the plaintiff] served her December 5 supplementation, indicating that Wapen would offer opinion testimony on the issue of causation. However, this supplementation did not provide any of the information required to be disclosed for retained experts under Rule 26(b)(4). The supplementation merely stated that Wapen would testify consistent with his deposition testimony and then provided direct quotes taken from Wapen's deposition on November 21. The supplementation did not state what Wapen's opinions would be, the basis for Wapen's causation opinions, or any facts or data that Wapen relied on in developing those opinions. [The plaintiff] did not even attempt to provide such information until her January 8 supplementation and rebuttal disclosures, three months after [the plaintiff's] initial disclosures were due and one month after [the defendant's] initial disclosures were due.

Easterling, 159 Idaho at 367 P.3d 1214 at 1222. Thus, the issue in *Easterling* was whether Wapen could offer testimony on causation even though the plaintiff did not indicate Wapen would offer such testimony in her initial disclosures. The *Easterling* Court did not address whether Rule 26(b)(4)(A)(i) required the plaintiff to disclose foundation for her expert's opinion. In contrast, the issue in the case before the Court is whether Rule 26(b)(4)(A)(i) does require the Fisks to disclose a proper foundation for their expert's opinion testimony as to the local standard of care and, if so, whether they sufficiently disclosed such foundation. Because the *Easterling* opinion does not address the issue presented in this case, the Court concludes that Dr. McDonald's reliance on the *Easterling* case and, in turn, his reliance on the *Lepper* Court's discussion of *Easterling* is misplaced.

The Court further disagrees with Dr. McDonald's assertion that "basis for an opinion can only be interpreted to require the foundation for such opinion pursuant to I.C. § 6-103." Reply Mem. Supp. McDonald's Mot. Summ. J. 3–5. Rule 26(b)(4)(A)(i) does require the Fisks to disclose the "basis and reasons" for the expert's opinion.

However, while the "basis" for an opinion might be interpreted to mean the foundational basis required for admission of the opinion, it can also reasonably be interpreted to mean the factual basis for the expert's opinion. Because the basis for an expert's opinion is subject to two reasonable interpretations, the Court finds that its pre-trial scheduling order did not put the Fisks on notice that they needed to disclose foundation for their expert's opinions.

As noted above, while the Court's decision to impose sanctions is discretionary, the Court may impose sanctions only if the Fisks had adequate notice of the disclosure requirement at issue. *Id.* In this case, the Court does not think its pre-trial scheduling order, which incorporated Rule 26(b)(4)(A)(i), put the Fisks on notice that they needed to disclose information sufficient to lay a proper foundation for their retained experts' standard of care opinions such that the opinions are admissible under Idaho Code §§ 6-1012 and 6-1013. Thus, the Court concludes that sanctions are not warranted because the pre-trial scheduling order did not require the Fisks to disclose foundation for their experts' standard of care opinions, or put the Fisks on notice that such disclosure was required. Because the Court declines to sanction the Fisks as requested by Dr. McDonald, Dr. McDonald's request for summary judgment fails to the extent that it relies on the Court excluding the Fisks retained experts from testifying in this matter.

2. The Merits of Dr. McDonald's Motion for Summary Judgment.

    a. The Fisks have not presented an admissible expert opinion establishing the local standard of care for a neurosurgeon in Post Falls, Idaho in March of 2015.

Next, Dr. McDonald argues that he is entitled to summary judgment because the Fisks failed to disclose or submit admissible testimony from an expert qualified to testify to the local standard of care for a neurosurgeon in the relevant geographic area at the relevant time. Mem. Supp. McDonald's Mot. Summ. J. 9–13; Reply Mem. Supp.

McDonald's Mot. Summ. J. 11–12. Dr. McDonald also points out that none of the Fisks' retained experts have disclosed an opinion critical of his care and treatment of Margaret. Mem. Supp. McDonald's Mot. Summ. J. 9–13; Reply Mem. Supp. McDonald's Mot. Summ. J. 11–12.

The Fisks do not directly respond to Dr. McDonald's argument. Instead, the Fisks contend that Dr. McDonald "cannot escape liability for [NP Sholtz's] negligent acts and omissions." Pls.' Mem. Opp'n Def.'s Mot. Summ. J. 19–23. Based on that assertion, the Fisks then proceed to argue that the declarations submitted by Dr. Uyeda, Kubiak, Nebeker, and Hawkins demonstrate each expert's familiarity with the local standard of care for a nurse practitioner at an acute care facility in Post Falls, Idaho in March of 2015. *Id.*

There are two problems with the Fisks' argument. First, as explained below, the Court finds that the Fisks have not adequately pled that Dr. McDonald is vicariously liable for NP Sholtz's acts and omissions under a theory of express authority, implied authority, or apparent authority. Second, even if the Fisks had adequately pled the existence of an employer-employee or principal-agent relationship between Dr. McDonald and NP Sholtz, the Court has concluded above that Dr. Uyeda, Kubiak, Nebeker, and Hawkins failed to demonstrate actual knowledge of the local standard of health care practice for a nurse practitioner at an acute care facility in Post Falls, Idaho in March of 2015. Because Dr. Uyeda, Kubiak, Nebeker, and Hawkins failed to demonstrate actual knowledge of the local standard of care, the Court has held that their opinions did not meet the foundational requirements of Idaho Code § 6-1013 and, therefore, are inadmissible and cannot be used to oppose summary judgment. *Id.* Consequently, the Fisks cannot avoid Dr. McDonald's Motion for Summary Judgment by relying on the declarations submitted Dr. Uyeda, Kubiak, Nebeker, and Hawkins.

