STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

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

JENNIFER KAY WAGNER, *Plaintiff*, vs. **KOOTENAI HOSPITAL DISTRICT, dba KOOTENAI MEDICAL CENTER, ET AL,** *Defendants*.

Case No. **CV 2011 8191**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT KOOTENAI HOSPITAL DISTRICT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF WAGNER'S MOTION TO STRIKE AFFIDAVIT OF JAN MOSELEY

I. PROCEDURAL HISTORY.

This matter is before the Court on defendant Kootenai Hospital District's (KHD) "Defendant Kootenai Hospital District's Motion for Summary Judgment" (KHD MSJ), which was filed June 7, 2013. KHD requests summary judgment on grounds that KHD and its employees met the applicable community standard of care. KHD MSJ, p. 2. In support of its motion, KHD filed its "Defendant Kootenai Hospital District's Memorandum in Support of its Motion for Summary Judgment" (KHD Memorandum in Support), "Affidavit of Jan Moseley in Support of Defendant Kootenai Hospital District's Motion for Summary Judgment" (Moseley Affidavit), and "Affidavit of Patrick E. Miller in Support of Kootenai Hospital District's Motion for Summary Judgment" (Miller Affidavit).

In response, on June 26, 2013, plaintiff Jennifer Wagner (Wagner) filed her "Memorandum in Opposition to Defendant Kootenai Hospital District's Motion for Summary Judgment" (Wagner's Memorandum in Opposition) and "Affidavit of Naomi L.

Lungstrom" (Lungstrom Affidavit). In addition, Wagner filed her "Plaintiff's Motion to Strike Affidavit of Jan Moseley in Support of Defendant Kootenai Hospital District's Motion for Summary Judgment", "Memorandum in Support of Plaintiff's Motion to Strike the Affidavit of Jan Moseley in Support of Defendant Kootenai Hospital District's Motion for Summary Judgment " (Memorandum in Support Motion to Strike) and "Affidavit of Erica S. Phillips in Support of Plaintiff's Motion to Strike Affidavit of Jan Moseley in Support of Defendant Kootenai Hospital District's Motion for Summary Judgment" (Phillips Affidavit).

On July 2, 2013, KHD filed its "Defendant Kootenai Hospital District's Reply Memorandum in Support of its Motion for Summary Judgment and Opposition to Plaintiff's Motion to Strike" (MSJ Reply Memorandum).

On July 3, 2013, Wagner filed her "Reply Memorandum in Support of Plaintiff's Motion to Strike the Affidavit of Jan Moseley" (Motion to Strike Reply).

Oral argument on Wagner's Motion to Strike and KHD's Motion for Summary Judgment was held on July 9, 2013.

II. FACTUAL BACKGROUND.

The Court has previously set forth the factual background of this case in its May 21, 2013, "Memorandum Decision and Order Denying Plaintiff's Motion for Leave to File Second Amended Complaint to Allege a Claim for Punitive Damages, and Memorandum Decision and Order Granting Plaintiff's Motion for Partial Summary Judgment" (May 21, 2013, Memorandum Decision):

> A brief non-technical summary of the facts is as follows: In an effort to self-detox from alcohol, Wagner over-hydrated herself by drinking large amounts of fluids, which resulted in dangerously low sodium levels in her body. Wagner had a seizure and was taken to Kootenai Medical Center, where she claims she was administered a solution of intravenous sodium at too fast a rate causing permanent damage to her brain. Failure to immediately address her low sodium

level would have resulted in brain damage. However, replacing her sodium too quickly also causes brain damage. What is in dispute is what is the standard of care regarding the maximum allowable rate at which a physician should replace the sodium.

