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

CHARLOTTE A. PRINTZ, a wife and heir of Peter A. Printz, deceased, *Plaintiff*, vs. **RICHARD B. CALDWELL, M.D., et al.** *Defendants*.	Case No. **CV 2009 1614** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING DEFENDANT CALDWELL'S MOTION TO STRIKE AND DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

I. PROCEDURAL HISTORY AND BACKGROUND.

This is a wrongful death lawsuit involving the death of Peter Printz, brought by his surviving spouse, Charlotte Printz (Printz). Printz alleges the malpractice of two physicians resulted in Peter Printz' death. Currently at issue before the court are defendant Dr. Richard Caldwell's (a Family Practice specialist) and defendant Dr. William Ganz' (a neurosurgeon) motions for summary judgment, Dr. Caldwell's Motion to Strike the Affidavit of Dr. Howard Miller (plaintiff's expert in Family Practice) and plaintiff Printz' Motion for a Protective Order.

These motions are intertwined. The motions for summary judgment were filed first, and claim Printz cannot proceed on her malpractice claim due to Printz not having any proof that either physician violated the local standard of care of applicable to their specialty. Both motions for summary judgment are supported by affidavits of each defendant physician, and those affidavits each state they did meet the standard of care

when caring for Peter Printz. After these motions for summary judgment and the affidavits of Dr. Caldwell and Dr. Ganz were filed, Printz filed the affidavits of her experts, Dr. Miller (Family Practice) and Dr. Emmons (neurosurgery). Once those affidavits were filed, Dr. Caldwell filed his Motion to Strike the Affidavit of Dr. Howard Miller. Dr. Caldwell alleged insufficiency in Dr. Miller's affidavit because Dr. Miller did not disclose the identity of the consulting physicians he used to familiarize himself with the local standard of care. Printz then filed a Motion for a Protective Order seeking to have this Court order the identity of the consulting physicians Miller used to familiarize himself with the local standard of care remain confidential.

As the analysis below shows, the two Motions for Summary Judgment, one by Dr. Caldwell and one by Dr. Ganz must at this point be denied. *Clarke v. Prenger,* 114 Idaho 766, 768, 760 P.2d 1182, 1184 (1988). The Motion to Strike filed by Dr. Caldwell must be denied. Printz' Motion for a Protective Order must be denied. Printz will have to disclose the identity of those local physicians whom her experts rely upon in order for this litigation to proceed. Should Printz fail to make such disclosure, Dr. Caldwell and Dr. Ganz may again move for summary judgment.

Peter Printz visited Dr. Richard Caldwell (Caldwell) on December 19, 2006, complaining of numbness in his hands. Complaint, p. 2, ¶3. A test revealed Peter Printz had a high mean corpuscular volume (MCV), which meant his red blood cells were too large and suggested a low vitamin B-12 level. *Id.* Printz, the surviving spouse, alleges Dr. Caldwell could have prevented Peter Printz' death with a lab test for a vitamin B-12 level. *Id.* On March 19, 2007, Peter Printz again visited Dr. Caldwell with increasingly severe symptoms and Dr. Caldwell referred Peter Printz to a neurosurgeon. *Id.,* ¶ 4. On June 13, 2007, as recommended by Dr. Caldwell, Peter Printz visited

neurosurgeon Dr. William Ganz. *Id.,* ¶ 6. Peter Printz' condition continued to deteriorate and he visited Dr. Caldwell again on June 18, 2007. *Id.,* p. 3, ¶ 7. At that visit Dr, Caldwell again ordered lab work and again failed to investigate the high MCV. *Id.* One month later, on July 13, 2007, Peter Printz visited Dr. Ganz again. *Id.,* ¶ 8. Instead of investigating the high MCV, Dr. Ganz made plans for a neck surgery on Peter Printz. *Id.* In August 2007, Peter Printz again saw Dr. Ganz, who ordered preoperative lab work. *Id.,* ¶ 9. The lab results showed the same high MCV, but Dr. Ganz did not investigate the elevated level and instead operated on Peter Printz' neck. *Id.* On October 24, 2007, Dr. Ganz saw Peter Printz and noted deteriorated motor function, mental function and weakness in the arms and legs, but did not investigate further. *Id.,* pp. 3-4, ¶ 11.

Peter Printz' condition continued to worsen, and an MRI performed in the emergency room revealed severe spinal cord degeneration. *Id.,* p. 4, ¶ 12. The emergency room doctor ordered a vitamin B-12 level check and noted a severely low vitamin B-12 level. *Id.* On November 29, 2007, Peter Printz was admitted to the hospital for severe vitamin B-12 deficiency and paralysis of his arms and legs. *Id.,* ¶ 13. The treating neurologist at the hospital, Dr. Lea, noted Peter Printz' vitamin B-12 level was "as low as anyone has ever seen it" and that it caused Peter Printz' symptoms. *Id.* Peter Printz died on January 11, 2008. *Id.,* ¶ 15.

