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CLERK OF DISTRICT COURT

Deputy

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

JUDITH YANCEY, a single woman,)
)
Plaintiff,)
vs.)
)
DR. DOUGLAS W. PULSIPHER, DDS and)
JANE DOE PULSIPHER, husband and wife;))
and RIVERSTONE DENTAL CARE, PC, an)
Idaho Corporation,)
)
Defendants.)
_____)

Case No. **CV 2009 6479**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

For the Plaintiff: Kevin P. Holt
For the Defendants: Bruce R. McAllister; Leslie S. Brown

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is a medical (dental) malpractice case, and is before the Court on defendants' Motion for Summary Judgment and defendants' Motion to Strike the Affidavit of Judith Yancey and Supplemental Affidavit of Geoffrey Thompson, DMD.

Plaintiff Judith Yancey (Yancey) filed her Complaint against Dr. Douglas Pulsipher (Pulsipher) and Riverstone Dental Care, PC (Riverstone, collectively referred to as Pulsipher) on August 12, 2009. Yancey alleges Pulsipher acted negligently in performing medical and dental procedures and she was damaged as a result.

Complaint, p. 2, ¶¶ 5-7. Pulsipher now moves this Court to grant him and his practice summary judgment, arguing "the claims against these Defendants should be dismissed on the grounds there exists no genuine issue of material fact regarding any alleged deviation from the applicable standard of dental care practice." Memorandum in

Support of Motion for Summary Judgment, p. 2. Pulsipher filed his Affidavit of Douglas Pulsipher, DDS in Support of Motion for Summary Judgment on August 16, 2010. In this Affidavit, Pulsipher testifies that his care of Yancey in 2006, 2007, and 2008, complied in all respects with the applicable standard of care applicable to a dentist in Coeur d'Alene. Affidavit of Douglas Pulsipher, p. 2, ¶ 4. He also states the informed consent obtained from Yancey for all treatment provided between 2006 and 2008 “complied in all respects with the standard of dental care practice applicable to a general dentist engaged in obtaining an informed consent before the various dental treatments I provided.” *Id.*, p. 3, ¶ 7. Pulsipher’s affidavit is the first time in this litigation that the issue of informed consent is raised, as Yancey never raised the issue of informed consent in her Complaint.

On September 29, 2010, this Court heard defendants’ motion in limine. That motion sought to exclude Yancey’s expert witnesses who had treated or examined Yancey or her records, but who had not yet disclosed their reports. The Court granted defendants’ motion on the record that day, and on October 11, 2010, the Court filed its “Order on Defendants’ Motion in Limine.” In that order, the Court wrote:

This Court further finds that although Plaintiff’s expert witness disclosure does contain subject matter upon which the experts are expected to testify, it does not contain the substance of any opinions to which these experts are expected to testify.

Order on Defendants’ Motion in Limine, p. 2. This Court’s “Scheduling Order, Notice of Trial Setting and Initial Pre-Trial Order” filed September 21, 2009, required Yancey to disclose her experts to be called at trial 180 days before trial, and: “Such disclosure shall 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, Notice of Trial Setting and Initial Pre-Trial Order, p. 4, ¶ 5. The entire

pertinent extent of Yancey's expert witness disclosure regarding Geoffrey W. Thompson, DMD, PA, filed on July 28, 2010, was as follows: "This witness would be expected to testify that Dr. Pulsipher's [sic] treatment of Plaintiff fell below the local minimum standard of care required of a dental professional." Plaintiff's Disclosure of Expert Witnesses, p. 3. While that disclosure adequately states the "subject matter upon which the expert is expected to testify" in compliance with this Court's pre-trial order, such disclosure does not give any indication about the "substance of any opinions to which the expert is expected to testify." As such, Yancey violated this Court's pre-trial order. Thus, on September 29, 2010, this Court held on the record and later stated in its October 11, 2010, order, that "...although Plaintiff's expert witness disclosure does contain subject matter upon which the experts are expected to testify, it does not contain "the substance of any opinions to which these experts are expected to testify." Following the September 29, 2010, hearing on Pulsipher's motion in limine, Yancey and Pulsipher entered into a stipulation filed with the court on October 8, 2010. That stipulation reads in part:

A copy of the October 2009 Affidavit of Plaintiff's expert Geoffrey W. Thompson, D.M.D. is attached to this Stipulation as Exhibit "A" [the Court notes there is no Exhibit "A" attached, however, Pulsipher's attorney attached a complete copy of the Affidavit of Geoffrey W. Thompson dated October 12, 2009, to discovery attached as Exhibit "C" to the Affidavit of Counsel (Leslie Brown) in Support of Motion in Limine filed on August 27, 2010]. The language contained in the attached Affidavit will be treated as if it had been referenced in Plaintiff's July 2010 Plaintiff's Disclosure of Expert Witnesses.

Stipulation on Defendants' Motion in Limine, p. 2. The problem with the October 12, 2009, Affidavit of Geoffrey W. Thompson, DMD, is that other than to describe the procedure Pulsipher performed, the affidavit provides no more information than Yancey's inadequate expert witness disclosure. The October 12, 2009, Affidavit of

Geffrey W. Thompson, DMD, reads:

...it is my belief, to a reasonable medical certainty, that Dr. Pulsipher's treatment of Ms. Yancey for her fixed partial denture to replace tooth #9 and the manner in which that treatment was administered fell below the requisite standard of care of dentists in general and specifically of dentists in this community (specifically, Coeur d'Alene and the greater Coeur d'Alene, Idaho area) and that during the time the subject treatment was administered, all resulting in significant pain, discomfort, distress and requirement of further treatment resulting in further discomfort and financial damages to Judith Yancey.

October 12, 2009, Affidavit of Geffrey W. Thompson, DMD, pp. 2-3, ¶8.

Pulsipher filed his Motion for Summary Judgment on August 16, 2010, and on that same date filed a "Memorandum in Support of Motion for Summary Judgment", and an "Affidavit of Douglas Pulsipher, D.D.S. in Support of Motion for Summary Judgment."

On October 1, 2010, Yancey filed the "Affidavit of Geffrey W. Thompson, DMD", signed October 12, 2009 [although the filed copy omits page two of this affidavit], and the "Supplemental Affidavit of Geffrey W. Thompson, DMD", signed September 16, 2010.

In the supplemental affidavit, for the *first time*, Geffrey W. Thompson explains the "substance of his opinions":

- 2.1. The deep bite was never addressed properly.
- 2.2. I question the need for extraction of #9 in the first place and *poor* management of the extraction site when it was extracted.
- 2.3. Over prepped teeth contributed to a lack of retention.
- 2.4. Double abutment on #10 and #11 with this bite was poor design.
- 2.5. According to Dr. Pulsipher's charting, there were five attempts to deliver this bridge. On the day of the delivery (5th try) the patient went home and the bridge fell out. They re-cemented and the next day the bridge fell out again.
- 2.6. Judith saw two (2) prostodontists, periodontists, two (2) endodontists, and an oral surgeon. She was also presented to two (2) dental study clubs. No one agreed with Dr. Pulsipher's treatment.

Supplemental Affidavit of Geffrey W. Thompson, DMD, signed September 16, 2010, p. 2, ¶ 2.1-2.6. (*italics in original*). On October 8, 2010, Yancey filed her "Memorandum in Opposition to Defendants' Motion for Summary Judgment", and the "Affidavit of Judith

Yancey”. On October 19, 2010, Pulsipher filed his “Motion to Strike Affidavit of Judith Yancey and Supplemental Affidavit of Geoffrey Thompson”, and a “Reply in Support of Motion for Summary Judgment and in Support of Motion to Strike.” On October 22, 2010, Yancey filed her “Objection to Defendants’ Motion to Strike Affidavits.”