This case is a medical malpractice case arising from treatment Wagner received at Kootenai Medical Center (KMC) on October 18-21, 2009. Statement of Facts, p. 2. Prior to her treatment, Wagner had an alcohol dependency problem she had battled on and off for several years, for which she attempted inpatient and outpatient rehabilitation on multiple occasions. *Id*. On several occasions prior to the events surrounding this lawsuit on October 18-21, 2009, Wagner's alcohol issues resulted in Wagner's hospital admission to obtain intravenous fluids, resuscitation relating to seizures and other alcohol consumption or withdrawal related symptoms, *Id*.

In mid-October 2009, Wagner had found employment and so attempted to wean herself off of alcohol by consuming large amounts of water, cranberry juice and other fluids. *Id*. Wagner began her self-weaning off alcohol and consumption of other fluids on October 15, 2009. Rockwood's Response to MPSJ, p. 3. On October 17, 2009, Wagner began vomiting and on October 18, 2009, Wagner had a seizure at which point her friend Laurie Gold (Gold) called 911. Statement of Facts, p. 2. Paramedics arrived and took Wagner to KMC's Emergency Department, arriving at approximately 2:46 p.m. *Id*. She was initially seen by Wallace Chun, M.D. (Chun), an emergency medicine specialist, who ordered fluid replacement at approximately 3:04 p.m. *Id*. Chun documented the following diagnoses: alcohol withdrawal seizure; hyponatremia; altered level of consciousness; delirium with postictal state and doubt status elepticus. Statement of Facts, p. 3. Wagner was then transferred to the care of Kevin Strait, M.D. (Strait), the on-call internal medicine/critical care medicine specialist, in the intensive care unit (ICU) based on her continued confused state, severe hypoatremia and hypokalemia. *Id*.

Strait assumed care of Wagner from approximately 5:33 p.m. on October 18, 2009, to approximately 7:00 a.m. on October 19, 2009. *Id*. At approximately 10:30 p.m. on October 18, 2009, Strait ordered sodium replacement of 3% hypertonic saline at 100 cc/hr by IV. *Id*. At approximately 7:00 a.m. on October 19, 2009, James Osmanski, M.D. (Osmanski), another internal medicine/critical care specialist, assumed care of Wagner. *Id*. Osmanski contacted Brendan Mielke M.D. (Mielke), a nephrology specialist, regarding Wagner's electrolyte replacement therapy at which point Mielke began writing orders at approximately 10:15 a.m. *Id*. Though the use of IV normal saline and hypertonic saline, Wagner's sodium levels increased 20 mm/L over the first 25 hours and 25 mm/L over the first 36 hours of treatment. *Id*. The sodium increased 23 mm/KL over the first 24 hours and 29 mm/L over the first 48 hours of treatment following the lowest sodium laboratory entry of 102 mm/L at 12:44 a.m. on October 19, 2009. Statement of Facts, pp. 3-4.

> Mielke was an employee of Rockwood Clinic, P.S. (Rockwood). Complaint, p. 3, ¶ 8; Answer of Brendan Mielke, M.D., and Rockwood Clinic, P.S. d/b/a Rockwood Kidney and Hypertension Center – Coeur d'Alene, pp. 2-3, ¶ 8.
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> On October 29, 2009, Wagner, pursuant to an MRI, was diagnosed with Central Pontine Myelinolysis (CPM), a severe permanent brain injury. Statement of Facts, p. 4.
>
> Wagner alleges all defendants were negligent in their care and treatment by allowing her serum sodium to increase at a rate "grossly exceeding community standards of care for internal medicine, critical care and nephrology specialists prevailing at the time and place of treatment." *Id*.
>
> In their response, Rockwood states Dr. Geoffrey Emry (Emry), a board-certified family physician, saw Wagner on October 3, 2008, almost one year prior to the incident leading up to this lawsuit. Rockwood's Response to MPSJ, p. 2. Emry instructed Wagner to cease consuming alcohol and recommended she enter into a treatment program. *Id*. On October 17, 2008, Emry again saw Wagner and stated her blood tests were consistent with liver damage. *Id*. Lab tests by Emry confirmed Wagner suffered from severe alcoholism and alcoholic hepatitis. KHD Memo in Opposition to MPSJ, p. 3. Despite Emry's advice that Wagner stop drinking in the setting of a supervised inpatient treatment, Wagner declined inpatient alcohol treatment. Rockwood's Response to MPSJ, pp. 2-3. Emry saw Wagner again on October 22, 2008, at which point he again advised Wagner to enter inpatient treatment, which she declined. Rockwood's Response to MPSJ, p. 3. Rockwood argues Wagner's attempts to wean herself from alcohol were dangerous and unreasonable given the nature of her past experiences and advice from medical providers. Rockwood's Response to MPSJ, p. 4.