Printz filed her Complaint on February 26, 2009. Printz alleges Dr. Ganz' and Dr. Caldwell's failure to investigate the high MCV levels resulted in neurologic damage and deterioration, twelve months of suffering, and ultimately the death of Peter Printz. *Id.,* pp. 5-8, ¶¶ 17-33.

On January 13, 2010, Dr. Caldwell filed his Motion for Summary Judgment,

arguing Printz has failed to comply with I.C §§ 6-1012, 1013. Also on January 13, 2010, Dr. Caldwell filed an "Affidavit of Richard B. Caldwell, M.D. in Support of Motion for Summary Judgment", in which Dr. Caldwell admits he provided care to Peter Printz, but that at all times he provided such care he complied with the standard of health care applicable for family practitioners in the Coeur d'Alene, Idaho area. Affidavit of Dr. Caldwell, ¶¶ 2, 3. Dr. Caldwell also states he is knowledgeable about the standard applicable to family care physicians in this area. *Id.,* ¶ 1.

Dr. Ganz filed a similar Motion for Summary Judgment on January 14, 2010. That same day, Dr. Ganz filed an "Affidavit of William F. Ganz, M.D. in Support of Motion for Summary Judgment" in which Dr. Ganz admits he provided care to Peter Printz, but that at all times he provided such care he complied with the standard of health care applicable for neurosurgeons in the Coeur d'Alene area. Affidavit of Dr. Ganz, pp. 2-3, ¶¶ 5, 6. Dr. Ganz states he is knowledgeable about the standard applicable to board-certified neurosurgeons in this area. *Id.,* p. 3, ¶ 6.

On January 28, 2010, Printz filed a "Motion for Protective Order Pertaining to Idaho Code 6-1013 Required Consultant Physicians." In that motion, Printz requests the Court allow the identity of the local consulting physicians utilized by Printz' expert Dr. Miller not be revealed to opposing counsel or other parties. Also on January 28, 2010, Printz filed "Plaintiff's Combined Answering Brief to Defendant Caldwell's and Defendant Ganz's Motions for Summary Judgment". Attached to that Answering Brief were Exhibit A, Affidavit of Howard B. Miller, M.D., Family Practice, and Exhibit B, Affidavit of W. Frank Emmons, Jr., M.D., Neurosurgery. Finally, on February 4, 2010, Dr. Caldwell filed a "Motion to Strike Portions of the Affidavit of Miller", Printz' expert. Oral argument was held on February 11, 2010.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted 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 must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). 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). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Printz seeks a Protective Order. In her Memorandum in Support of Motion for Protective Order Pertaining to Idaho Code 6-1013 Required Consultant Physicians, Printz cites Idaho Code § 6-1012 and § 6-1013, and I.R.C.P. 26(b)(4)(B). Idaho Rule of Civil Procedure 26(c) is also applicable. That rule sets forth that upon a motion by the party from whom discovery is sought, the Court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including that the discovery may be had only on specified terms and conditions, including the designation of the time and place. I.R.C.P. 26(c)(2).

The granting of a protective order in this context is a matter of discretion for the court. The word “may” in the rule denotes that such an action by the Court is

permissive and not compulsory. *Walborn v. Walborn,* 120 Idaho 494, 501 817 P.2d 160, 167 (1991). Given the permissive language, the Court's decision would not be overturned absent an abuse of discretion. *Selkirk Seed Co. v. Frney,* 134 Idaho 98 104 995 P.2d 798, 804 (2000).

Regarding Dr. Caldwell's Motion to Strike Portions of the Affidavit of Dr. Miller, Dr. Caldwell claims Dr. Miller's Affidavit does not comply with I.R.C.P. 56(e), and violates I.R.E. 401, 703, 705, and 801. Rulings regarding admissibility of expert testimony is limited to whether the challenged ruling was an abuse of the trial court's discretion. *Burgess v. Salmon River Canal Co.,* 127 Idaho 565, 903 P.2d 730 (1965).

III. ANALYSIS.

A. Dr. Caldwell's Motion to Strike.

Dr. Caldwell moves this Court for an Order striking portions of the Affidavit of Dr. Miller, a expert (in the specialty of Family Practice) retained by Printz. Motion to Strike Portions of the Affidavit of Miller, p. 1. Dr. Caldwell argues paragraphs 1, 2, 17, 18, and 20 of Dr. Miller's Affidavit fail to comply with the requirements of I.R.C.P. 56(e) as it "constitutes hearsay, is conclusory, speculative, and/or lacks adequate foundation." *Id.,* p. 2. Printz has not replied to Dr. Caldwell's motion to strike. Dr. Ganz has not joined in Dr. Caldwell's motion to strike and Dr. Ganz has not filed a corresponding motion to strike regarding the affidavit of Dr. Emmons, Printz' expert neurosurgeon.