Oral argument on Pulsipher’s Motion for Summary Judgment and Motion to Strike was held on October 26, 2010. At the beginning of oral argument the Court granted Pulsipher’s Motion to Shorten Time on the hearing on the Motion to Strike. Idaho Rule of Civil Procedure 7(b)(3)(A) requires fourteen days notice and the Motion to Strike was filed seven days before the October 26, 2010, hearing. The Court found Pulsipher was excused in the late filing of the Motion to Strike because it was Yancey’s affidavits filed October 1, 2010, and October 8, 2010, that prompted the October 19, 2010, filing of the Motion to Strike. The Court also found Yancey articulated no discernable prejudice in the hearing of the Motion to Strike on October 26, 2010.

The Court then heard argument on defendants’ Motion to Strike. At the conclusion of that oral argument, the Court denied Pulsipher’s Motion to Strike as to the affidavit of Yancey, and as to the Supplemental Affidavit of Geoffrey W. Thompson (Thompson for purposes of summary judgment only).

The decision to grant or deny a motion to strike is reviewed under the abuse of discretion standard. *State v. Campbell*, 123 Idaho 922, 925, 854 P.2d 265, 268 (Ct.App. 1993). And the weight to be given an affidavit is a matter for the Court. *City of McCall v. Seubert*, 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006) (“The City’s argument that the affidavit is irrelevant, lacking in foundation and based upon hearsay are likewise without merit, particularly in light of the district judge’s statement that he would consider the affidavit and ‘give it the weight to which [he] think[s] it’s entitled.’”)

Pulsipher correctly argues Yancey's expert, Geoffrey Thompson, improperly set forth new opinions not previously contained in disclosure in his supplemental affidavit. Reply in Support of Motion for Summary Judgment and in Support of Motion to Strike, pp. 11-12. With regard to Yancey's affidavit, Pulsipher argues the affidavit is insufficient to establish a *prima facie* case that Pulsipher violated the standard of care as to informed consent. Reply in Support of Motion for Summary Judgment and in Support of Motion to Strike, p. 8. In response, Yancey argues (1) Pulsipher's motion to strike is itself untimely under the Rules (dealt with in the Court's ruling on Pulsipher's Motion to Shorten time) and (2) the supplemental affidavit of Thompson "is valid because it is submitted in conformance with [the] scheduling order's requirement for supplementation and for purposes of summary judgment." *Objection to Defendants' Motion to Strike Affidavits*, p. 2.

Pulsipher argues Thompson's supplemental affidavit is untimely as it raises issues not disclosed by the expert witness disclosure deadline. Reply in Support of Motion for Summary Judgment and in Support of Motion to Strike, pp. 10 *et seq.* Despite I.R.C.P. 56(e)'s reference to the Court's discretion with regard to supplemental affidavits, no motion to supplement was made by Yancey.

The Idaho Supreme Court addressed this matter in *Dunlap By and Through Dunlap v. Garner*, 127 Idaho 599, 903 P.2d 1296 (1994). There, the Court examined the interplay between I.R.C.P. 56(e) and I.C. §§ 6-1012, 6-1013 and determined the lower court had erred on ruling the expert affidavits were inadmissible at the summary judgment hearing. 127 Idaho 599, 600, 903 P.2d 1296, 1297. The Court wrote:

Thus, the dispositive question becomes whether a trial court should weigh conflicting evidence regarding the admission of evidence in the setting of a summary judgment motion. We conclude that trial courts should refrain from making such factual determinations until evidence is heard on

disputed facts. On summary judgment, the trial court must look to the affidavit itself and determine whether it alleges facts which, if taken as true, would render the evidence therein admissible.^{FN 3.}

FN 3. This is not to say that the facts alleged in an affidavit must be taken in the light most favorable to them or that all reasonable inferences must be drawn in favor of the nonmoving party. To the contrary, the Court has recently written that, “[t]he question of admissibility is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to the admissible evidence.” *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 788, 794, 839 P.2d 1192, 1198 (1992). In that case, the affidavits in question did not contain admissible evidence even when the allegations contained therein were taken as true. All we hold today is that the allegations in the affidavits are to be taken as true.