May 21, 2013, Memorandum Decision, pp. 5-8.

III. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-

moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

In order to avoid a defense's 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 Regional Medical Center*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002). Such expert testimony is only admissible if the plaintiff lays the foundation required under I.C. § 6-1013. *Id*. Idaho Code § 6-1013 requires a foundation must first be laid. That statute, as interpreted by the Idaho Supreme Court in *Dulaney*, states the proponent must establish:

> (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which is expert opinion testimony is addressed.

137 Idaho 160, 164, 45 P.3d 816, 820.

The applicable community standard of care is defined in I.C. § 6-1012. That statute, as interpreted by the Idaho Supreme Court in *Dulaney,* requires the applicable community standard of care is:

> (a) the standard of care for the class of health care provider to which the defendant belonged and was functioning, taking into account the defendant's training, experience, and fields of medical specialization, if any; (b) as such standard existed at the time of the defendant's alleged negligence; and (c) as such standard existed at the place of the defendant's alleged negligence.

137 Idaho 160, 164, 45 P.3d 816, 820. (internal citations omitted).

Additionally, I.R.C.P. 56(e) imposes additional requirements for the admission of expert medical testimony, including: 1) the party offering such evidence must show it is based upon the witness' personal knowledge and it sets forth facts which would be admissible in evidence; 2) the party offering the evidence must alternatively show the witness is competent to testify about the matters stated in the testimony; and 3) statements which are conclusory or speculative do not satisfy either the requirements of admissibility or competency under I.R.C.P. 56(e). *Id*.

An expert testifying as to the standard of care in medical malpractice suits must show he or she is familiar with the standard of care for the particular care professional for the relevant community and time and state how he or she became familiar with that standard of care. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000). An out-of-state expert may obtain knowledge of the local standard of care by inquiring of a local specialist. *Id*.

IV. ANANLYSIS OF PLAINTIFF'S MOTION TO STRIKE.

There is an underlying issue that must be primarily addressed; that of Wagner's Motion to Strike. The Supreme Court has made it clear that before a motion for summary judgment can be decided, the Court must address the admissibility of expert testimony. *Suhadolnik v. Pressman*, 141 Idaho 110, 114, 254 P.3d 11, 15 (2011). The Supreme Court has also made it clear that the applicable standard of review is an abuse of discretion standard. *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221-22, 159 P.3d 856, 858-59 (2007). The "liberal construction and reasonable inferences standard" does not apply in such a case. *Suhadolnik*, 141 Idaho 110, 114, 254 P.3d 11, 15. Wagner seeks to strike paragraphs 4 through 6 of the affidavit of Jan Moseley (Moseley). Motion to Strike, p. 2. Moseley's affidavit reads:

