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 DEFENDANT CALDWELL'S RENEWED MOTION FOR SUMMARY JUDGMENT, AND DENYING DEFENDANT CALDWELL'S MOTION TO STRIKE PLAINTIFF'S UNTIMELY DISCLOSED EXPERT**

I. PROCEDURAL HISTORY AND BACKGROUND.

The following is from this Court's "Memorandum Decision and Order Denying Defendant's Motions for Summary Judgment, Denying Defendant Caldwell's Motion to Strike and Denying Plaintiff's Motion for Protective Order" filed February 18, 2010:

> 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.
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> 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.

Memorandum Decision and Order Denying Defendant's Motions for Summary Judgment, Denying Defendant Caldwell's Motion to Strike and Denying Plaintiff's Motion for Protective Order, pp. 1-4.

In this Court's Memorandum Decision and Order Denying Defendant's Motions for Summary Judgment, Denying Defendant Caldwell's Motion to Strike and Denying Plaintiff's Motion for Protective Order, this Court held:

> 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.

Id., pp. 21-22.

On April 27, 2010, Dr. Ganz renewed his Motion for Summary Judgment, and on April 28, 2010, Dr. Caldwell did the same. Printz and Ganz filed a Stipulation to Dismiss Complaint Against William F. Ganz, M.D." on May 11, 2010, and on May 17, 2010, this Court entered its "Order of Dismissal of Complaint Against William F. Ganz, M.D." Thus, for summary judgment purposes, Ganz' renewed motion for summary judgment is moot, and only the renewed motion of Caldwell is at issue. On May 11, 2010, Printz filed "Plaintiff's Answering Brief to Defendant Caldwell's Renewed Motion for Summary Judgment." On May 20, 2010, Caldwell filed "Defendant's Richard B. Caldwell, M.D.'s Reply Memorandum in Support of Summary Judgment."

On May 20, 2010, Defendant Dr. Caldwell filed a "Motion and Affidavit of Edward J. Bruya in Support of Defendant Richard B. Caldwell, M.D.'s Motion to Shorten Time and Motion to Strike Plaintiff's Untimely Disclosed Expert, or the Alternative, Entry of Sanctions" and an accompanying motion to shorten time. On May 25, 2010, Printz filed "Plaintiff's Response to Defendant Caldwell's Motion to Strike Plaintiff's Expert or for Sanctions" and an "Affidavit of Kenneth H. Coleman in Support of Plaintiff's Response to Defendant Caldwell's Motion to Strike Plaintiff's Expert".

At the May 27, 2010, hearing, the Motion to Shorten Time was granted. At that hearing, oral argument was held on defendant Caldwell's Renewed Motion for Summary Judgment and Motion to Strike Plaintiff's Untimely Disclosed Expert were taken under advisement.

This matter is currently set for a 10-day jury trial commencing on September 20, 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).

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 Plaintiff's Expert.

1. Motion to Strike.

Caldwell moves this Court for an Order striking Printz' expert, Dr. Miller, because of Printz' untimely disclosure and the blatant disregard of this Court's order dated February 18, 2010, for failing to properly disclose experts on the March 22, 2010, deadline in that order, and instead waiting until May 10, 2010, to properly do so. Motion and Affidavit of Edward Bruya in Support of Defendant Caldwell's Motion to Shorten Time and Motion to Strike, p. 3, ¶ 13. In the alternative, Caldwell moves this Court to impose sanctions pursuant to I.R.C.P. 37(e) for costs and fees associated with Printz' untimely disclosure. *Id.,* at ¶ 14. Printz replies Miller was disclosed to Caldwell as an expert on January 28, 2010, some 235 days before trial, via his detailed opinions supplied in support of Plaintiff's Combined Answering Brief to Defendant Caldwell's and Defendant Ganz' Motions for Summary Judgment. Plaintiff's Response to Defendant Caldwell's Motion to Strike Plaintiff's Expert or for Sanctions, p. 2. Because of Printz' counsel's "calendaring errors" no formal expert witness disclosure was provided 180 days before trial, as was required by this Court's Scheduling Order, Notice of Trial Setting and Initial Pretrial Order (page 4, ¶ 5), filed September 18, 2009. However, Printz states the opinion of Dr. Miller had already been provided to Caldwell and no other expert witnesses remained to be disclosed. *Id.,* p. 3.