Idaho Rule of Civil Procedure 56(e) states in part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Courts have broad discretion in making evidentiary rulings such as determining whether a witness is qualified as an expert, and admissibility of expert testimony will not be

overturned absent an abuse of that discretion. *Weeks v. E. Idaho Health Serv.,* 143 Idaho 834, 837, 153 P.3d 1180, 1183 (2007) (citing *Warren v. Sharp,* 139 Idaho 599, 605, 83 P.3d 773, 779 (2003)). Admissibility of affidavits under Rule 56(e) is a threshold question analyzed before applying the liberal construction and reasonable inference rules. *Rhodehouse v. Stutts,* 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). Courts look to the affidavit and determine whether it alleges facts, which would render the testimony admissible if they are taken as true. *Dulaney v. St. Alphonsus Regional Med. Ctr.,* 137 Idaho 160, 163, 45 P.3d 816, 819 (2002).

Paragraph 1 of Dr. Miller's Affidavit, which Caldwell argues is irrelevant, hearsay, and violative of the rules on expert witness testimony, details Dr. Miller's training and experience. That portion of paragraph 1 is relevant, is not hearsay and violates no rules on expert witness testimony. As paragraph 1 continues, Dr. Miller then states he familiarized himself with the local family practice standard of care in Coeur d'Alene, Idaho by speaking with "Idaho family practice physicians who are familiar with the practice of medicine and family practice in Coeur d'Alene." Affidavit of Howard B. Miller, M.D., p. 2, ¶ 1. The remainder of paragraph 1 discusses what these physicians advised Dr. Miller. *Id.* Although Dr. Miller does not identify who the practitioners are, or where in Idaho they practice, the paragraph does thoroughly explain that the local standard of care does not differ from other areas in Idaho or the country as a whole. *Id.* There is no "local deviation" from national standards. *Id.* Paragraph 2 sets forth the basis for Dr. Miller's opinion, including the medical records reviewed, the medical, family practice, and "neurosurgical professional knowledge" he has, and his knowledge of the community standard of care in Coeur d'Alene. *Id.,* ¶ 2. Paragraph 17 explains what medical students are taught regarding elevated MCV and vitamin B-12 deficiency. *Id.,*

p. 7, ¶ 17. Paragraphs 18-20 are Dr. Miller's conclusions and opinion that the failure to investigate the elevated MCV was negligent and the health decline and death resulted from Drs. Ganz and Caldwell's failure to diagnose and treat the vitamin B-12 deficiency. *Id.,* p. 7, ¶ ¶ 18-20.

An out-of-area expert may obtain knowledge on the local standard of care by consulting with a local specialist. *Perry v. Magic Valley Reg. med. Ctr.,* 134 Idaho 46, 51, 995 P.2d 816, 821 (2000). Because I.R.E 703 does not require facts or data relied upon to be admissible in evidence so long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences", to the extent Dr. Miller's opinion on the local standard is hearsay, it would nonetheless be admissible. Dr. Caldwell cites *Sammis v. MagneTek, Inc.,* 130 Idaho 342, 350-51, 941 P.2d 314, 322-23 (1997), for the proposition that "…inadmissible hearsay not meeting the requirements of I.R.C.P. 56(e) does not suffice to raise a genuine issue of fact and is appropriately stricken from the affidavit containing hearsay." Motion to Strike Portions of the Affidavit of Miller and Memorandum in Support Thereof, p. 2. However, *Sammis* did not concern affidavits of physicians in a medical malpractice case. *Sammis* concerned an affidavit of an electrical engineer, an expert (James Willmore) retained for trial testimony regarding his opinion that a fire was caused by a heater malfunction. 130 Idaho 342, 349, 941 P.2d. 314, 321. That expert also gave opinions on the corporate ownership of the company that made a component of that heater, the fan motor. 130 Idaho 342, 350, 941 P.2d 314 322. The Idaho Supreme Court held Willmore simply was *not qualified* to render his opinions on the portions of his affidavit that discussed corporate ownership of the company which manufactured the fan motor. 130 Idaho

342, 351, 941 P.2d 314, 323. Thus, *Sammis* turned on the witness' qualifications, not upon inadmissible hearsay.

In the present case, Dr. Miller does not disclose the facts or data underlying his opinion prior to giving testimony, which is permissible, though he may be required to do so upon receiving a discovery request or on cross-examination. I.R.E. 705. At this point, Dr. Miller's affidavit is admissible. Under I.R.C.P. 56(e), Dr. Miller has adequately set forth that his affidavit is made upon his personal knowledge, that he is competent to testify to the matters, and that the matters are admissible. This Court remains free to give Dr. Miller's affidavit appropriate weight given his reliance on an anonymous local standard specialist and questionable "neurosurgical professional knowledge" based on his education and training having been in family medicine. Finally, this Court's discussion of *Clarke v. Prenger,* 114 Idaho 766, 768, 760 P.2d 1182, 1184 (1988), set forth below in the discussion on the motions for summary judgment, more thoroughly explains why, at this summary judgment juncture, Dr. Caldwell's Motion to Strike Dr. Miller's testimony must be denied.