> 4. In 2009, I was employed at Kootenai Medical Center, licensed to practice nursing in the state of Idaho, and familiar with the standards and practices of nursing care, including the applicable community standard of care, at Kootenai Medical Center for those nursing functions and actions, and that nursing care, as provided to Plaintiff during her hospitalization at Kootenai Medical Center.
>
> 5. I am familiar with and have actual knowledge of the standard of nursing practice applicable to nurses providing nursing services to patients at Kootenai Medical Center in Coeur d'Alene, Idaho, in 2009.
>
> 6. It is my opinion that the nursing care provided to Jennifer K. Wagner and the nurses' actions associated with, and part of, the patient's hospital care, complied in all respects with the standard of health care practice applicable to nurses engaged in providing nursing care, including critical care, in Coeur d'Alene, Idaho, in 2009. It is my opinion that the nursing care provided to Jennifer K. Wagner met the applicable standard of care, and was consistent with the care typically provided to patients in the Coeur d'Alene community. My opinion is intended to encompass all aspects of the nursing care provided to Jennifer K. Wagner, while admitted at Kootenai Medical Center in October, 2009. I have reviewed the patient's hospital and medical record for the period of her admission at Kootenai Medical Center in 2009.

Affidavit of Jan Moseley in Support of Defendant Kootenai Hospital District's Motion for Summary Judgment (Moseley Affidavit), pp. 2-3, ¶¶ 4-6. Paragraphs 1-3 of Moseley's

affidavit cover Moseley's education and experience. Paragraph 7 of Moseley's affidavit is Moseley's opinion "…that nothing the nurses did, or the actions they performed in any way caused or contributed to the alleged damages set forth in the Plaintiff's First Amended Complaint." *Id.,* p. 3, ¶ 7. The above describes the entire extent of Moseley's affidavit.

Wagner argues foremost that Moseley's affidavit fails to set forth "necessary facts that demonstrate how she has personal knowledge of **foundational** facts required for such testimony." Memorandum in Support of Motion to Strike, p. 4. (emphasis in original). Wagner claims Moseley's statement that "she is familiar" with the local standard of care is not sufficient. *Id*. Wagner admits Moseley's affidavit states Moseley was employed at KMC in 2009 and licensed to practice nursing in the State of Idaho, but argues she fails to state whether she was actually practicing nursing at KMC at the time of the incident and fails to explain how her duties in 2009 provided her with a relevant standard of care in this case. *Id*. Wagner states Moseley provides no specific facts as to how her education and employment provided her with the relevant standards of care for intensive care nurses. *Id*. Additionally, Wagner states Moseley "never bothers to identify what that relevant standard of care might be.", and "Her testimony is nothing but a bald conclusion and must be stricken." *Id*. The Court agrees with Wagner's assessment; in that Moseley's affidavit does not describe the relevant standard of care.

Wagner also argues Moseley's affidavit contains conclusory statements regarding KMC's compliance with the "unidentified standard of care." *Id*. at 5. Specifically, Wagner points to Moseley's statement in Paragraph 6 of her affidavit: "the nursing care provided to Jennifer K. Wagner met the applicable standard of care, and was consistent with the care typically provided to patients in the Coeur d'Alene community". *Id*. The

Court agrees and finds that because Moseley's affidavit is devoid of any description of the applicable standard of care, Moseley's affidavit is conclusory. "Conclusion" is defined as "the necessary consequence of two or more propositions taken as premises; *esp*: the inferred proposition of a syllogism." Webster's Ninth New Collegiate Dictionary, p. 273 (1983). A "syllogism" is "a deductive scheme of a formal argument consisting of a major and a minor premise and a conclusion (as in "every virtue is laudable; kindness is a virtue; therefore kindness is laudable")". *Id.,* p. 1195. In the present case, the syllogism would be: "The standard of care for nurses at Kootenai Medical Center in 2009 was 'X'; all of Kootenai Medical Center's nurses did 'X'; therefore, Kootenai Medical Center's nurses met the standard of care." The fundamental deficiency is Moseley does not tell us what "X" is. If this were a buried treasure map, Moseley has not marked the location of the treasure. If this were a business objective, we would have the genesis of a Dilbert panel for tomorrow's newspaper.