127 Idaho 599, 605, 903 P.2d 1296, 1302. Due to Yancey’s non-compliance with the Court’s pretrial order, it may well be that Thompson might not be allowed to testify at trial consistent with his supplemental affidavit. That leads to a rather absurd result that the Court could consider Thompson’s supplemental affidavit for purposes of summary judgment, but that Thompson might not be able to testify on those matters in the supplemental affidavit at trial, but that absurd result is caused by the nature of Yancey’s violation...failure to comply with the Court’s pretrial order. The remedy for that order, as covered in a prior ruling, is to limit Yancey’s expert’s testimony to what was timely disclosed. Any other ruling remains to be determined at a later time. No motion in that regard was made to the Court at oral argument on October 26, 2010. No motion to continue the trial was made; no motion for relief from pretrial order was made. Certainly, no additional stipulations have been made between the parties.

This case remains set for a five-day jury trial commencing on January 24, 2011.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 sets forth that, 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).

III. ANALYSIS ON PULSIPHER’S MOTION FOR SUMMARY JUDGMENT.

A. Applicable Standard of Care.

Pulsipher argues summary judgment is proper because Pulsipher’s Affidavit establishes the requirement of Idaho Code §§ 6-1012, 6-1013, that Pulsipher had personal, actual knowledge of the applicable standard of care and complied with that standard of care. Memorandum in Support of Motion for Summary Judgment, p. 8. That is the extent of Pulsipher’s Motion for Summary Judgment. Pulsipher did not move for summary judgment on the issue of “informed consent” (or a lack thereof). Memorandum in Support of Motion for Summary Judgment, pp. 1-9; Motion for Summary Judgment, pp. 1-2. It is only in Pulsipher’s affidavit, filed on August 16, 2010, that this issue is raised for the first time. Affidavit of Douglas Pulsipher, D.D.S., p. 3, ¶¶ 6-7.

Yancey responds that two issues of disputed material fact remain: (1) whether Pulsipher obtained informed consent from her before undertaking treatment and (2)

whether Pulsipher's treatment in fact complied with the standard of care of dental care practice applicable to a dentist in Coeur d'Alene. Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 2. Yancey argues she has complied with I.C. §§ 6-1012, 6-1013 via the initial affidavit of Thompson, stating Pulsipher's care fell below the requisite standard of care of local dentists during the applicable time period. *Id.*, p. 4. Yancey's own affidavit sets forth that Pulsipher did not obtain proper informed consent as he did not discuss with her preparing her tooth #8 before extraction or bridge preparation, did not discuss why tooth #9 had to be extracted, and did not discuss "risks of treatment" with her. *Id.*, p. 6. This claim is discussed below.

In their reply memorandum, Pulsipher argues only Thompson's initial Affidavit is admissible and, at a minimum, Pulsipher is entitled to partial summary judgment "to the extent that Plaintiff sets forth any claims, the substance of which are not identified in the 2009 Thompson Affidavit." Reply in Support of Motion for Summary Judgment and in Support of Motion to Strike, p. 2. Pulsipher argues the stipulation entered into by the parties following this Court's ruling on Pulsipher's motion in limine was limited to treating Thompson's original 2009 Affidavit as though it had been referenced in Yancey's July 2010 disclosure of expert witnesses. *Id.*, p. 4. As such, Pulsipher argues Thompson's supplemental Affidavit, raising issues beyond those in the 2009 Affidavit, is improper. *Id.*, p. 5.