> There was essentially no change in Dr. Miller's liability and causation opinions in the new May 10, 2010 affidavit. The only change was in Dr. Miller's method of familiarizing himself with the local standard of care by reading a deposition to verify that there was no local deviation in the standard of care for family practice physicians.

Id., p. 4. Printz argues Caldwell was not prejudiced by the "unintended" failure to provide formal notice at the 180 day mark and that Caldwell has no "legitimate claim for sanctions," therefore, "Plaintiff …requests sanctions unless Defendant withdraws his motion." *Id.,* p. 5.

At the time this Court entered its Memorandum Decision and Order Denying Defendants' Motions for Summary Judgment, Caldwel's Motion to Strike, and Printz' Motion for Protective Order, on February 18, 2010, Printz had identified Miller as its expert, albeit not in the form of a 180-day Expert Witness Disclosure contemplated in this Court's September 18, 2009, Scheduling Order. The Court's Scheduling Order states, "[n]ot later that **one hundred eighty (180) days before trial,** plaintiff(s) shall disclose all experts to be called at trial." Scheduling Order, p. 4, ¶ 5 (emphasis in original). As the trial in this matter was scheduled for September 22, 2010, one hundred eighty days prior to that trial is approximately March 26, 2010. The Court's language is mandatory, not permissive, and the Court also requires such disclosure to be filed with the Court. Scheduling Order, p.4, ¶ 5. Back on January 28, 2010, Printz filed an Answering Brief to the motions for summary judgment filed by Caldwell (and, at the time Ganz). In that memorandum, Printz wrote:

> Attached as Exhibits A and B are the affidavits of two of Plaintiff's expert physicians. Howard B. Miller, M.D., is a board-certified family practitioner, and W. Frank Emmons, Jr., M.D., is a board-certified neurosurgeon. Both have familiarized themselves with the local standard of care by consultation with physicians familiar with the standard of care in the local community (Coeur d'Alene) where the defendants practiced and where the alleged malpractice occurred.

Plaintiff's Combined Answering Brief to Defendant Caldwell and Ganz's Motions for Summary Judgment, p. 4. Printz offered the opinions of Dr. Miller pursuant to I.C. § 6-1013. Title 6, Section 1010 of the Idaho Code is entitled: Testimony of Expert Witness on Community Standard. Both this Court in its February 18, 2010, Memorandum Decision

and Order and Caldwell himself in his Reply Brief in Support of Motion for Summary Judgment and Response to Plaintiff's Motion for Protective Order, filed February 4, 2010, recognized Miller as Printz' expert witness. The Court wrote, "…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." Memorandum Decision and Order, p. 4. Caldwell wrote:

> With respect to Dr. Miller's expert testimony in this matter, without the disclosure of the identity of the persons with whom he consulted and examination of the knowledge this unknown person or persons actually possess relative to the applicable community standard of care in Coeur d'Alene, Idaho as it existed in 2006 and 2007, there is nothing to show or substantiate Dr. Miller's **actual and personal knowledge** of the standard of care required of Dr. Caldwell.

Reply Brief in Support of Motion for Summary Judgment and Response to Plaintiff's Motion for Protective Order, pp. 4-5 (emphasis in original).