The Court also notes that the Fisks have not responded to Dr. McDonald's argument that they failed to disclose an expert opinion or offer into evidence an expert opinion critical of his treatment and care of Margaret. The Court's own review of the opinions submitted by the Fisks' retained experts reveal no criticisms of Dr. McDonald's treatment and care of Margaret. The opinions further fail to articulate the applicable standard of care for a neurosurgeon at an acute care facility in Post Falls, Idaho in March of 2015. From the Fisks' lack opposition and lack of evidence, it would seem that at the time of Dr. McDonald's summary judgment motion the Fisks' claim against Dr. McDonald was premised solely on the inadequately pled existence of a employer-employee or principal-agent relationship between himself and NP Sholtz. In doing so, the Fisks have erred.

In summary, the Court agrees with Dr. McDonald that the Fisks failed to present admissible expert testimony establishing the applicable local standard of care. They further failed to articulate any criticism of Dr. McDonald's treatment and care of Margaret.

b. The Fisks have failed to properly plead a theory of express authority, implied authority, or apparent authority in their Complaint.

In an effort to avoid summary judgment, the Fisks contend that Dr. McDonald is liable for NP Sholtz's acts and omissions because he was her employer. Pls.' Mem. Opp'n Def.'s Mot. Summ. J. 16–19. To support their assertion that Dr. McDonald was NP Sholtz's employer, the Fisks first direct the Court to the common law agency test used by the U.S. Supreme to determine whether an employee-employer relationship exists under ERISA. *Id.* at 17–18 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24, 112 S. Ct. 1344, 1348, 117 L.Ed.2d 581, 589–90 (1992)). They then point to deposition testimony from Dr. McDonald and NP Sholtz and NP Sholtz's

unsigned employment agreement as evidence that Dr. McDonald was NP Sholtz's employer. *Id.* at 18–19.

Dr. McDonald disputes the Fisks' assertion that he is NP Sholtz's employer and can be held vicariously liable for NP Sholtz's acts and omissions. Reply Mem. Supp. McDonald's Mot. Summ. J. 10–11. He makes three arguments. First, Dr. McDonald argues that the Fisks' Complaint does not allege that NP Sholtz was negligent or that she was the agent for Dr. McDonald. *Id.* at 11. Second, the evidence demonstrates that NP Sholtz was employed by North Idaho Neurosurgery and Spine, not Dr. McDonald. *Id.* Third, the Fisks failed to disclose competent expert testimony to show that NP Sholtz failed to comply with the local standard of care and, therefore, her principal North Idaho Neurosurgery and Spine cannot be held liable for her conduct. *Id.*

The Court agrees with Dr. McDonald that the Fisks' Complaint does not allege that NP Sholtz was the agent of Dr. McDonald, or that she was employed by Dr. McDonald. "A cause of action not raised in a party's pleadings may not be considered on summary judgment . . . ." *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 613, 114 P.3d 974, 983 (2005). In general, a pleading states a claim for relief if it contains a "short plain statement of the claim showing that the pleader is entitled to relief . . . ." I.R.C.P. 8(a)(1). "Under notice pleading, 'a party is no longer slavishly bound to stating particular theories in its pleadings.'" *Seiniger Law Office, P.A., v. N. Pacific Ins. Co.*, 145 Idaho 241, 246, 178 P.3d 606, 611 (2008) (quoting *Cook v. Skyline Corp.*, 135 Idaho 26, 33, 13 P.3d 857, 864 (2000)).

> A party's pleadings should be liberally construed to secure a just, speedy and inexpensive resolution of the case. The emphasis is to insure that a just result is accomplished, rather than requiring strict adherence to rigid forms of pleading. The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it.

Id. at 246–47, 178 P.3d at 611–12 (citations omitted) (internal quotation marks omitted).

As noted, the Fisks suggest that Dr. McDonald is vicariously liable for NP Shotltz's acts or omissions; however, the Fisks do not explain under what theory—express authority, implied authority, or apparent authority—supports their assertion of vicarious liability. Idaho recognizes three types of agencies: express authority, implied authority, and apparent authority. *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985). Neither express authority, implied authority, nor apparent authority are a cause of action; rather, they are legal theories through which agency arises. *Navo v. Bingham Mem. Hosp.*, 160 Idaho 363, 373, 373 P.3d 681, 693 (2016).