Incredibly, Yancey writes: "YANCEY disputes that Dr. Thompson's supplemental affidavit sets forth additional opinions; but instead that it only further defines the opinions disclosed to PULSIPHER on December 15, 2009 and on July 28, 2010." Objection to Defendants' Motion to Strike Affidavits, p. 3. That statement is incredible because all Thompson did in his initial affidavit was state the entirely unsupported

conclusion that Pulsipher fell below the local standard of care, while in Thompson's supplemental affidavit, Thompson clicked off at least six different ways Pulsipher failed to meet the local standard of care, and four other specialists and two study groups who shared that same conclusion:

- 2.1. The deep bite was never addressed properly.
- 2.2. I question the need for extraction of #9 in the first place and *poor* management of the extraction site when it was extracted.
- 2.3. Over prepped teeth contributed to a lack of retention.
- 2.4. Double abutment on #10 and #11 with this bite was poor design.
- 2.5. According to Dr. Pulsipher's charting, there were five attempts to deliver this bridge. On the day of the delivery (5th try) the patient went home and the bridge fell out. They re-cemented and the next day the bridge fell out again.
- 2.6. Judith saw two (2) prostodontists, periodontists, two (2) endodontists, and an oral surgeon. She was also presented to two (2) dental study clubs. No one agreed with Dr. Pulsipher's treatment.

Supplemental Affidavit of Geoffrey W. Thompson, DMD, signed September 16, 2010, p. 2, ¶ 2.1-2.6. (*italics in original*) It is unknown how Yancey can claim that Thompson's supplemental affidavit "only further defines the opinions" (plural) which Thompson previously gave, when Thompson in his initial affidavit only gave *one* opinion, the unsupported conclusion Pulsipher violated the local standard of care.

Next, Yancey blames the Court for her failure to timely disclose her expert Thompson's opinions as to how Pulsipher's conduct fell below the local standard of care which are contained in his supplemental affidavit. Yancey writes: "YANCEY respectfully advises the Court that the Scheduling Order does not define the term: 'the substance of any opinions.'" *Objection to Defendants' Motion to Strike Affidavits*, p. 3. Keep in mind Thompson originally opined: "...Dr. Pulsipher's treatment of Ms. Yancey for her fixed partial denture to replace tooth #9 and the manner in which that treatment was administered fell below the requisite standard of care of dentists in general and specifically of dentists in this community..." October 12, 2009, Affidavit of Geoffrey W.

Thompson, DMD, pp. 2-3, ¶8. That was it. There were no facts given, no reasons given, no basis given...no *substance* given, for that opinion. A year later, when Thompson signed his supplemental affidavit and spelled out the six different ways Pulsipher failed to meet the local standard of care, and four other specialists and two study groups who shared that same conclusion, that provided the *substance* to the initial opinion that Pulsipher had breached the local standard of care. Yancey is correct, the Court's pretrial order does not define "substance". All this amounts to is Yancey's attempt to misdirect blame for her failure to timely make the requisite pretrial disclosure. That misdirection is of no merit because the *only* opinion given in Thompson's initial affidavit was wholly unsupported, wholly lacking in "substance". A definition of "substance" does not change that fact that Yancey submitted no "substance". As this case now stands, that unsupported opinion is the *only* opinion Yancey has timely disclosed for purposes of the jury trial.

But at this time the Court is dealing with summary judgment, not the jury trial.

The Idaho Supreme Court in *Dulaney* set forth the following 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, only that they have familiarized themselves with the standard for a particular profession for the relevant community and time period and that the non-local expert 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.

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. Here, Thompson's initial affidavit sets forth: he is a licensed, practicing dentist in Coeur d'Alene for 32 years; that he holds the opinion that Pulispher's treatment fell below the level of quality of himself and others in the profession in Coeur d'Alene would have provided; and he is certain “within accepted medical science” that his testimony is true

and accurate. Affidavit of Geoffrey Thompson, DMD, p. 3. The *Dulaney* requirements have been met by Yancey via the initial affidavit of Thompson, which Pulsipher concedes is properly before the Court. Oddly enough, *Dulaney* does not require the testifying doctor set forth *how* the standard of care was violated, in order for the plaintiff to survive summary judgment.