Clearly, as early as February 4, 2010, Miller was recognized as Printz' expert by Caldwell. The question for this Court now is whether Printz has complied with the Court's Order that the 180-day expert witness disclosure consist of "at least the subject matter upon which the expert is expected to testify and the substance of any opinions to which the expert is expected to testify." Scheduling Order, p. 4, ¶ 5. In his Affidavit filed as an Exhibit on January 28, 2010, Miller opined "to a reasonable degree of medical certainty, Mr. Printz' decline and death were due to the failure of Drs. Caldwell and Ganz to diagnose and treat Mr. Printz' vitamin B-12 deficiency." Exhibit A to Plaintiff's Combined Answer to Defendants' Motions for Summary Judgment, Affidavit of Howard B. Miller, M.D., p. 7, ¶ 20. Dr. Miller's affidavit states his opinion is based upon his training, background, and review of medical records; that the opinions stated are actually held by him; and that he has medical, family practice, and neurosurgical professional knowledge "coupled with actual

knowledge of the applicable community standard in Coeur d'Alene, Idaho." *Id.,* pp. 2-3, ¶ 2.

Although the expert witness disclosure by Printz regarding Dr. Miller did not occur in the form expected and usually seen by this Court, the information relayed complied with this Court's directive in paragraph five of its Scheduling Order. Caldwell's argument that Printz submitting the second affidavit of Miller after Caldwell's renewed motion for summary judgment was filed, changing how Miller had familiarized himself with the local standard of care (from consultation with local physicians to establish no deviation from the national standard exists to review of deposition testimony of a local physician for the same purpose), was in violation of this Court's February 18, 2010, Memorandum Decision and Order is not persuasive. As argued by Printz, no prejudice or surprise can be claimed by Caldwell. Caldwell's counsel articulated no prejudice at the May 27, 2010, hearing.

Idaho Rules of Civil Procedure 61 reads:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Unfortunately, this Court is all too often cited to this rule by counsel who have neglected a deadline. In the present case Caldwell has not demonstrated to this Court that Printz' failure to formally file an expert witness disclosure until May 10, 2010, rises to the level of affecting Caldwell's "substantial rights". While Miller initially based his opinion on consultation with undisclosed local physicians and later based his opinion on review of deposition testimony by local physicians, there was no change in the "subject matter upon which the expert is expected to testify" or in the "substance of any opinions to which the

expert is expected to testify." Scheduling Order, p. 4, ¶ 5.

2. Alternative Motion for Sanctions Under I.R.C.P. 37(e).

In the alternative, Caldwell moves this Court to impose sanctions pursuant to I.R.C.P. 37(e) for "costs and fees associated with [Printz'] untimely disclosure of their expert." Motion and Affidavit of Edward Bruya in Support of Defendant Caldwell's Motion to Shorten Time and Motion to Strike, p. 3, ¶ 14. While Caldwell mentions the rule basis (I.R.C.P. 32(e)) and the sanctions sought (costs and fees), no factual basis for the entry of sanctions is provided by Caldwell when that claim for sanctions is made. *Id.* Also, it is not clear which "order" Caldwell claims Printz violated when that claim for sanctions is made. *Id.* Implicitly, Caldwell argues Printz violated this Court's February 18, 2010, Memorandum Decision and Order Denying Defendant's Motions for Summary Judgment, Denying Defendant Caldwell's Motion to Strike and Denying Plaintiff's Motion for Protective Order by not disclosing the identity of the local physicians. *Id.,* pp. 2-3, ¶¶ 3-13. However, as discussed immediately above in this Memorandum Opinion, Printz did not violate this Court's February 18, 2010, Memorandum Decision and Order Denying Defendant's Motions for Summary Judgment, Denying Defendant Caldwell's Motion to Strike and Denying Plaintiff's Motion for Protective Order. Printz violated this Court's September 18, 2009, Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, by not timely disclosing Printz' expert in the usual manner of a separate pleading "contemporaneously filed with the Court." Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, p. 4, ¶5. However, since there was substantial compliance through other disclosure, no sanctions against Printz are warranted.

3. Printz' "Request" for "Sanctions" in "Plaintiff's Response to Defendant Caldwell's Motion to Strike Plaintiff's Expert or for Sanctions".