B. Plaintiff's Motion for Protective Order.

Printz moves this Court for a Protective Order, requesting the identity of the consulting physicians used by Printz' experts remain confidential. Motion for Protective Order, p. 1. The Motion for Protective Order does not specify plaintiff's experts' names, but the briefing and attachments to Printz' briefing identifies those experts as Dr. Miller (Family Practice) and Dr. Emmons (neurosurgery). Plaintiff's Memorandum in Support of Motion for Protective Order Pertaining to Idaho Code 6-1013 Required Consultant Physicians, p. 2; Exhibit A and Exhibit B.

Printz gives three reasons why disclosure is not required. **First**, Printz argues

the disclosure of the consulting physicians' identity is not required by I.C. § 6-1013; all that is required is familiarization with local standards for health care. Memorandum in Support of Motion for Protective Order, p. 3. **Second,** Printz argues I.R.C.P. 26(b)(4)(B) would prevent the opposing parties from seeking disclosure of the consulting physicians because they are not expected to be called as witnesses. *Id.,* p. 5. **Third,** Printz lists for the Court several Idaho District Court cases in which the identity of individuals providing local standard of care information was protected. *Id.,* pp. 6-8, citing an unnamed Blaine County Case No. CV 98-5259; *McGurke v. Getz, M.D.,* Ada County Case No. CV PI-97-00069-D, *Fitzgereald et al., v. England,* Nez Perce County Case No. CV 01-00671. In contravention of this Court's Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, p. 3, ¶ 3, Printz did not attach a copy of these cases to the Court's copy of Printz' brief.

In response, Dr. Ganz argues Printz cannot have it both ways. That is, in order to survive summary judgment, Printz cannot rely on the expert opinion of Dr. Emmons (said opinion based in turn on the statement of anonymous local specialists), and at the same time attempt to prevent identification of such non-testifying experts. Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Protective Order, p. 7. Dr. Ganz argues Printz cannot use hearsay testimony from the unidentified local neurosurgeon to defend the summary judgment motion. *Id.,* p. 4. Dr. Ganz argues Printz could have sought information on the local standard of care in ways other than reliance on an anonymous neurosurgeon and that I.R.C.P. 26(b)(4)(B) says nothing in regards to protecting the identity, as opposed to the facts known or opinions held, by an individual not expected as a witness. *Id.,* pp. 4-5.

Similarly, Dr. Caldwell makes the arguments that: (1) without disclosure of the

individuals Dr. Miller consulted and examination of their knowledge for accuracy and reliability, there is no way to substantiate Dr. Miller's actual and personal knowledge; (2) I.R.E. 705 would require disclosure of the anonymous physicians if requested under the rules of evidence; (3) no privilege exists to shield disclosure of the anonymous physicians and I.R.C.P. 26(b)(1) would require disclosure of the identity of anyone with knowledge of any discoverable matter; and (4) the anonymous physicians are similar to texts or treatises consulted by Printz' experts and are unlike experts not expected to be called as witnesses because these individuals' opinion on the local standard of care directly inform the opinion of Dr. Miller. Reply Brief in support of Motion for Summary Judgment and Response to Motion for Protective Order, pp. 4-9.

As argued by the defendants, Idaho case law permits an out-of-state expert to become familiar with the local standard of care in one of two ways: "inquiring of a local specialist or by 'review of a deposition stating that the local standard does not vary from the national standard, coupled with the expert's personal knowledge of the national standard.'" *Grover v. Smith,* 137 Idaho 247, 251, 46 P.3d 1105, 1109 (2002). Here, Printz' experts Dr. Emmons and Dr. Miller opted for the first of the two options ("inquiring of a local specialist"), but in using that option they apparently hoped to keep the identity of that specialist anonymous. In *Grover,* the plaintiff's expert was an Omaha, Nebraska dentist (Dr. Thurmond) who had taught Idaho dentistry students and observed the administration of the Idaho State Dental Board Examination. *Id.* The dentist relied on his own experience and spoke with dentists who spoke on the condition of anonymity. In a second affidavit, the dentist stated in forming his opinion he had spoken with a Dr. Wilcox of Boise. The Court stated, "…standing alone, Dr. Wilcox and anonymous dentists would be insufficient to meet the requirements of I.C. § 6-

1013." *Id.* That phrase would seem to indicate the identity of the anonymous physicians in the present case must be disclosed. However, the Idaho Supreme Court did not set forth its reasoning in making that statement. That statement by the Idaho Supreme Court in *Grover* is confounded by the fact that eventually, in a second affidavit, one dentist (Dr. Wilcox) whom Dr. Thurmond had called to familiarize himself with the standard of care, was named, and in *dicta* at least, that was still not sufficient for the Idaho Supreme Court. That statement by the Idaho Supreme Court is further confounded by the fact that in determining Dr. Thurmond's opinion was admissible, the Idaho Supreme Court's decision turned on Dr. Thurmond's knowledge of what the Idaho State Dental Board was doing, not upon the knowledge of any one or group of dentists. 137 Idaho 247, 253, 46 P.3d 1105, 1111.