Wagner has provided this Court with a Bonneville County, Idaho, District Court decision by Judge Richard T. St. Clair, issued February 24, 2012, in *Young v. Packer,* Bonneville County case CV-10-1949, a medical malpractice case. In *Young*, the defendant doctor filed an affidavit. District Judge St.Clair noted:

> Dr. Packer's affidavit states that he is an osteopathic physician, licensed in Idaho and practicing family medicine in Idaho Falls from 2000 to the present. From that foundation alone, he further testified in part:
>
> > 5. I am familiar with, and have actual personal knowledge to a reasonable degree of medical certainty of, the local community standard of health care practice applicable to a physician practicing as a family practice physician in Idaho Falls, Idaho, as it existed, then and there, in March and April 2008.
> >
> > . . .
> >
> > 7. I am familiar with, and have actual and personal knowledge to a reasonable degree of medical certainty of, the local community standard of health care practice applicable to a family practice clinic providing health care in Idaho Falls, Idaho, as it existed in March and April 2008. The standard of health care

> practice for a family practice clinic is the local community standard of health care practice for a family practice clinic providing patient care services in Idaho Falls, Idaho.
>
> From the foregoing . . . Dr. Packer opines that his personal diagnosis and treatment of Young, and that of Family First, complied with the local standard of care for family practice physicians in March and April, 2008.

Phillips Affidavit, p. 2, ¶ 2, Exhibit A, p. 7. District Judge St. Clair in *Young* held:

> In a community where more than one physician or clinic practices a specialty, such as family medicine, an expert cannot know the "standard of care" of the specialty without either consulting others practicing the specialty in the community, or reviewing medical records generated by other specialists. A single physician's practice does not alone establish a community standard. The community standard of care is the "care typically provided under similar circumstances by the relevant health care provider in the community." While this Court suspects that Dr. Packer can lay a foundation for his conclusions in paragraphs 5 and 7 of his affidavit, by testifying about his knowledge of what other Idaho Falls family practice physicians were "typically" doing in March and April, 2008, the present record is cold as to what that foundation knowledge might be. Further, unlike the affidavit in *Suhadolnik* the moving party's affidavit **does not "provide a description of the standard."** From a reading of Dr. Packer's affidavit, the Court cannot ascertain what the "typical" family practice physician in Idaho Falls, in March and April, 2008, does to diagnose and treat a patient presenting the same complaints, exam findings, and test results as Young. Further foundation must be laid by Dr. Packer before paragraphs 5 through 8 would be admissible.
>
> Therefore, the Court will grant the plaintiff's motion to strike paragraphs 5 through 8 of Dr. Packer's affidavit.

Id. at 8. (bold added). When citing to *Suhadolnik*, Judge St.Clair refers to a footnote in *Suhadolnik v. Pressman*, 151 Idaho 110, 254 P.3d 11 (2011), in which the Idaho Supreme Court states"

> While the Suhadolniks also argue that Dr. Pressman's affidavit was too conclusory to meet Respondent's initial summary judgment burden, this evidentiary issue was not separately raised as an issue on appeal. Furthermore, this Court has held that a moving party must support their summary judgment motion with evidence, but it is the adverse party that must come forward with specific facts to support their claim. Therefore, Dr. Pressman's affidavit, which demonstrated knowledge of a local standard of care, **provided a description of that standard**, and alleged compliance with that standard, was sufficient to shift the burden to the plaintiffs to establish he foundation for Dr. Hofbauer's testimony.

Suhadolnik, 151 Idaho 110, 115 n. 4, 254 P.3d 11, 16, n. 4. (bold added). Thus, the Idaho Supreme Court has held it is essential that the actual standard of care be described.

This Court finds that in the instant case, Moseley's affidavit meets the Idaho Code § 6-1013 requirements as set forth above in *Dulaney* that: (a) the opinion expressed is held by her; (b) she can testify to the opinion with a reasonable degree of medical certainty; and (c) she possesses professional knowledge and expertise. Moseley Affidavit, p. 2. However, Moseley's affidavit is wholly devoid of the next criteria set forth above in *Dulaney*, "(d) that the expert witness has actual knowledge of the applicable community standard of care to which is expert opinion testimony is addressed." 137 Idaho 160, 164, 45 P.3d 816, 820. Moseley may well have actual knowledge of the applicable community standard of care, but the Court is completely unable to make that determination until she states what that standard of care is.