At page five of Printz' "Plaintiff's Response to Defendant Caldwell's Motion to Strike Plaintiff's Expert or for Sanctions", Printz does not favor the Court with the rule or statutory basis for those "sanctions", nor does Printz favor the Court with what "sanctions" Printz seeks. While the *legal* basis for Printz' request will apparently remain a mystery, the *factual* basis for Printz' request for sanctions is, incredibly:

> Defendant's Motion to Strike Plaintiff's Untimely Disclosed Expert or the Alternative, Entry of Sanctions, has caused Plaintiff's counsel to have to spend considerable time, work, and research in order to prepare this response. Therefore, while Defendant has no legitimate claim for sanctions, Plaintiff does have a legitimate claim for sanctions since there are no facts supported by case law to warrant Defendant's motion for witness exclusion or sanctions. Plaintiff therefore requests sanctions unless Defendant withdraws his motion.

Plaintiff's Response to Defendant Caldwell's Motion to Strike Plaintiff's Expert or for Sanctions, p. 5. Printz seems to have forgotten the fact that the reason Caldwell had to file a "motion for witness exclusion or sanctions" and Printz' "…counsel had to spend considerable time, work, and research in order to prepare his response" is *because Printz' counsel negligently failed to comply with this Court's order on expert witness disclosure in the first place.* For Printz to now request some unspecified "sanction" based upon no rule or statute, in light of Printz' own precipitating transgression, is absurd.

C. Dr. Caldwell's Renewed Motion for Summary Judgment.

Caldwell filed his renewed motion for summary judgment on April 28, 2010. Caldwell argues this Court ordered Printz to disclose the local physicians upon whom Miller was relying in establishing the local standard of care and, subsequently, Printz failed to do so. Memorandum in Support of Renewed Motion for Summary Judgment, p. 2. Caldwell argues:

> Plaintiff's [sic] have failed to present qualified expert affidavits

> consistent with the requirements of Idaho Code §§ 6-1012 and 6-1013, *Dulaney,* and the Court's Order of February 18, 2020. Therefore Dr. Caldwell is entitled to Summary Judgment as to all claims brought by plaintiffs.

Id.

In response, Printz submitted the Affidavit of Howard B. Miller, M.D., dated April 30, 2010, as an exhibit to Plaintiff's Answering Brief to Defendant Caldwell's Renewed Motion for Summary Judgment. The April 30, 2010, Affidavit of Miller differs from his previous Affidavit in only one respect: Miller now states he familiarized himself with the local standard of care in Coeur d'Alene via his review of the deposition of Lawrence K. Gibbon, M.D., as opposed to consultation with anonymous local experts. In the deposition reviewed by Miller, Dr. Gibbon, a Coeur d'Alene family physician during the years at issue in the instant case, testified to the standard of care for board-certified family physicians in Coeur d'Alene and Post Falls in Kootenai County. Based on Miller's review of Dr. Gibbon's deposition, along with Miller's knowledge of national standards, Miller determined there was no deviation between the national standards and the local standard of care during the time period applicable to Printz' case. Exhibit A to Plaintiff's Answering Brief to Defendant Caldwell's Renewed Motion for Summary Judgment, Affidavit of Howard B. Miller, M.D., p. 2, ¶ 1.

Caldwell replies Printz has not complied with the Court's February 18, 2010, Order, but rather "circumvented" the order by reviewing a deposition in a case that does not deal with mean corpuscular volume (MCV) levels or vitamin B-12 deficiency. Reply Memorandum in Support of Motion for Summary Judgment, pp. 1-2. Caldwell argues Miller cannot now "unlearn" what he previously testified to having learned via unnamed local physicians, despite his now claiming to have learned about the local standard of care from the deposition of Dr. Gibbon in a case involving prostate cancer and follow-up

care for prostate cancer. *Id.,* pp. 2-3.