In *Dulaney v. St. Alphonsus Regional Medical Center,* 137 Idaho 160, 45 P.3d 816 (2002), the Supreme Court held that a plaintiff's medical expert affidavit failed to allege specific facts showing that the local, anonymous professor of orthopedics consulted was in fact familiar with the standard of care at the time in question regarding actions involving paraplegia. The Court held the expert had not sufficiently familiarized himself with standards and practices of orthopedic surgeons in Boise, Idaho in August 1994. 137 Idaho 160, 169, 45 P.3d 816, 824. Essentially, the Idaho Supreme Court held that the plaintiff did not have the expert (Dr. Stump) state *how* the anonymous professor was familiar with the standard of care. As to the issue before this Court in the present case, there are two points in *Dulaney*. First of all, the Idaho Supreme Court noted, apparently with approval, that the plaintiff's two experts had familiarized themselves with the standard of care for emergency room physicians and neurologists by calling named, disclosed physicians (not anonymous physicians) who had practiced

in Idaho. Second, in discussing whether plaintiff's neurological expert could testify as to orthopedic standards of care, the neurologic expert consulted an anonymous orthopedic expert. On that subject the Idaho Supreme Court wrote:

> *Even assuming that the use of an anonymous informant is an acceptable manner for adequately familiarizing an out-of-area physician of the local standard of care*, Dr. Stump's affidavit does not allege specific facts showing that the anonymous professor was familiar with the standard of care for orthopedic surgeons in Boise in August 1994.

Id. (emphasis added).

No Idaho reported cases explicitly *require* the identity of the local physician(s) upon whom an expert retained for litigation purposes relies. As discussed below, most reported cases concerned situations where the local physician's identity was made known.

Ultimately, although the language of I.C. § 6-1013 may not explicitly *require* the identity of the local physician relied upon by an out-of-state expert, the anonymous physician must be familiar with the standards and practices of a particular area, and be able to demonstrate *how* they became familiar with those local standards. Dr. Miller's extrapolation from discussions with Idaho family practice physicians to familiarity with Coeur d'Alene family practice does not do that. At the very least, Dr. Miller must have discussed **"how"** these anonymous physicians are familiar with local standards for family medicine in Coeur d'Alene in 2006 and 2007. Because neither Dr. Miller nor Dr. Emmons described *how* the anonymous local physicians are familiar with the local standards in their respective specialties, this Court must deny the motion for a protective order.

In addition to disclosing **"how"** the anonymous physicians are familiar with local standards, **this Court is convinced that Printz' experts must also disclose the**

names of these anonymous physicians who purport to be familiar with local standards for family medicine in Coeur d'Alene in 2006 and 2007. This Court's reasoning is as follows:

Of paramount importance is the fact that without the identity of the anonymous physicians, defendants cannot inquire as to: (1) whether the anonymous physicians really hold an opinion as to the standard of care, (2) how they themselves acquired that knowledge, and (3) whether they in fact ever were contacted by the testifying expert. In *Dunlap v. Garner,* 127 Idaho 599, 903 P.2d 1296 (1994), the local physicians whom plaintiff's expert claimed to have called regarding the standard of care in Burley, Idaho (Dr. Holm and Dr. Peterson), denied or at least "did not recall" ever speaking to plaintiff's expert Dr. Oppenheim. 127 Idaho 599, 605, 903 P.2d 1296, 1302. Allowing any party's expert to keep secret the identity of the physician(s) contacted about the local standard of care would completely shield any such opinion from the crucible of investigation and cross-examination by the opposing party.

As noted by the Idaho Supreme Court in *Morris v. Thomas,* 130 Idaho 138, 146, 937 P.2d 1212, 1220 (1997), Idaho Code § 6-1013(c):

> "…establishes the method by which both local and non-local experts may testify regarding the standard of care:
>
> > The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the *applicable said community standard* to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides

> elsewhere from *adequately familiarizing himself* with the standards and practices of *(a particular) such area* and thereafter giving opinion testimony in such a trial.

The only way to explore how the expert "adequately familiar[ized] himself with the standards and practices of (a particular) such area", is to know **who** the consulting physicians were. That is the only way to explore the competency of the expert's testimony. The opposing party must be able to find out: (1) if the opponent's expert in fact contacted the local doctors (obviously an issue in *Dunlap*), (2) if the opponent's expert in fact made those contacts, and if so, what did those local doctors tell the expert (is the local doctor's statements as to the standard of care consistent with what he now states that standard of care to be), and (3) how did the local doctors become familiar with the local standard of care (the foundation, or lack thereof, of the local doctors' opinion on the local standard of care determines the strength of the foundation for the expert's opinion on the local standard of care).

Printz has not provided the Court or Dr. Caldwell or Dr. Ganz with sufficient evidence as to the foundational knowledge of any anonymous physicians. Absent disclosure of the identity of the anonymous physicians, defendants would be defending against opinions of Dr. Miller and Dr. Emmons based on inquiry of a "local" specialist who may or may not in fact have knowledge of the standard of care and who may or may not in fact be local. [Dr. Emmons uses almost identical language to that of Dr. Miller and states in his affidavit that he spoke with an "Idaho" practitioner, therefore the questions of if, how, and when the anonymous practitioner became familiar with Coeur d'Alene standards remain.]