Moseley gives her credentials, including her current employment as the Director of Nursing Systems, Operations and Innovation at KMC, her schooling and her certification and experience (35 years in med-surg, critical care, obstetrical and post-anesthesia recovery nursing and certified in critical care nursing and advanced certification in nursing administration). Moseley Affidavit, p. 2, ¶¶ 2-3. Moseley states in 2009:

> . . . I was employed at Kootenai Medical Center, licensed to practice nursing in the state of Idaho, and familiar with the standards and practices of nursing care, including the applicable community standard of care, at Kootenai Medical Center for those nursing functions and actions, and that nursing care, as provided to Plaintiff during her hospitalization at Kootenai Medical Center.

Id., ¶ 4. But Moseley's failure to set forth the applicable standard of care is fatal to KHD's motion for summary judgment.

Moseley further states she is "familiar with and [has] actual knowledge of the standard of nursing practice applicable to nurses providing nursing services to patients at Kootenai Medical Center in Coeur d'Alene, Idaho, in 2009." *Id*., ¶ 5. Her opinion states:

> It is my opinion that the nursing care provided to Jennifer K. Wagner and the nurses' actions associated with, and a part of, the patient's hospital care, complied in all respects with the standard of health care practice applicable to nurses engaged in providing nursing care, including critical care, in Coeur d'Alene, Idaho, in 2009. It is my opinion that the nursing care provided to Jennifer K. Wagner met the applicable standard of care, and was consistent with the care typically provided to patients in the Coeur d'Alene community. My opinion is intended to encompass all aspects of the nursing care provided to Jennifer K. Wagner, while admitted at Kootenai Medical Center in October, 2009. I have reviewed the patient's hospital and medical record for the period of her admission at Kootenai Medical Center in 2009. . . It is my opinion that nothing the nurses did, or the actions they performed in any way caused or contributed to the alleged damages set forth in the Plaintiff's First Amended Complaint.

Id. at 3, ¶¶ 6-7. That opinion is wholly conclusory without Moseley actually setting forth the standard of care. There is no description by Moseley of what a nurse should or should not do in this situation, only her conclusory opinion that the nurses here did it, whatever "it" is. Wagner's Motion to Strike the Affidavit of Jan Moseley must be granted. Without Moseley's affidavit, KHD's Motion for Summary Judgment must be denied, the lack of an admissible affidavit is dispositive of KHD's Motion for Summary Judgment.

V. ANALYSIS OF KHD's MOTION FOR SUMMARY JUDGMENT.

Even if Wagner's Motion to Strike were denied, KHD's Motion for Summary Judgment must still be denied.

As stated above, KHD seeks summary judgment on the grounds that KHD and its employees met the applicable community standard of care. KHD MSJ, p. 2. Even if this Court denied KHD's motion to strike and were able to consider KHD's expert Moseley's opinion, Wagner argues its own expert, Naomi Lungstrom (Lungstrom) demonstrates

that genuine issues of fact remain regarding whether KMC breached the applicable standard of health care practice. Wagner's Memorandum in Opposition, p. 5. This Court agrees. In her affidavit, Lungstrom states she is a registered nurse in Washington and provides her curriculum vitae. Lungstrom Affidavit, p. 2, ¶ 1. Lungstrom states she is familiar with the prevailing community standards of care for registered nurses in providing critical care nursing to patients in an acute care facility suffering from severe hyponatremia in Coeur d'Alene, Idaho in 2009 through her research, education, experience and teaching as identified within her CV. *Id*., ¶ 2. She states she has taught critical care nursing to several nurses who have practiced at KMC and has spoken to a nurse who provided treatment to patients presenting with hyponatremia at KMC in October 2009. *Id*. From these things, Lungstrom states she is aware there were no practical differences between the community standards of care at KMC in October 2009 and the national standards of care of which she is familiar in treating such patients. *Id*. In preparation, Lungstrom also states she has reviewed the medical records relating to the care and treatment of Wagner and has based her opinions on such. *Id*., ¶ 3.