Pulsipher argues that his affidavit puts at issue for summary judgment, the issue of “...*how* he complied with that standard of dental care practice as it relates to the entirety of the treatment provided to Plaintiff.” Memorandum in Support of Motion for Summary Judgment, p. 8. (italics added). Pulsipher argues:

These opinions are sufficient to shift the burden to Plaintiff to respond with an expert Affidavit consistent with the requirements of ***Dulaney*** outlined above. In the absence of qualified expert opinion testimony to rebut the opinions advanced by Dr. Pulsipher, the Plaintiff cannot, as a matter of law, establish a *prima facie* case.

Id. It is this issue (*how* Pulsipher complied/failed to comply with the local standard of care) to which Thompson’s Supplemental Affidavit responds. While there is significant doubt that the material covered in Thompson’s Supplemental Affidavit will be allowed in at trial, this Court has found that such material is proper to be considered in Pulsipher’s motion for summary judgment. For summary judgment purposes, the only time deadline was met. Yancey filed Thompson’s Supplemental Affidavit on October 1, 2010, more than fourteen days prior to oral argument. I.R.C.P. 56(c).

B. Lack of Informed Consent.

As mentioned above, Pulsipher did not move for summary judgment on the issue of “informed consent” (or a lack thereof). Memorandum in Support of Motion for Summary Judgment, pp. 1-9; Motion for Summary Judgment, pp. 1-2. It is only in Pulsipher’s affidavit, filed on August 16, 2010, that this issue is raised for the first time.

Affidavit of Douglas Pulsipher, D.D.S., p. 3, ¶¶ 6-7.

Yancey responds an issue of disputed material fact remains as to whether Pulsipher obtained informed consent from her before undertaking treatment.

Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 2.

Yancey claims her own affidavit sets forth that Pulsipher did not obtain proper informed consent as he did not discuss with her preparing her tooth #8 before extraction or bridge preparation, did not discuss why tooth #9 had to be extracted, and did not discuss "risks of treatment" with her. *Id.*, p. 6.

Pulsipher argues Yancey's (lack of) informed consent claim must fail. Reply in Support of Motion for Summary Judgment and in Support of Motion to Strike, p. 7.

First, Pulsipher notes no informed consent claim was ever made by Yancey and no motion for leave to amend her Complaint has been made. *Id.* While the Court agrees with that argument factually (Yancey has made no claim of violation of the informed consent statutes in her Complaint and has not moved to amend her Complaint), the Court will not rule on that informed consent argument since it was not raised in the motion for summary judgment itself, and it was not raised in the initial briefing submitted by Pulsipher. Even though Yancey has had the opportunity to respond, thus ameliorating the *State v. Rubbermaid*, 129 Idaho 353, 924 P.2d 615 (1996), concerns discussed *infra*, the Court is reluctant to grant summary judgment since Pulsipher did not raise that informed consent issue at inception. **Second**, Pulsipher makes two related arguments, a) Yancey's affidavit, stating Pulsipher failed to seek informed consent, is inadmissible under I.R.C.P. 56(e) and cannot amount to *expert* testimony that Pulsipher failed to obtain informed consent in compliance with the standard of care, (*Id.*, p. 8), and b) Pulsipher claims Yancey's affidavit does not establish Pulsipher

violated the requirements of I.C. § 39-4306, and that expert testimony is necessary to determine whether Yancey was given the amount of information ordinarily given under similar circumstances by a dentist in this community. *Id.*, p. 9.