A similar result is reached in evaluating Printz' I.R.C.P. 26(b)(4)(B) argument. The plain language of the rule protects facts known or opinions, but not *identities*, as

was correctly argued by Dr. Ganz. Reply Memorandum in Support of Motion for Summary Judgment and Memorandum in Opposition to Motion for Protective Order, p. 5; I.R.C.P. 26(b)(4)(B). And, as argued by Dr. Caldwell, the 10th Circuit case law interpreting the exceptional circumstance requirement for disclosure under Rule 26(b)(4)(B) is distinguishable. *Ager v. Jane C. Stormont Hospital,* 622 F.2d 496 (10th Cir. 1980) involved a discovery dispute resulting from the plaintiff's refusal to disclose any information concerning consultative experts. In *Ager,* the Court held experts not retained or specially employed did not need to be disclosed and the Court of Appeals remanded for the purposes of determining whether the experts were only informally consulted. The Court of Appeals discussed the advisory committee notes to Rule 26:

> Subdivision (b)(4)(B) is concerned with only experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed….

622 F.2d 496, 503. Here, the discussion by Dr. Miller and/or Dr. Emmons with the anonymous physicians goes beyond merely an informal consult and forms the very basis of Dr. Miller's and Dr. Emmons' qualification as experts. That is, Dr. Miller relied on the anonymous physician's opinions as to the local standard of care and whether it differs from a national standard. Clearly, as this opinion is necessary for Dr. Miller's and Dr. Emmons' testimony to be admissible at trial. This goes well beyond a mere informal consultation.

As mentioned above, Idaho case law permits an out-of-state expert to become familiar with the local standard of care by one of two ways: "inquiring of a local specialist or by 'review of a deposition stating that the local standard does not vary from the national standard, coupled with the expert's personal knowledge of the national standard.'" *Grover v. Smith,* 137 Idaho 247, 251, 46 P.3d 1105, 1109 (2002). When the

latter method is utilized, the identity of the prior deponent is known. In *Kozlowski v. Rush,* 121 Idaho 825, 828 P.2d 854 (1992), plaintiff's expert Dr. Friedman, relied on the deposition of a Dr. Rufi, another board-certified obstetrician-gynecologist practicing in Pocatello, Idaho. 121 Idaho 825, 828-29, 828 P.2d 854, 857-58. "The Supreme Court reversed, holding that the trial court erred in striking the plaintiff's expert's testimony, stating that the expert's review of the deposition of a Pocatello obstetrician-gynecologist regarding local standards and their similarity to national standards, along with his personal knowledge regarding national standards in similar cases, was enough to lay a foundation for his opinion regarding the actions of the defendant." *Watts v. Lynn,* 125 Idaho 341, 345, 870 P.2d 1300, 1304 (1994), referring to *Kozlowski v. Rush,* 121 Idaho 825, 828 P.2d 854 (1992). As to the two methods allowed under *Grover* for an out-of-state expert to become familiar with the local standard of care, if under the "review of deposition" method the identity of the deponent is known, then there is no logical reason to not make the identity of the local specialist known when using the alternative "inquiring of a local specialist" method.

In the majority of reported cases in Idaho, where an expert familiarized himself or herself with the local standard by "inquiring of a local specialist" (*Grover v. Smith,* 137 Idaho 247, 251, 46 P.3d 1105, 1109 (2002)), and the identity of that local specialist was known, the expert was allowed to testify. These cases will be discussed in chronological order.

In *Buck v. St.Clair,* 108 Idaho 743, 702 P.2d 781 (1985), the out of state expert (Dr. Broms) questioned a Caldwell, Idaho board-certified obstetrician-gynecologist named Dr. Roberge. 108 Idaho 743, 746, 702 P.2d 781, 784 (1985). That fact convinced the Idaho Supreme Court to reverse the district court's ruling that Dr. Brom's

testimony was inadmissible, and reversed the district court's grant of a directed verdict. *Id.*

In *Kozlowski v. Rush,* 121 Idaho 825, 828 P.2d 854 (1992), plaintiff's expert Dr. Friedman, relied on the deposition of a Dr. Rufi, another board-certified obstetricain-gynecologist practicing in Pocatello, Idaho. 121 Idaho 825, 828-29, 828 P.2d 854, 857-58. The Supreme Court reversed the district court finding it had erred in striking the plaintiff's expert's testimony. *Id.*

In *Watts v. Lynn,* 125 Idaho 341, 346, 870 P.2d 1300, 1305 (1994), the Idaho Supreme Court reversed the district court's grant of summary judgment in favor of defendant and held the affidavit of the medical expert was sufficient for summary judgment purposes to qualify the expert opinion on the local standard of care, where the trial Court "found" the communication with a local Wallace dentist to have been with one Dr. Branz. 125 Idaho 341, 343, 870 P.2d 1300, 1302. [The affidavit quoted in the decision contains Dr. Branz' name in brackets, indicating his name was later added for clarity].