In her affidavit, Lungstrom provides a number of opinions regarding what nurses are trained to do generally as well as in the care of a person who is chronically hyponatremic. One such statement is nurses are trained to understand that use of 3% hypertonic saline is rarely indicated and, when ordered, must be administered with great care and, as such, are trained to closely monitor laboratory results during the replacement of sodium, especially during periods when IV 3% hypertonic saline is administered, and are trained to follow the physician's orders carefully, to immediately communicate lab results to the attending physician and always document such communication and actions in the patient's chart. *Id.*, p. 4, ¶ 11. Essentially, this is part

of the nursing standard of care, in Lungstrom's opinion. Lungstrom also states her opinion that nurses have the duty to be a patient's advocate, such that if a physician's actions or inactions put the patient, in the nurse's opinion, at risk of avoidable injury, and the physician has not altered the course despite warnings, the nurse should "utilize the chain of command within the hospital to ensure that his/her concerns are properly addressed." *Id*.,¶ 12. This is the rest of the standard of care, in Lungstrom's opinion. Thus, Lungstrom set forth, at least implicitly, what Moseley failed to set forth in any way, shape or form: the applicable standard of care. Lungstrom then indicates a number of instances where documentation of certain situations in the present case did not occur. *Id*., p. 5, ¶¶ 14-17. Lungstrom's affidavit concludes by opining the nursing staff's actions were a breach of prevailing community standards of care in Coeur d'Alene, Idaho in October 2009. *Id.,* p. 6, ¶ 18.

KHD argues:

> Ms. Lungstrom states that, in general, nurses "are *trained*…to always document such communications and actions in the patient's chart." Aff. Lungstrom, ¶ 11 (emphasis added). However, she does not ever contend that this training constitutes the standard of care for nursing in Coeur d'Alene, Idaho in 2009.

MSJ Reply Memorandum, p. 10. This argument is somewhat accurate, but not persuasive. The argument is correct, that Lungstrom in her affidavit does not expressly state that what the nurses are trained to do constitutes the standard of care, but Lungstrom's affidavit certainly implies these actions which should be taken by nurses in this situation are the standard of care. That is sort of the definition of "standard of care". KHD's argument ignores that fact and also ignores its own quote "'The standard of care is simply the care typically provided under similar circumstances by the relevant type of health care provider in the community at the time and place of the alleged negligent act.'

Shane v. Blair, 139 Idaho 1236, 130, 75 p.3D 180 (2003)." *Id.,* p. 4. Lungstrom clearly and unequivocally opines that nurses are: 1) trained to closely monitor laboratory results during the replacement of sodium, especially during periods when IV 3% hypertonic saline is administered; 2) trained to follow the physician's orders carefully; 3) to immediately communicate lab results to the attending physician; and 4) always document such communication and actions in the patient's chart. Affidavit of Lungstrom, p. 4, ¶ 11. While not labeling it as a "standard of care", Lungstrom clearly expresses her opinion of what it is that the nurses must do, and that, at least inferentially, is the standard of care. KHD's expert Moseley did not even tell us what it is that nurses are supposed to do or not do in the medical situation at hand.