In their Complaint, the Fisks clearly allege a cause of action against Dr. McDonald for negligence. Compl. 7–8, ¶¶ 45–48. They state that Dr. McDonald was negligent in the care and treatment he provided Margaret and that his negligence injured Margaret. *Id.* However, while the Fisks state an underlying cause of action for negligence, they do not allege that Dr. McDonald is liable to them for NP Sholtz's acts and omissions, nor do the facts they recite in their Complaint suggest the possibility of liability arising under such a theory. For example, the Fisks do not allege the existence of an employer-employee or principal-agent relationship between Dr. McDonald and NP Sholtz, and they do not link Dr. McDonald's liability to NP Sholtz's conduct; rather, his alleged liability appears to be premised entirely on his own conduct (i.e., his failure to monitor Margaret's symptoms). Furthermore, when the Fisks' claim against the Hospital is compared to the claim against Dr. McDonald, it is evident that when drafting their Complaint the Fisks intended to hold the Hospital, but not Dr. McDonald, vicariously liable for the acts and omissions of its employees and agents. *Compare* Compl. 2, 7, ¶¶ 3, 43, *with* Compl. 2, 7, ¶¶ 4, 47. Altogether, there is nothing in the

Fisks' Complaint that would have put Dr. McDonald on notice that the Fisks intended to hold him liable for NP Sholtz's acts or omissions. As a result, the Court concludes that the Fisks have not properly pled a theory of express authority, implied authority, or apparent authority and, therefore, they are precluded from making that argument in response to Dr. McDonald's Motion for Summary Judgment.

c. Dr. McDonald has met his burden of proof.

In an attempt to avoid summary judgment, the Fisks assert that Dr. McDonald has failed to state what the local standard of care is and has failed to present evidence establishing the standard of care. Pls.' Mem. Opp'n Def.'s Mot. Summ. J. 14–16. Because Dr. McDonald failed to state the local standard of care and present relevant evidence, the Fisks contend that the burden of proof never shifted to them. *Id.* As indicated in the Standard of Review above, Dr. McDonald may meet the genuine issue of material fact burden by establishing the absence of evidence on an element that the Fisks will be required to prove at trial. *See Dunnick*, 126 Idaho at 311, 882 P.2d at 478. Such an absence of evidence may be established either by an affirmative showing with the Hospital's own evidence or by a review of all the Fisks' evidence and the contention that such proof of an element is lacking. *See id.* Here, Dr. McDonald has established that the Fisks are unable to prove an essential element of their claim, i.e., the local standard of care and a breach thereof. Because the Court has concluded that the declarations submitted by the Fisks to establish the local standard of care are inadmissible, the Fisks have failed to present admissible evidence on an essential element of their claim. Because the Fisks failed to present admissible evidence on an essential element of their claim, the Court concludes that Dr. McDonald is entitled to summary judgment. *See Dulaney*, 137 Idaho at 164, 45 P.3d at 820.

D. Miscellaneous.

The Court is certainly aware of the harsh result upon the Fisks, especially Margaret, created by this Court's decision granting summary judgment to the Hospital and Dr. McDonald. There is no doubt Margaret sustained serious injury and damage. As discussed above, there is evidence of causation that would allow her case to survive summary judgment, at least on that issue. However, Margaret's injuries and damage will not be addressed in this case because there has been insufficient testimony presented at this summary judgment juncture regarding the local standard of care at the relevant time period for the pertinent provider. Given the statute of limitation of Idaho Code § 5-219, it seems unlikely those injuries and damage will be addressed in any other case.

It seems likely to the Court that this deficiency could have been rectified at any time up to this Court's decision on summary judgment, but that deficiency has not been rectified. The Court notes that at no time has there been a request by counsel for Fisk under Idaho Rules of Civil Procedure 56(d)(1) to defer considering the Hospital's motion for summary judgment and Dr. McDonald's motion for summary judgment, nor has there been a request by counsel for Fisk to allow additional time for Fisk to obtain additional affidavits or declarations that could have addressed the local standard of care, as provided by Idaho Rule of Civil Procedure 56(d)(2). Just to be sure, the Court asked the attorneys for the parties at the May 23, 2018, summary judgment hearing if such a motion had been made. Even at hearing, no such motion was made.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court grants the Hospital's request to strike and exclude Smith as an expert witness; the Court grants the Hospital's request to limit

the testimony of the non-retained experts; and the Court should denies the remainder of the Hospital's Motion to Strike.

For the reasons set forth above, the Court grants the Hospital's Motion for Summary Judgment and the Court grants Dr. McDonald's Motion for Summary Judgment.

IT IS HEREBY ORDERED the Hospital's request to strike and exclude Smith as an expert witness is GRANTED; the Hospital's request to limit the testimony of the non-retained experts is GRANTED; all other aspects of the Hospital's Motion to Strike are DENIED.

IT IS FURTHER ORDERED the Hospital's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED Dr. McDonald's Motion for Summary Judgment is GRANTED.

Entered this 31st day of May, 2018.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 31 day of May, 2018, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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