In *Dunlap v. Garner,* 127 Idaho 599, 903 P.2d 1296 (1994), the identity of the local physicians whom plaintiff's expert claimed to have called regarding the standard of care in Burley, Idaho (Dr. Holm and Dr. Peterson), was known, and even though those local physicians denied or at least "did not recall" ever speaking to plaintiff's expert Dr. Oppenheim, that merely created an issue of fact which could not be resolved at summary judgment. 127 Idaho 599, 605, 903 P.2d 1296, 1302.

In *Dulaney v. St. Alphonsus Regional Medical Center,* 137 Idaho 160, 45 P.3d 816 (2002), the Idaho Supreme Court noted, apparently with approval, that the plaintiff's two experts had familiarized themselves with the standard of care for emergency room

physicians and neurologists by calling named, disclosed physicians (not anonymous physicians) who had practiced in Idaho. It was only where plaintiff's neurological expert attempted to testify as to orthopedic standards of care that the neurologic expert consulted an anonymous orthopedic expert. 137 Idaho 160, 169, 45 P.3d 816, 824. On that subject the Idaho Supreme Court wrote:

> *Even assuming that the use of an anonymous informant is an acceptable manner for adequately familiarizing an out-of-area physician of the local standard of care*, Dr. Stump's affidavit does not allege specific facts showing that the anonymous professor was familiar with the standard of care for orthopedic surgeons in Boise in August 1994.

Id. (emphasis added).

Grover was decided three weeks after *Dulaney.* In *Grover,* even with the identity of one local dentist (Dr. Wilcox) known, but others not disclosed, that would not be enough to allow Dr. Thurmond to testify, according to the Idaho Supreme Court. *Id.* It took those facts plus Dr. Thurmond's involvement with the Idaho State Dental Board Examination to convince the Idaho Supreme Court to overturn the district court's grant of summary judgment for the defense. 137 Idaho 247, 251-52, 46 P.3d 1105, 1009-10.

For the reasons set forth above, Printz' Motion for Protective Order must be denied.

C. Dr. Caldwell and Dr. Ganz' Motions for Summary Judgment.

Dr. Caldwell and Dr. Ganz argue summary judgment is proper because Printz has not demonstrated that Dr. Caldwell and Dr. Ganz failed to comply with the applicable standard of care required under I.C. § 6-1012 and § 6-1013. At the time of the filing of the respective motions for summary judgment, Printz had not filed the affidavits of Dr. Miller or Dr. Emmons.

The Supreme Court in *Dulaney* sets forth the proper analysis:

> To avoid summary judgment for the defense 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. In order for such expert testimony to be admissible, the plaintiff must lay the foundation required by Idaho Code § 6-1013. To do so, the plaintiff must offer evidence showing: (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 his expert opinion testimony is addressed. *Morris ex rel. Morris v. Thomson,* 130 Idaho 138, 937 P.2d 1212 (1997); *Rhodehouse v. Stutts,* 125 Idaho 208, 868 P.2d 1224 (1994); *Dunlap ex rel. Dunlap v. Garner,* 127 Idaho 599, 903 P.2d 1296 (1994).
>
> The applicable community standard of care is defined in Idaho Code § 6-1012. It 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; *Kolln v. Saint Luke's Reg'l Med. Ctr.,* 130 Idaho 323, 940 P.2d 1142 (1997); *Evans v. Griswold,* 129 Idaho 902, 935 P.2d 165 (1997); (b) as such standard existed at the time of the defendant's alleged negligence; *Perry v. Magic Valley Reg'l Med. Ctr.,* 134 Idaho 46, 995 P.2d 816 (2000); *Watts v. Lynn,* 125 Idaho 341, 870 P.2d 1300 (1994); *Gubler v. Boe,* 120 Idaho 294, 815 P.2d 1034 (1991); and (c) as such standard existed at the place of the defendant's alleged negligence. *Perry v. Magic Valley Reg'l Med. Ctr.,* 134 Idaho 46, 995 P.2d 816 (2000); *Watts v. Lynn,* 125 Idaho 341, 870 P.2d 1300 (1994); *Gubler v. Boe,* 120 Idaho 294, 815 P.2d 1034 (1991).

137 Idaho 160, 164, 45 P.3d 816, 820. There is no requirement that the expert testimony be rendered by a local expert. Even a local expert would have to state the standard of care and how they became familiar with that standard of care. The requirement is that the expert is not local, the expert must have familiarized himself or herself with the standard of care for a particular specialty for the relevant community during the relevant time period. That non-local expert must also state how they became familiar with the standard of care for the particular health care specialist. *Perry v. Magic Valley Reg. Med. Ctr.,* 134 Idaho 46, 51, 995 P.2d 816, 821 (citing *Kolln v. Saint Luke's Reg'l Med. Ctr.,* 130 Idaho 323, 331, 940 P.2d 1142, 1150 (1997)). Out-of-area experts

may obtain knowledge of the local standard of care by "inquiring of a local specialist or by reviewing depositions stating that the local standard of care does not vary from the national standard coupled with proof of the expert's knowledge of the national standard." *Perry,* 134 Idaho 46, 51, 995 P.2d 816, 821; *Strode v. Lenzi.* 116 Idaho 214, 216, 775 P.2d 106, 108 (1989); *McDaniel v. Inland Northwest Renal Care Group, LLC.,* 144 Idaho 219, 223, 159 P.3d 856, 860 (2007).