KHD argues there is no dispute of material fact because Lungstrom does not contend the nurses actually failed to timely, accurately and effectively communicate with physicians, but only refers to a lack of documentation of such communications. MSJ Reply Memorandum, p. 10. This is argument is simplistic and circular because unless the nurse happens to be in the patient's room at the same time as the physician, how is a nurse to communicate to the physician other than though documentation in the chart notes? Additionally, KHD asserts the physicians themselves have not claimed the nursing staff failed to communicate. *Id*. KHD states Osmanksi testified it was his practice to review lab results when they came in and when the sodium value reflected 142, Osmanski testified he was aware of that value at the time. *Id*. KHD also states Mielke testified he read all of the available labs when he first saw Wagner and continued to review the labs during his treatment of her. *Id*. KMC claims Mielke also testified to having seen the 142 sodium value, but did not give it any clinical significance, suspecting it was a misdraw. *Id*. KHD argues it was the physicians who made the

medical decision not to order a redraw. *Id*. Again, all of this misses the point. If the standard of care, as expressed in the opinion of Lungstrom, is that nurses have a duty to "closely monitor laboratory results," "immediately communicate laboratory results to the attending care provider(s) and to always document such communications in the patient's chart" (Affidavit of Lungstrom, p. 4, ¶ 11), and the nurses involved did not do so, then what difference does it make that the physicians have not claimed the nurses failed to communicate? Lungstrom's affidavit creates at least at this juncture, a dispute of material fact as to the standard of care, creates a dispute of fact as to whether KHD's nurses violated that standard of care. Whether or not the physicians claim the nurses failed to communicate goes more to the issue of causation, than it does to the issue of the standard of care and its breach.

To the extent Lungstrom states nurses have a duty to be a patient advocate, KHD states: "To the extent that Ms. Lungstrom argues that the nurses should have attempted to correct or prescribe a different course of treatment for Plaintiff, such a standard would apply to the practice of medicine rather than the practice of nursing and would constitute a felony." *Id.,* p. 11, citing I.C. § 54-1804(2). This argument misstates Lungstrom's affidavit. Nowhere does Lungstrom opine that a nurse should correct or prescribe a different course of action. What Lungstrom stated was her opinion that:

> 12. Another responsibility of nursing staff providing care to such a patient is the nurse's duties relating to patient advocacy. Where a physician's actions or inactions put the patient, in the nurse's opinion, at risk of avoidable injury, the nurse should communicate with the physician to address his/her concern. If, after speaking with the physician, the nurse still believes that the ordered course of treatment is not in the best interest of the patient, the nurse should utilize the chain of command within the hospital to ensure that his/her concerns are properly addressed.

Affidavit of Lungstrom, p. 4, ¶ 12. Lungstrom did not place the power to "correct or prescribe a different course of treatment" with KHD's nurses. Lungstrom simply stated

the duty of the nurse if he or she sees something wrong, is to communicate that to the physician, and if no action is taken at that point, then to communicate up the chain of command. Would any hospital really argue there is any different standard of care for its employee nurses?

Even if KHD's expert Moseley had articulated her opinion of the applicable standard of care (which she did not), Wagner's expert has at a minimum created a jury question regarding the standard of care, Summary judgment must be denied.

Finally, at oral argument on July 9, 2013, counsel for KHD emphasized that Lungstrom expressed her opinion with the assumption that Wagner was "chronically" hyponatremic, when, in fact, according to KHD's counsel, the evidence shows Lungstrom was "acutely" hyponatremic. Granted, Lungstrom's opinion mentions "chronic" hyponatremia. Affidavit of Lungstrom, p. 4, ¶¶ 10, 11, That fact is no reason to grant summary judgment for KHD. At the very least, it illustrates an issue of fact as to whether Wagner was acutely or chronically hyponatremic. Lungstrom does not address whether chronic or acute hyponatremia would affect her opinions, and Moseley does not mention the status of acute vs. chronic hyponatremia at all.

VI. CONCLUSION AND ORDER.

For the reasons stated above, this Court grants Wagner's motion to strike and denies KHD's motion for summary judgment.

IT IS HEREBY ORDERED Wagner's Motion to Strike is GRANTED.

IT IS FURTHER ORDERED KHD's Motion for Summary Judgment is DENIED.

Entered this 10th day of July, 2013.

_____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Eric S. Rossman	208-780-3930	Robert F. Sestero, Jr.	509-455-3632
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_____
Jeanne Clausen, Deputy Clerk