Although Yancey did not allege a claim under I.C. § 39-4301 *et seq.*, (the “medical consent” title of the Idaho Code) any concern regarding her raising the issue for the first time in a reply brief is likely mollified in light of Pulsipher having had an opportunity to respond. In *State v. Rubbermaid*, 129 Idaho 353, 359, 924 P.2d 615, 621 (1996) (Trout, J., dissenting), Justice Trout writes in her dissenting opinion:

As the moving party, Rubbermaid bore the initial responsibility of determining those issues of the State’s case on which it intended to move for summary judgment. Rubbermaid asserted three grounds in its motion for summary judgment. Rubbermaid cannot then assert additional issues in its reply brief, technically affording the State no opportunity to respond. *See, e.g., McDaniel v. Mississippi Baptist Medical Center*, 869 F.Supp. 445, 453 (S.D. Miss. 1994) (refusing to consider grounds in support of defendant’s motion for summary judgment, raised for the first time in its rebuttal memorandum: “In the interest of fairness, Defendant should not be allowed to raise the new grounds for the first time in its rebuttal to which Plaintiff will not have the opportunity to provide an adequate response.”) The burden is on the moving party to assert issues which are not in dispute, not on the non-moving party to object to issues which are not properly before the trial court.

Here, the non-moving party, Yancey, rebuts the statement of Pulsipher in her Affidavit and claims he did not discuss with her all treatment to be provided in advance of such treatment. Memorandum in Opposition to Defendants’ Motion for Summary Judgment, p. 6. Yancey has made no claim under I.C. § 39-4301 *et seq.* It appears she raises the issue now in response to summary judgment as evidence of a disputed material fact as to the overall care provided by Pulsipher having fallen below the local standard and in response to Pulsipher’s Affidavit, in which he states proper informed consent was present. This conclusion is further supported by the fact that the issue of informed consent is entirely separate and distinct from a negligence claim. *Foster v. Traul*, 145

Idaho 24, 26, 175 P.3d 186, 187 (2007). “A physician may be held liable under the doctrine of informed consent even if there was no negligence in the actual treatment of the patient.” *Sherwood v. Carter*, 119 Idaho 246, 251, 805 P.2d 452, 457 (1991).

Because Yancey made no informed consent claim, and because Pulsipher made no request for summary judgment based on the informed consent issue, even though Yancey has now had ample opportunity to respond, and indeed has responded, thereby avoiding the very proposition discussed by Justice Trout, *supra*, Pulsipher’s argument is premature. Pulsipher simply did not raise that issue initially on summary judgment. However, Pulsipher is correct; a valid claim based on informed consent in Idaho (should Yancey ever make such claim) requires that the facts disclosed to a patient be those that would be given by a like physician of good standing practicing in the same community. *Sherwood v. Carter*, 119 Idaho 246, 256, 805 P.2d 452, 462 (1991).

To the extent the issue of informed consent is before the Court at the present time, Yancey simply claims in her affidavit that no consent was sought by Pulsipher. While Yancey cannot testify that what Pulsipher did or did not inform her of violates what a dentist practicing in the same community as Pulsipher in good standing would have informed her of, Yancey can testify that there was *no* informed consent. In other words, if there were *some* quality of informed consent (information being give by Pulsipher to Yancey and Yancey’s consent) involved here, Yancey would need expert testimony as to the quality of that informed consent. But Yancey’s affidavit claims there was no consent, none at all, and an expert does not have to be the one to give such factual testimony. Indeed, Yancey is the only one on her behalf who can give such factual testimony. While Pulsipher may give his factual testimony on this point, Yancey’s testimony that there was *no* consent will not be stricken because it was not

testimony given by an expert. *If* the issue of informed consent is properly before the Court, Yancey has created an issue of material fact to survive summary judgment.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED defendants' Motion to Shorten time to hear defendants' Motion to Strike is GRANTED.

IT IS FURTHER ORDERED defendants' Motion to Strike is DENIED as to the affidavit of Yancey, and DENIED as to the Supplemental Affidavit of Geoffrey Thompson (Thompson denied for purposes of Summary Judgment only).

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

Entered this 28th day of October, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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