In this Court's February 18, 2010, Order, this Court denied Printz' motion for protective order and required disclosure of the anonymous local physicians consulted by Miller because, without such disclosure, Caldwell would have been unable to inquire:

> (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 were ever contacted by the testifying expert.

Memorandum Decision and Order, p. 14. This Court noted Printz had failed to provide the Court or Caldwell with sufficient evidence as to the foundational knowledge of the anonymous local physicians contacted. *Id.,* p. 16. But, in its Memorandum Decision and Order, this Court also discussed *Grover v. Smith,* 137 Idaho 247, 46 P.3d 1105 (2002) at length. *Grover* permits an out-of-state expert to become familiar with the local standard of care by either 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." 137 Idaho 247, 251, 46 P.3d 1105, 1109. Caldwell's argument on his renewed motion for summary judgment is flawed in three ways. First, it ignores this second permissible method of becoming acquainted with the local standard by deposition review. Thus, as Caldwell argues Miller cannot now "unlearn" what he previously testified to having learned via unnamed local physicians, is without merit, as Miller now has learned about the local standard of care from the deposition of Dr. Gibbon, which Miller is allowed to do. Second, it assumes the Court *prohibited* use of this second method in its February 10, 2010, Memorandum Decision and Order, which it did not. Third, the specific concern previously voiced by the Court regarding the first method (becoming acquainted with the local standard by inquiring of a local specialist), that being the lack of foundational

knowledge by *anonymous* local specialists, is assuaged when deposition testimony is utilized to gain familiarity with the local standard of care. As this Court previously noted: "When the latter method [listed in *Grover*] is utilized, the identity of the prior deponent is known." Memorandum Decision and Order, pp. 16-17.

Again, as previously stated by this Court in this case:

> There is no requirement that 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 [when] the expert is not local, the expert must have familiarized himself or herself with the standard of care 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).

Memorandum Decision and Order, pp. 20-21.

In denying Printz' motion for a protective order, this Court did not affirmatively order Printz to disclose the anonymous local physicians upon whom Miller relied to establish the local standard of care. Instead, the Court only prohibited Miller from relying upon *undisclosed* local specialists to establish the local standard of care. But, as of the filing of his May 11, 2010, affidavit, Miller was no longer doing so, because he switched to the deposition review method. Nothing in the Court's Memorandum Decision and Order prevented Miller from utilizing the deposition review method discussed in *Grover* for establishing the local standard of care in this case. Miller stated in his May 11, 2010, affidavit that he is very familiar with the national standard of care.

Exhibit A to Plaintiff's Answering Brief to Defendant Caldwell's Renewed Motion for Summary Judgment, Affidavit of Howard B. Miller, M.D., p. 2, ¶ 1. Miller reviewed the deposition of Dr. Gibbon, a local board-certified family physician during the applicable time period and found no local deviation from the national standard. *Id.* Because of Printz' and Miller's compliance with *Grover* and *Perry,* Caldwell is not entitled to summary judgment as a matter of law.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, Caldwell's Motion to Strike Plaintiff's Expert must be denied, and, as a result, Caldwell's motion for attorney's fees must be denied. Printz' "request" for "sanctions" must also be denied. Caldwell's Renewed Motion for Summary Judgment must be denied.

IT IS HEREBY ORDERED Caldwell's Motion to Strike Plaintiff's Expert is DENIED.

IT IS FURTHER ORDERED Caldwell's alternative motion for sanctions pursuant to I.R.C.P. 37(e) for costs and fees associated with Printz' untimely disclosure of expert is DENIED.

IT IS FURTHER ORDRED Printz' "request" for "sanctions" raised in "Plaintiff's Response to Defendant Caldwell's Motion to Strike Plaintiff's Expert or for Sanctions" at page 5, is DENIED.

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

Entered this 7th day of June, 2010.

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John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 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
		Edward J. Bruya	509-623-1380

_____
Jeanne Clausen, Deputy Clerk