Production of a competent expert who "possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed...." is required. I.C. § 6-1013. And to prove adequate familiarization with the standards and practices of a particular area, an expert from outside the community must inquire of *local* specialists. As such, in the light most favorable to the non-moving party, Printz, a question of material fact remains as to whether Dr. Miller consulted with *local* family medicine practitioners when he spoke with "Idaho" family medicine practitioners. Similarly, a question of material fact remains as to whether the "Idaho" neurosurgeon consulted by Dr. Emmons is a local specialist.

What is dispositive of the motions for summary judgment is *Clarke v. Prenger,* 114 Idaho 766, 768, 760 P.2d 1182, 1184 (1988), where the Idaho Supreme Court held, in reversing the district court which granted summary judgment in a medical malpractice case:

> We take this occasion to express our disapproval of what appears to be a growing practice among the trial courts of this state dismissing medical malpractice cases at the summary judgment point on the basis that plaintiffs' expert witnesses are not sufficiently familiar with the standard of care to be expected from defendant-physicians. Our rules and our decisional law, *Worthen v. State,* 96 Idaho 175, 525 P.2d 957 (1974); *Tri-State Nat. Bank v. Western Gateway Storage Co.,* 92 Idaho 543, 447 P.2d 409 (1968); I.R.C.P. 56(e), demonstrate that when faced with a

> motion for summary judgment the party against whom it is sought may not merely rest on allegations contained in his pleadings. Rather, he must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact. We do not view such burden as being onerous on plaintiffs in medical malpractice cases since ordinarily it only requires a positive indication that plaintiffs' expert witnesses possess the requisite knowledge of the local standard of care which has been allegedly violated. Unfortunately, plaintiffs' counsel too often are either unaware of the requirements of the summary judgment process, or fail to take their responsibilities seriously. On the other hand, it appears that some of our trial judges fail to recognize their obligation to construe not only the evidence before the court, but all reasonable inferences that flow therefrom, most favorably to the non-moving party. In our view the instant case provides an example of the lack of specific detail by plaintiff's counsel, and the error of the trial court in failing to view the evidence and the inferences flowing therefrom, most favorably toward the non-moving party.
>
> It would serve no purpose to set forth the affidavits of Dr. Rattray and the correspondence attached thereto at length. It is sufficient to say they may be viewed as deficient in that they fail to delineate the process by which the witness obtained his alleged knowledge of the local standard of care then prevailing in Shoshone County. However, if such were a material deficiency, and if indeed no process had been engaged in to determine such standard, the deficiencies could have been established by taking the deposition of the witness. Nevertheless, the affidavits establish by conclusory statements that the witness possessed knowledge of the applicable local standard of care, and the standard of care incumbent upon each defendant in their board-certified specialties. Hence, we hold that the statements contained in the affidavits, together with all the legitimate inferences flowing therefrom, were sufficient to establish the existence of a genuine issue of material fact which precluded the issuance of summary judgment, *i.e.,* did Rattray possess the requisite knowledge of the required standard of care.

Accordingly, Dr. Caldwell's and Dr. Ganz' Motions for Summary Judgment must be denied.

Because this Court has denied Printz' Motion for a Protective Order, Printz will have to disclose the local physicians Printz' experts have relied upon to establish the local standard of care. If Printz fails to make such disclosure, then there will be no dispute of fact as to whether Dr. Miller and Dr. Emmons have consulted with local physicians. If Printz fails to make such disclosure, then at that point in time, Dr. Miller's

and Dr. Emmons' opinion would lack foundation and not be accorded any weight, and Dr. Caldwell and Dr. Ganz could again move for summary judgment.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny the motions for summary judgment, deny the motion to strike, and deny the motion for protective order.

IT IS HEREBY ORDERED the Motion for Summary Judgment filed by Dr. Caldwell is DENIED.

IT IS FURTHER ORDERED the Motion for Summary Judgment filed by Dr. Ganz is DENIED.

IT IS FURTHER ORDERED the Motion to Strike filed by Dr. Caldwell is DENIED.

IT IS FURTHER ORDERED the Motion for Protective Order filed by Printz is DENIED.

Entered this 18th day of February, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 2010, 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 #
Richard M. Leland	509-484-7798	Kenneth H. Coleman	509-838-1792
Michael E. Ramsden	664-5884	Edward J. Bruya	509-623-1380

_____
Jeanne Clausen, Deputy Clerk